NO. 49552-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRITT ANDERSON
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Gary B. Bashor, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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ASSIGNMENTS OF ERROR

1. Anderson was denied due process where the state failed to prove beyond a reasonable doubt an essential element of the crime of possession of stolen property.

2. Anderson was denied due process by the submission of a to-convict jury instruction which omitted an essential element of the crime of bail jumping.

3. Anderson was denied equal protection by the state charging the general crime, possession of stolen property rather than the concurrent specific crime, possession of a stolen motor vehicle.

Issues Presented on Appeal

1. Was Anderson denied due process where the state failed to prove beyond a reasonable doubt the essential element of the crime of possession of stolen property, that Anderson knew the property he possessed was stolen?

2. Was Anderson denied due process by the submission of a to-convict jury instruction which omitted the essential element of the crime of bail jumping identifying the nature of the underlying crime?

3. Was Anderson denied equal protection by the state charging the general crime, possession of stolen property,

rather than the concurrent specific crime, possession of a stolen motor vehicle, where Anderson was charged with possessing a motor vehicle in the form of a front loader?

B. STATEMENT OF THE CASE

a. Procedural Facts.

Britt Anderson was charged with possession of stolen property in the first degree contrary to RCW 9A.56.150. CP 12-13. He was also charged with bail jumping contrary to RCW 9A.76.170(1). Anderson was convicted by a jury on both counts. CP 12-13. This timely appeal follows. CP107.

b. Substantive Facts.

(i) Possession Stolen Property.

On January 8, 2016, a sales representative from Star Rentals noticed that one of the gates surrounding the lot housing the construction rental equipment was removed from its hinges. RP 55-56. On January 11, 2016, sales representative Gary Halbrook noticed that a Takeuchi track loader was missing from the Star Rental lot. RP 57. Holbrook called 911 and reported the track loader missing and estimated its value to be between $25,000 and $30,000. The Takueuchi was missing with the key, which is needed to operate the vehicle. RP 58. Star Rentals places Star Rental decals on all of their rental equipment. RP 83.

On February 11, 2016, based on a telephone call from Joe Cammara, a friendly competitor, Brian Rush travelled with a sales

associate Jared Pipkin to 411 Douglas Street, Anderson's property. RP 70-72. Rush called 911 and Deputy O'Neill responded. RP 70, 134, 136. When Pipkin and Rush arrived at the Anderson property, they could hear a piece of diesel equipment running that sounded similar to a front loader RP 72.1. Neither saw the machine from the street but when Rush walked around a building and looked over a fence, he saw a front loader being operated by a person he could not identify. RP 73-76. Halbrook and Pipkin did not know Anderson or his co-defendant Samuel Skondin. RP 59-60, 78. Rush had no idea of Anderson or Skondin's involvement with the Star Rental front loader and could not positively identify the front loader as the one missing from Star Rentals. RP 78, 81-82.

When Deputy O'Neill travelled to the Anderson property he too could not see a front loader from the street, but heard a diesel engine running. RP 136. O'Neill walked down an adjacent dirt path where he saw a front loader being operated by Skondin in a patch of blackberry bushes. RP 137. O'Neill testified that he saw Anderson come out of his house and run over to the blackberry bushes. O'Neill also saw the vehicle being driven across the property into some blackberry bushes. RP 138-40. O'Neill heard the vehicle engine die and saw Skondin return through the fence. RP 140-41.

Cowlitz County deputy Garrett Spencer also arrived at 411

1 The witnesses refer to the stolen vehicle interchangeably as a "front loader" and a "track loader".

Douglass Street on February 9, 2016, and met both Anderson and Skondin who came out to investigate Deputy Spencer's and Rush's presence. RP 79, 81, 97.

O'Neill questioned Anderson before he saw the front loader. RP 141. Anderson explained that he had just purchased the front loader in Vancouver on February 8th or 9th from a Craigslist ad. RP 143-44. Anderson indicated that he had a bill of sale, but was unable to find it until after his arrest. RP 144-45; 276-80; Exhibits 26, 27A.

