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No. 49171-1-II  
COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

---

Skamania County Superior Court nos.  
16-1-00010-8

---

STATE OF WASHINGTON,  
Respondent

vs.

GREGORIO IVAN LAYNA,  
Appellant

---

BRIEF OF RESPONDENT

---

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**I. APPELLANT’S ASSIGNMENT OF ERROR**

1. The evidence presented at trial does not support conviction for Theft of Motor Vehicle under a sufficiency of the evidence analysis.
2. The evidence presented at trial does not support conviction for Trafficking in Stolen property in the Second Degree under a sufficiency of the evidence analysis.
3. The information as charged violated Double Jeopardy protections
4. The charges in the information should Merge.
5. The Jury instructions were improper.
6. The admission of CAD logs was improper.
7. The State committed prosecutorial misconduct by misstating the law.
8. The defendant received ineffective assistance of counsel.
9. The legal financial obligations were erroneously ordered.
10. Appellate costs should be waived.

**II. RESPONSE TO APPELLANT’S CLAIMS**

1. The evidence presented at trial is sufficient to establish a rational trier of fact could have found beyond a reasonable doubt that the appellant committed the crime of Theft of Motor Vehicle.
2. The evidence presented at trial is sufficient to establish a rational trier of fact could have found beyond a reasonable doubt that the appellant committed the crime of Trafficking in Stolen property in the Second Degree

3. Jeopardy Did not attach and each count constitutes a separate and distinct act which constituted the crime.
4. Merger is not appropriate based upon the separate time and location of the acts which constituted the crimes charged.
5. The jury instructions were pursuant to WPIC and were proper.
6. The information in the CAD logs were foundational and admitted to establish times, any testimonial information was derived from statements made by persons who testified to the same at trial.
7. The States statements at closing were derived from the testimony and properly drew natural inferences from the testimony presented.
8. Trial counsel properly represented the appellant at trial.
9. Legal financial obligations were properly ordered.
10. Appellate costs should be imposed pursuant to statute and rule.

### III. ARGUMENT

#### 1. Sufficiency of the Evidence re Theft of Motor Vehicle.

The court reviews the question of sufficiency of the evidence to determine "whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." State v. McKague, 172 Wn.2d 802, 805, 262 P.3d 1225 (2011). The court should assume the truth of the state's evidence, State v. Mines, 163 Wn.2d 387, 391, 179 P.3d 835 (2008), view reasonable inferences from the evidence in the light most favorable to the state, id., and deem circumstantial and direct evidence equally reliable, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997).

WPIC 70.26 Theft of Motor Vehicle—Elements states:

1 To convict the defendant of the crime of theft of a motor vehicle, each  
2 of the following three elements of the crime must be proved beyond a  
3 reasonable doubt:

4 (1) That on or about(date), the defendant

5 [(a) wrongfully obtained or exerted unauthorized control over a  
6 motor vehicle of another;] [or]

7 [(b) by color or aid of deception, obtained control over a motor vehicle  
8 of another;] [or]

9 [© appropriated a lost or misdelivered motor vehicle of another;

10 and

11 (2) That the defendant intended to deprive the other person of the  
12 motor vehicle; and

13 (3) That this act occurred in the State of Washington.

14 If you find from the evidence that elements (2) and (3), and any of the  
15 alternative elements [(1)(a)], [(1)(b)] or [(1)©] have been proved  
16 beyond a reasonable doubt, then it will be your duty to return a  
17 verdict of guilty. To return a verdict of guilty, the jury need not be  
18 unanimous as to which of alternatives [(1)(a)], [(1)(b)] or [(1)©] has  
19 been proved beyond a reasonable doubt, as long as each juror finds  
20 that at least one alternative has been proved beyond a reasonable  
21 doubt.

22 On the other hand, if after weighing all of the evidence you have a  
23 reasonable doubt as to any one of elements (1), (2), or (3), then it will  
24 be your duty to return a verdict of not guilty.

