

No. 42271-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Jodie Gragg,**

Appellant.

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Grays Harbor County Superior Court Cause No. 11-1-00072-1

The Honorable Judges Gordon Godfrey and F. Mark McCauley

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**

P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

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## ASSIGNMENTS OF ERROR

1. Mr. Gragg's conviction violated Wash. Const. Article I, Sections 21 and 22.
2. The trial court erred by entering conviction in the absence of a jury determination of the facts.
3. The trial court erred by accepting Mr. Gragg's jury waiver without an affirmative showing that he understood all of his rights under Wash. Const. Article I, Sections 21 and 22.
4. Mr. Gragg's conviction infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense under the law of the case.
5. The prosecution failed to prove beyond a reasonable doubt that Mr. Gragg "did knowingly initiate, organize, plan, finance, direct, manage, and supervise the theft of property... and did knowingly traffic in stolen property."
6. Mr. Gragg's conviction violated his state constitutional right to adequate notice of the charge against him under Wash. Const. Article I, Section 22.
7. Mr. Gragg's conviction violated his right to adequate notice of the charge against him under RCW 10.37.050, .052, .054, and .190.
8. Mr. Gragg's conviction violated his right to adequate notice of the charge against him under CrR 2.1.
9. The Information failed to outline the charged crime in a manner allowing a person of common understanding to know what was intended.
10. The trial court erred by entering Finding of Fact No. 15.
11. The trial court erred by entering Finding of Fact No. 16.
12. The trial court erred by entering Conclusion of Law No. 1.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Under the state constitution, the parties to a felony prosecution may not dispense with a jury for trial of factual issues. The conviction in this case was entered without a jury determination of the facts. Was the conviction entered in violation of the state constitution's requirement that felony cases be heard by a jury?
2. An accused person's state constitutional right to a jury trial is broader and more highly valued than the corresponding federal right. Here, the record does not affirmatively demonstrate that Mr. Gragg understood his right to help select the jury, to be tried by a fair and impartial jury, and to be presumed innocent by the jury. In the absence of such an affirmative showing, was Mr. Gragg's waiver of his right to a jury trial inadequate under Wash. Const. Article I, Sections 21 and 22?
3. To obtain a conviction for trafficking in stolen property as charged in this case, the prosecution was required to prove, *inter alia*, that Mr. Gragg "did knowingly initiate, organize, plan, finance, direct, manage, and supervise the theft of property." The trial court found that the prosecution had not met this burden. Did the conviction infringe Mr. Gragg's Fourteenth Amendment right to due process because it was based on insufficient evidence under the law of the case?
4. A charging document must be phrased in such a manner as to enable a person of common understanding to know what is intended. In this case, the Information suggested that the prosecution would be required to prove that Mr. Gragg was involved in the theft of property and that he knowingly trafficked in stolen property, in order to secure a conviction. Was the Information misleading, in violation of Mr. Gragg's right to adequate notice under Article I, Section 22, RCW 10.37, and CrR 2.1?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Jodie Gragg brought scrap metal to sell to Twin Harbors Recycling on February 7, 2011. CP 15. He was driven there by Marshall Gosney, who had metal in the back of the truck he drove. RP (4/26/11) 15. At about the same time, Richard Gates, the manager at a nearby wood grinder manufacturer, came to Twin Harbors Recycling to look for some steel pieces that had gone missing over the weekend. RP (4/26/11). He recognized Mr. Gragg and asked him about the pieces. RP (4/26/11) 41-46.

Gates assumed that Mr. Gragg worked at the scrap yard, and when he realized Mr. Gragg was not an employee, he followed Gosney's truck. CP 16. When he caught up to it, he spoke with Mr. Gragg again. CP 16. Gates went back to the scrap yard, talked with staff there, saw that the missing items had been brought in with Mr. Gragg and Gosney, and called the police. RP (4/26/11) 47-49, 76, 87.

The state charged Mr. Gragg with Trafficking in Stolen Property in the First Degree. The Information read:

That the said defendant, Jodie D. Gragg, in Grays Harbor County, Washington, on or about February 7, 2011, did knowingly initiate, organize, plan, finance, direct, manage, and supervise the theft of property, to wit: metal stolen from 458 Wynoochee Valley Road, Montesano, Washington, for sale to others, and did knowingly traffic in stolen property; CONTRARY TO RCW 9A.82.050...

CP 1.

At a pretrial hearing, Mr. Gragg's attorney presented a form entitled "Waiver of Jury Trial by Defendant." Supp. CP. After hearing that Mr. Gragg was dissatisfied with his attorney, the court reviewed the waiver:

THE COURT: Mr. Gragg, I have a document entitled waiver of trial by jury. Now, do you understand that you have the right to be tried by a jury of citizens to determine your guilt or innocence, and this right is protected by the constitution and the laws of the United State and the State of Washington?

THE DEFENDANT: Yes, I do.

THE COURT: Do you understand that in a jury trial the State must convince all of the 12 citizens or jurors of your guilt beyond a reasonable doubt, and in a trial by a judge, the State must only convince the judge beyond a reasonable doubt; do you understand that?

THE DEFENDANT: Yes, I do.

THE COURT: I have signed this document. You are waiving your right to a jury trial and asking that the case be tried by a judge without a jury; is that right?

THE DEFENDANT: Yes.

THE COURT: Did you sign this freely and voluntarily?

THE DEFENDANT: Totally.

THE COURT: It will be so ordered.

RP (4/19/11) 3-4.

