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51346-3-II  
Grays Harbor County No. 17-1-295-14

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

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STATE OF WASHINGTON,

Respondent,

v.

LARRIN BREITSPRECHER,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
GRAYS HARBOR COUNTY

---

The Honorable F. Mark McCauley, Trial Judge

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*APPELLANT'S OPENING BRIEF*

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## **ASSIGNMENT OF ERRORS**

1. The trial court erred in denying the Defendant's Motion to Dismiss the charge of Possession of Stolen Property due to lack of evidence.
2. The trial court erred in denying the Defendant's Motion to Dismiss the charge of Commercially Fished Using Unlawful Gear due to lack of evidence.
3. The trial court erred in denying the Defendant's Motion to Dismiss the charge of Unlawful Interference with Fishing or Hunting Gear.
4. The Trial Court erred in entering the Judgment and Sentence.

## **QUESTIONS PRESENTED**

1. Whether the trial court erred in denying the Defendant's Motion to Dismiss the charge of Possession of Stolen Property because the State did not show that Mr. Breitsprecher had actual or constructive possession.
2. Whether the trial court erred in denying the Defendant's Motion to Dismiss charges of Possession of Stolen Property and Commercial Fishing Using Unlawful Gear because the State failed to prove that the crab pots were the property of another.
3. Whether the trial court erred in denying the Defendant's Motion to Dismiss all three charges because the State failed to show a possessory interest in the crab pots.
4. Whether the trial court erred in denying the Defendant's Motion to Dismiss the charges of Commercial Fishing Using Unlawful Gear and of Unlawful Interference with Fishing or Hunting Gear because there was no evidence a crime occurred.
5. Whether the trial court erred in denying the Defendant's Motion to Dismiss all three charges because the State the State failed to show the incidents occurred in the State of Washington.
6. Whether the trial court erred in denying the Defendant's Motion to Arrest Judgment because the State failed to instruct the jury on accomplice liability.

## **STATEMENT OF THE CASE**

### **I. PROCEDURAL HISTORY**

Mr. Breitsprecher was charged on May 18, 2017, with (1) Theft in the Second Degree contrary to RCW 9A.56.040(1)(a) and RCW 9A.56.020(1); (2) Possession of Stolen Property in the Second Degree contrary to RCW 9A.56.160(1)(a) and RCW 9A.56.140(1); (3) Commercial Fishing Using Unlawful Gear contrary to RCW 77.15.520(1); and (4) Unlawful Interference with Hunting and Fishing Gear in the First Degree contrary to RCW 77.15.180(3). CP1.

The case proceeded to a jury trial before the Honorable F. Mark McCauley from October 17, 2017 till October 20, 2017. On October 19, 2017, defense filed a Motion to Dismiss the charge of Possession of Stolen Property in the Second Degree on grounds of Double Jeopardy, which was the heard by the court and cured with the jury instructions for an alternate finding. CP9, CP14. Defense, in addition, filed a Motion to Dismiss the charges of Theft in the Second Degree, Possession of Stolen Property in the Second Degree, Commercial Fishing Using Unlawful Gear, and Unlawful Interference with Hunting and Fishing Gear in the First Degree on the grounds of Insufficiency of Evidence, which was denied by the court on hearing oral arguments. CP10.

On October 20, 2017, the jury returned a verdict finding Mr. Breitsprecher guilty of Possession of Stolen Property in the Third Degree, Commercial Fishing Using Unlawful Gear, and Unlawful Interference with Hunting and Fishing Gear in the First Degree. C15-CP17. The Defense then filed a Motion for Arrest of Judgment, which was denied by the court. CP21, CP28. Mr. Breitsprecher was sentenced on November 15, 2018, to 364 days in jail with 334 of those days suspended and the remainder converted to 90 days of Electronic Home Monitoring. CP30.

## II. STATEMENT OF FACTS

### A. Pretrial Facts

On September 26, 2016, Officer Welter, of the Department of Fish and Wildlife, met with Kory Kerzman at Grays Harbor County Jail who had been arrested by Westport Police for an unrelated felony. CPII 2-3. Mr. Kerzman told officer Welter that he had been working as a deckhand on Mr. Breitsprecher's boat during the previous crabbing season. Mr. Kerzman stated that Mr. Breitsprecher would bring his boat up to a string of crab pots belonging to other fishermen and then would direct the deck crew to take the crabs and the pot or to sink the pot. CPII 3. Mr. Kerzman stated that he would then rig the stolen pots to match the other pots owned by Mr. Breitsprecher. CPII 3. Mr. Kerzman stated that he was instructed by Mr. Breitsprecher to steal 50-100 commercial crab pots. CPII 3. Officer Welter

visited the Port of Grays Harbor where the crab fishermen generally stored their pots to corroborate Mr. Kerzman's story and inspected the stack of pots in the area where Mr. Breitsprecher's stored his pots. CPII 3.

On October 13, 2016, Officer Welter accompanied Mr. Kerzman to Grays Harbor Port where the fisherman stored their crab pots and Mr. Kerzman identified various pots in Mr. Breitsprecher's pile that he stated did not belong to Mr. Breitsprecher. CPII 4. Based on this information, the State charged Mr. Breitsprecher with (1) Theft in the Second Degree contrary to RCW 9A.56.040(1)(a) and 9A.56.020(1); (2) Possession of Stolen Property in the Second Degree contrary to RCW 9A.56.160(1)(a) and 9A.56.140(1); (3) Commercial Fishing Using Unlawful Gear contrary to RCW 77.15.520(1); and (4) Unlawful Interference with Hunting and Fishing Gear in the First Degree contrary to RCW 77.15.180(3), on May 18, 2017. CPI.

B. Trial facts

The trial started on October 17, 2017, and the State called Edward Welter to the stand, a commissioned law enforcement officer who works the Washington Department of Fish and Wildlife (hereinafter "WDFW"). RPI 33. In his testimony, Mr. Welter described the commercial crabbing season, stating that it is generally around New Year's Day and that the Native American tribal fleet gets a forty-five-day head start before the

commercial fishing fleets in Westport. RPI 37. He stated that the season generally runs from Christmas and New Year's to around the 20th of September and that prior to the commencement of the season, the fisherman get there gear ready for the season by checking the polarity, replacing zincs, patching any holes they have, checking the tension of all the wires, and replacing bridles and shots of line if needed. *Id.* He testified the State required a fisherman to have a pot tag, which is a small yellow plastic tag bearing and identification of the owner of the pot, and most fishermen usually put the name of the boat or the name of the owner and phone number on the tag. RPI 38. They are also required to have a buoy tag, which identifies their buoy; however, Tribal fishermen are not required to have buoy tags but are required to have buoy with colors and pot tags. *Id.*

Officer Welter then stated that when a fisherman bought a crab pot, the fisherman usually customized it the way he would want by adding a bait jar and a pot tag. *Id.* The fishermen customized their pots depending on their boats and the size of their crew to enable feeding the line on and off different ways on the “block”, to lower and raise the pot out of the water, depending on where the dump shoot was located. RPI 40-41.

Officer Welter then described what fishermen generally do to identify their specific pots and prevent others from taking their pots. RPI 49. He explained how some fishermen paint the “tunnels” of the pot, some paint

the “ribs”, and some weld their brands on the weight bars. *Id.* He stated the fishermen’s brands usually consisted of their initials or the first letter of their boat, which was welded on the weight bar. *Id.*

When asked to define derelict gear, Officer Welter stated that derelict gear was gear that had been “abandoned.” RPI 56. When the crabbing season was over and somebody did not recover their pots after September 20th, the gear is deemed to be derelict. *Id.* At that point WDFW would issue a permit for a person to retrieve derelict gear. *Id.* He reiterated that derelict gear was gear that had been left out after the season had closed. *Id.*

When describing the details of this case, Mr. Welter stated that in September 2016 he received a call from a Westport police Officer stating that Mr. Kerzman had been arrested on a felony warrant and wanted to talk to him. RPI 59. He met with Mr. Kerzman and based on the information provided by Kerzman he decided to investigate potentially stolen crab pots. RPI 61-62. He went to the gear pile owned by Mr. Breitsprecher and inspected it to see whether the information he received had been accurate. RPI 62. The gear pile was at the Port of Grays Harbor property in Westport, where crabbers stacked their gear. *Id.* He knew he was looking at Mr. Breitsprecher’s gear because of the pot tags and branded buoys. RPI 62-63.

