

FILED
Court of Appeals
Division II
State of Washington
2/1/2019 3:34 PM
NO. 51346-3-II

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

STATE OF WASHINGTON,
Respondent,

v.

LARRIN BREITSPRECHER,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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I. INTRODUCTION

Commercial Dungeness crab fishing is a highly competitive business, with the Quinault Tribal Fleet and the State-regulated fleet competing for territory and crab off the shores of Grays Harbor County. The business has many hazards—vessels can run aground or catch fire, and the hundreds of crab pots laid on the ocean floor one after another in “strings” can be lost due to storms, washed ashore, or even fished and stolen by other crab fishermen.

The Washington State Department of Fish and Wildlife heavily regulates the commercial crabbing industry. Crab pots are required to have multiple elements to identify the owner and licensee. During the crab season, fishermen may only possess their own gear, and possessing another’s crab pot is a criminal offense. These statutes notwithstanding, some courteous fishermen bring into port stray crab pots to return to the true owners. The DFW and Quinault Nation each have a heavily regulated closed-season permitting processes whereby derelict gear on the ocean bottom may be retrieved, and the person making the recovery can possess and own a recovered crab pot.

At trial, the primary factual issue was whether Kory Kerzman had, at the direction of the Defendant, pulled aboard the Shearwater Two crab

pots belonging to other fishermen, and whether those pots remained a part of the Defendant's fishing gear.

The primary legal issue at trial became whether crab pots in the ocean without an identifying buoy, known as wrap-arounds, are abandoned property, and whether the original owner still had a possessory interest.

On appeal, the Defendant renews his argument that, given the court's instruction that wrap-around pots are abandoned property, the State failed to present sufficient evidence to support the jury verdicts. Accepting the trial court's definition of abandoned gear, and the accepting the Appellant's invitation to apply the common Law of Finds to such gear, would gut the DFW regulations of commercial fishing gear. It would completely undermine the derelict gear program and replace it with nothing more than a doctrine of "finders-keepers."

This Court does not need to sail into the treacherous waters of the abandonment issue. Rather, it should simply review of the evidence at trial to determine whether the State presented sufficient evidence that Mr. Kerzman, at the direction of the Appellant, pulled aboard the Shearwater Two crab pots that bore buoys of other fishermen, and uphold the conviction.

II. RESTATEMENT OF THE ASSIGNMENTS OF ERRORS

1. The Court did not err when it found sufficient evidence to uphold the jury's verdict and denied the Defendant's motion for arrest of judgement.
2. The Court did not err when it did not instruct the jury on accomplice liability when the State sought to convict the Defendant as a principal acting.

III. QUESTIONS PRESENTED BY RESPONDENT

1. Did the State present the sufficient quantum of evidence for the jury to find the Defendant knowingly possessed stolen crab pots belonging to others, and that he retained, possessed, or concealed the stolen pots for his use, and withheld them for his use rather than the true owner, based on the testimony of a crewmember regarding the stealing, converting, and retaining of the crab pots, done at the direction and instruction of the Defendant?
2. Did the State present the sufficient quantum of evidence for the jury to find the Defendant had actual or constructive possession of stolen crab pots when they were found among the Defendant's crabbing gear when that gear was stored in an area designated as the Defendant's, rent was paid, only the Defendant's fishing gear was in the designated space, and where moving the gear or gaining access to the inner stacks required heavy machinery?
3. Did the State present the sufficient quantum of evidence for the jury to find that stolen crab pots belonged to another, and that other fisherman had a possessory interest in them, when the crewmember who performed the stealing of the crab pots testified he stole crab pots that bore buoys of other fishermen?
4. Did the State present the sufficient quantum of evidence for the jury to find that the crimes occurred in the State of

Washington when the evidence shows some criminal acts began at sea and were part of Defendant's commercial purpose to fish for, harvest, or take shellfish from the crab pots of other fisherman, remove their pot tags, and destroy or alter the rigging of their crab pot, before keeping and landing the crab and crab pot in Westport, Washington?

5. Was *corpus delicti* of the crimes alleged satisfied by the testimony of a person other than the Appellant that crab pots belonging to another were stolen at sea, fished, and then retained by the Appellant, and where owners of the crab pots identified them as theirs and as stolen?
6. Did the Court properly instruct the jury when neither party took exception to the absence of an instruction on accomplice liability, when accomplice liability was not argued to the jury, and where the evidence showed the Defendant acted for a commercial purpose and when his crew acted at his direction as the Captain of the Shearwater Two in the general course of business?

IV. STATEMENT OF FACTS

The Washington Department of Fish and Wildlife (DFW) executed a search warrant on October 17, 2016, on the F/V Shearwater Two, a commercial crabbing vessel owned and operated by Larrin Breitsprecher, hereinafter the Appellant. The DFW also search the Appellant's commercial fishing gear—rows of crab pots stacked five high—on the Port of Grays Harbor property. The DFW served the search warrant with the assistance of Kory Kerzman, a former crewmember of the Shearwater Two, who helped officers identify the stolen pots. RPI 69–71.¹

Officers seized 32 crab pots identified by Mr. Kerzman as stolen. RPI 80. Officers also seized from the Shearwater Two a red grinder, consistent with one Mr. Kerzman said he used to grind off identifying marks from stolen pots. RPI 79–80.

At trial, the State brought five crab pots physically to the courtroom and each fisherman making an in-court identification definitively stated the pot in question was theirs (present tense). RP2 316, 347, 378, 380, 405.

¹ The State will follow the Appellant's style of reference—RPI, PRII, PRIII, and RPIV for the proceedings of the trial, with page numbering starting over for RPIV. RPV refers to the proceedings on November 6, 2017.

Kory Kerzman testified as to his practice, at the direction of the Appellant, of pulling crab pots with buoys from the water, including those he recognized as with a buoy belonging to a vessel other than the Shearwater Two's:

Q. During the 2016 season, did you ever pull pots onto the Shearwater Two that did not belong to the defendant?

A. Of course.

Q. All right. About how often?

A. We pulled a couple a trip.

...