The case was tried before a judge. The defense argued that the state had obligated itself to prove all the allegations charged in the Information, including that Mr. Gragg was involved in the theft of the property (in addition to knowingly trafficking in stolen property). RP (4/26/11) 11, 88-100, 105-107; RP (6/16/11) 125-131. The prosecution, the defense, and the trial judge all agreed that there was no evidence that Mr. Gragg had any involvement in the theft itself. RP (4/26/11) 94, 97, 104, 115. The court denied Mr. Gragg's motion to dismiss, ruling that the state was not required to prove involvement in the theft, despite the inclusion of that allegation in the Information. RP (4/26/11) 114-118; CP 15-17.

Mr. Gragg was convicted and sentenced. CP 15-17, 3-14. He timely appealed.<sup>1</sup> CP 18.

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<sup>1</sup> The Appellant did note an objection to the record as filed in this case; the trial court entered an Order Re: Certification of Record on January 3, 2012, holding that the filed transcripts were "complete and accurate." Supp CP.

## ARGUMENT

### I. **MR. GRAGG’S CONVICTION VIOLATED THE STATE CONSTITUTION’S REQUIREMENT THAT FELONY CASES BE TRIED TO A JURY.**

#### A. Standard of Review.

Constitutional questions are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wash.2d 695, 702, 257 P.3d 570 (2011).

#### B. Wash. Const. Article I, Sections 21 and 22 are not coextensive with the Sixth Amendment.

Wash. Const. Article I, Section 21 provides that “[t]he right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 22 (amend. 10) provides that “[i]n criminal prosecutions the accused shall have the right to. . . a speedy public trial by an impartial jury...” As with many other constitutional provisions, the right to a jury trial under the Washington State Constitution is broader than the federal right.<sup>2</sup> *See, e.g., City of Pasco v. Mace*, 98 Wash.2d 87, 97, 653 P.2d 618 (1982).

The scope of a provision of the state constitution is determined with respect to the six nonexclusive factors set forth in *State v. Gunwall*, 106 Wash.2d 54, 720 P.2d 808 (1986). *Gunwall* analysis in this context suggests

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<sup>2</sup> The Sixth Amendment to the U.S. Constitution (applicable to the states through the Fourteenth Amendment) guarantees a criminal defendant the right to a jury trial. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

that all felony cases in Washington must be tried to a jury, regardless of the parties' wishes.

C. Under the state constitution, parties to a criminal prosecution may not dispense with the jury in a felony case.

1. The language of the State Constitution.

Analysis of a constitutional provision begins and ends with the text. *State ex rel. Gallwey v. Grimm*, 146 Wash.2d 445, 459-460, 48 P.3d 274 (2002). This includes an examination of the words themselves, their grammatical relationship with one another, and their context. *Gallwey*, at 459-460. The constitution must be construed as the framers understood it in 1889. *State v. Norman*, 145 Wash.2d 578, 592, 40 P.3d 1161 (2002).

Article I, Section 21 preserves the right of jury trials "inviolable."

This term "connotes deserving of the highest protection." *Sofie v.*

*Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711 (1989). This

language

indicates that the right must remain the essential component of our legal system that it has always been. For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guarantees.

*Id.* The strong, simple, direct, and mandatory language ("shall remain inviolate") suggests that the present-day jury trial right must be identical to the right as it existed in 1889. As discussed below, it was almost

universally believed during that time period that the right could not be waived, and the framers elected not to continue an experiment undertaken by the territorial legislature in the years prior to 1889.

Furthermore, Article I, Section 21 expressly grants the legislature authority to allow waivers in civil cases, but not in felony prosecutions. Under the maxim *Expressio unius est exclusio alterius*,<sup>3</sup> this express grant of authority in civil cases suggests an intent to prohibit waivers in criminal cases. *See, e.g., State ex rel. Washington State Convention & Trade Ctr. v. Evans*, 136 Wash.2d 811, 830, 966 P.2d 1252 (1998).

Similarly, Article I, Section 22 provides strong protection to the jury system. The specific mention of juries in the context of “criminal prosecutions,” and the mandatory language employed by the provision (“shall have the right... to have a speedy public trial by an impartial jury”) demand that the jury tradition be afforded the highest respect.

Thus, the language of the two provisions weighs in favor of an independent application of the state constitution in this context.

## 2. Significant differences in the texts of parallel provisions of the Federal and State Constitutions.

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<sup>3</sup> “The expression of one thing is the exclusion of another.” *Black’s Law Dictionary* (6th ed. 1990).

The second *Gunwall* factor requires analysis of the differences between the texts of parallel provisions of the federal and state constitutions. Wash. Const. Article I, Section 21 has no federal counterpart. The Washington Supreme Court in *Mace* found this significant, and held that under the Washington Constitution “no offense can be deemed so petty as to warrant denying a jury trial if it constitutes a crime.” *Mace*, at 99-100. This is in contrast to the more limited protections available under the federal constitution. *Mace*, at 99-100.

Thus, differences in the language between the state and federal constitutions favor an independent application of the state constitution. Even though waiver of the federal right may be found in appropriate cases, the Washington Constitution prohibits jury waiver in felony prosecutions.

3. State constitutional and common law history demonstrates that drafters of the Washington Constitution intended to require jury trials for all felony prosecutions.

Under the third *Gunwall* factor, this court must look to state constitutional and common law history. Article I, Section 21, Washington “preserves the right as it existed at common law in the territory at the time of its adoption.” *Mace*, at 96. *See also State v. Schaaf*, 109 Wash.2d 1, 743 P.2d 240 (1987); *State v. Smith*, 150 Wash.2d 135, 151, 75 P.3d 934 (2003) (“*Smith I*”).

Although “little is known about what the drafters of article I, section 22 intended in 1889,” the explicit enumeration of certain rights suggests “that the drafters of this provision believed that these rights are of great importance.” *State v. Martin*, 171 Wash.2d 521, 531, 252 P.3d 872 (2011).

