

FILED

MAR 25 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

CAUSE NUMBER 31094-9-III

STATE OF WASHINGTON

Respondent.

V.

EDWARD W. TERRY,

Appellant.

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

The Honorable William D. Acey

RESPONDENT'S BRIEF IN RESPONSE TO APPELLANT'S
OPENING BRIEF

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A. COUNTER TO ASSIGNMENTS OF ERROR

1. Evidence was sufficient to sustain convictions for Theft of a Motor Vehicle, Possession of a Stolen Vehicle and Trespassing.
2. No error occurred regarding the juror question.
3. The trial court did not commit error in sustaining State's objection to question of law posed to witness regarding shoe prints.
4. State did not mis state facts or law, shift burden to defendant or impermissibly comment on post-arrest silence.
5. Trial court did not error in denying motion for mistrial based upon a juror briefly seeing defendant with officers.
6. Trial court did not error when reiterating to jury requirement for reaching verdict.
7. Trial court did not error when, after verdict was reached, court requested jury complete a verdict form.
8. Any error in sentencing is moot, based on correct offender score.
9. No error exists which requires reversal.

B. COUNTER STATEMENT OF THE CASE

Mr. Terry was convicted of Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Trespassing and Resisting Arrest. (RP, Volume F at page 355; 8-25 to 356; 1-4)

On May 21, 2011, Gordon Smith and his wife, Angelia Smith were on their farm property in Columbia County to bury their dog that

had died the previous night. (RP, Volume E, at page 159; 2-6, 170;12-170;12-14). They arrived at around 6:30 a.m. (RP Volume E, at page 160; 21-24, 170; 9-11). While there they saw a blue truck come flying around a corner in the road, spin out on the gravel and hit the bank flipping on to its side. (RP Volume E, at page 160; 5-16, 171; 4-22).

It was clear and light out that morning. (RP Volume E, at page 161; 1-3). Angelia Smith used her vehicle to call Onstar. (RP Volume E, at page 161; 9-25).

Angelia and Gordon saw a person crawling out from the truck. (RP Volume E, at page 162;1-12, 171; 23-25 and 172;1-20). They watched the person move in a swinging motion, as if he threw something and then start running up the hill. (RP Volume E, at page 172;1-6). The person crawling out of the truck was described as male, tall and slender, five and one-half to six feet tall, wearing dark clothing, a hoodie or a cap and jeans. (RP Volume E, at page 162;13-24, 172; 15-20 and 173; 6-17). The person crawled from the truck then ran up the nearby hill; which is property belonging to Mr. and Mrs. Smith. (RP Volume E, at page 172; 1-3 and 173;18-21). Mr. Smith then went to the truck to see if anyone else was trapped in the truck. (RP Volume E, at page 174; 13-16).

Deputy Richard Loyd of the Columbia County Sheriff Department arrived on scene while Mr. Smith was walking to the truck. (RP Volume E, at page 174; 18-19, and 222; 20-23). Deputy Loyd

checked the truck to make sure no one else was inside. (RP Volume E, at page 174; 21-24; , 224; 10-12). Mr. Smith showed Deputy Loyd which direction the person ran. (RP Volume E, at page 175; 10-12, and 224; 13-13-15). Mr. Smith explained to Deputy Loyd that he had traveled the hills on his property many times and he believed that the person would be winded and that they would be able to find the person (RP Volume E at page 175; 10-15 and 224; 10-18). Mr. Smith offered to ride with Deputy Loyd showing him the roads and directing him to where he thought someone headed in that direction would end up. (Id.).

Mr. Smith and Deputy Loyd traveled over the first ridge (RP Volume E, at page 176; 6-14). They saw an individual walking up the ridge. (RP Volume E, at page 176; 6-8, 225; 1-7). Mr. Smith continued to direct Deputy Loyd in order to arrive at the location the person appeared to be walking towards. (RP Volume E, at page 176; 14-21, and 225; 1-15). Mr. Smith did not see any other individuals that morning walking on the approximately 2000 acres. (RP Volume E, at page 177; 16-25). Mr. Smith and Deputy Loyd watched the individual crest a ridge, ridge, would briefly lose site of the individual as he would drop down the other side and then see the same individual come up the other side of the next ridge. (RP Volume E, see generally 177-178, 223-224). Mr. Smith testified that you could see where the individual had walked through the wheat fields and follow his footpath. (RP Volume E, at page 178; 6-11).

Mr. Smith and Deputy Loyd managed to cut the person off. (RP Volume E, at page 225; 14-15). Mr. Smith testified at trial that the person intercepted was the same person he saw leave from the truck crash. (RP Volume E, at page 177; 7-25 and 178; 12-24). Mr. Smith and Deputy Loyd both exited their vehicle when they intercepted him. (RP Volume E, at page 179 and 225 generally). Deputy Loyd approached the person. (RP Volume E, at page 225; 14-21).

Deputy Loyd recognized the person as Eddie Terry. (RP Volume E, at page 225; 23-25 and 226; 1-11). The clothing of the person intercepted (Mr. Eddie Terry) matched the description of the clothing of the person who ran from the crash scene. (RP Volume E, at page 177; 7-25 and 178; 1-24). Mr. Smith confirmed that the person intercepted was the same person who crawled from the truck and fled the crash scene. (Id., and RP Volume E, at page 184; 3-11 and 232; 7-11).

Deputy Loyd was in full uniform as he approached Mr. Terry. (RP Volume F, at page 279; 1-15). Deputy Loyd told Mr. Terry to stop and get on the ground. (RP Volume E, at page 227; 19-25 through 228 1-1-20 and Volume F, at page 279; 1-3). Mr. Terry refused and flipped off Deputy Loyd. (RP Volume E, at page 179; 10-21 and 228; 1-25, and 280; 1-23). Deputy Loyd continued to approach with his sidearm drawn. (Id. And RP Volume E, at page 227; 24-25 and 228; 13-15). When he was close enough to determine that Mr. Terry did not have any weapons in

his hands Deputy Loyd put away his sidearm and drew his taser and again told him to get on the ground and put his hands behind his back or he would be tased. (RP Volume E, at page 228; 10-20 and Volume F, at page 280; 6-23). Mr. Terry yelled "Oh, a taser" and then flipped off Deputy Loyd with both hands. (RP Volume E, at page 228;17-25 and Volume F at page, 280; 2-23). Mr. Terry then turned around and started to pull down his pants as if to moon Deputy Loyd and Mr. Smith. (RP Volume E, at page 179; 10-11 and 228; 17-25 and Volume F at page, 280; 2-23). Mr. Terry pulled up his pants, then dropped to the ground and put his hands behind his back. (RP Volume E, at page 229;1-2).

