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COURT OF APPEALS

NO. 34445-9

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STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

KEVIN HENDRICKSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner, Presiding Judge

No. 04-1-04088-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was there probable cause to arrest defendant for possession of stolen property where the defendant was observed attempting to unlock a stolen trailer and abandoned his attempt when he realized he was being watched?

2. Was the search of the trailer lawful where:

a. Defendant does not have standing to challenge the search of a trailer that he was not in possession of at the time of the search.

b. No search warrant was necessary to search the victim's trailer since the owner was present and gave verbal consent for the search.

c. The search warrant complaint does establish probable cause for the search of trailer.

3. Did defendant's counsel perform adequately so that he received a fair trial?

4. Did the prosecutor commit misconduct where admissible hearsay testimony was presented in the trial?

5. Were the charges which the prosecutor brought against defendant supported by sufficient facts where the jury convicted the defendant of those charges and the remaining charges were dismissed?

6. Did the State present sufficient information to establish that defendant committed Identity Theft in the Second Degree by possessing personal and financial information belonging to others with *intent* to commit, aid, or abet a crime?

B. STATEMENT OF THE CASE.

1. Procedure

On August 24, 2004, the defendant was charged with one count of possessing stolen property in the first degree for possession of a trailer stolen from Leo Brutsche. CP 1-2. On August 18, 2005, the State amended the charges to include 15 counts of identity theft in the second degree and one count of unlawful possession of fictitious identification to include some of the items of personal and financial identification which were found in the trailer. CP 3-10.

At a 3.5 and 3.6 hearing held on October 13, 2006, the defense moved to suppress all evidence discovered following the arrest of the defendant, and to dismiss all counts pursuant to Knapstad. After a two day hearing, defendant's statements to the officer were ruled to be admissible and all motions to dismiss were denied. CP 18-20, 21-23.¹

On the first day of trial, January 4, 2006, the State amended the Information to drop Count 17, unlawful possession of fictitious identification, and substitute Count 18, one count of identity theft in the second degree. This amendment was made in response to recent case law governing the definition of "fictitious." CP 24-31.

¹ The Report of Proceedings consists of 11 volumes. The two volumes covering the 3.5/3.6 hearing held on October 13 through 17, 2005, shall be referenced as "RP 3.5/3.6". The six volumes covering the trial shall be referenced as "RP". The remaining 3 volumes are referenced by the date of the hearing followed by "RP".

After presentation of the State's case, the prosecutor moved to dismiss Counts 2, 4, 5, 6, and 13, due to the unavailability of the victims for trial. This motion was granted. RP 377-379.

When the State rested, the defense moved for a directed verdict on the remaining counts. Defense argued that in Count 1, the State had not shown knowledge that the property was stolen. In the remaining counts, defense argued that the State had not shown intent to commit a crime. RP 380-383. This motion was granted on Counts 3, 7, 8, 9, 11, 14, and 15. RP 398-405.

A jury verdict of guilty was entered on charges of identity theft in the second degree on Counts 12, 16, and 18. The jury hung on Count 1, alleging possession of the stolen trailer. RP 462-465.

Defendant received a standard range sentence of 48 months. CP 75-85.

2. Facts

a. Facts at 3.5/3.6 hearing.

Michael Brutsche was driving through Tacoma and saw the Hustler trailer which had been stolen from his grandfather's business several months before. 3.5/3.6 RP 82; RP 53. The trailer was located in a lot which contained cars, apparently offered for sale. Michael Brutsche inspected the trailer and made sure it was his grandfathers, then he called 911 and his grandfather.

Michael Brutsche waited in the area and saw the defendant walk up to the trailer, place a box by it, walk around a little, and then go into a nearby building. Michael felt it was apparent that the defendant was aware that he was being watched. 3.5/3.6 RP 55. About 45 minutes later, the same male came back out to the trailer, then approached the Brutsches, and asked if they were waiting for Felix. The male then went back into the building. RP 85. Michael Brutsche observed the defendant act as though he possessed the trailer, putting the box by the trailer door, walking around the trailer, and not showing interest in anything else in the lot. 3.5/3.6 RP 56; RP 89. Michael Brutsche later looked into the box the defendant had left by the trailer and saw that it contained keys, among other items.

Leo Brutsche received a call from Michael telling him that the trailer had been found, and traveled to the lot where his trailer was parked. 3.5/3.6 RP 45. Leo Brutsche noted that the trailer had padlocked chains wrapped around the wheels. Mr. Brutsche saw the defendant arrive in a pick-up truck and go to the trailer with a box. 3.5/3.6 RP 45. The defendant set the box at the back of the trailer, looked around and went into a building. Later the defendant came out of the building, worked his way around to Leo Brutsche's location and asked if he was waiting for Felix. Once Mr. Brutsche assured that he was, the defendant left and went back inside the building. 3.5/3.6 RP 47.

