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neighborhood again. RP 66. One was Caucasian and the other African-America. RP 67. She watched as they walked into an overgrown greenbelt behind her neighbor's house. RP 67. Her neighbor are the Bingham. RP 68, 74. Five minutes later, the two young men walked out of the greenbelt and left, one walking and one on a bike. RP 67.

After seeing the young men for the second time, around 1:30 p.m., she called the police. RP 75. She thought they should be in school. RP 75. She also saw them carrying a large item, possibly a wall-mount TV, covered with a blanket. RP 75. Each young man carried one end of the object. RP 75.

Around 4.p.m., both young men returned as passengers in a car driven by a woman with bleached-blond hair. RP 73. The young men got out of the car, walked into the greenbelt, brought some speakers and other large items from the greenbelt and put them in the trunk of the car. RP 72. The young men were only there for two or three minutes. RP 72. Gehlhaar got the car's license plate and called it into the police. RP 77.

Around 5:30 p.m. Anita Bingham returned from work to find that her patio door had been pried open. RP 28-30. Missing from the house was a big screen flat TV, some speakers, a DVD player,

and some alcohol. RP 18, 31-33. Ms. Gehlhaar contacted Bingham as she arrived home because she was concerned that the Bingham home may have been burglarized. RP 31.

Olympia police Officer Bryan Henry was dispatched to both the burglary complaint and the complaint about the suspicion car. RP 9. He located the registered owner of the suspicious car called in by Gehlhaar. RP 9-13. The registered owner said that his daughter, Erika Greene, drove the car. RP 13-145. Officer Henry contacted the daughter, 17 year-old Erika Greene, who later testified at trial. RP 14, 86.

Erika is the friend of Kristen Eixenberger. RP 87. On the incident date, Erika picked up Kristen. RP 87-89. Kristen has a boyfriend named Raul. RP 89. Raul is a friend of Tyrone Rudolph. RP 87-89. Per Erika, Raul called Kristen and asked if they could give him a ride because some friends had given him some things. RP 91. They drove to where Raul and Tyrone were sitting on the side of the road. RP 92. Ericka opened her trunk. RP 92. Raul and Tyrone went into the woods and came out with a stereo, a TV, and a DVD player. RP 92-94. Tyrone and Raul loaded the items into the trunk. RP 93-94. She drove the guys to an apartment and

dropped them off. RP 95-96. Kristen stayed behind with the guys.
RP 96.

Kirsten testified and told a different story. She said that she and Erika went to an apartment after school where they met up with Tyrone and Raul. RP 132-33. Before they left the apartment, Tyrone said that he wanted to go and get his stuff. RP 136. As Erika was driving, Tyrone told Erika to pull over. RP 135. Tyrone got out of the car on his own and went into the woods and got a TV and speakers and put them into the trunk. RP 137. Because Raul did not help, Tyrone had to make a couple of trips to get all the stuff. RP 136-37. They then went back to the apartment they had left from. RP 137.

Approximately a month later, Sergeant Paul Lower checked the pawnshops in Olympia. RP 48. He went specifically to the Pawn X-change. RP 48. He learned that someone with Tyrone's driver's license and social security number pawned the Bingham's flat screen TV on May 25, 2007, at about 4:25 p.m. RP 49, 55-56, 106, 125.

Kevin Briley, a employee of the pawn shop, testified that he handled the transaction. RP 100-06. He explained that to pawn an item, the person must have picture identification. RP 103. In this

instance, the person had a driver's license in the name of Tyrone Rudolph. RP 106.

Rudolph did not testify at the trial RP 147. Rudolph presented no witness testimony. RP 147

D. ARGUMENT

THE RECORD SUPPORTED A LESSER INCLUDED OFFENSE INSTRUCTION FOR SECOND DEGREE TRAFFICKING IN STOLEN PROPERTY. THE TRIAL COURT ERRED IN REFUSING TO GIVE THE INSTRUCTION.

A criminal defendant may be held to answer only to those offenses contained in the information or indictment. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 6 P.3d 1150 (2000). Consistent with that notion, Wash. Const. Art. I, § 22 preserves a defendant's right to be informed of the charges against him and to be tried only for offenses charged. Fernandez-Medina, 141 Wn. 2d at 453. In keeping with the constitutional requirement of notice, the lesser included offense doctrine entitles the prosecution or the defendant to a jury instruction on a crime other than the one charged if the commission of the lesser offense is necessarily included within the offense for which the defendant is charged in the information. RCW 10.61.006.