1 Jury Instruction No. 13, which encapsulates the above WPIC for  
2 this case, as given to the Jury, stated:

3 **To convict the defendant of the crime of theft of a motor vehicle, as**  
4 **charged in Count Two, each of the following three elements of the**  
5 **crime must be proved beyond a reasonable doubt:**

6 **(1) That on or between January 25, 2016 and February 26, 2016, the**  
7 **defendant wrongfully obtained or exerted unauthorized control over a**  
8 **motor vehicle of another;**

9 **and**

10 **(2) That the defendant intended to deprive the other person of the**  
11 **motor vehicle; and**

12 **(3) That this act occurred in the State of Washington.**

13 **If you find from the evidence that elements have been proved beyond**  
14 **a reasonable doubt, then it will be your duty to return a verdict of**  
15 **guilty.**

16 **On the other hand, if after weighing all of the evidence you have a**  
17 **reasonable doubt as to any one of elements then it will be your duty to**  
18 **return a verdict of not guilty.**

19 At trial the Jury heard that the defendant was in possession of a  
20 Motorhome which had been stolen from a barn. (RP 67-69). The  
21 defendant was seen and recognized inside and in possession of the  
22 motorhome in a rural area of the county on a powerline road, with a dead  
23 battery, (RP 120-121), and then was subsequently seen with the  
24 motorhome while it is being stored in another out of the way area and

1 covering the motorhome's identifying markings, i.e. license plate, from  
2 view from the road. (RP 73-76 and 149-150). Further the jury heard that  
3 the motorhome when recovered was being operated via a "hotwire" by-  
4 pass in-lieu of a key and that the by-pass was effecting the vehicles ability  
5 to hold a charge in the battery. (RP 83-85). The jury also heard that the  
6 defendant did not have permission to possess or use the motorhome from  
7 the owner of the motorhome. (RP 100-101).

8 The testimony established that the defendant had wrongfully  
9 obtained or was exerting unauthorized control over the motor vehicle of  
10 another. It could reasonably be inferred from his subsequent actions in  
11 attempting to hide the motorhome in remote locales both his  
12 consciousness of guilt and intent not to return the motorhome to the  
13 rightful owner.

14 The evidence presented at trial forms a valid basis for a rational  
15 trier of fact to find beyond a reasonable doubt that the appellant committed  
16 the crime of Theft of Motor Vehicle.

17 2. Sufficiency of the Evidence re Trafficking in Stolen Property

18 The court reviews the question of sufficiency of the evidence to  
19 determine "whether any rational trier of fact could have found the  
20 elements of the crime beyond a reasonable doubt." State v. McKague, 172  
21 Wn.2d 802, 805, 262 P.3d 1225 (2011). The court should assume the truth  
22 of the state's evidence, State v. Mines, 163 Wn.2d 387, 391, 179 P.3d 835  
23 (2008), view reasonable inferences from the evidence in the light most  
24 favorable to the state, id., and deem circumstantial and direct evidence

equally reliable, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997)

WPIC 77.34 Trafficking in Stolen Property—Second

Degree—Elements states:

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

**(1) That on or about(date), the defendant recklessly trafficked in stolen property with reckless disregard of whether the property was stolen; and**

**(2) That this act occurred in the State of Washington.**

**If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.**

**On the other hand, if after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.**

Jury Instruction No. 24, which encapsulates the above WPIC for this case, as given to the Jury, stated:

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

**(1) That on or between February 21, 2016 and February 26, 2016, the defendant recklessly trafficked in stolen property with reckless disregard of whether the property was stolen; and**

1                   **(2) That this act occurred in the State of Washington.**

2                   **If you find from the evidence that each of these elements has been**  
3                   **proved beyond a reasonable doubt, then it will be your duty to return**  
4                   **a verdict of guilty.**

5                   **On the other hand, if after weighing all of the evidence you have a**  
6                   **reasonable doubt as to any one of these elements, then it will be your**  
7                   **duty to return a verdict of not guilty.**

8                   Jury instruction No. 25 which encapsulates WPIC 10.03 for this  
9                   case, as given to the Jury, stated:

10                   **A person is reckless or acts recklessly when he or she knows of and**  
11                   **disregards a substantial risk that a wrongful act may occur and this**  
12                   **disregard is a gross deviation from conduct that a reasonable person**  
13                   **would exercise in the same situation.**

14                   **When recklessness is required to establish an element of a crime, the**  
15                   **element is also established if a person acts intentionally or knowingly**  
16                   **as to that result.**

17                   The Jury instruction as provided is essentially a restatement of the WPIC  
18                   excluding the non-applicable parentheticals.