Officer Budinich was dispatched to a roadside lot on August 23, 2005, in response to Leo and Michael Brutsche's call to 911 about the location of their stolen trailer. 3.5/3.6 RP 14. Upon his arrival, the officer spoke with the Brutsches and family member Lee Ferrell about the contact the defendant had with the trailer while they had stood near it waiting for the police to arrive. 3.5/3.6 RP 18.

Michael Brutsche and Lee Ferrell told Officer Budinich that they had seen someone, later identified as the defendant, near one of the locks on the trailer, trying to open the door. They did not actually see a key. RP 3.5/3.6 RP 18 – 20. After a period of time, the defendant noted that he was being observed and walked away from the trailer, leaving a box of keys on the ground near the trailer door. 3.5/3.6 RP 20; RP 99-102. Based on the information he had been given, Officer Budinich determined that the defendant had been trying to get into the trailer and believed that he had probable cause to arrest him for possessing stolen property. 3.5/3.6 RP 21.

Officer Budinich asked the defendant what his involvement with the trailer was. The defendant initially denied any involvement. The officer confronted him with the observations made by the witnesses. The defendant then admitted to the officer that he has used the trailer before and that everybody uses it. 3.5/3.6 RP 24.

Michael Brutsche testified that Leo Brutsche asked the police to open the trailer so that he could look inside and see if his concrete cutter was inside. 3.5/3.6 RP 58.

Leo Brutsche explained to Officer Budinich that he had previous problems with the Auburn police and he was concerned about tow and storage fees on the trailer. RP 51. Mr. Brutsche showed proof of ownership of the trailer to Officer Budinich and told him that he was prepared to take the trailer with him rather than incur impound fees. 3.5/3.6 RP 47.

Officer Budinich testified that Mr. Brutsche requested that he release the trailer to him so that he could avoid impound fees. The officer was happy to do so, but wanted to assure that there was no person or other property inside the trailer before he released it to Mr. Brutsche. To that purpose, Officer Budinich used keys which were hanging on the defendant's belt in an attempt to unlock the wheels of the trailer and to open the trailer door so that the owner could ascertain if his stolen concrete cutter was inside. 3.5/3.6 RP 26.

Officer Budinich was recalled for rebuttal during the 3.5/3.6 hearing, and again told the court that the defendant initially denied any involvement with the trailer, but when confronted with the witness's observations, he admitted that he and others stored property in the trailer. 3.5/3.6 RP 62.

b. Facts at trial.

In May or June of 2004, Leo Brutsche's trailer was stolen from his business in Auburn. RP 47-49. In August of 2004, Michael Brutsche, Leo's grandson, was driving through Tacoma when he saw the trailer in a parking lot. RP 80 – 83. The police were called, and the Brutsches, with some family members, waited in the parking lot for them to respond. RP 83.

As the Brutsche family members watched the trailer, Michael Brutsche and Lee Ferrell saw defendant arrive in the area, walk up to the back door area of the trailer, place a wooden box on the ground, take some keys from the box, and use them in an attempt to open the trailer. RP 101. The defendant then appeared to notice that he was being watched, and he dropped the keys into the box and walked away. RP 21.

Approximately 45 minutes later, the family members saw the defendant walk back into the area, make a circuitous approach to Leo Brutsche, and ask him if he was waiting for Felix. Mr. Brutsche agreed that he was, and the defendant walked away from the area. RP 54, 84-85. Michael Brutsche indicated that the way the defendant had acted around the trailer, walking around it, putting the box down, and the way he treated it, gave him the impression that the trailer was in his possession. RP 89.

When the police officer arrived, Leo Brutsche provided documentation which identified the trailer as his, and asked that the trailer

be released to him so that he could avoid tow and impound tow fees. RP 56, 86, 89. Mr. Brutsche was also anxious to see if a concrete cutter which had been in the trailer when it was stolen was still inside. RP 57 – 59, 122.

The witnesses gave the officer a description of the defendant and told him that the defendant had gone into a nearby shop. The officer went to the shop, located that defendant, and arrested him for possessing stolen property. RP 103.