Anderson's wife, Leah Skondin, explained that Anderson buys and sells used vehicles and motorcycles and she is in charge of the paperwork. RP 229-30. Ms. Skondin places advertisements in Craigslist for her husband who is not good with computers or paperwork. She also monitors the ads and maintains the bills of sale from the purchases. RP 230-31. Ms. Skondin explained that the Craigslist ads expire automatically. RP 233.

Anderson bought and repaired an Aprilia Mana 850 motorcycle around Christmas time to be sold at a later time. RP 232-33. Ms. Skondin originally posted the Aprilia for sale for $6000 based on the high Blue Book value, but after not receiving any responses reduced the price to $3500. RP 253-54, 271. Ms. Skondin was not privy to the negotiations for the front loader. RP 235.

After re-posting the Aprilia for sale and getting responses, Anderson put the Aprilia on his father-in-law's trailer and returned on Sunday before dinner with the front loader parked on the street. RP

235-37, 243. Anderson priced front loaders before making the trade and determined from Craigslist and eBay that front loaders ranged in value form $5,000-$50,000. RP 301. Ultimately, Anderson paid the equivalent of $8000, valuing the Aprilia at $6000, and providing $2000 in cash. RP 256, 271-73, 351, 355.

The front loader remained on the street in front of the house on the trailer until Anderson's father-in-law told him to take it off the trailer because it was too heavy for that trailer. RP 263-64. After Anderson returned home with the front loader he placed the bill of sale on the table where Ms. Skondin retrieved it and placed it on top of the refrigerator for later filing. RP 238-40. Ms. Skondin is the record keeper and did not mention that she placed the bill of sale on the top of the refrigerator. RP 239-40.

During trial, Anderson provided the bill of sale and the seller's "power of attorney release of interest over, uh -- uh, a registered owner's vehicle". RP 277; Exhibit 26. The bill of sale was hand written and dated February 17, 2016, even though the trade occurred on February 9, 2016. The seller did this for Anderson because Anderson needed time to transfer the title paper work and did not want to have to pay a penalty for late registration. RP 276-80; Exhibit 27A. Anderson also provided the court with a copy of the Craigslist ad from Ms. Skondin's Yahoo account. RP 251-53; Exhibit 28.

Before making the trade, Anderson ran the VIN to make sure the front loader was not stolen. RP 276. The VIN was not reported as

stolen, but the police later decided that the VIN numbers had been altered and that the altered numbers matched the VIN for the front loader stolen from Star Rentals. RP 81, 111, 175. There were also no decals or stickers identifying the front loader as belonging to Star Rentals. RP 263. There was no damage to the vehicle when it was returned to Star Rental. RP 63.

(ii) Bail Jumping.

In relevant part, the state charged Anderson with bail jumping as follows:

The defendant, in the County of Cowlitz, State of Washington, on or about 4/11/2016, being charged with a crime that is classified as a **Class B or C felony**, to-wit: Possession of Stolen Property in the First Degree….." (Emphasis Added) CP 12-13.

The to-convict jury instruction did not contain the element of possession of stolen property but rather referred to a "**Class B or C felony**" as follows:

> (1) That on or about April 11, 2016, the defendant failed to appear before a court.
>
> (2) That the defendant was charged with a **Class A or B felony.**
>
> (3) That the defendant had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court.

(Emphasis added) CP 60-86 (JI 21).

Bail jumping was defined in relevant part in jury instruction as

having "knowledge of the requirement of a subsequent personal appearance **before any court o**f this State while charged with a **Class B or C felony**." (Emphasis added) CP 60-68.

Anderson requested permission to present a statutory defense to bail jumping based on his autistic son destroying the calendar where he noted his missed court date. RP 39-48. The court denied the motion based on its belief that the facts did not support the instruction, but nonetheless sent the statutory defense instruction to the jury. RP 47-48; CP 60-68.

Anderson missed his April 11, 2016, court date but the court did not issue a warrant, and Anderson appeared the next day to quash the warrant. RP 89-93, 89-92.

C. ARGUMENT

1. STATE FAILED TO PROVE THE ESSENTIAL ELEMENTS OF POSSESSION OF STOLEN PROPERTY.

a. Insufficient Evidence of Knowledge Property Was Stolen.

Anderson's conviction for possession of stolen property under RCW 9A.56.150 should be reversed because the state failed to prove beyond a reasonable that Anderson knew the front loader was stolen.