Welter looked for pots that were inconsistent with the way Mr. Breitsprecher rigged his gear. RPI 64. He took pictures of those inconsistent

pots and showed them to a Quinault Officer, Derrick Waugh, and subsequently met with Mr. Kurzman several times after. RPI 64, RPI 66-67. Based on the information he received from Mr. Kerzman, he obtained a search warrant to search Mr. Breitsprecher's vessel, the Shearwater Two, and the gear pile belonging to him. RPI 68-69. He executed the search warrant on October 17, 2016, with several other officers. RPI 69-70. The officers went through Mr. Breitsprecher's pile of pots with Mr. Kerzman, who help them identify the stolen Parts. RPI 71.

Mr. Welter stated that the warrant was also executed on the Shearwater Two. RPI 79. He stated the officers seized a GPS, chart plotter, and a red grinder with a grinding disk from the vessel. RPI 79-80. In addition, they seized thirty-two of the defendant's pots, which were then kept at the evidence yard in Montesano. RPI 80.

Officer Welter testified that he was assisted by Derrick Waugh to identify the persons whom he needed to call. *Id.* He prepared a questionnaire for the commercial fisherman, asking them whether they commercially crab fished, had pots stolen or gear missing, whether they believed their gear was stolen and if so whether they believe a specific person was responsible for stealing their gear. RPI 81-82. He conducted approximately thirty-one interviews where persons looked at the gear piles. RPI 84. Some of the fishermen could not identify the pots shown to them, some stated the pots

did not belong to them, and some had other statements. *Id.* If a fisherman identified a crab pot as theirs, Mr. Welter stated he marked that pot with a number. RPI 85.

On cross-examination Mr. Welter stated there were multiple ways of connecting the tail to the overall line to customize one's gear but had known only one-way Mr. Breitsprecher connected the tail on his gear, which he had observed on Mr. Breitsprecher's newer pots. RPI 88-90. When questioned about determining the age of a crab pot, Officer Welter stated a person could approximate the age of a pot by the rust on the weight bar; however, it also depended on how frequently that pot was fished. RPI 90. Another factor to estimate the age of a crab pot was by the growth on the weight bar caused by it sitting on the ocean floor. RPI 90.

When asked whether the State's Identification 16 could be an abandoned pot, Officer Welter stated the only way he could tell if a pot had been abandoned was if it had gone through the derelict gear program. RPI 91. Under the program, a person had to have a permit to retrieve derelict gear and when that gear was retrieved, it was identified as being derelict and WDFW puts an industrial zip tie or tag on it, which bears a serial number that helps keep a log of the original license number. RPI 91.

Mr. Walter then elucidated on wrap arounds and stated the current would drag a line around back and forth and those lines would become

wrapped around a line connected to a crab pot buoy. RPI 93-94. He stated that a vessel, such as a tanker or another crab fishing boat, could cut the line attached to the buoy when it went by, which would leave the crab pot with the line floating about. RPI 94.

The State then brought Derrick Waugh, a commissioned law enforcement officer for the Quinault Indian Nation, as its next witness. RPI 101. Mr. Waugh testified he knew how some tribal members rigged their gear; however, he was unaware of how fishermen in the Westport fleet rigged their gear. RPI 116-119. On cross examination, Mr. Waugh testified that every boat had a different area where they store their gear; tribal members usually stored their pots at Quinault Seafood, which was near Ocean Gold. RPI 120-121. He stated that the pots were kept in an area that was usually left open and unlocked. RPI 121. He testified there were areas all over Westport where the pots are left out in the open and there were many forklifts in Westport carrying pots. RPI 123. The whole parking lot, which was port property was wide open and unlocked with thousands of crab pots stored there. RPI 124. He stated there was also a dock on the marina where people dumped stray pots, which usually had seventy to eighty pots left there. RPI 125- 126.

Mr. Waugh then also described a wrap-around pot; he stated that when a boat dropped its gear close to another fisherman's gear and when one of

the fishermen pulled his pots up on to the boat, the line would get wrapped around the other's pots. RPI 127. The fisherman pulling his pots would end up pulling both pots up. RPI 127. Mr. Waugh stated he had seen thirty pots wrapped up together at times. RPI 127-128. He stated a fisherman who got a wraparound was left with little choice but to tow all the pots on to his boat and try to cut the other line to retrieve his pot. RPI 128. The fisherman would then leave the rest of the pots at that location, which would eventually be abandoned if they did not wash in, get run over, or have something else happen to them. RP 128. He stated those pots would end up getting washed onto the beach, where they got buried and left without use. RPI 129. Sometimes a fisherman would get a wraparound without buoys, i.e. pots that did not have buoys attached to them. *Id.* The lines of those crab pots without buoys would get wrapped around a fisherman's line, who would end up pulling the other pot up with it. *Id.*

Mr. Waugh testified he has lost between two hundred to two hundred and fifty pots a season RPI 130. One year he had experienced seventy-foot swells that pushed nearly everybody's gear on to the beach and buried it and no one could find their gear. *Id.* He stated that sometimes a buoy would get pulled below the surface of the water and would shrink due to the compression, thereby preventing the buoy from floating properly. RPI 131. He stated some Tribal members, and some non-Tribal, used line without

lead or sinkable line, which floated on top of the water surface and was a problem due to the risk of boats running over the and chopping it and sometimes big tankers pulled multiple pots into the bay. RPI 131-132.

Waugh testified there were crab pots scattered over the ocean floor, which had become a “wasteland” of derelict pots. RPI 133. The issue of derelict pots had gotten better over the last couple of years with the Salvage Program instituted by the Quinault tribe, which had initiated the program after receiving a grant to clean up the tribal fishing area. RPI 133-134. On redirect examination by State’s counsel, Mr. Waugh described how the tribe had contracted with various boats to pick up as many derelict pots as they can as part of the Salvage program. RPI 136.

On the second day of trial, State’s counsel brought Kory Kerzman as their witness. RPII 207. Mr. Kerzman stated that he moved in with Mr. Breitsprecher when he was thirteen years old and was taught to commercially fish by Mr. Breitsprecher. RPII 208-209. He stated that he couldn't recall if he had worked a full season with the defendant but had rigged gear on the defendant's boat and described the line and gear used by the defendant. RPII 209, RPII 212-215. He went on elaborate how the defendant label his new pots by having them branded “LB.” RPII 218. He stated the defendant, however, also bought “junkers.” RPII 218.

Mr. Kerzman stated he was aboard the Shearwater Two at the end of the 2016 crab season and had also been there two years prior to that and had pulled aboard pots that were not the Shearwater Two's. RPII 218. He could identify the Shearwater Two's pots because Mr. Breitsprecher's buoys were orange and red and had pulled aboard pots not belonging to the defendant from multiple times in the 2016 season. RPII 218-220.

Mr. Kerzman testified he would get five pots in a wraparound sometimes that he pulled onto the boat and would sometimes pull pots that were not wrap-arounds. RPII 220. He would pull up pots, which weren't wrapped around Mr. Breitsprecher's pots, by throwing the line on the block and coiling the block when the boat was passing alongside the other person's buoy. RPII 221. He stated Mr. Breitsprecher would "rev the motor" which, was a signal for him to grab the pot belonging to another fisherman. RPII 222. Mr. Kerzman would then bring the pot on board and determine whether or not to keep by assessing how conspicuous the pot was, whether it was a lesser-known brand, and who it belonged to. RPII 223-224. He would also consider the amount of work it would take to make it look like one of the defendant's pots. RPII 225. If he decided not to keep the crab pot, he would throw it back. RPII 225. If the pot was a keeper, he would take out the tags, change the line, change the bait containers, and sometimes

grind the weight bars to remove the brand displaying the owner. RPII 225-226. He would dispose the tags and the buoy of the owner. RPII 226- 227.

