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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSHUA DAVID AVALOS, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

The Honorable John D. Knodell, Judge

BRIEF OF RESPONDENT

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I. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

- A. WHOMEVER BURGLED THE ZHANG RESIDENCE MADE OFF WITH \$10,000 CASH, FINANCIAL DOCUMENTS, AND A PLATINUM AND DIAMOND WEDDING RING AND OTHER JEWELRY. AVALOS HAD NO EARNINGS RECORD IN WASHINGTON. TWO DAYS AFTER THE BURGLARY AVALOS POSSESSED ALMOST \$2,000 CASH. FIVE DAYS LATER, HE POSSESSED \$1,000 CASH AND HAD JUST PAID \$4,000 CASH FOR A CAR. A RING MATCHING THE DESCRIPTION OF THE STOLEN WEDDING RING WAS IN A BACKPACK ON THE BACKSEAT OF AVALOS'S NEW CAR, ALONG WITH AVALOS'S IDENTIFICATION AND TAX DOCUMENTS STOLEN IN THE BURGLARY. DID THE TRIAL COURT VIOLATE ER 401, 402, AND 403 BY ADMITTING EVIDENCE AVALOS HAD NO RECORD OF WASHINGTON EARNINGS AND EVIDENCE OF THE CASH IN AVALOS'S POSSESSION, AND, IF SO, WAS ADMISSION OF THAT EVIDENCE UNFAIRLY PREJUDICIAL? (ASSIGNMENTS OF ERROR NOS. 1 THROUGH 9)
- B. DURING ARGUMENT OVER AVALOS'S MOTION TO EXCLUDE EVIDENCE OF HIS AUGUST 26 POLICE CONTACT TWO DAYS AFTER THE ZHANG BURGLARY, THE COURT HEARD A SUMMARY OF EVENTS AND CONCLUDED THE AUGUST 26 STOP WAS "A CONTEMPORANEOUS BAD ACT." WHETHER THE STOP OCCURRED WAS NOT CONTESTED AND THE COURT IDENTIFIED THE PURPOSE FOR WHICH THE EVIDENCE WAS OFFERED AND FOUND IT RELEVANT. THE STATE MADE AN OFFER OF PROOF OF "SANITIZED" TESTIMONY OMITTING THE NATURE OF THE STOP. THE COURT DID NOT WEIGH PROBATIVE VALUE AGAINST PREJUDICE ON THE RECORD. DID THE COURT COMMIT REVERSIBLE ERROR? (ASSIGNMENT OF ERROR NOS. 10 THROUGH 12)
- C. OVER AVALOS'S OBJECTION, THE TRIAL COURT ADMITTED THE \$1,000 CASH FOUND IN AVALOS'S POCKET WHEN HE WAS ARRESTED WITHOUT LIMITING THE PURPOSES FOR WHICH THE CASH WAS ADMITTED. DID THE TRIAL COURT ERR BY REFUSING TO GIVE AVALOS'S PROPOSED JURY INSTRUCTION PROHIBITING THE JURY FROM CONSIDERING WHETHER THE CASH WAS STOLEN PROPERTY? (ASSIGNMENT OF ERROR NO. 13)
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- G. WASHINGTON COURTS CONSISTENTLY HOLD CONSTITUTIONALLY SUFFICIENT LANGUAGE CHARGING POSSESSION OF STOLEN PROPERTY NEED NOT IDENTIFY THE PROPERTY. WAS THE LANGUAGE CHARGING AVALOS WITH POSSESSION OF STOLEN PROPERTY CONSTITUTIONALLY SUFFICIENT DESPITE NOT HAVING DESCRIBED THE STOLEN PROPERTY ALLEGED TO HAVE BEEN IN HIS POSSESSION? (ASSIGNMENTS OF ERROR NOS. 18 THROUGH 21)
- H. THE STATE WILL NOT SEEK COSTS IF IT PREVAILS ON APPEAL, ALTHOUGH AVALOS'S POSITION THROUGHOUT TRIAL HAS BEEN INCONSISTENT WITH HIS CURRENT CLAIM OF INDIGENCE. (ASSIGNMENT OF ERROR No. 25)

¹ In the body of his brief, Avalos switched the order in which he presents the issues identified here as six and seven. The State's argument follows the order presented in the body of Avalos's brief.

II. STATEMENT OF THE CASE²

The State adopts the Statement of the Case in Appellant's Opening Brief (Br. of Appellant), RAP 10.3, and supplements those facts as follows.

On August 24, 2015 somebody burgled the Quincy, Washington home of Guange C. Zhang and his wife.³ 1RP 141-42. The couple owns a Chinese restaurant in Quincy. 1RP 141. The restaurant deals in large amounts of cash and over \$10,000 cash was taken in the burglary. 1RP 147. The couple separated their cash into bundles held together with rubber bands. *Id.* Among the many items stolen were three items made of 99.9% pure gold brought from China. 1RP 158-59. Also stolen were a pendant and a ring made of platinum. 1RP 159. Both had diamonds. *Id.*

Two days after the burglary, on August 26, 2015, Avalos was stopped in Ephrata for driving with a suspended license. 5RP 13. When stopped, he possessed almost \$2,000 cash. 1RP 183-84. Law enforcement gave the cash back to Avalos. 1RP 184. Avalos was arrested for the burglary a week after it occurred, on August 31, 2015. 1RP 83-84.

² The State cites to the five reports of proceedings as follows: Trial, December 14 through 16, 2016 as 1RP ____; the sequentially paginated report of fifteen hearings, including arraignment and sentencing, as 2RP ____; the report of proceedings covering motions on January 30 and February 7, 2017 as 3RP ____; the report covering two pretrial hearings on December 14, 2016 as 4RP ____; and the report of proceedings of the November 23, 2016 CrR 3.5/3.6 hearing as 5RP ____.

³ Zhang's wife is named Ling Wang. 1RP 157. For clarity, the State refers to this burglary as "the Zhang burglary" and means no disrespect to Mrs. Wang.

Avalos moved in limine on the first day of trial to exclude any allegation of prior bad acts of the defendant, “prohibited by ER 404 unless a hearing is held separate from the jury”, without identifying any specific act. CP 200 (Limine Motion No. 12). The parties apparently agreed the “bad acts” at issue included the August 26 Ephrata stop in which law enforcement recovered \$2,000 from Avalos’s wallet. 1RP 30. Avalos argued this was “404(b)⁴ evidence”, inadmissible as evidence of other crimes, wrongs, or acts. 1RP 170.

During argument, the court learned that a day or two after the police impounded Avalos’s car, he bought another for \$4,000. 1RP 15-16. Angela Olivares testified at trial she and her husband sold the car shown in Exhibit 22 to Avalos for \$4,000 cash. 1RP 79-80. When Avalos was arrested August 31, he had \$1,000 cash in his pocket, along with items taken in the burglary. 1RP 16. He lived in a small house with his mother. *Id.* In response to the State’s argument that this circumstantial evidence indicated the \$1,000 in Avalos’s pocket likely came from the burglary, the court replied: “Circumstantial? It sounds almost like direct evidence, doesn’t it?” 1RP 16.

⁴ ER 404(b) provides: “Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

Later, outside the presence of the jury, the court again considered Avalos's objection to evidence of the August 26 Ephrata stop. 1RP 170. Counsel referred to a previous argument concerning the Employment Security evidence and the State responded: "The same arguments." 1RP 171. During the argument on Employment Security evidence, Avalos argued evidence he lacked Washington "on the books" income was propensity evidence intended to show he was chronically unemployed. 1RP 125. When the State responded that Avalos's employment records were not being offered to show he committed a crime because he was poor, the court commented: "Well, evidently he was not poor. I mean, he paid - - he paid - - he paid \$4,000 for a car - - in cash. And then he had I think a total of, if I have this right, \$3,000 on the - - between the two times he was - - pulled over." 1RP 132. (State's interjections omitted.)