Deputy Loyd told him to turn his head away from him. (RP Volume E, at page 229; 1-12). Mr. Terry told him that was all he was going to get. (RP Volume E, at page 229; 1-4). Deputy Loyd walked around to the left side and knelt down to take Mr. Terry in to custody. (RP Volume E, at page 229;1-20). Deputy Loyd grabbed Mr. Terry's left arm, put a handcuff on his left wrist and reached for his right arm. (RP Volume E, at page 229; 22-25 and 230; 1-2). Mr. Terry tried to push up against Deputy Loyd and roll over. (RP Volume E, at page 230; 2-3). Mr. Terry also tried to bite Deputy Loyd (RP Volume E, at page 179; 17-18). Deputy Loyd told Mr. Terry to stop resisting. (RP Volume E, at page 230; 3-4). Mr. Terry continued to resist until Deputy Loyd used a pressure compliance technique with the handcuff. (RP Volume E, at page

230; 4-6). Mr. Terry then said he wasn't resisting and that he was done. (RP Volume E, at page 230; 6-10). Deputy Loyd was then able to cuff Mr. Terry's right wrist. (Id.). Mr. Terry complained of the hand-cuffs being too tight. (RP Volume E, at page 181;8-14 and 230;12-13). Deputy Loyd adjusted the handcuffs. (Id.).

Deputy Loyd asked Mr. Smith if the person in custody was the person he had seen running from the crash. (RP Volume E, at page 184; 7-11). Mr. Smith indicated that it was the same person he saw crawl out of the truck and flee the crash. (Id. And Volume E, at page 232; 8-11). Mr. Smith also confirmed that it was the same person that they saw walking over the first ridge and who they apprehended on the third ridge. (RP Volume E, at page 184; 6-11 and 232; 8-11). Mr. Smith, Deputy Loyd and Mr. Terry went back to the scene of the crash. (RP Volume E, at page 233; 5-11).

While Deputy Loyd and Mr. Smith were tracking Mr. Terry, Undersheriff Lee Brown arrived at the crash scene. (RP Volume E, at page 164; 24-25 and 212-213 generally). Undersheriff Brown searched the nearby field area where it appeared Mr. Terry might have thrown something. (RP Volume E, at page 214; 18-21). Undersheriff Brown searched the area around the vehicle, under the vehicle and checked the ignition for keys. (RP Volume E, at page 215; 1-4). No keys were found. (Id.).

Through his investigation Undersheriff Brown determined that the vehicle was registered to Mr. Ralph Frame. (RP Volume E, at page 215-216, generally). Undersheriff Brown testified that on his way to the crash scene from Dayton, he did not pass anybody walking, running, riding horses or bikes in the road or fields. (RP Volume E, at page 218; 18-25 through 219; 1-17). He also testified that he did not pass any other vehicles on the way to the scene. (Id.).

Deputy Loyd arrested and transported Mr. Terry to the Columbia County Sheriff Department for booking. (RP Volume E, at page 233; 8-11). Deputy Loyd further testified that Mr. Terry was wearing a white tee shirt underneath his long sleeved, dark green plaid overcoat. (RP Volume F, at page 278; 5-17). While Deputy Loyd was booking Mr. Terry, Mr. Frame called the Sheriff Office to report a stolen vehicle. (RP Volume E, at page 233; 10-16). It was determined that the vehicle that was involved in the crash was the vehicle which was reported stolen. (RP Volume E, at page 233; 5-16).

Deputy Loyd then went to speak with Mr. Frame (RP Volume E, at page 233; 24-25 and 234; 1-11). Mr. Frames lived approximately 10-10-12 miles from the crash site. (RP Volume E, at page 257; 9-18). Mr. Frame had last seen the truck the night before, parked in front of his shop. (RP Volume E, at page 202; 21-25 through 203; 1-16). In the morning the car was gone. (RP Volume E, at page 203; 17-25). Mr.

Frame testified that he had left the keys in the truck. (RP Volume E, at page 204; 2-3). Mr. Frame explained that he was concerned about the keys. (RP Volume E, at page 234; 20-25). Deputy Loyd told him he would go back to the collision site and search for the keys. (RP 234; 20-20-25 through 235; 1-11).

While at the scene, Deputy Loyd could see footsteps leaving the scene of the collision going up into the field. (RP Volume E, at page 235; 1-16). These footsteps tracked in the same direction that Mr. Smith had indicated the person fleeing the truck crash had gone. (Id.).

Deputy Loyd followed the tracks through the wheat field, lost them, picked them up again in the saddle between the wheat field and newly planted pea field and continued to follow the tracks through the pea field and lost them again on the roadway near a radio tower. (Id.). Deputy Loyd took photographs of the tracks, all of which were admitted in to evidence. (RP 235-251 generally). During the tracking, Deputy Loyd ran his GPS tracking device. (RP Volume E, at page 242; 25).

Photographs of Mr. Terry's shoe tread were taken in the jail. (RP Volume E, at page 248; 17-25 and 249; 1-25 through 250; 1-6). Deputy Loyd testified that based upon his training and experience as a law enforcement officer he reached the conclusion that the tracks through the field were made by the shoes worn by Mr. Terry. (Id. And 253; 18-20). Deputy Loyd also testified as to his GPS tracking and the maps of his

GPS were admitted into evidence. (250-254 generally). Deputy Loyd further testified that based upon his training and experience, the person he arrested, Mr. Terry, matched the description of the person Mr. Smith saw crawling out of the truck and fleeing the collision. (RP Volume E, at page 255; 15-18). Deputy Loyd testified that Mr. Terry had in his possession a ski mask and was wearing a stocking cap upon his arrest. (RP Volume F, at page 281; 24-25 through 282; 1-6).

