

NO. 44836-0

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ALIX HARRIS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Katherine M. Stolz

No. 12-1-01291-3

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should defendant's unpreserved assertion of *corpus delicti* fail as he did not raise it until the parties rested and his confession was corroborated by independent proof of his crimes?
2. Did the State adduce sufficient evidence to support defendant's convictions for possession of a stolen firearm and unlawful possession of a firearm in the first degree when the admitted evidence established each element of both offenses?
3. Has defendant failed to prove the trial court abused its discretion in denying his untimely motion to transfer venue to King County when defendant's two firearm offenses were an inseparable part of a conspiracy to traffic firearms stolen in Pierce County?

B. STATEMENT OF THE CASE.

1. Procedure

Appellant, Alix Harris, proceeded to trial on a third amended information that charged him with trafficking in stolen property in the first degree (Count I); possession of a stolen firearm (Count II); unlawful possession of a firearm in the first degree (Count III); and conspiracy to

commit trafficking in stolen property in the first degree (Count IV). RP 10, 89-90; CP 49, Ex.159-61. An original information that charged him with all but the conspiracy count was filed April 13, 2012. CP 1-2. Harris' King County counsel filed a notice of appearance April 24, 2012. CP 85-86.¹ Harris received the first 471 pages of discovery that day. CP 87-88. Harris scheduled the omnibus hearing and trial without noting a motion to change venue May 15, 2012. CP 89. Defendant moved to change venue from Pierce to King County May 22, 2012. *See* CP 8-13, 90. His motion was denied. RP (Jul.10) 12-14. The omnibus order entered September 17, 2012, made no reference to unresolved venue or *corpus delicti* claims. CP 91-93.

Harris' case was called for trial with co-defendant Andrew Stearman's case March 28, 2013. RP 5. Stearman's case was severed to comply with *Bruton v. United States*.² RP 74-78. Harris did not assert *corpus* or renew the motion to change venue during motions in limine. RP 6, 33-47.³ His confession was ruled admissible in a CrR 3.5 hearing. RP 8, 29, 32-33.

¹ Citations to Clerk's Papers beyond CP 84 reflect the State's estimate of how its supplemental designations will be numbered.

² 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968) (prejudicial error to admit codefendant's confession implicating the defendant at joint trial).

³ Harris indicated he intended to join most of Stearman's motions in limine without identifying which motions applied to his case. RP 47-73. Stearman's motions did not raise improper venue or *corpus delicti*. *Id.*

Harris proceeded to bench trial. RP 76-77, 79-80. He stipulated to several facts about the Pierce County burglary where the firearms at issue in his case were stolen and to a prior felony that made it unlawful for him to possess firearms. CP 49, Ex.1, 2. He elected to have the court consider Notla's CrR 3.5 testimony as evidence in the bench trial. RP 84-87, 96-97. Harris rested after the State without making any objections or asserting *corpus delicti* to bar the court's use of his confession. RP 89-90. Harris subsequently argued *corpus* and venue in a motion to dismiss all charges. RP 90, 97-101, 103; CP 50-58. He did not alternatively move for severance of offenses he claimed were exclusively committed in King County. *Id.* The court declined to reconsider the pretrial ruling on venue and denied the motion to dismiss. RP 104-105; RP (Jul.10) 12-14.

Defendant was convicted for possession of a stolen firearm and unlawful possession of a firearm in the first degree, but acquitted of trafficking in stolen property with the attending firearm enhancement and conspiracy to commit trafficking in stolen property. RP 112-13. The court imposed a low-end sentence of 33 months April 26, 2013. CP 64, 68.⁴ Harris filed a timely notice of appeal May 6, 2013. CP 74. His appellate brief did not assign error to any of the trial court's findings of fact. App.Br. 1, 12-13, 16-17, 20, 26-27, 28-29.

⁴ RCW 9.94A.589(1)(c) required convictions for unlawful possession of a firearm and possession of a stolen firearm to run consecutively.

2. Facts

Police responded to a burglar alarm at Sportco in Pierce County December 17, 2011, at 0330 hours. RP 10; CP 49, Ex.1 (Stipulation No.1); ER 201.⁵ A glass entrance and three firearm display cases were shattered. *Id.* Forty-one operable firearms were stolen. *Id.* Soeun Sun (AKA Mop), Joseph Soeung (AKA Joey), and David Bunta committed the burglary. RP 10-11; Ex.1; Ex.3 (17:12-14; 18:04).

Mop, Joey, and David arrived at Harris' King County residence several hours later. Ex.3 (17:12-17).⁶ They walked into the house with a duffle bag of firearms Harris knew were stolen from Sportco. Ex.3 (17:12-17; 17:39-41; 18:23-25; 18:29-32). Harris also knew he could not lawfully possess firearms. RP 12-13; Ex.1; Ex.3 (17:21-33; 17:41-45). Mop sold the firearms from Harris' residence over several days. Ex.3 (17:12-18; 17:27-36; 18:17-18; 18:27-29; 18:32-40). Buyers typically came from Tacoma and South Seattle. Ex.3 (17:27-29). At least one of the stolen firearms was transported back to Pierce County for sale. Ex.3 (17:44-47). Another was recovered in Harris' neighborhood. Ex.3.