In 1889, when the state constitution was adopted, there was a nearly universal understanding, throughout the states and territories, that the right to a jury trial in felony cases could not be waived. *See e.g., State v. Lockwood*, 43 Wis. 403, 405 (1877) (“The right of trial by jury, upon information or indictment for crime, is secured by the constitution, upon a principle of public policy, and cannot be waived”); *State v. Larrigan*, 66 Iowa 426 (1885); *Cordway v. State*, 25 Tex. Ct. App. 405, 417 (1888) (A defendant “may waive any... right except that of trial by jury in a felony case”); *United States v. Taylor*, 11 F. 470, 471 (C.C.Kan. 1882) (“This is a right which cannot be waived, and it has been frequently held that the trial of a criminal case before the court by the prisoner’s consent is erroneous”); *United States v. Smith*, 17 F. 510, 512 (C.C.Mass. 1883) (“The district judges in this district have thought that it goes even beyond the powers of congress in permitting the accused to waive a trial by jury, and have never consented to try the facts by the court...”)

This tradition was rooted in the common law:

There can be no question that, at common law, the only recognized tribunal for the trial of the guilt of the accused under an indictment for felony and a plea of not guilty, was a jury of twelve men. 4 Black. Com. 349; 1 Chitty's Crim. Law, 505; 2 Hale's Pleas of the Crown, 161; Bacon's Abridg. tit. Juries, A.; 2 Bennett & Heard's Lead. Cas. 327. This right of trial by jury in all capital cases -- and at common law a century and a half ago all felonies were capital -- was justly regarded as the great safe-guard of personal liberty. Says Mr. Blackstone: "The founders of the English law have, with excellent forecast, contrived that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury; and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen and superior to all suspicion." 4 Black. Com. 349. The trial of an indictment for a felony by a judge without a jury was a proceeding wholly unknown to the common law. The fundamental principle of the system in its relation to such trials was, that all questions of fact should be determined by the jury, questions of law only being reserved for the court.

Not only have we, in general terms, adopted the common law as a system, but by the express provisions of our Constitution and statutes the mode of trial in criminal cases known to that system is specifically adopted and preserved. By the clauses of the Constitution above cited, the common law right to a trial by jury in criminal cases is guaranteed and declared to be inviolable, and the statute requires that, except as therein provided, all trials for criminal offenses shall be conducted according to the course of the common law. It would thus seem that the power to conduct criminal trials in any other mode than that which prevailed at common law is necessarily excluded.

A jury of twelve men being the only legally constituted tribunal for the trial of an indictment for a felony, it necessarily follows that the court or judge is not such tribunal, and that in the absence of a jury, he has by law no jurisdiction. There is no law which authorizes him to sit as a substitute for a jury and perform their functions in such cases, and if he attempts to do so, his act must be regarded as nugatory.

*Harris v. People*, 128 Ill. 585, 590-591 (Ill. 1889), *overruled in part by People ex rel. Swanson v. Fisher*, 340 Ill. 250 (1930).

The constitutional prohibition against waiver of the jury right was thought to be based in “the soundest conception of public policy.” *State v. Carman*, 63 Iowa 130, 131 (1884). According to the Iowa Supreme Court:

Life and liberty are too sacred to be placed at the disposal of any one man, and always will be, so long as man is fallible. The innocent person, unduly influenced by his consciousness of innocence, and placing undue confidence in his evidence, would, when charged with crime, be the one most easily induced to waive his safe guards.

*Carman*, at 131.

The prohibition against jury waivers was also viewed as a natural limitation on an accused person’s power to shape the proceedings. For example, in *Territory v. Ah Wah*, 4 Mont. 149, 168-173 (1881), the Montana Supreme Court considered the question of whether or not a defendant could waive a twelve-person jury:

Can a defendant, on his own motion, change the tribunal and secure to himself a trial before a jury not authorized by and unknown to the law?... Jurisdiction comes by following the law. Disorder and uncertainty follow a departure therefrom. Neither the prosecution or the defendant, by any act of their own, can change or modify the law by which criminal trials are controlled... By the consent of the court, prosecution and defendant, a criminal trial ought not to be converted into a mere arbitration... “[T]he prisoner’s consent cannot change the law. His right to be tried by a jury of twelve men is not a mere privilege; it is a positive

requirement of the law... The law in its wisdom has declared what shall be a legal jury in the trial of criminal cases; that it shall be composed of twelve; and a defendant, when he is upon trial, cannot be permitted to change the law, and substitute another and a different tribunal to pass upon his guilt or innocence... Aside from the illegality of such a procedure, public policy condemns it. The prisoner is not in a condition to exercise a free and independent choice without often creating prejudice against him.”...

“...[W]e think there would be great danger in holding it competent for a defendant in a criminal case, by waiver or stipulation, to give authority, which it could not otherwise possess, to a jury of less than twelve men, for his trial and conviction; or to deprive himself in any way of the safeguards which the constitution has provided him, in the unanimous agreement of twelve men qualified to serve as jurors by the general laws of the land. Let it once be settled that a defendant may thus waive this constitutional right, and no one can foresee the extent of the evils which might follow; but the whole judicial history of the past must admonish us that very serious evils should be apprehended, and that every step taken in that direction would tend to increase the danger. One act or neglect might be recognized as a waiver in one case, and another in another, until the constitutional safeguards might be substantially frittered away. The only safe course is to meet the danger in limine, and prevent the first step in the wrong direction. It is the duty of courts to see that the constitutional rights of a defendant in a criminal case shall not be violated, however negligent he may be in raising the objection. It is in such cases, emphatically, that consent should not be allowed to give jurisdiction.”

*Territory v. Ah Wah*, at 168-173 (citations omitted).

