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Division II
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NO. 50293-3-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ANTHONY JOHN GARAY,

Appellant.

RESPONDENT'S BRIEF

**RYAN JURVAKAINEN
Prosecuting Attorney
MIKE NGUYEN/WSBA 31641
Deputy Prosecuting Attorney
Representing Respondent**

**HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080**

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I. ISSUES

1. WAS THERE SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF THEFT?
2. WAS THERE SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF RESIDENTIAL BURGLARY AND BURGLARY IN THE SECOND DEGREE?
3. DID THE TRIAL COURT VIOLATE THE APPELLANT'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY BY ENTERING CONVICTIONS FOR BOTH TRAFFICKING IN STOLEN PROPERTY AND THEFT?
4. WAS THE CHARGING LANGUAGE CONSTITUTIONALLY SUFFICIENT TO INFORM THE APPELLANT OF ALL THE ESSENTIAL ELEMENTS OF THE TRAFFICKING IN STOLEN PROPERTY AND THEFT CHARGES?
5. WAS THE STATE REQUIRED TO PROVE THE APPELLANT'S CRIMINAL HISTORY WHEN THE STATE CORRECTLY CALCULATED THE APPELLANT'S OFFENDER SCORES AND SENTENCING RANGES, AND THE APPELLANT AGREED TO THOSE SCORES AND SENTENCING RANGES?

II. SHORT ANSWERS

1. YES. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF THEFT.
2. YES. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF RESIDENTIAL BURGLARY AND BURGLARY IN THE SECOND DEGREE.
3. YES. THE TRIAL COURT DID VIOLATE THE APPELLANT'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY BY ENTERING CONVICTIONS FOR BOTH TRAFFICKING IN STOLEN PROPERTY AND THEFT.
4. YES. THE CHARGING LANGUAGE WAS CONSTITUTIONALLY SUFFICIENT TO INFORM THE APPELLANT OF ALL THE ESSENTIAL ELEMENTS OF THE

TRAFFICKING IN STOLEN PROPERTY AND THEFT CHARGES.

5. NO. THE STATE WAS NOT REQUIRED TO PROVE THE APPELLANT'S CRIMINAL HISTORY WHEN THE STATE CORRECTLY CALCULATED THE APPELLANT'S OFFENDER SCORES AND SENTENCING RANGES, AND THE APPELLANT AGREED TO THOSE SCORES AND SENTENCING RANGES.

III. FACTS

In May 2014, Jeri Jo Dalglish resided at 2648 Fir Street, Longview, WA, 98632, with her husband and two children. RP 249, 277, and 258-259. Her residence had a fenced backyard with a shop. RP 251. The residence had two upstairs bedrooms for her son and daughter, and a master bedroom in the basement for her and her husband. The master bedroom was close to and just off of the family room. RP 258-259.

In June 2014, Jason Gilliam resided with his girlfriend and children at 2809 Field Street, Longview, WA 98632. His residence had a fenced backyard and a detached garage. RP 380-382. Inside the garage, Mr. Gilliam stored his tools, workout equipment, and kids' bikes. Mr. Gilliam owned Dewalt tools and kept his garage in an orderly manner. RP 384-385. Mr. Gilliam's residence was within one block from Ms. Dalglish's residence. RP 303 and 384, Exhibit # 1, and Exhibit # 2.

Between May and June 2014, the appellant resided at 3148 Delaware Street, Apt 5, Longview, WA 98632. RP 299-300, Exhibit # 19,

and Exhibit # 21. The appellant's residence was between three to four blocks from Mr. Gilliam's residence and Ms. Dagleish's residence. RP 303-304 and Exhibit # 1.

On May 7, 2014, the Dagleish family went to bed between 10:30 pm to 11 pm. Ms. Dagleish was a spirit and wine distributor who often worked out of her family room. RP 248 and 254. Her work allowed her to receive a lot of specialized items such as a black Kettle 1 backpack and three Seahawks Marker's Mark bottles. The black Kettle 1 backpack was her favorite work bag and had a rip between the two inner compartments. RP 257-258. The Seahawks Marker's Mark bottles commemorated the Seahawks' Super Bowl victory, was limited to only 4200 bottles, dipped in Seahawks' blue and green colors, and was hard to obtain as only 1200 of the bottles were released to the market. RP 255-256. The three Seahawks bottles were a source of pride and prominently displayed in the family room. RP 256-257.

On May 8, 2014, at 2:57:45 am, the appellant created a Craigslist ad for three Seahawks Marker's Mark bottles. At 3:02:45 am, the appellant posted the ad for the three bottles. The ad was titled "Seahawks Maker's Mark Special Edition" with a description that read "Seahawk's Makers Mark Bottle only 4,200 of these made. 750 ml. Three available. Cash only. Must be over 21. Please text if interested. (530) 643-7978." Exhibit # 17

and RP 330-334. The appellant entered an authorized user's phone number of 360-431-0435 and that number was not visible in the ad. RP 334 and Exhibit # 17. The appellant conceded during closing that he created and posted the Craigslist ad for Ms. Dalglish's three Seahawks bottles. RP 458.