⁵ ER 201. Judicial Notice of Adjudicative Facts. (a) "A judicially noted fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned...(d) A court shall take judicial notice if requested by a party and supplied the necessary information." Defendant's stipulated the burglary was committed in Fife. CP 49, Ex.1. Judicial notice should be taken that the city of Fife is in Pierce County. *See* ER 201; *State v. Hardamon*, 29 Wn.2d 182, 186 P.2d 634 (1947) (that the city of Seattle is in King County).

⁶ The State's brief will refer to Sun, Soeung, and Bunta as Harris describes them in Exhibit 3 for the purpose of clarity. No disrespect is intended.

Harris began his affiliation with Mop approximately two years before the burglary. Ex.3 (17:37-39). Mop always conducted illicit business at Harris' residence due to his trust in Harris. Ex. 3 (17:27-31; 18:12-14). Harris knew those criminal activities included robberies and the sale of property stolen during robberies. Ex.3 (18:12-14; 18:25-27). Mop and his gang affiliates claimed "Westside," which Harris had tattooed on his arm. Ex.3 (18:10-13).

Harris received text messages from Wayland Witten (AKA Alec) about purchasing some of the stolen firearms and directed Wayland to Mop. Ex.3 (18:23-25); RP 12-14. Harris delivered a bag of firearms to Wayland for Mop within hours of the burglary. RP 12-13; Ex.3 (17:21-35; 17:41-45; 18:39-40). Harris knew Wayland gave some of the firearms to a cousin recently released from prison. Ex.3 (18:43-45). At least one was recovered in Wenatchee after being used in a robbery. RP 12-13; Ex.3 (17:34-35).⁷ Wayland and one of his robbery accomplices disclosed Harris was present when Asian males brought a duffle bag of firearms into his residence to negotiate sales and knew the firearms had been stolen from Sportco. RP 13-14. Harris confessed to distributing some of the stolen firearms. RP 19-20; Ex.3 (17:04).

C. ARGUMENT.

⁷ A transcription of Ex.3 was not made part of the record. Citations to Ex.3 endeavor to estimate where the statement appears in the video.

1. DEFENDANT'S UNPRESERVED CORPUS DELICTI CLAIM SHOULD FAIL BECAUSE HE DID NOT RAISE CORPUS UNTIL BOTH PARTIES RESTED AND THE CONFESSION WAS CORROBORATED BY INDEPENDENT PROOF OF HIS CRIMES.

Corpus delicti is a judicially created rule that prescribes the evidentiary foundation required to use a criminal defendant's confession at trial. See *City of Bremerton v. Corbett*, 106 Wn.2d 569, 576, 723 P.2d 1135 (1986) (citing *Smith v. United States*, 348 U.S. 147, 75 S. Ct. 194, 99 L. Ed. 192 (1954); 7 J. Wigmore, at §§ 2070–71); *State v. C.D.W.*, 76 Wn. App. 761, 763, 887 P.2d 911 (1995) (citing *Corbett*, 106 Wn.2d at 576); but see *State v. Pietrazak*, 110 Wn. App. 670, 680, 41 P.3d 1240 (2002)). It is intended to avoid convictions for crimes that never occurred. It is not a constitutional measure of the quantum of proof required to support a conviction. *Id.*; *State v. Dow*, 168 Wn.2d 243,249-50,227 P.3d 1278 (2010).

"The ... rule has been criticized by courts and legal commentators." *State v. Aten*, 130 Wn.2d 640, 662, 927 P.2d 210 (1996).⁸ "Some legal commentators suggest the rule should be abandoned all together [The]

⁸ *Id.* FN 94 citing e.g., 1 McCormick on Evidence, *supra*; 7 Wigmore on Evidence, *supra*; Thomas A. Mullen, Comment, **Rule Without Reason: Requiring Independent Proof of the *Corpus Delicti* as a Condition of Admitting an Extrajudicial Confession**, 27 U.S.F. L. Rev. 385 (1993); Maria Lisa Crisera, Comment, Reevaluation of the California Corpus Delicti Rule: A Response to the Invitation of Proposition 8, 78 Cal. L.Rev. 1571 (1990); Julian S. Millstein, Note, Confession Corroboration in New York: A Replacement for the *Corpus Delicti* Rule, 46 Fordham L. Rev. 1205 (1978); Developments in the Law—Confessions, 79 Harv. L. Rev. 935 (1966).

federal courts ... adopted [a] more relaxed rule" *Id.* at 662-663 (citing *Opper v. United States*, 348 U.S. 84, 93, 75 S. Ct. 158, 164-65, 99 L. Ed. 101 (1954)). An increasing number of state courts have followed th[at] trend." *Id.* Washington has yet to join them as it still requires evidence independent of an incriminating statement to ensure a criminal act described actually occurred. *Aten*, 130 Wn.2d at 662; *State v. Brokob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2007).

- a. Defendant's *corpus delicti* claim was not preserved as he did not assert the rule at the evidentiary hearing where his confession was admitted or before both parties rested.

An issue that is not timely raised by a criminal defendant at trial is waived unless it results in manifest constitutional error. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (citing *State v. Kirwin*, 165 Wn. 2d 818, 823, 203 P.3d 1044 (2009) (quoting *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). The principle predates RAP 2.5(a). *Id.* (citing e.g., *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967)). Insistence on issue preservation avoids unnecessary appeals and undesirable retrials by safeguarding the opportunity to correct errors at trial. *Robinson*, 171 Wn.2d at 305 (citing *McFarland*, 127 Wn.2d at 333).