As he was informed that he was under arrest, the defendant was handcuffed and placed in the officer's patrol car. The defendant was then advised of his Miranda warnings. RP 103–104. When questioned, the defendant initially denied any involvement with the trailer. When the officer explained that he was observed trying to get into the trailer, the defendant admitted that he did store some things in the trailer and everybody else does also. The officer asked the defendant how he got into the trailer and the defendant did not respond. The officer asked the defendant if he had keys which went to the trailer, and the defendant denied that he did. RP 105-107.

The officer removed a set of keys hanging from the defendant's belt and used them in an attempt to unlock and unchain the trailer. The keys unlocked several padlocks on the rear of the trailer, around the chain which was around the wheels, and the lock on the front hitch. RP 107-108, 119. One key from the defendant's key ring opened the back door of

the trailer. Because the trailer was backed up next to wall, the officer could not open that door very far. RP 119–120. The officer then used a knife to open the lock on the unobstructed side door of the trailer.

When he entered the trailer, he saw that there were boxes and boxes of junk. RP 123. The officer went into the trailer to clear it and observed a baggie of VIN plates. VIN plates are never to be removed from cars, and their removal was indicative of an attempt to obscure the identity of a car. This indicated there was something improper about the contents of the trailer. RP 123- 124.

Detective Christie Ygelsias served a search warrant on the trailer on September 3rd. RP 137. During the search of the trailer, she located bedding and totes which were released to the owner, boxes of tools, and documents with other people's names on them. The license plates and steel stamps which the officer had seen were similar to those used to mark VINs on cars. The stamps matched those on the recently imprinted trailer hitch, and had apparently been used to stamp an apparent VIN on the trailer itself. RP 138-144, 186.

One of the items found in the trailer and searched was a black file cabinet. RP 144-145. The filing cabinet contained several documents with the defendant's name on them, such as credit card applications. Also recovered from the file cabinet was a Safe-Light Glass tablet, which was marked as Plaintiff's Exhibit 4. RP 149. There was also an internet printout from Blackfeet Custom Graphic which was a fake ID or novelty

ID card order form. Transcript p. 171, Exhibit 8. The filing cabinet also contained wallets and credit card receipts which displayed the credit card numbers, and pay stubs belonging to several different people which displayed social security numbers. RP 181–182. Also in the filing cabinet were a VISA PIN, Employment Security Card stubs which included names and social security numbers, daily time records with SSNs, and checkbooks. RP 220–222. See Plaintiff's Exhibits 1, 2, 4, 7, 8, 11, 14, 16, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, and 33.

Finally, Detective Ygelsias testified that identity theft is usually perpetrated by stealing mail out of mailboxes or cars. Information such as names, dates of birth, addresses, and social security numbers can be compiled into profiles which thieves sell to others. With the possession of these pieces of information, as well as other information about bank account and credit card account numbers, thieves can use a victim's information to open credit accounts and run up charges without the victim's knowledge. RP 186–188.

Detective Ygelsias identified Plaintiff's Exhibit number 4 as a Safe-light pad which contained names and personal information of several different people. RP 145-146.

Joe Rogers is a special agent with the Social Security Administration Office of the Inspector General. RP 67. Mr. Rogers's job duties include conducting criminal investigations related to social security fraud and misuse of social security numbers and identity theft. RP 67.

The investigations he conducts range from identity takeovers to more general identity theft or misuse of other people's social security numbers. RP 67.

Mr. Rogers testified that in his official capacity he has access to the social security database, and he queried the data on social security cards which comprise Plaintiff's Exhibit 1 belonging to Don Noe, and Exhibit 2 which bears the name Rodrigo Castro Velazco.

Mr. Rogers' query of Mr. Noe's name and number indicated that the card was authentic and belonged to Mr. Noe. Mr. Rogers was in contact with Mr. Noe, who indicated that his social security card had been lost and that no one had his permission to possess it. RP 68. Mr. Rogers's investigation of the social security card belonging to Mr. Velazco determined that it was a counterfeit card, and that the number shown of the card belongs to an eight year old child who lives in Florida. RP 69-70. Mr. Rogers also testified that duplicate social security numbers are never issued, and that the use of a social security number by a person other than the true owner can impede a person's ability to receive social security payments. RP 79.

Jeffrey Cheney had been in a car wreck and his car was totaled. He was shown Plaintiff's Exhibit 4, which is a piece of paper containing his name, social security number, two bank account/credit card numbers, his address and his place of employment. He had not seen the paper before and it was not in his handwriting. He does not know the defendant

and did not give him permission to have his personal or financial information. RP 154-155.

Robert Phillips has had two cars towed in Pierce County. When shown Plaintiff's Exhibit 4, he identified his name, address, and social security number. He had not seen the paper before and it was not in his handwriting. He does not know the defendant and did not give him permission to have his personal or financial information. RP 161-162.

