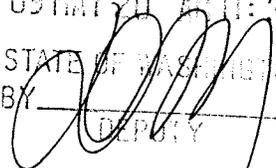


FILED  
COURT OF APPEALS  
DIVISION II

NO. 38519-8-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

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STATE OF WASHINGTON,

Respondent

vs.

JEFFREY D. PECK,

Appellant.

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
THURSTON COUNTY  
The Honorable Gary R. Tabor, Judge  
Cause No. 08-1-00520-1

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PATRICIA A. PETHICK, WSBA NO. 21324  
Attorney for Appellant

P.O. Box 7269  
Tacoma, WA 98417  
(253) 475-6369

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to allow Peck to present a diminished capacity defense.
2. The trial court erred in failing to grant Peck's request for funds to pay for an expert to support his diminished capacity defense.
3. The trial court erred in allowing Peck to be represented by counsel who provided ineffective assistance by erroneously informing the court while stand by counsel that Peck's charge precluded a diminished capacity defense and failing to pursue the same when reappointed as Peck's counsel.
4. The trial court erred in failing to give a missing witness instruction to which Peck was entitled.
5. The trial court erred in allowing Peck to be represented by counsel who provided ineffective assistance in failing to provide the court with a proposed missing witness instruction.
6. The trial court erred in not taking the case from the jury where the evidence does not establish beyond a reasonable doubt that Peck was guilty of possession of a stolen motor cycle.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in denying Peck funds for expert testimony to support his diminished capacity defense and holding that Peck was precluded from making a diminished capacity defense? [Assignments of Error Nos. 1, 2, and 3].
1. Whether the trial court erred in failing to give a missing witness instruction to which Peck was entitled? [Assignments of Error Nos. 4 and 5].

3. Whether the State elicited sufficient evidence to prove beyond a reasonable doubt that Peck was guilty of possession of a stolen motor vehicle? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

1. Procedure

Jeffrey D. Peck (Peck) was charged by information filed in Thurston County Superior Court with one count of possession of a stolen motor vehicle. [CP 4].

Prior to trial, Peck was evaluated and determined to be competent. [CP 9-13, 37, 182-193, 194-217, 218-228; 6-26-08 RP 3-4]. Peck also moved and was eventually granted the right to represent himself. [CP 18-20, 25-26, 27-29, 38-41; 5-8-08 RP 3-19; 6-26-08 RP 3-8; 7-8-08 RP 3-33]. Peck, pro se, indicated that his defense to the charge would be diminished capacity and sought funds for expert testimony supporting this defense, which the court denied stating that it was aware of no authority allowing for a diminished capacity defense for crimes requiring the mental element of knowledge. [CP 21-22, 23-24; 7-14-08 RP 3-4; 9-11-08 RP 20-33; 9-18-08 RP 13-23]. Thereafter, Peck filed a suppression motion, which was heard and denied by the court. [CP 66-92, 110-129, 130-139, 140-141; 9-22-08 RP 4-77]. The court entered the required written findings and conclusions following the suppression hearing. [CP 147-

150]. Peck then moved for reappointment of counsel, which was granted. [CP 143, 144, 145, 146].

Peck was tried by a jury, the Honorable Gary R. Tabor presiding. Peck took exception to the court's failure to give a missing witness instruction based on the State's failure to call Steven Mendelson with whom the State had negotiated a plea agreement to testify against Peck but had absconded from a drug treatment program—the court found that Mendelson was not “unusually available to any party and so the State would not be held liable for having him amenable to process and choosing not to call him.” [CP 153-161; Vol. I RP 71-72]. The jury found Peck guilty as charged of possession of a stolen motor vehicle. [CP 152; Vol. I RP 102-106].

The court sentenced Peck to a standard range sentence of 50-months based on an offender score of fourteen.<sup>1</sup> [CP 162-171, 174, 176; 10-03-08 RP 25-29].

Timely notice of appeal was filed on October 29, 2008. [CP 179]. This appeal follows.

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<sup>1</sup> At sentencing, Peck challenged two of his prior convictions and the State presented two judgment and sentences establishing these convictions. [CP 177-178; 10-3-08 RP 3-10]. The court determined that these convictions should be included in Peck's offender score, but noted that even if they were not included Peck's offender score would be ten with the same standard range. [10-3-08 RP 9-10, 25-29].

