

COURT OF APPEALS
DIVISION II
FILED 23 JUN 12 10
STATE OF WASHINGTON
BY 36
DEPUTY

NO. 41277-2

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH O. EHRHARDT,

Appellant.

APPELLANT'S BRIEF

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A. Assignments of Error

Assignments of Error

1. The trial court erred when it refused to give defendant's proposed instruction which states: "Mere possession of stolen property is insufficient to find the defendant guilty of either theft 2 or burglary 2."
2. The trial court erred when it gave instruction No. 6 regarding expert witnesses testimony.
3. The defendant was denied an opportunity to voir dire or to cross-examine the victim as to his qualifications as an expert witness.
4. The trial court erred when it gave instruction No. 16 defining value.
5. There was not substantial evidence to convict the defendant of the crimes of burglary in the second degree or theft in the second degree in violation of the Fourteenth Amendment.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred when it refused to give the defendant's proposed instruction which stated: "Mere possession of stolen property is insufficient to find the defendant guilty of either theft 2 or burglary 2."
(Assignment of Error No. 1.)
2. Whether the trial court erred when it gave instruction No. 6 which states:

"A witness who has special training, education or

experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.”

(Assignment of Error No. 2.)

3. Whether the defendant was denied an opportunity to voir dire or to cross-examine the victim as to his qualifications and the basis of his opinions when the state later obtained an instruction on expert witness testimony without qualifying the witness at the time of trial? (Assignment of Error 3.)

4. Whether the trial court erred when it gave instruction No. 16 which states:

“Value means the market value of the property at the time and in the approximate area of the act.”

(Assignment of Error No. 4.)

5. Whether there was sufficient evidence introduced during the trial to support the defendant’s convictions for burglary in the second degree and for theft in the second degree? (Assignment of Error 5.)

B. Statement of the Case

Procedure

Joseph Oryan Ehrhardt was charged in an amended information with Burglary in the Second Degree alleged to have occurred on June 15, 2010 in Kitsap County, Washington contrary to RCW 9A.52.030(1). CP 6. He was also charged with Theft in the Second Degree alleged to have occurred on the same day contrary to RCW 9A.56.020(1)(a) and RCW 9A.56.040(1)(a). CP 7.

He was found guilty of both counts after trial by jury. CP 63. Prior to trial the court conducted a CrR 3.5 hearing. RP 28-39. No record was entered by the trial court pursuant to CrR 3.5(c). Mr. Ehrhardt was sentenced on September 3, 2010 to concurrent sentences of 25 and 12 months confinement respectively. CP 69, 78. On September 24, 2010 a notice of appeal was filed. CP 79.

Trial Testimony

Deputy John C. Loftus testified that on June 15, 2010 he received a report of a burglary off Phillips Road over the radio. RP 43. He contacted a Mr. Glaze and received a description of the suspect and of his vehicle. Id. Later he received a call from another deputy indicating that a suspect matching the broadcast description was being detained at Christian Life Center in Kitsap County. RP 44.

Loftus arrived and saw a black D50 dodge pickup truck that matched the earlier description from the burglary. Id.; exs. 4-5. When the deputy contacted Mr. Ehrhardt he told the deputy that his car had broken down at the house on Phillips Road earlier in the day. RP 47. Ehrhardt denied that he committed any burglary at the residence when advised that the owner had discovered numerous items taken from his residence and outbuildings stacked up next to his driveway. RP 47-8.

Mr. Glaze was then contacted. He described two gas cans that had writings on them that said “dirt bike only, motor bike only.” RP 48. Glaze appeared at the second scene and identified the two red gas cans in the bed of Ehrhardt’s truck as belonging to him. RP 51; exs. 8-9.

Brian Glaze testified that he lived on Phillips Road in Port Orchard, Washington. RP 64. On June 15, 2010 he arrived home from work between about “about six o’clock” and 7:00 p.m. RP 65, 72. When he drove down his driveway he saw a truck about halfway down his driveway, facing in with its hood up. RP 66. It was described as “an older Dodge Ram pickup.” id. He observed random items in the back including a motorcycle frame and tool box.

The hood of the Dodge pickup was in the up position and Glaze observed a person working under the hood, who he identified at the trial as Mr. Ehrhardt. RP 67. At the time of the encounter Mr. Ehrhardt appeared

“really nervous.” RP 67. Ehrhardt described his vehicle problems as having to do with solenoid leads. Apparently a bolt had broken off one of the three leads and “he couldn’t re-attach the leads.” RP 68.