Deputy Loyd testified that his GPS mapping showed that the location of the truck at Mr. Frame's house was approximately one quarter mile from the location where Mr. Terry lived. (RP Volume E, at page 256; 11-25).

Mr. Terry's mother testified that Mr. Terry lived with her and slept on her couch. (RP Volume E, at page 197; 6-11 and 198; 11-12). She testified that she woke up sometime during the night and found the Mr. Terry was not at the house. (RP Volume E, at page 197; 13-14).

PROCEDURAL HISTORY

Mr. Terry was charged with Theft of a Motor Vehicle, Possession of a Stolen Vehicle, Trespassing, and Resisting Arrest. Jury trial was held and Mr. Terry was found guilty on all four charges. This appeal followed.

C. ARGUMENT

**1. Sufficient Evidence Was Presented To Sustain
Convictions For Theft Of A Motor Vehicle, Possession
Of A Stolen Vehicle And Trespassing.**

A review of sufficiency of evidence requires that the evidence be viewed in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wash.2d 216, 220-222, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wash.2d 899, 906-907, 567 P.2d 1136 (1977). The inferences drawn from the evidence must be interpreted most strongly against defendant. *State v. Salinas*, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992). The appellate court should defer to the fact finder on the persuasiveness of the evidence. *State v. Thomas*, 150 Wash. 2d 821, 874-875, 83 P.3d 970 (2004).

A recitation of the evidence which supports each element of the crimes will show that sufficient evidence was presented to sustain the convictions.

**1a. Sufficient Evidence For Conviction Of Theft of A
Motor Vehicle Was Presented**

The elements for Theft of a Motor Vehicle are set forth in WPIC 70.26 as follows:

- 1) That on or about May 21, 2011, the defendant:
 - a) wrongfully obtained or exerted unauthorized control over a motor vehicle, and
 - 2) That the defendant intended to deprive the other person of the motor vehicle, and
 - 3) That this act occurred in the State of Washington.
- 1) That on or about May 21, 2011, the defendant...*

The evidence that Mr. Terry was the person who stole the vehicle and was driving and crawled out of the truck after the collision is as follows:

a-Mrs. Smith described the person who crawled out of the truck as being tall and slender, wearing a hoodie or a cap, jeans and being a male;(RP Volume E, at page 162; 13-24).

b- Mr. Smith described the person who crawled out of the truck as being Caucasian, five and a half to six feet tall, slender build, wearing dark clothing, with dark hair or wearing a hat; (RP Volume E, at page 173; 4-17).

c- Mr. Smith testified that when Deputy Loyd apprehended Mr. Terry, he believed that it was the same person who crawled out of the truck. (RP Volume E, at page 177; 11-25). Mr. Terry's appearance was consistent with the description Mr. Smith provided to Onstar. (RP Volume E, at page 178; 12-24). Mr. Smith stated the basis for his opinion and testified as follows:

Well, number one, ah, we're talking about approximately 2,000 acres; ah, it's early in the morning; there's a foot path; ah, we saw the person go over the hill; we drove to the other side of the hill and he was on the other side of the hill; we saw him start to go over a hill and we went around to the other side of the next ridge and the person was there. Ah during the entire time of this incident did not see any other individuals anywhere on my property or on my cousin's property other than the three of us; the individual, the deputy and myself. (RP 177-178, see also 184)

d- Deputy Loyd testified that based upon his training and experience, he felt the description given by Mr. and Mrs. Smith matched Mr. Terry; (RP Volume E, at page 255; 15-18).

e- No other person was in the vicinity of the truck in the rural area very early in the morning; (RP Volume E, at page 177; 17-25 and 218; 18-25 and 219; 1-6 and 254; 6-21).

f- The only person in the area other than Mr. & Mrs. Smith, Undersheriff Brown and Deputy Loyd was Mr. Terry; (Id at 177, 218-219, 254).

g- Mr. Terry lived one-quarter of a mile from the location where the truck was stolen; (RP Volume E, at page 256; 15-25).

h- Mr. Terry was not at home the night the truck was stolen; (RP Volume E, at page 198; 6-14).

- i- Mr. Smith testified that as Mr. Terry sat in court, his stature and gender were consistent with what he saw the day of the collision. (RP Volume E, at page 189; 5-9).
- j- Mr. Smith testified that the collision occurred in a very rural area; (RP Volume E, at page 177-178 generally).
- k- Mr. Terry fled the scene; (RP Volume E, at page 162; 1-12 and 172; 1-20).
- l- Shoe treads of Mr. Terry's shoes when apprehended were similar to the shoe tread imprints left in the wheat and pea fields along the path taken by the person who fled the collision; (RP Volume E, at page 244-249 and 253 generally).
- m- Deputy Loyd followed the path from the collision scene to near the area where Mr. Terry was apprehended; (RP Volume E, at page 244-249 and 253 generally).

Drawing all reasonable inferences from the facts as set forth above, it is clear that a rational trier of fact could have found that Mr. Terry was the individual who had stolen the truck and been driving the truck, fleeing the scene after the collision.

Sufficient evidence exists to identify Mr. Terry as the individual who was driving the truck and had the collision. The collision was in a very rural area in the early morning hours. No other person was seen

walking around the area. Mr. Terry matched the description of the person who crawled out of the truck and fled the scene. Mr. Terry was tracked by Deputy Loyd and Mr. Smith. Deputy Loyd returned to the scene of the crash and followed the path made by the person who fled the scene to the location where Mr. Terry was apprehended. The reasonable and logical deduction is that Mr. Terry was the person who stole the truck and fled the scene. This element was satisfied.