Joshua Robertson twice had cars towed in Pierce County, and that he typically left personal and financial information in his cars. On one occasion, Mr. Robertson retrieved his car the following day and paid the towing charge by credit card. Mr. Robertson was shown Plaintiff's Exhibit 4, and identified his name, numbers which appeared to be expiration dates, the word "Visa" with a long string of numbers after it, his driver's license number, his Bank of America account number, and his home address. The information was not in his handwriting. Mr. Robertson never bought a car from the defendant and did not give him permission to have his personal or financial information. RP 201-207.

Robert Collier testified that Plaintiff's Exhibit 4 was not in his or his wife's handwriting. It contains his name, his wife's name, his former address, his social security number, and a Washington Mutual VISA account number which looks familiar as one he may have had. Mr. Collier had a car towed in King County and that it would have had only his name

and address in it. He never bought a car from the defendant and did not give him permission to have his personal or financial information. RP 298-303.

Robert Hausman testified that he did not write the information in Plaintiff's Exhibit 4. It has his name, social security number, his branch class in the military, his wife's and mother-in-law's name, and his old address. Mr. Hausman was in an accident and did not get a chance to clean his car before it was towed. He never bought a car from the defendant and did not give him permission to have his personal or financial information. RP 309-313.

Bronson Sterling testified that Plaintiff's Exhibit 4 contains his name, address, social security number, his military rank, his 2 year old daughter's name, his wife's name, date of birth, and wrong social security number. Mr. Bronson bought several cars from the defendant for timed cash payments, and gave him some financial information (see Plaintiff's Exhibit 35), but would not have given his, his wife's or his daughter's information for cash payments. RP 316- 331. He did not give the defendant permission to have his wife's and daughter's personal or financial information. RP 338-339.

Jamie Salazar-Guerrero testified that Plaintiff's Exhibit 4 has his name, address and social security number, and his wife's name with an apparent social security number. Mr. Salazar-Guerrero's car was almost towed years ago, the tow truck was at the car but he claimed it before it

was towed. Mr. Salazar-Guerrero also bought a car from a small lot years ago but does not remember the defendant. The defendant does not have his permission to have his financial information. RP 342- 347. Mr. Salazar-Guerrero paid cash for the cars he bought and did not give financial information since he did not get financing. RP 350.

Mr. Salazar-Guerrero has been the victim of identity theft. When he retired he was informed that someone had used his social security number. He has problems with the IRS, which is charging him extra money for the second job he had under his social security number. Mr. Salazar-Geurrero did not work for the second company which reported his earnings. RP 347-348.

Tyrone Long testified that his name, address and prior address, Washington ID numbers, race, height and weight are contained on Plaintiff's Exhibit 4. Mr. Long never had a car towed, never bought a car from the defendant, and did not give him permission to have his personal or financial information, and does not know how he got it. RP 354-360.

Debra Tainter testified that her and her husband's names and address are on Plaintiff's Exhibit 4. She has never seen that paper before, and the defendant did not have her permission to have that information. RP 368-371.

Wanda Klewin testified that she lives with the defendant and is familiar with his handwriting. When asked if the handwriting in State's

exhibit #4, the Safe-Light tablet, was the defendant's she answered that she guessed it was Kevin's (the defendant). She then confirmed that it was his writing. RP 376.

C. ARGUMENT.

1. THERE WAS PROBABLE CAUSE TO ARREST DEFENDANT, SO ALL EVIDENCE SEIZED SUBSEQUENT TO THIS ARREST WAS ADMISSIBLE AT TRIAL.

An appellate court reviews findings of fact from a suppression motion under the substantial evidence standard. State v. Hill, 123 Wn.2d 641, 647, 870 P. 2d 313 (1994). Substantial evidence exists where there is a sufficient quantity of evidence to persuade a fair-minded rational person of the truth of the finding. Id. at 644. Unchallenged findings are verities on appeal and an appellate court "will review only those facts to which error has been assigned." Id. at 647. Conclusions of law are reviewed de novo. State v. Johnson, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). Because defendant assigns no error to the courts factual findings, all of these findings are verities.

Probable cause for an arrest exists when "the facts and circumstances within the arresting officer's knowledge and of which he had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been committed." State v. Herzog, 73 Wn. App. 53, 867 P.2d 648 (1994).

While the findings of the trial court following a suppression hearing are of great significance to a reviewing court, the constitutional rights at issue require the Court of Appeals to independently evaluate the evidence. However, in considering credibility, deference will be given to the trial court, which was in a better position to evaluate the demeanor of witnesses. State v. Vriezema, 62 Wn. App. 437, 440 (n. 2), 814 P.2d 248 (1991).

