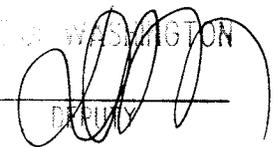


FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 39529-1-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

DAWNAJO HEIDENREICH,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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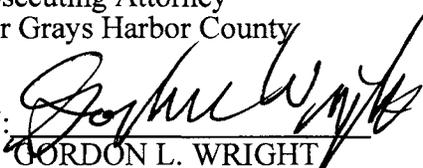
THE HONORABLE DAVID L. EDWARDS, JUDGE

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BRIEF OF RESPONDENT

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## STATEMENT OF THE CASE

The State accepts the appellant's "Statement of Facts and Prior Proceedings" as being an accurate representation of the facts and prior proceedings on this matter, as far as they go. The State would merely like to add that there was no objection from the defense to Jury Instruction No. 6 or Jury Instruction No. 7 as proposed and eventually accepted by the court. (RP 77).

## RESPONSE TO ASSIGNMENTS OF ERROR

**The defendant's conviction did not violate her Fourteenth Amendment Right to Due Process.**

**The court's knowledge instruction did not create a mandatory presumption and did not relieve the State of its burden to prove the essential elements of the crime.**

The Fourteenth Amendment's due process clause states that criminal defendants are presumed innocent until proven guilty and the government must prove guilt beyond a reasonable doubt. U.S. Const. amend XIV; *In re Winship*, 397, U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If a jury instruction were to relieve the State of its burden of

proof of every element of the charge, it would be a violation of due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

**Failure to preserve the issue below.**

It has been held that when no objection has been made on the record to a proposed jury instruction, the courts will not consider in argument for instructional error unless the appellant first demonstrates that the error is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3) (*See also State v. Gerdts*, 136 Wash.App. 720, ¶ 17, 150 P.3d 627 (2007)).

Here, the defendant failed to object to the jury instructions at issue before they were presented to the jury, after they were presented to the jury, and after the verdict was returned. If, as the State contends, there was no constitutional error in the jury instructions given, then this court would not be obliged to review the matter according to RAP 2.5.

**Standards.**

“Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly informed the trier of fact of the applicable law.” *Gerdts*, 136 Wash.App. ¶ 19 (2007) *quoting State v. Douglas*, 128 Wash.App. 555, 562, 116 P.3d 1012 (2005) (*quoting Bodin v. City of Stanwood*, 130 Wash.2d 726, 732, 927 P.2d 240 (1996)). *See also State v. Hutchinson*,

135 Wash.2d 863, 885, 959, P.2d 1061 (1988). *recon. denied*,  
*Hutchinson v. Washington*, 525 U.S. 1157, 119, S.Ct. 1965, 143 L.Ed.2d  
69 (1999). The jury is presumed to read the court's instructions as a  
whole, in light of the other included instructions.

**Mandatory Presumption.**

Instruction No. 4 of the Court's Instructions to the Jury was as  
follows: A person commits the crime of Trafficking in Stolen Property in  
the First Degree when he or she knowingly traffics in stolen property.  
(Supp. CP).

Instruction No. 5, Courts Instructions to the Jury was as follows:  
To convict the defendant of the crime of Trafficking in Stolen Property in  
the First Degree each of the following elements of the crime must be  
proved beyond a reasonable doubt: (1) that on or between July 23, 2008,  
and August 8, 2008, the defendant knowingly trafficked in stolen property;  
and (2) that the acts occurred in Grays Harbor County, Washington. If you  
find from the evidence that each of these elements been proved beyond a  
reasonable doubt, then it will be your duty to return a verdict of guilty. On  
the other hand, if, after weighing all the evidence, you have a reasonable  
doubt as to any one of the elements, then it will be your duty to return a  
verdict of not guilty. (Supp. CP).

Finally, Instruction No. 7, Court's Instructions to the Jury, was as  
follows: A person knows or acts knowingly or with knowledge when he or  
she is aware of facts or circumstances or results as described by law as

being a crime. If a person has information which lead a reasonable person in the same situation to believe that facts exists which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge. *Acting knowingly or with knowledge also is established if a person acts intentionally.* (Supp. CP) (*Italics mine*).

The defendant relies on the case of *State v. Goble* to bolster its argument that the final line in instruction No. 7 in essence removed any limitation on what intentional acts the jury could use to meet the knowledge requirement for culpability. The defense would have the court believe that the jury would be taking instruction No. 7 to mean that any intentional act would allow the jury to assume that the defendant was guilty, and thereby relieving the State of its burden. *State v. Goble*, 131 Wash.App. 194, 126 P.3d 821 (2006). In *Goble*, a case of assault in the third degree on a police officer, the same knowledge jury instruction was given as in the present case. There were two mens rea elements in that crime; that of the defendant knowing that the victim was an officer at the time of the offense and that the defendant intentionally assaulted the victim. There, the court held that the instructions stating that acting knowingly or with knowledge was also established if a person acted intentionally relieved the State of its burden of proving both intent elements of the crime by combining the two into a single element instead