Kerzman stated he observed a multitude of stray pots while fishing and the defendant would bring in tons of gear that belong to other people and return it to them. RPII 228-229. Mr. Kerzman would rig the pots and grind the weight bar of the pots he kept and throw them back in the water to be fished. RPII 229-230. He helped transport the defendant's pots to the crab pot yard the previous year by stacking them on the boat and sending them to the top of the dock; however, he did not stack the defendant's pots in the yard. RPII 231.

Mr. Kerzman then stated that he met Officer Welter in jail a few times the and went with law enforcement to the Crab Pot yard to identify pots that were stolen. RP 232-233. He was in the pot yard with Officer Welter and showed the Officers ways to identify pots belonging to the defendant. RPII 234-235. If they saw a pot that did not belong to Mr. Breitsprecher, he helped the officers identify those characteristics of the pot. RPII 236. He identified approximately thirty pots, some of which belong to the defendant and some which did not. RPII 236. State's counsel asked Mr. Kerzman how Mr. Breitsprecher knew that he was taking pots that belonged to other fishermen and keeping them. RPII 237. Mr. Kerzman responded the defendant knew everything on the boat. *Id.*

On cross-examination Mr. Kerzman stated that he did not have to be instructed to steal pots because he had been doing it for so long that the defendant did not have to instruct him. RPII 238. Mr. Kerzman stated he was fired from Matt Finley's boat for stealing pots. *Id.* When questioned about being told to steal pots for Mr. Breitsprecher, Kerzman stated the defendant may or may not have told him to do so a while ago, or someone else on the boat may have told him and taught him how to do it. RPII 240. He stated he made approximately ten trips with Mr. Breitsprecher the previous crabbing season and had made those trips with other deckhands, who would have seen him stealing the pots. RPII 240-242. He stated others, including Bob Wolfe, physically helped him steal the pots and it would be inconceivable for him to steal pots without some other crew member noticing it. RPII 242. Mr. Breitsprecher was the captain on the boat and in the wheelhouse at those times and did not come out on the boat deck because he could not walk very well. RPII 242-243.

Although Mr. Kerzman did not physically put those crab pots on the dock, he stated he would send them to the top of the dock, which was the last time he touched the pots. RPII 243. The pots were sent to the dock from the boat in stacks of 5 and then the Cannery takes control of them. RP 243. When the crab pots get sent to the dock, Washington Crab takes over the stacks of pots and transports them to the Port property, where the pots of

other's have been offloaded. RPII 244. On the Port property, the pots are stacked five high and stored in approximately rows of twenty. RPII 245.

When asked whether he directed law enforcement to the middle of the stack, Mr. Kerzman stated they started on the outside and worked their way to the middle of the stack. RPII 247. He stated he did not go out and look at the stack before he was arrested because did not have time to. RPII 248. Mr. Kerzman stated that he did not recall making a statement prior to his visit to the pot yard about the stolen gear being in the middle of the stack, but might have said that they probably were not on the outside. RPII 259. He stated he told law enforcement that the stolen pots were definitely not on the top of the stack, and we're going to be in the bottom. RPII 260.

Mr. Kerzman acknowledged he was aware the police were looking for him because there was a incident on the Shearwater Two. RPII 260. There was an allegation made of an incident on the boat around September 9, 2016, and there were a few weeks of time before he was expected to be arrested. RPII 260-261. When asked how he knew where the stolen pots were since he had not been to the yard, Mr. Kerzman he did not go to the yard prior to going there with Officer Welter. RPII 261-262.

Mr. Kerzman stated that when he was arrested approximately on October 1, 2016, he told one of the police officers in Westport to contact Welter. RPII 262. He stated he had expected being arrested. RPII 262. On

meeting Officer Welter, he informed him of aiding Mr. Breitsprecher in misappropriating other's crab pots and wanted to get a hold of the defendant to find out if he would to drop the filed charges. RPII 263.

Mr. Kerzman stated he was charged with robbery and vehicle prowl for going on Mr. Breitsprecher's boat without permission. RPII 263. He anticipated being sentenced to three to four years in prison. *Id.* Kerzman wanted to help himself and sought revenge on Mr. Breitsprecher for filing those charges. *Id.* Mr. Kerzman made an agreement on October 14, 2016, with the prosecutor's office and agreed to take law enforcement to Mr. Breitsprecher's gear pile and identify the crab pots. RPII 264. He was required to stay in contact with the prosecutor's office but violated the agreement by not staying in contact. RPII 265. The agreement stated that if he did as required, and testified, the case against him would be dismissed in its entirety. *Id.* Mr. Kurzman was let out of jail on approximately the October 17, 2016, and the case filed against him was dismissed. *Id.* Additionally, WFDW gave Mr. Kerzman a phone and a card with approximately \$400 or \$500 to get a bus ticket to Spokane. RPII 266.

Mr. Kerzman stated he was arrested again in August 2017, when he was charged again with robbery and vehicle prowl, the original charges filed against him. RPII 279. WDFW refiled the charges so as to have him arrested and brought back to testify. RPII 279-280. He stated he had been in jail

since being arrested the second time and had made a new agreement the previous day, which stated that his testimony had to be consistent with what he told the officer and his charges would be dismissed. RP 280 - 281.

When questioned about the grinders on the Shearwater Two, Mr. Kerzman stated a person could grind the brand on a crab pot with a grinder, which every commercial fisherman had on his boat, and hit it with a hammer until the brand broke off. RPII 282-283. He additionally stated Mr. Breitsprecher bought used pots. RPII 283. He stated the defendant fished from the beach where the waves crashed, up till depths of seventy to ninety fathoms, approximately twenty miles offshore. RPII 284. He had known Mr. Breitsprecher to bring in lost gear for his fellow fishermen and leave it on the docks. *Id.*

On redirect examination Mr. Kerzman stated Breitsprecher knew he was stealing pots because they operated like “one big machine” and if there was a buoy on the side of the boat, which Breitsprecher wanted pulled in, he revved his boat’s motor. RPII 291. Mr. Kerzman stated that when they got to port, people from the Port would send hooks down to the boat to pick up the stacks of pots. RPII 293. The pots were stacked with the stolen pots at the bottom when they were taken off the vessel. RPII 293.

On recross-examination Mr. Kerzman stated that he was willing to lie if it helped himself. RP 305. Mr. Kerzman also stated that if Breitsprecher

wanted to know what was going on deck he could open the door on the side of the boat or could see through the window. RPII 306. If Breitsprecher wanted to see what was going on at the back, he would have to walk out the back door. *Id.*

The State next called Christine Winn, who owned a fishing vessel called the Qualaysquallam. RPII 309-310. Ms. Winn stated she operated her own a vessel from 2003 to 2015 and fished under the Quinault Tribe Treaty. RPII 310. She stated she rigged her own gear every year and had a specific way she would rig her gear to ensure all her crab pots wear uniform. RPII 312. She stated Trilogy custom-built her pots, which were 42 inches, while a normal crab pot was between 36 and 38 inches. RPII 314. Her pots, in addition, were 14 inches tall compared to 12-inch standard pots. *Id.* Trilogy put a “Q” on the weight bars of her pots for the first letter of her boat. RPII 315. She believed some of her pots, which disappeared may have been stolen in the 2015-2016 season. *Id.*

Ms. Winn was then shown States Identification 25, which, she stated, she had seen before in the holding yard that belong to WDFW, in Montesano. RPII 317. She had identified six pots that belong to her in the holding yard that August, including States Identification 25, which she positively identified as being her crab pot because of the “Q” on the weight bar and because it was bigger than standard crab pots, had her bridle, same

line, and bait box that she used. RPII 318-319. However, she stated the pot tag was not hers but a pot tag belonging to the Shearwater Two and had never sold any commercial fishing gear to Mr. Breitsprecher. RPII 320-321.

