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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL H. DUNBAR, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court failed to obtain a valid waiver of Mr. Dunbar's jury trial right.
2. The trial court erred in entering findings of fact and conclusions of law that failed to address each element of the crime separately.
3. The trial court erred in entering finding of fact number 16, absent sufficient evidence in the record.
4. The trial court erred in entering finding of fact number 22, absent sufficient evidence in the record.
5. The trial court erred in entering finding of fact number 27, absent sufficient evidence in the record.
6. The trial court erred in entering finding of fact number 35, absent sufficient evidence in the record.
7. The trial court erred in entering finding of fact number 36, absent sufficient evidence in the record.
8. The trial court erred in entering finding of fact number 40, absent sufficient evidence in the record.
9. The trial court did not find the prosecutor proved the essential element of knowledge beyond a reasonable doubt.

II. ISSUES PRESENTED

1. Whether the defendant's claim of the invalidity of his jury trial waiver was preserved for appeal, whether any error with regard to his waiver of jury trial was invited, and whether, by executing a written waiver that was filed after trial, the defendant ratified having a trial without a jury?

2. Whether sufficient evidence exists to support the challenged findings of fact?

3. Whether the findings of fact support the trial court's conclusion that the defendant was guilty, beyond a reasonable doubt, of possession of a stolen motor vehicle, where corroborative evidence of the defendant's knowledge that the vehicle was stolen was admitted at trial, and the court found that evidence credible?

III. STATEMENT OF THE CASE

Procedural facts.

The defendant was charged by information with one count of possession of a stolen motor vehicle on November 7, 2016. CP 6. The matter proceeded to a jury trial on February 21, 2017, which resulted in a mistrial after the jury was deadlocked. CP 117. At a subsequent pretrial conference on March 18, 2017, defense counsel indicated that Mr. Dunbar would waive a jury trial, and proceed to a trial by the court, stating that she and Mr. Dunbar would complete a written waiver after leaving court.

3/17/17 RP 5. Based upon that representation, the court stated the matter would proceed to trial the following week without a jury. 3/17/17 RP 7. A written waiver was later signed by the defendant, his attorney, the prosecutor and the court, and was filed on March 31, 2017, after the bench trial had concluded. CP 20.

Substantive facts.

Steven Myers worked as general manager for Click It Auto and RV (hereinafter “Click It”) in the Spokane Valley in September 2016. RP 28. At that time, Click It had a 2006 Chevy Suburban in its inventory; the Suburban was a trade in.¹ RP 29; CP 26 (FF 2). Click It did not have the title to the Suburban transferred into the company’s name, but did file an odometer disclosure, title extension and release of interest (signed by the previous owner) with the Department of Licensing. RP 31-32.²

Mr. Myers was working at Click It on September 5 and 6, 2016 and noticed that the Suburban was missing from the dealership. RP 29, 34; CP 27 (FF 5). Mr. Myers went through the company’s protocol,³ and

¹ Brett Wideman had traded the Suburban for a Ford F-150 on August 24, 2016. RP 29. There were no lienholders on the vehicle, and Mr. Wideman was the legal owner at the time of the trade. RP 59.

² The court admitted each of these documents as State’s Exhibit P-2, without objection. RP 33.

³ Click It has six different dealership locations, and during the day, salesmen, lot attendants, and staff may move vehicles between the various lots. RP 35-36. Vehicle keys are kept in an office in the showroom. RP 36.

determined that the Suburban was not checked out, was not on a test drive, and was not physically present at any of the company's other dealership locations. RP 38; CP 27 (FF 5-12).

Close to midnight, after searching the last dealership lot (having not located the Suburban), Mr. Myers saw "*our Suburban* sitting at the light ... I don't know if it's Brown or Division where it comes into downtown ... there was [sic] about three cars behind it, so three cars in front of me." RP 39 (emphasis added); CP 28 (FF 13-15). Mr. Myers identified the Suburban as belonging to Click It because "it had the wheels on it, had our plate frames,⁴ and I was trying to get as close as I could to see if there was a trip permit in the back window to make sure it hadn't been sold and somebody had spaced it so, but it wasn't." RP 40; CP 28 (FF 14).

If a vehicle appears to be missing from the dealership's inventory, the company has a protocol by which employees are to determine whether it has been stolen. RP 37. An employee would first check "the board" to see if the vehicle is checked "in" or "out." Then the employee would call the other dealerships to see if they know whether the vehicle was left at another lot or sold. Then, the employee would call the company's vendors or detail companies to determine if the vehicle is being worked on outside the dealership. Lastly, the employee would do a physical inspection of each dealership to attempt to locate the missing car. RP 37; CP 27 (FF 6-11).