of keeping them as two separate elements. *Goble*, 131 Wash.App. 194 at ¶ 27. (See also *State v. Hayward*, 152 Wash.App. 632, 217 P.3d 354 (2009) (holding that in a trial for second degree assault, the jury instruction that stated recklessness was also established for a person who acted intentionally, permissibly allowed the jury to find the defendant recklessly inflicted substantial bodily harm if it found the defendant intentionally assaulted the victim. This conflated the intent elements the jury had to find regarding assault with intent to cause substantial bodily harm, required by a reckless mental state, into a single element and relieved the State of its burden of proving the defendant recklessly inflicted substantial bodily harm.)

However, in the present case, there are not two intent elements of the crime. Instruction No. 5, Court's Instructions to the Jury, had just two elements: (1) that on the date given the defendant knowingly trafficked in stolen property; and (2) the acts occurred in Grays Harbor County, Washington. (Supp. CP). There was only one intent element that needed to be proven, not two.

The courts have since come out with cases clarifying and limiting *Goble* to its own specific facts. The last sentence at the bottom of the instruction No. 7, on knowing or knowledge, only unconstitutional relieving the State's burden if it caused the jury to erroneously apply it to

the wrong element of the crime. Soon after *Goble*, the courts came out with a case clarifying and limiting the holding in *Goble*.

In the case of *State v. Gerdts*, the subject matter of the appeal was a finding of guilt for Malicious Mischief in the Second Degree. The element in question was knowingly and maliciously causing physical damage to the property of another. There, the jury instructions included the last line at issue on the knowledge instruction. The defense on appeal argued that this instruction would allow the jury to find that the defendant acted with knowledge if he intentionally did *any* act, thus relieving the State of having to prove every element of the offense. The court declined to follow that line of reasoning. The court instead stated that in the present case, unlike the issue in *Goble*, there was no second *mens rea* element to cause a conflict. They found that *Goble* did not apply in this particular incident because of there only being a single *mens rea* element and declined to follow the defendant's argument. *Gerdts*, 36 Wash.App. 720 (2004).

A more recent case limiting *Goble* came out in February of this year. In *State v. Sibert*, the court found that there was no second *mens rea* to conflate in a conviction for delivery of a controlled substance and hence the holding of *Goble* did not apply. The court further held that the jury instructions at the trial, taken as a whole, accurately defined knowledge and did not create a mandatory presumption. *Sibert*, \_\_\_\_\_ P.3d \_\_\_\_\_, ¶ 24, 2010 WL 653868 Wash. (2010)

The defense's reliance on *Goble* and *Hayward* are misapplied. Both of those cases concerned when there were two *mens rea* elements that needed to be proven by the State. When that is the case, the court has held that the language at the bottom of the knowledge instruction allowing knowledge be established by intentional acts is impermissible and relieves the State of its burden of proving all the elements. The courts have made it clear since then in subsequent opinions that when there is only a single *mens rea* element to be proven, as in the case here, then the knowledge instruction is not a constitutional error and does not impermissively relieve the State of its burden of proving the elements. The instructions, when taken as a whole and with presumption that the jury reads and applies the courts instructions as a whole, in light of all the evidence instructions, were adequate in this case.

Due to the fact that there is no manifest error affecting a constitutional right in this matter according to RAP 2.5(a)(3), and there was no objection on the record to the jury instructions as given by the court, the appellate court may refuse to review his claim of error. The State urges the court to take this fact into consideration along with the holding of the cases in this matter.

### **CONCLUSION**

The trial court did not error when it included the line stating “[a]cting, knowingly or with knowledge also has established if a person

acts intentionally” in the knowledge instruction. The holding in *State v. Goble* has been restricted to a specific set of facts which do not apply in this case, causing the appellant’s reliance on this case being misplaced. There was no error.

The judgment and verdict in this case should be affirmed.

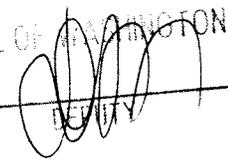
Respectfully Submitted,

By:   
GORDON L. WRIGHT  
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WSBA #32997

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STATE OF WASHINGTON

BY 

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STATE OF WASHINGTON,

Respondent,

No.: 39529-1-II

v.

**DECLARATION OF MAILING**

DAWNAJO HEIDENREICH,

Appellant.

**DECLARATION**

I, Randi M. Toyra hereby declare as follows:

On the 17<sup>th</sup> day of March, 2010, I mailed a copy of the Brief of Respondent to Jodi R. Backlund and Manek R. Mistry; Backlund & Mistry; 203 Fourth Avenue East, Suite 404 Olympia, WA 98501-1189, and Dawnajo Heidenreich; 511 K Street; Hoquiam, WA 98550, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 17<sup>th</sup> day of March, 2010, at Montesano, Washington.

