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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

No. 37661-0-II

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RONALD E. GUNDERSON,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Thomas Larkin (trial) and the Honorable Ronald
Culpepper (motion), Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Appellant Ronald Gunderson was deprived of his Fourth Amendment and Article I, § 7 rights to be free from unreasonable searches and seizures when the trial court failed to suppress evidence and statements which were the fruits of an unlawful arrest.

2. Gunderson assigns error to the trial court's conclusion IV in the findings and conclusions on the motions to suppress which provides, in relevant part, "that the deputies had probable cause to arrest the defendant." CP 129.

3. Gunderson assigns error to the trial court's conclusion II, which provides, in relevant part, "that a reasonable person looking at the facts in this case, prior to the defendant's arrest, would believe criminal activity was afoot." CP 128.

4. Gunderson assigns error to the trial court's conclusion III, which provides, in relevant part:

that the deputies had a reasonable suspicion that the defendant was engaged in criminal activity. This finding is based on the observations of the deputies, the observations of Peter Wooding, and the fact that these events occurred at 4:00 a.m.

CP 128-29.

5. Gunderson assigns error to the trial court's conclusion I, which provided that Gunderson "made a knowing, voluntary and intelligent waiver of his rights." CP 128. Gunderson also assigns error to the conclusion that all of the statements he made were admissible because they came after such a waiver. See CP 128.

6. The prosecution cannot satisfy the heavy burden of proving

that the constitutional errors of failing to suppress the statements and evidence were harmless beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

To be valid, a warrantless arrest must be based upon probable cause. At the time they arrested Ronald Gunderson, the officers knew only that he was working on a boat which could have been his on a beach which was not known to be closed or non-public at 4 in the morning and there had possibly been some noise at a vacant house nearby, although it was known to be difficult to identify the exact point of origin of noise at the beach.

1. Under Article I, § 7 of the Washington constitution, a valid arrest is necessary to support any search incident to arrest. Did the trial court err in failing to suppress evidence seized from Gunderson in a search incident to arrest where the arrest was unlawful?

2. Under both Article I, § 7 and the Fourth Amendment, statements made after an unlawful arrest are not admissible simply because officers subsequently read the defendant his rights and secure his waiver. Instead, the statements must be proven to be sufficiently distant from the illegal arrest so as to be completely untainted by the arrest. Did the trial court err in failing to suppress statements which occurred directly after an illegal arrest and in the same place, without any intervening circumstances to distance the statements from the arrest, where the purpose of the arrest was to conduct further investigation into whether a crime had occurred?

3. The erroneous failure to suppress evidence or statements

gathered in violation of a defendant's rights is constitutional error which compels reversal and dismissal unless the prosecution can prove the error harmless. A constitutional error is presumed prejudicial and can only be proved harmless if the reviewing court can conclude that any reasonable jury would have reached the same conclusion absent the error and that the overwhelming untainted evidence supports the conviction beyond a reasonable doubt. Is reversal and dismissal required in this case where the conviction depended upon the improper evidence, there was not overwhelming untainted evidence to otherwise support it and a reasonable jury could easily have acquitted absent the evidence?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Ronald E. Gunderson was charged by amended information with first- and second-degree theft. CP 28-29; RCW 9A.56.020(1)(a); RCW 9A.56.030(1)(a); RCW 9A.56.040(1)(a). The prosecution also alleged the aggravating circumstance that the operation of the "multiple offense" policy of RCW 9.94A.589 resulted in a presumptive sentence that was "clearly too lenient." CP 28-29; RCW 9.94A.535(2)(i); RCW 9.94A.589.

After a motion before the Honorable Ronald E. Culpepper on March 20, 2008, trial was held before the Honorable Thomas P. Larkin on March 24-27, 2008, after which the jury found Gunderson guilty of first-degree theft but could not reach a conclusion on the second-degree theft

charge.¹ RP 192-96.

On April 18, 2008, Judge Larkin imposed a standard-range sentence. CP 132-44; RP 211. Gunderson appealed and this pleading follows. CP 285-98.

2. Overview of facts relating to offense²

On July 6, 2007, at about 4:30 in the morning, Ronald Gunderson was arrested by Pierce County Sheriff's deputies Lincoln Hales and Dave Plummer on a beach where Gunderson was working on a boat. RP 109-117, 134. In Gunderson's pockets, the officers found miscellaneous tools, a wrench, a screwdriver and "things of that nature." RP 118-19. He also had a flashlight on his belt and there were four motor mount bolts and a wrench next to his feet. RP 118-19.