1a) wrongfully obtained or exerted unauthorized control over a motor vehicle;

Sufficient evidence that Mr. Terry wrongfully obtained and or exerted unauthorized control over the motor vehicle was presented as follows:

a- Mr. Frame testified that his Ford Ranger was in front of his shop on the night of May 20, 2011. (RP Volume E, at page 202; 21-25 through 203;1-6).

b- Mr. Frame reported that the vehicle was gone on the morning of May 21, 2011. (RP Volume E, at page 203; 17-25).

c- No one in Mr. Frame's family had taken the vehicle. (Id.).

d- Mr. Frame reported the vehicle stolen. (RP Volume E, at page 204; 9-15).

e- The license plate number and state of registration on the Ford Ranger belonging to Mr. Frame was consistent with the vehicle found at the collision. (RP Volume E, at page 208; 7-12).

Drawing all reasonable inferences from the facts as set forth above, it is clear that a rational trier of fact could have found that Mr. Frame's vehicle was wrongfully taken and unauthorized control was exerted over his vehicle by Mr. Terry.

2) *That the defendant intended to deprive the other person of the motor vehicle;*

A person acts with the intent to deprive a person of property when acting with the objective or purpose to accomplish a result that constitutes a crime. (WPIC 10.01).

The same evidence as set forth above for element 1(a) satisfies the proof of Mr. Terry's intent to deprive Mr. Frame of his motor vehicle. Because Mr. Terry took Mr. Frame's vehicle without permission, left Mr. Frame's property in the vehicle driving some 10 – 12 miles away from the property before he crashed; the only reasonable inference is that he intended to and did in fact deprive Mr. Frame of his vehicle.

Drawing all reasonable inferences from the facts as set forth above, it is clear that a rational trier of fact could have found that Mr. Terry intended and did deprive Mr. Frame of his vehicle.

3) That this act occurred in the State of Washington.

a- Mr. Frame testified that he lives in Columbia County, State of Washington. (RP Volume E, at page 201;18-21).

b- Mr. Frame kept the vehicle at his home. (RP Volume E, at page 202-203 generally).

c- The crash occurred in Columbia County, State of Washington as testified to by Mr. and Mrs. Smith and Deputy Loyd. (RP Volume E, at page 158, 169, 223 generally).

Drawing all reasonable inferences from the facts as set forth above, it is clear that a rational trier of fact could have found that the act of Theft of a Motor Vehicle occurred in Columbia County, State of Washington.

Flight From A Stolen Vehicle Is Properly Considered

Corroborative Evidence Of Theft .

Mr. Terry argues that his flight from the crash scene involving a stolen vehicle is not evidence of theft. However, flight from a stolen vehicle is appropriate corroborating evidence of theft of the vehicle. As set forth above, there is more than just evidence of Mr. Terry's possession.

When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction.

State v. Mace, 97 Wash.2d 840, 650 P.2d 217 (1982) at page 844.

Corroborative evidence of guilt can include the presence of the accused near the scene of the crime and among other things flight. *State v. Ehrhardt*, 167 Wash.App. 933, 939, 276 P.3d 332 (2012). In this matter, Mr. Terry's residence being only one-quarter of a mile from the location where the truck was stolen, (RP Volume E, at page 256; 11-25), the collision having occurred approximately 10-12 miles away from that location (RP Volume E, at page 257; 09-18), Mr. Terry not being home the night the truck was stolen (RP Volume E, at page 6-14), and Mr. Terry's flight from the crash (RP Volume E, at page 162;1-12 and 172; 5-7), are all inculpatory facts to satisfy the requirement of evidence in addition to the possession of the stolen motor vehicle. Mr. Terry's argument that his flight cannot be used as inculpatory because he was not being chased by law enforcement is specious and illogical. Mr. Terry fled the scene of the crash. No authority was cited by Mr. Terry that "flight" only occurs when law enforcement is involved. The reasonable inference is that no such authority exists.

Drawing all reasonable inferences from the facts as set forth above, it is clear that a rational trier of fact could have found that Mr. Frame's vehicle was wrongfully taken by and unauthorized control exerted over his vehicle by Mr. Terry.

1b. Sufficient Evidence For Conviction Of Possession Of A Stolen

Vehicle Was Presented

The elements for Possession of a Stolen Vehicle are set forth in WPIC

77.21 as follows:

- 1) That on or about May 21, 2011, the defendant: knowingly possessed a stolen motor vehicle;
- 2) That the defendant acted with knowledge that the motor vehicle had been stolen;
- 3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
- 4) That this act occurred in the State of Washington.

The evidence which supports these elements is as follows

- 1) That on or about May 21, 2011, the defendant knowingly possessed a stolen motor vehicle;***

Evidence which supports the identity of Mr. Terry having been the person who took, drove and crashed the vehicle and then fled from the scene is set forth above and also satisfies the requirement that it was Mr. Terry who possessed the stolen truck.

The element that Mr. Terry “knowingly” possessed a stolen motor vehicle is satisfied by the only reasonable deduction from the facts which show that Mr. Terry took the vehicle. (See argument above). Mr. Frame did not give permission for Mr. Terry to take the vehicle. Mr. Terry had to know that Mr. Frame did not give him permission to take the truck and there is no evidence that Mr. Frame gave such permission. The only reasonable deduction is that Mr. Terry knew the vehicle was stolen. The

testimony of Mr. and Mrs. Smith clearly shows that only one person was in the vehicle when it crashed, that person being Mr. Terry. Since he was the only one in the vehicle, he was the driver. Since he did not have permission to have the vehicle, the only reasonable inference is that he “knowingly” possessed a stolen vehicle.

2) That the defendant acted with knowledge that the motor vehicle had been stolen;

The same argument as set forth immediately above shows that this element is also satisfied.

3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;

Because Mr. Terry took Mr. Frame's vehicle without permission, left Mr. Frame's property in the vehicle driving some 10 – 12 miles away from the property before he crashed; the only reasonable inference is that he withheld or appropriated the motor vehicle to the use of someone other than the true owner – specifically, Mr. Frame.