19                   Jury Instruction No. 18 which encapsulates WPIC 77.35  
20                   Trafficking in Stolen Property—Traffic—Definition for Traffic, for this  
21                   case, as given to the jury stated:

22                   **“Traffic” means:**

23                   **to receive, possess, obtain control of, stolen property, with intent to**

1 **sell, transfer, distribute, dispense, or otherwise dispose of the**  
2 **property to another person.**

3 The Jury instruction as provided is essentially a restatement of the WPIC  
4 excluding the non-applicable parentheticals.

5 Here, the jury the testimony as referenced above and additionally,  
6 that the defendant had an intent to sell the motorhome which prompted  
7 one of the witnesses to contact the defendant regarding it's condition. (RP  
8 151-152). Further, a jury could reasonably infer the ultimate purpose for  
9 the theft of a vehicle of this sort was to sell or otherwise dispose of the  
10 property to another person based upon it's nature and the defendant's  
11 subsequent actions in hiding and moving the motorhome from location to  
12 location.

13 The evidence presented at trial forms a valid basis for a rational  
14 trier of fact to find beyond a reasonable doubt that the appellant committed  
15 the crime of Trafficking in Stolen Property in the Second Degree.

16 3. The Charges filed in the information violated Double Jeopardy  
17 protections and should Merge.

18 The court reviews alleged double jeopardy violations de novo. State  
19 v. Fuller, 169 Wn.App. 797, 832, 282 P.3d 126 (2012). The state and  
20 federal double jeopardy clauses protect a defendant from being punished  
21 multiple times for the same offense. State v. Adel, 136 Wn.2d 629, 632,  
22 965 P.2d 1072 (1998).

23 Generally, a double jeopardy violation exists where "(1) jeopardy has  
24 previously attached, (2) jeopardy has terminated, and (3) the defendant is

1 in jeopardy a second time for the same offense in fact and law." State v.  
2 Strine, 176 Wn.2d 742, 752, 293 P.3d 1177 (2013). "Jeopardy does not  
3 attach until a defendant 'is 'put to trial before the trier of the facts, whether  
4 the trier be a jury or a judge.'" State v. George, 160 Wn.2d 727, 742, 158  
5 P.3d 1169 (2007) (internal quotation marks omitted) (quoting Serfass v.  
6 United States, 420 U.S. 377, 391, 95 S.Ct. 1055, 43 L.Ed.2d 265 (1975)).  
7 As a result, jeopardy does not attach merely because the State files charges  
8 or pretrial proceedings occur. George, 160 Wn.2d at 742. Jeopardy  
9 attaches in a jury trial when the jury is empaneled. George, 160 Wn.2d at  
10 742.

11 [T]he guaranty against double jeopardy protects against multiple  
12 punishments for the same offense. Whalen v. United States, 445 U.S. 684,  
13 688, 100 S.Ct. 1432, 1436, 63 L.Ed.2d 715 (1980). Within constitutional  
14 constraints, the legislative branch has the power to define criminal conduct  
15 and assign punishment for such conduct. Whalen at 689, 100 S.Ct. at  
16 1436. Therefore, the question whether punishments imposed by a court,  
17 following conviction upon criminal charges, are unconstitutionally  
18 multiple cannot be resolved without determining what punishments the  
19 legislative branch has authorized. Whalen at 688, 100 S.Ct. at 1435. The  
20 review of these sentences is limited to assuring that the court did not  
21 exceed its legislative authority by imposing multiple punishments for the  
22 same offense. Albernaz v. United States, 450 U.S. 333, 344, 101 S.Ct.  
23 1137, 1145, 67 L.Ed.2d 275 (1981) (citing Brown v. Ohio, 432 U.S. 161,  
24 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977)).

1 In examining whether the Legislature intended to authorize  
2 multiple punishments for violations arising from the same offense, we  
3 start with the language of the statutes themselves. See *Albernaz*, 450 U.S.  
4 at 336, 101 S.Ct. at 1141; *Birgen*, 33 Wash.App. at 8, 651 P.2d 240.

5 If the statutes do not expressly allow for convictions for each crime arising  
6 out of the same act, the analysis turns to the statutory construction to  
7 determine whether the two statutory offenses may be punished  
8 cumulatively. See *Albernaz*, 450 U.S. at 337, 101 S.Ct. at 1141.