Gunderson was charged with stealing the boat as well as an inflatable dinghy later found nearby. RP 88, 122-23. He was acquitted of the charge relating to the dinghy but convicted of first-degree theft for the boat. RP 192-96.

D. ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS THE
EVIDENCE AND STATEMENTS WHICH WERE THE
FRUITS OF AN UNLAWFUL ARREST

Both the state and federal constitutions prohibit unreasonable

¹The verbatim report of proceedings consists of 6 volumes, which will be referred to as follows:

the motion proceedings of March 20, 2008, as "MRP;"
the chronologically paginated volumes containing the trial and sentencing proceedings of March 24-27 and April 18, 2008, as "RP."

²More detailed discussion of the facts related to the issues is contained in the argument section, *infra*.

searches and seizures. See State v. Ozuna, 80 Wn. App. 684, 687-88, 911 P.2d 395, review denied, 129 Wn.2d 1030 (1996); Payton v. New York, 445 U.S. 573, 585, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); Art. 1, § 7; 4th Amend.; 14th Amend. Any evidence or statements which are the “fruits” of such a search or seizure must be suppressed. See State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Under both the Fourth Amendment and Article I, section 7, warrantless searches or seizures are per se unreasonable. See State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007); Coolidge v. New Hampshire, 403 U.S. 443, 454, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). There are a few narrowly drawn, carefully limited exceptions, although the scope of some exceptions may differ under the different constitutions because the Washington constitution provides greater protection from governmental intrusion than the federal constitution. See, e.g., Moore, 161 Wn.2d at 885 (valid arrest must precede a search incident to arrest); Rawlings v. Kentucky, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980) (where an arrest occurred after a search, the evidence was still admissible as gathered in a valid search incident to arrest).

One of the exceptions to the warrant requirement allows officers to arrest someone when they have probable cause to believe that person is guilty of a crime. State v. Grande, 164 Wn.2d 135, 141, 87 P.3d 248 (2008).

In this case, the prosecution relied on the evidence seized from Gunderson’s pockets in the search incident to his arrest and the statements

he made during questioning after the arrest. RP 192-96. The trial court erred in failing to suppress that evidence and those statements, however, because the arrest was unlawful and the evidence and statements were the fruits of that arrest.

a. Relevant facts

At the suppression hearing, Deputy Hales testified about what the officers knew before the arrest and how the arrest occurred. According to Hales, he and Deputy Plummer went to the beach in response to a report that someone had been seen driving around in a boat and working on it at a “very odd hour.” RP 17-19. Hales also said he thought it had been reported that there was “a bunch of noise going on at the vacant neighbor’s” house. RP 17-19.

Once the officers arrived, they spoke to Peter Wooding, the man who had called 9-1-1. RP 19; see RP 66-67. Wooding had been camping outside on his property and heard noises. See RP 18. Wooding told the officers that there was “somebody milling around all morning.” RP 19. Wooding also said there was some “commotion going on,” but Hales admitted that, on a beach, noise bounces around a little and it can be “disorienting” and difficult for someone to identify exactly where noise is originating. RP 19.

Hales himself said he heard a “clinging and clanging” when he was talking to Wooding. RP 19. Hales assumed the sound was from a wrench. RP 19.

Wooding pointed the officers to the silhouette of a man who was hunched over a boat, past the bulkhead and on the beach below the

property next door. RP 19, 34. Hales admitted Gunderson that man, later identified as Gunderson, was at least 10-15 yards down on the beach. RP 34-36. Hales also conceded that he did not know if the public was permitted to be on the beach where Gunderson was standing. RP 37.

At that point, the officers decided to approach Gunderson from different sides to eliminate “any avenue of escape.” RP 20. Hales admitted that, as they approached, the officers probably had their guns drawn. RP 36, 38.

Gunderson was at the stern of the boat, standing in the mud and “pretty wet through.” RP 20. The officers advanced and shouted, “Police[,] don’t move.” RP 21. They also ordered Gunderson to show them his hands. RP 20.

After a moment, Gunderson “kind of saw” the officers, then dropped the wrench and folded his arms. RP 20-21. It was at that point, Hales admitted, that the officers arrested Gunderson, ordering him to get down into the mud and then handcuffing him. RP 21, 38. The officers then searched Gunderson incident to that arrest and found “tools” in his pockets. RP 21.

