

COURT OF APPEALS
DIVISION II

12 MAR -8 AM 11:53

NO. 42271-9-II

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

STATE OF WASHINGTON
BY JW
DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

JODIE D. GRAGG,
Appellant.

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

THE HONORABLE JUDGES GORDON L. GODFREY and F. MARK MCCAULEY

BRIEF OF RESPONDENT

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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Factual Background

The facts in support of the conviction are undisputed. On February 5, 2011, Mr. Richard Gates discovered that several pieces of custom fabricated metal and some metal tubing had been stolen from his business. (CP 15, Finding of Fact 1). On the morning of February 7, 2011, the defendant sold these items to Twin Harbors Recycling. (CP 15 Finding of Fact 2-4). Following the transaction the defendant was asked to wait on the premises, as the owner, who had the checkbook, had not yet come into work. (CP 16, Finding of Fact 5).

As the defendant and his friend, Mr. Gosney, were waiting, Mr. Gates and a co-worker arrived at Twin Harbors Recycling, looking for their stolen items. Mr. Gates and his co-worker approached the defendant and Gosney, thinking that they were employees of the business. Mr. Gates showed the defendant a sample of his property similar to the stolen items and asked his assistance to see if his stolen property could be located at the recycling center. (CP 16, Finding of Fact 8, RP 45-46).

Once the defendant discovered that the victim was on the premises, he left without being paid. (CP 16, Finding of Fact 11). When Mr. Gates and his co-worker discovered what had happened, they got into their vehicle and followed the defendant. When confronted by Mr. Gates, the defendant denied selling any metal resembling the custom fabricated items

stolen from Mr. Gates. The defendant told Mr. Gates that he only sold some old cans and shavings. (CP 16-17, Finding of Fact 12, 13). Following his conversation with the defendant, Mr. Gates returned to the recycling center and located his stolen property. (CP 17, Finding of Fact 14).

Procedural Background

The defendant was charged by Information on February 22, 2011, with Trafficking in Stolen Property in the First Degree, RCW 9A.82.050. (CP 1). On April 19, 2011, the defendant appeared before the Honorable Gordon L. Godfrey and executed a Waiver of Trial by Jury. A certified copy is attached. The court questioned the defendant about his decision, assured itself that the defendant was making a knowing and intelligent waiver of his right to trial by jury and accepted the written waiver. (RP, 4/19/11 pages 3-4).

The matter was tried to the court on April 26, 2011. At the end of the State's case the defendant moved to dismiss, alleging that the State had not proved each of the alternative means alleged. The Court denied the motion, determining that the State was not required to prove all of the alternative means, so long as there was evidence to support proof beyond a reasonable doubt as to one of the alternative means. (RP 88-95).

Based upon the evidence presented, the court found, beyond a reasonable doubt, that the defendant had knowledge that the items he sold were stolen, possessed the items with the intent to sell them and did, in

fact, knowingly transfer the stolen items to Twin Harbors Recycling. (CP 17, Findings of Fact 15-16). The Court concluded that there was proof beyond a reasonable doubt that the defendant had trafficked in stolen property. (CP 17, Conclusions of Law 1).

RESPONSE TO ASSIGNMENTS OF ERROR

A defendant in a criminal case may waive his right to jury under the Washington State Constitution (Response to Assignments of Error 1, 2)

This issue was answered long ago by the Washington Supreme Court. State v. Forza, 70 Wn.2d 69, 422 P.2d 475 (1966). The defendant in Forza made the same argument, that waiver of a jury trial in a non-capital case is unconstitutional because it contravenes Article 1, Section 21 of the Washington State Constitution. The court in Forza held as follows, Forza 70 Wn.2d at page 70:

This constitutional provision is a guarantee that a right of trial by jury shall not be impaired or infringed. It sets out the limited circumstances in which the legislature may shape the application of the right of trial by jury. However, because an accused cannot be deprived of this right, by legislative or judicial action, it does not follow that he cannot waive it.

The same principle was pronounced in State v. Lane, 40 Wn.2d 734, 246 P.2d 474 (1952). Lane reasoned that while the constitutional language prohibited legislative interference with the right to jury trial, it did not prohibit an accused from making a knowing and intelligent waiver

of the right to jury trial. Lane, 40 Wn.2d at page 736. The court in Lane specifically rejected the assertion of the dissent that the Washington constitution did not allow a defendant to waive the right to jury.

