

NO. 50293-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY GARAY,
Appellant.

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

Cowlitz County Cause No. 14-1-00818-7

The Honorable Stephen M. Warning, Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Garay's burglary convictions were entered in violation of his Fourteenth Amendment right to Due Process
2. The state presented insufficient evidence to convict Mr. Garay of Count I.
3. The state presented insufficient evidence to convict Mr. Garay of Count III.
4. No rational jury could have found Mr. Garay guilty of burglary beyond a reasonable doubt.

ISSUE 1: In order to support a conviction for burglary, the state must prove that the accused entered into or unlawfully remained inside a residence or building. Did the state present insufficient evidence to convict Mr. Garay of residential burglary and second degree burglary when there was no evidence that he was ever in or anywhere near the premises from which some items were stolen?

5. Mr. Garay's theft conviction was entered in violation of his Fourteenth Amendment right to Due Process
6. The state presented insufficient evidence to convict Mr. Garay of Count V.
7. No rational jury could have found Mr. Garay guilty of theft beyond a reasonable doubt.

ISSUE 2: In order to support a conviction for theft, the state is required to prove that the accused exerted unauthorized control over property with the intent to deprive its true owner of the property. Did the state present insufficient evidence to convict Mr. Garay of theft based on allegations that he had sold some items to a pawnshop, which were later recovered by the police, leaving the pawnshop unable to recoup its payout?

8. The court violated Mr. Garay's Sixth and Fourteenth Amendment right to be free from double jeopardy by entering convictions for Counts II, IV, and V.
9. The court violated Mr. Garay's Wash. Const. art. I, § 9 right to be free from double jeopardy by entering convictions for Counts II, IV, and V.

10. Mr. Garay's convictions for theft and trafficking in stolen property were based on the "same evidence," in violation of the constitutional prohibition on double jeopardy.

ISSUE 3: The constitutional prohibition on double jeopardy precludes the entry of two convictions that are based on the "same evidence." Did the court violate Mr. Garay's right to be free from double jeopardy by entering convictions for trafficking in stolen property and theft, both based on the single act of selling some stolen items to a pawnshop?

11. Mr. Garay's convictions for trafficking in stolen property violated his Sixth and Fourteenth Amendment right to an adequate charging document.
12. Mr. Garay's convictions for trafficking in stolen property violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.
13. Mr. Garay's conviction for theft violated his Sixth and Fourteenth Amendment right to an adequate charging document.
14. Mr. Garay's conviction for theft violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.
15. The charging document failed to set forth the critical facts related to the charges against Mr. Garay.
16. The charging document failed to charge Mr. Garay with trafficking in "specifically described property."
17. The charging document failed to charge Mr. Garay with theft of "specifically described property."

ISSUE 4: An Information charging a theft offense must "clearly" charge the accused with a crime relating to "specifically described property." Was the charging language related to the Trafficking in Stolen Property offenses in Mr. Garay's case constitutionally deficient when it did not include any language describing the stolen property in which he allegedly trafficked?

18. The sentencing court exceeded its authority by sentencing Mr. Garay with an offender score based, in part, on alleged prior convictions, for which the state did not present evidence.

ISSUE 5: In order for a prior conviction to be included in an offender score calculation, the state must prove that the conviction occurred by a preponderance of the evidence. Did the trial court err by increasing Mr. Garay's offender score based on alleged prior convictions for which the state did not provide any evidence?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

One morning, Jeri Dagleish woke up to find that her house had been burglarized. RP 260-61. Her laptop computer, several video games, a Nook e-reader, a “Kettle 1” backpack, and a blanket with the Eiffel Tower printed on it were all gone. RP 261. The burglars had also taken her three limited edition, commemorative Seahawks bottles of Maker’s Mark bourbon. RP 255-56, 261.

Ms. Dagleish did not see anything unusual or have any idea who had broken into her home. RP 264, 276. She had no surveillance footage of her home. RP 276. She reported the crime to the police, but the officers did not canvas the neighbors to ask if they had seen anyone nearby at the time of the burglary. RP 336, 338.