2. Facts

On March 17, 2008, Tumwater Police Officers Rosco Rollman and Tygh Hollinger were dispatched to Littlerock Road based on a resident, reporting to 911 that two men riding a motorcycle without helmets in a reckless manner. [Vol. I RP 17-19, 29-30]. The passenger was described as having a black ponytail wearing a blue jacket and the driver of the motorcycle was described as wearing a red bandanna. [Vol. I RP 19, 30]. Upon arriving at the scene, the officers saw a Harley Davidson motorcycle parked in a driveway and observed two men near that matched the descriptions given. [Vol. I RP 19-20]. Rollman contacted the man wearing the red bandanna and asked for identification. [Vol. I RP 20-21]. The man couldn't locate his identification but gave his name as Jeffrey Peck. [Vol. I RP 21]. Peck also admitted that he had been driving the motorcycle. [Vol. I RP 22, 32-33]. The passenger was then contacted and identified as Steven Mendelson. [Vol. I RP 22, 33]. Hollinger contacted the homeowner where the motorcycle was parked and learned he did not know either Peck or Mendelson. [Vol. I RP 22, 35]. The license plate on the motorcycle was checked and it was reported as stolen. [Vol. I RP 23-24, 33-35]. Upon confirmation that the motorcycle was stolen, Peck and Mendelson were arrested. [Vol. I RP 23-24, 35]. A search of Peck's

person incident to his arrest revealed the key to the motorcycle. [Vol. I RP 24].

Jerry Hansen testified that he owned a white Harley Davidson motorcycle and that it had been stolen on March 17, 2008, while he had been at work. [Vol. I RP 13-14]. Hansen identified a picture of the motorcycle Peck had been driving as his stolen motorcycle. [Vol. I RP 14-15]. Hansen testified that he had given no one permission to take his motorcycle. [Vol. I RP 15].

Peter Valentine and Michael Skoczen both testified that they knew Steven Mendelson, whom they called Straven, and that he had come over to where they lived on March 17, 2008, leaving a white Harley Davidson motorcycle. [Vol. I RP 53-56, 61-54]. Fearing that the motorcycle had been stolen, they ordered Mendelson to leave with it. [Vol. I RP 56-57, 59, 65-67]. Skoczen saw Mendelson leave then return five minutes later with a man he identified as Peck and the two of them leave on the motorcycle. [Vol. I RP 68-69]. Valentine had never seen Peck before. [Vol. I RP 59].

Peck did not testify at trial.

D. ARGUMENT

- (1) PECK WAS ENTITLED TO PRESENT A DIMINISHED CAPACITY DEFENSE TO THE CHARGE OF POSSESSION OF A STOLEN MOTORCYCLE AND HE WAS ALSO ENTITLED TO FUNDS FOR AN EXPERT TO SUPPORT THAT DEFENSE.

Under the Sixth Amendment to the Federal Constitution and Art. 1 sec. 22 (amend. 10) of the Washington Constitution, a criminal defendant has the right to present all admissible evidence in his or her defense. State v. Clark, 78 Wn. App. 471, 999 P.2d 964 (1995); State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996). Evidence is admissible when relevant, provided other rules do not preclude its admission. State v. Clark, 78 Wn. App. at 477; ER 401, 402, *see also* State v. Austin, 59 Wn. App. 186, 194-95, 796 P.2d 746 (1990).

a. Overview Of What Occurred.

Peck, an indigent defendant, was charged with possession of a stolen motor vehicle (a motorcycle) which required as an element that he knew the motorcycle was stolen. [CP 4, 159; 3-18-08 RP 4]. Prior to trial, Peck was evaluated and determined to be competent but the evaluations indicated that he may have mental issues that would affect his ability to form the requisite mental state for the crime with which he was charged. [CP 9-13, 37, 182-193, 194-217, 218-228; 6-26-08 RP 3-4]. Peck also moved and was eventually granted the right to represent himself.

[CP 18-20, 25-26, 27-29, 38-41; 5-8-08 RP 3-19; 6-26-08 RP 3-8; 7-8-08 RP 3-33]. Peck, pro se, indicated that his defense to the charge would be diminished capacity and sought funds for expert testimony supporting this defense. [CP 21-22, 23-24; 7-14-08 RP 3-4; 9-11-08 RP 20-33; 9-18-08 RP 13-23]. The court denied Peck the right to present a diminished capacity defense and funds for an expert to support this defense stating that it was aware of no authority allowing for a diminished capacity defense for crimes requiring the mental element of knowledge. [CP 21-22, 23-24; 7-14-08 RP 3-4; 9-11-08 RP 20-33; 9-18-08 RP 13-23]. Particularly troubling about this ruling was the fact that Peck's stand by counsel tacitly supported the court's decision stating, "Your Honor, my understanding is that it (diminished capacity) would not be an appropriate defense, but Mr. Peck wishes to pursue it and so therefore I believe he's entitled to pursue his theory of the case." [9-19-08 RP 18]. Peck's stand by counsel was reappointed shortly thereafter, [CP 143, 144, 145, 146], but did not pursue a diminished capacity defense.

b. Peck Was Entitled To Present A Diminished Capacity Defense.

