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NO. 52858-4-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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STATE OF WASHINGTON,

Respondent,

v.

KYLE INGALLS,

Appellant.

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BRIEF OF APPELLANT,  
KYLE INGALLS

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY  
THE HONORABLE MICHAEL E. SCHWARTZ, JUDGE

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## I. INTRODUCTION

From December 2017 to April 2018, the state brought a total of 16 charges against Mr. Ingalls. These included charges for trafficking in stolen property, theft, forgery, and identity theft. Mr. Ingalls was tried and convicted by a jury for two of these counts, third-degree theft and first-degree trafficking in stolen property. He then pled guilty to the remaining 14 counts.

This Court should reverse all of Kyle Ingalls's convictions, and allow him to withdraw his guilty plea, for four reasons. First, the charging documents were constitutionally deficient in this case. Second, during trial, the prosecutor misrepresented the burden of proof, undermining Mr. Ingalls's presumption of innocence. Third, the evidence at trial was insufficient to convict Mr. Ingalls of theft and trafficking in stolen property. Fourth, the cumulative effect of these errors denied Mr. Ingalls due process of law.

## II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The charging documents in this case omitted critical facts and were constitutionally deficient.

Assignment of Error 2: The prosecutor committed misconduct that prejudiced Mr. Ingalls by telling jurors in closing argument that they could convict even with reasonable doubts.

Assignment of Error 3: The evidence at trial was insufficient to support Mr. Ingalls's convictions for third-degree theft and second-degree trafficking in stolen property.

Assignment of Error 4: Cumulative error denied Mr. Ingalls a fair trial.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Did the charging documents fail to provide adequate notice of the charges and protection against double jeopardy when they contained almost no facts in support?

Issue 2: Did the prosecutor commit misconduct, prejudicing Mr. Ingalls, when she told the jury in closing arguments that they could "have a doubt that's reasonable" and still convict?

Issue 3: Was there insufficient evidence to support Mr. Ingalls's convictions for third-degree theft and first-degree trafficking in stolen property when the state failed to prove beyond a reasonable doubt that Mr. Ingalls stole the gift card?

Issue 4: Did cumulative error deny Mr. Ingalls due process and a fair trial?

### **IV. STATEMENT OF THE CASE**

On February 8, 2017, a man walked into a Lowe's hardware store in Lakewood, WA. RP at 177, 223. The man browsed the store for about an hour, then went to the counter and returned some merchandise. RP at 198-99. The man used identification belonging to Kyle Ingalls to complete the

transaction. RP at 206. He did not have a receipt, so he was provided a gift card worth \$138.42. RP at 197.

The next day, February 9, 2017, a man went into Gold and Silver Trading, a pawn shop in Tacoma, WA. RP at 245. He sold the Lowe's gift card for \$96.89, in cash. RP at 254. According to the store manager, the man presented identification belonging to Kyle Ingalls. RP at 247.

In December 2017, the state charged Mr. Ingalls with first-degree trafficking in stolen property and third-degree theft. CP 2-3. The information listed the gift card as "stolen property" in the trafficking charge. *Id.* However, for the theft charge, the information did not identify or describe the property allegedly stolen. *Id.*

The state brought additional charges against Mr. Ingalls in early 2018. In January 2018, Mr. Ingalls was charged with one count of forgery. CP 174. In February 2018, he was charged with four counts of forgery and two counts of second-degree theft. CP 269-71. In April 2018, Mr. Ingalls was charged with seven counts of identity theft. CP 364-67.

All of the 2018 charges arose from an alleged check forging scheme involving many persons. CP 172-73, 272-73, 368-73. The scheme allegedly involved stealing financial information, creating fake checks based on real bank accounts, and then cashing those checks, usually at

casinos. *Id.* The state alleged that Mr. Ingalls was involved in creating and cashing the fake checks. *Id.*

Mr. Ingalls proceeded to trial on the third-degree theft and first-degree trafficking in stolen property charges. RP at 172. The trial took place on October 17 and 18, 2018. RP at 172, 268. The state presented testimony from two witnesses. RP at 176, 237.