Our courts apply the two-pronged Workman test to determine whether a lesser offense is included within the charged offense. State v. Workman, 90 Wn. 2d 443, 447-48, 584 P.2d 382 (1978). First, under the legal prong, each of the elements of the lesser offense must be a necessary element of the offense charged. Id. Specifically, the elements of the lesser offense must be necessarily and invariably included among the elements of the greater charged offense. State v. Harris, 121 Wn.2d 317, 321-23, 325-26, 849 P.2d 1216 (1993).

In Rudolph's case, the requirements of the legal prong are met. First degree trafficking in stolen property necessarily and invariably includes the elements of second degree trafficking in stolen property. As charged, Rudolph was accused of knowingly selling, transferring, or otherwise disposing of stolen property to another person. The lesser offense of second degree trafficking in stolen property requires proof that Rudolph recklessly trafficked in stolen property. CP 21. The only difference between first degree and second degree is the mental element, knowingly trafficking versus recklessly trafficking. Knowingly if defined as:

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the

person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted by not required to find that he or she acted with knowledge. Acting knowingly or with knowledge is established if a person acts intentionally.

CP 36.

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and the disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.

CP 24.

Under the factual prong, the evidence of the case must support an inference that only the lesser included offense was committed to the exclusion of the charged offense. Fernandez-Medina, 141 Wn.2d at 455. In other words, the evidence must affirmatively establish the defendant's theory of the case as it is not enough that the jury might disbelieve the evidence pointing to guilt. Id. at 456. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction should be given. State v. Berlin, 133 Wn. 2d 541, 546, 947 P.2d 700 (1997). If the evidence would permit a jury to rationally find a defendant guilty of the lesser

offense and acquit him of the greater offense, a lesser included offense instruction should be given. Beck v. Alabama, 447 U.S. 625, 635, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). Although there must be affirmative evidence from which a jury could find the defendant committed the lesser offense, the evidence can come from the state or from the defendant because there is no requirement that the defendant offer the evidence or that the defendant's testimony cannot contradict the evidence. State v. Gostol, 92 Wn. App. 832, 838, 965 P.2d 1121 (1998).

Legal questions including alleged errors of law in a trial court's jury instructions are reviewed de novo. State v. Porter, 150 Wn.2d 732, 735, 82 P.3d 234 (2004). In determining if the evidence at trial was sufficient to support the giving of a lesser included instruction, the evidence must be viewed in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56. As applied to our facts, this court must review the evidence in the light most favorable to Rudolph, to determine whether it supported an inference that Rudolph committed second degree trafficking in stolen property. Error in failing to give a legally and factually supported lesser included

instruction is always reversible error. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993); State v. Parker, 102 Wn.2d 161, 683 P.2d 189 (1984).

Here there was sufficient evidence that Rudolph acted recklessly and not knowingly. Erika testified that Kristen told her that Raul called and said that he needed help getting some stuff that a friend had given him. Although the evidence suggests that both Rudolph and Raul had been hanging around the Bingham neighborhood off and on during the day, there is no proof that either was involved with the Bingham burglary. The state did not charge Rudolph with burglary. Further, nothing disproves Raul's statement that friends had given him the property. This is true despite Gehlhaar's testimony that she saw two young men carrying what she believed was a TV earlier in the day. Reviewing this evidence in the light most favorable to Rudolph, it was error for the court to refuse to give the lesser second degree instruction.

E. CONCLUSION

Rudolph's conviction should be reversed and his case remanded for retrial.

Respectfully submitted this 16th day of March, 2009.



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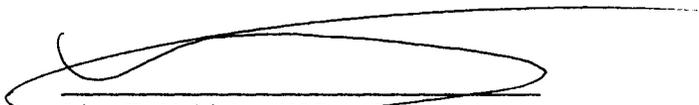
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I certify under penalty of perjury pursuant to the laws of the State of Washington
that the foregoing is true and correct.

Dated this 16th day of March 2009, in Longview, Washington.



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