In every criminal prosecution, due process requires the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. *In re Winship* 397 U.S. 358, 364, 90 S.Ct. 1068, 25

L.Ed.2d 368 (1970). In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution and inquires whether the evidence was sufficient for a rational trier of fact to find guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), *overruled on other grounds by Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *State v. Green*, 94 Wn.2d 216, 220–21, 616 P.2d 628 (1980), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006).

More than a mere scintilla of evidence is needed to meet the beyond a reasonable doubt standard; "there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved." *State v. Miller*, 60 Wn. App. 767, 772, 807 P.2d 893 (1991), *abrogated on other grounds in State Roggenkamp,* 153 Wn.2d 614, 106 P.3d 196 (2005).

Although circumstantial evidence can be adequate, the existence of a fact cannot rest on guess, speculation, or conjecture. "This rule is even more essential in criminal cases where the evidence is entirely circumstantial." *State v. Golladay*, 78 Wn.2d 121, 130, 470 P.2d 191 (1970), *overruled on other grounds by State v. Arndt,* 87 Wn.2d 374, 553 P.2d 1328 (1976). In *State v. Liles*, 11 Wn. App. 166, 521 P.2d 973 (1974), the court explained:

> When substantial evidence is present, the drawing of reasonable inferences therefrom and the doing

> of some conjecturing on the basis of such evidence is permissible and acceptable. If, however, the necessity for conjecture results from the fact that the evidence is merely scintilla evidence, then the necessity for conjecture is fatal.

Liles, 11 Wn. App. at 171 (*citation omitted*); *accord, State v. Harris*, 14 Wn. App. 414, 417–18, 542 P.2d 122 (1975).

To prove the crime of unlawful possession of stolen property the state had to prove beyond a reasonable doubt that Mr. Anderson "possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds five thousand dollars in value." RCW 9A.56.150.

"Possession" is defined as "knowing" possession. RCW 9A.56.140(1). Accordingly, knowledge is an essential element of possession of stolen property. RCW 9A.56.140(1); *State v. Porter*, 186 Wn.2d 85, 93, 375 P.3d 664 (2016); *State v. Moavenzadeh,* 135 Wn.2d 359, 362, 956 P.2d 1097 (1998) (possession of stolen vehicle); *State v. McPhee* 156 Wn. App. 44, 62, 230 P.3d 284, *rev. denied*, 169 Wn.2d 1028 (2010), *citing State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); RCW 9A.56.140, .150.

"Bare possession of stolen property is insufficient to justify a conviction," for possession of a stolen firearm. *McPhee* 156 Wn. App. at 62. Knowledge may be proven if there is information from which a reasonable person would conclude the fact at issue. *State v. Shipp*, 93 Wn.2d 510, 514, 516, 610 P.2d 1322 (1980).

For example in *United States v. Howard*, 214 F.3d 361, 364 (2d

Cir. 2000) the Second Circuit explained that the issues of illegal possession of a firearm do not establish knowledge that the purchased weapon was stolen. The Court reasoned:

> [T]he fact that appellant may have known that as a convicted felon he could not lawfully obtain a firearm does not tend to prove that he had reason to know that the gun in question was stolen. We have no basis on this record or on the arguments made to us to opine that such a significant portion of guns sold on the 'black market' are stolen that a purchaser would likely share such knowledge and believe that any particular gun sold on that market was even highly likely to have been stolen.

Howard, 214 F.3d at 364.

The definition of "possession" is the same for possession of a firearm and possession of stolen property: both must be knowingly. RCW 9A.56.150; RCW 9A.56.310. Possession of firearm cases are helpful in understanding the type and quantum of evidence needed to establish a defendant knew the item he possessed was stolen. - it must be more than a scintilla to establish the knowledge prong. *McPhee* 156 Wn. App. 44, 62.

For example, for possession of recently stolen property, inconsistent or improbable statements about how the item came into the possession of the person can be considered slight additional evidence sufficient to establish the knowledge element. *State v. Pisauro*, 14 Wn. App. 217, 220–21, 540 P.2d 447 (1975); *State v. Withers*, 8 Wn. App. 123, 128, 504 P.2d 1151 (1972), *citing State v. Portee*, 25 Wn.2d 246, 170 P.2d 326 (1946). *See also*, *State v. Ladely,* 82 Wn.2d 172, 174-76,

509 P.2d 658 (1973) (evidence sufficient to establish guilt where defendant gave police three different versions about his ownership of stolen antique gun).