Scott Patronaggio testified that he is the loss prevention supervisor at the Lowe's in Lakewood. RP at 176. His job duties include reviewing surveillance footage of suspicious transactions. RP at 181-82. The Lakewood Lowe's has about 60 cameras surveilling the store. RP at 181. Mr. Patronaggio also receives reports of all of the refunds processed by Lowe's. He pays particular attention to refunds over \$100, reviewing surveillance video and paperwork for these returns. RP at 183.

Mr. Patronaggio testified about Lowe's refund policy. The Lakewood Lowe's accepts refunds both with and without a receipt. RP at 187. If a customer does not have a receipt, they must present valid identification in order to process the return, such as a driver's license. RP at 188. The information on the driver's license is inputted into the Lowe's database system. RP at 191. Without a receipt, items can only be returned for an in-store merchandise card, not cash. RP at 184-85.

Mr. Patronaggio testified about a return that occurred on February 8, 2017, at about 6:16PM. RP at 194. A customer returned a roll of aluminum insulation and a cart of plywood without a receipt, valued at \$138.42. RP at 197, 200. The customer presented identification belonging to Kyle Ingalls. RP at 206. Mr. Patronaggio reviewed surveillance footage of the return, noted the customer's appearance, and then went back through all of the Lowe's surveillance footage to track the customer in the store. RP at 198-200.

According to Mr. Patronaggio, the customer was in the store for about an hour. RP at 199. He entered with nothing in his hands at about 5:21PM. RP at 200, 223. The customer then went to the outdoor power tools department, and later to the lumber department. RP at 225-26. He spoke to a sales associate in the lumber department at about 5:31PM. RP at 226.

At that point, Mr. Patronaggio testified that the customer disappeared from all cameras for about 25 minutes. RP at 226-28. He reappeared in the flooring department at about 5:55PM. RP at 227-28. A little while later, around 6:04PM, the customer appeared at the return counter and returned the roll of aluminum and the cart of plywood. RP at 229-230. He received an in-store merchandise card in exchange. RP at 217-18. The customer left Lowe's at around 6:17PM. RP at 232.

After reviewing this footage, Mr. Patronaggio concluded that the customer took merchandise from Lowe's, did not pay for the merchandise, and then returned the merchandise without a receipt in exchange for a gift card. RP at 199-202. Mr. Patronaggio filed a report with the Lakewood Police Department. RP at 206.

The second witness to testify at trial was Okhapkin Dmytro, the manager of Gold and Silver Traders in Tacoma. RP at 236-37. Mr. Dmytro testified about the process of selling items to Gold and Silver. RP at 239. He said that the store uses an online database to create a profile for a seller. *Id.* Sellers must present a valid form of identification, which is photographed and uploaded to the database. RP at 240-41. Returning customers still must show identification in order to sell an item. RP at 244. An employee will compare that identification to the ID on file associated with the seller's profile. *Id.*

Gold and Silver buys gift cards in addition to other merchandise. RP at 241-42. The store will estimate how much they can sell the gift card for, and then offer to pay cash for about 10 percent less than that price, averaging a 10 percent profit for the store. RP at 243.

Mr. Dmytro testified that Gold and Silver bought a Lowe's gift card on February 9, 2017. RP at 245. According to the store's records, the Lowe's card was sold by Kyle Ingalls. RP at 247. Mr. Ingalls already had

a seller account at Gold and Silver, created in December 2016. RP at 248-49. The store had his identification on file from this prior transaction. *Id.* Mr. Dmytro testified that he could not remember whether he personally completed the February 2017 transaction, but he believed that the seller would have to present identification in order to sell the Lowe's card. RP at 248.

At the conclusion of evidence, the parties gave closing arguments. During the state's closing, the prosecutor gave the following description of the "beyond a reasonable doubt" standard:

It's an abiding belief in the truth of the charge. That's what you get. It's not a standard higher than that. ***It's not beyond a reasonable doubt***, all belief, or beyond all doubt. But you can have a doubt. Beyond a reasonable doubt means that ***you can have a doubt that's reasonable***, and if you are so convinced even with that doubt, you are convinced beyond a reasonable doubt. It's an abiding belief in the truth of the charge.