Jason Gilliam lives about a block away from Ms. Dagleish. RP 303. About a month after the Dagleish burglary, someone broke into Mr. Gilliam’s garage and took several power tools. RP 385-86.

Mr. Gilliam had no idea who had committed the burglary. RP 394. He also did not have any surveillance footage and had not seen anything unusual. RP 394. The police did not ask the neighbors if they had seen anything related to his case, either. RP 336, 338.

Using a pawn database, the police eventually learned that Anthony Garay had sold the Maker's Mark bottles from Ms. Dalglish's home to a pawnshop and had pawned the power tools from Mr. Gilliam's home at the same pawnshop. RP 306-16.

A warrant search also turned up Ms. Dalglish's backpack and Eiffel Tower blanket in Mr. Garay's bedroom. RP 288.

The police never found Ms. Dalglish's laptop or any of the other missing items. RP 274.

The police arrested Mr. Garay and charged him with residential burglary, second degree burglary, two counts of trafficking in stolen property, and third degree theft.¹ CP 21-23.

The state did not charge Mr. Garay with stealing anything from Ms. Dalglish's home or Mr. Gilliam's garage. RP 21-23. Rather, the theft charge alleged that Mr. Garay had stolen from the pawnshop where he sold the Maker's Mark bottles and tools. CP 22.

The state originally charged Mr. Garay with trafficking in specific items: "commemorative bottles," "game systems, games, and/or controllers," and "tools." CP 12-13.

¹ Mr. Garay was also charged with and convicted of bail jumping, but that offense is not relevant to any of the issues on appeal. CP 22, RP 473.

But the Information was later amended to omit two of the original four counts of trafficking in stolen property. CP 21-22. The new charging language did not specify what items Mr. Garay was alleged to have trafficked. CP 22.

At trial, the state did not present any evidence that Mr. Garay had ever been in either Ms. Dalglish's or Mr. Gilliam's homes. *See RP generally.* There was no fingerprint or other forensic evidence, no surveillance footage, and no witness who had seen Mr. Garay in the area at the time of the burglaries. *See RP generally.*

The state presented evidence that Mr. Garay lived about three blocks away from the Dalglish and Gilliams homes, but there was no evidence that he was in the neighborhood or even in town on the dates of the burglaries. RP 303.

A police officer testified that someone using Mr. Garay's phone number had posted an ad on Craigslist attempting to sell Marker's Mark bottles similar to those belonging to Ms. Dalglish in the early morning of the date of the burglary on her home. RP 329-334; Ex. 15-17. The police tried to contact the number to set up a "buy" of the bottles, but got no response. RP 298.

In closing, the prosecution theory for the theft charge against Mr. Garay was that he had stolen from the pawnshop by selling and pawning

items that had been stolen. RP 450-51. The prosecutor argued that the pawnshop owner had lost the money that he paid to Mr. Garay for the items, and that the jury could find Mr. Garay guilty of theft for taking that money. RP 450-51.

The prosecutor also argued that the jury should conclude that Mr. Garay had entered Ms. Dagleish's home and Mr. Gilliam's garage because he lived nearby and had possession of some of the stolen items later. RP 447-48.

The jury found Mr. Garay guilty of all of the charges. RP 472-72.

At sentencing, the state argued that Mr. Garay's offender score was eleven for the burglary charges and nine for the other charges, based, in part, on several alleged prior felony convictions. RP 478-80; CP 15-16. But the state did not present any court documents or other demonstrating that Mr. Garay had been previously convicted of any felony. *See* RP 478-88 *generally*. Even so, the court found on the Judgment & Sentence that Mr. Garay had five prior felony convictions and sentenced him with offender scores of eleven and nine. CP 73-74, 76.

This timely appeal follows. CP 85.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. GARAY OF THEFT OR BURGLARY.