What Washington authority the defendant does cite demonstrates that the Washington Supreme Court has always recognized the right of a defendant to waive his right to a jury trial. The territorial legislature, by statute, provided for jury waivers in non-capital criminal cases. Laws of Washington territory, Chapter 23, Section 249 (1854-1862). Statutory provisions authorizing waiver of right to trial by jury have been in effect continuously since that time. The provisions of RCW 10.01.060 go back to 1854..

In 1909 the legislature adopted the Rem. Rev. Stat. Section 2309 which provided that a person could only be convicted of a crime upon his admission to the charge in open court or by verdict of the jury. The court in State v. Karsunky, 197 Wash.87, 84 P.2d 390 (1938) held that the defendant could not waive his right to trial by jury because the two statutory provisions regarding waiver of jury trial were in conflict, leaving no statutory authorization for waiver of trial by jury. Karsunky 197 Wn.2d at page 100:

The rule uniformly followed is that, in the absence of statutory authority, the one who is charged with a commission of a felony cannot, on pleading not guilty, waive his right to trial by jury, or that he cannot, by waiver, confer jurisdiction and proceed without a jury.

Currently, both RCW 10.01.060 and CrR6.1 authorize a defendant to waive his right to trial by jury. The Washington courts have long recognized this right. State v. Ellis, 22 Wash.129, 132, 60 E.136 (1900), overruled in part by State v. Lane, 40 Wn.2d 734, 246 P.2d 474 (1952); State v. Stegall, 124 Wn.2d 719, 724, 881 P.2d 979 (1994).

In Re: Brandon v. Webb, 23 Wn.2d, 155, 160 P.2d 529 (1945) sets forth the understanding of the courts regarding the ability of a defendant to waive his right to jury trial. Defendant Brandon was charged with Murder in the First Degree. The defendant agreed to enter a plea of guilty to Murder in the Second Degree. Thereafter, he was committed to prison. Nine years later he filed a Writ of Habeas Corpus alleging that he had the right to have a jury determine the degree of the crime and that the trial court could not have accepted his waiver of a right to a trial by jury when he pled guilty. The court in Brandon, 23 Wn.2d at page 159, held as follows:

It is undoubtedly true that, under the constitutional provision referred to above, 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 *preserve to the accused the right* to a trial by jury as it had therefore 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.

The views expressed in Brandon, Lane, and Forza have been the law in Washington since territorial times. This is an issue that has consistently been addressed and decided in light of the specific provisions of the Washington State Constitution. Nothing has changed. The defendant may validly waive his right to trial by jury.

The logical consequence of the defendant's argument is that all criminal cases must be tried to a jury. Every time a defendant pleads guilty in a criminal case that defendant waives the right to jury trial, along with a number of other constitutional rights. Is the defendant suggesting that no defendant may plead guilty? The answer certainly must be no.

In any event, a defendant who invites error, even constitutional error, may not claim on appeal that such error requires a new trial. A defendant who "affirmatively consents" to the alleged constitutional error is said to have invited that error and cannot, essentially, change his mind after he receives an adverse result. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). To hold otherwise would put a premium on defendant's ability to mislead the trial court. State v. Henderson, 114 Wn.2d 867, 868, 792 P.2d 514 (1990).

This defendant made a knowing and intelligent waiver of his right to trial by jury. He asked the court to hear the case without a jury. He cannot now complain of his decision.

This assignment of error must be denied.

The defendant executed a valid waiver of his right to trial by jury (Response to Assignment of Error No. 3)

The defendant validly waived his right to jury trial. A constitutional right may be waived by a knowing, intelligent, and voluntary act of the defendant. State v. Stegall, *supra*, 124 Wn.2d at p. 725. A waiver of right to jury trial is no different than any other constitutional right. There is no requirement that the court explain each and every consequence of a jury waiver. Stegall 124 Wn.2d at page 724.

The current state of the law has been summarized by the court in State v. Pierce, 134 Wn.App. 763, 771, 142 P.3d 610, 613-614 (2006).