Ms. Winn stated that after she was done fishing, her gear was taken to the Grays Harbor Port gear yard in Westport. RPII 322. She stated she had never sold any of her pots. RPII 323. She stated if she ever obtained any derelict gear she put it on the end of a slip and usually call the owner on the radio if there was a number on the pot tag. RPII 323-324.

On cross-examination, Ms. Winn stated that she had forty-five crab pots stolen “just off the bar” and guessed that states identification 25 was one of those. RPII 325-326. She stated she owned approximately 550 pots and generally lost 60 to 70 a year, but had lost 100 pots in 2003, the first year she finished. RPII 328.

Ms. Winn testified she stored her pots in the yard next to the Jolly Roger, which was an open yard. RPII 329. She knew that specific pot was stolen as compared to being abandoned because a whole string of pots disappeared and assumed it got stolen. *Id.* She believed wrap arounds were very rare, which made it unlikely her pot came up in a wraparound. RPII 330. On redirect examination, Ms. Winn stated that the 45 pots that went missing were at a depth of 25 fathoms. RPII 331. She stated she had lost 75 pots 3 years ago. RPII 331.

The state next brought on Pete Wilson, fishermen from the Quinault Indian Nation. RPII 336-337. Mr. Wilson stated he used a 42-inch Trilogy Crab Pot with his initials, "PW", welded into the weight bar and described how he rigs his bridle and other gear. RPII 339-340, RPII 342. He, in addition, stated he typically lost around 10% of his pots every season. RPII 342. The lost pots were usually run over by other boats or dragged off by the ocean in a storm. RPII 342.

Mr. Wilson stated he was contacted by Officer Welter and asked to go to the WFDW office to identify pots and was able to identify two of his pots. RP 342-344. He was then able to identify State's identification 26 as being one of his pots from the bridle, the lid hooks, and the zincs on the pots, but stated his initials had been ground off and the pot tag belonged to the Shearwater Two. RPII 347-350. Mr. Wilson stated he had never sold any gear to Mr. Breitsprecher or ever purchased gear from him. RPII 352. He stated he stored his gear at a storage lot in a gear shed in Westport, which was not locked or secured, had no gate, and could be driven on and off. RPII 353.

On cross-examination, Mr. Wilson stated he had lost between 200 and 300 pots in the last four to five years and did not know how the pots got lost. RPII 356. When pots were sitting on the ocean floor and the buoys were floating on top, the buoys could get run over and cut off by other boats.

RPII 356-357. Additionally, if the pots were close to the beach, the rise and fall of the ocean could drag the pots into the surf and were then unretrievable. RPII 357. He described how when a line gets cut off a buoy line wraps around another belonging to someone else, which causes a wraparound. RPII 357-358.

Mr. Wilson stated he was unable to testify whether his pots were stolen or not, but that Exhibit 26 was approximately 5-years-old and did not know when he lost it. RPII 359. He also stated he could not confirm whether other fishermen rigged their gear the way he did but was confident that Exhibit 26 belong to him. RPII 360. He stated he did not know if that pot ended up as a wraparound or whether somebody brought it to the dock and did not call him. RPII 363.

On redirect examination, Mr. Wilson stated that he got wrap around approximately 10 times a season. RPII 364-365. He stated he previously did not put pot tags on his pot but had been doing that for the last 2 or 3 years. RP 365. He, in addition, stated he did not observe the pots being set and retrieved very often while fishing because he drove the boat and would occasionally go out on deck. RPII 366.

The State next called Matthew Winsberg, who owned three fishing vessels. RPII 369. Mr. Winsberg described how he rigged his bridle and how Carl, who worked on his other boat, did it. RPII 371. He stated he

bought a lot of used pots because they were cheaper. RPII 373. If he bought new pots, he had them branded with "MW". RPII 374. He was asked to come identify gear by Officer Welter the previous year and recognized six pots belonging to him. RPII 375-377. He recognized some of those pots because they were the biggest pots legally allowed in Washington, designed by the University of Washington, and were originally purchased by Mark Donovanick. RPII 375-376. He recognized States Identification 27 as being one of his pots because it had his brand on it and the bridle looked like one that had been rigged by Carl. RPII 378. The buoys on the pot belong to the defendant. RPII 379. He recognized States identification number 28 as one of his pots because of Carl's work in the rigging. RPII 381. The pot, however, had Breitsprecher's buoys on it. RPII 382. He had never sold any gear to Mr. Breitsprecher RPII 384. He stated he usually got around twenty wraparounds in a year and usually left them on the dock in Westport or called the owner. RPII 385-386.

On cross-examination Mr Winsberg stated that he thought he had seen Exhibit 28 when it was last fished 30 fathoms, approximately 15 miles, offshore. RPII 387. He stated he had lost 100 to 150 pots a year and approximately 500 to 700 pots in the last five years. RPII 389. He stated he had approximately 140 of the large pots four years ago and was unsure whether that pot was one he had purchased from Mark donovick. RPII 390.

On redirect examination by State's counsel, Mr. Winsberg stated that he rarely pulled up wrap-arounds which had tags on them. RPII 391.

The State next witness Rex Rhoades, a commercial crab fisherman from the Quinault Tribe. RPII 393-394. Mr. Rhoades had a specific way he rigged his gear and had a bullet point sheet for his crew to follow. RPII 395, RPII 398-399. He stated he bought his crab pots from Trilogy and never got them branded until two years ago. RPII 400. He stated he got a 50-day head start to the crabbing season because he was a tribal member, which he believed was a reason his pots were generally stolen. RPII 401. He believed his pots were stolen or run over by other boats because he fished his pots in a line and would come across a gap in the line occasionally. RPII 402. He usually lost gear when non-tribal members started fishing. *Id.* He was contacted by Officer Welter approximately 8 months ago to identify pots at the WDFW yard and was able to identify four pots which he believed were his. RPII 403-404. He then identified States Identification 29 as one of his pots because it was a 38 in Trilogy Crab Pot with his bridle on it and was rigged the way he rigged his pots. RPII 405-406. He, however, was unable to identify the weight bar and was unaware of how other people rigged their weight bars. RP 406-407. He stated he had never bought or sold gear to Mr. Breitsprecher. RPII 407. He got wrap around 30 to 50 times a season and the wrap-around seldom had a pot tag attached to them. RPII 408. Mr.

Rhoades also stated he stored his gear in Westport, at a location that was not secured and was five minutes away from the Port of Grays Harbor Yard. RP 409.

On cross-examination Mr. Rhoades stated there was an incident where the cabin on his boat caught on fire and had a friend accompany him to retrieve pots after that fire. RPII 411-412. He stated he lost 50 to 100 pots during that episode, which were out in the deep. RPII 412. He was unsure when he last saw Exhibit 29 and was unsure whether it was lost or stolen. RPII 412. He stated he generally loses anywhere from 25 to 50 pots a year and gets 10 to 15 of them back if they are found the other fishermen and left on the dock. RPII 413-414. He believed that Exhibit 29 was approximately 3 years old. RPII 414.

After the State rested its case, defense counsel brought their first witness, Matthew Finley, a commercial fisherman was part of the Westport fishing fleet, to the stand. RPIII 446. Mr. Finley said he had been contacted by WDFW to identify some pots they had found and was able to identify one pot because it had his brand in it. RPIII 448. Mr. Finley stated Mr. Breitsprecher had contacted him a few times to collect his pots that Breitsprecher had retrieved as wrap arounds. RPIII 449. He testified it was typical for Breitsprecher to return pots that belong to him when they were found. RPIII 450. Mr. Finley also stated he has a 300-pot license and

generally loses 15 to 20% of his pots in a season. RPIII 463. He stated he usually recovered a few of them back at the pier and was happy if he got ten of those lost pots back. RPIII 463.