When Officer Budinich arrived at the scene in response to the 911 call and spoke with the witnesses, he confirmed through their paperwork that this was their stolen trailer, and was informed that they had seen the defendant walk up to the trailer with a box of keys and try one of the keys on the trailer lock in an attempt to open the door. RP 20. At some point, the defendant seemed to realize that he was being watched by the three men and walked away, leaving the keys there.

Officer Budinich then had probable cause to believe that a crime had been committed, possessing stolen property. The defendant's action of attempting to unlock a chained and padlocked trailer exhibits a possessory interest in the trailer. The fact that when he realized that he was being watched, the defendant abandoned his attempt to open the trailer, and the keys to the trailer indicates an attempt to disassociate himself from the property, a sign of guilty knowledge. The Officer had reason to believe that the defendant was connected to the crime of possessing the stolen trailer.

Michael Brutsche believed that the defendant's actions exhibited a possessory interest in the trailer; he put the box right by the trailer door, he walked around the trailer, he showed no interest in anything else in the yard. 3.5/3.6 RP 56, RP 89.

The defendant's guilty knowledge was further manifested when he made a circuitous trip through the "car lot" to approach Leo Brutsche, and employ an apparent ruse to ask him why he was present. RP 46.

Officer Budinich did have sufficient facts and circumstances to believe that the Brutsche's trailer had been stolen, and that it was in the possession of the defendant. Officer Budinich did have probable cause to arrest the defendant for possessing stolen property. The trial court's determination that there was probable cause to arrest the defendant for possessing stolen property should be upheld.

2. THE SEARCH OF THE TRAILER WAS LAWFUL.

Defendant challenges the search of the trailer on appeal. The trial court properly denied defendant's suppression motion and may be upheld on appeal where (a) defendant has no standing to challenge the search of the trailer, (b) the owner's consented to the search, and (c) the search was done pursuant to a valid search warrant.

This court can affirm the trial court's decision to deny the suppression motion on any ground supported by the record, even if the trial court made an erroneous legal conclusion. State v. Bryant, 97 Wn.

App. 479, 490-91, 983 P.2d 1181 (1999) (*citing* State v. Norlin, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998)), review denied, 140 Wn.2d 1026, 10 P.3d 406 (2000). Again, no error was assigned to the court's factual findings on this issue and they are verities on appeal. State v. Hill, 123 Wn.2d at 647.

a. Defendant does not have standing to challenge the search.

Washington defendants have traditionally been granted automatic standing to challenge a search of property in crimes involving "possession" as an element. State v. Simpson, 95 Wn.2d 170, 182, 622 P.2d 1199 (1980). Automatic standing has historically been granted to a defendant who makes a showing that 1) the offense with which he is charged involves possession as an essential element of the offense; and 2) the defendant was in possession at the time of the contested search or seizure. Id. at 181.

The grounds for automatic standing have been somewhat modified, although the Court of Appeals for Division 1 has stated that "it still maintains a presence in Washington law." State v. Kypros, 110 Wn. App 612, 623, 39 P.3 352, 371 (2002), aff'd on remand, 115 Wn. App. 207, 61 P.3d 352 (2002). The Court of Appeals modified the application of "automatic standing" to situations in which the defendant can also make a showing that he had a reasonable belief that he was legitimately on the premises which was searched. Id. at 623, 377.

The Kypros Court was concerned with a citizen's right to privacy in an area where he had a reasonable expectation of privacy. The facts of Kypros are similar to those at bar. Kyrpos was a felon in possession of a firearm who contested a search of a stolen trailer he was occupying. Unlike this case, Kypros was occupying a trailer home and expressed surprise when told that the trailer was stolen. State v. Kypros 115 Wn. App. 207, 211, 61 P.3d 352, 354, (2002).

The Court of Appeals, in the first Kyrpos case, discussed the repugnance of extending automatic standing to protect someone burglarizing a house where he would have no legitimate expectation of privacy. The court looked at the reasonableness of Kypros' belief that he was legitimately on the premises to be searched and his knowledge that the trailer was stolen.

In the case at bar, the defendant was far from asserting possessory control over the trailer. He appeared to be aware that the Brutsche family was interested in the trailer, and he took actions to distance himself from it. When he saw them watching him attempt to unlock the trailer, he dropped the keys he was using and left. When questioned by the officer, the defendant initially denied that he knew anything about the trailer or that he used it. He also denied that he had keys to it. The defendant, once confronted with the observations made by the Brutsches, reluctantly admitted that he and some others used the trailer. The defendant asserted little or no legitimate expectation of privacy under these circumstances.