4) That this act occurred in the State of Washington.

a- Mr. Frame testified that he lives in Columbia County, State of Washington. (RP Volume E, at page 201; 18-21).

b- Mr. Frame kept the vehicle at his home. (RP Volume E, at page 202-203 generally).

c- The crash occurred in Columbia County, State of Washington as testified to by Mr. and Mrs. Smith and Deputy Loyd. (RP Volume E, at page 158, 169, 223 generally).

Drawing all reasonable inferences from the facts as set forth above, it is clear that a rational trier of fact could have found that the act of Possession of a Stolen Vehicle occurred in Columbia County, State of Washington.

1c. Sufficient Evidence For Conviction Of Trespass Was Presented

The elements for Trespass, second degree are set forth in WPIC 60.18 as follows:

- 1) That on or about May 21, 2011, the defendant knowingly entered or remained in or upon the premises of another; and
- 2) That the defendant knew that the entry or remaining was unlawful and
- 3) That this act occurred in the State of Washington.

1) That on or about May 21, 2011, the defendant knowingly entered or remained in or upon the premises of another; and

a- Mr. and Mrs. Smith testified that they saw a person identified as Mr. Terry, crawl out of the crashed truck and enter their wheat field while fleeing the scene. (RP Volume E, at page 162; 6-8 and 172; 5-7). Mr. Terry entered upon property that was not his.

b- Mr. Terry lived approximately 12 miles away from the scene of the crash and the land he entered. (RP Volume E, at page 257; 9-18). The reasonable inference is that Mr. Terry knew the property he entered was not his own.

3) *That the defendant knew that the entry or remaining was unlawful and*

a- Mr. Terry lived approximately 12 miles away from the scene of the crash and the land he entered. (Id.). The only reasonable inference is that Mr. Terry knew the property he entered was not his own and that he did not have permission to be on the land.

4) *That this act occurred in the State of Washington.*

a- Mr. and Mrs. Smith testified that their land that Mr. Terry entered is located in Columbia County, State of Washington. (RP Volume E, at page 158; 17-20, 169; 17-19).

The State Did Not Misstate Facts Or Law.

State did not misstate the facts and law. State submitted their argument to the jury. The closing argument is not evidence and is not to be considered as evidence. WPIC 1.02. (See argument in Section 5 herein).

2. No Error Was Committed Regarding Post-Arrest Silence.

Mr. Terry waived any objection at trial by failing to object to the juror question based upon violation of Mr. Terry's Fifth Amendment Right to Silence. *State v. Holmes*, 122 Wash.App. 438, 93 P.3d 212 (2004). The objection raised was based upon hearsay and speculation, not the Fifth Amendment. The juror question was two part:

The question, ah, proposed is, "Did he, Eddie Terry, ever ask or wonder why he was arrested? Was he surprised he was arrested?"

(RP Volume F, at page 292; 12-14).

Defense counsel's objection was as follows:

MR. SLACK: I think most of that question would go to hearsay. Ah, I think asking the deputy whether or not Mr. Terry was surprised would ask for, ah, speculation on the deputy's part, ah, so I would object to that question."

(RP Volume F, at page 292; 16-19).

Defense counsel did not object on the basis that the question violated Mr. Terry's Fifth Amendment Right to Silence. Any such objection is waived on appeal. The trial court must be given an opportunity to correct the claimed error before the matter can be reviewed by this court. *State v. Miller*, 66 Wash.2d 535, 403 P.2d 884 (1965) and *State v. Calhoun*, 60 Wash.2d 488, 374 P.2d 555 (1962).

Without objection at trial, review is appropriate only if there is a manifest error affecting a constitutional right. RAP 2.5(a). The

framework for analyzing the error alleged by Mr. Terry is set forth in *State v. Holmes*, 122 Wash.App. 438, 93 P.3d 212 (2004); citing *State v. Romero*, 113 Wash.App. 779, 790-791, 54 P.3d 1255 (2002). Three factors are considered:

- a. Was the comment be purposeful, meaning in response to the State's questioning?

The State did not elicit any comments from a witness in this matter. The question was posed by a juror.

- b. Was the comment unresponsive to a question posed by either examiner?

Again, the question was posed by a juror without objection regarding right to silence from defense counsel.

- b(i) In the context of the defense- was the comment for the purpose of prejudice to the defense or resulted in likely prejudice to the defendant?

The Deputy's answer was to the juror question? The State did not ask the question and the question was not asked in the context of the defense. The question was not for the purpose of prejudicing the defense. As set forth above, there is ample evidence to sustain the convictions herein. Any argued error should be considered harmless as sufficient untainted evidence was presented to sustain Mr. Terry's convictions. Accordingly, no prejudice has been shown.

c. Was the comment exploited by the State in apparent attempt to prejudice the defense offered by the defendant?

Deputy Loyd's response to the juror question was not exploited by the State. Passing mention in argument is not considered exploitation by the State and should not be considered error of constitutional magnitude. *State v. Sweet*, 138 Wash.2d 466, 980 P.2d 1223 (1999).

No objection was made by Mr. Terry's counsel based upon right to remain silent. The question by the juror did not violate Mr. Terry's Fifth Amendment Right to Silence.

The Court in *State v. Easter*, 130 Wash.2d 228, 922 P.2d 1285 (1996) stated:

At trial, the right against self-incrimination prohibits the State from forcing the defendant to testify. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence. (at page 236).

Additionally, pre-arrest silence, lacks the same "implicit assurance" as does post arrest silence and does not implicate due process principles. *Id.* at 236-237. A reasonable interpretation is that the juror question applies to the pre-arrest time period when Mr. Terry was first being approached by Deputy Loyd. Due Process principals are not implicated.

The portion of the juror question as to whether Mr. Terry was surprised does not violate Mr. Terry's Fifth Amendment Right to Remain Silent as, in addition to the above, it is not regarding any comment or lack of comment but is a question as to the Deputy's observations. The court in *State v. Easter*, (supra) held that the State does not violate the defendant's Fifth Amendment Right to Remain Silent by introducing pre-arrest, non-testimonial nature about the accused, such as physical evidence, demeanor, conduct, or the like. (at page 243). The question of whether Mr. Terry was surprised goes directly to the Deputy's observation of Mr. Terry's demeanor. The question does not raise constitutional issues. This appeal fails.