9 Under the "same evidence" rule of construction which the Supreme  
10 Court of Washington adopted in 1896, the defendant's double jeopardy  
11 rights are violated if he or she is convicted of offenses that are identical  
12 both in fact and in law. *Johnson*, 96 Wash.2d at 933, 639 P.2d 1332; *State*  
13 *v. Roybal*, 82 Wash.2d 577, 582, 512 P.2d 718 (1973) (quoting *State v.*  
14 *Reiff*, 14 Wash. 664, 667, 45 P. 318 (1896)). However, if each offense, as  
15 charged, includes elements not included in the other, the offenses are  
16 different and multiple convictions can stand. *Vladovic*, at 423, 662 P.2d  
17 853, cited in *In re Fletcher*, 113 Wash.2d 42, 49, 776 P.2d 114 (1989). In  
18 order to be the "same offense" for purposes of double jeopardy the  
19 offenses must be the same in law and in fact. If there is an element in each  
20 offense which is not included in the other, and proof of one offense would  
21 not necessarily also prove the other, the offenses are not constitutionally  
22 the same and the double jeopardy clause does not prevent convictions for  
23 both offenses. *Vladovic*, at 423, 662 P.2d 853, cited in *Fletcher*, 113

1 Wash.2d at 47, 776 P.2d 114. Washington's "same evidence" test is very  
2 similar to the rule set forth in Blockburger v. United States, 284 U.S. 299,  
3 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). The applicable rule is that  
4 where the same act or transaction constitutes a violation of two distinct  
5 statutory provisions, the [125 Wn.2d 778] test to be applied to determine  
6 whether there are two offenses or only one, is whether each provision  
7 requires proof of a fact which the other does not. Blockburger, at 304, 52  
8 S.Ct. at 182.

9 Here, the statute does not expressly exempt the crimes Theft of  
10 Motor Vehicle and Possession of Stolen Motor Vehicle. Therefore, an  
11 analysis of the facts is needed. The theft of motor vehicle occurred when  
12 the vehicle was taken from the barn in Stabler, WA. From that point  
13 forward the vehicle is stolen. Regardless if abandoned, set afire or given  
14 away it has been stolen. Here, as recited earlier, the jury heard that the  
15 vehicle was transported from one town to a powerline road outside another  
16 where the defendant is seen in the motorhome as it sits there with a dead  
17 battery. (RP 122). After being observed by the witness Tina Anderson  
18 who knows the defendant and works for the Sheriff's Office the defendant  
19 is observed coasting the stolen motorhome without power down the  
20 powerline road, (RP 123). This incident occurred on February 21, 2016.  
21 (RP 123-124). The vehicle is subsequently discovered in a remote area in  
22 another town stored under a tarp next to a residence and recovered by Law  
23 enforcement on February 26, 2016. (RP 71-74 and 149-150). During the  
24 intervening five days from when the defendant is first seen in possession

1 of the stolen motorhome the defendant moves the motorhome from one  
2 town to another and hides the motorhome so as not to be detectable.  
3 These actions are occurring after the initial theft of the motorhome has  
4 occurred and are done from the state's perspective to continue to deprive  
5 the true owner of the property rightful possession. Under the appellant's  
6 theory once a theft has occurred any all actions taken subsequently by the  
7 party that thieved the property are subsumed by the initial act and no  
8 further crimes can be charged. While this may prove true in the period  
9 directly following the theft and the actions that make up the act of the  
10 initial theft. Here, we are dealing with days and miles from the location of  
11 the initial theft. These actions constitute separate and distinct crimes  
12 which were properly charged.

13 Double jeopardy and merger do not apply accordingly.

14 4. Merger of the charges

15 Issues of merger are addressed above.

16 5. The Jury instructions were improper.

17 Generally, the court will not review an error raised for the first  
18 time on appeal. RAP 2.5(a); State v. Kalebaugh, 183 Wn.2d 578, 583, 355  
19 P.3d 253 (2015). One exception to the general rule is if the error is a  
20 "manifest error affecting a constitutional right." RAP 2.5(a)(3);  
21 Kalebaugh, 183 Wn.2d at 255-56. "Accordingly, an appellant may raise an  
22 error for the first time on appeal if he or she demonstrates (1) that the error  
23 is manifest and (2) that the error is truly of constitutional dimension." In re  
24 Det. of Brown, 154 Wn.App. 116, 121, 225 P.3d 1028 (2010). The court

1 reviews challenged jury instructions de novo, in the context of the  
2 instructions as a whole. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d  
3 1241 (2007), asking whether they allowed the parties to argue their case  
4 theories, did not mislead the jury, and properly informed the jury of the  
5 applicable law. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213  
6 (2005).