Concerning the August 26 Ephrata stop, after the State went over the chronology of events from the August 24 burglary through the August 31 arrest, identifying the items found in Avalos's possession during that time span, the court ruled the Ephrata stop evidence was relevant to whether Avalos "was in possession of money stolen from a burglary and was aware that it was stolen." 1RP 175. The court did not discuss prejudice.

Before making its final ruling during trial, the court clarified its understanding that \$10,000 had been stolen in the Zhang burglary and that a few days later, Avalos, unemployed with no evident source of income, was stopped in Ephrata with \$2,000 cash. 1RP 175. Noting the issue for trial was whether Avalos possessed stolen property with knowledge, the court found the fact Avalos had \$2,000 cash a few days after the burglary led to the inference he possessed cash from the burglary on when he was arrested August 31 and knew the cash was stolen. 1RP 175-76.

At trial, Josh Buescher testified he had been an officer with the City of Ephrata and on duty August 26, 2015, when he had contact with Avalos, who was driving a vehicle. 1RP 178. Buescher testified Avalos was “separated” from the vehicle and the vehicle was towed. *Id.* That was the extent of Buescher’s testimony. *Id.* The State then called the tow truck driver, who testified his son found a wallet in a car he had impounded for law enforcement and that the wallet was returned to the police. 1RP 179-80. No property alleged to have been stolen in the burglary was found in the impounded car. 1RP 180-81.

Ephrata Police Patrol Sergeant Gabriel Garcia testified he looked inside the wallet and determined Avalos was the owner. 1RP 183. He also testified the wallet contained \$1,900 in cash. *Id.* The cash was eventually returned to Avalos because, at that time, nothing indicated the cash was

part of a crime. 1RP184. There was no testimony about the reason Avalos was stopped or why law enforcement impounded his car. 1RP 178-84.

Three days after Avalos's August 31 arrest, on September 3, 2015, law enforcement obtained a warrant to search the Cadillac Avalos bought from Angela Olivares about a week earlier. CP D36 at 1. Zhang's wife, Ling Wang, had reported stolen a number of items of jewelry, including the platinum wedding ring with a one carat round diamond, estimated to be worth \$4,000. CP D36 at 2. During trial, Avalos tried to establish through testimony of the searching officer that law enforcement did not recover a number of items reported stolen. 1RP 246. The State objected that the officer's testimony was hearsay. 1RP 245. Because there were no confrontation issues, the court allowed Avalos to question the officer about what had been reported stolen. 1RP 249. After establishing there had been no vehicle titles among the property in Avalos's backpack, counsel said: "And you didn't find a wedding ring valued at \$4,000, correct?" 1RP 250. The State objected on the basis of knowledge, stating that while a wedding ring was found, the officer had no way of determining its worth. *Id.* Counsel replied: "Well, it's written in the search warrant." *Id.* The court allowed the question. 1RP 251. When the officer testified a wedding ring had been found in Avalos's backpack, the court admitted a copy of the search warrant as Ex. D36. 1RP 253; CP D36. The

ring found in the backpack matched the description of the ring reported stolen. 1RP 251-52. Only one ring was listed on the warrant. CP D36.

During closing argument, the State pointed out that only one ring appeared on the search warrant and that the warrant listed the ring's value at \$4,000. 1RP 288. He argued the ring was recovered and the jury could tell by looking at it that it matched the description of the ring listed in the warrant and was worth at least \$750, even if it was not worth exactly \$4,000. *Id.* He pointed out that, in addition to the ring, the jewelry stolen from the Zhang's and recovered from Avalos's vehicle included "the other gold items in here and the jewelry and the other diamond pendant that's in this jewelry that you can look at." *Id.* He then said: "The other way [to establish the value of the stolen property] is the cash. Did that come from the burglary?" *Id.*

The State's amended Information, filed May 3, 2016, alleged

On or about the 31st day of August, 2015, in the State of Washington, the above-named Defendant did, knowingly receive, retain, possess, conceal, or dispose of stolen property, knowing that it had been stolen, and did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto, said property being in excess of seven hundred fifty dollars (\$750.00) but less than five thousand dollars (\$5,000.00) in value; contrary to the Revised Code of Washington 9A.56.140(1) and RCW 9A.56.160(1)(a).
(MAXIMUM PENALTY-Five (5) years imprisonment and/or a \$10,000 fine pursuant to RCW 9A.56.160(2) and 9A.20.021(1)(c), plus restitution and assessments.)

CP 18. Avalos did not challenge this language before his conviction.

Avalos objected to admission of the \$1,000 cash found in his pocket on August 31, claiming there was nothing unique about the cash. 1RP 232-33. He asserted nothing tied the cash to the burglary, focusing on the lack of testimony about denominations stolen in that burglary. 1RP 232. He conceded a rubber band similar to those used by the burglary victims was in Avalos's pocket, but argued "[t]here's lots of rubber bands in this world, and it wasn't unique, a tan rubber band." 1RP 233.

The State pointed out "we've argued this time and time again" and summarized the evidence. 1RP 234. The money was found on Avalos's person. *Id.* In the backpack were his identification and documents stolen in the Zhang burglary. 1RP 235. Avalos had no apparent means of obtaining the thousand dollars in his pocket. *Id.*

Defense counsel's objection remained focused on lack of evidence of the denominations taken, arguing the cash had no relevance because it was not connected to the Zhang burglary. 1RP 236-37. When asked by the court whether the facts that Avalos was in possession of a large sum of money, that a large sum of money had been stolen from the Zhang residence a few days earlier, and that the money was stolen at the same time as the tax returns found in Avalos's backpack, "doesn't that make it at least more probable than not that Mr. Avalos stole some property?" 1RP

239. When counsel replied: “No.”, the court pointed out jewelry stolen in the burglary was also in Avalos’s car. *Id.* The State then argued that the jury did not have to accept the inference that the cash in Avalos’s pocket came from the Zhang burglary, “[b]ut it’s up to the jury.” 1RP 240.

Counsel confirmed Avalos questioned whether the State could establish a foundation that the cash was taken from the Zhang home. 1RP 233. The State argued it was reasonable to infer the money came from the burglary, given all the other items from the burglary recovered at the same time and considering Avalos’s apparent lack of any other means of obtaining the funds. 1RP 234. The court went back through the evidence, concluding: “And so what you’re trying to tell me is that – that the jury could find on the basis of proximity of those - - of all those things together that - - at least some evidence that at least makes it more like- - more probable than it would have otherwise that the money came from Mr. Zhang and Mrs. Wang’s home?” 1RP 235-36. The State replied: “Yes” and the court asked counsel to respond. 1RP 236.

Counsel repeated only that there was no testimony about the denominations stolen and that nothing could be inferred from the cash because “cash is not unique.” 1RP 236. Counsel then conceded the cash raised an inference, “but it’s a rebuttable inference. The jury doesn’t have to, you know, buy off on the inference.” *Id.* The State “totally agree[d].”

Id. The court asked counsel why the evidence was not relevant under ER 401 and proposed a hypothetical: if Avalos had a thousand dollars on him because he had just robbed a gas station, would that be relevant on the question of whether he was knowingly in possession of stolen money? 1RP 237. Counsel asserted there would have to be evidence tying the money to the gas station. *Id.*

The court asked whether Avalos was charged with being in possession of the Zhang's money and counsel answered: "Yeah." 1RP 238. This was not accurate. The information charged only that Avalos "did, knowingly receive, retain, possess, conceal, or dispose of stolen property, knowing that it had been stolen, and did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto" CP 18. Concluding the evidence was insufficient to "prove conclusively" the cash came from the Zhang burglary, the court referred to ER 401, and asked "doesn't [the cash, combined with other property that did come from the burglary] make it at least more probable than not that Mr. Avalos stole some property?" 1RP 239.