On cross-examination by State's counsel, Mr. Finley stated that without the mirror on his boat he would not be able to discern what was happening at the back. RPIII 471. He stated if he opened the door to the wheelhouse, all the electronics were susceptible to getting wet from sea spray and Rain. RPIII 471. He stated he got wrap arounds very often and most of the time they had some kind of tag on them. RPIII 473. He stated the defendant had called him the previous year about having some of his pots that came up as wraparounds stacked on the deck of his boat. RPIII 474.

The defense then called its next witness, Kenneth Rausch, who was the operations manager for the port of Grays Harbor. RPIII 480. He stated that after the fisherman brought the wraparound to the dock they put those pots on the end of the dock and once a year he would try to get the names of the buoys and call the respective owners. RPIII 481. Him and his coworkers cleared the docks of the pots in June so they can start working on the dock. RPIII 481. He stated there was no way of knowing how many stray pots were set on the dock because his department generally gathered a hundred pots before they started calling people to come pick them up. RPIII 482. The owners generally came to pick up the pots, which were never surveilled.

RPIII 483. If the pots were not picked up by their owners, his department would take them to the Port of Grays Harbor crab pot yard and store them there. *Id.* If the pots remained unclaimed and in the yard for more than a year, the pots were impounded and auctioned. RPIII 483-484. He stated forty percent of the pots they obtained were without any identification tags, including ten percent that had no marks to identify the owners. RPIII 484. The unidentifiable pots would be incorporated in the unclaimed group of pots. *Id.*

Mr. Rausch stated that although the compound of the crab pot yard was fenced, the gates were open 24 hours a day. RPIII 485. He stated that crab pots had gone missing from the compound in the past. *Id.* The Port of Grays Harbor leased property across from its office to Washington Crab, which they utilized for staging crab pots before and after the crabbing season. RPIII 486. Mr. Brietsprecher's pots were stored in that area. *Id.* The leased area was an unfenced area and people had unlimited access to it. RPIII 487.

On cross-examination by States counsel, Mr. Rausch stated that of the forty percent of unidentified pots, he was unaware of how thirty percent got back to their owners. RPIII 492. A fisherman who picked up an unidentified pot did not have to check with Mr. Rausch before they picked up the pot. RPIII 492-493.

On redirect examination by defense counsel, Mr. Rausch stated Mr. Breitsprecher leased an area from Washington crab and that the pots were transported by forklift from the dock to that area. RPIII 495-496. He was unaware of how persons gained access to the forklift to move the pots around in the Washington crab area. RP 496 - 497. During the cross examination by States Council, Mr. Rausch stated that the Port of Grays Harbor had forklifts, which were made available to customers. RPIII 497. A person borrowing a forklift from the Port of Grays Harbor needed to fill a lease and pay a fee to do so. *Id.*

The Defense next called Scott King, who had worked for the defendant on his boat for approximately four years. RPIII 507. Mr. King described how the crew pulled up the pots and stated that they had to time the retrieval of the pots with the movement of the tide. RPIII 508. The “puller” reached out and grabs the buoys with a buoy stick and put the line on the “power block” to haul the buoys in. RPIII 509. Mr. King assisted the puller try to bring the pot in and land it on the “dump chute” where they opened the Crab Pot to release the crabs RPIII 509-510. They then baited the pot again, closed the lid, and waited to be instructed to throw the pot back in. RPIII 510. He stated Mr. Breitsprecher revved his motor to let the crew know when the pots were to be thrown overboard. RPIII 510. The crew worked by the exhaust of the boat; hence, they could hear when the defendant

revved the motor, signalling them to dump the pot and grab the next one.

*Id.*

Mr. King stated there were approximately 250 crab boats from Westport and sometimes the fishermen would lay pots a couple of hundred feet from each other and would have to lay the pots without getting tangled in another person's pots. RPIII 514. The pots would wrap around each other due to the daily tide changes. RPIII 515. The tide and the weather governed the time a boat could go crabbing. RPIII 515. Although some boats went out in 60 knot winds and 20 foot seas, the Shearwater Two would not go out if the winds exceeded 40 knots. RPIII 515.

When questioned about wrap-arounds, Mr. King stated the crew would try to untangle the wraparound and pull their pot up slowly so the other person's line did not go into the block. RPIII 516. They would grab the other line and throw it back in the water and leave the other person's gear alone while they stacked their own pots. RPIII 517. Sometimes the pots would get so tangled it would take 20 to 30 minutes to untangle them. *Id.* They would sometimes have 15 pots tangled together. *Id.* Sometimes thousands of pots would get dragged by the weather and the current and get dumped behind the South jetty. *Id.* The boats would then have to drive around looking for their gear. RPIII 518.

Mr. King also stated they often got unidentifiable wrap-arounds, which would be thrown back into the ocean. RPIII 518-519. Sometimes lose 100-foot sections of line would get wrapped around their line multiple times due to the many tide changes. RPIII 519. If the crew retrieved a pot with a brand or pot tag they would usually call the owner; otherwise they would set the pots on the dock so the fishermen could get their pots back. *Id.* Mr. Rausch, in addition, stated he had never stolen a pot. *Id.* Although he had worked with Mr. Kerzman in the pot yard when Mr. Kerzman was helping them rig and clean gear, he had never observed the Shearwater Two crew pick up other people's buoys and take them on board. RPIII 521.

On cross-examination by State's counsel, Mr. King stated that when the Shearwater Two crew were pulling up their own pots and another person's line was tangled, they would undo the knot when it came up and let the other gear go. RPIII 523. Sometimes it would take 20 minutes to untangle the other gear because they did not want to damage it. RPIII 524. He stated it was respectful to pick up other gear without buoys, tag that gear, and call the respectful owner. RPIII 526. If they could not get a hold of the owner, they would leave it at the end of Float 3, just as the other fishermen would. *Id.* He stated if they picked up a crab pot belonging to someone else they would set it at the back on the bait tote and stated he had never stacked somebody else's gear in there gear pile. RPIII 528.

On a redirect examination by defense counsel, Mr. King describe how they offloaded the pots at the end of the crabbing season. RP 533 - 534. He stated that they would pile the pots in stacks of 5 and put a single buoy on top of the stack before they were sent to the dock, which signified that those pots belong to the Shearwater Two. RP 533 - 534.

Defense counsel then brought John Waale, a commercial fisherman, to the stand. RPIII 535. Mr. Waale stopped fishing in 2013 because the boat he had ran aground and had a 300 pot permit, half of which he sold because he was not fishing anymore. RPIII 537. He stated he had sold a number of pots of different sizes and shapes to Mr. Breitsprecher, of which some were bought used and some he bought new. *Id.* Seventy percent of the pots he purchased were used. RPIII 638. He stated he lost sixty to hundred pots every year. *Id.* One year he lost over 300 buoys and around 40 of his pots on the opening day of the season because and an inexperienced crew member did not do his job correctly. RPIII 539. He was able to locate some of his lost pots because of his GPS locator and got many wrap-arounds that year. RPIII 539-540.

Mr. Waale was then asked to look at the crab pots in the courtroom and asked whether they were similar to pots he had sold to Mr. Breitsprecher. RPIII 542-543. He stated that exhibit 26 and 27 looked like pots he had sold to Mr. Breitsprecher. RPIII 543-544 He stated that exhibit 26 was built by

the same pod company that had built new pots for him. RPIII 543- 544. He stated Exhibit 27 could have been a pot he sold to Breitsprecher because a lot of his pots were worn out and that pot look like it one of his. RPIII 544. He stated the defendant had purchased pots from him several times in the past. RPIII 544.

On cross-examination by States counsel, Mr. Waale stated that he was bought 42-inch pots from Trilogy and had sold them to the defendant for \$40 to \$50. RPIII 545-546. He had sold around 100 pots to the defendant over the years. RPIII 546-547. Mr. Waale had purchased several used pots from different crab fisherman and had bought used pots from Rex Rhoades. RPIII 548.