Q. How many - how many is a couple? Is it two -

A. Anywhere from - anywhere from two to 20.

...

Q. Do you know what a wrap-around is?

A. Yep.

Q. All right. ... [T]hese two to 20 that you pull up, were they wrap-arounds?

A. Sometimes.

Q. Okay. But sometimes they were not?

A. Sometimes not.

Q. All right. Let's talk first about the ones that that weren't wrap-arounds.

A. (Nods head.)

Q. How did you go about pulling a non-wrap-around pot that was not the Defendant's? How would you go about putting that on to your vessel?

...

A. When it's coming down the side of the boat. ... You got buoys floating on the water. ... You're standing at the rail and your buoy is coming down the side of the boat.

...

Q. Okay. When the vessel does that, as a crew member, are you able to look at the buoy and tell whether or not it's the defendant's?

A. Yeah.

...

Q. So the next thing you said is you come alongside of the boat. And then what would happen?

A. You'd hear him rev the motor and that means you better grab the buoy ... So you grab the buoy and then you pick it up.

...

Q. So Larry would rev the motor. And then what would you do?

A. I would coil it. ... It means grab the buoys and run everything through the block and pick all the line up.

...

Q. So once it comes aboard, what would you do with the pot?

A. Look at it.

Q. And what were you looking for?

A. To determine what we were going to - what the verdict - like what we're going to do with it.

...

Q. All right. So once you've got it up there, you said you're inspecting it to see if it's a keeper. What are you looking for to determine what's a keeper?

A. How easy it would be to make it ours.

Q. Okay. Describe that for the jury.

A. Not real noticeable, no big brands, and depending on who it was.

Q. Okay. Those pots, what would - what would you do with the buoy?

A. Just save them.

Q. ... What would determine whether or not a pot was not a keeper? How - how would you make that decision?

A. Probably the way it was built.

Q. Okay.

A. And the amount work it would take.

Q. The amount of work it would take to do what?

A. To make it one of Breitprecher's pots.

Q. So if it was not a keeper, what would you do with it?

A. Depending on, once again, whose pot it was, throw it back or maybe save it to throw all the buoys in.

...

Q. If it was a keeper, as you call it, what would you do with it then?

A. We would go down and strip it down to make it ours.

Q. So when you say strip it down, what does that mean?

A. Take out the tags, if need be, everything that - change out their line, if need be. ... Change out their bait containers. Even sometimes grind - grind weight bars.

Q. Grind weight bars. Why would you grind weight bars?

A. Take brands off.

Q. Brands belonging to?

A. Whoever owns the pot.

...

Q. All right. What would you do with the - the pot tags if it was a keeper?

...

A. Get rid of them - throw them, get rid of them, throw them over.

Q. I'll - I want to - you're kind of mumbling. I want to make sure the jury can hear you.

A. You're out in the ocean. Stuff disappears in the ocean. Get it off the boat.

Q. Okay. What about - what about the buoys?

A. Save them for a pot.

Q. ...What does mean, save them for a [pot?]

A. Save them for a big heavy pot that is not - it's too much work to mess with.

Q. Okay.

A. And then get rid of the buoys.

Q. How would you get rid of the buoys?

A. Throw them in the pot [and] throw the pot over.

Q. Okay. So you would -

A. Sink them.

[...]

Q. So if you had multiple buoys on the vessel that weren't Larrin's, what would you do with them?

A. Get rid of them.

Q. How - by doing - how would you get rid of them?

A. Like I just said.

Q. I know. I'm trying to get you to explain it. ... So the buoys would go where?

A. They would go to the bottom ... Davy's locker.

Q. Davy's locker.

A. Go to the bottom of the ocean.

Q. Did you have a way of getting rid of the buoys?

A. Yes.

Q. And is that what you've been explaining to the jury?

A. Yes.

RP11 219–228

Mr. Kerzman testified this theft occurred during the 2016 fishing season. RP2 220. He testified that the Defendant taught him this practice and knew what he was doing. RP2 237-238, 291.

Christine Winn, owner of the F/V Qualaysquallum, described to the jury how commercial fisherman recognizes their own fishing gear, even without pot tags and buoys:

There's a specific way everybody rigs their gear. It's like how you fix your hair. You know, I don't fix my hair like you fix your hair or you. I mean we all have our own special way and there's things that we do differently. A crab pot is very unique, it's very personal. You can easily identify your crab pots.

RP2 311.

Ms. Winn recognized Exhibit 25 as her crab pot. RP2 316. She had a “Q” welded on her weight bars by the manufacturer. RP2 318. She identified five others in the DFW evidence yard as hers. RP2 320. Exhibit 25, in the courtroom, bore a pot tag for the Shearwater Two. Id. She also testified that when she had “a whole string of pots disappear, I assume it got stolen.” RP2 329.

Pete Wilson, owner of the F/V Johnny B, testified he is also able to recognize crab pots belonging to his vessel even without identifying tags of buoys:

When you have so many of these and this is what you've done and you put them all together the exact same way, you know when they're yours. It's like you just know. I mean I have a white Ford F-350, but if there were five of them in the parking lot I would know which one is mine.

RP2 345. He recognized Exhibit 26 as his crab pot and noted that the weight bar had a section that had been “ground smooth and it's not wearing the same as the rest of this weight bar, because my initials have been ground off.” RP2 347–50.

Matthew Winsberg, owner of three commercial crabbing vessels, testified that he immediately identified six crab pots in the DFW evidence yard. RP2 375–377. In court, he identified Exhibit 27 as his crab pot. “Oh, it's definitely my crab pot. That's my identification brand there on the

weight bar right there.” RP2 378. He also identified Exhibit 28. RP2 380.

Both exhibits had a buoy of the Appellant. RP2 379, 382.

Rex Rhodes, owner of the F/V Lady Michelle, testified he identified four crab pots at the DFW evidence yard. RP2 404. In court, he recognized Exhibit 29 as his crab pot. RP2 405. That crab pot bore the pot tag of the Shearwater Two. RP2 406.