On May 8, 2014, between 6 am and 6:30 am, Ms. Dalglish woke up and discovered someone broke into and stolen things from her residence. Inside the family room, she noticed several missing items such as the three Seahawks bottles, a computer, a nook, a reader, her Kettle 1 work backpack, her son's backpack, and her favorite blanket, a black and white Eiffel Tower blanket. RP 254 and 260-262. Outside the residence, she saw footprints and impressions on the wet grass going to and coming from the back alley. RP 262-263.

On May 8, 2014, between 9 am and 9:30 am, she checked Craigslist and found the appellant's Craigslist ad for the three Seahawks bottles. She suspected the ad was for her three stolen Seahawks bottles because the description of the bottles resembled her stolen Seahawks bottles. The contact person for the ad was Anthony with a 530-643-7978 phone number. She saved a copy of the ad and later provided the ad to law enforcement. RP 264-267 and 296-298.

On May 8, 2014, Detective Bokma of the Longview Police Department inherited Ms. Dalglish's case. RP 291 and 293. Detective

Bokma was aware of the Craigslist ad and tried unsuccessfully to contact Anthony at 530-643-7978. RP 294-298. As a result, Detective Bokma ran the phone number and learned the phone number was associated with an Anthony Garay with a DOB of 3/24/90 and an address of 3148 Delaware Street, No. 5. RP 299-300.

On May 12, 2014, the appellant went to the Pawn Shop and More in Longview, WA 98632, and sold three Seahawks Marker's Mark bottles to the shop for \$45. The shop issued a receipt for the transaction, Exhibit # 19. To do the sale, the appellant presented his identification and signed the receipt declaring that, "I, the undersigned, do hereby sell outright and convey full title to the above listed items. I further certify that I am at least 18 years of age, and the sole owner of the above listed items and am selling them free of any indebtedness or claim of any kind. THIS IS A BILL OF SALE." Exhibit # 19 and RP 401-405.

The shop made a copy of his identification and recorded his name, address, DOB, driver's license number, and phone number on the receipt. RP 397 and Exhibit # 19. The receipt for that transaction was for Anthony Garay with a DOB of 3/24/90 and a driver's license number of GARAYAJ101D4. The appellant provided an address of 3148 Delaware Street, Apt 5, Longview, WA 98632, with a phone number of 360-578-7873. Exhibit # 19.

Ms. Dagleish was not aware the appellant had sold her three Seahawks Marker's Mark bottles to the pawnshop on May 12, 2014. Ms. Dagleish did not know the appellant and did not give appellant permission to be inside her residence, possess her three Seahawks bottles, or sell her three Seahawks bottles to the pawnshop. RP 274-275.

On June 11, 2014, Mr. Gilliam noticed the kids' bikes were out of place inside the garage. The bikes are typically off to the right all lined up neatly, but on this day, the bikes were kind of moved about the garage, which was kind of unusual. RP 385. A couple of days later, Mr. Gilliam learned his kids were not responsible for the bikes being out of place and looked around the garage to discover he was missing some Dewalt tools. Mr. Gilliam was missing a Dewalt sander, a Dewalt drill, a Dewalt right angle grinder, and a Dewalt jigsaw. All the tools were relatively new. The grinder had its cord specifically wrapped up and around the main handle. The jigsaw was only used once or twice and stored in its plastic Dewalt case. The drill was stored in a bag with some extensions. RP 386-387. Mr. Gilliam did not notice any signs of forced entry into the garage. RP 388.

On June 14, 2014, the appellant went to the Pawn Shop and More in Longview, WA 98632, and pawned a Dewalt grinder with cord wrapped up and around the handled, a Dewalt jigsaw in a plastic Dewalt box, and a Dewalt drill in a bag for \$30. RP 405-408, Exhibit # 21, Exhibit # 22 to

Exhibit # 29. The shop issued a receipt for the transaction. Exhibit # 21. To do the sale, the appellant presented his identification and signed the receipt declaring in relevant part that, “The pledger represents and warrants that the pledged property is not stolen, rented, or leased, and that the property has no liens or encumbrances against them. Pledger also attests to have good title to the pledged property, and that the pledger has the right to pledge the property. Etc...” Exhibit # 21, p. 2 and RP 407-408.

The shop made a copy of his identification and recorded his name, address, DOB, driver’s license number, and phone number on the receipt. RP 397 and Exhibit # 21. The receipt for that transaction was for Anthony Garay with a DOB of 3/24/90 and a driver’s license number of GARAYAJ101D. The appellant provided an address of 3148 Delaware Street, Apt 5, Longview, WA 98632, with a phone number of 360-578-7873. Exhibit # 21.

On June 15, 2014, Mr. Gilliam called 911 to report the burglary of his detached garage. RP 388. Mr. Gilliam was not aware the appellant had pawned his Dewalt tools with the pawnshop on June 14, 2014. Mr. Gilliam did not know the appellant and did not give appellant permission to be inside his garage, possess his tools, or pawn his tools to the pawnshop. RP 392-393. Sometime after June 15, 2014, Detective Bokma inherited Mr. Gilliam’s case. RP 300-301 and 388.