⁴ When Click It receives a vehicle, it takes the existing license plates off the vehicle, in accordance with Washington law, and inserts a plate frame and plate inserts with the store logo in place of the license plates. RP 40.

Mr. Myers attempted to get a closer look at the Suburban, but was pulled over for speeding and running a red light. RP 41; CP 28 (FF 16). Mr. Myers told the officer that he knew that he was speeding and had run a red light but that he “was chasing a vehicle [he was] pretty sure was [his] stolen Suburban” and described the vehicle to the officer. RP 41.

Mr. Myers then returned to the dealership and reported the Suburban stolen, reporting that the Suburban had a custom grille and a unique tire package. RP 42-43; CP 28 (FF 16). At no point in time did Click It sell the vehicle to Mr. Dunbar or to Cliff’s Auto, and at no time were Mr. Dunbar or Cliff’s Auto authorized to possess the Suburban. RP 46.

Over a month later, on October 15, 2016, Trooper Jason Bart stopped Mr. Dunbar at 11:30 p.m.; Mr. Dunbar was driving a Chevy Suburban outside of his lane of travel. RP 168, 171; CP 28-29 (FF 18, 24-26). Trooper Bart asked Mr. Dunbar for his license and registration. RP 171. Mr. Dunbar admitted he had a suspended license, and began looking for his registration paperwork. RP 171; CP 29 (FF 27). Mr. Dunbar looked through the center console and glove box, and then explained that one of his passengers “may have cleaned the vehicle out and moved the paperwork somewhere else within the vehicle, but he was sure he had it somewhere.” RP 172; CP 29 (FF 27).

While writing Mr. Dunbar a citation for driving while suspended, Trooper Bart discovered that the license plate on the Suburban returned to a 2001 GMC Yukon. RP 173-74; CP 28-29 (FF 19-20, 29). The trooper then compared the VIN number associated with the Yukon with the VIN on the dashboard of the Suburban, and determined they did not match. RP 174; CP 29 (FF 32-33). Trooper Bart detained Mr. Dunbar, explaining to him that the license plates belonged to a different vehicle. RP 174-75. Mr. Dunbar then told Trooper Bart that he had purchased the vehicle from Cliff's Auto.⁵ RP 175; CP 30 (FF 37).

Trooper Bart searched the Suburban's VIN number and determined that the vehicle had been reported stolen from Click It on September 6, 2016. RP 176; CP 29 (FF 36). The report also indicated that there were no license plates on the vehicle at the time it was stolen, and that it had large chrome wheels and an aftermarket grille. RP 176. Trooper Bart then inspected the Suburban more carefully. The tires were mismatched, and the vehicle bore gray steel rims. RP 177. The grille was not an aftermarket, expensive-looking grille. RP 177. The license plate holder reflected the name "Cliff's Auto." RP 178; CP 29 (FF 30).

⁵ Dispatch searched the license plates that were on the vehicle and advised that the plates were associated with Cliff's Auto. RP 177.

Trooper Bart made efforts to locate the paperwork Mr. Dunbar claimed to be within the vehicle:

There was an effort to discover whether Mr. Dunbar's story was true about papership, ownership of the vehicle that he said he possessed that he said was in the vehicle, and I did make an effort to have him help me find that said paperwork, which to this day I've yet to see, but we did make an effort to discover that paperwork that he said was in the back.

He guided me to where it would be, to include at one point I got him out of the vehicle, still in handcuffs but out of my patrol vehicle, and we -- he kind of guided me to this cardboard box, kind of where to look within it, where it might be, this paperwork, but it never materialized. So I went forward with the -- the possession of stolen vehicle charge.⁶

RP 179; CP 29 (FF 35-36, 40).

Trooper Curtis Cook assisted Trooper Bart in searching the belongings in the vehicle to locate any paperwork identifying the vehicle as belonging to Mr. Dunbar, to no avail. RP 153; CP 29 (FF 35).

Mr. Dunbar claimed he owed \$6,400 for the Suburban and was making monthly payments. RP 205. Trooper Bart asked Mr. Dunbar what happened to the chrome wheels that had been affixed to the vehicle. RP 182.

⁶ "There were several bags of paperwork in plastic bags within the vehicle, none of them had to do with the -- ownership of any vehicle, more or less this one." RP 180. Specifically, the Trooper was looking for pink and yellow bill of sale carbon copies one would receive after buying a car from a dealership. RP 181. Although Trooper Bart was not specifically looking for green registration paperwork, he located vehicle registrations for *other* vehicles, but not one pertaining to the Suburban, and not reflecting registration of any vehicle in the defendant's name. RP 181.