Defense Witness Mark Finley, owner of the F/V Terry F, testified that once a crab pot was stacked with others on his fishing vessel, it would be hoisted onto land and kept among his pile of gear. Therefore, a crab pot that was not his, whether it had another vessel’s pot tag, would become his if it became stored among his gear; he considered any crab pot belonging to another which was intermingled with his gear, whether with a pot tag or not, to be theft. RPIII 467–468. Mr. Finley also testified that a captain is wholly responsible for what happens on his or her vessel, and that nothing happens, or nothing should happen, without a captain’s knowledge. RPIII 466.

Scott King, a crewmember aboard the Shearwater Two, testified that the Appellant, in the wheelhouse, communicated with his crew by revving the engine. He testified that, in the pot yard in Westport, the crew delimit the stacks of pots as the Appellant’s by putting on the top pot a

loose buoy “signifying that this is the Shearwater Two stack of pots.” RP3 534.

Multiple witnesses—Officer Welter, Ken Rousch, and Cole Miller—testified as to the layout and accessibility of the stacks of crab pots on Port property, and that the ones searched by DFW belonged to the Defendant. RPI 71–72, 162–63. Mr. Rousch testified that the crab pot yard is fenced but accessible at all hours. RPIII 485. He also testified that the either the fish processing companies or individual fishermen rent space to store crab gear. RPIII 494–495.

Mr. Miller, who called the Appellant the day of the search warrant, told the jury he knew the stacks of pots being searched belonged to the Appellant. RPIII 596. Derrick Waugh, the tribal enforcement officer and commercial fishing crewmember, testified that “when you take your pots to Westport, you try to keep them all grouped up and keep them in line so that people know that these are your pots.” RPI 124–125. No evidence suggested any other crabber used or kept gear intermingled with the Defendant’s gear. No evidence suggested the portion of the gear yard used by the Defendant was used by any other fisherman.

At the close of the State’s case in chief, the Defendant moved for dismissal based on insufficient evidence. CP 31–38 (filed October 19,

2016). The motions were heard, actually, at the close of the Defendant's case but before jury instructions and closing arguments on October 20. The motions were denied. RPIV 23.

The jury did not convict the Appellant of Theft in the Second Degree, convicting instead of the lesser included of the alternate count— Possession of Stolen Property in the Third Degree. The jury also convicted the Appellant of two Fish and Wildlife gross misdemeanors—Commercial Fished Using Unlawful Gear and Unlawful Interference with Fishing or Hunting Gear.

Following the jury verdict, the Defendant moved the trial court to arrest the judgment based on insufficiency of evidence as to all counts. CP 61–65, 80–87. The trial court denied the motion and entered a Judgment and Sentence. CP 96, 98–100.

V. ARGUMENT

The Appellant asks this Court to reverse his three convictions based on the following alleged deficiencies in evidence at trial: The State failed to prove possession of the stolen crab pots by the Appellant, either actual or constructive; the State failed to show the stolen crab pots belonged to someone else, or that someone else had a possessory interest in them; the State failed to establish *corpus delicti* for the offenses; the State failed to prove the criminal acts occurred in Washington State; and, the trial court improperly failed to instruct regarding accomplice liability.

These challenges can be sorted into two categories: 1) a straightforward sufficiency-of-the-evidence challenge regarding possession, jurisdiction, and *corpus delicti*; and, 2) the complex claim that the State failed to provide sufficient evidence the crab pots at issue were capable of being stolen by virtue of their being abandoned or having been recovered as abandoned by the Appellant. This second category of argument requires this Court accept the trial court's definition of "abandoned" fishing gear and apply common law doctrine contrary to the regulatory regime of commercial crabbing and the regulations regarding derelict crabbing gear.

For this Court to overturn the jury verdict, the Appellant must convince this Court not just of a scarcity of evidence, but practically a complete lack of evidence. This is a standard the Appellant cannot meet.

REVIEWING THE SUFFICIENT QUANTUM OF EVIDENCE
TO UPHOLD THE JURY'S VERDICT

The Appellant assigns error and presents questions regarding motions to dismiss made mid-trial as well as the motion for arrest of judgement. The motion for arrest of judgement claimed insufficient evidence to uphold each verdict. On appeal, however, the Appellant only presents the question of whether the denial of the motion for arrest of judgement was proper solely because the court failed to instruct the jury on accomplice liability.

The Motions to Dismiss are not available for review, but the Court can and should review the motion for arrest of judgement as it pertains to the sufficiency of evidence to support the jury's verdict for each charge

The mid-trial motions to dismiss are not reviewable by this Court. “[A] defendant who presents a defense case in chief ‘waives’ (i.e., may not appeal) the denial of a motion to dismiss made at the end of the State's case in chief.” *State v. Jackson*, 82 Wn. App. 594, 607–09, 918 P.2d 945 (1996). *Jackson* does not hold that the sufficiency of the evidence cannot be reviewed, but the amount of evidence considered by the reviewing court increases with each phase of the trial. Such a review “will be

analyzed using the most complete factual basis available,” which includes all evidence presented during trial. *Id.*

The case at hand proceeded to a jury verdict, and the Appellant’s motion for arrest of judgement claimed a lack of evidence to support each verdict. Courts are loathe to encroach on a jury’s role as finder of fact to overturn a jury’s verdict, making review of the mid-trial motions more problematic. Because a just verdict was given, the best place in the record to review the sufficiency of the evidence could be by reviewing the entire CrR 7.4 motion for arrest of judgement.