Eventually Ehrhardt got his truck started. He then drove down the drive-way and looped around the U-turn and drove off. RP 69. Meanwhile Mr. Glaze drove down his driveway and parked next to the master bedroom of his house. RP 70. He then observed “a pile of my tools all sitting there right by the nearest bedroom.” RP 71. The tools¹ were “Right here in the grass [indicating]. There’s a deck connected to the master bedroom and they were right off the deck connected to the bedroom.” id. Previously, the tools had been stored in an unlocked storage shed. id.

Mr. Glaze then called his wife and 911. He reported the theft, and provided a description of the vehicle and of the driver he had contact with. RP 73; ex. 5. Later, Mr. Glaze looked around his property. He discovered that gas caps on the lawn mowers and his two, four-wheel ATV vehicles were removed and there was no gas in anything. Also missing was a gas

¹ Tools were described as consisting of a small air compressor (ex. 10); an electric pressure washer (ex. 12); a Dewalt roto hammer drill (ex. 13); a chain saw; two pneumatic Hitachi nail guns (ex. 14); a Bosch rotor hammer (ex. 15) and a box of stereo wiring and connections (ex. 11). RP 71; CP 39.

can previously located on his covered back deck and a gas can next to the two quads. RP 76

Glaze was able to identify the gas can from his back porch depicted in the photographs and labeled “dirt bikes only.” id.; exs. 7 and 8. Later, he arrived at the Christian Life Center where he recognized Mr. Ehrhardt’s truck as the same one that had been at his residence earlier in the day. RP 78. He also was able to identify the gas cans as belonging to him. id.

Glaze concluded his direct examination by testifying that the did not give Mr. Ehrhardt permission to enter his shed on June 15, 2010 or to remove any of his tools. RP 88.

C. Argument

I. THE TRIAL COURT ERRED WHEN IT REFUSED TO GIVE THE DEFENDANT’S PROPOSED INSTRUCTION.

The trial court erred when it refused to give the defendant’s proposed instruction which stated: “Mere possession of stolen property is insufficient to find the defendant guilty of either theft 2 or burglary 2.” CP 38 (see appendix for court’s and defendant’s proposed instruction).

At the time that the instruction was proposed the defense argued:

“MR. THIMONS: Well, Your Honor, the to-convict instructions that we’ve agreed upon by the State caused me concern in the facts of this specific case because there’s information that the defendant has stolen property in his vehicle, and I’m

concerned that that may be enough for the jurors upon what's been presented, and assuming what will be argued here, and that they won't bother to go through the elements and determine that it was, in fact, the defendant that did these things, these acts of entering or remaining unlawfully, taking the property.

And so I propose the instruction to make it clear that -- for the jurors, I think that it should be appropriate to find something more than that. And, certainly, there's inferences to be made by his -- he being identified on the property where the alleged burglary had occurred. But I'm concerned that because he was on the property and there was apparently -- if they find that that was stolen property in the truck, that that will be satisfactory. There is no one to say that he's the one that went up there and took these items out.

And I just want to make sure -- and I think my instructions ensures that -- that's not the only thing they will look at. That they will go, in fact, and look at the other information, perhaps make the proper inference and perhaps find the defendant guilty. But I just wanted to make sure that the defendant is getting a fair trial by having them look a little further than that simple gas can in the vehicle." Rp 105-6.

The trial court refused to give this instructions, primarily because it was not a standard WPIC instruction. RP 108, 110. The standard of review for jury instructions is as follows:

"The standard for review applied to this appeal depends on whether the trial court's refusal to grant the jury instruction was based upon a matter of law or of fact. A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable only for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). The trial court's refusal to give an instruction based on a ruling of law is reviewed de novo. *id.*"

According to *State v. Porter*, 150 Wn.2d 732, 735, 82 P.3d 234 (2004) (“Legal questions, including alleged error of law in a trial court’s jury instructions, are reviewed *dei novo*.”)

The defendant’s proposed instruction was based on *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982). According to *State v. Mark*:

“An instruction is sufficient if it correctly states the law, is not misleading, and permits counsel to argue his theory of the case. *State v. Dana*, 73 Wn.2d 533, 439 P.2d 403 (1968).”