As these authorities show, judges throughout the nation believed that a felony charge could only be tried to a jury. Despite this prevailing view, the Washington territorial legislature enacted a statute in 1854 allowing “[t]he defendant and prosecuting attorney with the assent of the court [to] submit the trial to the court, except in capital cases.” Laws of

Washington Territory, Chapter 23, Section 249 (1854-1862). However, this experiment did not survive the passage of the constitution.<sup>4, 5</sup> The framers would have been aware of both the prevailing view (described above) and the territorial legislature's experiment. Because the framers did not explicitly permit the legislature to provide for waivers in felony cases, such permission cannot be read into the constitution.

The state constitutional and common law history shows that jury waivers are prohibited in felony cases. *Gunwall* factor three favors the interpretation of Article I, Section 21 urged by Mr. Gragg.

4. Although pre-existing state statutes permit jury waivers in felony cases, the constitutionality of such laws has yet to be properly analyzed.

The fourth *Gunwall* factor “directs examination of preexisting state law, which ‘may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims.’” *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wash.2d 791, 809, 83 P.3d 419 (2004) (quoting *Gunwall*, at 62).

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<sup>4</sup> Instead, as noted above, they adopted language permitting the legislature to allow waiver only in civil cases.

<sup>5</sup> The 1854 statute was implicitly repealed by the adoption of Wash. Const. Article I, Section 21, because it was the statute was repugnant to that provision of the constitution: “All laws now in force in the Territory of Washington, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature...” Wash. Const. Article XXVII, Section 2.

As noted previously, the territorial legislature provided for jury waivers in noncapital criminal cases. Laws of Washington Territory, Chapter 23, Section 249 (1854-1862). This law did not survive adoption of the constitution. Wash. Const. Article XXVII, Section 2. A similar statute (RCW 10.01.060) is in effect today, and is echoed in CrR 6.1. However, the constitutionality of these enactments has never been properly analyzed under Wash. Const. Article I, Section 21.

Instead, Washington courts have come to accept jury waivers in felony cases on the basis of *dicta*, and on authority relating to the federal jury right. Furthermore, the cases examining the issue all predate *Gunwall*, and thus are no longer binding precedent. *See, e.g., State v. Brown*, 132 Wash.2d 529, 595 n. 169, 940 P.2d 546 (1997).

The first case addressing the issue in *dicta* was *State v. Ellis*, 22 Wash. 129, 132, 60 P. 136 (1900), *overruled in part by State v. Lane*, 40 Wash.2d 734, 246 P.2d 474 (1952). Although the opinion reversed a guilty verdict reached by fewer than 12 jurors, the Court evidently believed the jury trial right could be waived:

It would seem to the writer of this opinion that the first clause of the section, viz., “that the right of trial by jury shall remain inviolate,” was simply intended as a limitation of the right of the legislature to take away the right of trial by jury, and that it

did not intend to interfere with the right of the individual to waive such privilege.<sup>6</sup>

*State v. Ellis*, at 131, 134. From this brief *dicta*, the Washington Supreme Court eventually found constitutional authority for the legislature to authorize waiver of the jury trial right even in felony cases.

First, however, the Court in *State v. Karsunky*, 197 Wash. 87, 84 P.2d 390 (1938) held that waivers of the jury trial right were statutorily prohibited in felony cases. In *State v. McCaw*, 198 Wash. 345, 88 P.2d 444 (1939), the Court held that this statutory prohibition also extended to misdemeanors.

In *Brandon v. Webb*, 23 Wash.2d 155, 160 P.2d 529 (1945), the Court held that a defendant could waive the right to a jury trial by pleading guilty:

It is undoubtedly true that, under [Article I, Section 21], the right of trial by jury may not, by legislative or judicial action, be annulled, nor be so impaired, obstructed, or restricted as to make of it a nullity. That does not mean, however, that a trial by jury is imperative and compulsory in every instance, regardless of whether or not the accused by his plea has raised an issue of fact triable by a jury. The purpose of the constitutional provision was to

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<sup>6</sup> The Supreme Court expressly reserved its opinion on the effect of the second clause of Article I, Section 21: "What construction might be placed upon the further provisions of the same section as indicating the intention of the members of the constitutional convention is not necessary to determine here, for the trouble with the case at bar is that the legislature has not attempted to provide any method by which the guilt or innocence of a defendant can be determined other than by a jury; and it must be conceded that, when the constitution speaks of a right of trial by jury, it refers to a common law jury of twelve men." *State v. Ellis*, at 131-132.

preserve to the accused the right to a trial by jury as it had theretofore existed; it was not the purpose of the fundamental enactment to render the intervention of a jury mandatory, in the face of the accused person's voluntary plea of guilty to the charge, where no issue of fact was left for submission to, or determination by, the jury.

*Webb*, at 159.

In *Lane*, the Court denied an appeal based on invited error, where the defendant had requested the trial court to allow an eleven person jury to reach a verdict. The Court also suggested in *dicta* (which relied upon the above-quoted *dicta* in *Ellis*, as well as a U.S. Supreme Court decision analyzing the federal jury right) that a waiver of the right to a jury trial would be permitted under the state constitution:

[Article I, Section 21] is a guaranty that the right of trial by jury shall not be impaired by legislative or judicial action.... But, because an accused cannot be deprived of this right, it does not follow that he cannot waive it....[S]ee *Patton v. United States*, 281 U.S. 276, 293 et seq., 74 L. Ed. 854, 50 S. Ct. 253, 70 A. L. R. 263 (1930).... A right which can be waived is, in fact, a privilege... It is not the legislative policy of this state that a jury trial is essential in every case to safeguard the interests of the accused and maintain confidence in the judicial system. The cited enactment is consistent with the idea that persons accused of crime have individual rights of election which must be secure. Granting a choice of privileges can in no way jeopardize their preservation. If an accused desires to waive a privilege, our concern should be to assure him that it can be done. ...The denial of that power of election would convert the privilege into an imperative requirement. *Patton v. United States*, *supra*, p. 298.