Under the logic of the Kyrpos court, automatic standing should not be bestowed upon the defendant under this set of facts.

- b. No search warrant was necessary to search the victim's trailer since the owner was present and gave verbal consent for the search.

Leo Brutsche, the true owner of the trailer, was also at the scene when Officer Budinich arrived. Leo Brutsche, as the owner of the trailer, can lawfully give consent for a search of the trailer. Mr. Brutsche asked the officer to open the trailer because he wanted to recover his concrete cutter, an expensive saw which had been in the trailer when it was stolen. This conflict of privacy interest should be resolved in favor of the owner who had a legitimate reason to ask that the trailer be opened.

The situation encountered by Officer Budinich here may be compared to situations in which an officer gets permission to search a car from one of multiple occupants. This issue was confronted by the Washington Supreme Court in State v. Cantrell, 124 Wn.2d 183, 875 P.2d 1208 (1994). Cantrell concerned a traffic stop where the owner of a car gave consent for a search of the car, which revealed drugs belonging to the driver of the car. The Supreme Court decided that it would be unworkable for officers to seek and obtain consent to search from each occupant of a vehicle. Id at 192. The Court's opinion stated:

“the voluntary consent of one who possesses common authority over a vehicle is sufficient to support a search. We reiterate that the issue of whether such consent would continue to be valid as to a co-occupant if the co-occupant overtly objected to the search is not before us.” Id.

In this case, the true owner of the car, Mr. Brutsche who stood with registration and license in hand, should be considered to have interest in the trailer superior to the defendant’s. If the court does not agree, he should be considered to have at least equal interest, regardless of whether he occupied or possessed the vehicle since it was stolen from him months earlier. During the search of the trailer, the defendant was present but did not object to the search of the trailer. Mr. Brutsche’s consent to search the trailer was valid and authorized the officer to open and look into it. The search in this case was lawful, and the trial court’s decision to admit them should not be overturned.

Police may retrieve voluntarily abandoned property without violating Fourth Amendment rights. State v. Nettles, 70 Wn. App. 706, 855 P. 2d 699 (1993). Where a defendant voluntarily abandons property and that property is subsequently searched, the defendant may claim an exception to this rule upon a showing that the abandonment was the result of unlawful police conduct. State v. Reynolds, 144 Wn.2d 282, 287, 27 P. 3d 200 (2001). The defendant in this case may be said to have abandoned the property which was later searched.

Initially the defendant expressed abandonment of his interest in the trailer when the Brutsches observed defendant abandon the keys to the trailer when he noticed that they were observing him with it. The defendant did not return to the trailer, though he did return to the lot to ask them the reason for their presence. When Officer Budinich arrested the defendant for possession of stolen property, the defendant initially denied any involvement with it, then when confronted admitted that he and others stored property in it. RP 84. There was no official police conduct which resulted in the defendant abandoning the trailer, he abandoned it when he saw the Brutsches watching it, long before the police arrived. The defendant cannot assert a right to privacy in property which he voluntarily abandoned.

c. The search warrant complaint does establish probable cause for the search of trailer.

A magistrate's determination that a warrant should issue is an exercise of judicial discretion that is reviewed for abuse of discretion. State v. Remboldt, 64 Wn. App. 505, 509, 827 P.2d 282 (1995). This determination generally should be given great deference by a reviewing court. An application for a search warrant should be judged in the light of common sense with doubts resolved in favor of the warrant. State v. Young, 123 Wn.2d 173,195, 867 P.2d 593 (1994). Probable cause is established when the affidavit sets forth facts sufficient to lead a

reasonable person to conclude there is a probability the defendant is involved in criminal activity. State v. Cord, 103 Wn.2d 361, 365, 693 P.2d 81 (1985). Generally, the probable cause determination of the issuing judge is given great deference. State v. Huft, 106 Wn.2d 206, 211, 720 P.2d 838 (1986).

The warrant in this case cited facts sufficient to support a search for documents of dominion and control belonging to the defendant. The warrant explicitly sought permission to search the “utility trailer and contents.” The defendant told the officer that he did store items in the trailer. The defendant had keys which matched some of the locks on the trailer. The facts of the warrant are sufficient to establish both a nexus between the defendant and the trailer, and probable cause to search the trailer for items showing dominion and control by the defendant.