There Was No Prosecutorial Error During Closing Argument

Prosecutorial error did not occur during the closing argument. If any error is found, it was harmless. The Court in *State v. Sweet*, 138 Wash.2d 466, 980 P.2d 1223 (1999) distinguished the many comments made by the State on the defendant's silence in the *Easter* case, supra, from a passing comment by the law enforcement officer and prosecutor in the matter before the court. The *Sweet* court held that a mere reference to silence was not a comment on silence.

Likewise in *State v. Gregory*, 158 Wash.2d 759, 147 P.3d 1201 (2006), there was no objection at trial to the law enforcement witnesses brief comment that the officer asked if the defendant would like to give a

formal statement. The court further held that the defendant failed to establish a violation of his Fifth Amendment Right to Remain Silent when there was no evidence that the defendant ever refused to answer a question. (at page 837).

Further, any comment by the State in closing argument is only error if used by the State as substantive evidence of guilt or that the defendant's silence was an admission of guilt. *Id.* at page 837-838. Such is not the case in the within matter. The State never argued that Mr. Terry's silence was an admission of guilt. (RP Volume E, at page 329 generally). The State did not improperly comment Mr. Terry's Fifth Amendment Right to Remain Silent.

Constitutional error, although non-existent in this matter, is harmless if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *State v. Holmes*, 122 Wash.App. 438, 93 P.3d 212 (2004). Mr. Terry was identified as the driver of the vehicle and was tracked by Mr. Smith and Deputy Loyd being the only person walking around the area of the collision. (See Sufficiency of Evidence Argument, *Supra*). The evidence of guilt is overwhelming. This appeal fails.

3. No Error Was Committed Regarding Evidence Of

Shoe Print.

Expert Testimony Was Not Required For The Shoe

Print Testimony

Evidence Rule 701 provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

Evidence Rule 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

a. Deputy Loyd Testified As A Lay Person, Not An Expert.

A law enforcement officer is permitted to testify as to his observations made during an investigation. *State v. Ortiz*, 119 Wash.2d 294, 831 P.2d 1060 (1992). Deputy Loyd's testimony was admissible as lay opinion testimony under Evidence Rule 701. His testimony was rationally based upon the perceptions he made while he was conducting his investigation. He testified as to the shoe prints he saw in the fields and the photographs he took of those shoe prints and his opinion on the

photograph of Mr. Terry's shoes he was wearing when arrested. (RP Volume E, at page 248-250 generally). His testimony was also helpful to the jury as his testimony explained what he saw in the fields and what he saw on Mr. Terry's shoes.

Deputy Loyd's testimony and opinion was not based upon scientific, technical or other specialized knowledge within the scope of rule 702, because he testified as to what he saw in the shoe prints in the fields and how that compared to the photograph of the shoe tread worn by Mr. Terry when arrested. A lay person would be able to testify as to what he saw; which is precisely what Deputy Loyd did in this matter.

Evidence Rule 702 requires expert testimony if the testimony concerns scientific, technical or other specialized knowledge. Since a lay person can compare shapes impressed in the dirt by a shoe tread to a shoe tread and tell if the shapes are similar, expert testimony is not required. Deputy Loyd testified only as to his observations. No error occurred.

**b. Cross-Examination Was Not Precluded By Sustaining
The State's Objection.**

Mr. Terry misstates the question posed by Mr. Terry's attorney, the objection made and the ruling on the objection. During cross-examination of Deputy Loyd, Mr. Terry's attorney asked:

Q: And would you agree that to do an exact match of a footprint, somebody should probably be an expert in that?

(RP Volume E, at page 287; 10-11).

The State objected, because expert designation was not required for Deputy Loyd to testify as to observations he made of the shoe prints during his investigation. The court sustained the objection because Mr. Terry's attorney's question sought a legal opinion from the witness. The court stated:

"THE JUDGE: He was asking the --- this witness for a legal opinion..."

(RP Volume E, at page 287; 19-20).

The question posed by Mr. Terry's attorney is whether an expert is required for testimony of shoe print comparison. Such a question is a question of law, not a question which should have been asked of Deputy Loyd. Questions of law are addressed to the court. RCW §4.44.080.

The court did not limit the cross-examination of Deputy Loyd as to his observations and lay opinion. (RP Volume F, at page 287- 288 generally). In fact, the cross-examination continued and included testimony by Deputy Loyd that two different people can have the same pair of shoes, that two different pairs of shoes can have similar tread and that shoes could leave similar treads even though they're not the same shoes. (RP Volume E, at page 287-288 generally). Mr. Terry's attorney

was able to fully cross-examine Deputy Loyd on his observations and lay opinion. No error occurred. This appeal fails.

4. Closing Argument– The State Did Not Place The Burden Of Proof On Mr. Terry

Mr. Terry's argument that the State shifted the burden of proof to him is specious. The State's comments that the jury may consider the evidence and lack of evidence is simply based upon the WPIC jury instructions given (RP Volume F, at page 312; 2-8). The jury is permitted to consider evidence and lack of evidence. The State is permitted to use jury instructions in closing argument. The interpretation that Mr. Terry places on the State's rebuttal argument logically refers to the evidence and or lack of evidence produced by the State. The recitation of evidence the State produced immediately following the reference to evidence and lack of evidence is regarding the evidence produced by the State, therefore the reference in the sentence preceding is evidence and lack of evidence apparent in the State's case. The State was simply acknowledging the parameters of what the jury could consider. The State never argued that Mr. Terry bore any burden of proof or production of evidence. No error occurred.

Additionally, the remark made by the State was clearly in response to Mr. Terry's closing argument that "We just don't have any evidence". (RP Volume F, at page 346; 4-14). The State is permitted to

respond to Mr. Terry's argument. The State was also clearly quoting Mr. Terry's counsel who was arguing that the State did not present sufficient evidence. As such it is a comment on the State's evidence. A party may not object to statements made by opposing counsel to jury when he has invited such statements by his own argument. *State v. Jacobson*, 74 Wash.2d 36, 442 P.2d 629 (1968).