State's counsel asked Mr. Waale whether he painted his crab pots to which Mr. Waale replied that he painted the tunnels pink and although neither Exhibit 26 or 27 had pink paint on them the paint would usually wear out within the first year. RPIII 557. Mr. Waale also stated that if he retrieved a wraparound that belong to another person and the pot lacked a tag and buoy he would usually keep the unidentifiable pot. RPIII 558 - 559. Some of those unidentifiable pots that he kept were possibly sold to the defendant. RPIII 559.

The defense then called Cole Miller to the stand. RPIII 586. On cross examination by States counsel, Mr. Miller stated that there were forklifts in

the port area that had the keys left in them and anybody in Westport could come up and drive the forklift. RPIII 595. The forklifts were usually parked outside the Cannery, where the doors were usually left open. RPIII 595 - 596. After Mr. Miller's testimony, the Defense rested its case. RPIII 601.

The court then took up the Defendant's motions and the jury instructions. RPIII 608. The court heard argument on whether an element of knowledge needed to be included for Count 3, i.e. Commercial Fishing Using Unlawful Gear. RPIII 615. Defense stated that there was an element of knowledge that was needed on whether the defendant was using unlawful gear. RPIII 617. State's counsel argued that District Court had instructed the jury in a soft-shell crab case without the element of mens rea because the defendant was acting for a commercial purpose. *Id.* He stated that the Court of Appeals refused discretionary review and in doing so stated that although strict liability crimes are disfavored, the regulatory fishing offenses need not contain any mens rea element. RPIII 617-618. The court stated that the statute was putting responsibility on the fisherman to ensure that he inspected and used his own unlawful gear when fishing. RPIII 619.

Defense counsel then argued whether a person could be a victim of a theft if they abandoned property in the sea. RPIII 622. Council stated that the Law of Finds, an old canon, applied. RPIII 622. Counsel argued that ownership of property abandoned at Sea lies with the person who finds the

property. RPIII 626. Counsel argued that it was a defense to the theft allegation. RPIII 629. States Counsel argued that the law of Finds did not apply because the state had ownership interest because of a regulatory structure for how to salvage those pots and stated that he disagreed a wraparound was an abandoned pot. RPIII 631. State's counsel argued the property was not considered abandoned until the season closed and once the season closed it became derelict gear, at which point there was a regulatory structure for retrieving abandoned pots. RPIII 635. He stated that in the derelict gear program, a fisherman had to notify WDFW when they retrieve and abandoned pot and have fish and wildlife inspected. RPIII 636. The department then tags it with a zip tie and the person who brought it in gets to fish that pot. RPIII 636-637.

When the court reconvened on October 20, 2017, the court pointed out that the witnesses admitted the pots could have been lost in the last few years. RPIV 5. The court exhibited doubt on whether a fisherman could be charged with a crime if he retrieved a pot subsequent to it being deemed derelict at the end of a season. RPIV 5-6. The court also stated that a fisherman did not have a way of knowing whether a pot without a buoy was lost that season or in previous seasons. RPIV 6. State's Counsel argued the pots would cease to be derelict when the season started again because the pots could be fished and hold crab. *Id.* He argued that the WDFW's position

was that gear was derelict only when out of season and once the season restarted a fisherman was prohibited from possessing pots that belong to others. RPIV 7. Defense counsel argued that the derelict pot program divested the owner of ownership after every season and one was unable to tell whether a pot that was procured by a fisherman was obtained within the season or after a few years. RPIV 8.

The court commented on the vagueness of the pots becoming derelict at the end of the season and WDFW having the ability or a right to send out derelict pot collectors and keep them for their own and when the new season began, the pots spring back to life and people had a possessory interest in those pots again. RPIV 9. Nonetheless, the court stated concern of the fact that a pot was considered abandoned at the end of the season as far as the derelict program was concerned, but regained an ownership interest when the season started again. RPIV 17. A person could not prove theft Beyond a Reasonable Doubt based on those facts. RPIV 17. However, there were circumstantial evidence that the defendant got other people's pots in his stack, and if the jury believed the testimony of Mr. Kerzman that he intentionally pulled up other people buoys, stripped them down, and stole them, then the jury could convict the defendant. RPIV 18. The Court ruled that the state had the burden of proving that the pots belong to another and the State had to prove beyond a reasonable doubt that the defendant

wrongfully obtained and exerted unauthorized control over property of another. RPIV 19. The court also gave an instruction for abandoned pots, that that “ownership of property abandoned at sea lies with the person who finds the property. To be considered abandoned property, a crab pot must not have attached crab buoys of a licensed holder.” RPIV 20.

The court then heard the Defendant’s Motion to Dismiss. RPIV 21. Defense counsel argued that there was insufficient evidence showing the pots were in fact taken because they could be considered abandoned. RPIV 21-22. The court denied the defenses motion because there was testimony of pots belonging to other fishermen being grabbed and strip down. RPIV 23. The court stated there was circumstantial evidence of other people's pots being in the defendant’s stack. RPIV 23. The court then read the prepared instructions to the jury and both councils made their closing statements. RPIV 28 - 119.

The jury found the defendant guilty of the crime of possession of stolen property in the third degree, of the crime of commercial fishing using unlawful gear, and the crime of unlawful interference with hunting or fishing gear in the first degree. RPIV 125.

Defense counsel then filed a motion for arrest of judgment, which was heard on November 6, 2017. Defense counsel argued that the jury was given facts stating that the defendant had acted in a certain manner without being

instructed on accomplice liability. RPV 3. The Defendant was in the wheelhouse of the boat when these acts took place. *Id.* The court stated that there was testimony that the captain was in charge of the boat and was aware of the doings on the vessel. RPV 4. Defense counsel argued that Mr. Kerzman stated that he was the one who took the crab pots of another person and there was no evidence that the defendant came down from the wheelhouse and aided in taking those pots and stripping off the tags and putting his own buoys on them. RPV 5-6. There was no allegation that he personally touched any of those parts. RPV 6. Defense counsel argued the State needed to show acts that amounted to a conspiracy or doing it as part of an accomplice. RPV 7. The court reasoned that it was not necessary to have accomplished language always included in the instructions. RPV 13. Defense counsel then address the issue of whether the misappropriated pots were in his possession. RPV 13-14. Defense counsel argued that the defendant did not own or lease the property where the pots were found; the property belonged to the Port of Grays Harbor and was least Washington crab. RPV 14. The court denied the Defendant's motion. CP28.

## ARGUMENT

### I. THE COURT ERRED IN DENYING MR. BREITSPRECHER'S MOTION TO DISMISS BECAUSE THE STATE FAILED TO PROVIDE EVIDENCE THAT MR. BREITSPRECHER COMMITTED THE CRIMES OF POSSESSION OF STOLEN PROPERTY, COMMERCIAL FISHING USING UNLAWFUL GEAR, AND UNLAWFUL INTERFERENCE WITH FISHING OR HUNTING GEAR

The court erred in denying Mr. Breitsprecher's Motion to Dismiss the charges because the State failed to provide evidence that he committed any crime. A trial court's decision of a Motion to Dismiss a criminal prosecution is reviewed by the appellate court de novo and, in its review, the court views all facts and all reasonable inferences in the light most favorable to the State. See *State v. Bauer*, 180 Wn.2d 929, 935, 329 P.2d 67 (2014).

#### A. The Court erred in denying Mr. Breitsprecher's Motion to Dismiss the charge of Possession of Stolen Property because he never had actual or constructive possession of the crab pots.

To convict a person for Possession of Stolen Property, the State needs to show "(1) actual or constructive possession of the stolen property with (2) actual or constructive knowledge that the property is stolen." *State v. Summers*, 45 Wn.App. 761, 764-765, 728 P.2d 613 (1986). Actual possession is defined as having personal custody. *State v. Callahan*, 77 Wn.2d 27, 28, 459 P.2d 400 (1969). Constructive possession is defined as dominion or control over the stolen goods or over the premises where they are found. *State v. McCaughey*, 14 Wn.App. 326, 329, 541 P.2d 998 (1975)

(citing *Callahan*, 77 Wn.2d 27). “Dominion and control means that the object may be reduced to actual possession immediately”. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). “Mere proximity to stolen property or one's presence at the place where it is found, without proof of dominion and control over the property or the premises, is not sufficient proof of possession.” *State v. Summers*, 45 Wn.App. 761, 764-765 (1986).