Evidence is insufficient to support a conviction if, taking the evidence in the light most favorable to the state, no rational jury could have found each element proved beyond a reasonable doubt. *State v. Larson*, 184 Wn.2d 843, 855, 365 P.3d 740 (2015).²

A. No rational jury could have found beyond a reasonable doubt that Mr. Garay committed theft by selling items to the pawnshop.

The state chose not to charge Mr. Garay with theft of the items taken from Ms. Dagleish's house or Mr. Gilliam's garage. CP 21-23. Instead, the state charged him with stealing from the pawnshop to which he had sold the bottles and tools. CP 22.

The prosecution's theory was that Mr. Garay had "stolen" from the pawnshop by taking money in exchange for the items. RP 450-51. This is because, the state theorized, the pawnshop owner lost the money he had paid to Mr. Garay when the police seized the items, leaving the pawnshop unable to sell them and recoup the money. RP 450-51.

But, in order to convict Mr. Garay of theft from the pawnshop, the state was required to prove that he wrongfully obtained or exerted

² The Court of Appeals reviews the evidence *de novo*. *Larson*, 184 Wn.2d at 855.

unauthorized controlled over property from the pawnshop “with the intent to permanently deprive” the business of that property. RCW 9A.56.020(1). Because the state failed to prove this element of theft, Mr. Garay’s theft conviction must be vacated for insufficient evidence. *Larson*, 184 Wn.2d at 855.

In support of the allegation that Mr. Garay had “stolen” from the pawnshop, the state presented evidence that he had sold and pawned items that later turned out to have been stolen. RP 306-16. The pawnshop owner testified that, because the police had later seized the items, he was unable to sell them and recoup his costs. RP 408.

But this evidence does not demonstrate that Mr. Garay took the payment with the intent to permanently deprive the owner of the money. Indeed, there was no evidence that Mr. Garay knew the items would be later seized by the police, leaving the pawnshop owner unable to sell them and recoup his payout.

While the evidence was likely sufficient to demonstrate that Mr. Garay had trafficked in stolen property, the state failed to prove that he had committed “theft” by accepting money in exchange for the items that he left with the pawnshop.

No rational jury could have found Mr. Garay guilty of theft from the pawnshop beyond a reasonable doubt because there was no evidence

that he had the intent to permanently deprive the owner of the money he was paid. *Larson*, 184 Wn.2d at 855. Mr. Garay's theft conviction must be vacated and dismissed with prejudice. *Id.*

- B. No rational jury could have found Mr. Garay guilty of burglary beyond a reasonable doubt when there was no evidence that he was ever in the house or garage from which the items were stolen.

The state did not present any evidence that Mr. Garay had ever been inside Ms. Dagleish's home or Mr. Gilliam's garage. Indeed, the evidence did not indicate that he had ever been near their homes or was even in town on the day of the burglaries.

Even so, the jury convicted him of two counts of burglary, based solely on the evidence that he lived nearby and had been found in possession of some of the stolen property. Mr. Garay's burglary convictions are based on insufficient evidence.

In order to convict Mr. Garay of residential burglary and burglary in the second degree the state was required to prove that he "unlawfully entered" into Ms. Dagleish's house and Mr. Gilliam's garage. RCW 9A.52.025; RCW 9A.52.030.

But mere possession of stolen property is insufficient to prove burglary. *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217 (1982). Rather, evidence of possession must be accompanied *at a minimum* by

“slight corroborative evidence of other inculpatory circumstances tending to show [the accused’s] guilt” of burglary. *Mace*, 97 Wn.2d at 843.

In *Mace*, for example, the state presented insufficient evidence to sustain a burglary conviction when it demonstrated only that the accused was in possession of a stolen bank card and had no reasonable explanation of that possession at the time of his arrest or at trial. *Mace*, 97 Wn.2d at 844-45. In that situation, the state had presented strong evidence of possession of stolen property, but no evidence that the accused had actually entered the premises from which the property was taken. *Id.*

Similarly, in Mr. Garay’s case, the state’s evidence demonstrated, at most, that he possessed some of the stolen property and lived nearby. No rational jury could have found, based on this evidence, that Mr. Garay had actually entered into Ms. Dagleish’s house or Mr. Gilliam’s garage.