Mr. Dunbar explained he had a flat tire, so he had the flat removed, and placed a spare tire on the car; then, during the time the spare was on the car, the other three wheels were stolen off the vehicle, and the fourth was stolen out of the back of the vehicle.⁷ RP 182; CP 30 (FF 39, 51).

Upon closer examination of the grille, Trooper Bart noted that it was too small for the Suburban, and appeared to be held in place with wood screws; “it was kinda thrown together, you could grab and shake it, and the headlights were not in there real secure, either.” RP 183.

Mr. Myers responded to identify the Suburban. RP 43. He recognized the Suburban right away, but acknowledged the changes that had been made to the car. RP 183. The grille had been removed and the Suburban had mismatched tires. RP 44. The grille had been replaced with a different Chevrolet grille, that was tied to the front of the vehicle. RP 69; CP 30 (FF 38).

While at the scene, Mr. Myers also advised Trooper Bart that he had located an advertisement for the missing wheels on Craigslist. RP 45, 207; CP 31 (FF 50). He determined the seller of the wheels was Brittany Snow, the defendant’s then-girlfriend. RP 46, 180; CP 31 (FF 50-51).

⁷ The lug nut key was still in the vehicle, and the lug nuts for the chrome rims “were still on the vehicle, so whoever stole his rims didn’t take the lug nuts with them.” RP 192.

Trooper Bart arranged for Ms. Snow to come to the scene and remove the defendant's property, which had been taken out of the Suburban. RP 213; CP 30 (FF 40).⁸ Ms. Snow testified that Mr. Dunbar removed the chrome wheels and sold them. RP 286. Jennifer Hall, who had been a passenger in the Suburban, was also permitted to remove her belongings from the car before it was returned to Mr. Myers. RP 151, 178.

After law enforcement was unable to locate any information which would corroborate the defendant's story, the defendant was placed under arrest for possession of a stolen motor vehicle; the Suburban was returned to Mr. Myers and Click It.

Approximately a month later on November 18, 2016, after the defendant had already been charged with possession of the Suburban, CP 6, Officer Kevin Reese was dispatched to take a stolen vehicle report from Mr. Dunbar. RP 140; CP 30 (FF 41-43). Officer Reese called Mr. Dunbar, who reported the same Suburban had been stolen from him. RP 140. Officer Reese determined that Mr. Dunbar was not the registered owner of the vehicle, and that the vehicle had already been reported stolen. RP 141; CP 30 (FF 41-43). During the conversation, Mr. Dunbar mentioned Cliff's

⁸ Ms. Snow also testified at trial on the defendant's behalf. She confirmed that she responded to the scene to retrieve Mr. Dunbar's belongings from the Suburban. RP 286.

Auto and Click It. RP 141. The officer believed the issue to be a civil issue, and took no action in investigating any criminal offense. RP 141.

Christopher Dunn worked for Cliff's Auto as a salesman. RP 75. He was working on September 7, 2016. RP 76. On that date, Cliff's Auto did not have a 2006 Chevrolet Suburban on its lot, but it did own a 2001 GMC Yukon.⁹ RP 76. Cliff's Auto sold the GMC Yukon on September 7, 2016 to David Holder, and documented the sale. RP 77. Upon completion of any sale, Cliff's Auto removes the license plate that is affixed to the sold vehicle, and places it in a large drum locked away at another site; every year, one of Cliff's Auto's employees destroys the plates and recycles the metal. RP 82-83.

Mr. Dunn indicated that Cliff's Auto had never sold a vehicle to Mr. Dunbar, nor was Mr. Dunbar present at the time Mr. Holder purchased the Yukon. RP 81. Mr. Dunn testified, "In our system [Mr. Dunbar's] name doesn't show up as sold a vehicle to under sold, anything like old deals, nothing." RP 81. Once a vehicle is sold by Cliff's Auto, the documentation is filed, by last name, in alphabetical order, in the company's filing cabinets. RP 90. Cliff's Auto also tracks vehicles by their VIN number, and used the

⁹ Cliff Grout, the owner of Cliff's Auto, likewise indicated that on September 7, 2016, his dealership did not possess a 2006 Chevrolet Suburban, but did possess a 2001 GMC Yukon. RP 115.

VIN provided on a subpoena to check whether the Suburban was in its inventory. RP 109. Mr. Dunn indicated that the VIN number supplied on the subpoena for the Suburban was 1GNFK16Z0J150636. RP 87. The VIN number for the Suburban was actually 1GNFK16Z06J150636. Ex. S-2; RP 269-70.