*Lane*, at 739 (state citations omitted).

Finally, in 1966, relying on *Lane, supra* (and again citing *Patton, supra*), the Supreme Court upheld a defendant's waiver of his right to a jury trial (based on a 1951 statute authorizing such waivers):

The judgment of the trial court is affirmed on the authority of [*Lane*], where we held that an accused can waive his privilege of a trial by a jury of 12 and submit his case to 11 jurors. That the right of an accused to waive the presence of one juror compels the conclusion that he may waive the entire jury, see also [*Patton*].

...Constitutional guarantees are subject to waiver by an accused if he knowingly, intentionally, and voluntarily waives them.

*State v. Forza*, 70 Wash.2d 69, 70-71, 422 P.2d 475 (1966).

As these cases show, the current practice of allowing waivers in felony prosecutions rests on *dicta* and on cases allowing waiver of the federal right, rather than on sound analysis of the state constitution under *Gunwall*. Because it was decided “without benefit of *Gunwall* scrutiny,” *Forza* “lack[s] the precedential force which follows from this more thorough review.” *State v. Rivers*, 129 Wash.2d 697, 723, 921 P.2d 495 (1996) (Sanders, J., dissenting). Because of this, *Forza* and the preceding cases do not control the issue. *Brown*, at 595 n. 169. Thus, even though the fourth *Gunwall* factor does not support Mr. Gragg's position, this factor alone should not be dispositive.

5. Differences in structure between the Federal and State Constitutions.

The fifth *Gunwall* factor “will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state constitution represents a limitation of the State’s power.” *State v. Young*, 123 Wash.2d 173, 180, 867 P.2d 593 (1994). As in all contexts, this factor favors application of the state constitution. *Id.*

6. Matters of particular state interest or local concern.

The sixth *Gunwall* factor deals with whether the issue is a matter of particular state interest or local concern. The ability of an accused person prosecuted in state court to effectuate a waiver of rights guaranteed by the state constitution is purely a matter of state concern. *See Smith I*, at 152. *Gunwall* factor number six thus also points to an independent application of the state constitutional provision in this case.

7. Conclusion: *Gunwall* analysis establish that the parties may not dispense with the jury in a felony case.

Five of the six *Gunwall* factors indicate that the parties to a felony prosecution may not dispense with jury trials when there are issues of fact to be decided. Factor four (preexisting state law that is not of constitutional dimension) does not support Mr. Gragg’s position; however, it should not be permitted to influence the outcome because the preexisting state law is not controlling and rests on unsound footing.

The waiver in this case violates Wash. Const. Article I, Sections 21 and 22. Accordingly, Mr. Gragg's conviction must be reversed and the case remanded to the trial court for a jury trial.

D. *Forza* does not control the outcome of this issue.

Although *Forza* was decided by the Supreme Court, it does not control Mr. Gragg's case. This is so for two reasons.

First, as noted above, the *Forza* Court lacked the benefit of *Gunwall*'s analytical framework. Cases addressing the state constitution without benefit of *Gunwall* were implicitly overruled by *Gunwall*. *Brown, supra*. In *Brown*, the Supreme Court addressed a capital defendant's argument that "death qualifying" a jury violates Article I, Section 22. *Brown, at 593-600*. Although the same issue had previously been decided prior to *Gunwall*, the Court did not consider the pre-*Gunwall* holding to have continuing viability in the post-*Gunwall* era:

In *State v. Hughes*, 106 Wash.2d 176, 721 P.2d 902 this Court concluded that death qualifying a jury was permissible not only under the federal constitution, but under the state constitution as well. Some cases have relied upon *Hughes* to reach the same conclusion....But *Hughes* did not analyze the six factors in *State v. Gunwall* to conclude that death qualification is allowed under the Washington Constitution. Thus, in determining whether death qualification violates the Washington Constitution, *Hughes* and the cases following *do not control at this point*.

*Brown, at 595 n. 169* (emphasis added) (additional citations omitted).

Similarly, the *Forza* decision failed to take into account matters that are essential to understanding of a state constitutional provision, and thus its result stems from a flawed understanding of Article I, Section 21. It, and any subsequent cases, “do not control at this point.” *Id.*

Second, the *Forza* Court considered only the issue of waiver under Article I, Section 21. *See Forza, at 70* (“Appellant’s sole assignment of error is that RCW 10.01.060, providing for waiver of a jury trial by an accused in non-capital cases, is unconstitutional because it contravenes art. 1, s 21 of the Washington State Constitution.”) (footnotes omitted). The *Forza* Court did not examine waivers under Article I, Section 22, and did not consider whether the two provisions together protected the longstanding tradition of requiring parties to submit any issues of fact to a jury, when the accused person was charged with a felony.

Mr. Gragg, by contrast, brings his argument under both constitutional provisions, and makes the arguments that were not addressed in *Forza*. Accordingly, *Forza* does not control the outcome of Mr. Gragg’s case. Under the state constitution, his waiver was ineffective. The conviction is invalid, because it was achieved without involvement of a jury.

- E. Even if the jury may be dispensed with in a felony case, Mr. Gragg did not properly waive his right to a jury trial.
1. Where the state constitution provides broader protection than its federal counterpart, waiver of the state right requires greater safeguards.

Courts indulge every reasonable presumption against waiver of fundamental rights. *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Waiver of a constitutional right must clearly consist of “an intentional relinquishment or abandonment of a known right or privilege.” *Zerbst*, at 464. The “heavy burden” of proving a valid waiver of constitutional rights rests with the government. *Matter of James*, 96 Wash.2d 847, 851, 640 P.2d 18 (1982). A valid waiver is one that is “voluntary, knowing, and intelligent.” *State v. Hos*, 154 Wash.App. 238, 250, 225 P.3d 389 (2010).