The State argued the cash in Avalos's pocket was connected to the burglary by the other stolen property found in his car, agreeing the jury did not have to accept that inference. 1RP 240. "But it's up to the jury. And so that's where we go. We admit it. Then we both argue our points to the

jury. . . . They go make their decision. That's the way it works." *Id.*

Defense counsel responded that there was no evidence of the denominations stolen during the burglary. *Id.* He continued to argue lack of denomination evidence meant the money could have come from anywhere. 1RP 241. The State responded that testimony showed the cash had originally come from a restaurant till, and that "[t]he denominations are gonna be all over the place." *Id.*

The court then announced it denied Avalos's motion to exclude the evidence "for reason that I think should be apparent from my questions." 1RP 241. Pressed by Avalos to state a reason, the court said: "this is relevant on the issue of whether or not Mr. Avalos was knowingly in possession of - - of stolen property." *Id.*

At sentencing, the State asked \$5,000 restitution, arguing it had proved by a preponderance of the evidence that the \$4,000 Avalos paid for Olivares's Cadillac and \$1,000 from the Ephrata incident had come from the burglary. 2RP 97. Mr. Zhang and Mrs. Wang claimed they lost cash and property worth \$31,350. 1RP 99. The court continued the restitution portion of the hearing. 1RP 100.

At the restitution hearing, the State argued the court could reasonably conclude the \$4,000 Avalos paid for the Olivares's Cadillac was part of the property stolen in the burglary and was not recovered. 2RP

104. The State asked for that \$4,000 and \$1,000 from the \$2,000 returned to Avalos from the Ephrata stop. 2RP 106. Avalos countered no restitution was due because his possession of stolen property did not cause any damage and the property he possessed had been returned. 2RP 104-05. He argued the unrecovered property was outside the facts of the case and the State disagreed. 2RP 105. The State pointed out its burden on the restitution issue was by a preponderance of the evidence, which showed the money used to purchase the Cadillac was stolen. 2RP 107. The court noted this was because “the testimony was he didn’t seem to have any other source of income.” *Id.* The State clarified it was not arguing Avalos stole the money to begin with, but that the State had proved by a preponderance of the evidence Avalos possessed some of the Zhang household’s stolen money, and he used it. 2RP 109. The State noted a different judge previously dismissed an original charge of trafficking in stolen property due to insufficient evidence to prove the charge beyond a reasonable doubt. 2RP 110. The State argued the burden of proof for restitution was an entirely different standard than the burden for conviction. 2RP 110-11. The court recessed the hearing to review additional authorities. 2RP 111.

When the hearing reconvened a week later, the court asked the State to again clarify it’s \$5,000 request and the State responded that

\$4,000 had gone to purchase the car and that the remaining \$1,000 was requested on an assumption that the \$1,000 found in Avalos's pocket was half of the \$2,000 he had five days earlier. 3RP 3-4. The State was not certain it was the same money, but if it were, "there would be \$1,000 missing there." 3RP 4.

Citing "*Griffith*,"⁵ 3RP 3, the court stated it did not "have much problem with the notion" the State had proved by a preponderance the money Avalos used to buy the car and the money he had in his possession at the Ephrata incident was stolen money. 3RP 4. Noting Avalos was not charged with any crime related to the Ephrata incident, the court declined to impose restitution for purchase of the car, "which - - constitutes another crime."⁶ *Id.*

III. ARGUMENT

A. WHOMEVER BURGLED THE ZHANG RESIDENCE MADE OFF WITH \$10,000 CASH, FINANCIAL DOCUMENTS, GOLD OBJECTS, AND A PLATINUM AND DIAMOND WEDDING RING AND OTHER JEWELRY. AVALOS HAD NO EARNINGS RECORD IN WASHINGTON. TWO DAYS AFTER THE BURGLARY AVALOS POSSESSED ALMOST \$2,000 CASH. FIVE DAYS LATER, HE POSSESSED \$1,000 CASH AND HAD JUST PAID \$4,000 CASH FOR A CAR. A RING MATCHING THE DESCRIPTION OF THE STOLEN WEDDING RING WAS IN A BACKPACK ON THE BACKSEAT OF AVALOS'S NEW CAR, ALONG WITH AVALOS'S IDENTIFICATION AND TAX DOCUMENTS STOLEN IN THE BURGLARY. THE TRIAL COURT

⁵ *State v. Griffith*, 164 Wn.2d 960, 195 P.3d 506 (2008).

⁶ The court noted at the earlier restitution hearing he was not the judge who dismissed the trafficking charge. It appears he agreed with the State that decision was in error.
2RP 110

DID NOT VIOLATE ER 401, 402, AND 403 BY ADMITTING EVIDENCE AVALOS HAD NO RECORD OF WASHINGTON EARNINGS AND EVIDENCE OF THE CASH IN AVALOS'S POSSESSION. ADMISSION OF THAT EVIDENCE WAS NOT UNFAIRLY PREJUDICIAL.

Appellate courts review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996), *review denied*, 167 Wn.2d 1001 (2009).

Avalos was arrested with a backpack containing not only his identification, but jewelry and documents stolen in a recent burglary in which \$10,000 in cash was also stolen. Avalos argues that the fact he had no recorded earnings from Washington employment was irrelevant to the question of whether he knowingly possessed stolen property when he had \$1,000 cash in his pocket at the time of his arrest and other trial evidence established that a few days earlier, he had \$2,000 in his pocket and had purchased a car with \$4,000 cash. He also argues that the court erred by admitting evidence of the cash he possessed two days after the burglary, of the car purchase, and of the cash he possessed the day he was arrested, because it was irrelevant. Br. of Appellant at 1. The evidence was undeniably relevant. The combined evidence of the cash in Avalos's possession and of his lack of Washington earnings records tended to infer the Avalos's sudden affluence came from stolen property.

Avalos argues the State's case rested *only* on "the very tenuous presumption" that a person with no recorded employment in the state could have a large sum of cash only if the cash were stolen. Br. of Appellant at 10. Avalos is mistaken. In addition to the \$1,000 cash in Avalos's pocket, his backpack contained documents and jewelry reported stolen in the Zhang burglary, including a platinum and diamond wedding ring estimated to be worth \$4,000. 1RP 250-52. To convict Avalos of possession of stolen property in the second degree, the State had to prove he had stolen property in his possession worth over \$750, that he knew it was stolen, and that he had no intention of giving the property back to the person legally entitled to it. CP 279.

Avalos argues his lack of Washington employment history is irrelevant because it lacked any probative value. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evidence Rule (ER) 401. Avalos's lack of a Washington earnings record is relevant to support an inference the cash in his pocket and valuables in his backpack were

stolen property. Unless limited by constitutional or statutory provisions not applicable here, all relevant evidence is admissible. ER 402.⁷

Relevant evidence not admissible when, under ER 403, it is so prejudicial as to substantially outweigh its probative value, confuse the issues, mislead the jury, or cause any undue delay, waste of time, or needless presentation of cumulative evidence. *State v. Powell*, 126 Wn.2d 244, 259-60, 893 P.2d 615 (1995). Avalos argues that, even if relevant, the prejudicial effect of his lack of “on the books” Washington employment outweighed its probative value and should be excluded under ER 403.⁸ The evidence is undeniably prejudicial—that is, it makes the State’s case stronger than it would be without it. But the evidence was not admitted for an improper reason, such as inviting the jury to draw the impermissible inference that Avalos was more likely than employed people to commit a crime. “[P]oor people are not more likely to steal than are people of higher income levels.” *State v. Matthews*, 75 Wn. App. 278, 286, 877 P.2d 252 (1994). However, financial circumstances are relevant to show, among