On June 20, 2014, Detective Bokma checked a pawnshop database and found descriptions for several pawned items that appeared to match the stolen items of Ms. Dagleish and Mr. Gilliam. The items were pawned at the Pawnshop and More on May 12, 2014, and June 14, 2014. RP 307-308. As a result, Detective Bokma went to the pawn shop and spoke to the owner, Gary Hunter, about those transactions. Detective Bokma obtained records from the shop for those two transactions and saw items that match the descriptions of the stolen items, three Seahawks Marker's Mark bottles, a Dewalt drill, a Dewalt grinder, and a Dewalt jigsaw. RP 309-310. The pawn shop provided Detective Bokma with a copy of the appellant's Washington driver's license and two pawn receipts. RP 311-313.

On June 25, 2014, Detective Bokma got a search warrant for the appellant's residence at 3148 Delaware Street, Apt 5, Longview, WA 98632. RP 315-316. Detective Johnson of the Longview Police Department assisted Detective Bokma with the execution of the search warrant. RP 278 and 280-283.

During the search of the residence, Detectives searched the appellant's entire residence. RP 410. Detective Johnson found the appellant inside a room in the residence. RP 283-284. Prior to searching the appellant's room, Detective Johnson spoke to the appellant. Appellant admitted to Detective Johnson that it was his room and he lived in the room

by himself. RP 286. The appellant told Detective Johnson that all the property inside his room were his. RP 287. Appellant admitted he had no job at the time. RP 290. When asked “where [were] the items that [the appellant] [had] to sell,” RP 288, the appellant told Detective Johnson he did not know what Detective Johnson was talking about. RP 288.

Following their conversation, the appellant was removed from the room and Detective Johnson searched the room. RP 288. Inside the appellant’s room, Detective Johnson found the appellant’s Washington driver license, GARAYAJ101D4, and Ms. Dagleish’s stolen Kettle 1 backpack and Eiffel Tower blanket. RP 288-289 and 324, Exhibit # 33, Exhibit # 34. Nothing else of high value was inside appellant’s room. RP 320. The only items seized in the residence were from the appellant’s room, the Eiffel Tower blanket and Kettle 1 backpack. RP 320, 324, and 410.

After Detective Johnson’s conversation with the appellant, Detective Bokma spoke to the appellant. When asked if he had pawned any items recently, the appellant told Detective Bokma that he had not pawn anything recently. The appellant also claimed ownership of the Eiffel Tower blanket. RP 319. The appellant told Detective Bokma that he bought the Eiffel Tower blanket, but the appellant could not recall the details of that purchase as it pertained to where, from whom, and for how much. RP 335 and 337.

The appellant was subsequently arrested and booked into custody. During booking, the appellant listed his address as being 3148 Delaware Street, Apartment 5, Longview, WA 98632, and listed his phone number as being 360-431-0435. RP 320-323. The appellant's booking phone number matched the hidden Craigslist authorized user's phone number for the three Seahawks bottles. RP 320-323 and 334 and Exhibit # 17.

On July 8, 2014, Ms. Dalglish went to the Longview Police Department to identify and recover her stolen Kettle 1 backpack and Eiffel Tower blanket. RP 268-271 and 324.

On July 9, 2014, Mr. Gilliam met Detective Bokma at the pawn shop to identify and recover his stolen Dewalt tools. RP 325-329 and 389-392.

On July 23, 2014, Detective Bokma applied for a search warrant for the May 8, 2014, Craigslist ad. RP 329. Detective Bokma subsequently learned the details of that ad as indicated above. RP 334 and Exhibit # 17.

On July 24, 2017, Ms. Dalglish met Detective Bokma at the pawn shop to identify and recover her three stolen Seahawks Marker's Mark bottles. RP 272-273 and 325.

After turning the stolen Dewalt tools over to Mr. Gilliam and stolen Seahawks bottles over to Ms. Dalglish, Gary Hunter and the pawn shop was not compensated for the money paid to the appellant for those stolen

items. Those transactions happened in the City of Longview, County of Cowlitz, and State of Washington. RP 398-400 and 408-409.

On December 1, 2016, State filed a second amended information at the start of the first jury trial. RP. 10. The amended information dismissed some charges where the appellant's sister was a victim of some of the charges. RP 10-11. The appellant did not object to second amended information. RP 11. The appellant never requested a bill of particulars with regards to any charges in the second amended information. RP 10-477. The court conducted a 3.5 hearing and admitted the appellant's statements. RP 40-53. The first trial resulted in a mistrial. RP 192-197.

Starting March 2, 2017, Judge Marilyn Haan, Cowlitz County Superior Court Judge, presided over appellant's second jury trial. RP 209-477. At the conclusion of the trial, the jury found the appellant guilty of all counts. RP 472-476. Sentencing was set over to March 20, 2017. In addition to this case, the appellant had another case, case # 16-1-01295-4, pending sentencing. The appellant had pled to one count of eluding in case # 16-1-01295-4. RP 478-479.