A reviewing court decides whether a sufficient quantum of evidence exists to support a jury verdict without weighing the strength of that evidence or credibility of the witnesses

Whether reviewing the mid-trial Motions to Dismiss, or the motion for arrest of judgement, the *de novo* standard of review proposed by the Appellant is incorrect. When reviewing a denial of a motion for arrest of judgement, the appellate court uses the same standard of review as the trial court. When reviewing an order arresting judgment granted pursuant to CrR 7.4(a)(3), the appellate court functions only to determine whether “the evidence was *legally sufficient* to support such a finding—that is, whether there is *substantial evidence* tending to establish circumstances on which such a finding could be predicated.” *State v. Randecker*, 79 Wn.2d 512,

515–16, 487 P.2d 1295 (1971) (*italics in original*). “In short, if there is substantial evidence the issue must be resolved by the jury and not by the court.” *Id.* The evidence is legally sufficient if any rational trier of fact viewing it most favorably to the State could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

The question before a reviewing court is one of amount, not strength, for evidence. The court shall only determine whether “the necessary quantum [of evidence] has been produced to establish some proof of an element of the crime.” *State v. Coleman*, 54 Wn. App. 742, 747, 775 P.2d 986 (1989). A trial court may not weigh the evidence to determine whether the necessary quantum of evidence exists; it may only test or examine the sufficiency thereof. *State v. Dugger*, 75 Wn.2d 689, 453 P.2d 655 (1969). The jury is the sole and exclusive judge of the weight of evidence, and of the credibility of witnesses. *State v. Basford*, 76 Wn.2d 522, 457 P.2d 1010 (1969). As the finder of fact, it was the jury's role to consider the demeanor of witnesses, their fairness or lack thereof, and their apparent candor or lack thereof. *In re Gallinger's Estate*, 31 Wn.2d 823, 199 P.2d 575 (1948). In other words, the trial court must concern itself only with the presence or absence of the required quantum,

a long held standard. *Basford, supra*; *State v. Lewis*, 55 Wn.2d 665, 349 P.2d 438 (1960); *State v. Donckers*, 200 Wn. 45, 93 P.2d 355 (1939).

As it applies to the case at hand, this standard of review means this Court, just like the trial court, does not judge the credibility of the trial witnesses, but accepts each witness's testimony as true. "The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or [negate] guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict."

Randecker, 79 Wn.2d at 517–518, *citing Lewis, supra*; *State v. Donckers, supra*.

CONSTRUCTIVE POSSESSION

The Appellant challenges the sufficiency of the State's evidence regarding possession of the stolen crab pots. The trial court found sufficient evidence had been presented for the question to proceed to the jury, and then that sufficient evidence had been presented that the jury's verdict should be upheld.

The jury was properly instructed re constructive possession and dominion and control. Jury Instruction 23 provided the jury with several "factors [a jury] may consider" in determining dominion and control,

providing a non-exclusive list of possible factors for consideration. The instruction states that “Dominion and control need not be exclusive to support a finding of constructive possession.” CP 52.

Sufficient evidence supports the jury finding that the Appellant had dominion and control over his crab gear in the Westport crab yard

The Court must look at the “totality of the situation to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control.” *State v. Partin*, 88 Wn. 2d 899, 906, 567 P.2d 1136 (1977).

The Appellant relies on *State v. Callahan*, wherein the defendant was charged with possession of drugs of which he was in proximity on another person’s houseboat. *Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969). The *Callahan* case focused on whether the defendant had dominion and control of an area owned by another—a place where *another* person would have an expectation of privacy. *Callahan* is distinguishable from the case at hand. While the Westport gear yard may be private property, and the Port is paid so that the Appellant may use the space (RP3 486, 494), like a houseboat with a room for rent, there is no expectation of privacy there, unlike on a houseboat.

The *Partin* Court specifically cautioned against “read[ing] too much into *Callahan* or the list of “various indicia of dominion and control”, saying the primary holding is the cumulative effect of details to determine constructive possession. *Partin*, 88 Wn. 2d at 906.

More on point is *State v. Lakotiy*, 151 Wn. App 699, 214 P.3d 181 (2009). In that case, Mr. Lakotiy was properly convicted for possession of a stolen vehicle when it was recovered in the common area of a storage facility. Although the case focuses on the absence of an expectation of privacy in such an area, the question of Mr. Lakotiy’s possession was never questioned even though it was in a common area easily accessible by many others. *Id.* That is the same as here, where the pot yard is accessible to many, yet there are demarked areas for each individual to enjoy exclusive use for their gear storage and off-season rigging.

The jury, properly instructed on possession in Instruction No. 23, CP 52, had a numerous facts to consider when it determined the Appellant did have possession over the stolen crab pots. All five crab pots in evidence, seized from the Defendant’s gear pile, bear either Shearwater Two pot tags or buoys. RP2 320; RP2 350; RP2 379; RP2 382; RP2 406.

The Appellant has no privacy interest in open pot yard, and others could have shared access. Still, the heavy and bulky nature of the gear and

designation that the rows of stacks were his shows he considered it his area alone, and he could exclude or discourage others using signage or other indicators of ownership. The Defendant's gear was unloaded by the fish processor in a place designated just for his gear, and the gear was labeled by buoys. RP1 62–63; RP1 124. Witnesses testified that moving crab pots requires heavy machinery and that such machinery was not commonly readily available (RP3 496), meaning it would have been difficult for anyone else to actually exercise dominion and control over the Appellant's gear. Finally, no one disputed the Appellant's exclusive ownership of the gear piles searched. From these facts, the jury could rationally have found the Appellant had constructive possession over the crab pots in his gear piles.

It is akin to a vehicle being in an assigned parking space in an office parking garage—it is partially secured, open to all, and everyone recognizes ownership of the car—the owner of the car can still rationally be said to constructively possess his car even when at his desk. The evidence was “legally sufficient to support the jury's finding.” *See Bourne, supra.*

WASHINGTON'S OFFSHORE JURISDICTION

Washington Courts have jurisdiction three miles off shore, but also over those who commit a crime "in whole or in part" within Washington

Jurisdiction is a question of law reviewed *de novo*. *State v. Squally*, 132 Wn.2d 333, 937 P.2d 1069 (1997). Washington's Fish and Wildlife regulations apply beyond the three-mile line up to 200 miles offshore by virtue of the federal Fishery Conservation and Management Act of 1976, 16 U.S.C.A. § 1801. The state's judicial jurisdiction is more limited—"state court jurisdiction over persons ... extends three miles offshore [one marine league]." *State v. Pollock*, 136 Wn. 25, 239 P. 8 (1925).