State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

Mace was charged with second degree possession of stolen property and with second degree burglary in unrelated incidents and in separate proceedings. The Supreme Court affirmed a guilty plea to possession of stolen property and reversed the verdict to of guilty to the burglary charge based on insufficient evidence in consolidated habitual criminal proceedings.

The *Mace* court held as follows:

“It is well settled law in Washington that proof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not *prima facie* evidence of burglary.[citations set forth below]² The reason for the rule

² *State v. Garske*, 74 Wn.2d 901, 447 P.2d 167 (1968); *State v. Douglas*, 71 Wn.2d 303, 428 P.2d 535 (1967); *State v. Megvis*, 53 Wn.2d 377, 333 P.2d 1095(1959); *State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946); *State v. Rodriguez*, 20 Wn. App. 876, 582 P.2d 904 (1978); *State*

is more evident when such possession is established by inference or circumstantial evidence,³ as we have here, rather than direct evidence.”

See also, *State v. Q.D.*, 102 Wn.,2d 19, 28, 685 P.2d 557 (1984).

The *Mace* court did state, however, that proof of possession of stolen property, “...if accompanied by “indicatory evidence on collateral matters,” will support a burglary conviction.⁴ *Garske*, at 903.” *id.* at 843. Such was not found in *Mace* even though fingerprints belonging to the defendant were found in Kennewick on a sack that contained the Richland burglary victim’s wallet. Also, the next day after the burglary of the victim’s purse from inside her apartment the police discovered a bank receipt in a trash receptacle that matched the defendant’s fingerprints. There, the victim’s cash machine card was seized by the bank machine when someone attempted to use it.

Here, Ehrhardt told the police officer that his car had broken down

v. Pisauero, 14 Wn.App. 217, 540 P.2d 447 (1975); *State v. Beck*, 4 Wn.App. 306, 480 P.2d 803 (1971).

³ The trial court gave an instruction describing “circumstantial evidence”. Instr. No. 5; CP 48. This instruction was based on WPIC 5.01 (2008). CP 15.

⁴ Corroborative evidence of other inculpatory circumstances that can be shown or proven would be giving a false or improbable explanation of the possession of stolen property, a failure to explain the alleged possession, flight or the presence of the accused near the scene of the crime.

at a house on Phillips Road earlier in the day. RP 47. Ehrhardt denied that he committed any burglary at the residence. RP 47-8. He was asked if he had a receipt for the two red gas cans in the back of his truck by Deputy Loftus. He replied that he did not. RP 52. The shed where Mr. Blaze stored his equipment was not fingerprinted and no footprints were introduced into evidence.

II. THE TRIAL COURT ERRED WHEN IT GAVE INSTRUCTION NO. 6 REGARDING EXPERT TESTIMONY.

The trial court erred when it gave instruction No. 6 regarding expert witnesses. CP 49. At the time this instruction was proposed, the prosecutor justified giving it because “...the only reason I included this is Mr. Glaze testified to knowledge of certain items because of his employment.” RP 101. The defense objected and argued: “I don’t think he was classified enough detail as an expert witness on this point.” RP 101-02.

The trial court overruled the objection and stated:

“THE COURT: He did testify about an opinion, and he had a background that I think was useful to the jury that way. He wasn’t technically labeled an expert, but he certainly gave helpful information. So I am going to use instruction No 5.”

RP 102 (the prosecutor’s proposed expert instruction was ultimately numbered instruction No. 6. CP 49. It was based on WPIC 6.51, 11

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(2008). CP 20.)

In spite of the defendant's objections, the trial court gave instruction No. 6. which states:

“A witness who has special training, education or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.”

CP 49.

Compare Tegland, 5B Washington Practice *Evidence Law and Practice* 62 (2007) (“Again, the owner of personal property is usually allowed to state an opinion on the value of property, but on the theory the testimony is within the scope of permissible *lay* opinion.”) (Italics Tegland's ; see ER 701 “Opinion Testimony by Lay Witness”.)

The standard of review for jury instructions is set forth in *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007): “A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole. *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995) (citing *State v. Benn*, 120 Wn.2d 631, 1654-55, 845 P.2d 289 (1993).”

ER 702 states as follows:

“ If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.”

During trial the prosecutor did not attempt to qualify the victim as an expert witness on the value of items of property that were taken from a shed on his property. It was not until the instructions were addressed at the conclusion of the trial that the prosecutor argued Instruction No. 6 should be given based on the victim’s employment. RP 101. Yet, Mr. Glaze’s employment experience as a carpenter for just four years allowed his testimony to be given extra weight concerning the value of tools that were removed from his shed. RP 79.⁵

According to Karl B. Tegland:

“No expert opinion is admissible over objection unless the witness has first been qualified by a showing that he or she has sufficient expertise to state a helpful and meaningful opinion. Ordinarily the necessary foundation is established by questioning the expert himself or herself.”