As noted in the preceding sections, *Gunwall* analysis of Article I, Sections 21 and 22 suggest the right to a jury trial under the state constitution is broader than the corresponding federal right. *See, e.g., Mace*, at 99-100. The state constitutional right to a jury trial “is a valuable right, jealously guarded by the courts.” *Watkins v. Siler Logging Co.*, 9 Wash.2d 703, 710, 116 P.2d 315 (1941). Any waiver under the state constitution “should be narrowly construed in favor of preserving the right.” *Wilson v. Horsley*, 137 Wash.2d 500, 509, 974 P.2d 316 (1999).

Because the state constitutional right to a jury trial is broad and highly valued, a waiver of the state constitutional right must be examined carefully.<sup>7</sup> In order to meet its heavy burden of proving an intentional relinquishment or abandonment of a known right or privilege, the state must show that any waiver was executed with a thorough understanding of the right. If the accused person lacked a thorough understanding of the right, the waiver cannot be “voluntary, knowing, and intelligent.” *Hos*, at 250.

Accordingly, in order to sustain a waiver, a reviewing court must find in the record affirmative proof that the defendant fully understood the right under the state constitution—including the right to participate in selecting jurors, the right to a jury of twelve, the right to a fair and impartial jury, the right to be presumed innocent by the jury unless proven guilty by proof beyond a reasonable doubt, and the right to a unanimous verdict.

Here, the record does not affirmatively establish that Mr. Gragg waived his state constitutional right to a jury trial with a full understanding

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<sup>7</sup> Waiver of the federal jury trial right must be made knowingly, intelligently and voluntarily; the waiver must either be in writing, or done orally on the record. *State v. Treat*, 109 Wash.App. 419, 427-428, 35 P.3d 1192 (2001). The federal constitutional right to a jury trial is one of the most fundamental of constitutional rights, one which an attorney “cannot waive without the fully informed and publicly acknowledged consent of the client...” *Taylor v. Illinois*, 484 U.S. 400, 418 n. 24, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). In the absence of a valid waiver of the federal right, a criminal defendant’s conviction following a bench trial must be reversed. *Treat, supra*.

of the right. Mr. Gragg's written waiver referred only to "a jury citizens [sic] who would determine [his] guilt or innocence," to juror unanimity, and to proof beyond a reasonable doubt. Waiver, Supp. CP. His brief colloquy with the judge was simply a review of the document. RP (4/19/11) 3. The record does not contain affirmative evidence establishing that he understood he would have the opportunity to help select the jury, that he had the right to a fair and impartial jury, and that he would be presumed innocent by the jury unless proven guilty at trial.

In the absence of an affirmative showing that Mr. Gragg fully understood his state constitutional right to a jury trial, his waiver is invalid and his conviction was entered in violation of Wash. Const. Article I, Sections 21 and 22. The case must be remanded to the trial court for a new trial.

2. *Pierce* was wrongly decided and should be reconsidered, in light of controlling Supreme Court precedent.

The Court of Appeals has held that *Gunwall* analysis does not apply to waiver of state constitutional rights:

*Gunwall* addresses the extent of a right and not how the right in question may be waived.... The issue here is waiver. Although Washington's constitutional right to a jury trial is more expansive than the federal right, it does not automatically follow that additional safeguards are required before a more expansive right may be waived.

*State v. Pierce*, 134 Wash. App. 763, 770-773, 142 P.3d 610 (2006)  
(citations omitted).

This view has been rejected by the Supreme Court. *State v. Dodd*, 120 Wash.2d 1, 838 P.2d 86 (1992). In *Dodd*, the Supreme Court applied *Gunwall* to determine the validity of a capital defendant's waiver of the right to appeal. *Dodd*, at 20-21. See also *State v. Thomas*, 128 Wash.2d 553, 562, 910 P.2d 475 (1996) (Court will not consider validity of a waiver under state constitution because of the inadequacy of the appellant's *Gunwall* briefing); *State v. Earls*, 116 Wash.2d 364, 374-378, 805 P.2d 211 (1991) (citing *Gunwall* and holding that waiver of right to counsel under Article I, Section 9 should be analyzed using the federal test developed under the Fifth Amendment); *State v. Medlock*, 86 Wash.App. 89, 98-99, 935 P.2d 693 (1997) (*Gunwall* applies to determine validity of waiver of the right to counsel under Article I, Section 22).

*Pierce* was wrongly decided, and should be reconsidered. *Gunwall* provides the appropriate framework for determining what safeguards are required for waiver of a right under the state constitution. *Dodd*, at 20-21. The *Pierce* court did not articulate *any* test for determining the requisites of a valid waiver under the state constitution. Because *Pierce* fails to outline any test for determining the validity of a state constitutional right, it should be abandoned.

**II. MR. GRAGG’S CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF FIRST-DEGREE TRAFFICKING AS CHARGED.**

A. Standard of Review

Constitutional questions are reviewed *de novo*. *E.S., at 702.*

Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wash.2d 572, 576, 210 P.3d 1007 (2009).

B. The prosecution failed to prove the elements of first-degree trafficking as charged in this case.

1. Equal protection requires that the “law of the case” doctrine be applied to Mr. Gragg’s trial.

Equal protection requires that people who appear to be similarly situated must be treated alike. U.S. Const. Amend. XIV; Wash. Const. Article I, Section 12; *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985); *State v. Thorne*, 129 Wash.2d 736, 770-771, 921 P.2d 514 (1996). A classification that implicates physical liberty is subject to rational basis scrutiny. *Thorne, at 771.*

Under the rational basis test, a practice is constitutional if (1) the legislation applies alike to all persons within a designated class; (2) reasonable grounds exist for distinguishing between those who fall within the class and those who do not; and (3) the classification has a rational relationship to the purpose of the practice under review. A classification which is “purely arbitrary” violates equal protection. *State v. Smith*, 117 Wash.2d 117, 263, 279, 814 P.2d 652 (1991) (*Smith II*).