“A failure to move for the suppression of evidence waives any right to its exclusion.” *State v. Lee*, 162 Wn. App. 852, 857, 259 P.3d 294 (2011) (citing *State v. Mierz*, 72 Wn. App. 783, 789, 866 P.2d 65, 875

P.2d 1228 (1994) (citing *State v. Tarica*, 59 Wn. App. 368, 372–73, 798 P.2d 296 (1990), *overruled on other grounds*, *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995)); see also *State v. Desantiago*, 149 Wn.2d 402, 413, 68 P.3d 1065 (2003); ER 103.⁹ Subsumed within that waiver is the right to challenge the adequacy of underlying foundation. *Desantiago*, 149 Wn.2d at 413; *State v. Coria*, 146 Wn.2d 631, 641, 48 P.3d 980 (2002); *State v. Newbern*, 95 Wn. App. 277, 288-289, 975 P.2d 1041 (1999); see also RAP 2.5(a). It follows that failure to timely raise *corpus delicti* waives its review. *C.D.W.*, 76 Wn. App. at 763-64.

Defendant waived his *corpus delicti* claim when he failed to assert it until after the State's witness had been excused, defendant's confession had been admitted and both parties had rested. RP 28, 89-90; CP 50. A rule that permitted untimely objections based on *corpus delicti* would encourage defendants to withhold them until the State is potentially unable to perfect the perceived defect due to uncontrollable circumstances such as the inability to relocate witnesses already excused. See generally *State v. Nonog*, 169 Wn.2d 220, 227, 237 P.3d 250 (2010) (citing 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.2, at 448–52 (1984)). Courts recognize "it may well be that proof of *corpus delicti* was available and at hand during the trial, but that in the absence of a specific objection

⁹ ER 103 provides "[e]rror may not be predicated upon a ruling which admits ... evidence unless a substantial right of the party is affected, and ... [i]n the case the ruling is one admitting evidence, a timely objection ... is made, stating the specific ground of objection, if the specific ground was not apparent from the context."

calling for such proof it was omitted." *C.D.W.*, 76 Wn. App. at 763-64 (citing *People v. Wright*, 52 Cal.3d 367, 802 P.2d 221 (1990) (quoting *People v. Mitchell*, 239 Cal.App.2d 318 (1966)) *cert. denied, sub nom. Wright v. California*, 502 U.S. 834, 112 S. Ct. 113, 116 L. Ed. 2d 82 (1992)). Washington courts can avoid the waste of societal resources that would attend untimely assertions of *corpus delicti* by denying review to defendants who fail to assert the rule when the admissibility of their confessions is decided. *See* ER 103; *Desantiago*, 149 Wn.2d at 413; *Coria*, 146 Wn.2d at 641; *Newbern*, 95 Wn. App. at 288-289; *C.D.W.*, 76 Wn. App. at 763 (citing *Corbett*, 106 Wn.2d at 576).

Defendant relies on *State v. Piertrazk*, 110 Wn. App. 670, 680, 41 P.3d 1240 (2002) to argue *corpus delicti* is not waived when untimely raised. App.Br.7-8. *Piertrazk* is distinguishable from defendant's case in that Piertrazk raised *corpus* before resting, which ostensibly provided the State an opportunity to perfect the challenged foundation through rebuttal. *Piertrazk*, 110 Wn. App. 679-80. Defendant did not raise *corpus* until after the State and the defense rested, denying the State a similar opportunity to supplement the record. *See* RP 89-90. *Piertrazk's* waiver analysis is flawed as it infers a liberal preservation of untimely raised *corpus* claims from cases where waiver was not raised by the State. *See* 110 Wn. App. at 680 (citing *Aten*, 130 Wn.2d at 654; *State v. Vangerpen*, 125 Wn.2d 782, 795-96, 888 P.2d 1177 (1995)). Deviation from the rule governing issue preservation should not be inferred from a court's failure to analyze an

unasserted waiver as courts refrain from addressing issues neither party raised. See *Salviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 180 P.3d 874 (2008).

Piertrazk also needlessly expands access to a procedural rule that can be most generously described as an anachronism in all but the very few cases in which a person of questionable faculties confesses to a crime that never occurred. Such cases are better addressed through the adversarial process, the burden of proof and diversionary programs for the mentally ill than by the expansion of a rule that lingers in its nationally estranged form through an unprofitable adherence to *stare decisis*. See e.g., *State v. Ray*, 130 Wn.2d 673, 675-79, 681, 926 P.2d 904 (1996).¹⁰

Corpus delicti is not a standard required by either the state or federal constitution; therefore, a failure of *corpus delicti* could never amount to manifest constitutional error with the attending judicial tolerance for belated claims. *Dow*, 168 Wn.2d at 249-50. It is simply one of many claims justly forfeited when untimely raised. See e.g., *Desantiago*, 149 Wn.2d at 413; *Coria*, 146 Wn.2d at 641); *Newbern*, 95 Wn. App. at 288-289; *C.D.W.*, 76 Wn. App. at 763 (citing *Corbett*, 106 Wn.2d at 576). In that it joins the most basic rights of criminal defendants,