RP at 279 (emphasis added). Mr. Ingalls's attorney did not object to the prosecutor telling jurors they could convict even if they "have a doubt that's reasonable." *Id.*

On October 18, 2018, a jury convicted Mr. Ingalls of both third-degree theft and first-degree trafficking in stolen property. RP 310. A few days later, on October 22, 2018, Mr. Ingalls pled guilty to the remaining 14 pending charges. RP at 317-33. These included a total of five counts of

forgery, two counts of second-degree theft, and seven counts of second-degree identity theft. *Id.*; CP 209-18, 300-09, 393-402. On November 16, 2018, he was sentenced for all 16 convictions to a total of 63 months incarceration, served concurrently, and 12 months community custody. CP 133-46, 233-46, 327-41, 419-33. Mr. Ingalls appeals. CP 157, 253, 348, 438.

## V. ARGUMENT

This Court should reverse all of Kyle Ingalls's convictions, for four reasons. First, the charging documents were constitutionally deficient, omitting critical facts about his alleged offenses. Second, during trial, the prosecutor misstated the burden of proof, telling jurors they could convict even if they had reasonable doubts about Mr. Ingalls's guilt. Third, the evidence at trial was insufficient to convict Mr. Ingalls of third-degree theft and first-degree trafficking in stolen property. Fourth, the cumulative effect of these errors denied Mr. Ingalls due process.

### A. **The Charging Documents in this Case were Constitutionally Deficient.**

Mr. Ingalls's convictions must be overturned because the charging documents were constitutionally deficient. Charging documents must contain enough factual information to provide notice of the crimes and to guard against double jeopardy. The language charging Mr. Ingalls with theft was insufficient because it did not specify the property he allegedly

stole. The language charging Mr. Ingalls with the remaining counts also lacked factual specificity. This Court must reverse.

This argument applies to the charges to which Mr. Ingalls pled guilty. Generally, a defendant waives his right to appeal by pleading guilty. *State v. Majors*, 94 Wn.2d 354, 355, 616 P.2d 1237 (1980). However, a guilty plea does not preclude appeal of collateral questions. *State v. Gaut*, 111 Wn. App. 875, 880, 46 P.3d 832, 834-35 (2002). A defendant “preserves the right to challenge the judgment and sentence on collateral grounds,” including the “sufficiency of the information.” *State v. Brandenburg*, 153 Wn. App. 944, 948, 223 P.3d 1259 (2009) (citing *Majors*, 94 Wn.2d at 355).

**1. Charging documents must be sufficiently specific to provide notice to the accused and the protect against double jeopardy.**

The Sixth Amendment guarantees the right “to be informed of the nature and cause of the accusation.” U.S. Const. Amend. VI; *see also* Wash. Const. art. I, § 22. Both the federal and state constitutions also protect due process. U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. These constitutional provisions impose certain requirements on charging documents.

A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of

the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005). The charge must include more than “the elements of the offense intended to be charged.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038 (1962) (citations and internal quotation marks omitted).

An information must include each essential element of the alleged crime. *State v. Courneya*, 132 Wn. App. 347, 351, 131 P.3d 343 (2006). Additionally, an information must allege facts supporting each element. *Id.* at 350. Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004). These legal and factual requirements are designed to give the defendant adequate notice of the charges so that he or she may prepare a defense. *Courneya*, 132 Wn. App. at 351.

Challenges to the sufficiency of a charging document are reviewed de novo. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012). When a defendant challenges the sufficiency of an information for the first time on appeal, reviewing courts construe the charging documents liberally in favor of validity. *State v. Williams*, 162 Wn.2d 177, 185, 170 P.3d 30 (2007).

Courts employ a two-prong test: (1) do the necessary elements appear in any form, or by fair construction can they be found in the

information and, if so, (2) can the defendant show he or she was actually prejudiced by the vague or inartful language. *State v. Zillyette*, 173 Wn.2d 784, 786, 270 P.3d 589 (2012). If the information is deficient, prejudice is presumed. *Rivas*, 168 Wn. App. at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.* at 893.

**2. The language charging Mr. Ingalls with theft were constitutionally deficient by failing to specify what he allegedly stole.**

Mr. Ingalls was charged with theft in the third degree in December 2017, and with two counts of theft in the second degree in February 2018. CP 2-3, 269-71. All of these convictions must be overturned, and Mr. Ingalls must be allowed to withdraw his guilty plea to the latter, because the charging documents were deficient.