On March 20, 2017, both of the appellant's cases, case # 14-1-00818-7 and case # 16-1-01295-4, were before Judge Haan for sentencing. Case # 16-1-01295-4 was dealt first as it was the lesser of the two cases and was to run concurrent with the more serious case of 14-1-00818-7. The

appellant agreed that his offender score was 9 and the State recommended 29 months for that case to run concurrent with case # 14-1-00818-7. RP 478-479.

The agreed upon criminal history for case # 16-1-01295-4 was the same criminal history for case # 14-1-00818-7, the only difference being that there were multipliers in case # 14-1-00818-7 due to the burglary convictions. For case #14-1-00818-7, the appellant had a score of 11 with range of 63-84 months for count 1, score of 9 with range of 63-84 months for count 2, score of 11 with range of 63-84 months for count 3, score 9 and range of 63-84 months for count 4, range of 0-364 days for a gross misdemeanor for count 5, and score 9 and range of 51-60 months for count 6. RP 479-480. The appellant never disputed his scores and sentencing ranges. RP 479-485. After the appellant was sentenced on both cases, the court set over for entry of judgments on March 28, 2017. RP 489-491.

On March 28, 2017, both case # 14-1-00818-7 and case # 16-1-01295-4 were on for entry of judgments. There was a mix up in the judgment for case # 16-1-01295-4. RP 489. Appellant again did not dispute the scores and sentencing ranges for case # 14-1-00818-7. Appellant acknowledged, “[t]he ranges are different because on the first cause [14-1-00818-7] there was multiplier to get a higher range.” RP 490. Appellant again confirmed his score of 9 and range of 22-29 months for case # 16-1-

01295-4. RP 490. Appellant acknowledged the judgment for case # 14-1-00818-7 was correct. RP 491. Both cases were continued to March 30, 2017, for entry of judgments. RP 491.

On March 30, 2017, the appellant did not dispute his offender scores or sentencing ranges in case # 14-1-00818-7, and signed his judgment with the scores and sentencing ranges indicated on March 20, 2017. RP 492-493.

IV. ARGUMENTS

A. **THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF THEFT.**

When determining the sufficiency of evidence, the standard of review is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt.” State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). At trial, the State has the burden of proving each element of the offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). However, a reviewing court need not itself be convinced beyond a reasonable doubt, State v. Jones, 63 Wn.App. 703, 708, 821 P.2d 543, review denied, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn.App. 410, 415-16, 824 P.2d 533, review denied,

119 Wn.2d 1011 (1992). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. Jones, 63 Wn.App. at 707-08.

“In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). “Nothing forbids a jury, or a judge, from logically inferring intent from proven facts, so long as it is satisfied the state has proved that intent beyond a reasonable doubt.” State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. State v. Joy, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

Count five of the second amended information charged the appellant with one count of Theft in the Third Degree. Count five states “[t]he defendant, in the County of Cowlitz, State of Washington, on or about or between 05/12/2014 and 06/14/2014, did wrongfully obtain or exert unauthorized control over property belonging to another, of a value not exceeding \$750, with intent to deprive Pawn Shop And More of such property; contrary to RCW 9A.56.050(1)(a) and RCW 9A.56.020(1)(a) and against the peace and dignity of the State of Washington.” Second Amended Information, p. 2.

Count five covered the transactions on May 15, 2014, and on June 14, 2014. On May 15, 2014, appellant sold three stolen Seahawks bottles and was paid \$45. On June 14, 2014, the appellant pawned three stolen Dewalt tools and was paid 30. Prior to closing, the court read instruction No. 26 to the jury. Instruction No. 26 stated, “[t]he State alleges that the defendant committed acts of theft in the third degree on multiple occasions. To convict the defendant of theft in the third degree, one particular act of theft in the third degree must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of theft in the third degree.” RP 428.

There was sufficient evidence for the jury to find appellant guilty of Theft in the Third Degree. The May 12, 2014, incident alone provides sufficient evidence for the conviction. On May 12, 2014, the appellant sold three stolen Seahawks bottles outright to the pawnshop. He signed a receipt declaring “I, the undersigned, do hereby sell outright and convey full title to the above listed items. I further certify that I am at least 18 years of age, and the sole owner of the above listed items and am selling them free of any indebtedness or claim of any kind. THIS IS A BILL OF SALE.” Exhibit # 19. The appellant sold the stolen bottles without the owner’s permission and wrongfully took the pawnshop’s money as he had no authority to sell

the stolen bottles. It was reasonable for the jury to find the appellant acted with intent to deprive the pawnshop of \$45 when the appellant sold the pawnshop stolen property. There was sufficient evidence for the jury to find the appellant guilty of Theft in the Third Degree and his conviction for Count Five should be affirmed.

B. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND THE APPELLANT GUILTY OF RESIDENTIAL BURGLARY AND BURGLARY IN THE SECOND DEGREE.