7 WPIC 79.02 Wrongfully Obtains—Exerts Unauthorized  
8 Control—Definition states:

9 **[Wrongfully obtains means to take wrongfully the property or  
10 services of another.]**

11 **[To exert unauthorized control means, having any property or  
12 services in one's possession, custody, or control, as a(nature of  
13 custodian), to secrete, withhold, or appropriate the same to his or her  
14 own use or to the use of any person other than the true owner or  
15 person entitled thereto.]**

16 **[To exert unauthorized control [also] means, having any property or  
17 services in one's possession, custody, or control as partner, to secrete,  
18 withhold, or appropriate the same to his or her own use or to the use  
19 of any person other than the true owner or person entitled thereto,  
20 where such use is unauthorized by the partnership agreement.]**

21 Jury Instruction No. 14, which encapsulates the above WPIC for  
22 this case, as given to the Jury, stated:

23 **Wrongfully obtains means to take wrongfully the property or services  
24 of another.**

1 **To exert unauthorized control means, having any property or services**  
2 **in one's possession, custody, or control, as a nature of custodian, to**  
3 **secrete, withhold, or appropriate the same to his or her own use or to**  
4 **the use of any person other than the true owner or person entitled**  
5 **thereto.**

6 Here, there was no objection to instruction 14 during the Jury  
7 instruction conference at trial (RP 141). The issued raised on appeal is to  
8 the definition of wrongfully obtain as defined in the instruction and argued  
9 by counsel. This issue does not rise to the level of a constitutional  
10 dimension violation and as such has not been preserved for appeal and is  
11 not appropriately before the court.

12 However, if the court were to review the instruction the initial  
13 definition given in instruction 14 is correct and the definition of exert  
14 unauthorized control is correct as well. The state did in-artfully leave a  
15 parenthetical that refers to a custodian nature. That inclusion does not  
16 restrict argument or any theory of the case argued by prosecution or  
17 defense.

18 6. The admission of CAD logs was improper.

19 The Confrontation Clause bars "admission of testimonial  
20 statements of a witness who did not appear at trial unless he was  
21 unavailable to testify, and the defendant had a prior opportunity for  
22 cross-examination." Crawford v. Washington, 541 U.S. 36, 53-54, 124  
23 S.Ct. 1354, 158 L.Ed.2d 177. Whether a statement is testimonial, in the  
24 case of non-expert statements depends on the declarant's purpose in

1 making the statement. *Davis v. Washington*, 126 S.Ct. 2266, 547 U.S.  
2 813 (2006). A statement is testimonial when " the primary purpose of the  
3 interrogation is to establish or prove past events potentially relevant to  
4 later criminal prosecution." *Id.* That is, a statement is testimonial if it is  
5 "solely directed at establishing the facts of a past crime, in order to identify  
6 (or provide evidence to convict) the perpetrator." *Id.* at 826.

7 ER 802 states: Hearsay is not admissible except as provided by  
8 these rules, by other court rules, or by statute.

9 ER 803 states in relevant part: (a) Specific Exceptions. The  
10 following are not excluded by the hearsay rule, even though the declarant  
11 is available as a witness: ... (6) Records of Regularly Conducted Activities  
12 (Reserved. See 5.45).

13 RCW 5.45.020 Business records as evidence states:

14 **A record of an act, condition or event, shall in so far as relevant, be**  
15 **competent evidence if the custodian or other qualified witness testifies**  
16 **to its identity and the mode of its preparation, and if it was made in**  
17 **the regular course of business, at or near the time of the act, condition**  
18 **or event, and if, in the opinion of the court, the sources of**  
19 **information, method and time of preparation were such as to justify**  
20 **its admission.**

21 RCW 5.45.010 "Business" defined states:

22 **The term "business" shall include every kind of business, profession,**  
23 **occupation, calling or operation of institutions, whether carried on for**  
24 **profit or not.**

1 Nonconstitutional error in admitting hearsay evidence requires  
2 reversal only if there is a reasonable probability that the error materially  
3 affected the outcome of the trial. State v. Neal, 144 Wn.2d 600, 611, 30  
4 P.3d 1255 (2001) (quoting State v. Smith, 106 Wn.2d 772, 780, 725 P.2d  
5 951 (1986)). Improper admission of evidence is harmless if the evidence is  
6 of minor significance when compared to the evidence as a whole. Neal,  
7 144 Wn.2d at 611.