Likewise, familiarity with the location of the theft when combined with a dubious explanation has also been held sufficient to show knowledge that property was stolen. *State v. Smyth*, 7 Wn. App. 50, 499 P.2d 63 (1972). For example, Smyth admitted he had visited the home the property was stolen from on several occasions. *Smyth*, 7 Wn. App at 51–52. There was also evidence attempted to obtain a fictitious bill of sale while he was in jail awaiting trial. Id. at 52–54. On appeal, the court held that these facts, taken together, were sufficient to submit the question of guilt to the jury. *Smyth*, 7 Wn. App at 53–54.

Here, there was no evidence that Mr. Anderson was familiar with the location of the theft. None of the Star Rental employees knew Anderson and none had any idea how he came to possess the front loader. RP 69-70, 78. Mr. Anderson did not recently visit Star Rentals and there was no evidence Mr. Anderson had any connection with anyone involved with Star Rentals.

Mr. Anderson told the detective he purchased/traded for the front loader from a person selling it on Craigslist. RP 143-46, 152-53. Mr. Anderson gave the man his valuable Aprilia motorcycle worth approximately $6000 plus $2000 dollars for the front loader RP146, 153. Mr. Anderson explained that he is not computer savvy and that his wife handles the bills of sale and maintains the Craigslist ads. RP 232, 238.

Ms. Skondin explained that Craigslist ads expire on their own and are often difficult to track once expired. RP 126, 233. This explanation for the purchase of the front loader was uncontroverted by evidence. The state did speculate but speculation is not evidence. *Liles*, 11 Wn. App. at 171.

After Mr. Anderson purchased the front loader, he moved it using his father-in-law's trailer and left it parked in full view on the street until his father-in-law told Mr. Anderson to unload the front loader to avoid damaging the trailer. RP 260-61, 264. There was no evidence that Mr. Anderson attempted to conceal the front loader. Id. When the police arrived and questioned Mr. Anderson about whether he had a front loader on his property, he answered in the negative, which was accurate because the front loader was parked on the adjacent neighbor's property. RP 98-99, 141-43, 174-75.

When the police learned from the rental company that a front loader was stolen they did not have any information on the identity of the thief. Also, Mr. Anderson buying an item from an unknown person is not proof he knew it was stolen. *Thomas v. State*, 270 Ga. App. 181, 182, 606 S.E.2d 275 (2004) (conviction for possession of stolen firearm reversed because only evidence of knowledge was that appellant had purchased the pistol for $120 from someone he did not know).

Mr. Anderson's explanation of the purchase was un-contradicted. The mere fact that Mr. Anderson purchased a front loader from a person selling on Craigslist is not proof that he knew the front loader was stolen. *Thomas*, 270 Ga. App. at 182; *Howard*, 214 F.3d at 364.

This sufficiency issue does not rest on the jury believing or disbelieving Mr. Anderson's explanation because the jury was entitled to disbelieve him. However, whether or not the jury believed Mr. Anderson had no bearing on the fact that the state failed to provide sufficient evidence from which to infer beyond a reasonable doubt that Mr. Anderson knew that the front loader was stolen.

The circumstantial evidence in this case did not in any manner establish beyond a reasonable doubt that Anderson knew the front loader was stolen. The evidence simply established that Anderson was in possession of the stolen front loader without any knowledge that it was a stolen vehicle. Viewing the evidence in the light most favorable to the state does not permit an inference that the state proved that Anderson knew the front loader was stolen. Accordingly, this conviction must be reversed and the matter remanded for dismissal with prejudice.

b. Other than a motor vehicle.

Mr. Anderson was charged under RCW 9A.56.150 (possession of stolen property) which expressly excludes motor vehicles. Id. A "motor vehicle" is defined in many statutes. RCW 46.04.320 defines "motor vehicle" in relevant part as":

> "Motor vehicle" means every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails.... An electric personal assistive mobility device is not considered a motor vehicle. A power wheelchair is not considered a motor vehicle. A golf cart is not considered a motor vehicle, except for the purposes of chapter 46.61 RCW.