Under the “law of the case” doctrine, elements may be added to the prosecution’s burden, in addition to those specified by a criminal statute. *See State v. Hickman*, 135 Wash.2d 97, 101-103, 954 P.2d 900 (1998). The doctrine has roots that stretch back more than a century. *See Pepperall v. City Park Transit Co.*, 15 Wash. 176, 45 P. 743, 745 (1896), *overruled on other grounds by Thornton v. Dow*, 60 Wash. 622, 629, 111 P. 899 (1910).

Although this definition of the “law of the case”<sup>8</sup> has historically been applied only to jury trials, there is no reason it can’t be applied when the accused person submits her or his case to a judge.<sup>9</sup> Failure to apply the

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<sup>8</sup> The phrase “law of the case” can also refer to law that is already settled for a particular case, i.e. by a Court of Appeals decision. *See* RAP 2.5(c). This other definition is not at issue in this case.

<sup>9</sup> Divisions I and III have refused to apply the doctrine to bench trials. *See State v. Munson*, 120 Wash.App. 103, 83 P.3d 1057 (2004); *State v. Hawthorne* 48 Wash.App. 23, 737 P.2d 717 (1987). It does not appear that Division II has addressed the issue. The

“law of the case” doctrine to bench trials violates equal protection; there is no rational basis to deny the benefit of the rule to defendants who waive their right to a jury, or to juvenile offenders (whose cases are always tried to the court). *Smith II*. Accordingly, the doctrine must be applied to bench trials, where appropriate. *Id.*

Since bench trials involve no written instructions, application of the doctrine turns on the charging language. Where the charging language adds extraneous elements to those inherent in the charged crime, the prosecution is bound to prove those elements at trial, unless the error is corrected by timely amendment of the charge.

Here, the Information alleged that Mr. Gragg “did knowingly initiate, organize, plan, finance, direct, manage, and supervise the theft of property... and did knowingly traffic in stolen property.” CP 1. By using the conjunctive (“and”) instead of the disjunctive (“or”), the prosecution undertook to prove that Mr. Gragg committed all of the acts alleged.<sup>10, 11</sup>

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Supreme Court has apparently reserved ruling on the subject. *State v. DeVries*, 149 Wash.2d 842, 850 n. 4, 72 P.3d 748 (2003).

<sup>10</sup> The statute, by contrast, uses the disjunctive (“or”) to separate the crime into alternative means.

<sup>11</sup> Although some cases sustain the use of charging in the conjunctive despite the statute’s use of the disjunctive, those cases are inapplicable here. *See, e.g., State v. Dixon*, 78 Wash.2d 796, 803, 479 P.2d 931 (1971) (“Acts or conduct described in a penal statute in the disjunctive or alternative may be pleaded in the conjunctive.”) This is so because those cases are rooted in “duplicity” challenges, which turn on whether or not the Information charges

This, the prosecution failed to do, as the court noted in its findings. CP 15-17.

Accordingly, the evidence was insufficient for conviction. Mr. Gragg's conviction must be reversed and the case dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

**III. MR. GRAGG'S CONVICTION WAS ENTERED IN VIOLATION OF HIS RIGHT TO ADEQUATE NOTICE UNDER ARTICLE I, SECTION 22, RCW 10.37, AND CRR 2.1.**

A. Standard of Review

Constitutional questions are reviewed *de novo*. *E.S.*, at 702.

B. Article I, Section 22's notice provision is broader than its federal counterpart, and strongly protects an accused person's right to adequate notice of the crime charged.

As noted above, the scope of a state constitutional provision is determined with reference to the six *Gunwall* factors. Analysis under *Gunwall* establishes that the prosecution may not charge a crime in language that might mislead a person of common understanding as to the elements to be proved at trial.

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more than one offense in a single count. *See, e.g., State v. Larson*, 120 Wash. 559, 562-563, 207 P. 1052 (1922); *State v. Mayer*, 154 Wash. 667, 669-670, 283 P. 195 (1929); *State v. McBride*, 72 Wash. 390, 396, 130 P. 486 (1913).

1. The language of the state constitution.

Article I, Section 22 provides that “In criminal prosecutions the accused shall have the right...to demand the nature and cause of the accusation against him [and] to have a copy thereof.” This simple, direct language is mandatory (“shall have”) and provides the accused two related rights—the right to demand the “nature and cause” of the accusation, and the right “to have a copy” of the accusation. Article I, Section 22. The provision has been interpreted to require the prosecution to include in the charging document “[a]ll essential elements of a crime, statutory or nonstatutory ... in order to give the accused notice of the nature of the allegations so that a defense can be properly prepared.” *State v. Siers*, 158 Wash.App. 686, 693, 244 P.3d 15 (2010).

2. Significant differences in the texts of parallel provisions of the Federal and State Constitutions.

The language of Article I, Section 22 differs from the corresponding text of the Sixth Amendment, which provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI. First, the state text includes language modifying the word accusation (“accusation against him”); this modifying language is absent from the federal constitution. Second, under the state provision, the accused person

has the right to a copy of the accusation; this language, too, is absent from the Sixth Amendment

From these differences it can be inferred that the framers wished to make clear the requirement that any charging document must (1) provide the particulars unique to the individual person charged (“the accusation *against him*”), and that the language of the charge must be such that a lay person might understand the accusation when holding “a copy thereof” in her or his hand. Article I, Section 22. Both these inferences are confirmed by another provision, which guarantees “the right to appear and defend *in person*,” a right that finds no explicit counterpart in the federal constitution. It would be irrational to guarantee the right to appear *pro se*, without also ensuring that the *pro se* litigant have a fair chance of understanding the charge.