Cliff Grout, owner of Cliff's Auto, testified that when the dealership sells a car with in-house financing, the company generates various documents, including a purchase order, right to repossession, as-is statements, and a temporary registration, along with a credit application. RP 116. Mr. Grout was familiar with every car held for sale in his dealership, and he was aware of his dealership's inventory. RP 120-21. Cliff's Auto had not used license plate holders since 1986.¹⁰ RP 81, 128. Mr. Grout searched Cliff's Auto's vehicle records for the VIN number associated with the Suburban, and agreed that if the VIN number provided was incorrect, it would affect the search. RP 128-29.

Detective Steven White of the Washington State Patrol testified that he conducted additional investigation into the case. During that investigation, he learned that the Suburban was equipped with an On-Star

¹⁰ Mr. Grout was unsure whether Cliff's Auto had *ever* used license plate holders, but if the company did use plate holders, that practice had not occurred while at the current dealership location on Market Street, or since 1986. RP 128.

GPS system, which was activated on September 17, 2016 in the defendant's name. RP 234. According to On-Star, all one must do to register for the company's services was activate the "blue start button" within the car, represent that the car has been purchased, and indicate a desire to enroll in services; upon completion of those steps, a driver would be provided a free three-month trial of On-Star's services. RP 234.

Defense investigator, Jacklyn Geurin, testified regarding Defense Exhibit D-103, an invoice that "denotes items that were sold to Daniel Dunbar, shipped to Cliff's Automotive. Provides a business address of 3515 North Market, Spokane, Washington. Says it was sold by Cliff, shipped in store, one set of 20-inch rims and tires sold separately from a 2006 Suburban. The price was \$800, minus \$500 equipment exchange, \$300 on the bill, dated 9/1 of 2016." RP 259-60. Neither Mr. Grout, nor Mr. Dunn were able to authenticate the document, as neither recognized the handwriting on the purported invoice. RP 105-06, 124-26. Ms. Geurin agreed that she could not verify the receipt came from Cliff's Auto. RP 272. The receipt was not admitted by the trial court. RP 5, 337-38.

The court found Mr. Dunbar guilty of possession of a stolen motor vehicle, and filed findings of fact and conclusions of law in support of that verdict on April 17, 2017. CP 26-31. The court sentenced Mr. Dunbar to a

standard range sentence of 57 months, to run concurrently with a prior sentence. RP 359. The defendant timely appealed.

IV. ARGUMENT

A. THE DEFENDANT’S ARGUMENT REGARDING THE VALIDITY OF HIS JURY TRIAL WAIVER WAS NOT PRESERVED FOR APPEAL; IN ANY EVENT, THE DEFENDANT KNOWINGLY, VOLUNTARILY AND INTELLIGENTLY WAIVED HIS RIGHT TO A JURY TRIAL, AND ANY ERROR WAS HARMLESS BECAUSE THE DEFENDANT RATIFIED THE JURY WAIVER AFTER TRIAL.

1. The jury trial waiver issue is not preserved for appeal, and, if error, was invited.

The defendant did not raise the issue of whether he had validly waived his right to a jury trial in the lower court. The failure to raise an issue in the trial court precludes appellate review unless the trial court committed a manifest error affecting a constitutional right. RAP 2.5(a)(3). It is a fundamental principle of appellate jurisprudence that a party may not assert on appeal a claim that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013).

RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749. This rule supports a basic sense of fairness, perhaps best

expressed in *Strine*, where the court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6-2(b), at 472-73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50. Specifically regarding RAP 2.5(a)(3), our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Thus, to establish that the alleged constitutional error is reviewable, the defendant must establish that the error is “manifest.”

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. See *Harclaon*, 56 Wn.2d at 597, 354 P.2d 928; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could

not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (footnote omitted) (emphasis added).

In determining whether a claimed error is manifest, this Court views the claimed error in the context of the record as a whole, rather than in isolation. *Scott*, 110 Wn.2d at 688. Manifest error is “unmistakable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008).

There is nothing in defendant’s claim of error that is plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge trying the case should have recognized the alleged deficiency in the proceedings after counsel represented to the court that Mr. Dunbar would waive his right to a jury trial.

At the pretrial hearing, three days before trial, the prosecutor indicated the State’s readiness for trial to commence the following Monday. 3/17/17 RP 1. After discussing other issues, defense counsel represented to the court:

Mr. Dunbar and I have discussed his options, and we’d be ready to proceed to a bench trial on Monday. I think we’d

waive jury this time and hopefully that is substantive notice for the court. *I believe there's a form I fill out, and I can do that as soon as I get back to the office,* but Mr. Dunbar and I just spoke about it for the first time yesterday, and I just wanted to double check with him this morning before I made any commitments to the court.

3/17/17 RP 5 (emphasis added).

The State did not object to the waiver of a jury trial. 3/17/17 RP 7. When asked again by the court if defendant was prepared to commit to waiving a jury trial, defense counsel answered in the affirmative. 3/17/17 RP 7.