Diminished capacity is a defense when either specific intent or knowledge is an element, evidence of diminished capacity can then be considered in determining whether the defendant had the capacity to form

the requisite mental state. State v. Warden, 133 Wn.2d 559, 564, 947 P.2d 708 (1997); State v. Greene, 92 Wash. App. 80, 106-07, 960 P.2d 980 (1998).

Here it cannot be disputed that Peck was charged with a crime (possession of a stolen motor vehicle) that included as an element knowledge. Contrary to the trial court's ruling and stand by counsel's statement denying the applicability of a diminished capacity defense to Peck's case, the mental element of intent was not necessary before Peck could assert this defense. The court's and stand by counsel's fundamental lack of understanding of the law precluded Peck from presenting a viable defense to the crime with which he was charged. This court should reverse Peck's conviction.

c. Peck Was Entitled To Fund For An Expert To Support His Diminished Capacity Defense.

The Sixth Amendment right to effective assistance of counsel includes expert assistance necessary to an adequate defense. Ake v. Oklahoma, 470 U.S. 68, 72, 105 S. Ct. 1087, 84 L. Ed.2d 53 (1985). Washington discharges its obligations to provide indigent criminal defendants necessary expert assistance under CrR 3.1(f). *See* State v. Kelly, 102 Wn.2d 188, 201, 685 P.2d 564 (1984). Under CrR 3.1(f), a "defendant is entitled to the appointment of experts if financially unable to

obtain them and if the services are necessary to the defense.” State v. Hoffman, 116 Wn.2d 51, 90, 804 P.2d 577 (1991). The determination of whether expert services are necessary for an indigent defendant’s adequate defense is within the trial court’s discretion. State v. Heffner, 126 Wn. App. 803, 809, 110 P.3d 219 (2006). Such a decision will not be overturned on review without clear showing of substantial prejudice. Id (trial court did not abuse its discretion in denying funds for expert where defendant failed to identify expert or the costs of the services).

To present a diminished capacity defense, expert testimony must establish that a “mental disorder, not amounting to insanity, impaired the defendant’s ability to form the culpable mental state to commit the crime charged.” State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). The expert testimony must “logically and reasonably connect the defendant’s alleged mental condition with the asserted inability to form the required mental state to commit the crime charged.” State v. Ferrick, 81 Wn.2d 942, 945, 506 P.2d 860 (1973).

Here, Peck not only identified an expert (Bret Trowbridge), but kept the court informed about his inability to retain him and told the court the name of other experts willing to conduct a diminished capacity evaluation (Dr. Wise, Dr. Young, Dr. Gagliardi, and Dr. Muscatel) and as well as their fees (\$2000 and \$3000). [9-18-08 RP 13-17]. All Peck

needed was for the court to approve the funds. The trial court denied Peck's request for funds for an expert because, as argued above, the court failed to recognize that a diminished capacity defense was applicable to a crime with the mental state of knowledge. [9-18-08 RP 17-20].

Essentially the trial court ruled that since in the court's mind the defense did not apply Peck was not entitled to funds for an expert. The court was wrong, and in making this ruling presented a clear showing of substantial prejudice to Peck. Peck was denied his defense and any means by which to establish his defense. This court should reverse Peck's conviction.

d. Peck Was Prejudiced By His Stand By Counsel's Failure To Recognize That A Diminished Capacity Defense Applied to His Case And In Failing To Pursue This Defense Upon Reappointment.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is

determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the errors claimed and argued above by undermining Peck's pro se argument while acting as Peck's stand by counsel in failing to recognize that a diminished capacity defense applied to a crime with the mental state of knowledge and in failing to pursue this defense upon reappointment,<sup>2</sup> then both elements of ineffective assistance of counsel have been established. For the reasons set forth above, the record does not reveal any tactical or strategic reason why trial counsel would have failed to recognize and pursue a viable defense as the entire trial turned on whether Peck knew the motorcycle was stolen, and had counsel done so, the trial court would have provided Peck the funds necessary to support the defense and allowed Peck to present the defense that demonstrated he in fact lacked the capacity to know the motorcycle was stolen.

