

CROSS-Res. Reply

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY       
DEPUTY

37610-5  
NO. 36710-5-11

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON

Respondent,

v.

JEFFREY D. McPHEE,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF PACIFIC COUNTY

Before  
The Honorable Michael Sullivan, Judge

APPELLANT'S RESPONSE BRIEF  
TO RESPONDENT'S CROSS-APPEAL

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**A. RESPONSE TO CROSS-APPELLANT'S ASSIGNMENT OF ERROR**

The trial court did not abuse its discretion by dismissing Count 3, possession of stolen property in the second degree.

**B. STATEMENT OF THE CASE IN RESPONSE**

As discussed in his opening brief, Jeff McPhee was charged in his second trial with two counts of possession of a stolen firearm and one count of possession of stolen property in the second degree. Clerk's Papers [CP] 107-09. McPhee was found guilty of possession of stolen firearms as alleged in Counts 1 and 2. CP 160, 161. After the State had rested its case-in-chief, the defense moved to dismiss Count 3, pertaining to a set of tusks and a pair of binoculars, and the court granted the motion. 2Report of Proceedings [RP] at 88. The court denied the State's motion to amend Count 3 to possession of stolen property in the third degree. 2 RP at 89.

The State filed a cross-appeal, arguing that the trial court abused its decision by dismissing Count 3 on the basis that there was insufficient evidence of the market value of the tusks and binoculars in the area where the crime was alleged to have been committed, and that the trial court erred in refusing to permit the jury to consider a lesser included crime of possession of stolen property in the third degree. Brief of Respondent at 4, 43.

C. CROSS-RESPONDENT'S ARGUMENT

1. THE TRIAL COURT CORRECTLY GRANTED THE DEFENSE MOTION TO DISMISS WHERE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE AS TO MARKET VALUE OF THE TUSKS AND BINOCULARS.

A conviction of possession of stolen property in the second degree requires the State to prove that the value of stolen property exceeds \$250, but does not exceed \$1500. RCW 9A.56.160. "Value" means the market value of the property at the time and place of the theft. RCW 9A.56.010(18)(a); *State v. Kleist*, 126 Wn.2d 432, 873 P.2d 587 (1994); *State v. Longshore*, 97 Wn. App. 144, 982 P.2d 1191 (1999), *aff'd*, 144 Wn.2d 414 (1999). RCW 9A.56.010(18)(e) provides:

Property or services having value that cannot be ascertained pursuant to the standards set forth above shall be deemed to be of a value not exceeding two hundred and fifty dollars.

Market value is the price "a well-informed buyer would pay to a well-informed seller, where neither is obligated to enter into the transaction." *Kleist*, 126 Wn.2d at 435 (citing *State v. Clark*, 13 Wn. App. 782, 537 P.2d 820 (1975)). Market value is determined by an objective standard; it is not based on the value of the goods to any particular person. *Longshore*, 97 Wn. App. at 148-49. Absent any absolute standard for

determining the market value with definiteness, any facts that reasonably tend to show the stolen property's present value may be admitted. *Clark*, 13 Wn. App. at 788. If the value can be inferred from other evidence, direct evidence of value is not essential. *State v. Melrose*, 2 Wn. App. 831, 470 P.2d 552 (1970).

In determining the market value of the property in question in order to establish the degree of an offense, the court is given specific instructions through statute and case law. First, RCW 9A.56.010(18) declares that the fair market value of the property must be determined according to the standards set by the statute, and if this is not possible the property must be concluded to be worth less than \$250.00. Fair market value is a term used specifically in the statute, and does not refer to retail price or retail value per se. It also is restricted to the area of the criminal act by the terms of the statute. The State must prove these elements beyond a reasonable doubt in order to support a finding of guilt to possession of stolen property.