The Appellant's claim that the State did not prove jurisdiction regarding the crime of possession of stolen property is easily set aside. The crab pots at issue were seized from the Defendant's gear pile in Westport. RPI 69. The State argued the point to the trial court, saying "when the Shearwater Two came into Port and crossed that three-mile line, it was exerting unauthorized control. And when it ended up back in the stack, that's when the Defendant continued to possess it." RPIII 609.

The question jurisdiction is easily answered regarding the crime of the Commercial Fishing Using Unlawful Gear. An element of the crime requires that a defendant act "for a commercial purpose and did take or fish for any fish or shellfish" in violation of a rule of the Washington State

Fish and Wildlife Commission. CP 50. To *fish* "means an effort to kill, injure, harass, harvest, or capture a fish or shellfish." RCW 77.08.010(20). To *take* "means to kill, injure, harvest, or capture a fish, shellfish, wild animal, bird, or seaweed." RCW 77.08.010(62). Further, to *take* has a common legal meaning that includes "[t]o obtain possession or control, whether legally or illegally." TAKE, Black's Law Dictionary (10th ed. 2014). Acting for commercial purposes, as defined in Instruction 27, is engaging "in conduct that relates to commerce in fish, seaweed, shellfish." CP 53.

These definitions show that the act of fishing and taking shellfish logically must include the landing of the catch, and that occurred in Westport. The maintenance of gear, transporting it, storing it, etc., certainly constitute acts of a commercial purpose as they are directly related to the business of commercial crabbing. That, too, occurred in Westport when the Shearwater Two came into port. The evidence presented shows that when crab pots were stolen at sea, the crab within was dumped out, sorted, and kept if the crab were harvestable. RP2 223. The crab then, presumably, came into Port aboard the Shearwater Two and thus crossed the three-mile offshore line along with the stolen crab pots.

This line of reasoning applies to the offense of Unlawful Interference with Fishing or Hunting Gear. The jury was instructed that the elements of unlawful interference with fishing or hunting gear included as alternatives either that 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.” CP 50–51. The jurisdictional question is easily answered by referring to the State’s argument before the trial court. “What better way to interfere with somebody else's gear than to keep it and make it yours? If you believe that these pots are somebody else's and that he's keeping them, he's interfering with their gear.” RPIV 82.

THE BODY OF THE CRIME

The Appellant incorrectly presents the *corpus delicti* question, arguing that *corpus delicti* was not met because “the State did not introduce any evidence that he [the Appellant] fished using unlawful gear or that he interfered with fishing gear,” comparing the situation to a homicide without a body. Brief of Appellant 44–45. The Appellant seems to demand physical evidence, arguing that “other than the statements of Mr. Kerzman, the State did not introduce any evidence.” Id.

The *corpus delicti* rule precludes statements by the accused to establish, *prima facie*, the body of the crime; the

statements of another, such as a vessel's crew member, may provide the necessary proof

First, Appellant's reliance on *Corbett* is misplaced so far as he insists there be proof that the Appellant committed the offenses to establish *corpus delicti*. "Proof of the identity of the person who committed the crime is not part of the *corpus delicti*, which only requires proof that a crime was committed by someone." *City of Bremerton v. Corbett*, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986).

Second, the Appellants' contention that *corpus delicti* was not established by Mr. Kerzman's testimony misunderstands the purpose of the rule. The *corpus delicti* rule protects an accused from the possibility of an unjust conviction based upon a false confession alone. *See Smith v. United States*, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954); *State v. Scott*, 86 Wn. 296, 298, 150 P. 423, 424 (1915).

Physical evidence is not necessary where there is testimony from someone other than the accused. In *Scott*, for example, *corpus delicti* of larceny required evidence "that the property of Effie Carter was where she had placed it in the morning; that it was not there at noon; that some one [sic] other than herself had removed it from the place where it was kept." *Scott*, 86 Wn. at 298. Those facts were proved by a witness who "testified to the material facts, so far as missing the property was concerned." *Id.*

There was no independent proof, such as photographs, that the stolen property was there at one time then gone at another.

In this case, to establish the body of the crime, the State need only prove the crab pots were stolen, meaning the true owner did not give permission for their taking, and that the circumstances of their theft or continued possession constituted a violation of the Title 77 counts. The State need not show, as a matter of *corpus delicti*, that the Defendant was the actor. Each witness who identified a crab pot in court stated that they did not sell, give, or otherwise permit the Appellant to possess the crab pot. RPII 321, 350, 379–82, 407. In fact, both Pete Wilson and Christine Winn specifically stated they believed their crab pots had been stolen RP2 329, 359. Further, the testimony of Mr. Kerzman alone establishes *corpus delicti*. He testified he stole crab pots, that they were in the possession of the Defendant on his vessel and in his gear storage stacks, and that the way he stole them violated the particular Fish and Wildlife laws. *Corpus delicti* was easily established.

ABANDONDED GEAR AND THE LAW OF FINDS

The Appellant's definition of abandoned crab pots improperly added elements the state needed to prove, and ignores other identifying aspects of crab pots missing buoys

The Appellant asserts the State failed to provide sufficient evidence proving that the “crab pots were the property of another,” and failed “to show a possessory interest in the crab pots [by another].” Brief of Appellant 1. The Appellant seeks to add an element of the offense that the State must prove—that the crab pots at issue were not abandoned. The Appellant argues that the evidence was insufficient because “none of the witnesses identified the pots as being stolen rather than lost at sea”, that “there is no evidence the crab pots were not derelict gear”, and that “the State failed to show that none of the crab pots were not abandoned gear.” Brief of Appellant, 39–40, 42, 44–45.

The Appellant's arguments rely on the belief that, under maritime law, crabbing gear which is considered abandoned becomes the property of the person who recovers it, and that commercial crabbing gear that does not bear an identifying buoy is abandoned. The definition of abandoned ignores the presence of required pot tags on the actual pots themselves. It also ignores that the loss of a buoy is nearly always an unintentional act. The Appellant also ignores the distinction between derelict gear and wrap-arounds, as discussed by Officer Welter. “Derelict gear has been left out

after the season has closed ... Wrap-around is actively fishing, still in the water, still potentially under water in a guy's string.” RP1 56–57. Still, the trial court instructed the jury regarding abandoned crab pots, CP 51, over the State’s objection. RPIV 27.