Hales said that he arrested Gunderson because he thought Gunderson was “stealing the boat motor, stealing the boat.” RP 29. When prompted by the prosecutor as to whether Hales also arrested Gunderson for “trespassing,” Hales said, “[a]bsolutely.” RP 29. A moment later, however, Hales said that the arrest was for theft of the boat and boat motor or suspicion of theft. RP 30.

Hales conceded that the officers had received no report of a stolen

boat at the time they made the arrest. RP 30.

Hales first said that the officers “knew” the boat was not Gunderson’s at the time of the arrest. RP 29-30. A moment later, Hales admitted that the reason he thought they had that “knowledge” was because Gunderson had said the boat did not belong to him. RP 29-30. Hales then conceded that, in fact, Gunderson had made no statements about the boat prior to the arrest. RP 30. Instead, at the time the officers ordered Gunderson down, put him in handcuffs, seized and arrested him and read him his rights, Hales admitted, the officers did not know, in fact, whether the boat belonged to Gunderson or someone else. RP 30-31.

Just after arresting him, Hales told Gunderson his rights. RP 24. Prior to that, Hales had not asked any questions and Gunderson had made no statements. RP 24. Hales then questioned Gunderson about what he was doing there, eliciting what Hales would later describe as conflicting stories about why Gunderson was there and what Gunderson was doing. RP 25-27. The stories included Gunderson claiming he was fixing the boat for a friend but not knowing the friend’s name, stating he was clamming but having no tools or items relating to clamming and stating he was working on the boat because it was overheating when the motor was, in fact, cold to the touch. RP 25-30.

After the arrest, the officers found a car associated with Gunderson parked at the vacant house. RP 28, 42. They also found an inflatable dinghy closer to the neighbor’s house, on the “bulkhead.” RP 28, 42.³

³The jury later acquitted Gunderson of the charge relating to that dinghy. RP 192-96.

In denying Gunderson's motions to suppress the evidence and the statements, the court first focused on whether there was a "reasonable suspicion" that something was "going on out there" on the beach. RP 52. While recognizing there was not "a lot to go on" to establish such suspicion based upon the telephone call to 9-1-1, the court found that the officers "got a little more information" when they arrived, which supported a "reasonable suspicion." RP 54. The court then found "the officers did have probable cause to make the arrest, to do what they did, to follow up in a reasonable way" because "a reasonable person" would conclude "that there's something fishy going on" out there. RP 54. In addition to admitting the evidence seized after the arrest, the court also held that the post-arrest statements were admissible, because Gunderson had been read his rights prior to making them. RP 54.

The court later entered written findings in support of its decision. CP 125-29.

- b. The evidence and statements should have been suppressed because they were the fruits of an unlawful arrest

The trial court erred in failing to suppress the evidence and statements, because they were the direct result of an unlawful arrest.

As a threshold matter, in refusing to suppress the evidence, the trial court erred in focusing on whether the officers had a "reasonable suspicion" that Gunderson either had committed or was about to commit a crime. See CP 125-29. The question of whether there was a "reasonable suspicion" to believe criminal activity has occurred or is about to occur arises when the seizure involved is a brief investigatory detention. See

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). Such a seizure, however, involves “significantly less” intrusion into a person’s private affairs than an arrest. State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). As a result, only “reasonable suspicion” or “well-founded suspicion” is required to justify an officer’s brief detention of a person in order to investigate suspected criminal activity. See State v. Sieler, 95 Wn.2d 43, 46, 621 P.2d 1272 (1980); Brown v. Texas, 443 U.S. 47, 51, 99 S. Ct. 2637, 61 L. Ed.2d 357 (1979).

In contrast, where a person is arrested, that intrusion upon their liberty is “so substantial that its reasonableness is dependent upon probable cause and hence cannot be supported by suspicion alone.” State v. Belieu, 112 Wn.2d 587, 596, 773 P.2d 46 (1989); see Dunaway v. New York, 442 U.S. 200, 208-209, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).