In addition to the sufficiency of the evidence standard indicated above, courts recognized “that ‘proof of possession of recently stolen property, unless accompanied by other evidence of guilt, is not prima facie evidence of burglary.’ 97 Wash.2d at 843, 650 P.2d 217. To support a burglary conviction, the State must also show at least slight corroborative evidence of other inculpatory circumstances. 97 Wash.2d at 843, 650 P.2d 217 (quoting State v. Portee, 25 Wash.2d 246, 253-54, 170 P.2d 326 (1946)). Such inculpatory circumstances include ‘presence of the accused near scene of the crime,’ or ‘flight’, improbable or inconsistent explanations, the giving of fictitious names or circumstantial proof of entry.” State v. Ehrhardt, 167 Wash.App. 934, 939 (2012).

In State v. Portee, 25 Wash.2d 246 (1946), the victim temporarily left her baggage, consisting of eight pieces, in storage at the railroad depot

on September 17, 1945. On September 21, 1945, she claimed her baggage and discovered that she was missing a suitcase with two hundred dollars' worth of clothing. Id. at 249-250. "A day or two thereafter, the defendant was arrested on a charge wholly disconnected with this case. A pawn ticket, No. 66727, was found among his personal effects which indicated that he had pawned a suitcase at the Empire Loan Company on September 21." Id. at 250. Subsequently, the victim identified the item pawned by the defendant was her missing suitcase. Id. at 250. The defendant gave the police a written statement indicating that "a colored man came to me and offered me a suitcase for \$4.00. That he needed the money to get his wife out of jail. I gave him the \$4.00, and then we went to a pawn shop on 1st Avenue where I pawned it for \$10.00. He was about 25 years old, 5 ft. 5 in. tall and about 140 pounds, dark brown skinned negro. After pawning the suitcase, he came to the City Jail with me, but he was not permitted to see his wife. We both went back to the Greenland Tavern. He left me there and I have never seen him since." Id. at 251. The manager for the Empire Loan Company testified the defendant pawned the victim's suitcase with a fake name and fake address. The pawn ticket was admitted into evidence. Id. at 251. The trial court granted the defendant's motion for directed verdict and the State appealed the dismissal. Id. at 252-253.

On appeal, the court noted that "[m]ere possession of stolen goods,

unaccompanied by other evidence of guilt, is not to be regarded as prima facie evidence of burglary. But the rule is otherwise when there is indicatory evidence on collateral points.” Id. at 253. “Possession of recently stolen property, in connection with other evidence tending to show guilt, is sufficient to warrant a conviction. When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction. When the fact of possession of recently stolen property is supplemented by the giving of a false or improbable explanation of it, or a failure to explain when a larceny is charged, or the possession of a forged bill of sale, or the giving of a fictitious name, a case is made for the jury.” Id. at 254-255.

Reversing the trial court’s directed verdict, the court held that “the [trial court] erred in directing a verdict in the instant case. The state did not rely upon possession alone. Other circumstances were shown. As we have hitherto seen, the state produced evidence that the suitcase was purloined sometime in the afternoon of September 21, 1945, and that defendant pawned it as his own that same afternoon, (1) giving a fictitious name and (2) a false address, and, after these facts were discovered, (3) an explanation of a kind that could not be checked or rebutted, and (4) one that a jury could regard as improbable. These circumstances, we think, are of the kind Mr.

Wharton had in mind when, as shown in a foregoing quotation, he said that mere possession is not prima facie evidence of burglary; but the rule is otherwise where there is 'indicatory evidence on collateral points.' We further think that they are circumstances of the kind the author of the extensive note in 19 Am. & Eng. Ann. Cas. 1281 had in mind when he used the phrases 'other incriminating circumstances' and 'other guilty circumstances.'" Id. at 254.

State v. Parks, 198 Wash.App. 1007 (2017), is an unpublished opinion filed on or after March 1, 2013, that is not binding authority, but may be accorded such persuasive value as the court deems appropriate under GR 14.1. In Parks, the Antique Mall rented cubicles to a number of antique vendors within a large store. The store's back door faced a Les Schwab store that was between 120 and 160 feet away. Id. at 1. Shortly after midnight on February 28, 2015, surveillance video captured two men breaking into the Antique Mall and stealing a number of things. The police found various tools inside the store and directly outside the store. One of the individuals wore a distinctive jacket with white sleeves. A store employee recognized Parks on the surveillance video as someone who had been in the store the previous evening with the same style jacket and having a tattoo of musical symbols on his hand. When he was arrested, Parks wore

a jacket with white sleeves and had tattoo of musical symbols on his right hand. Id. at 1.

Later that morning, Les Schwab employees discovered someone had entered into and stolen a sledgehammer and pin puller from a truck parked in Les Schwab's fenced lot. The sledgehammer and pin puller were found in the Antique Mall after the break in. Les Schwab had locked the fenced lot at 6 pm the evening before and its surveillance camera was inoperable. There was no video of anyone entering the lot. Id. at 2. Parks was charged and convicted of two counts of second degree burglary for the Antique Mall and Les Schwab. Id. at 3.