¹⁰ *Ray* provides a disturbing example of how Washington's *corpus delicti* rule leaves the most vulnerable exposed to the most dangerous among us. The rule as applied in *Ray* permits offenders under treatment for "sexual deviancy" to *admittedly* molest children with impunity provided the offenders strategically target victims too youthful to provide legally competent testimony and have enough presence of mind to commit their crimes in private. 130 Wn.2d at 675-79.

which are equally subject to waiver. See *Pertez v. United States*, 501 U.S. 923, 936-37, 111 S. Ct. 2661, 115 L. Ed. 2d 808 (1991).¹¹ Washington already pays a grievous price to maintain *corpus delicti* in its present form.¹² Vesting the rule with an anomalous immunity to waiver worsens what is already recognized to be a "positive obstruction to the course of justice." See *Ray*, 130 Wn.2d at 685 (quoting 7 John Henry Wigmore, Evidence § 2070, at 510 (Chadbourn rev.1978)). Defendant's *corpus delicti* claim was not preserved for review.

- b. Sufficient independent evidence of defendant's crimes was adduced to comply with *corpus delicti*'s minimal foundational showing of corroborative proof.

Washington's *corpus delicti* rule requires proof of a criminal act and cause. *State v. Angulo*, 148 Wn. App. 642, 653, 200 P.3d 752 (2009) (citing *State v. Meyer*, 37 Wn.2d 759, 763, 226 P.2d 204 (1951), review

¹¹ See e.g., *United States v. Gagnon*, 470 U.S. 522, 528[, 105 S. Ct. 1482, 84 L. Ed. 2d 486] (1985) (absence of objection constitutes waiver of right to be present at all stages of criminal trial); *Segurola v. United States*, 275 U.S. 106, 111, 48 S. Ct. 77, 79, 72 L. Ed. 186(1927) (failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure); *United States v. Figueroa*, 818 F.2d 1020, 1025 (C.A.1 1987) (failure to object results in forfeiture of claim of unlawful post arrest delay) ... *United States v. Coleman*, 707 F.2d 374, 376 (CA9) (failure to object constitutes waiver of Fifth Amendment claim), cert. denied, 464 U.S. 854, 104 S.Ct. 171, 78 L.Ed.2d 154] (1983). See generally *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 677, 88 L. Ed. 834] (1944) ("No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right"). See also *State v. Sublett*, 176 Wn.2d 58, 124-35, 292 P.3d 715 (2012) (Madsen, C.J., concurring).

¹² "The rule of *corpus delicti* has become a serious impediment to the proper handling of certain kinds of cases, particularly those involving highly vulnerable or youthful victims of crime who cannot give voice to the fact of the crime against them." *Ray*, 130 Wn.2d at 687 (Talmadge concurring) (citing *Aten*, 130 Wn.2d 640)."

denied, 170 Wn.2d 1009, 236 P.3d 207 (2010)). When *corpus delicti* is timely challenged the State bears the burden to establish both elements on a *prima facie* basis. *Id.*; see also *C.D.W.*, 76 Wn. App. at 763 (citing *Corbett*, 106 Wn.2d at 576). *Prima facie* in this context means evidence that preponderates in favor of the existence those elements. *Angulo*, 148 Wn. App. at 653 (citing *Aten*, 130 Wn.2d at 660; *Brockob*, 159 Wn.2d at 329). There need only be "evidence of sufficient circumstances which would support a logical and reasonable inference of the facts sought to be proved. The evidence need not be enough to support a conviction or send the case to the jury." *Aten*, 130 Wn.2d at 656 (emphasis added). In other words, "[t]he corroboration does not require proof of all elements of the charged offense." *Angulo*, 148 Wn. App. at 653 (citing *State v. Lung*, 70 Wn.2d 365, 371, 423 P.2d 72 (1967); *Meyer*, 37 Wn.2d at 763)). Tying *corpus delicti's* corroboration requirement too closely to the elements of a charged offense could easily result in unnecessarily excluding extremely relevant and probative evidence—and doing so without furthering the rule's limited purpose. See *Angulo*, 148 Wn. App. at 657-58.

"The confession of a person charged with the commission of a crime is not sufficient to establish *corpus delicti*, but if there is independent proof thereof, such confession may then be considered in connection therewith and the *corpus delicti* established by a combination of the independent proof and the confession...." *Aten*, 130 Wn.2d at 656 (citing *State v. Meyer*, 37 Wn.2d 759, 226 P.2d 204 (1951); *Dow*, 168

Wn.2d at 252). *Corpus delicti* can be proved by direct or circumstantial evidence, which must be reviewed in a light most favorable to the State. *Brockob*, 159 Wn.2d at 328; *Aten*, 130 Wn.2d 655.

i. Independent proof corroborated defendant's possession of stolen firearms.

Defendant was charged with possessing a stolen firearm between December 17, 2011, and January 5, 2012. CP 59-60. A person is guilty of possessing a stolen firearm¹³ if he or she possesses, carries, delivers, sells, or is in control of a firearm with knowledge the firearm had been stolen. RCW 9A.56.310; RCW 9A.56.140; WPIC 77.13.