Washington courts have already determined that the right to trial by jury under Washington's state constitution is broader than the federal constitutional jury trial right. *State v. Hobble*, 126 Wn.2d 283, 298, 892 P.2d 85 (1985) (citing *Pasco v. Mace* Wn.2d 87, 99, 653 P.2d 618 (1982)). for example, the court in *Pasco* held that the state constitution, unlike the federal, provides the right to a jury trial for any adult criminal offense, including petty offenses. *Pasco*, 98 Wn.2d at 99.

Washington already has rules governing a defendant's waiver of the jury trial right. A defendant may waive the right as long as the defendant acts knowingly, intelligently, voluntarily, and free from improper influences. *State v. Stegall*, 124 Wn.2d 719,

724-25, 881 P.2d 979 (1994). We will not presume that the defendant waived his jury trial right unless we have an adequate record showing that the waiver occurred. *State v. Woo Won Choi*, 55 Wn.App. 895, 903, 781 P.2d 1001 (1994) (citing *Seattle v. Williams*, 101 Wn.2d 445, 451, 680 P.2d 1051 (1984)).

In examining the record, we consider whether [the defendant] was informed of his constitutional right to a jury trial. *Woo Won Choi*, 55 Wn.App. at 903. We also examine the facts and circumstances generally, including [the defendant's experience and capabilities. *Woo Won Choi*, 55 Wn.App. at 903.

A written waiver, as CrR 6.1(a) requires, is not determinative but is strong evidence that the defendant validly waived the jury trial right. *State v. Woo Won Choi*, 55 Wash.App. 895, 904, 781 P.2d 505. An attorney's representation that his client knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant. *Woo Won Choi*, 55 Wash.App. at 904, 781 P.2d 505. Courts have not required an extended colloquy on the record. *Stegall*, 124 Wash.2d at 725, 881 P.2d 979; *State v. Brand*, 55 Wash.App. 780, 785, 780 P.2d 894 (1989). Instead, Washington requires only a personal expression of waiver from the defendant. *Stegall*, 124 Wash.2d at 725, 881 P.2d 979.

Contrary to defendant's assertion, there is no authority requiring a higher standard for waiver of right to trial by jury. *Pierce*, *supra*, 134 Wn.App. at p. 773. While the right to jury trial may be more expansive, the requirements of a valid waiver are no different. *Pierce*, *supra*.

The colloquy between the court and the defendant clearly shows that there was a knowing and intelligent waiver. (RP 4/19/11, p. 3-4):

THE COURT: Now, you are Jodie Gragg, correct?

THE DEFENDANT: Yes.

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 States 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 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 correct?

THE DEFENDANT: yes.

THE COURT: Did you sign this freely and voluntarily?

THE DEFENDANT: Totally.

THE COURT: It will be so ordered. If you gentleman have motions to make, please get them filed so we can listen to them and take care of them accordingly.

It is difficult to understand what more would be required in the case at hand for a knowing and intelligent waiver. The defendant signed a written waiver of trial by jury in the presence of the court. The document affirmatively informed the defendant that he was entitled to a trial by jury

consisting of twelve citizens who would determine his guilt or innocence. The waiver further informed the defendant that all twelve jurors must find guilt beyond a reasonable doubt.

The trial court went to great lengths to go over the waiver form with the defendant, make sure the defendant understood it, and ensure itself that the defendant made a knowing and intelligent waiver of his right to jury trial.

This assignment of error must be denied.

The defendant was given proper notice of the nature of the charge (Response to Assignment of Error 6 - 9)

RCW 9A.82.050 provides as follows, setting forth alternative means of committing the crime of Trafficking in Stolen Property in the First Degree:

A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.010 further provides a definition offer the term traffic:

“Traffic” means to sell, to transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

The information is set forth in the exact language of the statute. It is clear and concise. It sets forth all of the elements of each of the

alternative means by which the crime may be committed. Contrary to the assertions of the defendant, the language of the information sets forth the charge “clearly and distinctly in ordinary and concise” language. The charge against the defendant allows a person of common understanding to know and understand the accusation.

The defendant has cited no authority supporting a determination that the charging language in the case at hand is confusing or misleading. In fact, the only case cited by the defendant, State v. Gifford, 19 Wash.464, 468, 53 P.709 (1899), holding that an indictment charging a defendant as a principle is not sufficient to give notice that the defendant is charged as an accomplice, has long been disavowed. State v. Carothers, 84 Wn.2d 256, 260-61, 525 P.2d 731 (1974).