The day of trial, however, trial did not commence as planned, as the defendant moved for a continuance; trial was continued for one day. 3/20/17 RP 1-21. After additional preliminary matters were discussed on March 21, 2017, trial commenced. When asked if the defense was ready to proceed, defense counsel answered in the affirmative. There was no discussion on the record that Mr. Dunbar had reconsidered his desire to have a bench trial.

The issue of whether the defendant validly waived his right to a jury trial is not so unmistakable that the trial court should have remedied the situation. The trial court took the defense counsel at her word that Mr. Dunbar would complete the jury trial waiver form, and, hearing no additional information which would lead the court to believe that

Mr. Dunbar had reconsidered his position, proceeded to a bench trial as had been discussed at the pretrial conference.

Furthermore, manifest constitutional error analysis requires the defendant to demonstrate that the error had practical, identifiable consequences at his trial, i.e., the defendant must show actual prejudice. *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Here, the defendant filed a waiver of his jury trial, albeit after the trial had concluded. CP 20. Thus, there is no practical, or identifiable consequence flowing from the trial court's failure to obtain a waiver of defendant's jury trial right before trial; as further discussed below, defendant's post-trial waiver of the right ratified the representations of his attorney and the actions of counsel and the court to proceed to a bench trial.

Additionally, the error was invited. The basic premise of the invited error doctrine is that a party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. The doctrine was designed in part to prevent parties from misleading trial courts and receiving a windfall by doing so. *State v. Henderson*, 114 Wn.2d 867, 868, 792 P.2d 514 (1990). Based upon that doctrine, Mr. Dunbar, who was familiar with the criminal justice system, had already had a jury trial on the *same case*, and was "an intelligent man," RP 358, should not now be allowed to claim error after (1) hearing his attorney represent to the court

his desire to waive trial by jury, (2) hearing counsel's representation that a written waiver would be executed and provided to the court, during which representations, the defendant stood mute, (3) thereafter failing to verbally advise the court he had reconsidered his attorney's request for a bench trial before trial commenced, (4) sitting through the entire bench trial requested on his behalf by his attorney, and finally, (5) executing a post-trial, pre-sentencing, written jury trial waiver.

In *United States v. Page*, 661 F.2d 1080, 1082 (1981), the Court of Appeals for the Fifth Circuit reviewed strikingly similar facts:

Recapitulating briefly, then, the record properly before us shows Page's trial counsel, at a conference held on the brink of trial and with the venire sitting outside in the courtroom, assuring the court that he and Page have thought the matter over with care and deliberately decided to waive the jury and try his case to the court. Government counsel at first objects but agrees after consulting higher authority. All parties having advised that they agree on waiver and a bench trial, the court observes that it will state this fact on the record in open court. It does so in the presence of Page, a highly educated and articulate man, who in no manner exhibits objection or surprise as his counsel waives jury trial on the record and the venire is dismissed. The trial proceeds, Page is convicted and he comes to us via new counsel complaining that he gave no effective, personal waiver, written or oral, of his constitutional right to be tried by a jury.

The Fifth Circuit rejected the defendant's claim of an invalid jury trial waiver, finding that while a written waiver would have been preferable, if the trial court "fell into error, it was led there by Page and his trial

counsel.” *Id.* at 1083. The court found that it was entitled to rely on counsel’s representations that he had conferred with his client, as well as the defendant’s own conduct, in sitting through a bench trial, held at his request, and without objection. *Id.* The court stated, “it follows ineluctably that Page cannot complain to us of the manner in which the trial court carried out his wishes... The court did what Page, explicitly by counsel and implicitly by his own conduct, asked it to do. Page will not now be heard to say that the court fell into technical error in the process of effectively carrying out his request.” *Id.* Thus, the court found waiver of the error based on the defendant’s own *conduct* at trial. The same is true here. If the trial court “fell into error, it was led there” by Mr. Dunbar and his attorney. The defendant invited the error of which he now complains, and the court should decline to review it.

2. The defendant waived his right to a jury trial by subsequent ratification of his trial without a jury.

The court reviews constitutional issues, including whether a defendant waived his right to a jury trial de novo. *See, e.g., State v. Ramirez–Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007).

Article I, section 21 of the Washington Constitution provides “[t]he right of trial by jury shall remain inviolate...” However, Washington law

allows a defendant to waive a jury trial. *State v. Stegall*, 124 Wn.2d 719, 723, 881 P.2d 979 (1994).