There can be no question that Gunderson was immediately arrested by Hales and Plummer when they arrived. Hales conceded that Gunderson was arrested at that point - as did the prosecution. See RP 21-38; CP 32, 34-35. And the trial court specifically so found. CP 127. Further, it is difficult to conceive how what occurred could be characterized as anything but a full arrest, when officers approached Gunderson from both sides, probably with guns drawn, ordered him not to move, demanded that he show his hands, then made him get face down into mud and handcuffed him. See, e.g., State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984). Thus, the trial court’s focus on the “reasonable suspicion” standard was in

error.⁴

Because the seizure of Gunderson was an arrest, the officers were required to have probable cause to support it in order for it to be lawful. See Williams, 102 Wn.2d at 741-42. For probable cause to exist, there must have been “facts and circumstances within the arresting officer’s knowledge and of which the officer has reasonable trustworthy information,” and those facts and circumstances must have been “sufficient to warrant a person of reasonable caution to believe that an offense has been committed.” State v. Fore, 56 Wn. App. 339, 343, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990). Put another way, there must be “evidence of circumstances sufficiently strong in themselves to allow a cautious and disinterested person to believe” a crime has been or is being committed and that “the suspect is guilty” of that crime. State v. Conner, 58 Wn. App. 90, 98, 791 P.2d 261, review denied, 115 Wn.2d 1020 (1990).

In this case, the officers did not have probable cause to believe that Gunderson was committing or had committed a crime at the time of the arrest. All the officers knew was that Gunderson was on a beach working on a boat at an early hour in the morning after a neighbor had heard activity. They had no report of a stolen boat. They had no evidence that the beach on which Gunderson was standing was somehow private or had been closed. See e.g., State v. Morgan, 78 Wn. App. 208, 211, 896 P.2d 731 (1995), review denied, 127 Wn.2d 1026 (1996) (without notice that a

⁴Even if it had applied here, the “reasonable suspicion” standard would not have been met. See *infra*.

public park was closed there could be no probable cause for an officer to believe the defendant had committed criminal trespass). And as Hales admitted, at the time of the arrest, the officers did not know if the boat on which Gunderson was working actually *belonged* to Gunderson. RP 30-31.

Further, although the police said they were responding to a call of a suspected trespass or burglary, the trial court did not enter any findings supporting a reasonable belief such activity had occurred. It made no findings indicating that Wooding or anyone else had heard or seen anyone at or near the neighbor's vacant house. See CP 125-29. Indeed, the court specifically declined to enter a proposed finding that "Wooding had seen someone come ashore and go up towards the vacant house." CP 126.

When a court does not enter a finding on a factual issue, it is presumed that the party which had the burden of proof failed to satisfy the burden of proving that fact. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997); State v. Byrd, 110 Wn. App. 259, 265, 39 P.3d 1010 (2002).

In addition, although the police later found a car associated with Gunderson parked on the neighbor's property, the trial court made no findings that the officers about the presence of any car at the time they made the arrest. CP 125-29. And probable cause cannot be found by looking in hindsight, relying on facts later developed or evidence later found. Rather, it is "judged on the facts known to the arresting officer *before or at* the time of the arrest" only, because the arrest must be lawful when it occurred, rather than justified by information discovered after the fact. State v. Gillenwater, 96 Wn. App. 667, 670, 980 P.2d 318 (1999),

review denied, 140 Wn.2d 1004 (2000) (emphasis added).

Thus, the facts and circumstances within the officers' knowledge at the time of the arrest fell far short of probable cause to believe Gunderson had committed or was committing a crime. At most, based upon the lateness of the hour, the officers had a hunch that something "fishy" might be going on or *suspected* Gunderson was potentially involved in a crime. But probable cause does not exist simply because officers have a "bare suspicion" of criminal activity. See State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Nor is a bare suspicion of the *possibility* of a crime enough. See State v. Franklin, 41 Wn. App. 409, 416, 704 P.2d 666 (1985).

Indeed, the facts and circumstances known to the officers at the time of the arrest would not have supported even the less intrusive seizure of an investigative detention. To satisfy the "reasonable suspicion" standard for such a detention, the prosecution must show that there were "specific and articulable facts which, taken together with rational inferences from those facts," reasonably and objectively indicated that the defendant has committed or was about to commit a crime. See Terry, 392 U.S. at 19-21; State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002). A "hunch" that criminal activity might be occurring is not enough. See State v. O'Cain, 108 Wn. App. 542, 548-49, 31 P.3d 733 (2001). Instead, the police must have a "well founded" suspicion that the person being detained is involved in such activity before the seizure of investigative detention can occur. Sieler, 95 Wn.2d at 46. And even though such brief detention is considered less intrusive than an arrest, it must nevertheless be

“reasonable” and based upon specific facts which would lead an objective person to believe the intrusion was warranted. See Kennedy, 107 Wn.2d at 4.