Even taking the evidence in the light most favorable to the state, no rational jury could have found beyond a reasonable doubt that Mr. Garay actually entered into Ms. Dagleish’s house or Mr. Gilliam’s garage, as required to sustain his burglary convictions. *Id.*; *Larson*, 184 Wn.2d at 855. Mr. Garay’s burglary convictions must be vacated and dismissed with prejudice. *Id.*

II. THE COURT VIOLATED MR. GARAY’S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY BY ENTERING CONVICTIONS FOR BOTH TRAFFICKING IN STOLEN PROPERTY AND THEFT, BASED ON THE SAME EVIDENCE OF SELLING ALLEGEDLY STOLEN GOODS TO A PAWNSHOP.

The state charged Mr. Garay with two counts of trafficking in stolen property for selling the bottles and tools to the pawnshop. CP 22. But the state also charged him with theft for accepting money from the pawnshop in exchange for the items. CP 22; RP 450-51.

Accordingly, the trafficking charges and the unusual theft charge were supported by exactly the same evidence: that showing that Mr. Garay sold items that he knew to be stolen to the pawnshop. Because the charges were based on the same evidence, the court violated the constitutional prohibition against double jeopardy by entering convictions for both trafficking in stolen property and theft in Mr. Garay’s case.

Both the Washington state and federal constitutions prohibit multiple punishments for a single offense. U.S. Const. Amends. V, XIV; art. I, § 9; *In re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004).

The *Blockburger*³ or “same evidence” test controls the double jeopardy analysis unless there is a clear indication that the legislature intended otherwise. *State v. Womac*, 160 Wn.2d 643, 652, 160 P.3d 40

³ *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

(2007). Under the *Blockburger* test, multiple convictions based on a single act violate double jeopardy if the evidence necessary to support a conviction for one offense is sufficient to support a conviction for the other. *Orange*, 152 Wn.2d at 816.

The legal elements of the offenses are not dispositive of the *Blockburger* test for double jeopardy. *Womac*, 160 Wn.2d at 652.

The *Orange* court, for example, found that convictions for first degree attempted murder and first degree assault violated double jeopardy even though attempted murder required the additional element of intent to cause death. *Orange*, 152 Wn.2d at 820. Because the offenses were both based on the single act of firing one shot at another person, the evidence required for attempted murder was sufficient to support the assault conviction. *Id*; see also *State v. Martin*, 149 Wn. App. 689, 699, 205 P.3d 931 (2009) (finding that convictions for assault and attempted rape violated double jeopardy despite different legal elements).

Likewise, in Mr. Garay's case, the evidence in support of the trafficking in stolen property charges and the theft charge was identical. In support of both, the state simply demonstrated that Mr. Garay had sold or pawned stolen items to the pawnshop. The evidence necessary to support the trafficking charges was also sufficient to convict for theft under the state's unusually theory in this case.

The trafficking in stolen property and theft convictions were based on the “same evidence,” so entry of both violated Mr. Garay’s right to be free from double jeopardy. *Orange*, 152 Wn.2d at 816. Mr. Garay’s theft conviction must be vacated. *Id.*

III. THE LANGUAGE CHARGING MR. GARAY WITH TRAFFICKING IN STOLEN PROPERTY AND THEFT WAS CONSTITUTIONALLY DEFICIENT.

The Information in Mr. Garay’s case charged him with trafficking in un-defined “property” and with theft of “property belonging to another, of a value not exceeding \$750.” CP 22.

Indeed, the state originally charged Mr. Garay with trafficking in specific items, but later amended the Information to delete those references. *See* CP 11-12, 21-23.

Because it did not allege *what* Mr. Garay was alleged to have stolen or to have trafficked, the Information did not provide him adequate notice of the charges against him. The charging language was constitutionally deficient.