A trial record must adequately establish that the defendant waived his right to a jury trial knowingly, intelligently, and voluntarily. *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). Unlike a waiver of the right to counsel or to trial, no “colloquy or on-the-record advice as to the consequences of a waiver is required for waiver of a jury trial.” *Stegall*, 124 Wn.2d at 725. The law requires “only a personal expression of waiver from the defendant.” *Pierce*, 134 Wn. App. at 771 (citing *Stegall*, 124 Wn.2d at 725). A written waiver “is strong evidence that the defendant validly waived the jury trial right.” Additionally, an attorney’s representation that the defendant’s waiver is knowing, intelligent, and voluntary is also relevant. *Id.* (citing *State v. Woo Won Choi*, 55 Wn. App. 895, 904, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990)). As a result, the right to a jury trial is easier to waive than other constitutional rights. *Id.* at 772.

Although a defense attorney may not waive the right to a jury trial on behalf of a defendant, without the defendant making a “personal expression” of the waiver, *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979), a defendant may subsequently ratify that waiver by executing a written waiver, *State v. Wiley*, 26 Wn. App. 422, 429, 613 P.2d 549 (1980)

(at sentencing hearing, defendant filed written waiver of jury trial; defendant's subsequent ratification of jury trial waiver sufficient to demonstrate a valid waiver of the right to jury trial). Additionally, a defendant may validly waive his right to a jury trial by an informed acquiescence. *Stegall*, 124 Wn.2d at 731; *see also*, *State v. Cham*, 165 Wn. App. 438, 267 P.3d 528 (2011) (record demonstrated an informed acquiescence waiving right to a jury trial on aggravating factor – defendant heard counsel's representation that counsel had spoken with the defendant, and he wanted to waive his right to a jury trial, defendant had knowledge of function and role of judge and jury, defendant invoked his right to a jury on the underlying criminal charges while waiving only as to aggravating factor of rapid recidivism).

Here, the defendant ratified his counsel's representation that he would waive his right to a jury trial. Mr. Dunbar signed and filed a written jury trial waiver, in which he acknowledged his right to a jury trial and his desire to waive that right. CP 20. The defendant made a counseled decision to waive a second jury trial (after his first jury trial resulted in a hung jury) in favor of a bench trial, and a greater likelihood that the judge who presided over the first trial by jury would be disinclined to convict him for a crime when a jury could not do so.

Additionally, as in *Cham*, the record reflects that Mr. Dunbar heard his counsel's unchallenged representations to the court regarding Mr. Dunbar's desire to waive convening another jury trial and that he understood the difference between a jury trial and bench trial (having his case previously heard by a jury). Thus, the record reflects not only the subsequent ratification of the bench trial by written waiver, but also an informed acquiescence to the waiver before and during trial.

B. THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW SUFFICIENTLY ADDRESS EACH ELEMENT OF THE CRIME OF POSSESSION OF A STOLEN MOTOR VEHICLE.

1. Standard of review.

Following a bench trial, appellate review is limited to determining whether substantial evidence supports the challenged findings of fact and, if so, whether the findings of fact support the conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). Unchallenged findings of fact are verities on appeal.¹¹ *Id.* at 106.

¹¹ The defendant does not directly attack the sufficiency of the evidence, but rather, attacks the sufficiency of the trial court's findings of fact and conclusions of law. If the defendant directly attacked the sufficiency of the evidence, the defendant would have to "admit the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Substantial evidence exists when it is enough “to persuade a fair-minded person of the truth of the stated premise.” *State v. Russell*, 180 Wn.2d 860, 866-67, 330 P.3d 151 (2014). Stated differently, substantial evidence is “a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Deference is given to the trier of fact who resolves conflicting testimony, evaluates witness credibility and decides the persuasiveness of material evidence. *State v. Carver*, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

The court reviews challenges to a trial court’s conclusions of law de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008).

2. The trial court’s findings of facts are supported by substantial evidence.

The defendant’s primary assignment of error claims that the trial court’s findings of fact and conclusions of law are insufficient because those findings and conclusions fail to specify “which facts supported the court’s conclusion of law regarding the essential element of knowledge.” Appellant’s Br. at 12. In so claiming, the defendant relies heavily on *State v. Heffner*, 126 Wn. App. 803, 110 P.3d 219 (2005) and *State v. Banks*, 149 Wn.2d 38, 65 P.3d 1198 (2003). Appellant’s Br. at 11-12.

CrR 6.1(d) states, in pertinent part: “In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated.” Following a bench trial, findings of fact and conclusions of law must address each element of the crime separately, and each conclusion of law must be supported by a factual basis. *Banks*, 149 Wn.2d at 43 (citing *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)). The findings must expressly indicate that an element has been met. *Banks*, 149 Wn.2d at 43.