Here, the facts and circumstances known to the officers would not have supported a man of reasonable caution having a “reasonable suspicion” that a crime had been or was about to be committed. The “specific and articulable” facts known to the officers were that the defendant was seen on a beach which the officers had no indication was anything other than public and that he was working on a boat the officers had no evidence was not his, and that a neighbor heard something which sounded like it came from the house next door but saw nothing and no one there - and heard the noise in a place where sound direction can be distorted. While the time of day might have seemed at first glance to be unusual, it is not a crime to go fishing or work on your boat on public property at an early hour of the morning. And there was no testimony that clamming or fishing or other such activities *do not* take place at such an hour. Taken objectively, the facts and circumstances known to the officers at the time of the arrest did not even support a reasonable suspicion that the defendant was engaged in criminal activity, despite the trial court’s findings to the contrary.

Gunderson is not disputing that the officers were entitled to respond to the 9-1-1 call and investigate Wooding’s concerns. Certainly the officers could have approached and engaged Gunderson in conversation about what he was doing. See, e.g., Armenta, 134 Wn.2d at 11. But they were constitutionally prohibited from seizing Gunderson

unless they had legally sufficient grounds to do so. Because there was not probable cause to support the arrest, the arrest was thus unlawful.

As a result, the trial court erred in failing to suppress the evidence seized from Gunderson in the search incident to that arrest and the statements made in the subsequent questioning. Evidence which is the fruit of an unlawful arrest must be suppressed. Franklin, 41 Wn. App. at 417. Regarding the evidence seized, under Article 1, § 7 of the Washington constitution, a lawful custodial arrest is a constitutionally mandated prerequisite to any search incident to arrest. See State v. O'Neill, 148 Wn.2d 564, 585, 62 P.3d 489 (2003); see also, Moore, 161 Wn.2d at 885. Where the arrest is not lawful, the evidence seized in the search incident to the arrest must be suppressed. See Franklin, 41 Wn. App. 417.

Similarly, under both Article I, § 7 and the Fourth Amendment, statements made as a direct result of an unlawful arrest must be suppressed unless they are sufficiently purged of the taint of the unlawful arrest as to authorize their admission. See State v. Avila-Avina, 99 Wn. App. 9, 13-14, 991 P.2d 720 (2000); Brown v. Illinois, 422 U.S. 590, 602, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975). Although the trial court here found the statements admissible because they were made after Miranda⁵ warnings were properly given, the court reached that conclusion in the context of having already erroneously found the arrest was lawful. Where an arrest is *not* lawful, however, the proper giving of the Miranda warnings does not

⁵Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 695 (1966).

alone purge the taint from the unlawful arrest. Avila-Avina, 99 Wn. App. at 13-14. Instead, the court must decide whether the statements made are sufficiently distinguishable as to have been “purged of the primary taint,” rather than being the result of that illegality. Wong Sun, 371 U.S. at 488. This is determined by examining not only whether the Miranda warnings were properly subsequently given but also by looking at 1) the temporal proximity between the arrest and the statements, 2) whether there were significant “intervening circumstances” distancing the illegal arrest from the giving of the statements, and 3) the purpose and flagrancy of the officer’s misconduct in making the illegal arrest. See State v. Gonzales, 46 Wn. App. 388, 398, 731 P.2d 1101 (1986); Brown, 422 U.S. at 602. The purpose of this analysis is to ensure that illegal seizures are not encouraged by allowing the government to use evidence resulting from such a seizure. Brown, 422 U.S. at 602. To satisfy that purpose the resulting statement is inadmissible unless the prosecution can show it to be totally “an act of free will,” unaffected by the illegal seizure. Id.

Here, the state cannot meet that burden. The only time which passed between the arrest and the statements was the mere moments required for Hales to recite the Miranda warnings and secure Gunderson’s waiver. Further, the arrest and the statements occurred in exactly the same place, with Gunderson still wet and likely muddy from being told to get down in order to be handcuffed.