⁷ “All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.” ER 402

⁸ “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403

other things, a motive to steal. *Id.* at 286-87. In *Matthews*, the Court found “the focus of the evidence was not on poverty, but rather on the fact that the lifestyle of Matthews and his family seemingly exceeded the family’s income. *Id.* at 286. The Court noted that it did not equate “the prejudice of a recent bankruptcy and living beyond ones means with the prejudice of heroin addiction.” *Id.*

Avalos’s lack of Washington employment did not invite the jury to infer he was more likely to avail himself of stolen property than employed people would be. The *Matthews* court discussed a Montana case, *State v. Armstrong*, 170 Mont. 256, 552 P.2d 616 (1976), in which the trial court admitted evidence of the defendant’s recent loss of his job, his statements that he was without money, his admission he had written checks without sufficient funds, and the fact he had been involved in a poker game the night of the incident leading to his convictions for deliberate homicide and robbery. *Matthews*, 75 Wn. App. at 287. The evidence of his dire financial circumstances was properly admitted because it provided an inference for motive for the robbery and homicide. *Id.* at 288. Evidence of a defendant’s financial state is admissible when accompanied by other evidence, such as evidence of an unexplained, abrupt change in financial circumstances, or evidence that tends to show that the defendant was living beyond his means. *State v. Kennard*, 101 Wn. App. 533, 541-42, 6 P.3d 38, 42 (2000).

When a person is not merely unemployed or not working, “but [is] a person who is unemployed who has a large amount of cash in his pocket and is accused of a crime for which profit is certainly a motive for a commission of such an act[,]” evidence of possession of a large amount of cash is relevant and admissible. *State v. Jones*, 93 Wn. App. 166, 173, 968 P.2d 888, 891-92 (1998). For example, the relevance of possession of a large sum of money following a drug deal is undeniably relevant. *Id.* Further, the State is entitled to rebut a defendant’s “likely argument that he acquired this money from a lawful source” by presenting evidence the defendant had no apparent source of lawful income. *Id.* at 175. In *Jones*, the Court noted the “evidence was not intended to establish that Jones was a drug dealer simply because he had no reported income; rather, the financial reports became relevant when the State presented evidence of money found on Jones’s person during his arrest and inquired about its source.” *Id.* “[The defendant] could have refuted any negative inference arising from this evidence by pointing to a verifiable source of this income, but he failed to do so persuasively.” *Id.* at 175-76.

Avalos had \$1,000 in his pocket on August 31, had been found with \$2,000 in his pocket five days earlier, and in between those two days had bought a car for \$4,000 cash. 1RP 79. A platinum and diamond ring found in his possession August 31 had been reported stolen and its value

estimated at \$4,000. CP D36 at 2. The State was entitled to anticipate an argument in Avalos's defense that he acquired the cash and the ring from a lawful source. *Jones*, 93 Wn. App. at 175. The evidence was undeniably probative, and its prejudice—the simple fact of Avalos's lack of “on the books” Washington income—was not unfair.

Avalos argues that without the evidence of his financial circumstances—the \$2,000 he had with him when he was arrested August 26, the \$1,000 in his pocket on August 31, the \$4,000 cash he paid for the Cadillac after losing his car on August 26, and the fact he had no “on the books” income in Washington—the jury would not have inferred the \$1,000 in his pocket came from the Zhang burglary. But the jury did not have to believe the \$1,000 was stolen money. As the State argued in closing, one ring was reported stolen in the Zhang burglary. 1RP 288; CP D36 at 2. It matched the ring in Avalos's possession—platinum with a round, one carat diamond. *Id.* Its value was estimated at \$4,000, sufficient for the jury to find Avalos knowingly possessed stolen property of a value greater than \$750. With this evidence the State provided the jury with independent grounds to convict.

This Court should find the trial court did not abuse its discretion by admitting evidence of Avalos's lack of Washington income and abundance of ready cash and valuables.

B. DURING ARGUMENT OVER AVALOS'S MOTION TO EXCLUDE EVIDENCE OF HIS AUGUST 26 POLICE CONTACT, THE COURT HEARD A SUMMARY OF EVENTS AND CONCLUDED THE AUGUST 26 STOP WAS "A CONTEMPORANEOUS BAD ACT." WHETHER THE STOP OCCURRED WAS NOT CONTESTED AND THE COURT IDENTIFIED THE PURPOSE FOR WHICH THE EVIDENCE WAS OFFERED AND FOUND IT RELEVANT. THE STATE MADE AN OFFER OF PROOF OF "SANITIZED" TESTIMONY OMITTING THE NATURE OF THE STOP. THE COURT DID NOT WEIGH ON THE RECORD PROBATIVE VALUE OF THE EVIDENCE AGAINST PREJUDICE. DID THE COURT COMMIT REVERSIBLE ERROR?

Admission of evidence is reviewed under an abuse of discretion standard. *State v. Tharp*, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Avalos asserts evidence of his contact with Ephrata police officers on August 26 (the August 26 Ephrata incident) was inadmissible under ER 403⁹ and ER 404(b), and that he was prejudiced by its admission. Br. of Appellant at 1, 20. Avalos claims the trial court did not conduct a proper inquiry on the record before admitting circumscribed evidence of his August 26 contact with Ephrata police officers. Br. of Appellant at 18. He is mistaken. The court did conduct such an inquiry and concluded the

⁹ ER 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

evidence was of “a contemporaneous bad act,” not a “prior bad act”, probative of whether Avalos knowingly possessed stolen property. 1RP 30-31, 170, 175-76.

1. *The trial court followed the four-part balancing analysis for evidence admitted under ER 404(b) but failed to weigh aloud the probative value versus prejudicial effect.*

Before admitting evidence of other crimes, wrongs, or acts under ER 404(b),

the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.

State v. Pirtle, supra, 127 Wn.2d at 648-49. Avalos did not deny he was stopped by Ephrata law enforcement on August 26, that his car was impounded, or that he left a wallet with almost \$2,000 cash in his car. 1RP 16-31. As discussed below, the court identified the purpose for the evidence and its relevance to prove an element of the crime charged. 1RP 30-31, 170, 175-76. The court did not, however, state out loud its balancing of the evidence’s probative value against its prejudicial effect when concluding the evidence was admissible. *Id.*

2. *The trial court identified a proper purpose for admitting uncontested evidence Avalos had an unspecified police contact that resulted the towing of his car, which led to law enforcement later becoming aware he possessed almost*

\$2,000 cash two days after the Zhang burglary and five days before his arrest for second degree possession of stolen property.

The court concluded the August 26 Ephrata incident was a “contemporaneous bad act”, not a prior bad act. 1RP 30-31. Contemporaneous bad acts, usually uncharged crimes committed around the time of the incident at issue, are also referred to as “same transaction” or “res gestae” evidence. *Tharp*, 27 Wn. App. at 204 (citation omitted). The rationale for admitting res gestae evidence is that the jury is entitled to know the whole story, and a

defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant’s bad character. “(A) party cannot, by multiplying his crimes, diminish the volume of competent testimony against him.”

Tharp, 27 Wn. App. at 205 (quoting *State v. King*, 111 Kan. 140, 145, 206 P. 883 (1922)). The threshold consideration for res gestae evidence is its logical relevance to the charged crime. *State v. Saltarelli*, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). “[T]he true test of admissibility of unrelated crimes is not only whether they fall into any specific exception, but whether the evidence is relevant and necessary to prove an essential ingredient of the crime charged”. *Tharp*, 96 Wn.2d at 596. Res gestae

evidence must be admitted to complete the picture of the charged crime.

Id. at 594.

Here, the trial court carefully examined whether this incident was connected to Avalos's charge of second degree possession of stolen property and concluded the large amount of cash in Avalos's wallet two days after the Zhang burglary was relevant to whether Avalos possessed stolen property on August 31 and whether he was aware the property was stolen. 1RP 30-31, 175-76.