Defendant's stipulation No.1 provided independent proof the firearms defendant admittedly possessed were stolen from Sportco in Fife December 17, 2011, by Soeun Sun, Joseph Soeung, and David Bunta. Ex.1. That independent evidence was supplemented by Nolta's testimony about the burglary, theft of 41 firearms, and investigation that resulted in defendant's arrest. RP 10-12. During the investigation Wayland disclosed how defendant knowingly discussed the distribution of stolen Sportco firearms in his house. RP 13-14. Wayland's connection to defendant was

¹³ "Possessing a stolen firearm" means knowingly to receive, retain, possess, conceal, or dispose of a stolen firearm knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto. RCW 9A.56.310; RCW 9A.56.140; WPIC 77.12.

corroborated through text messages and defendant was connected to other suspects through Facebook. RP 15.

Reasonable and logical inferences drawn from the totality of that evidence is alone sufficient to establish *corpus delicti* for possession of a stolen firearm as it at least establishes defendant's constructive¹⁴ possession of firearms he knew to be stolen. There can be no rational concern defendant confessed to a crime that never occurred. The independent evidence tying defendant to the charged offense is reinforced when properly considered in conjunction with defendant's confession. *Aten*, 130 Wn.2d at 656 (citing *Meyer*, 37 Wn.2d 759)). The synthesized proof that defendant delivered stolen firearms from Mop to Wayland within hours of the December 17, 2011, Sportco burglary plainly exceeds *corpus delicti's* minimal *prima facie* requirement. Ex.3 (17:12-17; 17:21-33; 17:39-45; 18:23-25).

Defendant attempts to undermine the record that established *corpus delicti* by arguing it cannot be proved by admitted evidence that might have been excluded if it had been timely challenged below. (Citing *State v. Gower*, 172 Wn. App. 31, 288 P.3d 665 (2012), *reversed on other grounds*, ___ Wn.2d ___, ___ P.3d ___ (2014 WL 554468)). His argument

¹⁴ "Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item...." WPIC 133.52.

is predicated on a misunderstanding of the presumption trial courts know and apply the law in a bench trial. Contrary to defendant's understanding the presumption does not relieve a party of the obligation to object to disputed evidence. App.Br. 8; *compare with State v. Read*, 147 Wn.2d 238, 245, 53 P.3d 26 (2002); *State v. Miles*, 77 Wn.2d 593, 601, 464 P.2d 723 (1970); *State v. Myers*, 133 Wn.2d 26, 34, 941 P.2d 1102 (1997); *In re Dependency of Penelope B.*, 104 Wn.2d 643, 659-60, 709 P.2d 1185 (1985); ER 103; RAP 2.5. Rather the doctrine presumes trial courts do not use admitted evidence for an improper purpose, such as inferring guilt from a defendant's propensity to commit crimes.¹⁵ *See Read*, 147 Wn.2d at 245; *Miles*, 77 Wn.2d at 601.

Once evidence is admitted without objection it may be considered of any proper purpose. *See Myers*, 133 Wn.2d at 34 (*citing Penelope B.*, 104 Wn.2d at 659-60); *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967); *Callen v. Coca-Cola Bottling Inc.*, 50 Wn.2d 180, 182-83, 310 P.2d 236 (1957). For this reason evidence that may be excluded as hearsay or as violative of the Confrontation Clause is best characterized as objectionable in the sense that exclusion should follow an opponent's timely objection on either basis absent the proponent's invocation of an overpowering exception. *Myers*, 133 Wn.2d at 34 (*citing Penelope B.*, 104 Wn.2d at 659-60); *Callen*, 50 Wn.2d at 182-83 ("Although ... clearly

¹⁵ ER 404(b) "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith"

hearsay, we may consider it because no proper objection was made to it."); *State v. Lui*, ___ Wn.2d ___, 315 P.3d 493, 526 (2014) ("[d]efendant always has the burden of raising his Confrontation Clause objection...") (quoting *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 327, 129 S. Ct. 2527, 174 L. Ed. 314 (2009)); *State v. Wright*, 76 Wn. App. 811, 822-23, 888 P.2d 1214 (1995)). A criminal defendant may not undermine *corpus delicti* through retroactive objections to evidence admitted without opposition. *See Id.*

Defendant might have *but did not* object to some aspect of Nolta's testimony when it was admitted at trial. RP 29, 32-33. RP 84-87, 89-90, 96-97. That evidence consequently joins defendant's stipulations to independently corroborate the crimes defendant confessed to committing. *See Myers*, 133 Wn.2d at 34;¹⁶ *C.D.W.*, 76 Wn. App. at 763-64.

ii. Independent proof corroborated defendant's unlawful possession of a firearm.

A person commits the crime of unlawful possession of a firearm in the first degree when he or she has previously been convicted of a serious offense and knowingly owns or has in his or her possession or control any

¹⁶ Neither the rules of evidence nor the Confrontation Clause apply to preliminary questions of fact underlying the admissibility of evidence. *See* ER 104; ER 1101; *State v. Fortun-Cebada*, 158 Wn. App. 158, 241 P.3d 800 (2010); *In re Herbert* 85 Wn.2d 719, 538 P.2d 1212 (1975); *State v. Neslund*, 50 Wn. App. 531, 749 P.2d 725 (1988). Courts should be similarly unconstrained by the evidentiary rules and Confrontation Clause when determining whether a defendant confessed to an actual crime for the purpose of *corpus delicti*.

firearm. RCW 9.41.040(1); WPIC 133.01. The evidence summarized above in section (i) combines with defendant's stipulated offender history to independently corroborate defendant's constructive possession of a firearm in violation of RCW9.41.040(1). *See* Ex.2; RP 10-15. Aggregating that evidence with defendant's confessed delivery of stolen firearms firmly establishes actual possession in violation of the statute. *Corpus delicti* was proved.