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

Here, the documents charging Mr. Ingalls with theft did not provide adequate notice because they did not “specifically describe[]” the property

allegedly stolen. *Greathouse*, 113 Wn. App. at 903. The December 2017 information, charging Mr. Ingalls with third-degree theft, alleges that on or about February 8, 2017, Mr. Ingalls:

...did unlawfully and wrongfully obtain or exert control over property and/or services...belonging to another, of a value that does not exceed \$750 . . . with intent to deprive said owner of such property and/or services...”

CP 2-3. The February 2018 information, charging Mr. Ingalls with two counts of second-degree theft, is similarly unspecific. Except for the date, the language for both counts was identical and alleged that Mr. Ingalls:

...did unlawfully and feloniously, by color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services, commit[ted] theft of: 1) property or services which exceed(s) seven hundred fifty dollars but does not exceed five thousand dollars in value...

CP 269-71.

This charging language does not provide any allegations about the nature or character of the items Mr. Ingalls is supposed to have stolen. *See Greathouse*, 113 Wn. App. at 903. By not specifying what Mr. Ingalls allegedly stole, the charging documents do not provide adequate notice of the theft charges and do not provide any protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631. The allegations were thus “too vague and indefinite upon which to deprive [Mr. Ingalls] of

his liberty,” requiring reversal. *Edwards*, 266 F. at 851; *see also Rivas*, 168 Wn. App. at 893.

**3. The language charging Mr. Ingalls with trafficking in stolen property, identity theft, and forgery were factually unspecific and constitutionally deficient.**

Mr. Ingalls was also charged with trafficking in stolen property, identity theft, and forgery. CP 2-3, 174, 269-71, 364-67. The charging documents included only limited factual information.<sup>1</sup> *Id.* Other than this information, the charging language parroted the language of the statutes without adding anything specific. *Id.* The documents did not specify where the offenses occurred, did not include any information about the allegedly forged checks or the allegedly stolen gift card, and did not allege how Mr. Ingalls was supposed to have stolen these identities. *Id.*

Even under a liberal construction, the facts necessary for Mr. Ingalls to prepare a defense and guard against subsequent prosecution in violation of double jeopardy do not appear anywhere in the charging documents. *Russell*, 369 U.S. at 763-64. The charging language for Mr. Ingalls’s convictions was constitutionally deficient. *Id.* These convictions must be reversed, and he must be permitted to withdraw his guilty plea. *Id.*

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<sup>1</sup> All of the charging documents specified the date of the alleged offenses. CP 2-3, 174, 269-71, 364-67. Additionally, the charging documents specified that Mr. Ingalls allegedly forged checks, trafficked a stolen gift card, and stole the identities of named alleged victims. *Id.*

**B. The Prosecutor Misstated the Law by Telling Jurors They Could Convict Even if They Had Reasonable Doubt.**

During closing statements, the prosecutor misstated the standard of proof. The prosecutor told jurors that “you can have a doubt that’s reasonable” and still convict Mr. Ingalls if “you are so convinced [of his guilt] even with that doubt.” RP at 279. The prosecutor’s statements muddled the reasonable doubt standard, eroded Mr. Ingalls’s presumption of innocence, and likely confused the jury. This Court should reverse and remand for a new trial.

The right to a fair trial is a fundamental liberty secured by the United State and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Courts consider the prosecutor’s alleged improper conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Anderson*, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009).

In order to prevail on a claim of prosecutorial misconduct, a defendant must show that the prosecutor’s conduct was both improper and

prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011).

Both requirements are met in this case.

**1. The prosecutor committed misconduct by misrepresenting the “beyond a reasonable doubt” standard.**

The prosecutor committed misconduct on this case by misstating the burden of proof. Specifically, she attempted to define the “beyond a reasonable doubt” standard but got confused, stating, “it’s not beyond a reasonable doubt.” RP at 279. Later, she muddied the definition even further, stating “you can have a doubt that’s reasonable” and still convict.

*Id.* Her full statement on the burden was as follows:

Here is your definition: It’s an abiding belief in the truth of the charge. That’s what you get. It’s not a standard higher than that. ***It’s not beyond a reasonable doubt***, all belief, or beyond all doubt. But you can have a doubt. ***Beyond a reasonable doubt means that you can have a doubt that’s reasonable***, and if you are so convinced even with that doubt, you are convinced beyond a reasonable doubt. It’s an abiding belief in the truth of the charge.