5B Washington Practice- *Evidence Law and Practice*- 45 (5th ed. 2007).

⁵ See also state’s closing argument: “The second element: “that the property exceeded \$750 in value.” And for that I direct your attention to the board here. These are the—the values that the victim—based on his trade—this is his bread and butter. He’s been a builder for four years....” RP 117.

Not only was the defense not afforded an opportunity to voir dire⁶ or to cross examine the victim as to his purported qualifications as an expert, it is questionable that based on Glaze's relatively short work experience of four years in construction that he should have qualified as an expert. The following testimony⁷ was the only basis to qualify this witness as an expert on the market value of construction equipment.

State v. Thorpe, 51 Wn.App. 582, 754 P.2d 1050 (Div. 1 1988) was a prosecution for theft of a meat saw. The appellate court stated: "Value [of the saw] was properly established through witness Neal Wheeler, who had 30 years' experience in the meat cutting business, had experience in purchasing meat saws, and had previously examined the saw." *id.* at 590.

Additionally, according to Tegland: "A party may testify as his or her own expert, so long as the party possesses the necessary

⁶ See *City of Bellevue v. Lightfoot*, 75 Wn.App. 214, 877 P.2d 247 (Div. 1 1994), *review denied*, 125 Wn.2d 1025 (1995) "(defendant was improperly denied the right to inquire into the qualifications of a prosecution witness)." Tegland, 5B Washington Practice 50, n. 4.

⁷ "Q. [by Ms. Mosca] While those are being marked, Mr. Glaze, what is your occupation? A. I build houses, framer, foreman. Q. And how long have you been building houses? A. Four years. Q. Okay. Where – where are you employed? A. F&B Construction." RP 79.

When he was not building houses he testified "...I do dirt work and infrastructure, water lines, sewer lines, that kind of stuff." RP 80.

qualifications.” id. at 51. It may be argued that Mr. Glaze is not a party. However, his interest in the case is similar to a party and he is the party who would seek restitution. The point is the victim was never qualified to render an expert opinion on the value of the items that were attempted to be taken.

The defendant was prejudiced by the failure of the prosecutor to qualify the victim as an expert witness on value. According to Instruction No. 17 one element of theft in the second degree is “(2) That the property exceeded \$750 in value.” CP 20. Instruction No. 13 states: “A person commits the crime of theft in the second degree when he or she commits theft of property exceeding \$750 in value.” CP 16.

III. THE DEFENDANT WAS DENIED AN OPPORTUNITY TO VOIR DIRE OR TO CROSS-EXAMINE THE VICTIM REGARDING HIS QUALIFICATIONS AS AN EXPERT.

The state did not seek to qualify Mr. Glaze as an expert during its direct examination, but only at the time the instruction on expert testimony was presented to the court. RP 101. This was after the parties had rested and after the defense had any meaningful opportunity to cross-examine the victim as to his qualifications; such as whether he completed an apprenticeship or a journeyman program; whether he had consulted the manufacturer of the various tools or what constituted the basis of his estimates of value based on the condition of the tools and equipment. RP

99.

City of Bellevue v. Lightfoot, supra, consisted of two consolidated actions involving discretionary review of two superior court decisions: one affirmed a speeding conviction against Lightfoot and the other reversed a speeding conviction against Strauss.

In Lightfoot's case the City called an expert witness, Edward Cole to authenticate its radar device. "Prior to the City's examination of Cole, Lightfoot asked the court for permission to reserve voir dire of Cole until his own examination. The City had no objection, and the trial court consented." *id.* At 216.

Then "[p]rior to cross examination, Lightfoot began to question Cole about the scope of his expertise, attempting to show that Cole had no experience or training in the field of engineering. The City objected on the basis of relevancy. Notwithstanding the trial court's earlier ruling that Lightfoot could reserve voir dire until his own examination of Cole, the court sustained the City's objection and did not permit Lightfoot to conduct any voir dire examination." *id.* At 217.