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<sup>2</sup> While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent—but for counsel's failure to recognize and pursue a viable defense Peck would not have been convicted. This court should reverse Peck's conviction for possession of a stolen motor vehicle.

(2) PECK WAS ENTITLED TO A MISSING WITNESS INSTRUCTION.

A party's failure to produce a particular witness who would ordinarily and naturally testify raises the inference in certain circumstances that the witness's testimony would have been unfavorable. State v. McGhee, 57 Wn. App. 457, 462-463, 788 P.2d 603 (1990); State v. David, 118 Wn. App. 61, 74 P.3d 686 (2003), *opinion amended on other grounds*, 130 Wn. App. 232, 122 P.3d 764 (2005). To invoke the missing witness rule and obtain an instruction in a criminal case, the defendant is not required to prove that the prosecution deliberately suppressed unfavorable evidence only that the prosecution would not knowingly fail to call the witness unless the witness's testimony would be

damaging. State v. Davis, 73 Wn.2d 271, 279-80, 438 P.2d 185 (1968).

Further, the missing witness instruction is appropriate when the uncalled witness is peculiarly available to one of the parties, i.e. there must be a community of interest between the party and witness, or the party must have a superior opportunity of knowledge of the witness. Id at 277.

Thus, the missing witness instruction<sup>3</sup> is appropriate when: (1) the witness is peculiarly available to a party, (2) the witness's testimony relates to an issue of fundamental importance, and (3) circumstances at

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<sup>3</sup> Current, as of July 2008, WPIC 5.20, the missing witness instruction, reads:

If a person who could have been a witness at the trial is not called to testify, you may be able to infer that the person's testimony would have been unfavorable to a party in the case. You may draw with inference only if you find that:

- (1) The witness is within the control of, or peculiarly available, to that party;
- (2) The issue on which the person could have testified is an issue of fundamental importance, rather than on that is trivial or insignificant;
- (3) As a matter of reasonable probability, it appears naturally in the interest of that party to call the person as a witness;
- (4) There is no satisfactory explanation of why the party did not call the person as a witness; and
- (5) The inference is reasonable in light of all the circumstances.

The parties in this case are the [State of Washington] and [Mr. Peck].

Former WPIC 5.20 read:

If a party does not produce the testimony of a witness who is [within the control of] [or] [peculiarly available to] that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have give would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

trial establish that, as a matter of reasonable probability, the party would not fail to call the witness unless the testimony would have been damaging or unfavorable. *Id.* at 276-78. Here, Peck met the criteria for the giving of a missing witness instruction regarding the State's failure to call Steven Mendelson and the court's failure to give such an instruction requires reversal. [Vol. I RP 71-72].

First, Mendelson was particularly available to the State. The State had negotiated a plea agreement with Mendelson, which plea included his testimony against Peck<sup>4</sup>, all the while keeping Mendelson in custody or in treatment and unavailable to Peck. [CP 93-109; 9-22-08 RP 77-80]. In fact, when Peck reminded the court that it had ordered the State to make Mendelson available to Peck for an interview, the State admitted that it did not have an address for Mendelson, had not confirmed whether Mendelson was still in treatment or in custody as he was under supervision directed by Judge Hirsch, that Peck's remedy was to obtain a deposition, and that the State had no objection to precluding Mendelson's testimony until Peck had interviewed Mendelson all the while thwarting Peck's efforts to do so. [9-22-08 RP 77-80].

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<sup>4</sup> In *State v. McGhee*, *supra*, Division I determined that the failure to give the missing witness instruction was not error. The court determined that the defendant had failed to establish that the witness was peculiarly available to the State based on the fact that the State had negotiated a plea agreement with the witness. However, the plea agreement negotiated in *McGhee*, unlike the instant case, specified that the witness would not be called to testify against McGhee. Here, the obligation was for Mendelson to testify.

Second, Mendelson's testimony related to an issue of fundamental importance. Mendelson's plea was to possession of a stolen motor vehicle, which requires proof the he knew the motorcycle was stolen. Based on his plea, Mendelson admitted he knew the motorcycle was stolen, but the fundamental issue in Peck's trial, who was also charged with possession of a stolen motor vehicle, was whether Peck knew the motorcycle was stolen. The only person who could conclusively answer that question and who was obligated to the State to testify was Mendelson.