RP at 279. At the very least, these statements confused the jury. They also undermined the presumption of innocence, violating Mr. Ingalls’s constitutional rights.

Due process requires the prosecution to prove, beyond a reasonable doubt, every element necessary to constitute the crime with which the defendant is charged. *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068 (1970). Shifting the burden of proof to the defendant is improper argument,

amounting to flagrant and ill-intentioned misconduct. *E.g.*, *State v. Fleming*, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996); *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74 (1991). Misstating the burden of proof insidiously shifts the requirement that the state prove a defendant's guilt beyond a reasonable doubt. *Fleming*, 83 Wn. App. at 213.

Here, the prosecutor misstated the burden of proof, undermining the presumption of innocence. Her first misstatement was confusing but relatively minor. She misspoke by stating "it's not beyond a reasonable doubt," but quickly corrected herself by adding "all belief, or beyond all doubt." RP at 279. However, her second misstatement went further. She told jurors they could convict even if they "have a doubt that's reasonable..." *Id.* This statement encouraged jurors to convict even if they had reasonable doubts about Mr. Ingalls's guilt, amounting to prosecutorial misconduct. *See Fleming*, 83 Wn. App. at 213.

**2. The prosecutor's misconduct prejudiced Mr. Ingalls by confusing the jury about the burden of proof.**

The prosecutor's misconduct prejudiced Mr. Ingalls. Prejudice requires showing a substantial likelihood that the misconduct affected the jury verdict. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010). Mr.

Ingalls did not object at trial and thus must show that a jury instruction would not have cured the prejudice. *Thorgerson*, 172 Wn.2d at 443.

In most cases, trial court instructions can minimize the negative impact of improper statements. *Anderson*, 153 Wn. App. at 432. Reviewing courts presume jurors follow the trial court's instructions. *Id.* However, the presumption of innocence is the "bedrock upon which [our] criminal justice system stands." *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). A misstatement affecting the presumption of innocence "constitutes great prejudice because it reduces the state's burden and undermines a defendant's due process rights." *State v. Johnson*, 158 Wn. App. 677, 686, 243 P.3d 936 (2010).

Here, the prosecutor's misstatements encouraged jurors to apply a lower burden of proof by telling them that even if they "have a doubt that's reasonable," they can still convict. RP at 279. At a minimum, this contradictory statement confused the jury about the reasonable doubt standard. It also undermined Mr. Ingalls's due process rights and presumption of innocence, amounting to "great prejudice." *Johnson*, 158 Wn. App. at 686. This Court must reverse and remand for a new trial.

**C. No Rational Jury Could Have Found Beyond a Reasonable Doubt that Mr. Ingalls Trafficked in Stolen Property or Committed Theft.**

At trial, the state presented insufficient evidence to support Mr. Ingalls's convictions for trafficking in stolen property or theft. It is unclear exactly what Mr. Ingalls was charged with stealing because, as explained above, the charging language for theft did not specify. CP 2-3. Assuming Mr. Ingalls was convicted of stealing the gift card,<sup>2</sup> the evidence at trial was insufficient to support that conviction, or to conclude that the gift card was "stolen property" to support the trafficking conviction. This Court should reverse.

"The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld." *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (internal quotations omitted). To determine whether sufficient evidence supports a conviction, courts view the evidence in the light most favorable to the state and determine whether any rational trier of

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<sup>2</sup> It is unclear from the information charging Mr. Ingalls with third-degree theft whether he was alleged to have stolen the items he returned, the gift card, or both. CP 2-3. At trial, the state advanced both theories. The Lowe's representative testified that "technically" Lowe's is "out product" in the sense that they are "short the roll of aluminum rolls plus the three sheets of plywood" Mr. Ingalls allegedly took off the shelves and returned to the store. RP at 233. However, in closing, the state argued that Mr. Ingalls "orchestrated the theft" of the gift card. RP at 272. The distinction matters because items taken within a store and returned are not stolen because the accused never intended to deprive the store of those items. See *State v. Graham*, 182 Wn. App. 180, 184, 327 P.3d 717 (2014).

fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182, 185 (2014).