2. THE STATE ADDUCED SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S CONVICTIONS FOR POSSESSION OF A STOLEN FIREARM AND UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE.

"A challenge to the sufficiency of the evidence presented at a bench trial requires ... review [of] the trial court's findings of fact and conclusions of law to determine whether substantial evidence supports the challenged findings and whether the findings support the conclusions." *State v. Roman*, 172 Wn. App. 448, 490, 290 P.3d 1041 (2012) (*citing State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005), *review granted*, 177 Wn.2d 1022 (2013)). Substantial evidence exists where there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Hill*, 123 Wn.2d at 644 (*citing State v. Halstien*, 122 Wn.2d 109, 128, 857 P.2d 270 (1994)). The State's evidence is accepted as true with all inferences that can reasonably be drawn from

it. *State v. Salinas*, 119 Wn.2d 192, 201, 829, P.2d 1068 (1992). Appellate courts defer to the trial court's assessment of witness credibility and evidence weight. *City of Seattle v. Nguyen*, ___ Wn. App. ___ 317 P.3d 518, 522 (2014) (citing *In re Welfare of Seago*, 82 Wn.2d 736, 739–40, 513 P.2d 831 (1973)). They will not substitute their judgment for that of the trial court. *Id.* (citing *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003)).

Unchallenged and improperly challenged findings are verities on appeal when substantially supported by the record. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); *State v. Hill*, 123 Wn.2d 641, 644–45, 870 P.2d 313 (1994); *State v. Jacobson*, 92 Wn. App. 958, 964 n.1, 965 P.2d 1140 (1998); *see also* RAP 10.3(g). Conclusions of law are reviewed *de novo*. *State v. Homan*, 172 Wn. App. 488, 490, 290 P.3d 1041 (2012).

The trial court found defendant was in actual or constructive possession of firearms at his residence knowing they had been stolen from Sportco in Fife. CP 77. Defendant's guilty knowledge was inferred from his conversation with the burglars and other circumstantial evidence, such as the number of firearms, the nature of Sun's involvement, and his desire to sell the firearms. *Id.* The court accepted defendant's stipulation to the "serious offense" that made it unlawful for him to possess firearms. *Id.*

Defendant's vague challenges to the sufficiency of the evidence fail to assign error to any of the trial court's findings of fact, making them

verities on appeal. Those verities collectively support the elements of possession of a stolen firearm and unlawful possession of a firearm. RCW 9A.56.310; RCW 9A.56.140; RCW 9.41.040(1); WPIC 133.01; WPIC 77.12. Defendant's sufficiency of the evidence claim is predicated on an erroneous belief the entirety of Nolta's testimony cannot be considered by the Court. The opposite is plainly true. *Supra* (citing *Myers*, 133 Wn.2d at 34). Each of the findings is substantially supported with or without defendant's confession. Ex.1-2; RP 10-15. And amply proved with it. Ex.1-2, 3 (17:21-35; 17:41-45; 18:23-25; 18:29-32); RP10-15. His convictions should be affirmed.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO CHANGE VENUE TO KING COUNTY AS HIS FIREARM OFFENSES WERE AN INSEPARABLE PART OF A CONSPIRACY TO TRAFFIC FIREARMS STOLEN IN PIERCE COUNTY.

A criminal offense may be adjudicated in any county where at least one element of the offense occurred. *State v. Rockl*, 130 Wn. App. 293, 296-97, 122 P.3d 759 (2005); CrR 5.1(a). Proper venue is not an element of a crime or a matter of jurisdiction. *State v. McCorkell*, 63 Wn. App. 798, 800, 822 P.2d 795 (1992). It is a constitutional right that is waived when untimely raised. *Id.* (citing *State v. Harris*, 48 Wn. App. 279, 282, 738 P.2d 1059, *review denied*, 108 Wn.2d 1036 (1987); *State v. Johnson*,

45 Wn. App. 794, 796, 727 P.2d 693 (1986), *review denied*, 107 Wn.2d 1035 (1987)).

A trial court's denial of a motion to change venue will only be disturbed for a proven abuse of discretion. *Rockl*, 130 Wn. App. at 297 n.6 (citing *State v. Olds*, 39 Wn.2d 258, 235 P.2d 165 (1951); *State v. Ryan*, 192 Wash. 160, 73 P.2d 735 (1937)). Trial courts abuse their discretion when their decisions are manifestly unreasonable or rest on untenable grounds or reasons. *State v. Johnson*, 172 Wn. App. 112, 124-26, 297 P.3d 710 (2013) (citing *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008), *review granted*, 178 Wn.2d 1001, 308 P.3d 642 (2013); *State v. Johnson*, 159 Wn. App. 766, 773, 247 P. 3d 11 (2011) (citing *State v. Powell*, 126 Wn.2d 244,258, 893 P.2d 615 (1995)). Whereas interpretation of the rule governing change of venue is a question of law reviewed *de novo*. *Rockl*, 130 Wn. App. at 297 (citing *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003) (citing *State v. Schultz*, 146 Wn.2d 540, 544, 48 P.3d 301 (2002))).