3. *The trial court's failure to state on the record its balancing of probity versus prejudice is harmless error.*

Avalos argues the court failed analyze the probative value of the August 26 Ephrata evidence against its prejudicial effect, as required by ER 404(b). *See, e.g., State v. Jackson*, 102 Wn.2d 689, 694, 689 P.2d 76 (1984) (court must balance on the record when applying ER 404(b)).

Avalos misstates what happened. The record demonstrates the court could not have ignored the prejudicial effect of the jury learning that Ephrata police had "contact" with Avalos that resulted in his car being towed. Although Avalos did not file written pleadings referring to this incident, nor did he specifically argue it in the initial pre-trial limine discussion, 1RP 16-31, he orally argued mid-trial that evidence of the August 26 contact was "again 404(b) evidence." 1RP 170. The concept of prejudice

is implicit in a “404(b) objection. Counsel continued: “The fact that Avalos was stopped on a separate occasion for a driving offense and found cash on his person frankly is not relevant to any of the elements of the charge and it’s improper character evidence.” 1RP 170. Again, the concept of prejudice is implicit in the phrase “improper character evidence.”

The State clarified to the court: “This goes to that \$2,000 in his wallet two days prior.” 1RP 171. The State made a testimonial offer of proof outside the jury’s presence. 1RP 171-73. In the offer, the officer and the State referred to Avalos being “separated from his car.” 1RP 173. The State commented: “I think that sanitizes it fairly well but still gets the point the State needs to get, which is it’s his wallet and it has the cash in it.” *Id.* The State’s comment about sanitizing the testimony recognizes the potential for prejudice.

Avalos argued the incident was evidence of another police contact that inferred he was a bad person. 1RP 174. The court asked whether he wanted a limiting instruction. *Id.* When counsel responded that he wanted the entire incident excluded, the court replied: “Okay, okay. But if there’s gonna be a limiting instruction, I need you to propose a limiting instruction to me.” *Id.* Avalos declined to request a limiting instruction for this evidence, but asked the court to specify its basis for admitting the August 26 Ephrata incident. *Id.* The Court, after hearing the State’s

summary of where this evidence fit into the weeklong sequence of events starting with the August 24 burglary and ending with Avalos's August 31 arrest, said:

Yeah. This is the – it's not just a question of possession. It's a question does he possess it with knowledge. I think this is – this is evidence from which a jury can conclude that Mr. Avalos was aware -- was in possession of money that was stolen from a burglary and was aware that it was stolen. That's my ruling.

IRP 175-76. The court, during its analysis, could not have ignored that evidence of the August 26 incident was prejudicial. All relevant evidence is prejudicial to one side or the other. The question is whether the court's failure to state aloud its weighing considerations is harmless error.

When it is clear from the record that the trial court adopted the argument of one of the parties concerning the purpose for which evidence was offered, including that party's balancing of probative value against prejudice, failure to conduct the full analysis on the record is not reversible error. *Pirtle*, 127 Wn.2d at 650-51. The record here shows the trial court adopted the State's argument, including the State's recognition that it needed to "sanitize" the events for the jury. The court went so far as to ask Avalos for a limiting instruction, which Avalos declined to give. Although it would have been the better practice for the court to have

conducted the full on-the-record analysis, check-point by check-point, this omission is not dispositive here.

Further, the evidence presented to the jury left open the reason for Avalos's contact with the Ephrata police. The jury knew Avalos had contact with Buescher on August 26, that he was separated from a vehicle he was driving, the vehicle was towed, 1RP 176, and the tow truck driver recovered Avalos's wallet containing \$1,900 from the console of Avalos's car. 1RP 181, 184. The jury also learned there was no indication at the time the cash was related to a crime and was returned to Avalos. 1RP 184.

The evidence Avalos knowingly possessed stolen property valued greater than \$750 was overwhelming. Leaving aside the \$1,000 in his pocket on August 31, he also had several items of jewelry from the burglary, including the white gold and diamond wedding ring with an estimated value of \$4,000 and another platinum and diamond pendant. CP D36. The jury did not have to conclude the cash came from the burglary to find Avalos guilty.

4. *Res gestae evidence is also properly considered under ER 403, which does not require balancing on the record.*

In 2012, Division Two of this Court reexamined the rationale and analysis under which res gestae evidence is admitted in *State v. Grier*, 168 Wn. App. 635, 278 P.3d 225 (2012), cert. denied, 135 S. Ct. 153 (2014).

The Court concluded that with the exception of identity, all other stated exceptions to ER 404(b) relate to a defendant's state of mind. 168 Wn. App. at 646. Res gestae evidence, however, does not concern state of mind. *Id.* Drawing on principles of statutory construction, the Court decided res gestae evidence should not be considered an exception to ER 404(b) because it "is so unlike the expressly listed ER 404(b) exceptions that considering 'res gestae' evidence to be an ER 404(b) exception contravenes the ejusdem generis doctrine." *Id.*

Instead, "'res gestae' evidence more appropriately falls within ER 401's definition of 'relevant' evidence, which is generally admissible under ER 402."¹⁰ *Id.* Division Two cited the definition of this evidence from *State v. Lane*: "'[R]es gestae' evidence complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place" 125 Wn.2d 825, 831, 889 P.2d 929 (1995) (internal quotation marks omitted), and compared it to the language of ER 401: "evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence'". *Grier*, 168 Wn. App. at

¹⁰ ER 402 provides, "All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible."

646-67. Division Two concluded evidence of the defendant's threatening behavior on the night of a murder was admissible as "res gestae" evidence, arguably under ER 404(b), "but . . . also because it was evidence of the continuing events leading to the murder, relevant under ER 401, and, thus, not 'prior misconduct' of the type generally inadmissible under ER 404(b)." *Id.* at 647. Under this approach, res gestae evidence is admitted unless it is unduly prejudicial under ER 403. In contrast to the almost identical analysis required under ER 404(b), the trial court is not required to weigh its decision on the record in the instance of an ER 403 objection. *Carson v. Fine*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994).

It is illogical to conclude failure to conduct a prejudicial-probative balancing on the record requires reversal if the objection is brought under ER 404(b) but not if brought under ER 403. The fact that Avalos declined to propose a limiting instruction when invited to do so indicates he did not consider the evidence unduly prejudicial at the time.

This Court should conclude the record demonstrates the trial court adopted the State's argument, that the probative value of this evidence outweighed its prejudice under all the facts and circumstances, and that failure to conduct the final balancing on the record is harmless error.

C. OVER AVALOS'S OBJECTION, THE TRIAL COURT ADMITTED THE \$1,000 CASH FOUND IN AVALOS'S POCKET WHEN HE WAS ARRESTED WITHOUT LIMITING THE PURPOSES FOR WHICH THE CASH WAS

ADMITTED. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO GIVE AVALOS'S PROPOSED INSTRUCTION PROHIBITING THE JURY FROM CONSIDERING WHETHER THE CASH WAS STOLEN PROPERTY.

Avalos misstates and misinterprets a single statement made by the court explaining its reason for denying his motion to suppress cash evidence. From this flawed premise, he argues he should have been allowed an instruction prohibiting the jury from considering whether the cash found in Avalos's pocket on August 31 was stolen property. He both misstates the court's ruling and misinterprets its reasoning.

Avalos was not charged with possessing money stolen during the Zhang burglary. He was charged with knowingly possessing stolen property that exceeded \$750 in value. CP 18. He now argues the court admitted the cash found in his pocket for only a limited purpose. He asserts the court erred in its subsequent refusal to give a limiting instruction prohibiting the jury from considering whether the cash, itself, was stolen property. Br. of Appellant at 20. Avalos asserts the court admitted the evidence "because it was relevant to Mr. Avalos's knowledge that the items [in his car] had been stolen." Br. of Appellant at 20. His rewording of the actual ruling misstates the court's reasoning by implying the court found the cash relevant only to whether Avalos knew the *other* items in his car were stolen. The court did not say that, nor does the construal hold up when considering the court's questions during argument.