Mr. Terry never objected to the State's rebuttal argument at trial. (RP Volume F, at page 346 generally). Any alleged improper argument of counsel cannot be urged as error on appeal unless aggrieved party requested trial court to correct it by instructing jury to disregard it, and claimed error for court's refusal to do so. *State v. Keller*, 65 Wash.2d 907, 400 P.2d 370 (1965).

Unless the State's argument is flagrant and ill-intentioned and resulting prejudice is so enduring that jury admonitions cannot neutralize its effect, any claimed error arising from the State's argument is waived by failure to object and request curative instruction. *State v. Brown*, 29 Wash.App. 770, 630 P.2d 1378 (1981). Mr. Terry never objected and no curative instruction was requested. Mr. Terry's trial counsel clearly believed that the comments made by the State in closing rebuttal were not flagrant and ill-intentioned. The comment did not shift the burden to Mr. Terry to prove his innocence. The comment is no more than a recitation of a WPIC; as such it is not flagrant or ill-intentioned.

5. Closing Argument- The State Did Not Misstate The Law Or Facts.

The State did not misstate the law in closing argument. No statement about the law was made, the State simply argued the facts. (RP Volume E, at page 322). The State submitted to the jury the State's argument of the facts. Argument is not evidence. The jury is instructed that they are only to consider the evidence not the argument of the attorney. WPIC (1.02). A jury is presumed to follow the jury instructions. *State v. Perez-Valdez*, 172 Wash.2d 808, 265 P.3d 853 (2011).

The State's argument that Mr. Smith identified Mr. Terry is not a misstatement of facts. The citation in Mr. Terry's brief refers only to the in court identification which was as follows:

Cross Examination by Mr. Terry's attorney:

Q. ... Okay.
As your're sitting here today you can't actually positively identify Mr. Terry as the individual getting out of that truck; can you?

A. That would be correct.

(RP Volume E, at page 188;19-23).

The identification by Mr. Smith at the time of the arrest was positive. (RP Volume E, at page 177;12-25). Mr. Smith identified the

person who climbed out of the truck and fled as the person that Deputy Loyd arrested. (Id. and as set forth below).

Direct Examination of Mr. Smith by State:

Q. Did , ah, the deputy ask you anything about the person he had in custody?

A. Ah —

Q. – Did he ask you if this was the person?

A. Oh, absolutely. He said, “Is this the person that you’ve seen?” And I said, “Yes this is the same person I saw before.” It’s also the same person that the deputy saw after we crossed the first ridge and then apprehended on the third ridge.

(RP Volume E, at page 184; 3-11).

A positive identification was made by Mr. Smith. The State did not misstate the facts.

Mr. Terry again misstates the States closing argument. The State argued as follows:

“What else do we also know? The person who took that motor vehicle intended to deprive Mr. Frame of it. He took it, drove it away, and crashed it; right? No dispute.”

(RP Volume F, at page 320; 22-24).

This portion of the State’s argument refers to the intent to deprive. That is clear from the argument itself. Mr. Terry incorrectly states that this portion of the argument refers to the identity of Mr. Terry as being the person who committed the vehicle theft. The State is

permitted to argue inferences from the evidence. *State v. Papadopoulos*, 34 Wash.App. 397, 662 P.2d 59 (1983). Such is not a misstatement of the law. Again, this is argument, not evidence. The jury is instructed to consider only the evidence, not argument of counsel. (WPIC 1.02).

The State did not misstate any facts or law by reiterating that the case “really comes down to is whether the defendant was the person that crashed the car...” (See Appellant’s Brief, page 29). Mr. Terry argued throughout his trial (and in this appeal) that the identification was not sufficient to tie Mr. Terry, walking through the fields, to the truck crash. Mr. Terry’s argument is specious that the State misstated the facts and law by addressing an issue in the case.

Mr. Terry’s argument that these alleged errors cumulatively require reversal is incorrect. No misstatements of law or fact occurred. Even if this court were to find error during closing argument, the jury was instructed that argument is not evidence and that they were only to consider the evidence. (RP Volume F, at page 309; 18-25). No prejudice could be shown and Mr. Terry made no effort to explain how any supposed misstatements caused him any prejudice. The duty to show prejudice is upon Mr. Terry. *State v. Price*, 126 Wash.App. 617, 109 P.3d 27 (2005). Since Mr. Terry has not and cannot show prejudice, this appeal fails.

6. No Error Was Committed By The Trial Court In Not

**Granting A Mistrial Based Upon A Juror Seeing Mr.
Terry With Officers.**

Mr. Terry's right to a fair trial was not violated when the court denied his motion for mistrial after one juror saw him in the presence of DOC officers. The sighting was brief and inadvertent. (RP Volume F, at page 300-301 generally). The juror did not notice any shackles; the juror only noticed that officers were with Mr. Terry. (RP Volume F, at page 300-301 generally). When a view of a defendant in shackles is brief or inadvertent, the defendant bears the burden of making an affirmative showing of prejudice. *State v. Elmore*, 139 Wash.2d 250, 273, 985 P.2d 289 (1999). A claim of unconstitutional shackling is subject to harmless error analysis. *State v. Hutchinson*, 135 Wash. 2d 863, 888, 959 P.2d 1061 (1998). Trial court has broad discretion in making a determination regarding security. *State v. Breedlove*, 79 Wash.App. 101, 113-114, 900 P.2d 586 (1995).

Juror Number Nine indicated that he did not really pay attention to Mr. Terry and that all he noticed was that Mr. Terry had two officers with him. (RP Volume F, at page 301; 4-21). Juror Number Nine did not notice whether Mr. Terry was handcuffed or shackled. (RP Volume F, at page 301; 4-21). The juror stated:

“JUROR NUMBER NINE: Of course, I wasn’t really paying attention. I was trying to get back to work, so I—I entered the restroom and came back out, went outside, realized I left my coffee cup in there, ran back inside (inaudible) went back to work.”

(RP Volume F, at page 301; 17-21).