The State may charge alternative means of the crime of Trafficking in Stolen Property in the First Degree (Response to Assignments of Error 4, 5)

It is immediately apparent from reading RCW 9A.82.050 and reviewing the definition of the term “traffic,” that there are alternative means of committing the crime of Trafficking in Stolen Property in the First Degree. A person need not initiate, organize, or plan the theft of property for sale to others to commit the crime. A person who knowingly traffics in stolen property i.e. knowingly sells or possesses with intent to sell stolen property is likewise guilty of the crime of Trafficking in Stolen Property in the First Degree.

Acts described in a penal statute in the alternative or disjunctive may be pleaded in the information in the conjunctive. Proof that the crime was committed in one of several different ways will support a conviction. State v. Ford, 33 Wn.App. 788 658 P.2d 36 (1983); State v. McGary, 37 Wn.App. 856, 860, 683 P.2d 1125 (1984). A statute that sets out alternative means of committing a crime in the disjunctive may be pleaded or charged in the conjunctive if a single offense may be committed in several ways which are not repugnant to each other. State v. Walker, 14 Wn.App. 348, 354, 541 P.2d 237 (1975). See also, State v. Sells, Court of Appeals 67635-1, Decided 3/5/12.

The defendant mistakenly believes that the so called “law of the case” doctrine requires proof of both alternative means. When the state includes language in the information that is not an element of the crime and that element is included in the “to convict” instruction without objection, it becomes the law of the case. The doctrine addresses the inclusion of elements that are not otherwise necessary to prove the elements of the crime charged as defined by statute. State v. Barringer, 32 Wn.App. 882, 887-888, 650 P.2d 1129 (1982). Such added non-statutory elements become the law of the case when they are included in the information and in the instructions to the jury. State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995). State v. Worland, 70 Wn.App. 559, 582 P.2d 539 (1978).

This does not mean that if such elements are included in the information that they must be proven beyond a reasonable doubt to convict. There would be nothing to preclude a court from determining that the non-statutory element in the information is excess language when drafting jury instructions. Lee, supra, 128 Wn.2d at p. 159 (elements added to the information only become “law of case” when included in the instructions). For that matter, there is no reason why the court, sitting without a jury, could not look to the statute to determine what portion of the charging language constitutes the necessary elements of the crime that must be proven beyond a reasonable doubt. Sells, supra.

In any event, the “law of the case” doctrine does not apply to these facts. This doctrine is limited to situations in which an element is added to the information that is not a required element of the charged crime. Thus, for example, the crime of Theft or Possession of Stolen Property does not require that the name of the victim be listed. When the name is listed, however, the State must prove the identity of the victim beyond a reasonable doubt. State v. Lee, 128 Wn.2d 151, 159-60, 904 P.2d 1143 (1995). See also, State v. Worland, supra, 20 Wn.App. at p. 565-66 (proof of wilful possession required in drug possession when information and jury instruction both included such language).

The “law of the case” doctrine does not apply when alternative means are alleged. State v. O’Donnell, 142 Wn.App. 314, 174 P.3d 1205 (2007). In an information charging Robbery, the state may allege that the

taking was either “from the person” or “in the presence” of the victim. It is not error to submit the case only on the alternative means that the property was taken from the person of the victim. O’Donnell, 142 Wn.App. at 323-24; State v. Chamroeum Nam, 136 Wn.App. 698, 705 150 P.3d 617 (2007).

The case at hand is not a situation in which the State has alleged additional elements not required by the statute. In fact, the information is in the exact language of RCW 9A.82.050 which sets forth the alternative means of committing the crime of Trafficking in Stolen Property in the First Degree. The State charged alternative means. The State is not required to prove each alternative means beyond a reasonable doubt. The defendant may be convicted so long as there is evidence beyond a reasonable doubt to support one of the alternative means. The court’s written findings reflect that it found beyond a reasonable doubt that the defendant trafficked in stolen property.