In the case at bar, the retail price of the items cannot be said to be the value of the tusks and binoculars to Ron Miller nor is it replacement price. Retail price may be an indicator of fair market value, but is not necessarily so. In *Kleist*, the Court considered first the sufficiency of the State's evidence of testimony presented as to value without the proper

foundation. The Court found the State's evidence sufficient because the valuation had been checked against computerized inventory records, and the prices were non-negotiable. *Kleist*, 126 Wn.2d at 436. This is not true in the case at bar, however, as the only testimony presented by the State was by Mr. Miller, who did not testify to any market basis for his opinion expressed as to the value of the items. As stated in *Kleist*:

Despite the tempting simplicity of the theory that a thief should be bound by the victim's retail price, we cannot rewrite the statute. The Legislature has unambiguously declared value as market value. An exception to this rule exists for only one category of goods, tickets, to be valued by retail price. (Statutory reference omitted) Only by reading the statute to mean market value is broader than retail price do we assure this exception is not rendered superfluous. (Citation omitted)

...

Market value is not based on "the value thereof to any particular person", but rather on an objective standard. *Clark*, 13 Wn. App. at 788.

...

*Kleist*, 126 Wn.2d at 438.

In the case of *State v. Skorpen*, 57 Wn. App. 144, 787 P.2d 54 (1990), the parties agreed on appeal that the defendant had committed a theft, but disagreed as to the degree of the theft. *Skorpen*, 57 Wn. App. at 146. The court reviewed the provisions defining value contained in RCW 9A.56.010(12), (now 9A.45.010(18)). The case involved the valuation of a forged check, and no evidence was presented as to market value. The

court held that as the value of the property could not be established, that 9A.56.010(12)(e) applies, and the value “shall be deemed to be of a value not exceeding two hundred and fifty dollars”. Finding the actual economic loss suffered by the victim to be “highly speculative” and not established to the standards required by 9A.56.010, the court reversed the conviction. *Skorpen*, 57 Wn. App. at 150.

Applying the holding of *Skorpen* to the case at bar requires the same result. Here, there was no testimony that Mr. Miller had the items valued or engaged in the purchase and sale of similar items. Without appropriate evidence on the record as to the value of the tusks and binoculars, RCW 9A.56.010(18) applies.

In contrast, our Supreme Court in *Longshore* addressed the issue of valuation, and indicated that:

Evidence of retail price along may be sufficient to establish value. *Kleist*, 126 Wn.2d at 436. If value has recently been established at a nearby place, that is proper evidence of value. *Clark*, 13 Wn. App. at 787-788.

*Longshore*, 141 Wn.2d at 424. The Court in *Longshore* affirmed the conviction because substantial evidence was presented by the State at trial through qualified experts, demonstrating that there was, in fact, a quantifiable market value in the area for the stolen property.

The State did not meet this burden in the case at bar. Here, the State failed to present any facts that established the value of the tusks and binoculars at the time and place. First, it failed to specifically establish the condition of the property at the time of the theft; or the replacement cost of the items. Second, no testimony of any kind was presented as to the market value of the items in Pacific County, Washington, the “approximate area of the criminal act” as required by RCW 9A.56.010(18)(a). According to the clear language of the statute and holding of *Clark, supra*, 13 Wn. App. at 787-788, the trial court judge did not abuse his discretion in granting the motion to dismiss Count 3. As there is no evidence on the record as to the value of the items in the area of the criminal act, RCW 9A.56.010(18)(e) applies, and the value of them cannot be said to exceed \$250.00.

The State also assigns error the failure of the trial court judge to allow the State to amend the charge to third degree possession of stolen property. Once the State rests its case it may not amend the information to correct its failure to charge a crime. *State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995). The defense concedes that under the facts of this case, the State may amend to a lesser degree of the same charge and that this does not constitute a violation of the mandatory joinder rule.

A criminal charge may not be amended after the State has

rested its case in chief unless the amendment is to a lesser degree of the same charge or a lesser included offense. Anything else is a violation of the defendant's article 1, section 22 right to demand the nature and cause of the accusation against him or her.