There is absolutely no showing that Juror Number Nine was influenced in any way by what he saw. The juror did not notice whether Mr. Terry was handcuffed or shackled. The trial court properly found no prejudice based upon Juror Number Nine’s comment that “I didn’t notice anything” (RP Volume F, at page 301; 14). Authority cited by Mr. Terry consistently addresses the issue of prejudice when the defendant is seen shackled, not merely in the presence of law enforcement. Mr. Terry was not seen shackled. The juror only saw that he was with two officers.

No prejudice occurred and none can be shown by Mr. Terry. This appeal fails.

7. No Error Was Committed By The Trial Court Regarding The Verdict.

Mr. Terry is required to make an affirmative showing that there is a reasonable and substantial possibility the verdict was improperly influenced by the court. *State v. Ford*, 171 Wash.2d 185, 193, 188-89, 250 P.3d 97 (2011). Mr. Terry must show that any involvement rises to the level of manifest error. *Id.* Mr. Terry cannot make such a showing.

A jury is permitted to ask a question of the court during deliberations. (WPIC 4.66). Mr. Terry has mischaracterized the exchange between the judge and the jury herein. The jury asked whether non-agreement on guilty results in a not guilty ruling. The judge simply answered the question that a not guilty verdict or guilty must be unanimous. (CP 16 at page 163). Mr. Terry argues that this response informed the jury that they MUST reach a unanimous verdict, implying that the jury must find him guilty. The answer from the judge does not require that the jury come to a unanimous agreement, only that to reach a not guilty or guilty the verdict is to be unanimous. This is consistent with WPIC 151 which was given to the jury. (CP 3 at pages 135-162). There is no language in the note from the judge telling the jury that they are required to reach unanimity. The note did not instruct the jury that they must be unanimous, only that to reach either guilty or not guilty required unanimity. The option of not reaching a verdict was not foreclosed. The jury was instructed that the only reach a verdict if they agree. (CP 3 at pages 135-162 and WPIC 151). The jury is presumed to follow the instructions. *State v. Perez-Valdez*, 172 Wash.2d 808, 265 P.3d 853 (2011). No error occurred.

Mr. Terry further misstates that the response to the jury question was given to the jury without agreement of the parties, this is incorrect. Both counsel reviewed the answer of the judge and approved as to form.

(RP Volume F, at page 352;14-20). The judge asked Mr. Terry's attorney for input and he said that it was preferable to the jury "wringing their hands over it". (RP Volume F, at page 351; 14-25). Mr. Terry's attorney had full opportunity for input and did not object. (RP 351-352 generally).

a. To Convict Instructions – Do Not Violate Due Process

Mr. Terry argues that the "to convict" instructions misstate the law because the instruction violates the defendants right to due process by imposing a "duty to convict" (See brief page 37). This argument is specious.

The requirements of due process are met when the jury is informed of all the elements of an offense and instructed that unless each element is established beyond a reasonable doubt the defendant must be acquitted. *State v. Scott*, 110 Wash. 2d 682, 757 P.2d 492, (1988) also See *State v. McHenry*, 88 Wash.2d 211, 558 P.2d 188 (1977). The "to convict" instructions given were standard WPIC instructions (CP 3 at pages 135-162 generally) and meet the requirements established to satisfy due process. No error occurred. This appeal fails.

b. Jury Was Not Coerced On Trespassing Verdict.

Mr. Terry's argument that the jury was coerced to enter a guilty verdict on the trespassing count is incorrect. When the jury first came into the court room, the judge asked them if they had reached a verdict and the presiding juror indicated that the jury had reached a verdict. (RP

Volume F, at page 353; 9-11). If the jury had not reached a verdict it is reasonable to presume that the answer would have been no. The act of sending the jury back in to the jury room to complete the verdict form was not coercive. A verdict had already been reached as stated by the presiding juror. (Id.). The judge did not question the jury as to why the form needed to be completed or indicate in any way how to complete the form. (RP Volume F, at page 353; 12-19). The jury indicated that verdicts had been reached before it was discovered that a form was left blank. The return to the jury room to fill out the blank form was simply a “housekeeping” measure.

8. Resentencing Would Be Moot.

State v. Hunley, 161 Wash.App 919 (2012) requires resentencing. However, Appellant has failed to allege that any error occurred in the sentence imposed. Resentencing would have no different outcome. Appellant has not alleged that the calculation of the offender score of 6 is incorrect. To require resentencing based upon Appellant’s criminal history which he acknowledged as correct by signing the Judgment and Sentence would be moot. Remand for resentencing should take place when a defendant has been erroneously sentenced. *State v. Ford*, 137 Wash.2d 472, 973 P.2d 1369 (1993).

9. Reversal Is Not Required – No Cumulative Error

Under the cumulative error doctrine, reversal of a defendant's conviction may be warranted if the combined effect of trial errors effectively denied the defendant a fair trial, even if each error standing alone may be considered harmless. *State v. Brewczynski*, 294 P.3d 825 (February 14, 2013) citing *State v. Weber*, 159 Wash.2d 252, 279, 149 P.3d 646 (2006). The doctrine does not apply if the errors are few and have little or no effect on the trial outcome. (Id.).

As set forth above, the claimed errors are either non-existent. Mr. Terry has made conclusory allegations that he was denied a fair trial and his right to due process was violated. Such is not the case. This appeal fails.

D. CONCLUSION

For the foregoing reasons, it is respectfully requested that Mr. Terry's appeal be denied.

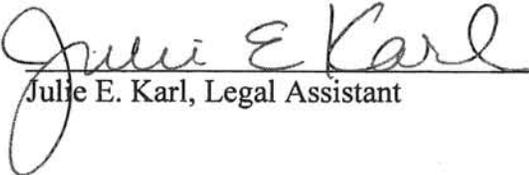
Dated; 3-21-13


June L. Riley, Deputy Prosecuting Attorney
Columbia County WSBA # 29198

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This envelope contained a copy of the following document(s): Respondent's Brief in Response to Appellant's Opening Brief.

Dated March 21, 2013, Executed in Dayton, Washington.


Julie E. Karl, Legal Assistant