### 3. State constitutional and common law history.

Washington’s territorial justices were concerned with the adequacy of the notice provided by charging documents, even before the constitution was adopted. *See, e.g., Harland v. Territory*, 3 Wash.Terr. 131, 156, 13 P. 453 (1887) (Langford, J., concurring). This is the context in which Article I, Section 22 was adopted. Furthermore, Washington courts have long applied Article I, Section 22 to require adequate notice of the offense charged. *See, e.g., State v. Gifford*, 19 Wash. 464, 468, 53 P.

709 (1898) (holding that indictment as a principal is insufficient to charge a person with accomplice liability) (“Surely, in this case, and under the direct language of this indictment, the appellant was not informed of the nature or cause of the accusation against him as it was developed at the trial.”) Accordingly, state constitutional and common law history support the interpretation urged by Mr. Gragg.

4. Pre-existing state law.

Washington courts have endorsed the rule of pleading referenced above, which allows an offense to be charged in the conjunctive even where the statute uses the disjunctive. *Dixon*, at 803. This weighs against the independent application of Article I, Section 22 sought by Mr. Gragg.

However, preexisting state law also supports Mr. Gragg’s position. Specifically, RCW 10.37.050 (captioned “Indictment or information— Sufficiency”) provides that an Information “is sufficient if it can be understood therefrom... [t]hat the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended; [and that] [t]he act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction according to the right of the case.” RCW 10.37.050(6) and (7). Likewise, RCW 10.37.052

(captioned “Indictment or information—Requisites”) requires an Information to contain “[a] statement of the acts constituting the offense, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended.” RCW 10.37.052(2).

Another provision (captioned “Indictment or information—Certainty”) requires that the Information “be direct and certain as it regards...The crime charged; and...The particular circumstances of the crime charged, when they are necessary to constitute a complete crime.” RCW 10.37.054(2) and (3). Finally, another section provides that “[t]he words used in an indictment or information must be construed in their usual acceptance, in common language, except words and phrases defined by law, which are to be construed according to their legal meaning.” RCW 10.37.190.

With few modifications, these statutes have existed since before ratification of the state constitution in 1889. *See* Laws of Washington Territory (1854), p. 112 (Section 61); Laws of Washington Territory (1869), pp. 240 (Section 182), 241 (Section 190), and 242 (Section 192).

Similarly, CrR 2.1(a)(1) requires the Information to consist of “a plain, concise and definite written statement of the essential facts constituting the offense charged...” CrR 3.2.1(e)(1) requires the trial

court to “orally inform the accused...of the nature of the charge” at the preliminary appearance. CrR 4.1(f) requires that the Information be read to the defendant (unless reading is waived), and that a copy be given to the defendant.

As these statutes and rules show, preexisting state law has been very concerned with the need to fully inform the accused person of the crime charged. The notice must be provided in simple language, so that a person of common understanding will know what is intended.

Accordingly, *Gunwall* factor four favors Mr. Gragg’s interpretation of the Article I, Section 22.

5. Differences in structure between the Federal and State Constitutions.

The fifth *Gunwall* factor “will always point toward pursuing an independent State Constitutional analysis.” *Young, at 180.*

6. Matters of particular state interest or local concern.

Criminal procedures are generally a matter of state concern, because there is no need for national uniformity on the subject. In particular, the requisites of a charging document are a subject suited to control by the state authority.

7. Conclusion: Article I, Section 22 requires the state to draft charging documents in a manner that will not mislead a person of

common understanding as to the elements of the crime to be established at trial.

As the above analysis demonstrates, the notice provisions of Article I, Section 22 are broader than their federal counterpart. An independent application of the state constitution is therefore appropriate in this case.

C. The Information misled Mr. Gragg and his lawyer into thinking that the prosecution was obligated to prove Mr. Gragg's involvement in the theft of property.

Where an Information fails to adequately inform the accused person of the charge alleged, the remedy is dismissal of the charge without prejudice. *State v. Cochrane*, 160 Wash.App. 18, 26, 253 P.3d 95 (2011).

In this case, the prosecution charged Mr. Gragg using the word "and" in place of the disjunctive used by the statute. CP 1. Anyone not well versed in the law would read the text of the information to mean exactly what it says: that Mr. Gragg was accused of doing all of the acts listed, and that the prosecution was required to prove all of the elements set forth. Indeed, even defense counsel appeared to believe that the use of the conjunctive required the prosecution to prove all the elements listed. RP (4/26/11) 11, 88-89, 100.

Accordingly, the Information was misleading. It violated Article I, Section 22, RCW 10.37.050, .052, .054, and .190, as well as CrR 2.1.

Because the Information was misleading, Mr. Gragg's conviction must be reversed and the charge dismissed without prejudice. Article I, Section 22; *Cochrane*, at 26.

**CONCLUSION**

For the foregoing reasons, Mr. Gragg's conviction must be reversed and the charge dismissed with prejudice. In the alternative, the case must be remanded for a jury trial.

Respectfully submitted on February 24, 2012.

**BACKLUND AND MISTRY**



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Jodie Gragg  
5720 Central Park Dr.  
Aberdeen, WA 98520

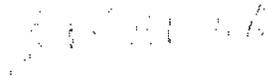
And to:

Grays Harbor County Prosecutor  
102 W Broadway Ave Rm 102  
Montesano WA 98563-3621

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 24, 2012.



Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**February 24, 2012 - 11:26 AM**

## Transmittal Letter

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