Id. Motor vehicle is defined in RCW 46.25.010(14) as follows:

> (14) "Motor vehicle" means a vehicle, machine, tractor, trailer, or semitrailer propelled or drawn by mechanical power used on highways, or any other vehicle required to be registered under the laws of this state, but does not include a vehicle, machine, tractor, trailer, or semitrailer operated exclusively on a rail.

Id. "Vehicle" is defined in relevant part as:

> "Vehicle" includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles. "Vehicle" does not include power wheelchairs or devices other than bicycles

> moved by human or animal power or used exclusively upon stationary rails or tracks. ….

RCW 46.04.670. Under RCW 46.04.551,2 "earth moving equipment " is considered a "vehicle". Id. The definition of "motor" vehicle has changed little since 1929. That version provided:

> '(a) 'Vehicle.' Every device in, upon or by which any person or property is or may be transported or drawn upon a public highway excepting devices moved by human power or used exclusively upon stationary rails or tracks.'(b) 'Motor Vehicle.' Every vehicle, as herein defined, which is self-propelled.'

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2 (1) "Special highway construction equipment" means any vehicle that is (a) designed and used primarily for the grading of highways, the paving of highways, earth moving, and other construction work on highways, (b) not designed or used primarily to transport persons or property on a public highway, and (c) only incidentally operated or moved over the highway.
(2) "Special highway construction equipment" includes, but is not limited to, road construction and maintenance machinery that is designed and used for the purposes described under subsection (1) of this section, such as portable air compressors, air drills, asphalt spreaders, bituminous mixers, bucket loaders, track laying tractors, ditchers, leveling graders, finishing machines, motor graders, paving mixers, road rollers, scarifiers, earthmoving scrapers and carryalls, lighting plants, welders, pumps, power shovels and draglines, and self-propelled and tractor-drawn earthmoving equipment and machinery, including dump trucks and tractor-dump trailer combinations that (a) are in excess of the legal width, (b) because of their length, height, or unladen weight, may not be moved on a public highway without the permit specified in RCW 46.44.090 and are not operated laden except within the boundaries of the project limits as defined by the contract, and other similar types of construction equipment, or (c) are driven or moved upon a public highway only for the purpose of crossing the highway from one property to another, provided that the movement does not exceed five hundred feet and the vehicle is equipped with wheels or pads that will not damage the roadway surface.

Remington's Revised Statutes, chapter 3 of Title 41, §§ 6362–1 to 6362–57. Section 2.

While the language is slightly different, these statutes consider any self-propelled vehicle that can be used on a public highway to be a "motor vehicle" unless used exclusively on tracks. Id; RCW 46.04.320; RCW 46.04.670; RCW 46.25.010(14). *State v. Barnes*, 196 Wn. App. 261, 270-71, 382 P.3d 729 (2016); *Peterson v. King County*, 199 Wash. 106, 110, 112, 90 P.2d 729 (1939), (*affirmed on this point and declined to follow on other grounds in Bissell v. Seattle Vancouver Motor Freight*, 25 Wn.2d 68, 84, 168 P.2d 390 (1946)).

Analyzing the theft of a motor vehicle statute, RCW 46.04.320, Division three in *Barnes*, recently considered whether a riding lawn mower was a motor vehicle under RCW 46.04.320. *Barnes*, 196 Wn. App. at 270-71. In determining that the legislature did not intend a riding lawn mower to be a motor vehicle, the Court in *Barnes*, considered that a riding lawn mowers were not at issue when the theft of a motor vehicle statute was enacted because of a "rash of automobile thefts and because of the importance of a car in our mobile society." *Barnes*, 196 Wn.App. at 270-71.

The Court also noted that one does not need a driver's license to drive a lawn mower and a lawn mower cannot be used on a highway. *Barnes*, 196

Wn. App. at 271-73. Even if a front loader is a vehicle that may not need a license under RCW 46.20.025 it can be used on a highway because it is a "vehicle" as defined in RCW 46.04.551.