The Sixth Amendment right “to be informed of the nature and cause of the accusation” and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI,

XIV.⁴ A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005).⁵ The charge must include more than “the elements of the offense intended to be charged.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).⁶

Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction “in case any other proceedings are taken against him for a similar offense.” *Id.*

⁴ Wash. Const. art. I, §§ 3 and 22 impose similar requirements.

⁵ The Fifth Amendment, applicable through the Fourteenth, protects the accused person against double jeopardy. U.S. Const. Amends. V, XIV.

⁶ Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised for the first time on appeal. *Id.*

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether the necessary facts appear or can be found by fair construction in the charging document. *Id.* If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).

In cases involving offenses related to theft, the Information must “clearly” charge the accused person with a crime relating to “specifically described property.” *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes “not a single word to indicate the nature, character, or value of the property,” the charge is “too vague and indefinite upon which to deprive one of his [or her] liberty.” *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

In this case, the Information passes only the first of these three requirements: it charges in the language of the statutes, and thus “contains the elements of the offense intended to be charged.” *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it omits critical facts. In the absence of critical facts, the Information does not provide adequate notice of the charges, nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

Here, the Information does not provide any allegations regarding the nature or character of the items Mr. Garay is supposed to have trafficked or stolen. CP 21-23. Because of this, the allegations are “too vague and indefinite upon which to deprive [Mr. Garay] of his liberty.” *Id.*

The Information provides neither notice⁷ nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631. The critical facts in Mr. Garay’s trafficking and theft charges cannot be found by any fair construction of the charging document. *Rivas*, 168 Wn. App. at 887.

The Information is constitutionally deficient. Mr. Garay’s trafficking and theft convictions must be reversed and the charges dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

IV. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY INCREASING MR. GARAY’S OFFENDER SCORE BASED ON ALLEGED PRIOR CONVICTIONS OF WHICH THE STATE PRESENTED NO EVIDENCE.

In order for a prior conviction to be included in an offender score calculation, the state must prove that the conviction occurred by a preponderance of the evidence. *State v. Hunley*, 175 Wn.2d 901, 909, 287 P.3d 584 (2012). Bare assertions on the part of the state fail to meet this burden. *Id.* The state must introduce “evidence of some kind to support the alleged criminal history.” *Id.*

⁷ Indeed, the prosecution’s theory that Mr. Garay had committed theft of money from the pawnshop by selling items that were later seized by the police was far from intuitive. It is unlikely that a seasoned attorney (far less an accused person) would be able to determine what he was alleged to have stolen based on the bald assertion in the charging document even if s/he was otherwise familiar with all of the allegations in the case.

Here, Mr. Garay's Judgment and Sentence lists five alleged prior convictions. CP 73-74. But the state did not present any evidence at sentencing that Mr. Garay had ever been convicted of a crime. *See* RP 478-88. Even so, the court sentenced him with an offender score of eleven for the residential burglary convictions and of nine for the other felonies. CP 74.

No evidence supports the court's finding that Mr. Garay had any prior felony convictions. Mr. Garay's case must be remanded for resentencing. *Hunley*, 175 Wn.2d at 909.

CONCLUSION

No rational jury could have found Mr. Garay guilty of burglary or theft. The court violated the constitutional prohibition against double jeopardy by entering convictions in Mr. Garay's case for both trafficking in stolen property and theft, based entirely on the same evidence. The language charging Mr. Garay with trafficking in stolen property and theft was constitutionally deficient because it did not allege that he had trafficked or stolen any "specifically described property." Mr. Garay's convictions for burglary, theft, and trafficking in stolen property must be reversed.

In the alternative, the sentencing court erred by calculating Mr. Garay's offender score based on alleged prior convictions of which the state provided no evidence. Mr. Garay's case must be remanded for resentencing.

Respectfully submitted on October 5, 2017,



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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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

Signed at Seattle, Washington on October 5, 2017.



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LAW OFFICE OF SKYLAR BRETT

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