When the court denied Avalos's motion, it stated the evidence was admitted for reasons that should be clear from the questions asked during argument. 1RP 241. Avalos pressed for a stated reason and the court said the cash "is relevant on the issue of whether or not Mr. Avalos was knowingly in possession of - - stolen property." 1RP 241. That statement, on its face, cannot fairly be said to restrict the scope of stolen property alleged to have been in Avalos's possession to everything except the cash. The argument flowing from this misinterpretation—that the ruling required an instruction prohibiting the jury from considering whether the cash was stolen property—is supported only by its false premise.

If there were any doubt concerning the court's reasoning, review of the questions from the bench during argument, recited here in the order asked, establishes the court did not intend to preclude the jury's consideration of the cash as stolen property. After reviewing all the evidence with the prosecutor, the court confirmed that the State's position was "the jury could find on the basis of proximity of . . . all those things together that that - - at least some evidence that at least makes it more like-
- more probable than it would have otherwise that the money came from Mr. Zhang and Mrs. Wang's home[.]" 1RP 235-36. The court then asked why the cash evidence was not relevant under ER 401. 1RP 237. The court asked whether the fact of Avalos's possession of a large sum of money

made it at least more probable than not that Avalos stole some property when considered in light of the larger sum of money stolen during the Zhang burglary in which the tax documents, gold, and jewelry found in Avalos's car were also stolen. 1RP 239. The court correctly assessed that the cash could not be conclusively shown to have come from the Zhang burglary, then immediately referred again to ER 401, asking: "doesn't [the cash, combined with other property that did come from the burglary] make it at least more probable than not that Mr. Avalos stole some property?" 1RP 239. Although the court incorrectly stated the issue, it corrected the misstatement when concluding the cash "is relevant on the issue of whether or not Mr. Avalos was knowingly in possession of - - stolen property." 1RP 241. The court's subsequent refusal to prohibit consideration of whether the cash, itself, was stolen property demonstrates the court never intended such a restriction in its original ruling.

This Court should conclude that because the cash was admitted without limitation, the court did not err when it refused to give a limiting instruction not supported by its evidentiary ruling.

- D. DURING CLOSING, THE STATE ASKED THE JURY TO EXAMINE WHETHER THERE WAS ANY REASONABLE EXPLANATION FOR AVALOS'S SUDDEN AFFLUENCE OTHER THAN THAT HIS CASH CAME FROM THE ZHANG BURGLARY. THE STATE MAY PROPERLY COMMENT ON LACK OF EVIDENCE WHEN THAT EVIDENCE COULD COME FROM SOMEONE OTHER THAN THE DEFENDANT. THE PROSECUTOR'S COMMENTS WERE PROPER AND NOT MISCONDUCT.

During closing argument, the prosecutor pointed out the jury could consider both direct and circumstantial evidence when deciding whether the cash came from the Zhang burglary, 1RP 289.

[W]hen Mr. Avalos was caught on the 31st he had all the evidence from the burglary. The officers found out that he had got a car for \$4,000 after his car was taken by the towing company. He doesn't work in any kind of legitimate job. Now, [defense counsel] will come up and say, I'm sure, "well, there's other ways he could have gotten that cash. He could have worked under the table", whatever. That's possible. That's where the reasonable [in]¹¹ reasonable doubt comes in. *When you look at all the evidence. is it reasonable to conclude that he got that cash from some other source when you consider that it's within a week of the burglary. all of a sudden he has all this cash. There's no other - - what other explanations are reasonable? That's for you to decide.*"

1RP 289.¹² (emphasis added). Trained and experienced prosecutors appreciate the long line of Washington cases recognizing that "[w]hile it is improper to imply that the defense has a duty to present evidence, a prosecutor may properly comment on the evidence." *State v. Jackson*, 150 Wn. App. 877, 887, 209 P.3d 553 (2009) (citing *State v. McKenzie*, 157 Wn.2d 44, 58-59, 134 P.3d 221 (2006)). "Further, a prosecutor may comment on the absence of certain evidence if persons other than the

¹¹ The transcriptionist wrote "and" instead of "in," although it is apparent from the context her transcription is incorrect.

¹² Avalos does not identify the precise statement complained of, citing only to page 289 of the trial record, cited here as 1RP 289. The statement quoted above contains everything the State identifies as possibly corresponding to Avalos's argument.

defendant could have testified regarding that evidence.” *Id.* (citing *State v. Ashby*, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969)).

[T]he rule enunciated by [the Washington Supreme Court] in *State v. Litzenberger*, 140 Wash. 308, 248 P. 799 (1926), that “Surely the prosecutor may comment upon the fact that certain testimony is undenied, without reference to who may or may not be in a position to deny it; and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his” is still good law.

Ashby, 77 Wn.2d at 38. The prosecutor in *Ashby* said: “So I say it is not disputed that he sold those articles to the defendant, Mr. Ashby. Consider it just for a few moments. Has anyone disputed that particular evidence that those articles were sold to Mr. Ashby?” *Id.* at 37. This statement did not deny Mr. Ashby a fair trial. *Id.* at 38. In Mr. Avalos’s trial, prosecutor said only: “*There’s no other - - what other explanations are reasonable? That’s for you to decide.*” 1RP 289. Comparison of the two statements makes obvious the established propriety of the State’s glancing remark. “The mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.” *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009) (citing *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996), *review denied*, 131 Wn.2d 1018 (1997); *State v. Traweek*, 43 Wn. App. 99, 106-07, 715

P.2d 1148, *review denied*, 106 Wn.2d 1007 (1986), *overruled on other grounds by State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991)).

The record here shows the prosecutor did not hint that only Avalos could have provided an explanation for his sudden affluence, nor did he identify other witnesses who might have given an explanation. 1RP 289.

The cases cited by Mr. Avalos are unpersuasive. The first three paragraphs of his argument cite cases discussing only generally the evils of prejudicial prosecutorial misconduct. Br. of Appellant at 22-23. His citation to *State v. Fleming*, 83 Wn. App. 208, 921 P.2d 1076 (1996), however, is misplaced because its facts bear little resemblance to what happened in Avalos's trial.

In *Fleming*, the prosecutor argued “[I]t’s true that the burden is on the State. *But you . . . would expect and hope that if the defendants are suggesting there is a reasonable doubt, they would explain some fundamental evidence in this [matter].* And several things, they never explained.” *Id.* at 215 (emphasis in original). The prosecutor continued, listing the “several things” the defense had not explained. This error, the court concluded, “was compounded by the prosecutor’s earlier misstatement of the law that the jury could acquit only if it found [the victim] to be lying or mistaken.” *Id.* These violations are a far cry from what was said concerning the source of the cash in Avalos’s pocket:

“There’s no other - - what other explanations are reasonable? That’s for you to decide.” 1RP 289. This was not a comment on Avalos’s decision not to testify, nor did it infer Avalos had any duty to present evidence. The prosecutor cut himself off from the “no other evidence” direction in which was headed and, instead, asked the jury to examine whether other reasonable explanations may have existed.

This Court should conclude the State’s remarks properly commented on lack of evidence without shifting the burden of proof.

E. THE TRIAL COURT DID NOT ERR WHEN IT REFUSED TO LIMIT THE PURPOSE FOR WHICH THE JURY COULD CONSIDER THE \$1,000 FOUND IN AVALOS’S POCKET NOR DID THE PROSECUTOR COMMIT MISCONDUCT. BECAUSE THERE WAS NO ERROR, THERE CAN BE NO CUMULATIVE PREJUDICIAL EFFECT.