8 Here, the CAD logs were admitted to establish the time of  
9 reporting of the crime by the victims which had testified earlier in the case.  
10 (RP 98, 108, 155-156). The CAD logs were presented to establish a  
11 foundational issue of time and were generated as part of the Skamania  
12 County Sheriff's Office day to day log keeping and not prepared for  
13 litigation purposes as testified to by Deputy Steve Rasmussen. (RP 154).  
14 The CAD logs are not testimonial fall under an exception to the hearsay  
15 rule. Additionally, the information provided by the logs as to the  
16 allegations already existed pursuant to testimony of witnesses and the  
17 addition of the time of reporting was of de minimis impact on the finding  
18 of guilt when looking at the totality of the evidence.

19 7. The State committed prosecutorial misconduct by misstating the  
20 law.

21 The prosecutor may not misstate the law to the jury. State v.  
22 Swanson, 181 Wn.App. 953, 959, 327 P.3d 67 (2014), review denied, 181  
23 Wn.2d 1024 (2015). We view prosecutor's allegedly improper remarks in  
24 the context of the entire argument, the issues in the case, the evidence

1 addressed in the argument, and the instructions given to the jury. Yates,  
2 161 Wn.2d at 774.

3 A prosecutor has wide latitude during closing arguments to draw  
4 reasonable inferences from the evidence and to express those inferences to  
5 the jury. Reed, 168 Wn.App. at 577. RCW 9A.04.110(12) explicitly states,  
6 "Malice may be inferred from an act done in willful disregard of the rights  
7 of another, or an act wrongfully done without just cause or excuse." [3]  
8 (Emphasis added).

9 On a claim of prosecutorial misconduct, the appellant must show  
10 that the prosecutor's conduct was both improper and prejudicial. State v.  
11 Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). Once a defendant has  
12 demonstrated that the prosecutor's conduct was improper, the court shall  
13 evaluate the defendant's claim of prejudice under two different standards  
14 of review, depending on whether the defendant objected to the misconduct  
15 at trial. Emery, 174 Wn.2d at 760. If the defendant did not object at trial,  
16 he is deemed to have waived any error unless the prosecutor's misconduct  
17 was so flagrant and ill-intentioned that an instruction could not have cured  
18 the resulting prejudice. Emery, 174 Wn.2d 760-61. When there is no  
19 objection, the court shall apply a heightened standard requiring the  
20 defendant to show that "(1) 'no curative instruction would have obviated  
21 any prejudicial effect on the jury' and (2) the misconduct resulted in  
22 prejudice that 'had a substantial likelihood of affecting the jury verdict.'"  
23 Emery, 174 Wn.2d at 761 (quoting State v. Thorgerson, 172 Wn.2d 438,  
24 455, 258 P.3d 43 (2011)).

1 Here, the appellant takes issue with again the jury instruction  
2 regarding exerting unauthorized control. The state has addressed that  
3 issue above. In the transcript of proceedings the state uses the term  
4 “consciousness of guilt” on three occasions during closing (RP 178, 181,  
5 184). On two occasions the transcript reflects the state used the term  
6 “consciousness of guilty”. (RP 181, 184). Having used the term of art  
7 “consciousness of guilt” regularly over the years the state believes the  
8 transcript to be in error in the two instances where “guilty” is shown. The  
9 defense makes reference to the states argument in their closing on and  
10 refers to consciousness of guilt twice (RP 192). The appellant’s  
11 characterization that the state’s argument that defendant’s actions are  
12 consciousness of guilty by virtue of possession of the motorhome is  
13 incorrect. The state appropriately argued that the defendant’s actions as  
14 seen by multiple witnesses possessing the vehicle in remote areas, leaving  
15 after being seen with the vehicle in a fashion that was unsafe and peculiar  
16 due the disabled nature of the vehicle and subsequently storing the vehicle  
17 in a manner and place that hid identifying attributes of the stolen vehicle  
18 were consciousness of guilt and evidence of knowledge that the vehicle  
19 was stolen and the by virtue of the time line, of the discovery of the  
20 burglary and theft and the locations of the defendant’s possession of the  
21 motorhome that the defendant could reasonably be inferred to be the  
22 individual that stole the motor vehicle. The argument is appropriate and  
23 the state drew appropriate inferences from the testimony.