Because the jury was instructed on abandoned crab pots, and the jury found the Appellant guilty notwithstanding the instruction, this Court need not address definition of abandoned crab pots or the Law of Finds; the State presented sufficient evidence that crab pots bearing pot tags and buoys of the true owners were stolen, fished, and kept

The Appellant asks this Court to engage in an inquiry that could undermine the regulatory regime of commercial crabbing by invalidating the regulations of the Department of Fish and Wildlife regarding commercial crabbing gear. Appellant’s argument on this point is misplaced, and this Court need not reach the question of whether the crab pots without buoys are abandoned property, or whether ownership of such pots transfers to whoever pulls them off the ocean floor. This Court need not engage in such a fishing expedition. Instead, the Court need only review the evidence, viewed in the light most favorable to the State, find the necessary quantum exists for the jury to believe the Appellant possessed crabs pots which were stolen when they bore buoys and crab pots identifying other fishermen as the owners.

Mr. Kerzman testified specifically about the Appellant's buoys and pulling crab pots that he knew were not the Appellant's:

Q. During the time that you were on the Shearwater Two, have you ever pulled on board a pot that was not the Shearwater Two's?

A. Of course.

Q. Okay. When you were out there in the ocean running your string, how can you tell which pots are the Shearwater Two's?

A. Because his buoys are orange and red.

Q. Okay. Is there a mark on the buoy?

A. Yeah. He's got his - one - I forget what it is exactly, but it's got numbers on it. It's like 600.

Q. Okay. You've pulled - you just testified that you pulled pots on to the vessel that were not the Shearwater Two's. How did you know they weren't belonging to the defendant?

A. Different colors.

RPII 218–219.

Mr. Kerzman was also asked specifically about wrap-around buoys and whether those constituted the stolen crab pots. He said they sometimes did, but also reaffirmed that stolen pots included those pulled on board that did have buoys:

Q. Do you know what a wrap-around is?

A. Yep.

Q. All right. These - these two to 20 pots per trip ... were they wrap-arounds?

A. You could get five of them in one wrap-around sometimes.

Q. Okay. But these two to 20 that you pull up, were they wrap-arounds?

A. Sometimes.

Q. Okay. But sometimes they were not?

A. Sometimes not.

RPII 220.

Further evidence that the crab pots stolen by Mr. Kerzman were properly marked with boys and pot tags came from Mr. Kerzman's explanation of how he disposed of the buoys from those stolen pots:

Q. So if it was not a keeper, what would you do with it?

A. Depending on, once again, whose pot it was, throw it back or maybe save it to throw all the buoys in.

...

You're out in the ocean. Stuff disappears in the ocean. Get it off the boat.

Q. Okay. What about - what about the buoys?

A. Save them for a pot.

Q. Save them for a pot. What does mean, save them for a -

A. Save them for a big heavy pot that is not - it's too much work to mess with.

Q. Okay.

A. And then get rid of the buoys.

Q. How would you get rid of the buoys?

A. Throw them in the pot, throw the pot over.

Q. Okay. So you would -

A. Sink them.

RPII 225, 226-228.

While a substantial amount of testimony and argument during trial involved wrap-arounds and what constituted an abandoned crab pot, on appeal the issue is of little significance. The Court need not address the issue of what is abandoned at sea; by looking to Mr. Kerzman's testimony

this Court can find that the State presented sufficient evidence regarding crab pots with buoys to uphold the jury's verdict.

The Appellant's definition of an abandoned crab pot has no support in law. The application of the Law of Finds does not apply to commercial fishing gear and would undermine the strict regulatory scheme established by the DFW

The Appellant argues that a regulatory scheme which "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." Brief of Appellant 43. But, that is precisely the regulatory scheme of Washington State.

The Washington Administrative Code specifically addresses pulling aboard wrap-around and other so-called abandoned gear. "It is unlawful to place in the water, pull from the water, possess on the water, or transport on the water any crab buoy or crab pot without an attached buoy tag and pot tag ..." WAC 220-340-430.² The WAC in effect at the time provided only one exception³—"Persons operating under a valid coastal gear recovery permit as provided in WAC 220-340-440 may

² Formerly WAC 220-52-042, which was in effect at the time of these offenses.

³ The State has since created the coastal gear transport permit (WAC 220-340-440) which is the only other exception currently allowed in the current regulations.

possess crab pots or buoys missing tags or bearing the tags of another license holder.” *Id.*

The WAC also makes it unlawful, and punishable under RCW 77.15.180, for “any person to possess, use, control, or operate any crab pot bearing a tag identifying the pot as belonging to another person, or any buoy not bearing tags issued by the department to the person possessing them.” WAC 220-340-440.⁴ This regulation provides certain exceptions, including for “persons operating under a valid coastal gear recovery permit issued by the department.” No other exceptions to that prohibition are found in the WAC or RCW.

This Coastal Gear Recovery Permit program, commonly referred to as the derelict gear program, is to “allow crab fishers to recover shellfish pots that were irretrievable at the end of the lawful season opening due to extreme weather conditions.” WAC 220-340-490.⁵ These permits are granted 15 days after the season closes. *Id.* The permit requires that “This permit must be on-board the vessel at any time that crab pot recovery work is being conducted or anytime that crab pots that do not belong to the license owner are on board.” *Coastal Dungeness Crab Gear*

⁴ Formerly WAC 220-52-047, in effect at the time of the current offenses.

⁵ Formerly WAC 220-52-044, in effect at the time of the current offenses.

Removal Permit, WASH. DEP'T OF FISH AND WILDLIFE,
http://www.opc.ca.gov/webmaster/_media_library/2009/04/WDFW-gear-recovery-permit_FINAL.pdf (last accessed Jan. 30, 2019). The Quinault Nation also has a regulated derelict gear program. RP1 136.