Because Lightfoot was denied an opportunity to challenge the qualifications of an expert witness the Court of Appeals reversed the Superior court decision and the judgment against Lightfoot. *id.* at 215. The unanimous appellate court held in a one paragraph decision:

“In Lightfoot’s case, the State conceded at oral argument that Lightfoot was entirely cut off from conducting his voir dire examination of Cole’s expertise...As we have indicated, the accuracy of a radar device’s engineering design is not relevant to the inquiry under *Mociulski*.⁸ Because, however, Lightfoot was not given any opportunity to inquire as to Cole’s general qualifications, we reverse and remand for a new trial.” *id.* at 223.

In the case at bench, this court should rule in a similar fashion and reverse Mr. Ehrhardt’s convictions because his attorney had no opportunity to voir dire or to cross-examine the victim Mr. Glaze about his qualifications as an expert to testify about the value of the various items.

IV. THE TRIAL COURT ERRED WHEN IT GAVE INSTRUCTION NO. 16.

Instruction No. 16 states: “Value means the market value of the property at the time and in the approximate area of the act.” CP 19. This standard instruction is based on WPIC 79.20. CP 32; RCW 9A.56.010(18)(a).

At the time this instruction was proposed the defense argued: “MR. THIMONS: Um, I object. I don’t think the witness testified to actual market value. He estimated what he believed things cost.” RP 103. The

⁸ *Bellevue v. Mociulski*, 51 Wn.App. 855, 756 P.2d 1320, *review denied*, 111 Wn.2d 1019 (1988) (*Mociulski* identified the foundation requirements for the admission of radar results, whether provided by a certificate or by an expert witnesses’ testimony).

trial court included the instruction and reasoned “...I think his testimony was that he bought something at a swap meet, which is similar to going into a store.”⁹ RP 104.

The standard of review for jury instructions is set forth in *State v. Bennett, supra* 161 Wn.2d 303 at 307: “A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole.”(citations omitted.)

The victim testified that he purchased the air compressor “maybe 6 years ago, 5 years somewhere in that range.” RP 81; ex. 10. He testified that he “...bought it for a hundred dollars at a swap meet.” id. With regard to the box of stereo wiring and connections, the victim testified: “It’s a box that I’ve been hauling around for probably 4 or 5 years, maybe.” RP 83; ex. 11. He estimated that he paid “...about a hundred bucks” for the bits, parts and pieces. RP 84.

When asked when the DeWalt hammer drill or rotor drill was purchased, the victim responded: Q. “...And what – do you recall when

⁹ See *State v. Herman*, 138 Wn.App. 596, 606-7, 158 P.3d 96 (2007). The appellate court held that a judge improperly commented on the evidence when instructing the jury: “Evidence of a retail price may be sufficient to establish value.” The jury was improperly directed to determine the value of jewelry based only on its purchase price compared to other evidence of value. See comments, 11A Washington Practice 197.

you purchased it? A. Actually, that belongs to my boss. It's a company tool....Q. Okay. And what is the cost of this item? A. About \$450." RP 85, ex. 13. The two Hitachi pneumatic nail guns were company tools that had been purchased three years ago. RP 87, ex. 14. Mr. Glaze testified that these two Hitachi pneumatic nail guns were company tools that cost "...in the \$230 range a piece." RP 87 The DeWalt roto hammer was also a company tool. The victim testified: "...I've had it in my possession for three years." RP 88, ex. 15. He estimated the cost at "about \$450." id.

As shown above the victim, testifying as an expert, did not establish the value of the items at the time nor in the area of the incident of June 15, 2010. Thus, there was not sufficient evidence of market value to warrant giving instruction. No. 16.

According to the comments following WPIC 79.20 *Value-*

Definition:

"Market value is determined by an objective standard; it is not the value to a particular person. *State v. Longshore*, 97 Wn.App. 144, 148-49, 982 P.2d 1191 (1999), affirmed at 141 Wn.2d 414, 5 P.3d 1256 (2000). Market value is the price that a well-informed buyer would pay to a well-informed seller, when neither is obligated to enter into the transaction. *State v. Kleist*, 126 Wn.2d 432, 435, 895 P.2d 398 (1995); *State v. Longshore*, 97 Wn. App. At 148."

11A Washington Practice- *Washington Pattern Jury Instructions*- 198

(2008).