In this case, the trial court properly entered written findings of fact and conclusions of law. CP 26-31.¹² Nothing in *Banks*, *Heffner*, or *Head* requires the trial court to specify which findings of fact correspond to a particular conclusion of law. Such a policy would be onerous, as specific facts could reasonably support more than one conclusion of law. What is important, is that the trial court document the findings of fact it has made, after weighing the evidence, and determining witness credibility, such that

¹² This Court has affirmed a trial court’s written findings of fact and conclusions of law where the written findings and conclusions were significantly less detailed than those entered in this case. *See, e.g., State v. Caldwell*, 2018WL446223, 2 Wn. App. 2d 1009 (2018) (Unpublished Opinion (pursuant to GR 14.1, a party may cite unpublished opinions filed on or after March 1, 2013; such opinions have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate)).

review of those facts for support in the record may be had. Similarly, with regard to conclusions of law, it is only necessary for the trial court to express its conclusions, that each element of the crime was proved beyond a reasonable doubt.

Even if this Court were to find the manner in which the trial court entered its written findings of fact and conclusions of law to be insufficient because the court did not expressly enumerate which findings of fact led the court to make a particular conclusion of law, the court's findings and conclusions are subject to harmless error analysis. *Banks*, 149 Wn.2d at 43-44. "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred... A reasonable probability exists when confidence in the outcome of the trial is undermined." *Id.* at 44.

In *Banks*, findings following a bench trial failed to address whether the defendant had "knowingly" possessed a firearm, a necessary element of unlawfully possessing it. Because it was clear on review of the record that "the trial court took [the defendant]'s knowledge into account," the court explained there was "no reasonable probability that the outcome would differ if ... the court had entered an express finding on knowledge." *Id.* at 46. Because the error was harmless, the court affirmed the conviction and did not remand. *Id.* at 47.

As discussed below, the evidence was sufficient for the trial court to determine that Mr. Dunbar had knowledge the Suburban was stolen, and, assuming more specific findings of fact were necessary, the entry of such findings would not yield a different result. Furthermore, the trial court entered a conclusion of law expressly concluding that the defendant had knowledge that the Suburban was stolen and was aware that neither he nor his passengers were the true owner or person entitled to the Suburban.¹³ CP 31 (CL B and C). In this regard, the trial court *did* separately address the requirement that the defendant had “knowledge” that the vehicle was stolen.

3. Discussion of challenged findings of fact.

a. *Finding of fact 16.*

The court found:

Although Myers was unable to get his vehicle through traffic and so was not able to identify the driver, he was convinced that it was Click It’s Suburban and called the Spokane Police Department to report the vehicle stolen.

CP 28.

¹³ On appeal, defendant claims that the trial court “failed to enter any findings of fact or *conclusions of law* that addressed whether Mr. Dunbar knew the Suburban was stolen.” Appellant’s Br. at 11 (emphasis added). This contention is perplexing, considering the trial court’s conclusion of law B, which states “Dunbar possessed the Suburban with knowledge that it had been stolen.” CP 31. This contention is even more perplexing given defendant’s apparent concession that the trial court did enter a conclusion of law determining the defendant knew the Suburban to be stolen, but that the findings of fact did not specify which element of the offense they supported. Appellant’s Br. at 12.

This finding of fact is supported by substantial evidence. Mr. Myers testified that after he left the final dealership lot, after looking for the Suburban, he thought he saw the Suburban stopped at the light at Brown Street and Spokane Falls Boulevard. RP 39. He stated he believed it was Click It's missing Suburban because it had the wheels on it, and a Click It license plate frame. RP 40. He followed the Suburban to see who was driving, but was three cars behind it, and was unable to catch up to it. RP 41. When he was pulled over by the State Trooper for speeding, he told the trooper, he was "pretty sure" he was following the stolen Suburban. RP 41. After being released by the trooper, Mr. Myers returned to the store he managed, and reported the Suburban stolen. RP 42.

Defendant faults the court for its use of the word "convinced" in this finding of fact. Appellant's Br. at 8. However, the trial court was in the best position to determine the credibility of the witness. The trial court had the opportunity to view Mr. Myers' demeanor as he testified. Mr. Myers identified the reasons why he believed the Suburban to be Click Its' missing vehicle – it bore the distinctive wheels and a Click It license plate holder. And, while there may be some difference between the use of the word "believed" or "was convinced," that word choice is ultimately irrelevant to the pertinent question on appeal – whether Mr. Dunbar had knowledge that

the Suburban was stolen at the time he possessed it six weeks later. Any error in the court's word choice is harmless.

b. Finding of fact 22.

The court found:

Cliff's records indicated that it never had the Suburban under its possession, control or in its inventory.

CP 28.