So, as much as it may defy common sense to require fishermen throwback wrap-arounds during the commercial season, and as much as it could punish those commercial fishermen who keep wrap-around pots on board so as to give them back to the owner, or put on a communal pile of derelict gear, that is the regulatory scheme the State has established. It is a strict and complex regulatory scheme and one that is incompatible with the Appellant's argument that the common Law of Finds applies to derelict fishing gear.

The Law of Finds is a common law doctrine which may have more bearing in admiralty courts, but which must give way to codified laws and regulations. "We find the law of finds must give way to our state and federal constitutions and laws, and we decline to apply it to these logs." *In re Tortorelli*, 149 Wn.2d 82, 92–93, 66 P.3d 606 (2003) (ancient logs submerged in Lake Washington were the property of the State, and did not belong to salvager.)

Finally, this court should take the following advice from the United States District Court for the Eastern District of Virginia regarding the Law of Finds:

The law of finds is a disfavored common-law doctrine incorporated into admiralty but only rarely applied. Whereas salvage law is based on the principle of mutual aid, “a free finders-keepers policy is but a short step from active piracy and pillaging.” Thus, the law of finds should be “applied sparingly—only when no private or public interest would be adversely affected by its application.”

Recovery Ltd. P'ship v. Wrecked & Abandoned Vessel, S.S. CENTRAL AMERICA, 120 F. Supp. 3d 500, 505 (E.D. Va. 2015).

ACCOMPLICE LIABILITY

The jury instructions as given are the law of the case and not ripe for review, absent an error of constitutional magnitude

The Appellant's assignment of error regarding the absence of an accomplice liability instruction may be raised only by arguing that the absence of the instruction raises an issue of constitutional magnitude. Otherwise, an objection to a jury instruction cannot be raised for the first time on appeal. *State v. Dent*, 123 Wn.2d 467, 869 P.2d 392 (1994). Uncontested instructions become the law of the case. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). Here, neither party took exception to the absence of the accomplice instruction. RPIV 26.

Determining whether an error in the jury instructions rises to the level of a constitutional magnitude is determined by applying a two-part test—was the alleged error truly constitutional, and was the alleged error manifest, i.e. "whether the error had practical and identifiable consequences in the trial of the case." *State v. Kirkpatrick*, 160 Wn.2d 873, 880, 161 P.3d 990 (2007). Even so, a constitutional error still requires the court to examine the effect of the error on the defendant's trial under a harmless error standard. *Neder v. United States*, 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The Accomplice Liability instruction was not necessary, thus its absence did not relieve the State from proving an element and was not, therefore a constitutional issue

The jury instructions, taken in their entirety, must inform the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995). It is reversible error to instruct the jury in a manner that would relieve the State of this burden. *Id.*

Appellant argues that the absence of the accomplice liability instruction reduces the State's burden of proof and thus violates the Due Process Clause of the Fourteenth Amendment. Such argument is misguided as the Appellant, because the crimes occurred as was acting for

a commercial purpose and under his direction for his benefit in the courts of business, he is liable and may be prosecuted as a principal.

As a threshold matter, there is no accomplice liability issue regarding the conviction for possession of stolen property as there has been no suggestion that Mr. Kerzman possessed the crab pots instead of the Appellant. The jury did not convict the Appellant of theft, and the evidence presented showed the crab pots at issue were in the possession of the Appellant alone.

As captain of the Shearwater Two and business owner, the Defendant is strictly liable, and liable as a principal, for the criminal conduct that occurs on his vessel

A vessel captain is strictly liable for an offense is done with a commercial purpose where that purpose is an element of the offense. *State v. Martens*, 148 Wn.2d 820, 64 P.3d 633 (2003). This Court has previously applied *Martens* to offenses committed by others that occur on the vessel under the captain's direction. "By assuming the role of captain, the Appellant assumed responsibility of ensuring that he and his crew possessed no soft shell crab." *State v. Breitsprecher*, No. 49747-6, Ruling Denying Motion for Discretionary Review (Division II, Jan. 26, 2017).. With strict liability imposed, the *mens rea* of the accomplice liability

instruction is not necessary regarding the offense of Commercial Fishing Using Unlawful Gear.

The Appellant may properly be prosecuted as a principal for the offense of Unlawful Interference with Fishing or Hunting Gear. Where the evidence and the State's theory show the crime was committed with a commercial purpose in the course of business, as a business owner a defendant is liable as a principal. The North Carolina case of *State v. Kittelle*, 110 N.C. 560, 15 S.E. 103 (1892), adopted by Washington in several cases, best outlines this principle of liability best—"A principal is *prima facie* liable for the acts of his agents done in the general course of business authorized by him, as where a barkeeper sells liquor, or a clerk sells a libel or prints one in a newspaper." *Id* at 104.

Washington courts first adopted the *Kittelle* test in *State v. Constantine*, 43 Wn. 102, 86 P. 384, (1906). In *Constantine*, the owner of a saloon was convicted of the crime of knowingly selling intoxicating liquors to a minor, where the sale was made by his bartender when the owner was absent and had no notice or knowledge thereof. *Id*. The Court pointed out the several cases, and variety of cases, where an employer was liable as a principal:

It is undoubtedly a general rule of law that there can be no crime without a criminal intent, and that one

man is not criminally responsible for the acts of another, even though such other be his agent or servant, unless something more than the mere relation of master and servant is shown. [...] In *Carrol v. State*, 63 Md. 551, 3 Atl. 29, the court said: ‘When the agent, as in this case, is set to do the very thing which, and which only, the principal's business contemplates, namely, the dispensing of liquors to purchasers the principal must be chargeable with the agent's violation of legal restriction on that business. His gains are increased, and he must bear the consequences.

Id (internal citations omitted) .

In *Patterson*, a construction crew discharged a blast in violation of a Spokane ordinance. *City of Spokane v. Patterson*, 46 Wn. 93, 89 P. 402 (1907). Although the owner of the company, Mr. Patterson, had directed his crew to protect the blasting caps per the ordinance, he was held criminally liable when a crew member failed to do so. No accomplice liability instruction was given. *Id.*, at 93.