On appeal, Parks argued there was insufficient evidence that he committed second degree burglary as it pertained to Les Schwab because there was no evidence that he was ever at Les Schwab. The court noted that possession of recently stolen property "will support a burglary conviction if there is additional corroborative evidence, even if slight, tending to show the defendant's guilt." Id. at 3. Park's burglary conviction with regards to Les Schwab was affirmed because "the State presented corroborative evidence of guilt beyond Park's possession of stolen tools. First, there was direct evidence that Parks was present near the scene of the Les Schwab crimes shortly after those crimes were committed. Parks committed a burglary next door around midnight, and the evidence suggested that the

crimes at Les Schwab occurred after Les Schwab closed at 6:00 PM the previous evening. Second, the evidence creates inferences that Parks used the tools stolen from Les Schwab to commit the Antique Mall burglary and that Parks committed the Les Schwab crimes to assist in the Antique Mall burglary.” Id. at 3.

There was sufficient evidence for the jury to find the appellant guilty of residential burglary of the Dagleish’s residence. On May 7, 2014, between 10:30 pm and 11 pm, the Dagleish family went to bed. On May 8, 2014, at 2:57:45 am, the appellant created a Craigslist ad for Ms. Dagleish’s three stolen Seahawks Marker’s Mark bottles. At 3:02:45 am, the appellant posted the ad for the three bottles. At the time, the appellant resided within four blocks of Ms. Dagleish and did not have a job. Therefore, it was reasonable for the jury to find the appellant committed the residential burglary because the time of the ad and his residence placed him near the scene of the crime.

In addition, the appellant was later found to be in possession of Ms. Dagleish’s stolen blanket and backpack. When confronted about the stolen blanket, the appellant gave an improbable explanation of buying it, but not recalling where he bought it, who he bought it from, and how much he paid for the blanket. Furthermore, he gave inconsistent explanations with regards to his connection to Ms. Dagleish’s stolen Seahawks bottles. On

May 12, 2014, he sold the stolen bottles to the pawnshop and signed a receipt stating that he was the sole owner of the bottles. On June 25, 2014, Detective Bokma asked if the appellant had pawned anything recently and the appellant denied pawning anything recently. The appellant's temporal and physical proximity to the scene of the crime combined with his possession of recently stolen property, his improbable explanation about the stolen blanket, and his inconsistent statements about the stolen bottles provided sufficient evidence for a jury to find him guilty of residential burglary. Therefore, his conviction for residential burglary should be affirmed.

There was sufficient evidence for the jury to find the appellant guilty of burglary in the second degree for Mr. Gilliam's detached garage. While there was less evidence connecting the appellant to Mr. Gilliam's detached garage than Ms. Dalgleish's residence, there was still slight corroborative evidence to sustain the appellant's second degree burglary conviction.

On June 11, 2014, Mr. Gilliam noticed his detached garage was compromised and things were out of place. He subsequently discovered some missing Dewalt tools. At the time, the appellant resided within three blocks of Mr. Gilliam and did not have a job. On June 14, 2014, the appellant pawned Mr. Gilliam's stolen Dewalt tools at the Pawn Shop and More in Longview, WA 98632, and signed a receipt stating that the tools

were not stolen and that he had good title to the property and the right to pledge the tools. On June 25, 2014, Detective Bokma asked if the appellant had pawned anything recently and the appellant denied pawning anything recently. The appellant's recent possession of the stolen tools on June 14, 2014, combined with his inconsistent statements about the stolen tools to the pawnshop and Detective Bokma, provided sufficient evidence for a jury to find him guilty of burglary in the second degree for Mr. Gilliam's detached garage. Therefore, his conviction for burglary in the second should be affirmed.

C. THE TRIAL COURT DID VIOLATE THE APPELLANT'S CONSTITUTIONAL RIGHT TO BE FREE FROM DOUBLE JEOPARDY BY ENTERING CONVICTIONS FOR BOTH TRAFFICKING IN STOLEN PROPERTY AND THEFT.

The State concedes that the evidence presented to convict the appellant of the trafficking charges and the theft charge were the same evidence. Therefore, the case should be remanded back to the trial court to vacate count five, the theft charge.

D. THE CHARGING LANGUAGE WAS CONSTITUTIONALLY SUFFICIENT TO INFORM THE APPELLANT OF ALL THE ESSENTIAL ELEMENTS OF THE TRAFFICKING IN STOLEN PROPERTY AND THEFT CHARGES.

In State v. Kjorsvik, 117 Wash.2d 93 (1991), the court adopted the federal courts' rule that "indictments which are tardily challenged are

liberally construed in favor of validity,” Id. at 103, because it “fairly balances the right of a defendant to proper and timely notice of the accusation against the defendant and the right of the State not to have basically fair convictions overturned on delayed post-verdict challenges to the sufficiency of a charging document.” Id. at 108. “When an objection to an indictment is not timely made the reviewing court has considerable leeway to imply the necessary allegations from the language of the charging document.” Id. at 104. “Under this rule of liberal construction, even if there is an apparently missing element, it may be able to be fairly implied from the language within the charging document.” Id. “It is sufficient to charge in the language of a statute if it defines the offense with certainty.” State v. Elliott, 114 Wash.2d 6, 13 (1990).