Nor were there any intervening circumstances, let alone circumstances significant enough to purge the taint of the illegal arrest. Instead, the statements were elicited by the officers directly after they had

made the illegal arrest. Further, the purpose of the arrest was to conduct further investigation. See, e.g., Brown, 422 U.S. at 604-605 (such a purpose weighs against a finding that statements were sufficiently attenuated from an illegal arrest). The statements were the direct result of the unlawful arrest and the court erred in failing to suppress them.

c. The prosecution cannot prove the constitutional error harmless

Reversal and dismissal of the conviction is required. Where, as here, evidence and statements are improperly admitted based on a trial court's erroneous failure to suppress, it is constitutional error which is presumed prejudicial. See State v. McReynolds, 117 Wn. App. 309, 326, 71 P.3d 663 (2003), disapproved on other grounds by State v. Ose, 156 Wn.2d 140, 145, 124 P.3d 635 (2005). The prosecution can only override this presumption if it meets the heavy burden of convincing this Court, beyond a reasonable doubt, that any reasonable jury would have reached the same conclusion absent the error and that the untainted evidence was so overwhelming that it necessarily leads to a finding of guilt. See State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). The prosecution cannot meet that burden here.

i. Testimony and arguments at trial

At trial, Wooding testified that he had heard what sounded like a car door and some "footsteps" in the mud. RP 67. He believed the neighbor's house was for sale and vacant and thought the sounds were "odd" because of the time of night. RP 67. Wooding's garage had been broken into a few weeks earlier, so he went outside his tent to see what

was going on. RP 67-68.

Wooding could not remember if he “specifically saw something” but said he could tell there was “movement” and that he saw an “outline” of what he thought was a person moving in the dark near the water on his neighbor’s property. RP 69-70. There was a boat in the mud and the person Wooding saw was about halfway between that boat and the “bulkhead” where the water stopped at high tide. RP 68-69.

Wooding had not seen any boats come ashore. RP 78-80. Although he hesitated to characterize the beach where the man and boat were as “public access,” he admitted that people sometimes walked across it and there was a state park about a mile along which “wrap[s] around” that beach to it. RP 76-77. Because the park was a mile away, Wooding said, there were not many people who came “that far down,” but they could do so if they wanted. RP 77. Wooding ultimately admitted that the beach on which Gunderson was might be public up to the high water mark, although Wooding had not noticed anyone there at that hour of the morning before. RP 77, 82.

When police arrived, Wooding met them at his driveway and walked them down to the bulkhead along Wooding’s property. RP 72. By that time, Wooding said, the person who had been in the mud had gone up past the neighbor’s house to a car, made some noise Wooding thought was “picking up tools, or something,” and had returned. RP 72.

Officers Hales and Plummer saw Gunderson hunched over a boat, could hear some metal clanging sounds and thought Gunderson appeared to be working on the boat’s motor. RP 114, 132.

After the arrest, in Gunderson's pockets, the officers found miscellaneous tools, a wrench, screwdriver and "things of that nature." RP 118-19. Gunderson had a flashlight on his belt and there were four motor mount bolts and a wrench next to his feet. RP 118-19. Hales questioned Gunderson about why he was there at "such an odd hour" and Gunderson said he was working on the motor for a friend, and that the motor had overheated and he needed to work on it right away. RP 120-22. Gunderson did not, however, recall his friend's name, and when Hales put his hands on the motor, it was not warm. RP 121. Hales told Gunderson he thought the story "was bogus" and Gunderson then said he had been clamming. RP 121. Wooding admitted clam digging goes on in the area, but Hales said he did not see any clam shells or other tools for clamming that night. RP 82, 121.

Later, the officers found a car registered to Gunderson's mother parked in the driveway of the vacant house. RP 124. The boat the officers had seen Gunderson working on was later identified as belonging to Jeffrey Rankin, who did not know it was missing until the police contacted him about it the following morning. RP 84, 134. The house where the boat was found was about 600 yards from Rankin's home. RP 86.

Also found farther up on the beach toward's Wooding's neighbor's house was an inflatable dinghy which appeared to have been torn. RP 122-23. That dinghy belonged to Pete Philley, who had left it on his property nearby the night before. RP 96. Gunderson was not convicted of stealing the dinghy. See RP 192-96.