Examples of employer-based principal liability appear in several other cases. In *Burnam*, a manager and secretary-treasurer of a corporation was convicted of the criminal offense of having in his possession milk of a grade below the standard fixed by law with the intent to sell and deliver the milk. *State v. Burnam*, 71 Wn. 199, 128 P. 218 (1912). The Court stated simply “where the manner of conducting a business is the offense, and the agent or servant controls or aids and assists in the regulation of the

business, he may be liable as well as the principal.” *Burnam*, 71 Wn. at 202 (internal citation omitted).

In the case at hand, the Appellant, as the vessel captain, is liable for the strict liability offense of Commercial Fishing Using Unlawful Gear per *Mertens*. Regarding the conviction for Unlawful Interference with Fishing or Hunting Gear, as the vessel owner and the person in a position to economically gain from the criminality of his crew, the Appellant was properly liable as a principal. Therefore, an instruction on accessory liability was not necessary; its absence did not omit an element the State needed to prove, and the omission, if error, was not of constitutional magnitude. The absence of the instruction did not have a “practical and identifiable consequence [] in the trial of the case” as *Kirkpatrick* requires.

If constitutionally required, the omission of the accomplice liability instruction was harmless error as including the instruction would not have altered the jury’s verdict

Even if this Court finds that the accomplice liability instruction would be necessary for any of the crimes charged, its omission was harmless error. A constitutional error is harmless when it appears “beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” *Neder*, 527 U.S. at 15; *State v. Brown*, 147 Wn.2d 330,

58 P.3d 889 (2002). "When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." *Brown*, 147 Wn.2d at 341. Further, if the record supports a finding that the jury verdict would be the same absent the error, harmless error may be found. *Neder*, 527 U.S. at 17; *Brown*, 147 Wn.2d at 344.

Criminal culpability as a principal and as an accomplice are similar and "when a person is involved in the commission of a felony, whether they directly committed the offense or aided in its commission, that person is a principal and shall be prosecuted as such. Thus, the elements of a crime are considered the same for a principal and an accomplice." *State v. Teal*, 152 Wn.2d 333, 339, 96 P.3d 974 (2004). In such instances, "jury instructions are sufficient when, read as a whole, they accurately state the law, do not mislead the jury, and permit each party to argue its theory of the case." *Id.* In the case at hand, the State did not argue accomplice liability.⁶ Instead, the State argued the Defendant was guilty as a principal by virtue of the crab pots being in his possession in the Westport pot yard,

⁶ Compare to *State v. Ransom*, wherein the prosecutor discussed "aiding and abetting" in closing arguments though there were no jury instructions given. "Counsel may argue all issues and theories covered by the instructions, whether raised by him or opposing counsel, but may not argue theories not covered by the instructions." *State v. Ransom*, 56 Wn. App. 712, 714, 785 P.2d 469 (1990).

and that he was guilty for Mr. Kerzman's actions on the Shearwater Two by virtue of being captain, of knowing what occurs on his vessel, and having taught and directed Mr. Kerzman to steal pots as he did.

Appellant argues additionally that "The State did not provide any evidence that Mr. Breitsprecher was aware of Mr. Kerzman's unlawful acts other than Mr. Kerzman's statements." Brief of Appellant 49. But Mr. Kerzman's statements are sufficient evidence and do not require corroborating evidence. The evidence apparently persuaded the jury. They provide the necessary quantum of evidence to uphold the jury's verdict.

While the Appellant did not personally commit the commercial fishing violations, in the sense that his hands were not, literally, dirty, the Appellant ignores that liability attached to the Defendant acting for a commercial purpose, and ignores the broad definitions "to fish" and "to take." The State argued, successfully, that as captain of the Shearwater Two, the Appellant was criminally liable as a principal. Letting the State also argue accomplice liability would not have changed the elements of the offense, and would not have precluded the State from arguing the Appellant's guilt as a principal. Given that the jury convicted the Defendant as a principal, had the accomplice liability instruction been

included, the jury verdict would have been the same. Therefore, any error is be harmless.

VI. CONCLUSION

Mr. Breitsprecher directed his crew member, Kory Kerzman, to pull from the ocean crab pots which belonged to other fishermen, to fish those pots, and then, if the pots were a “keeper,” to strip it of any identifying markings and make it “one of Breitsprecher's pots.” Although Mr. Kerzman confessed this to DFW Officer Welter while he was in jail, Officer Welter corroborated what Mr. Kerzman said. When the DFW executed a search warrant on the Appellant’s gear piles, officers seized 32 possibly stolen crab pots. At trial, other commercial fishermen identified five crab pots as belonging to them and that they believed to be stolen.

On this evidence, a jury convicted the Appellant of Possession of Stolen Property in the Third Degree, Commercial Fishing Using Unlawful Gear, and Unlawful Interference with Fishing or Hunting Gear. On review, the amount of evidence sufficiently supports each of the jury’s verdicts.

After reviewing the evidence and testimony of Mr. Kerzman, the Court need not address the questions presented by the Appellant regarding the Law of Finds and definition of abandoned crab pots. A common law

doctrine applicable to shipwrecks does not provide a defense to criminal prosecution in this case, and does not undermine any of the State's evidence; sufficient evidence exists to support the jury's verdict even accepting the Appellant's arguments.

The State respectfully request this Court find that the trial court did not err in denying the Appellant's motions to dismiss or motion for arrest of judgement, and that a sufficient quantum of evidence exists to uphold the jury's verdict.

The State also respectfully requests this Court find the trial court did not err when it did not instruct the jury on accomplice liability. As captain of the Shearwater Two the Appellant is liable as a principal for the criminal activities of his crew done at his direction in the normal course of business for the purpose of his business.

The State respectfully requests this Court affirm the conviction.

DATED this _1st_ day of February, 2019.

Respectfully Submitted,

By: 
Randy J. Trick
Deputy Prosecuting Attorney
WSBA # 45190

RJT/rjt

GRAYS HARBOR PROSECUTING ATTORNEY

February 01, 2019 - 3:34 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Appellate Court Case Title: State of Washington, Respondent v. Larrin J. Breitsprecher, Appellant
Superior Court Case Number: 17-1-00295-2

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