See also, State v. Clark, 13 Wn.App. 782, 788, 537 P.2d 820 (1975): “[I]t has been held that evidence of the purchase price, selling price, and the condition of the property when stolen is admissible, especially when the property has been used but a short while” (quoting 52A C.J.S. *Larceny* sec. 118, at 618-19 (1968)). Here, the condition of the property was never established. Also, the testimony was that it had been purchased “maybe 6 years ago..I’ve been hauling it around for probably 4 or 5 years....purchased three years ago...it’s been in my possession for three years.” RP 81-8.

V. THERE WAS NOT SUBSTANTIAL EVIDENCE THAT THE DEFENDANT COMMITTED THE CRIMES OF BURGLARY AND THEFT IN THE SECOND DEGREE.

There was not substantial evidence to convict the defendant of the crimes of burglary in the second degree or theft in the second degree in violation of the Fourteenth Amendment. According to *State v. Bingham*:¹⁰

“The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is “Whether, after viewing the evidence in the light most favorable to the prosecution , any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560,

¹⁰ 105 Wn.2d 820, 823, 719 P.2d 109 (1986).

99 S.Ct. 2781, *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).”

See also, State v. Hughes, 106 Wn.2d 176, 721 P.2d 902 (1986).

It was stated in *Jackson v. Virginia*:

“In short, *Winship*, presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer to onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”

443 U.S. at 316, 99 S.Ct. at 2787 (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

The defense argued to the jury that there was no evidence that anyone saw Mr. Ehrhardt enter any building, shed or outbuilding. RP 124. Mr. Ehrhardt was observed on the victim’s property. However, he was legitimately working on his truck to fix a solenoid. Also, his vehicle was facing in and not outward bound in the driveway. RP 124-127.

With regard to theft in the second degree, there was not sufficient evidence to prove value of the property as required by 9A.56.010(18)(a). (See above arguments on value, incorporated by reference.)

D. Conclusion

This court should reverse the defendant’s convictions and the

judgement and sentence.

Dated this 21st day of February 2011.

Respectfully Submitted,


James L. Reese, III
WSBA #7806
Court Appointed Attorney
For Appellant

RECEIVED AND FILED
IN OPEN COURT

AUG 31 2010

DAVID W. PETERSON
TTSAP COUNTY CLERK

INSTRUCTION NO. _____

Mere possession of stolen property alone is insufficient to find the
defendant guilty of either theft 2 or burglary 2.

Defense proposed instruction
10-1-00490-2

State
vs.
Ehrhardt

A

State v. Mace, 97 Wn.2d 840 (1982) paraphrase of courts language.

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RECEIVED AND FILED
IN OPEN COURT
SEP 01 2010
DAVID W. PETERSON
KITSAP COUNTY CLERK

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON,)
) No. 10-1-00490-2
)
 Plaintiff,)
)
 v.)
)
 JOSEPH ORYAN EHRHARDT,)
)
 Defendant.)

COURT'S INSTRUCTIONS TO THE JURY

DATED Aug 31, 2010 Anna M. Laurie, JUDGE

B

ORIGINAL

1

20

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed

in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

The defendant is not required to testify. You may not use the fact that the defendant has not testified to infer guilt or to prejudice him in any way.

INSTRUCTION NO. 5

The evidence that has been presented to you may be either direct or circumstantial. The term “direct evidence” refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term “circumstantial evidence” refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A witness who has special training, education or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

INSTRUCTION NO. 7

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 8

A person commits the crime of burglary in the second degree when he or she enters or remains unlawfully in a building with intent to commit a crime against a person or property therein.

INSTRUCTION NO. 9

A person enters or remains unlawfully in or upon premises when he or she is not then licensed, invited, or otherwise privileged to so enter or remain.

INSTRUCTION NO. 10

Building, in addition to its ordinary meaning, includes any other structure used for the use, sale or deposit of goods.

INSTRUCTION NO. 11

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.

INSTRUCTION NO. 12

To convict the defendant of the crime of burglary in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about June 15, 2010, the defendant entered or remained unlawfully in a building;

(2) That the entering or remaining was with intent to commit a crime against a person or property therein; and

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13

A person commits the crime of theft in the second degree when he or she commits theft of property exceeding \$750 in value.

INSTRUCTION NO. 14

Theft means to wrongfully obtain or exert unauthorized control over the property of another, or the value thereof, with intent to deprive that person of such property.

INSTRUCTION NO. 15

Property means anything of value.

INSTRUCTION NO. 14

Value means the market value of the property at the time and in the approximate area of the act.