- a. Defendant waived his objection to venue when he failed to promptly raise it in accordance with Washington's expeditious objection requirement.

"Any objection to venue must be made as soon after the initial pleading is filed as the defendant has knowledge upon which to make it."

CrR 5.1(c). The objection to venue is waived if not promptly made pursuant to Washington's "expeditious objection requirement." *State v. Price*, 94 Wn.2d 810, 816, 620 P.2d 994 (1980); *see also State v. Dent*, 123 Wn.2d 464, 480, 869 P.2d 392 (1994).

Defendant waived his objection to venue when he failed to promptly make it after being charged April 13, 2012. CP 1-2. On that day the State filed a five page probable cause declaration that detailed where the charged offenses occurred. CP 3-7. Defendant's King County counsel filed a notice of appearance and discovery demand April 24, 2012. CP 85-86. Defendant received the first 427 pages of discovery that day. CP 87-88. On May 15, 2012, defense counsel signed for a Pierce County trial date without moving to change venue. CP 89. That motion did not come until May 22, 2012—over a month after the charges and probable cause declaration were filed. CP 3-8, CP 90.

Defendant's forfeited objection to venue should not be considered on appeal. He at least acquired knowledge necessary to move for change of venue April 13, 2012, when the State's comprehensive probable cause declaration was filed. CP 3-7. That document formally told defendant where each relevant step of the charged criminal enterprise occurred. *Id.* While his confession shows he was well aware of those facts when the underlying crimes occurred. Ex. 3 (17:12-17; 17:21-33; 17:39-45; 18:23-

25). He nevertheless failed to challenge venue for over a month after formally receiving the information on which that motion relied, and one week after his counsel signed for a Pierce County trial date. CP 8, 90. CrR 5.1(c) required defendant to object to venue sooner than he did. His delay placed venue beyond review. *See State v. Harris*, 48 Wn. App. 279, 282-283, 738 P.2d 1059 (1987) (citing *Price*, 94 Wn.2d at 81).

- b. The trial court properly denied defendant's motion to dismiss all counts as a meritorious venue claim would only have entitled defendant to severance, which he failed to request as required by CrR 4.4(2).

"Separate trials are disfavored in Washington." *State v. Emery*, 174 Wn.2d 741, 752, 278 P.3d 653 (2012). "Two or more offenses may be joined in one charging document, with each offense stated in a different count, when the offenses ... [a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.3(a). The rule governing joinder of offenses should be construed expansively to promote Washington's public policy of conserving judicial resources. *State v. Bryant*, 89 Wn. App. 857, 864, 950 P.2d 1004, *review denied*, 137 Wn.2d 1017, 978 P.2d 1100 (1999). Improper joinder shall not preclude subsequent prosecution of the charge improperly joined. CrR 4.3(3).

Venue is proper in any county where an over act in furtherance of a charged conspiracy occurred. *State v. Dent*, 123 Wn.2d 467, 481, 869 P.2d 392 (1994) (citing *State v. Mardesich*, 79 Wash. 204, 208, 140 P. 573 (1914)). If a defendant's pretrial motion to sever offenses improperly charged with a conspiracy count is overruled the defendant may renew the motion on the same ground at or before the close of the evidence. Severance is waived by failure to renew the motion. See CrR 4.4(a)(2); *Emery*, 174 Wn.2d at 754; *State v. McDaniel*, 155 Wn. App. 829, 859, 230 P.3d 245, review denied, 169 Wn.2d 1027, 241 P.3d 413(2010); *State v. Ben-Neth*, 34 Wn. App. 600, 606, 663 P.2d 156 (1983). A defendant must point to specific prejudice to establish a trial court abused its discretion in denying a motion to sever. *State v. Huynh*, 175 Wn. App. 896, 908-09, 307 P.3d 788 (2013).

Defendant was charged with a four count amended information on July 10, 2012, which included a count of conspiracy to traffic stolen property. (Count IV). CP 33-35, 59-61. During defendant's untimely pretrial motion on venue he opined severance of Counts I-III would be necessary if the court found Count IV was properly filed in Pierce County. RP (Jul. 10, 2012) 10-11. Defendant never renewed a motion to sever any offense. CP 50-58; RP 96-101, 103-04.

Even if defendant's pretrial reference to severance is generously interpreted as a motion for that result, he still failed to comply with CrR 4.4(a)(2) when he did not renew that motion to sever offenses purportedly committed in King County from at least the conspiracy count for which Pierce County was a proper venue. *See Dent*, 123 Wn.2d at 481, 869 P.2d 392 (1994) (*citing Mardesich*, 79 Wash. at 208). His claim that the Pierce County Superior Court erroneously entered convictions on King County offenses was waived by that failure. His motion to dismiss all counts should not be interpreted as a renewed motion to sever some counts as severance was plainly not the relief requested. CP 50-58; RP 96-101, 103-04. The court did not manifestly abuse its discretion when it refused to dismiss all counts as that remedy would not have been appropriate because *at least* the conspiracy count was properly before it. And the trial court cannot be faulted for refraining to *sua sponte* explore the possibility of severance when severance was not part of the relief defendant requested.

- c. Pierce County was the proper venue for defendant's possession of a stolen firearm charge because the firearm was stolen in Pierce County.