The complaint also implied that other stolen property may be found in the trailer when it stated that license plates and VIN plates were present in the trailer. These items are highly regulated by the state, and finding them in a stolen trailer is highly suspicious and indicative of illegal activity consistent with possession of stolen property.

Detective Yglesias did mention in the complaint that she was advising the court of Officer Budinich’s actions in opening the trailer. Defense has cited no case law which indicates that this clarifying information should not be considered along with the other information provided in the complaint. Defense has given no reason to disregard the

fact that Officer Budinich observed probable contraband when he initially looked into the trailer, or the nature of the contraband.

The facts cited in the search warrant do establish probable cause to search the trailer. There is a nexus between the defendant and the trailer, and the trailer and the presence of presumptively stolen property. The fact that the defendant had prior convictions for crimes similar to possessing stolen property, and warrants for possession of stolen property, only bolsters the grounds the detectives had to justify the issuance of a search warrant in this case.

3. DEFENDANT'S COUNSEL PERFORMED ADEQUATELY SO THAT HE RECEIVED A FAIR TRIAL.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Courts engage in a strong presumption counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The

burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. Id. at 334.

Defendant must not only show he was actually prejudiced by counsel's failure to object, he must show the trial court likely would have granted the motion if made. It is not enough that the defendant allege prejudice - actual prejudice must appear in the record. Because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not "manifest", and the issue is not reviewable under RAP 2.5(a)(3).

The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1215, 1257 (1995).

The defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. Absent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice. Id. at 337.

The challenged hearsay testimony came from Joe Rogers, the investigator with the Social Security Commission. Mr. Rogers based his information on his access to the Social Security Administration's data base

of card numbers and number holders. Such information is admissible under ER 803(a)(6) Records of Regularly Conducted Activity (see RCW 5.45); (8) Public Records and Reports (see RCW 5.44.040); and (9) Records of Vital Statistics.

Police Departments and other government offices do qualify as businesses, State v. Plewak, 46 Wn. App. 757, 732 P.2d 999 (1987). These are the types of records which are kept in the regular course of the Social Security Administration's business, and are records of acts, conditions or events. Finally, the identification was made by someone connected with the business. The challenged hearsay evidence was admissible pursuant to one exception to hearsay established in the hearsay rules, and was proper. Given that the evidence was properly admissible, the defense attorney was not ineffective in failing to object.

4. THE PROSECUTOR DID NOT COMMIT MISCONDUCT WHEN HEARSAY TESTIMONY WAS PRESENTED IN THE TRIAL.

When alleging misconduct by a prosecutor, defense must make a timely objection and request a curative instruction. State v. Gentry, 125 Wn.2d 570, 888 P.2d 1005 (1995). If a timely objection is not made, or a curative instruction is not requested, then such failure constitutes a waiver unless the defendant demonstrates that it was so flagrant and ill intentioned that it "evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury". Gentry, 125

Wn.2d at 640 (quoting State v. Hoffman, 116 wn.2d 51, 93 P.2d 577 (1991)).

In the case at bar, the prosecutor did solicit hearsay testimony for which a hearsay exception was available. See argument above, section 3. The fact that the defense did not object obviated the need for the prosecution to put the exception on the record. That does not negate the fact that the hearsay was admissible, relevant and would properly have been admitted. As such, there was no prejudice to the defendant and no misconduct by the prosecutor.

Defendant is also unable to articulate a remedy for the alleged mischarging. Defendant was afforded the properly available remedy where there is a lack of evidence to support charges – a directed verdict. Any of the remaining convictions should be analyzed under a sufficiency of the evidence standard.

5. THE CHARGES WHICH THE PROSECUTOR BROUGHT AGAINST DEFENDANT WERE SUPPORTED BY THE FACTS AND PROPERLY BROUGHT.

Prosecutors are vested with wide discretion in determining whether to charge suspects with criminal offenses. Bordenkircher v. Hayes, 434 U.S. 357, 365, 98 S. Ct. 663, 54 L.Ed.2d 604 reh'g denied, 435 U.S. 918, 98 S. Ct. 1477, 55 L.Ed.2d 511 (1978); State v. Pettit, 93 Wn.2d 288, 294, 609 P.2d 1364 (1980). Exercise of this discretion involves consideration

of factors such as the public interest, as well as the strength of the case which could be proven. United States v. Lovasco, 431 U.S. 783, 794, 97 S. Ct. 2044, 52 L.Ed.2d 752 (1977); Pettit at 295.

In the case at bar, the defense brought a motion for a directed verdict on all counts. This motion was denied as to counts I, II, XVI and XVIII. RP 399. This comports with the prosecutorial mandate that only charges supported by probable cause should be brought. In addition, the jury convicted on these counts, which shows that the prosecutor brought charges which it was able to prove beyond a reasonable doubt.