Lastly, the circumstances indicate that the State would not fail to call Mendelson unless his testimony would be unfavorable to its prosecution of Peck. As set forth above, the State put up every road block to prevent Peck from even interviewing Mendelson, and failed to keep track of him while he was in custody and in treatment. [9-22-08 RP 77-80]. The trial court should have given a missing witness instruction. This court should reverse Peck's conviction.

Finally, while Peck's counsel took exception to the trial court's failure to give a missing witness instruction [Vol. I RP 71-72], counsel failed to provide the court with a proposed instruction and in doing so provided Peck with ineffective assistance of counsel.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e. that the

representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the error claimed and argued above by failing to make the appropriate record by filing a proposed missing witness instruction, then both elements of ineffective assistance of counsel have been established. For the reasons set forth above, the record does not reveal any tactical or strategic reason why trial counsel would have failed to provide a proposed instruction when this witness was key to the theory of the case that Peck did not know the motorcycle was stolen and that Mendelson's testimony would have

established this fact, and had counsel done so, the trial court would have been more likely to give such an instruction.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is apparent—but for counsel's failure to make the appropriate record the trial court would have been more likely to have given the instruction with the result that Peck may not have been convicted.

(3) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO FIND PECK GUILTY BEYOND A REASONABLE DOUBT OF POSSESSION OF A STOLEN MOTOR VEHICLE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992).

Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, the State charged and Peck was convicted of possession of a stolen motor vehicle. [CP 4, 152]. As instructed in Instruction No. 8, the State bore the burden of proving beyond a reasonable doubt the following:

- (1) That on or about March 17, 2008, the defendant knowingly possessed a stolen motor vehicle;
- (2) That the defendant acted with knowledge that the vehicle had been stolen;
- (3) That the defendant appropriated the vehicle to the use of a person other than the person entitle [sic] to such property; and
- (4) That the acts occurred in the State of Washington.

[Emphasis added]. [CP 159].

The jury was also instructed in Instruction No. 9 on the definition of knowledge as follows:

A person knows or acts knowingly or with knowledge when he 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, or 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 but not required to find that he acted with knowledge. Acting knowingly or with knowledge also is established if a person acts intentionally.

[CP 159-160].

As instructed in order to sustain Peck's conviction for possession of a stolen motor vehicle, the State bore the burden of proving beyond a reasonable doubt that he knew the motorcycle he was driving was stolen. This is a burden the State cannot meet.

While it cannot be disputed based on Hansen's testimony that the motorcycle was stolen and that Peck possessed the motorcycle based on the fact that he admitted to driving the motorcycle, the evidence does not establish that Peck knew the motorcycle was stolen particularly in light of Valentine's and Skoczen's testimony that it was Mendelson who appeared at their homes with the motorcycle and not Peck. It was only when Valentine and Skoczen ordered Mendelson to leave with the motorcycle that Peck was seen by Skoczen. There's nothing in the evidence that establishes that Mendelson told Peck that the motorcycle was stolen or for that matter that Mendelson and Peck had any sort of friendship beyond this one encounter in which Peck drove the motorcycle. Absent evidence specifically establishing that Peck knew the motorcycle he drove was

stolen, Peck's conviction for possession of a stolen motorcycle cannot stand. This court should reverse and dismiss this conviction.

E. CONCLUSION

Based on the above, Peck respectfully requests this court to reverse and dismiss his conviction for possession of a stolen motor vehicle.

DATED this 19<sup>th</sup> day of May 2009.

*Patricia A. Pethick*  
PATRICIA A. PETHICK  
Attorney for Appellant  
WSBA NO. 21324

CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 19<sup>th</sup> day of May 2009, I delivered a true and correct copy of the Petition for Review to which this certificate is attached by United States Mail, to the following:

Jeffrey D. Peck  
DOC# 933029  
Monroe Correctional Complex  
P.O. Box 514  
Monroe, WA 98272

Carol La Verne  
Thurston County Dep. Pros. Atty.  
2000 Lakeridge Drive SW  
Olympia, WA 98502  
(and the transcript)

FILED  
COURT OF APPEALS  
DIVISION II  
09 MAY 20 AM 11:40  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

Signed at Tacoma, Washington this 19<sup>th</sup> day of May 2009.

Patricia A. Pethick  
Patricia A. Pethick