“The test is: ‘(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?’ Tresenriter, 101 Wash.App. at 491, 4 P.3d 145 (quoting Kjorsvik, 117 Wash.2d at 105-06, 812 P.2d 86). We distinguish between charging documents that are constitutionally deficient—i.e., documents that fail to allege sufficient facts supporting each element of the crime charged—and those that are merely vague. State v. Leach, 113 Wash.2d 679, 686, 782

P.2d 552 (1989). A charging document that states each statutory element of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. Leach, 113 Wash.2d at 687, 782 P.2d 552. A defendant may not challenge a charging document for “vagueness” on appeal if he or she failed to request a bill of particulars at trial. Leach, 113 Wash.2d at 687, 782 P.2d 552.” State v. Winings, 126 Wash.App. 75, 84 (2005).

In State v. Winings, Winings was charged with second degree assault while armed with a deadly weapon. The information states, “In the County of Clallam, State of Washington, on or about the 24th day of March, 2003, the Defendant did assault another with a deadly weapon; in violation of RCW 9A.36.021, a Class B felony.” Id. at 80. The information failed to identify the victim, the weapon used, or how Winings used the weapon. On appeal, the court held that the information, although vague, was constitutionally sufficient because it alleged assault of another with a deadly weapon in violation of RCW 9A.36.021 and it included the assault’s date and location. Id. at 84-86.

In State v. Parks, 198 Wash.App. 1007 (2017), an unpublished opinion filed on or after March 1, 2013, that is not binding authorities, but may be accorded such persuasive value as the court deems appropriate under GR 14.1, the defendant argued that “the information charging him

with two counts of second degree theft, second degree malicious mischief, and second degree vehicle prowling was insufficient because it did not allege the specific facts about the crimes.” Id. at 6.

In Parks, the defendant “concedes that the information contained the essential elements of the crimes. He argues that the information did not describe the property he was accused of stealing, the property he was accused of damaging, and the vehicle he was accused of entering. But we distinguish between charging documents that are constitutionally deficient because of the State’s failure to allege each essential element of the crime charged and those that are merely factually vague as to some other matter. State v. Mason, 170 Wn.App. 375, 385, 285 P.3d 154 (2012). Parks has not shown that he was prejudiced as a result of any vagueness in the information. Accordingly, we hold that the information was sufficient with regard to the theft, malicious mischief and vehicle prowling charges.” Id. at 7.

Pursuant to RCW 9A.82.050(1), “[a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.”

Count two of the second amended information states, “[t]he defendant, in the County of Cowlitz, State of Washington, on or about

05/12/2014, did knowingly initiate, organize, plan, direct, or supervise the theft of property for sale to others, or did knowingly traffic in stolen property, contrary to RCW 9A.82.050(1) and against the peace and dignity of the State of Washington.” Second Amended Information, p. 2. Count four charges the appellant with the same crime and same language, but for a date of 06/14/2014. Id.

Counts two and count four of the second amended information included all essential elements of the crime of Trafficking in Stolen Property in the First Degree. While factually vague as to “property,” the appellant was not prejudiced by the charging language in count two and count four. The dates correspond with when he sold the three stolen Seahawks bottles on May 12, 2014, and pawned the three stolen Dewalt tools on June 14, 2014. Appellant was well aware of those dates and items transacted on those dates. He did not object to the filing of the second amended information and never sought a bill of particulars with regards to those two counts because he knew the allegations against him and properties involved in those two counts. The charging language for count two and count four did not prejudice the appellant and was constitutionally sufficient.

Pursuant to RCW 9A.56.050(1)(a), “person is guilty of theft in the third degree if he or she commits theft of property or services which (a) does not exceed seven hundred fifty dollars in value.”

Pursuant to RCW 9A.56.020(1)(a), “[t]heft’ means: (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.”

Count five of the second amended information states, “[t]he defendant, in the County of Cowlitz, State of Washington, on or about or between 05/12/2014 and 06/14/2014, did wrongfully obtain or exert unauthorized control over property belonging to another, of a value not exceeding \$750, with intent to deprive Pawn Shop And More of such property, contrary to RCW 9A.56.050(1)(a) and RCW 9A.56.020(1)(a) and against the peace and dignity of the State of Washington.” Second Amended Information, p. 2.

Count five of the second amended information included all essential elements of the crime of Theft in the Third Degree. While factually vague as to “property,” the appellant was not prejudiced by the charging language in count five. The dates correspond with when he sold the three stolen Seahawks bottles and pawned the three stolen Dewalt tools to the pawnshop. The only thing the appellant obtained from Pawn Shop and More was United States Currency when the pawnshop paid the appellant for the stolen bottles and stolen tools. There was no confusion regarding what the appellant had obtained from the pawnshop. He did not object to

the filing of the second amended information and never sought a bill of particulars with regards to count five because he knew the allegation against him and what property he had obtained from the pawnshop. The charging language for count five did not prejudice the appellant and was constitutionally sufficient. Therefore, the appellant's convictions for count two and count four should be affirmed because the charging language contained all the essential elements of the charges and did not prejudiced the appellant.