Findings of Fact 15 and 16 are supported by proof beyond a reasonable doubt (Response to Assignments of Error 10 through 12)

The defendant has assigned error to Findings of Fact 15 and 16 as well as to Conclusions of Law 1. The brief of the appellant, however, does not address these assignments of error. The court’s Findings of Fact as set forth in Finding of Fact 15 and 16 are set forth below:

15. The defendant had knowledge that the metal that he intended to sell for scrap was stolen based on compelling circumstantial evidence of his conduct.

16. The defendant knowingly possessed the stolen metal with intent to sell and did, in fact, transfer the stolen metal, not withstanding he did not receive payment.

The standard for review in determining these sufficiency of evidence is whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In reviewing a challenge to sufficiency of the evidence this court must draw all reasonable inferences from the evidence in favor of the state. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). The court must not engage in credibility determinations. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Direct and circumstantial evidence must be considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In the end, the only possible claim the defendant could make is that there was insufficient proof to demonstrate that he acted “knowingly.” The evidence is overwhelming.

The defendant possessed the stolen property. A good portion of it was a custom fabricated piece of metal. The defendant had it in his possession and transferred it to the recycling company for sale two days after it was stolen. After speaking to the owner of the property, who happened to be at the recycling center, the defendant immediately fled, without payment. When confronted by the owner, the defendant denied

having sold the items, claiming that he only sold some old cans and shavings.

Based upon this testimony, the trial court was entitled to find that the defendant had actual knowledge, when he sold the items, that they were stolen. Although the defendant assigns error to these two findings, he makes no argument in his brief regarding the sufficiency of the evidence. The defendant has essentially abandoned this assignment of error. In any event, the assignment of error regarding the sufficiency of the evidence is completely without merit.

CONCLUSIONS OF LAW

For the reasons set forth, the defendant's conviction must be affirmed.

DATED this 7 day of March, 2012.

Respectfully Submitted,

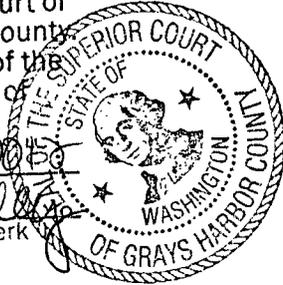
By: Gerald R Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/lh

BK

Certificate of Clerk of the Superior Court of Washington in and for Grays Harbor County. The above is a true and correct copy of the original instrument which is on file or of record in this court.

Done this 17th day of March 2011
Cheryl Brown, Clerk By B. McCallister
Deputy Clerk



FILED
GRAYS HARBOR COUNTY
C. BROWN, CLERK

2011 APR 19 PM 3:20

SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY

STATE OF WASHINGTON,
Plaintiff

vs. Jodie Gragg
Defendant

NO. 11-1-00072-1

WAIVER OF TRIAL BY JURY

I, the undersigned Defendant, am aware of the following matters concerning waiver of my right to a jury trial:

1. I am entitled to a trial by a jury citizens who would determine my guilt or innocence. This right is protected by the Constitution and laws of the United States and the State of Washington.
2. In a jury trial, the State must convince all of the twelve citizens (the jurors) of my guilt beyond a reasonable doubt. In a trial by judge, the State must only convince the judge beyond a reasonable doubt.

I understand these rights and waive (give up) my right to a jury trial and agree that my case can be tried by a judge without a jury.

DATED: 4/18/2011

Jodie Gragg
DEFENDANT

I have reviewed the right to a jury of twelve with the Defendant. I believe the Defendant's waiver of a trial by jury and agreement to be tried by a judge is voluntarily, knowingly and intelligently made.

[Signature] 4164
ATTORNEY FOR DEFENDANT

Based on the above, IT IS ORDERED that this cause be tried before a judge without a jury.

DATED: April 19, 2011

[Signature]
JUDGE

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COURT OF APPEALS
DIVISION II

12 MAR -8 AM 11:53

STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 42271-9-II

v.

DECLARATION OF MAILING

JODIE D. GRAGG,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 7th day of March, 2012, I mailed a copy of the Brief of Respondent to Jodi R. Backlund and Manek R. Mistry, Backlund & Mistry, P. O. Box 6490, Olympia, WA 98507, by depositing the same in the United States Mail, postage prepaid.

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

DATED this 7th day of March, 2012, at Montesano, Washington.

Barbara Chapman