*State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987). See also, *State v. Dallas*, 126 Wn.2d 324, 892 P.2d 1082 (1995).

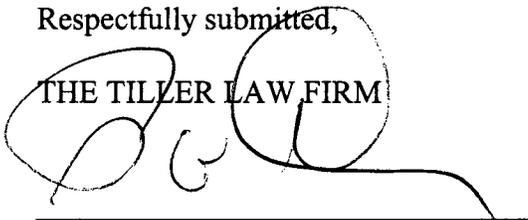
**D. CONCLUSION**

This Court should reverse and dismiss Mr. McPhee's convictions of possession of a stolen firearm. If the convictions are not reversed, this Court should reject the State's cross-appeal.

DATED: July 7, 2009.

Respectfully submitted,

THE TILLER LAW FIRM

  
PETER B. TILLER-WSBA 20835  
Of Attorneys for Appellant

## ***RCW 9A.56.010***

### **Definitions.**

The following definitions are applicable in this chapter unless the context otherwise requires:

(1) "Access device" means any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument;

(2) "Appropriate lost or misdelivered property or services" means obtaining or exerting control over the property or services of another which the actor knows to have been lost or mislaid, or to have been delivered under a mistake as to identity of the recipient or as to the nature or amount of the property;

(3) "Beverage crate" means a plastic or metal box-like container used by a manufacturer or distributor in the transportation or distribution of individually packaged beverages to retail outlets, and affixed with language stating "property of . . . .," "owned by . . . .," or other markings or words identifying ownership;

(4) "By color or aid of deception" means that the deception operated to bring about the obtaining of the property or services; it is not necessary that deception be the sole means of obtaining the property or services;

(5) "Deception" occurs when an actor knowingly:

(a) Creates or confirms another's false impression which the actor knows to be false; or

(b) Fails to correct another's impression which the actor previously has created or confirmed; or

(c) Prevents another from acquiring information material to the disposition of the property involved; or

(d) Transfers or encumbers property without disclosing a lien, adverse

claim, or other legal impediment to the enjoyment of the property, whether that impediment is or is not valid, or is or is not a matter of official record; or

(e) Promises performance which the actor does not intend to perform or knows will not be performed.

(6) "Deprive" in addition to its common meaning means to make unauthorized use or an unauthorized copy of records, information, data, trade secrets, or computer programs;

(7) "Merchandise pallet" means a wood or plastic carrier designed and manufactured as an item on which products can be placed before or during transport to retail outlets, manufacturers, or contractors, and affixed with language stating "property of . . .," "owned by . . .," or other markings or words identifying ownership;

(8) "Obtain control over" in addition to its common meaning, means:

(a) In relation to property, to bring about a transfer or purported transfer to the obtainer or another of a legally recognized interest in the property; or

(b) In relation to labor or service, to secure performance thereof for the benefits of the obtainer or another;

(9) "Owner" means a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services;

(10) "Parking area" means a parking lot or other property provided by retailers for use by a customer for parking an automobile or other vehicle;

(11) "Receive" includes, but is not limited to, acquiring title, possession, control, or a security interest, or any other interest in the property;

(12) "Services" includes, but is not limited to, labor, professional services, transportation services, electronic computer services, the supplying of hotel accommodations, restaurant services, entertainment, the

supplying of equipment for use, and the supplying of commodities of a public utility nature such as gas, electricity, steam, and water;

(13) "Shopping cart" means a basket mounted on wheels or similar container generally used in a retail establishment by a customer for the purpose of transporting goods of any kind;

(14) "Stolen" means obtained by theft, robbery, or extortion;

(15) "Subscription television service" means cable or encrypted video and related audio and data services intended for viewing on a home television by authorized members of the public only, who have agreed to pay a fee for the service. Subscription services include but are not limited to those video services presently delivered by coaxial cable, fiber optic cable, terrestrial microwave, television broadcast, and satellite transmission;

(16) "Telecommunication device" means (a) any type of instrument, device, machine, or equipment that is capable of transmitting or receiving telephonic or electronic communications; or (b) any part of such an instrument, device, machine, or equipment, or any computer circuit, computer chip, electronic mechanism, or other component, that is capable of facilitating the transmission or reception of telephonic or electronic communications;

(17) "Telecommunication service" includes any service other than subscription television service provided for a charge or compensation to facilitate the transmission, transfer, or reception of a telephonic communication or an electronic communication;

(18) Value. (a) "Value" means the market value of the property or services at the time and in the approximate area of the criminal act.