The Court in *Barnes*, relied on *Peterson* to distinguish a lawn mower from a piece of construction equipment on the basis that lawn mower was not used "upon the public highways for the transportation of persons, freight, produce, or any commodity." *Barnes*, 196 Wn. App. at 272, *citing Peterson*, 199 Wash. at 210. The Court in *Barnes* noted that unlike a lawn mower, a "grader was built and equipped in many respects like heavy duty trucks and was intended to be operated on highways in going and returning from places where it was employed in the task of grading." *Barnes*, 196 Wn. App. at 272, *citing Peterson*, 199 Wash. at 210.

A front loader is like a grader; it is built and equipped in many respects like heavy duty trucks and is intended to be operated on highways in going and returning from places where it is employed in the task of moving material. Id. The front loader in this case was self-propelled and there was no evidence presented that the front loader could not be used on a public highway.

Accordingly, the front loader is a motor vehicle which is by definition is excluded from the definition of possession of stolen property set forth in

RCW 9A.56.150. *Barnes*, 196 Wn. App. at 270-71 Because of this express exclusion from RCW 9A.56.150, it was impossible for the state to prove beyond a reasonable doubt the essential element of "stolen property". The remedy is dismissal with prejudice. *Green*, 94 Wn.2d at 216, 220–21.

2. UNDER THE EQUAL PROTECTION CLAUSE MR. ANDERSON COULD ONLY BE CHARGED WITH THE MORE SPECIFIC STATUTE UNLAWFUL POSSESSION OF A VEHICLE RATHER AND UNLAWFUL POSSESSION OF STOLEN PROPERTY.

Mr. Anderson was charged with possession of stolen property in the first degree contrary to RCW 9A.56.150 provides as follows:

> (1) A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property, **other than** a firearm as defined in RCW 9.41.010 or **a motor vehicle**, which exceeds five thousand dollars in value.

(Emphasis added) Id. Possession of a stolen motor vehicle is defined as:

> (1) A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.
>
> (2) Possession of a stolen motor vehicle is a class B felony.

RCW 9A.56.068.

When a specific statute proscribes conduct that is also prohibited by a more general statute, the "general-specific" rule of statutory construction requires the state to prosecute only under the more specific statute. *State v. Conte*, 159 Wn.2d 797, 803-04, 154 P.3d 194, *cert. denied*, 552 U.S. 992 (2007); *State v. Shriner*,101 Wn.2d 576, 580, 681 P.2d 237 (1984).

Here, if this Court believes that possession of a stolen front loader can form the basis of the stolen property element in the possession of stolen property charge, then possession of a stolen vehicle is a concurrent crime with possession of stolen property. *State v. Chase*, 134 Wn. App. 792, 800, 142 P.3d 630 (2006).

Criminal statutes are concurrent for Equal Protection purposes when every violation of the specific results in a violation of the general. *State v. Ou*, 156 Wn. App. 899, 902-03, 234 P.3d 1186 (2010); *State v Thomas,* 35 Wn. App. 598, 602, 668 P.2d 1294 (1983); *State v. Jessup*, 31 Wn. App. 304, 307, 641 P.2d 1185 (1982); *See* U.S. Const. Amend. XIV. In making this determination, the court considers the elements of the crimes not the underlying facts. *Ou*, 156 Wn. App. at 903.The rule is designed to promote equal protection of the laws by subjecting people committing the same misconduct to the same potential punishment. *Jessup*, 31 Wn. App. at 307-08.

If a prosecutor may elect which statute to charge based on unfettered whim or dislike for the particular offender, the state improperly controls the degree of punishment it wishes to impose on differently situated persons, for identical criminal conduct. *State v. State v. Cann*, 92 Wn.2d 193, 196, 595 P.2d 912 (1979), *superseded on unrelated statutory grounds in In re Taylor,* 105 Wn.2d 67, 70, 711 P.2d 345 (1985). Whether the specific statute contains elements not found in the general is irrelevant. *Shriner*, 101 Wn.2d at 580.

The Washington Supreme Court utilized this principle to vacate a conviction for second degree escape because the defendant's conduct was more properly prosecuted as a failure to return to work release. *State v. Danforth*, 97 Wn.2d 255, 643 P.2d 882 (1982). The Court pointed out that the failure to return to work release statute recognized a valid legislative distinction between the purposeful act of "going over a prison wall" and the situation where a person fails to return to work release when due. *Danforth*, 97 Wn.2d at 258.