Avalos repeats the two arguments he set forth in the previous sections, asserting in this section that the two errors combined to magnify the prejudice of which he previously complained. A defendant may be entitled to a new trial when cumulative errors make a trial fundamentally unfair. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Avalos’s challenges fail, and he is not entitled to a new trial, because he was not deprived a fundamentally fair trial.

For the reasons stated earlier, the State responds that this Court should conclude there was no error, thus no cumulative effect.

F. THE TRIAL COURT ORDERED \$1,000 RESTITUTION AFTER IMPLICITLY AGREEING WITH THE STATE’S ARGUMENT THAT SUBSTANTIAL EVIDENCE SUPPORTED THAT THE \$2,000 AVALOS POSSESSED IN EPHRATA ON AUGUST 26 WAS CAUSALLY CONNECTED TO THE CHARGE OF POSSESSION OF STOLEN PROPERTY. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY ORDERING AS RESTITUTION THE \$1,000 DIFFERENCE BETWEEN THE CASH AVALOS POSSESSED ON AUGUST 26 AND THAT WHICH HE POSSESSED AUGUST 31.

1. *Standard of review and relevant legal principles*

“The size of [a restitution] award is within the court’s discretion and will not be disturbed on appeal absent a showing of abuse.” *Griffith*, 164 Wn.2d at 965 (citations omitted). A trial court’s factual findings are reviewed for substantial evidence. *Id.* (citation omitted). The State must prove disputed damages by a preponderance of the evidence. *Id.* (citation omitted).

Restitution may be ordered only for losses ‘causally connected’ to the crimes charged. *Id.* at 965-66 (citations omitted). Losses are causally connected if, but for the charged crime, the victim would not have incurred the loss. *State v. Tobin*, 161 Wn.2d 517, 524, 166 P.3d 1167 (2007). The existence of “but for” causation is a factual determination made by the trial court, a determination given deference on review. *Rasmussen v. Bendotti*, 107 Wn. App. 947, 959, 29 P.3d 56 (2001). “In determining whether a causal connection exists, [reviewing courts] look to

the underlying facts of the charged offense” *Griffith*, 164 Wn.2d at 966 (citation omitted).

2. *The trial court’s award of \$1,000 restitution was causally connected to Avalos’s crime, was supported by a preponderance of the evidence, and was not an abuse of discretion.*

Trial courts exercise broad discretion, both in deciding to impose restitution and in determining the appropriate amount. *State v. Woods*, 90 Wn. App. 904, 906, 953 P.2d 834 (1998) (citing *State v. Bennett*, 63 Wn. App. 530, 535, 821 P.2d 499 (1991)). Here, the court imposed restitution after hearing all the trial evidence and considering the principles and facts set forth in *Griffith, supra*. 3RP 3.

In *Griffith*, the question was whether sufficient evidence supported an \$11,500 restitution order for jewelry still missing from a residential burglary. *Id.* at 963. Griffith was charged with trafficking in stolen property related to that burglary. *Id.* A pawnshop owner was unable to confirm any of the unrecovered items listed on the police report were among the “bag of stuff” Griffith sold him for \$96. *Id.* at 964. The trial court had found the pawnshop owner identified \$11,500 of the victim’s [unrecovered] property as having been in Griffith’s possession and “[t]he State concede[d] the factual basis for Griffith’s restitution order [was] ‘skimpy.’” *Id.* Here, conversely, the trial court questioned why Avalos was

not charged with trafficking in stolen property for having purchased the Olivares's Cadillac sometime between August 26 and August 31. 3RP 4. Upon being told the State's trafficking charge was dismissed before trial, the court asked whether he was the judge who made the decision, clearly disagreeing with the dismissal after having presided over trial. 2RP 110. The State assured the court a different judge had dismissed the charge. *Id.* It is apparent from the court's comments the court found some significant amount of evidence to support the trafficking charge.

The skimpy evidence in *Griffith* caused the Washington Supreme Court to remand the matter with an order for the trial court to "determine the value of [the victim's] unrecovered items from the police report that can be identified by a preponderance of the evidence to have been in Griffith's possession." *Id.* Here, the trial court made that determination. Despite its apparent frustration concerning the trafficking charge, the court declined to order restitution for the purchased Cadillac. 3RP 4. Instead, it implicitly found the State had shown by at least a preponderance of the evidence the \$2,000 Avalos possessed in Ephrata on August 26 came from the Zhang burglary and that, with only \$1,000 recovered on August 31, Avalos was liable to the victims for the remaining \$1,000. 3RP 4. This is not manifestly unreasonable. The fact Avalos also possessed gold, jewelry, and tax documents from the burglary with no apparent source of income

sufficient to have allowed him to acquire any of the property by legal means supports the court's implicit finding that the cash Avalos possessed on both days was causally connected to the Zhang burglary.

This Court should find the trial court's findings are supported by substantial evidence, the \$1,000 ordered is causally connected to the Zhang burglary, and the trial court did not abuse its discretion.

G. WASHINGTON COURTS CONSISTENTLY HOLD THAT CONSTITUTIONALLY SUFFICIENT LANGUAGE CHARGING POSSESSION OF STOLEN PROPERTY NEED NOT IDENTIFY THE PROPERTY. THE LANGUAGE CHARGING AVALOS WITH POSSESSION OF STOLEN PROPERTY WAS CONSTITUTIONALLY SUFFICIENT DESPITE NOT HAVING DESCRIBED THE STOLEN PROPERTY ALLEGED TO HAVE BEEN IN HIS POSSESSION.

Avalos asserts the amended Information charged him with possession of undefined stolen property allegedly belonging to "some unnamed person." Br. of Appellant at 29. He argues the language charging him with second degree possession of stolen property, RCW 9A.56.140(1)¹³ and 9A.56.160(1)(a),¹⁴ was constitutionally defective

¹³ RCW 9A.56.140(1) provides: "'Possessing stolen property' means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto."

¹⁴ RCW 9A.56.160(1)(a) provides: "A person is guilty of possessing stolen property in the second degree if: (a) He or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds seven hundred fifty dollars in value but does not exceed five thousand dollars in value;"

“[b]ecause it did not allege *what* stolen property Mr. Avalos was alleged to have possessed.” Br. of Appellant at 30 (emphasis in original).

1. *Standard of review and legal principles*

A defendant has a constitutional right to be informed of the nature and cause of the charges against him. U.S. CONST. amend. VI; WASH. CONST. art. 1 § 22. Review of challenges to the adequacy of a charging document is de novo. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014). When, as here, a defendant waits until after conviction to challenge the sufficiency of charging language, reviewing courts construe that language liberally in favor of its validity. *State v. Tresenriter*, 101 Wn. App. 486, 491, 4 P.3d 145, 14 P.3d 788 (2000), *review denied*, 143 Wn.2d 1010 (2001). Courts distinguish between constitutionally deficient charging documents—those that fail to allege facts sufficient to support each element—and those that are “merely vague.” *State v. Leach*, 113 Wn.2d 679, 686, 782 P.2d 552 (1989).

When an information states each statutory element of the charged crime, “but is vague as to some other matter significant to the defense, a bill of particulars is capable of correcting the defect.” *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985) (citing *State v. Bonds*, 98 Wn.2d 1, 16, 653 P.2d 1024 (1982), *cert. denied*, 464 U.S. 831 (1983)). A defendant who fails to request a bill of particulars while the case was pending in trial

court is not entitled to challenge the information on appeal. *Id.* (citing *Bonds, supra. In re Richard*, 75 Wn.2d 208, 449 P.2d 809 (1969); *State v. Johnson*, 100 Wn.2d 607, 674 P.2d 145 (1983)).