(b) Whether or not they have been issued or delivered, written instruments, except those having a readily ascertained market value, shall be evaluated as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft, or promissory note, shall be deemed the amount due or collectible thereon or thereby, that figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied;

(ii) The value of a ticket or equivalent instrument which evidences a right to receive transportation, entertainment, or other service shall be deemed the price stated thereon, if any; and if no price is stated thereon, the value shall be deemed the price of such ticket or equivalent instrument which the issuer charged the general public;

(iii) The value of any other instrument that creates, releases, discharges, or otherwise affects any valuable legal right, privilege, or obligation shall be deemed the greatest amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(c) Except as provided in RCW 9A.56.340(4) and 9A.56.350(4), whenever any series of transactions which constitute theft, would, when considered separately, constitute theft in the third degree because of value, and said series of transactions are a part of a criminal episode or a common scheme or plan, then the transactions may be aggregated in one count and the sum of the value of all said transactions shall be the value considered in determining the degree of theft involved.

For purposes of this subsection, "criminal episode" means a series of thefts committed by the same person from one or more mercantile establishments on three or more occasions within a five-day period.

(d) Whenever any person is charged with possessing stolen property and such person has unlawfully in his possession at the same time the stolen property of more than one person, then the stolen property possessed may be aggregated in one count and the sum of the value of all said stolen property shall be the value considered in determining the degree of theft involved. Thefts committed by the same person in different counties that have been aggregated in one county may be prosecuted in any county in which one of the thefts occurred.

(e) Property or services having value that cannot be ascertained pursuant to the standards set forth above shall be deemed to be of a value not exceeding two hundred and fifty dollars;

(19) "Wrongfully obtains" or "exerts unauthorized control" means:

(a) To take the property or services of another;

(b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto; or

(c) Having any property or services in one's possession, custody, or control as partner, to secrete, withhold, or appropriate the same to his or her use or to the use of any person other than the true owner or person entitled thereto, where the use is unauthorized by the partnership agreement.

[2006 c 277 § 4; 2002 c 97 § 1; 1999 c 143 § 36; 1998 c 236 § 1; 1997 c 346 § 2; 1995 c 92 § 1; 1987 c 140 § 1; 1986 c 257 § 2; 1985 c 382 § 1; 1984 c 273 § 6; 1975-'76 2nd ex.s. c 38 § 8; 1975 1st ex.s. c 260 § 9A.56.010.]

***RCW 9A.56.160***

**Possessing stolen property in the second degree — Other than firearm or motor vehicle.**

(1) A person is guilty of possessing stolen property in the second degree if:

(a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds two hundred fifty dollars in value but does not exceed one thousand five hundred dollars in value; or

(b) He or she possesses a stolen public record, writing or instrument kept, filed, or deposited according to law; or

(c) He or she possesses a stolen access device.

(2) Possessing stolen property in the second degree is a class C felony.

[2007 c 199 § 7; 1995 c 129 § 15 (Initiative Measure No. 159); 1994 sp.s. c 7 § 434; 1987 c 140 § 4; 1975 1st ex.s. c 260 § 9A.56.160.]

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07-1-00030-3

CERTIFICATE OF MAILING

The undersigned attorney for the Respondent hereby certifies that one original and one copy of the Opening Brief of Respondent was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to, Jeffrey D. McPhee, Respondent, and Ms. Susan Baur, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on July 7, 2009, at the Centralia, Washington post office addressed as follows:

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