Similarly, in *Thomas*, the prosecutor impermissibly charged the general crime of unlawful imprisonment over the specific crime of custodial interference. *Thomas*, 35 Wn. App. at 604. The Court held that this charging decision violated Thomas' equal protection in deciding whether to charge a

felony or a misdemeanor based upon identical criminal conduct. *Thomas*, 35 Wn. App. at 605.

If a front loader is a motor vehicle than the two statues are concurrent because one cannot commit possession of a stolen vehicle without also committing possession of stolen property. In enacting the possession of a stolen vehicle statute, the legislature recognized a valid legislative distinction between possession of a stolen motor vehicle from other property.

Here, the prosecutor was permitted to charge the general over the specific crime, ignoring the valid legislative distinction between stolen property and a stolen vehicle in violation of Anderson's equal protection rights. This was reversible error under the 14th Amendment. *Danforth*, 97 Wn.2d at 258;*Thomas*, 35 Wn. App. at 605. The remedy is dismissal.

3. MR. ANDERSON'S CONSTITUTIONAL RIGHT TO DUE PROCESS WAS VIOLATED BECAUSE THE JURY INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF BAIL JUMPING.

The "to convict" instruction must contain all essential elements of the charged crime. *State v. Williams*, 162 Wn.2d 177, 186-87, 170 P.3d 30 (2007); *State v. Mills*, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). A fundamental

component of due process is that the jury find every essential element of the crime beyond a reasonable doubt. This cannot happen unless the jury is properly instructed on every essential element. U.S. Const. Amends. VI, XIV; Wash. Const. art. I § 3, 21, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 478, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *Williams,* 162 Wn.2d at 186-87.

Because the "to convict" instruction purports to be a complete statement of every essential element of the crime , it serves as the jury's "yardstick,". Subsequently, the jury thus cannot be expected to hunt for essential elements in other instructions. *State v. Smith*, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997); *State v. Emmanuel*, 42 Wn.2d 799, 819, 820-21, 259 P.2d 845 (1953). "It cannot be said a defendant has had a fair trial if the jury must guess at the meaning of an essential element of the crime or if the jury might assume that an essential element need not be proved." *Smith,* 131 Wn.2d at 263.

The failure to include an essential element of the crime in the jury instructions is a constitutional issue that may be raised for the first time on appeal. RAP 2.5(a); *Mills*, 154 Wn.2d at 6; *State v. Pope*, 100 Wn. App. 624, 628-30, 999 P.2d 51 (2000). This Court reviews jury instructions de novo. *Mills*, 154 Wn.2d at 7. While the reviewing court generally looks at the jury instructions as a whole, it may not rely upon other instructions to supply an

element missing from the "to convict" instruction. Id.

A jury may not convict a defendant of bail jumping unless it finds beyond a reasonable doubt s/he (1) was held for, charged with, or convicted of a **particular crime,** (2) was released by court order or admitted to bail with the requirement of subsequent personal appearance, and (3) knowingly failed to appear as required. RCW 9A.76.170(1); *Williams,* 162 Wn.2d at 183-84; *Pope*, 100 Wn. App. at 627. The particular underlying crime is an essential element of bail jumping. *Williams*,162 Wn.2d at 183-85; *State v. Marin*, 150 Wn. App. 434, 443-44, 208 P.3d 1184 (2009).

In *Williams*, the "to convict" instruction in a bail jumping prosecution informed the jury it was required to find beyond a reasonable doubt, "[t]hat the defendant was charged with Possession of a Controlled Substance,". *Williams*, 162 Wn.2d at 187, 182. Williams unsuccessfully argued the jury was also required to find the crime's classification as a Class C felony. *Williams*, 162 Wn.2d at 187, 182. The Court held the name of the crime was sufficient, because its classification was not an essential element of bail jumping. *Williams*, 162 Wn.2d at 187-88.

Williams instructs that the name of underlying crime in a bail jumping case is an essential element that must be included in the "to convict" instruction. *Williams*, 162 Wn.2d at 188. This may be accomplished by "a

simple identification of the crime". *Williams*, 162 Wn.2d at 188.