6. THE STATE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THAT DEFENDANT POSSESSED THE VICTIM'S FINANCIAL INFORMATION WITH THE INTENT TO COMMIT OR AID OR ABET A CRIME.

The jurors in this trial determined that the defendant was guilty of three counts of identity theft in the second degree. A conviction will be affirmed if the appellate court, viewing the evidence in the light most favorable to the State, is satisfied there is sufficient evidence to justify any rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). This test does not require the State to convince the appellate court that the defendant is guilty beyond a reasonable doubt- just that a rational trier of fact could so conclude. Id.

The crime of Identity Theft is defined by RCW 9.35.202:

- (1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, aid, or abet any crime.

The defendant argues that there was no proof of his intent to use the items found in his possession to commit any crime. The State disagrees.

Evidence showed that the defendant had not only information belonging to others, but that the information such as names, addresses, dates of birth, credit card and bank account numbers, and other information had been compiled into "profiles." Numerous witnesses testified that they had no idea how defendant had gained their information, they had not given their information to him that they did not give him permission to possess it and their family members, including children, had not done so. The information went beyond that displayed on the documents they had left in their cars.

Along with these profiles were details of how to produce fake identification, birth certificates and social security cards for people living in other states. RP 171, Plaintiff's Exhibit 8. These companion documents in defendant's name and in his possession are proof of his intent to commit or aid, or abet any crime. When applied to defendant's case, the criminal conduct was not any particular use of the personal and financial information. Rather, it was the knowing and unlawful acquisition, compilation and possession of tax documents and other forms

containing social security numbers with corresponding names, none of which belonged to him. The defendant was not arrested for “use” of this information, but for “possession” of these documents.

At trial, eight victims testified that they did not know the defendant or give the defendant to have their financial or personal information, or that of their family members. Yet he had possession of this additional information. In addition, another victim testified that he has purchased cars from the defendant, and to that end gave him some financial information, but not that of his infant daughter. This shows that the defendant took steps beyond obtaining and keeping information which was given to him, he did further research on the victims and acquired further information which he then compiled to complete his “profiles.”
RP 154.

A reading of the statute's other sections adds further clarity to its purpose. RCW 9.35.001 reads:

The legislature finds that financial information is personal and sensitive information that if unlawfully obtained by others may do significant harm to a person's privacy, financial security, and other interests. The legislature finds that unscrupulous persons find ever more clever ways, including identity theft, to improperly obtain and use financial information. The legislature intends to penalize unscrupulous people for improperly obtaining financial information.

Defendant claims the evidence was insufficient to show “intent to use” the financial information or means of identification of others, as

prohibited in RCW 9.35.020(3). Defendant was charged with second degree identity theft because there was no proof he had actually obtained anything of value through the use of the personal and financial records he possessed. The statute still imposes criminal liability even though nothing was obtained through its use. State v. Berry, 129 Wn. App. 59, 117 P.3d 1162 (2005).

Defendant possessed several checkbooks, documents with social security numbers, counterfeit and lost social security cards, and instructions on how to obtain fake identities. None of the victims had given him permission to possess this information. A reasonable inference can be drawn that defendant knowingly obtained and possessed the personal and financial records of others. Further, the jury could infer intent to commit a crime with these documents since the defendant had no legitimate reason to be in possession of them. The fact that an internet document outlining how to obtain fake identification was found with these documents reinforces a finding of intent to commit, aid, or abet a crime.

The defense asserted in this case was that the defendant had sold vehicles, and that the personal and financial information he had was to facilitate his extension of credit to the purchasers. However, most victims testified that they had not bought cars from him, or when they did, that they had paid cash and given limited information to him, not to the extent of their children's names, dates of birth, or their credit card or bank account numbers. This evidence, coupled with the compilation of many

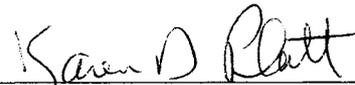
pages of “profiles” for these and other people Plaintiff’s Exhibit 4, was sufficient to support an inference that he possessed the personal and financial information with intent to commit, or aid and abet a crime. The jury’s conclusion that the defendant had formed intent to commit, aid or abet a crime with the personal and financial information he compiled and possessed should not be disturbed on appeal.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this court affirm the defendant’s conviction for three counts of identity theft in the second degree.

DATED: December 4, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



KAREN PLATT
Deputy Prosecuting Attorney
WSB # 17290

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12/5/06 *[Signature]*
Date Signature