In arguing that Gunderson was guilty, the prosecutor relied, *inter*

alia, on the “problems” with Gunderson’s statements about why he was on the beach, his inability to state the name of the person to whom the boat belonged even though he said he was that person’s friend and that Gunderson did not have tools for digging clams in his pockets or on his belt but had claimed in one of his “stories” that he was going clamming. RP 166-71. He argued that the fact that Gunderson told “these incredible stories that make no sense” proved his guilt. RP 166-70. Focusing largely on Gunderson’s statements, the prosecutor told the jury to ask themselves “why is the defendant telling these stories to the officer” and telling them it was because Gunderson was “caught red-handed, and . . . trying to make excuses for what he did.” RP 168. In addition, the prosecutor relied on the belief that Gunderson must have taken the boats because the boats had been with their owners the night before but were on the beach at 4. RP 166-70. The prosecutor also told the jury that Gunderson must have stolen the boats because he was the only person police found near the boats on the beach that morning. RP 166-70.

- ii. The untainted evidence was not “overwhelming” and the prosecution cannot show that any reasonable jury would have found Gunderson guilty absent the error

The prosecution cannot meet the constitutional harmless error standard for the failure to suppress the statements and evidence, because it cannot show that the untainted evidence was so “overwhelming” that it necessarily leads to a finding of guilt and that any reasonable jury would have reached the same conclusion absent the error.

The determination of whether there was “overwhelming evidence”

to support a conviction is *not* the same as the determination of whether there is sufficient evidence to support a conviction challenged on appeal. See State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). Romero is instructive. In Romero, the defendant was arrested and charged with first-degree unlawful possession of a firearm in an incident that occurred after there was a report of shots fired at a mobile home in the middle of the night. Id. An officer using a flashlight had responded and seen Romero coming around the front of a mobile home holding his right hand behind his body. Id. The officer repeatedly ordered Romero to show his hands. 113 Wn. App. at 783. Romero refused and would not step away from the mobile home, instead running around it and later being found inside. Id.

Officers later found a shotgun inside the mobile home where Romero was hiding and shell casings on the ground next to the mobile home's front porch. Id. Descriptions of the shooter pointed to Romero and an eyewitness testified to seeing him shooting the weapon. 113 Wn. App. at 784. Although the witness was "one hundred percent" positive the shooter was Romero, the witness remembered seeing that man wearing a blue-checked shirt, rather than a grey-checked shirt Romero had on. 113 Wn. App. at 784. And although another man, wearing a blue-checked shirt, was also with Romero that night, when shown the shirt Romero was wearing the eyewitness identified it as the one the shooter had worn. 113 Wn. App. at 784.

The Romero Court first rejected a challenge based upon insufficiency of the evidence, finding the evidence sufficient to support a

finding of guilt for unlawful possession of a firearm. 113 Wn. App. at 797-98. But that same evidence was not sufficient to satisfy the constitutional harmless error test. There was conflicting evidence on certain points relating to guilt, and, although there was significant evidence Mr. Romero was guilty, that was not sufficient to amount to “overwhelming” evidence of guilt, sufficient to find the constitutional error harmless. 113 Wn. App. at 795-96.

Here, there was far less evidence of Gunderson’s guilt than was present in Romero. The improper evidence of Gunderson’s statements and the tools in his pockets formed the backbone of the prosecution’s case. The prosecution’s focus in closing argument on the conflicting stories Gunderson gave establishes just how significant those statements were to the case against Gunderson. Without those statements and the tools, the prosecution’s case was simply that Gunderson must have stolen the boats because he was next to them. But a defendant’s mere possession of stolen property is not sufficient to prove that he was guilty of stealing that property. See, e.g., State v. Q.D., 102 Wn.2d 19, 28, 685 P.2d 557 (1984). It is only with other evidence of guilt such as “the giving of a false or improbable explanation” that a defendant’s guilt for taking the property can be established. See, e.g., State v. Mace, 97 Wn.2d 840, 843, 650 P.2d 217 (1982).

Here, at most, the untainted evidence established Gunderson’s constructive possession of the boat. Without the statements, the prosecution’s claim that Gunderson should be assumed to have committed the theft of the boat would have been unsupported. Because there was not

“overwhelming untainted evidence” proving Gunderson’s guilt for first-degree theft of the boat beyond a reasonable doubt, the prosecution cannot prove the constitutional error of failing to suppress the evidence and statements harmless, and this Court should reverse and dismiss the conviction.

E. CONCLUSION

For the reasons stated herein, this Court should reverse.

DATED this 27th day of February, 2009.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Washington, 98402;

to Mr. Ronald Gunderson, DOC 958016, Twin Rivers Corr. Center, P.O. Box 888, Monroe, WA. 98272.

DATED this 27th day of February, 2009.



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