The "to convict" bail jumping instruction in this case did not identify the underlying charge of possession of stolen property. The "to convict" instruction for Count 2 required the jury to find the following elements beyond a reasonable doubt:

> That on or about April 11, 2016, the defendant knowingly failed to appear before a court;
>
> That the defendant was charged with a **Class B or C felony**;
>
> That the defendant had been released by court order or admitted to bail with the requirement of a subsequent personal appearance before that court' and
>
> That the acts occurred in the State of Washington....

CP 60-68 (emphasis added). This "to convict" instruction informed the jury that it was required to find Mr. Anderson was charged with "a class B or C felony," the offense classification, rather than simply identifying the underlying crime of possession of stolen property, the offense name. CP 12-13.

This instruction is inadequate under *Williams*, which held sufficient a to-convict instruction that named the crime alone without the designation of the class of felony because the name alone identified the underlying crime.

Williams, 162 Wn.2d at 186-87.

Here, the instruction is the opposite of *Williams*; it does not contain the name of the underlying crime, but simply lists the possibility that the underlying crime was a Class B or C felony. The classification alone without identifying the underlying crime is constitutionally inadequate under *Williams*, because it relieved the state from proving the essential element of the identification of the underlying crime. *Williams,* 162 Wn.2d 187.

In *Pope*, the "to convict" instruction in a bail jumping case informed the jury it had to find the defendant had been released or admitted to bail with the requirement of a personal appearance "for a felony matter." *Pope*, 100 Wn. App. at 629. The conviction was reversed because the instruction relieved the state of its burden of proving every essential element of the crime. *Pope*, 100 Wn. App. at 630.

As in *Pope*, "a class B or C felony" is equally inadequate as a felony matter" because neither instruction informs the jury "that the defendant was held for, charged with, or convicted of a particular crime." *Pope*, 100 Wn. App at 629-30.

Additionally, the instruction does not adhere to the 4 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 120.41 (2008) (WPIC) for bail jumping, which provides in relevant part:

> (1) That on or about (date), the defendant failed [to appear before a court] [or] [to surrender for service of sentence];
>
> (2) That the defendant [was being held for] [or] [was charged with] [or] [had been convicted of] **[(fill in crime**)] [a crime under RCW (fill in statute)] [a class A felony] [a class B or C felony] [a gross misdemeanor or misdemeanor];
>
> (3) That the defendant had been released by court order [or admitted to bail] with knowledge of [the requirement of a subsequent personal appearance before that court] [or] [the requirement to report to a correctional facility for service of sentence]; and

(Emphasis added).This instruction leaves blank the identity of the crime and directs the user to "fill in crime." WPIC 120.41.

While another jury instruction defining "bail jumping" would not have cured the omission in the to-convict instruction, it is noteworthy that the jury instruction defining bail jumping in this case similarly omitted the element of the underlying crime. *Williams*, 162 Wn.2d at 186-87; S*mith,* 131 Wn.2d at 263. It provided as follows:

> A person commits the crime of bail jumping when he fails to appear as required after having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this State while charged with a Class B or C felony.

CP 60-68.

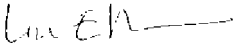
Mr. Anderson's bail jumping conviction must be reversed and remanded for a new trial because the jury instruction relieved the state of proving the essential element of the underlying crime. *Pope*, 100 Wn. App at 631.

D. CONCLUSION

Mr. Anderson respectfully requests this Court reversed and dismiss with prejudice his possession of stolen property conviction based on insufficient evidence. In the alternative, Mr. Anderson requests this Court dismiss the possession of stolen property charge under equal protection grounds. Mr. Anderson also requests dismissal of the bail jumping charge because the jury instructions relieved the state of proving all of the essential elements.

DATED this 9th day of May 2017.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955

I, Lise Ellner, a person over the age of 18 years of age, served the Cowlitz County Prosecutor at appeals@co.cowlitz.wa.us and Britt Anderson, 411 Douglas Street, Kelso, WA 98626 a true copy of the document to which this certificate is affixed, on May 9, 2017. Service was made electronically to the prosecutor and via U.S. Mail to Britt Anderson.

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