A claim of insufficient evidence admits the truth of the state's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Here, Mr. Ingalls was convicted of theft and trafficking in stolen property. RP at 310. A person commits third-degree theft when he “commits theft of property or services” which “does not exceed seven hundred fifty dollars in value.” RCW 9A.56.050(1). “Theft” means “to wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a).

First degree trafficking in stolen property occurs when a person “knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others,” or “knowingly traffics in stolen property.” RCW 9A.82.050(1). To traffic means to “sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another

person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.” RCW 9A.82.010(19). Stolen property is defined as “property that has been obtained by theft, robbery, or extortion.” RCW 9A.82.010(16).

The state’s theory of the case was that Mr. Ingalls stole the gift card from Lowe’s and then trafficked that stolen property by selling the gift card to a pawn shop. RP at 272. The evidence did not support this theory because the state failed to prove that the gift card was stolen, for two reasons.

First, factually, no rational jury could conclude that Mr. Ingalls stole the gift card. Assuming Mr. Ingalls was the man on the surveillance video at Lowe’s, there was a 25-minute span of time where he was not on video. RP at 226-28. During that time, he could have purchased the items, changed his mind, and returned them. He also could have gone out to his car and brought the bulky items in through a different door. With that long a gap, the jury could not convict Mr. Ingalls of theft beyond a reasonable doubt.

Second, even assuming Mr. Ingalls took items from Lowe’s, did not pay for them, and then returned the items in exchange for a gift card, this conduct does not amount to theft as charged by the state. Mr. Ingalls did not “wrongfully obtain or exert unauthorized control over” the gift card; he

followed Lowe's procedures and the store gave him the gift card willingly.<sup>3</sup>  
RCW 9A.56.020(1)(a).

Either way, because Mr. Ingalls did not steal the gift card, he did not traffic in stolen property by selling the gift card to the pawn shop. RCW 9A.82.050(1). Mr. Ingalls's convictions for third-degree theft and first-degree trafficking in stolen property must be reversed because no rational jury could convict him of these crimes.

**D. Cumulative Error Denied Mr. Ingalls Due Process.**

Even if each of the errors described above are not sufficient for reversal, their cumulative effect denied Mr. Ingalls a fair trial and due process. This Court should reverse and remand because of the pervasiveness of the errors in this case.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors produce a trial that is fundamentally unfair. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (accumulated errors, including permitting inadmissible

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<sup>3</sup> Arguably, Mr. Ingalls committed theft "by color or aid of deception," an alternative definition listed in RCW 9A.56.020(1)(b), but this allegation was not charged or presented to the jury.

evidence and prosecutorial discovery violations, required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

In this case, the errors made by the state each warrant reversal. However, even if each error standing alone is harmless, the accumulation of these errors deprived Mr. Ingalls of due process and a fair trial. *See Coe*, 101 Wn.2d at 789. This Court should reverse. *State v. Venegas*, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010).

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## VI. CONCLUSION

Kyle Ingalls's convictions must be reversed due to pervasive and significant errors. The charging documents were constitutionally deficient, omitting critical facts about his alleged offenses. During trial, the prosecutor misstated the burden of proof, telling jurors they could convict even with reasonable doubts about Mr. Ingalls's guilt. Finally, the evidence at trial was insufficient for a rational jury to convict Mr. Ingalls of third-degree theft and first-degree trafficking in stolen property. The cumulative effect of these errors denied Mr. Ingalls a fair trial. Mr. Ingalls respectfully requests that this Court reverse his convictions, allow him to withdraw his guilty plea, and remanded to the trial court.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of July, 2019.

  
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STEPHANIE TAPLIN  
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Attorney for Appellant, Kyle Ingalls

No. 52858-4-II

CERTIFICATE OF SERVICE

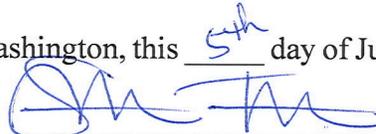
I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On July 5, 2019, I electronically filed a true and correct copy of the **Opening Brief of Appellant, Kyle Ingalls**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Kristie Barham	( X ) via U.S. mail
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Kyle Ingalls	( X ) via U.S. mail
DOC # 799566	
Monroe Correctional Complex	
PO Box 7001	
Monroe, WA 98272	

SIGNED in Port Orchard, Washington, this 5<sup>th</sup> day of July, 2019.



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