E. THE STATE WAS NOT REQUIRED TO PROVE THE APPELLANT'S CRIMINAL HISTORY WHEN THE STATE CORRECTLY CALCULATED THE APPELLANT'S OFFENDER SCORES AND SENTENCING RANGES, AND THE APPELLANT AGREED TO THOSE SCORES AND SENTENCING RANGES.

In State v. Hunter, 116 Wash.App. 300 (2003), the appellant pled guilty to second degree robbery. On appeal, the appellant "argues that the State failed to prove that his out-of-state convictions were comparable to Washington felonies." Id. at 301. The appellate court noted that "[a]t the time [appellant] entered his guilty plea, [appellant] disputed the State's assertion that his offender score was five, based on five out-of-state convictions. At sentencing, the deputy prosecutor acknowledged that the State was unable to prove that one of the five out-of-state convictions was comparable to a Washington felony and that [appellant's] offender score

was therefore four. In response, the defense counsel expressly conceded that the only other conviction that [appellant] was challenging was properly included in his offender score. Defense counsel also acknowledged that the State had properly calculated [appellant's] standard range.” *Id.* at 302. Therefore, the appellate court noted that the appellant “does not allege that his prior out-of-state convictions were erroneously classified; rather, his sole claim is that the State failed to prove comparability at sentencing. Because [appellant] affirmatively acknowledged the correctness of the State’s classification, the sentencing court was not required to consider any further proof.” *Id.* at 372.

In addition to the present case, the appellant had another pending case, case # 16-1-01295-4. In case # 16-1-01295-4, the appellant pled guilty to one count of eluding and his sentencing was set over to the same sentencing date on this case. At the sentencing for both cases, case # 16-1-01295-4 was dealt first as it was the lesser of the two cases and was to run concurrent with this more serious case. In case # 16-1-01295-4, the appellant agreed that his offender score was 9 and that his sentencing range was 22-29 months.

The agreed upon criminal history for case # 16-1-01295-4 was the same criminal history for case # 14-1-00818-7, the only difference being that there were multipliers in case # 14-1-00818-7 due to the burglary

convictions. In case # 14-1-00818-7, the State accurately calculated his offender scores and sentencing ranges. The appellant agreed the State accurately calculated his scores and sentencing ranges, and confirmed on multiple occasions that the only difference between the two cases were the multipliers.

Presently, the appellant does not allege that his offender scores and sentencing ranges were miscalculated in case # 14-1-00818-7, rather he claims the state failed to prove the appellant's criminal convictions at time of sentencing. As in Hunter, the appellant pled guilty to eluding and agreed that his criminal history resulted in him having an offender score of 9 in case # 16-1-01295-4.

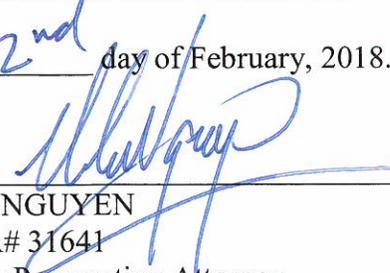
Case # 14-1-00818-7 was on for sentencing at the same time as case # 16-1-01295-4. The agreed upon criminal history for case # 16-1-01295-4 was the same criminal history for case # 14-1-00818-7, the only difference being that there were multipliers in case # 14-1-00818-7 due to the burglary convictions. Instead of challenging his scores and sentencing ranges in case # 14-1-00818-7, the appellant repeatedly agreed his criminal history, offender scores, and sentencing ranges were correct on several different occasions. Therefore, the State was not required to prove the appellant's criminal history in case # 14-1-00818-7 because it correctly calculated the

appellant's offender scores and sentencing ranges, and the appellant agreed to those calculations.

V. CONCLUSION

The case should be remanded back to the trial court to vacate count five, Theft in the Third Degree, and affirm all other convictions.

Respectfully submitted this 2nd day of February, 2018.



MIKE NGUYEN
WSBA# 31641
Deputy Prosecuting Attorney

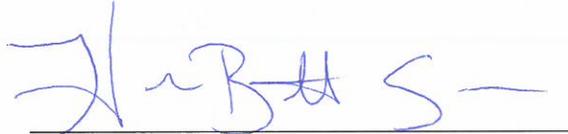
CERTIFICATE OF SERVICE

Hannah Bennett-Swanson, certifies that opposing counsel was served electronically via the Division II portal:

Skyler T. Brett
Law Offices of Lise Ellner
P.O. Box 18084
Seattle, WA 98118
skylarbrettlawoffice@gmail.com

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

Signed at Kelso, Washington on February 2, 2018.



Hannah Bennett-Swanson

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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