INSTRUCTION NO. 17

To convict the defendant of the crime of theft in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 15, 2010 the defendant wrongfully obtained or exerted unauthorized control over property of another;
- (2) That the property exceeded \$750 in value;
- (3) That the defendant intended to deprive the other person of the property; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has 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 of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 18

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. For this purpose, use the form provided in the jury room. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given any exhibits admitted in evidence, these instructions, and a verdict form for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The presiding juror must sign the verdict form and notify the bailiff. The bailiff will bring you into court to declare your verdict.

(d) Video Conference Proceedings.

(1) *Authorization.* Preliminary appearances held pursuant to CrR 3.2.1, arraignments held pursuant to this rule and CrR 4.1, bail hearings held pursuant to CrR 3.2, and trial settings held pursuant to CrR 3.3, may be conducted by video conference in which all participants can simultaneously see, hear, and speak with each other. Such proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule or policy. All video conference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Any party may request an in person hearing, which may in the trial court judge's discretion be granted.

(2) *Agreement.* Other trial court proceedings including the entry of a Statement of Defendant on Plea of Guilty as provided for by CrR 4.2 may be conducted by video conference only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.

(3) *Standards for Video Conference Proceedings.* The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. Video conference facilities must provide for confidential communications between attorney and client and security sufficient to protect the safety of all participants and observers. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.

[Amended effective September 1, 1995; December 28, 1999; April 3, 2001.]

Comment

Supersedes RCW 10.01.080; RCW 10.46.120, .130; RCW 10.64.020, .030.

RULE 3.5 CONFESSION PROCEDURE

(a) **Requirement for and Time of Hearing.** When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) **Duty of Court to Inform Defendant.** It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the

circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) **Duty of Court to Make a Record.** After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) **Rights of Defendant When Statement Is Ruled Admissible.** If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

**RULE 3.6 SUPPRESSION HEARINGS—
DUTY OF COURT**

(a) **Pleadings.** Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) **Hearing.** If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

[Adopted effective May 15, 1978; amended effective January 2, 1997.]

RULE 613. PRIOR STATEMENTS OF WITNESSES

(a) **Examining Witness Concerning Prior Statement.** In the examination of a witness concerning a prior statement made by the witness, whether written or not, the court may require that the statement be shown or its contents disclosed to the witness at that time, and on request the same shall be shown or disclosed to opposing counsel.

(b) **Extrinsic Evidence of Prior Inconsistent Statement of Witness.** Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801(d)(2).

[Amended effective September 1, 1992.]

RULE 614. CALLING AND INTERROGATION OF WITNESSES BY COURT

(a) **Calling by Court.** The court may, on its own motion where necessary in the interests of justice or on

motion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) **Interrogation by Court.** The court may interrogate witnesses, whether called by itself or by a party; provided, however, that in trials before a jury, the court's questioning must be cautiously guarded so as not to constitute a comment on the evidence.

(c) **Objections.** Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

RULE 615. EXCLUSION OF WITNESSES

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be reasonably necessary to the presentation of the party's cause.

[Amended effective September 1, 1992.]

TITLE VII. OPINIONS AND EXPERT TESTIMONY

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

[Amended effective September 1, 1992; September 1, 2004.]

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

[Amended effective September 1, 1992.]

RULE 704. OPINION ON ULTIMATE ISSUE

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

RULE 705. DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION

The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the judge requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross examination.

[Amended effective September 1, 1992.]

RULE 706. COURT APPOINTED EXPERTS

(a) **Appointment.** The court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness

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.]

Notes:

AMENDMENT (XIV)

Ss. 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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DIVISION II

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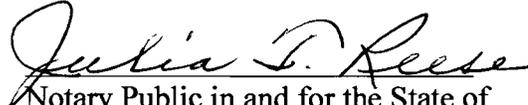
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness herein.

That on the 22nd day of February, 2011, he deposited in the mails of the United States of America, postage prepaid, the original and one (1) copy of Appellant's Brief in State of Washington v. Joseph O. Ehrhardt, No. 41277-2-II for filing to the office of David Ponzoha, Clerk, Court of Appeals, Division Two, 950 Broadway, Ste. 300, Tacoma, WA 98402-4454; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, WA 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant at his last known address; Joseph O. Ehrhardt, DOC #864176, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326.



Signed and Attested to before me this 22nd day of February, 2011 by James L. Reese, III.


Notary Public in and for the State of
Washington residing at Port Orchard.
My Appointment Expires: 4/04/13