2. *A document charging possession of stolen property under Washington law does not need to identify the property alleged to be stolen.*

Tresenriter, supra. established eighteen years ago that the State does not need to identify the property taken when charging possession of stolen property. 101 Wn. App. at 495. In *Tresenriter*, the charging document did not state what the property was, where it was located, or its connection to the defendant's charges. *Id.* There, Division Two of this Court held the information was constitutionally sufficient because the omitted facts did not constitute elements of the charged crime. *Id.* at 495. If Avalos had wanted more specificity, he should have requested a bill of particulars before trial. *Tresenriter*, 101 Wn. App. at 495; *Holt*, 104 Wn.2d at 320.

3. *The two cases on which Avalos relies are not good law under the facts of this case.*

Avalos is apparently unaware of *Tresenriter, supra*, and the Washington cases citing it for its holding that a description of the stolen property is not an essential element of a possession of stolen property charge. *See, State v. W.N.*, No. 49809-0-II, 2017 Wash. App. LEXIS 2540

(Ct. App. Nov. 7, 2017);¹⁵ *State v. Winings*, 126 Wn. App. 75, 84, 107 P.3d 141 (2005); *State v. Donnette-Sherman*, No. 47602-9-II, 2016 Wash. App. LEXIS 2593, at 14 (Ct. App. Oct. 25, 2016); *State v. Bowen*, No. 47286-4-II, 2016 Wash. App. LEXIS 1953, at 16 (Ct. App. Aug. 16, 2016); *State v. Duggins*, No. 46068-8-II, 2015 Wash. App. LEXIS 1052, at 10 (Ct. App. May 19, 2015).

Avalos cites only two cases in support of his assertion that, despite *Tresenriter*, “[a]n Information charging a theft-related offense must ‘clearly’ charge the accused person with a crime relating to ‘specifically described property.’” Br. of Appellant at 31 (citing *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002)). Neither of these cases support his position.

- a. *Greathouse’s* holding does not extend to all “theft-related” offenses.

In *Greathouse*, Division One of this Court addressed whether the charging language was inadequate for multiple counts of theft by means of embezzlement when it omitted the name of the victim of the thefts and did not allege the true owner of the stolen property. 113 Wn. App. at 900. Like Avalos here, *Greathouse* cited a case in which the issue he raised was not

¹⁵ The unpublished cases here are cited pursuant to GR 14.1 These decisions have no precedential value, are not binding on any court, and are cited only for such persuasive value as the court deems appropriate. *Crosswhite v. Wash. Dep’t of Social and Health Services*, 197 Wn.App. 539, 544, 389 P.3d 731 (2017).

at issue. The *Greathouse* court rejected Greathouse's argument, finding the case he cited "does not stand for the proposition that an information that fails to state the name of the owner of the stolen property is constitutionally deficient." *Id.* at 902. The property stolen was identified and not at issue. *Id.* at 900. The Court reasoned that naming a victim would be beneficial but failure to do so did not render the charging language inadequate because each count specified the date and place of the crime, the number of gallons of fuel alleged to have been stolen, the fuel's value, the allegation that the fuel belonged to another, and the allegation that Greathouse exerted unauthorized control over the fuel with intent to deprive another of that value. *Id.* at 905. In reaching that conclusion, the Court discussed that the holding in *State v. Holt*, 52 Wn.2d 195, 324 P.2d 793 (1958), concerning sufficiency of trial evidence to prove embezzlement,

indirectly supports the proposition that, in Washington, *an information charging theft by embezzlement* need not name the owner of the stolen property, so long as it clearly charges that the defendant, on or about a specific date, with intent to deprive the owner thereof, exercised unauthorized control over specifically described property of another.

Greathouse, 113 Wn. App. at 903 (emphasis added). Whether property had to be "specifically described" for any other crime is not addressed and was not at issue.

Avalos argues that because *Greathouse* held that an information was sufficient because it identified, among other facts, “specifically described property,” the fact that the property in his case was not described requires reversal. But *Greathouse* concerned the issue of whether a victim needs to be named in an information charging theft by embezzlement. Its comment on the contents of the remainder of the charging language is of limited value here, especially in light of *Tresenriter*’s on-point ruling on the issue squarely before this court.

- b. *Edwards v. United States* has been overruled and is an “encrusted barnacle” from a bygone era, inapplicable here.

Avalos also cites *Edwards v. United States*, 266 F. 848 (4th Cir. 1920), which held language alleging “that the defendant applied to his own use certain property of the United States government,” without “a single word to indicate the nature, character, or value of the property” was “too vague and indefinite upon which to deprive one of his liberty.” 266 F.848 at 851. It may well be *Edwards* was the only case standing for this proposition Avalos was able to find. And there is a reason for that. As noted in 2003 in *United States v. Wheeler*, a portion of the ruling in *Edwards* was overruled in *United States v. Duncan*, 598 F.2d 839, 848 (4th Cir. 1979). *Wheeler*, Nos. 02-3087M, 02-3084M, 2003 U.S. Dist. LEXIS 4532, at 9 (D. Md. Mar. 6, 2003). “Further, *Duncan* not only

overruled the holding of *Edwards*, it also brought into question the efficacy of relying on *Edwards* in the instant case because *Edwards* was decided some 20 years before the enactment of the Federal Rules of Criminal Procedure.” *Id. Duncan*, discussing *Edwards*, recognized that the

Federal Rules of Criminal Procedure have abandoned the excessive technicality demanded of an indictment by the common law. While perhaps suited to an age when the typical punishment for many crimes was death and some amelioration of those rigors, albeit indirect, was necessary, technicality of this sort is no longer justified.

598 F.2d at 848. A separate United States District Court discussed how adoption of the Federal Rules of Criminal Procedure abrogated

the technicalities which all too often had led to dismissal of indictments and to reversals of convictions on grounds that had no connection with the guilt or innocence of the defendant. . . . *Among the many refinements impeding the decision of criminal cases on their merits were numerous technical requirements as to the contents of the indictment and the manner in which averments should be made, all inherited from a bygone era. . . .* One of the chief purposes of the new rules was to jettison this superfluous cargo, which interfered with the determination of the basic question whether the defendant committed the crime with which he was charged. The history of the common law of crimes indicates that criminal procedure became encrusted with these barnacles as a result of commendable efforts of English judges to mitigate the rigors of the law of their day, under which the death penalty was imposed for every felony. The ingenious judicial mind gradually devised these technicalities as an escape. They have no place in modern jurisprudence.

United States v. Young, 14 F.R.D. 406, 407-08 (D.D.C. 1953) (emphasis added).

This Court should reject Avalos's argument and, following the established rule in *Tresenriter*, conclude the language charging Avalos with possession of stolen property was constitutionally sufficient without a description of the stolen property in his possession.

H. THE STATE WILL NOT SEEK COSTS IF IT PREVAILS ON APPEAL, ALTHOUGH AVALOS'S POSITION THROUGHOUT TRIAL HAS BEEN INCONSISTENT WITH HIS CURRENT CLAIM OF INDIGENCE.

Throughout this case, Avalos has vigorously argued the substantial amounts of cash he was shown to have following the Zhang burglary could have come from any number of legitimate sources. Here, he asserts on-going indigency and correctly stresses that the State is unable to provide evidence his financial situation has improved since he was found indigent. *Id.* at 33-34. The State has never accepted Avalos's contention concerning legitimate sources of income and will not claim to do so now.

Further, the State's primary financial concern is that Mr. Zhang and Mrs. Wang receive the restitution Avalos was ordered to pay.

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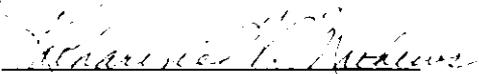
IV. CONCLUSION

This Court should affirm Avalos's conviction for possession of stolen property in the second degree.

DATED this 30th day of March, 2018.

Respectfully submitted,

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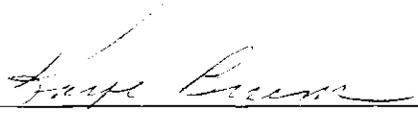
CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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Dated: March 30, 2018.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

March 30, 2018 - 4:35 PM

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