A defendant may be tried for crimes of larceny in the county where the theft was committed or in the county to which the misappropriated property was removed. *State v. Howell*, 40 Wn. App. 49, 52, 696 P.2d

1253 (1985)) (citing *State v. Ashe*, 182 Wash. 598, 603, 48 P.2d 213 (1935), *overruled on other grounds*, *State v. Goodwin*, 29 Wn.2d 276, 186 P.2d 935 (1947); *State v. Knutson*, 168 Wash. 633, 12 P.2d 923 (1932); *State v. Carrol*, 55 Wash. 588, 590, 104 P.814 (1909). A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a firearm with knowledge the firearm had been stolen. RCW 9A.56.310; RCW 9A.56.140; WPIC 77.13.

Uncontroverted evidence established the firearm defendant was charged with possessing in King County was stolen from Pierce County; therefore, one element of the offense was committed in Pierce County. *See* Ex. 1, 3 (17:21-35; 17:41-45; 18:12-14; 18:23-25); RP 10-15. Both counties were consequently a proper venue for its adjudication. CrR 5.1(a)(2). However, the ability adjudicate the offense in either county did not give defendant a right of election as there was no reasonable doubt that one element was committed in Pierce County. *See* Ex. 1, 3 (17:21-35; 17:41-45; 18:12-14; 18:23-25); RP 10-15; *Rockl*, 130 Wn. App. at 298-99.

- d. Pierce County was the proper venue for defendant's unlawful possession of a firearm charge as that offense was an inseparable part of a conspiracy to traffic firearms stolen from Pierce County.

"A ... crime may be the result of a series of acts The direct consequences may be made to occur at various times and in different

localities ... Wherever any part is done, that becomes the locality of the crime as much as where it may have culminated." *Howell*, 40 Wn. App. at 52 (quoting *Ashe*, 182 Wash. at 603). It follows that venue is proper wherever an overt act in furtherance of a conspiracy occurred. See *Dent*, 123 Wn.2d at 481-82. A criminal conspiracy need not be charged to invoke court rules predicated on a conspiracy's existence. See *State v. Dictado*, 102 Wn.2d 277, 283, 687 P.2d 172 (1984); *State v. Sanchez-Guillen*, 135 Wn. App. 636, 642-43, 145 P.3d 406 (2006). Nor must the conspiracy be integral to the crime charged. See *Sanchez-Guillen*, 135 Wn. App. at 642-43. It is sufficient the evidence shows individuals working together with a single design to accomplish a common criminal purpose. *Id.*

A person commits the crime of unlawful possession of a firearm in the first degree (UPOF) when he has been previously convicted of a serious offense and knowingly possesses any firearm. RCW 9.41.040(1); WPIC 133.01. Defendant possessed a firearm stolen from Pierce County in furtherance of a conspiracy to traffic stolen firearms between Pierce and King County. See Ex.1, 3 (17:21-35; 17:41-45; 18:12-14; 18:23-25); RP 10-15. The role of defendant's possession in that conspiracy caused the possession element of his UPOF offense to have sufficient contact with, or affect upon, Pierce County to make it a proper venue to adjudicate that offense. See generally *Howell*, 40 Wn. App. at 52-53 (citing *Ashe*, 182

Wash. at 603); *Knutson*, 168 Wash. 633; *Carrol*, 55 Wash. at 590, 104 P.814 (1909); *Dictado*, 102 Wn.2d at 283; *Sanchez-Guillen*, 135 Wn. App. at 642-43; see also *Krammerer v. Western Gear Corp.*, 96 Wn.2d 416, 438, 635 P.2d 708 (1981).¹⁷ If defendant's UPOF had to be prosecuted in King County despite that offense's status as a substantial step in a conspiracy to traffic firearms stolen in Pierce County, adjudication of the criminal enterprise would require juries from two counties to decide the same evidence contrary to Washington's policy of disfavoring separate trials. See *Emery*, 174 Wn.2d at 752; CrR 4.3(a)(2). Pierce County was a proper venue for defendant's UPOF offense.¹⁸

¹⁷ 96 Wn.2d at 438 (long-arm statutes generally give plaintiffs the ability to prosecute claims in other states whenever there is some "minimal contact, much less a significant contact, with that state.").

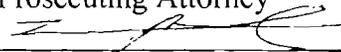
¹⁸ Should the Court find defendant preserved his venue claim and decide venue was improper as to any conviction, the remedy for the improper denial of a motion for change of venue is remand to transfer the case to the proper venue for retrial. *State v. Hillman*, 42 Wash. 615, 619, 85 P.63 (1906); see also CrR 4.3(3).

D. CONCLUSION.

Defendant's *corpus delicti* and venue claims should be rejected because they were not preserved for review and fail on their merits. His well founded convictions should be affirmed.

DATED: February 28, 2014.

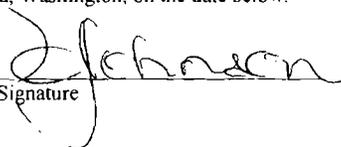
MARK LINDQUIST
Pierce County
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Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{cc file} ~~US Mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his or her attorney or to the attorney of record for the respondent and respondent c/o his or her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

3/3/14 
Date Signature

PIERCE COUNTY PROSECUTOR

March 03, 2014 - 10:21 AM

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