In *Callahan*, the defendant was found guilty by a jury of possession of dangerous drugs. 77 Wn.2d 27, 28 (1969). The defendant in that case admitted that two guns, two books on narcotics and a set of broken scales, which could be used for measuring drugs, found in the houseboat belonged to him. He further admitted that he had handled the drugs earlier that day. *Id.* He, in addition, stated that he had stayed on the houseboat for a few days. *Id.* The court, in its ruling, stated that although Mr. Callahan had stayed on the houseboat for a few days, there was no evidence that he paid the rent or maintained it as his residence. *Id.* at 31. Merely because he had personal possessions on the premises was insufficient to prove that he had dominion or control over the houseboat. *Id.*

In the present case, the State claims that the stolen pots were found in Mr. Breitsprecher's stack; however, as stated by the witnesses, Mr. Breitsprecher's stack of pots was at the common storage area in Westport, which was unlocked and open to access by the public at large. RPI 124,

RPIII 485. He did not personally stack the pots in the area leased by Washington Crab; the pots were stacked there by the employees of the Port of Grays Harbor that controlled the area. RPII 243. Mr. Breitsprecher did not have exclusive access to the area and the mere proximity of Mr. Breitsprecher's stack of pots to the stolen pots does not exhibit dominion and control over the stolen pots. Additionally, although the crab pots were found in his stack, he could not reduce possession of the pots to actual possession immediately.

Furthermore, none of the State's witnesses have stated that Mr. Breitsprecher had knowledge the stolen pots were in his stack of crab pots. The area was controlled by the port and the forklifts used to move pots could be used by anyone. RPIII 585, RPIII 595. Therefore, the court erred in denying the Motion to Dismiss the charge of Possession of Stolen Property in the Third Degree because the State failed to show Mr. Breitsprecher had knowledge or dominion and control over the stolen pots.

B. The court erred in denying Mr. Breitsprecher's Motion to Dismiss the charges of Possession of Stolen Property in the Third Degree and Commercial Fishing Using Unlawful Gear because the State failed to prove that the crab pots were the property of another.

The court erred in denying Mr. Breitsprecher's Motion to Dismiss the charges of Possession of Stolen Property in the Third Degree and Commercial Fishing Using Unlawful Gear because none of the witnesses

identified the pots as being stolen rather than lost at sea. “The State bears the burden of proving every element of the crime charged beyond a reasonable doubt. It follows that the “to-convict” instruction must contain every element of the crime charged. Failure to include every element of the crime charged amounts to constitutional error that may be raised for the first time on appeal.” *State v. Jain*, 151 Wn. App. 117, 124-25, 210 P.3d 1061 (2009). The Court reviews “to-convict” instructions de novo. *Id.* at 125.

Instruction 11 stated “(1) That on or about October 17, 2016, the defendant knowingly received, retained, possessed, concealed, or disposed of stolen property; (2) That the defendant acted with knowledge that the property had been stolen.”

Instruction 13 stated “(1) That on or about October 17, 2016, the defendant acted for a commercial purpose and did take or fish for any fish or shellfish; and (2) That the defendant did use any gear or method in violation of a rule of the commission specifying, regulating, or limiting the gear or method for taking, fishing, or harvesting of such fish or shellfish; and (3) That the acts occurred in the State of Washington.”

Instruction 26 stated “At the time of the alleged offense, the Commission had enacted a rule prohibiting any person from the use, control, or operation of any crab pot bearing a tag identifying the pot as 'belonging to another person...’”

Instruction 15 stated that “(1) That on or about October 17, 2016, the defendant (a) removed or released fish or shellfish from commercial fishing gear without the owner's permission, or (b) intentionally destroyed or interfered with commercial fishing gear; and (2) that the acts occurred in the State of Washington.”

None of the State's witnesses who testified could confirm that their crab pots had been stolen. All the witnesses brought forth by the State stated they lost around fifty crab pots a year due to factors such as ocean currents or due to lines being cut by passing vessels. RPII 356, RPII 413. Although the witnesses stated the crab pots shown to them did belong to them, none could confirm whether the pots had been lost at sea or had been stolen. RPII 356, RPII 412. Ms. Winn stated she guessed Exhibit 25 was one of forty five pots she believed were stolen “just of the bar.” RPII 325-326. However, she also stated she lost 60-70 pots a year. RPII 328. Mr. Rhodes stated he had gone looking for pots after his boat caught on fire, but was unsure whether the pot shown to him, Exhibit 29, had been stolen or had been lost. RPII 412. Furthermore, although Mr. Kerzman stated he stole crab pots under the direction of Mr. Breitsprecher, he did not identify any pots that were stolen and used by Mr. Breitsprecher. RPII 220-229. Although he stated he identified stolen pots in the crab pot yard for the WDFW, he did not identify any specific pots that were stolen while under oath. RPII 233.

Therefore, since no witness specifically identified gear that was stolen, Mr. Breitsprecher's conviction for Possession of Stolen Property in the Third Degree and for Commercial Fishing Using Unlawful Gear should be reversed.

- C. The court erred in denying Mr. Breitsprecher's Motion to Dismiss the charges of Possession of Stolen Property, Commercial Fishing Using Unlawful Gear and of Unlawful Interference with Fishing or Hunting Gear because the State failed to show the crab pots were not abandoned property.

The court erred in denying Mr. Breitsprecher's Motion to Dismiss the charges of Possession of Stolen Property in the Third Degree, of Commercial Fishing Using Unlawful Gear, and of Unlawful Interference with Fishing or Hunting Gear because there is no evidence the crab pots were not derelict gear. The salvage or recovery of property lost on navigable waters has been governed by the general maritime law of the United States, and disputes over the salvage and finds of such property are encompassed within the admiralty jurisdiction of the federal courts. See *Houseman v. The Cargo of the Schooner NORTH CAROLINA*, 40 U.S. 40, 48, 15 Pet. 40 (1841). Whether the lost property is legally abandoned and is covered under the maritime law of finds (see *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 459-61 (4th Cir. 1992); *Martha's Vineyard Scuba H.Q. v. Unidentified Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059, 1065, 1988 A.M.C. 1109 (1st Cir. 1987); *Treasure*

*Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337, 1978 A.M.C. 1404 (5th Cir. 1978), or still has a legal owner and is governed by the law of salvage, the disposition of such property is governed under these “characteristic features” of the admiralty. See *American Dredging Co. v. Miller*, 510 U.S. 443, 446-47, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994) (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S.Ct. 524 (1917) (a state law which “works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations” is void)).

In the present case, Mr. Wilson stated the pot shown to him was approximately five years old and Mr. Rhodes stated the pot shown to him was at least three years old. RPII 359, RPII 414. State’s counsel argued that crab pots that had not been retrieved at the end of the season were considered derelict and were allowed to be retrieved by other fishermen who obtained a permit from WDFW. RPIV 6-7. Since the witnesses stated the pots were three to five years old, they, therefore, would be considered derelict gear at the end of the season. A statute that deems fishing equipment to be abandoned or derelict at the end of a season and then regain an ownership interest when a new season begins would be absurd and prejudicial against fishermen. Therefore, since the State failed to show that

none of the crab pots were not abandoned gear, Mr. Breitsprecher's convictions for Commercial Fishing Using Unlawful Gear and for Unlawful Interference with Fishing or Hunting Gear should be reversed.

- D. The court erred in denying Mr. Breitsprecher's Motion to Dismiss the charges of Commercial Fishing Using Unlawful Gear and of Unlawful Interference with Fishing or Hunting Gear because there was no evidence that a crime occurred.