8. Ineffective assistance of counsel.

1  
2 Claims of ineffective assistance of counsel are reviewed de novo.  
3 State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail  
4 on an ineffective assistance of counsel claim, the appellant must show  
5 both that 1) defense counsel's representation was deficient and 2) the  
6 deficient representation prejudiced the defendant. Strickland v.  
7 Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984);  
8 State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).  
9 Representation is deficient if after considering all the circumstances, it  
10 falls below an objective standard of reasonableness. Grier, 171 Wn.2d at  
11 33. Prejudice exists if there is a reasonable probability that except for  
12 counsel's errors, the result of the proceeding would have been different.  
13 Grier, 171 Wn.2d at 34. The remedy for a lawyer's ineffective assistance is  
14 to put the defendant in the position in which he or she would have been  
15 had counsel been effective. State v. Crawford, 159 Wn.2d 86, 107-08, 147  
16 P.3d 1288 (2006).

17 Here, the state has addressed the issue of the Jury instruction and  
18 reiterates that the instruction as provided was proper. Further, trial  
19 counsel did propose jury instructions (Clerk's Designation of Papers #25).

20 The state has further addressed the alleged improper argument.  
21 The state made appropriate argument drawing reasonable inference from  
22 the testimony. Defense counsel addressed that argument in closing as  
23 discussed above.

24 Ultimately, the defendant was acquitted of Burglary in the Second

1 Degree and the Jury hung on trafficking in Stolen property in the First  
2 Degree, base upon the representation of counsel.

3 9. Imposition of Legal Financial Obligations after Trial.

4 The court is required to make and individualized inquiry as to the  
5 ability of the defendant to pay legal financial obligations. At sentencing  
6 the trial judge asked the appellant how he would be employed upon  
7 release. The appellant responded that he was a mechanic and that he had a  
8 number of shops he can work at. Based upon that representation the court  
9 ordered a \$1,000.00 emergency response fund payment, a \$500 victim  
10 penalty assessment, a \$200 filing fee, \$100 DNA fee. The court further  
11 ordered court appointed attorney fees of \$1,000, reduced from the \$2,000  
12 amount reported to the court. The court further ordered that the legal  
13 financial obligations would be paid at \$50 per month beginning two years  
14 from sentencing. The appellant was sentenced to a total of 18 months  
15 prison.

16 The court appropriately inquired of the appellant future ability to  
17 pay and set terms for payment of legal financial obligations based upon the  
18 reported ability.

19 10. Waiver of Appellate Costs.

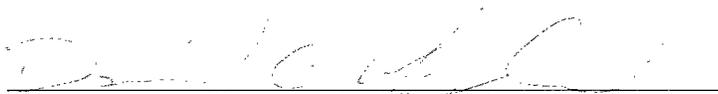
20 As stated above the appellant indicated an ability to be employed  
21 and responsible fiscally for the legal financial obligations arising from this  
22 case. Based upon that representation the state asks the court impose costs  
23 as appropriate under statute and rule.

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**IV. CONCLUSION**

The state respectfully submits that the evidence elicited at trial forms a firm basis for a rational trier of fact to find beyond a reasonable doubt that the appellant committed the crime of Theft of Motor Vehicle and Trafficking in Stolen property in the second Degree. Additionally, the state respectfully submits that the charges as filed do not violate double jeopardy protections nor should they merge as the acts that make up the alleged crimes are separate and distinct in time and location. The CAD logs submitted were done so as appropriate exceptions to hearsay. The state appropriately argued it's case based upon reasonable inferences drawn from the testimony. The defendant received adequate counsel who defended his interests in a robust and ethical manner. Finally, that the defendant indicated after be inquired of that he has the future ability to pay based upon his experience, training and connections in the automotive care profession and expects to be employed upon release and should be financially responsible for the appropriate components of the legal proceedings and the legal financial obligations as ordered by the trial court.

RESPECTFULLY SUBMITTED this 25<sup>th</sup> day of DECEMBER, 2016.

  
\_\_\_\_\_  
DANIEL C. MCGILL, WSBA# 39129  
Skamania County Deputy Prosecuting Attorney

**SKAMANIA COUNTY PROSECUTOR**

**December 20, 2016 - 3:10 PM**

**Transmittal Letter**

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Court of Appeals Case Number: 49171-1

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