The court erred in denying Mr. Breitsprecher's Motion to Dismiss the charges of Commercial Fishing Using Unlawful Gear and of Unlawful Interference with Fishing or Hunting Gear because, other than the statements of Mr. Kerzman, the State did not introduce any evidence that he fished using unlawful gear or that he interfered with fishing gear. Corpus delicti usually consists of two elements: (1) an injury or loss (e.g., death or missing property) and (2) someone's criminal act as the cause thereof. To sustain a conviction, there also must be proof that the defendant was the actor. *City of Bremerton v. Corbett*, 106 Wn.2d 569, 573-574, 723 P.2d 1135 (1986) (Citing *State v. Meyer*, 37 Wash.2d 759, 763, 226 P.2d 204 (1951)). For instance, in a homicide case, corpus delicti requires "...1) fact of death, and 2) the responsibility of a criminal agency for the death." *State v. Sellers*, 39 Wn.App. 799, 695 P.2d 1014 (1985); See also, *State v. Adams*, 76 Wn.2d 650, 458 P.2d 558 (1989); *State v. Lung*, 70 Wn.2d 365, 423 P.2d 72 (1967).

In the present case, Mr. Breitsprecher was convicted of Commercial Fishing Using Unlawful Gear and of Unlawful Interference with Fishing or Hunting Gear. The only evidence the State proffered was the statement of Mr. Kerzman, who stated he stole crab pots under the direction of Mr. Breitsprecher; Kerzman did not identify any pots that were stolen and were used to fish. RPII 220-229. None of the other witness, corroborated Mr. Kerzman's statements. Testimony of other members of Mr. Breitsprecher's crew contradicted Mr. Kerzman's statements; for instance, Mr. King stated that they spent thirty minutes untangling pots belonging to other fishermen and would throw it back in the ocean as required. RPIII 518-519. Mr. Kerzman, in addition, did not identify any specific stolen pots that he used for commercial fishing or that he unlawfully interfered with. Even if Mr. Kerzman's statements are evidence of a criminal act, the State did not provide any evidence that a crime actually occurred. This lack of evidence is homologous to a homicide case without evidence of an actual body. Therefore, since the State did not provide any evidence that a crime actually occurred, Mr. Breitsprecher's conviction for Commercial Fishing Using Unlawful Gear and of Unlawful Interference with Fishing or Hunting Gear should be reversed.

E. Mr. Breitsprecher was wrongfully convicted of Commercial Fishing Using Unlawful Gear and of Unlawful Interference with Fishing or Hunting Gear in the First Degree because there was no evidence these acts occurred within the boundaries of the State of Washington.

The trial court erred in finding Mr. Breitsprecher guilty of Commercial Fishing Using Unlawful Gear and of Unlawful Interference with Fishing or Hunting Gear in the First Degree because the State failed to show the unlawful acts occurred within the boundaries of the State of Washington. The United Nations Convention on the Law of the Sea (UNLCOS) defines territorial waters of a nation as the waters offshore at a distance of not greater than 12 miles from the shore. Art. 3.

Furthermore, 43 USC Sec. 1311 States that

“(1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereo.”

A plain reading of the statute shows that the State of Washington has a right no manage the lands and resources of the sea bed to a distance of 3 miles from the shore. Furthermore, seas beyond the 12-mile line are beyond the territorial seas of the United States. Mr. Kerzman testified that Mr. Breitsprecher sometimes fished 20 miles from the shore. The State's other witnesses also testified to fishing at distances beyond the 12-mile line. The State has not shown that Mr. Breitsprecher Commercial Fished Using Unlawful Gear or Unlawfully Interfered with Fishing or Hunting Gear in the First Degree within 12 miles of the shore. Since, the State has failed to prove that the crimes occurred in the State of Washington, Mr. Breitsprecher's conviction on all three counts should be reversed.

II. THE FAILURE TO INSTRUCT THE JURY ON ACCOMPLICE LIABILITY WAS PREJUDICIAL TO MR. BREITSPRECHER BECAUSE THE STATE DID NOT PROVIDE ANY EVIDENCE THAT MR. BREITSPRECHER COMMERCIAL FISHED USING UNLAWFUL GEAR OR UNLAWFUL INTERFERED WITH FISHING GEAR HIMSELF.

The court erred in denying the Defendant's Motion to Arrest Judgment because the jury was not instructed on accomplice liability. When reviewing a trial court's decision on a motion for arrest of judgment, the appellate court is required to engage in the same examination of sufficiency as the trial court. *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000). The right to a jury trial includes the right to a jury determination of

every fact necessary for a conviction. *In re Pers. Restraint of Beito*, 167 Wn.2d 497, 504-05, 220 P.3d 489 (2009). Instructions that reduce the State's burden of proof violate the Due Process Clause of the Fourteenth Amendment. *State v. Bennett*, 161 Wn.2d 303, 306, 165 P.3d 1241 (2007). When read as a whole, instructions must clearly inform the jury of the allocation of the burden of proof. *State v. Coe*, 101 Wn.2d 772, 787, 684 P.2d 668 (1984). Jury instructions also violate accused person's right to due process if they relieve the state of its burden of proving each element beyond a reasonable doubt. *State v. Hayward*, 152 Wn. App. 632, 645, 217 P.3d 354 (2009).

The “‘to convict’ instruction must contain all of the elements of the crime because it serves as a ‘yardstick’ by which the jury measures the evidence to determine guilt or innocence.” *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)). The inaccurate definition of an essential element of a charged offense constitutes automatic reversible error as it deprives the defendant of due process by permitting the jury to convict without proof of all essential elements. *Smith*, 131 Wn.2d at 263. Failure to instruct the jury on an essential element is a “fatal defect” which requires reversal. *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984); *State v. Eastmond*, 129 Wn.2d 497, 503, 919 P.2d 577 (1996).

In the present case, the State's witness, Mr. Kerzman, stated that he believed that Mr. Breitsprecher knew Mr. Kerzman was grabbing crab pots belonging to other fishermen. The State did not provide any evidence that Mr. Breitsprecher was aware of Mr. Kerzman's unlawful acts other than Mr. Kerzman's statements. Furthermore, it is evident from Mr. Kerzman's statements that Mr. Breitsprecher did not personally commit the violations of Commercial Fishing Using Unlawful Gear and of Unlawful Interference with Fishing or Hunting Gear in the First Degree. However, the State did not instruct the jury on accomplice liability for either of these charges; the "to convict" instructions were phrased as though Mr. Breitsprecher himself committed the crimes.

Instruction 11 stated "(1) That on or about October 17, 2016, the defendant knowingly received, retained, possessed, concealed, or disposed of stolen property; (2) That the defendant acted with knowledge that the property had been stolen."

Instruction 13 stated "(1) That on or about October 17, 2016, the defendant acted for a commercial purpose and did take or fish for any fish or shellfish; and (2) That the defendant did use any gear or method in violation of a rule of the commission specifying, regulating, or limiting the gear or method for taking, fishing, or harvesting of such fish or shellfish; and (3) That the acts occurred in the State of Washington."

The State did not provide any evidence that Mr. Breitsprecher personally committed the unlawful acts and did not instruct the jury that he was vicariously liable through the actions of Mr. Kerzman, which is a fatal defect in its instructions and constitutes a reversible error. Therefore, since the State failed to provide jury instructions that contained all the elements of the crime, the convictions of Mr. Breitsprecher for Commercial Fishing Using Unlawful Gear and of Unlawful Interference with Fishing or Hunting Gear in the First Degree should be reversed.

#### **CONCLUSION**

For the reasons set above, the Appellant respectfully requests that the Court reverse the judgment of the trial court.

Respectfully submitted this 29 October 2018.

*/s/ Scott Campbell*

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on October 30, 2018, I caused the foregoing document to be filed with the Court and served on Counsel listed below by way of the Washington State Appellate Courts' Portal.

Katherine Lee Svoboda  
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DATED this 30<sup>th</sup> day of October, 2018.

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I declare, under penalty of perjury under the laws of the State of Washington, that on October 30, 2018, I mailed copy of the Appellant's Brief to the Defendant at

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DATED this 30<sup>th</sup> day of October, 2018.

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