The state agrees that the VIN number provided to Cliff's Auto by subpoena which Cliff's apparently used to conduct a search of its inventory was missing a digit. Notwithstanding that fact, the evidence also demonstrated that Cliff's records (filed alphabetically by purchaser name) indicated that the company had never sold a vehicle, let alone a Suburban, to Mr. Dunbar. RP 81. Furthermore, the recollection of both Mr. Grout and Mr. Dunn indicated that the Suburban was never held for sale, sold, or possessed by Cliff's Auto. These facts were sufficient for the trial court to determine that the Suburban was never in Cliff's inventory, and therefore, could not be sold to Mr. Dunbar, who never purchased a vehicle from Cliff's in any event. The trial court did not err in entering this finding of fact.

c. Finding of fact 27.

The court found:

Thereafter Dunbar admitted he did not have a valid driver's license and could not find ownership documentation or insurance information relative to the Suburban, but told Bart

that he had purchased the vehicle from Cliff's and the ownership paperwork was in the back of the vehicle with other of Dunbar's belongings.

CP 29.

This finding of fact is amply supported by the record. Mr. Dunbar admitted to the Trooper he had a suspended license. RP 171. When asked for his registration, Mr. Dunbar looked through the center console and glove box, and then explained that one of his passengers "may have cleaned the vehicle out and moved the paperwork somewhere else within the vehicle, but he was sure he had it somewhere." RP 172. He told Trooper Bart he had purchased the car from Cliff's Auto. Mr. Dunbar then told Trooper Bart that he had purchased the vehicle from Cliff's Auto and owed a total of \$6,400 in monthly installments. RP 175, 205. Mr. Dunbar was not able to produce insurance information. RP 182.

The trial court did not err in entering this finding of fact.

d. Finding of fact 35.

The court found:

Washington State Patrol Officers Curtis J. Cook, CA Bruner, and Douglas J. Thoet all responded to the scene and assisted Bart by contacting the three passengers, as well as looking for ownership paperwork in the back of the Suburban with the permission and at the direction of Dunbar.

CP 29.

This finding of fact is supported by the record. Trooper Cook and Trooper Thoet testified at trial, along with Trooper Bart. Cook and Thoet testified that they assisted with Bart's investigation. RP 151, 297-99. They testified that Trooper Bruner was also present. RP 297. They testified that they contacted the passengers in Mr. Dunbar's vehicle. RP 151, 156-58. And, lastly, they testified that they searched for ownership paperwork in the Suburban at Mr. Dunbar's direction. RP 151-53, 179-80, 299.

The trial court did not err in entering this finding of fact.

e. Finding of fact 36.

The court found:

No ownership documentation or insurance information was found in the Suburban and eventually it was determined that the Suburban had been reported stolen by Click It in September.

CP 29.

This finding of fact is supported by substantial evidence. Trooper Cook testified he did not locate any ownership information or paperwork tying the Suburban to Mr. Dunbar. RP 153. Trooper Bart testified that, he too, searched for documentation at Mr. Dunbar's direction, to no avail. RP 179-81. Trooper Bart also determined, through radio, that the Suburban had been reported stolen from a car lot called Click It RV in September. RP 176.

The trial court did not err in entering this finding of fact.

f. Finding of fact 40.

The court found:

Brittany Snow (hereinafter “Snow” for ease of the Court with no disrespect intended) was identified as Dunbar’s girlfriend and she came to the location of the Suburban about 3:00 AM to retrieve Dunbar’s belongings, which had been searched with his permission and found to contain no ownership documentation or insurance information relating to the Suburban.

CP 30.

Ms. Snow testified at trial. In October 2016, she and Mr. Dunbar were in a relationship, getting back together during the second week of September 2016. RP 289. Trooper Bart testified Ms. Snow came to the location of the Suburban at about 3:00 a.m. RP 197. She was called to that location to retrieve Mr. Dunbar’s belongings. RP 180-85. And, as discussed above, Trooper Bart searched the belongings while Mr. Dunbar “was kind of pointing [him] where to search” for ownership information, which was never found. RP 180-81.

The trial court did not err in entering this finding of fact.

C. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE EVIDENCE DEMONSTRATED, BEYOND A REASONABLE DOUBT, THAT THE DEFENDANT KNEW THE SUBURBAN WAS STOLEN.

Defendant alleges the trial court’s findings of fact were insufficient to support the trial court’s conclusion that he knew the vehicle he was

driving was stolen. There was more than sufficient evidence presented at trial to support that the court's conclusion of law that the defendant knew the vehicle was stolen.

“[B]are possession of recently stolen property alone is not sufficient to justify a conviction.” *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967) (but evidence was sufficient where the defendant offered unsubstantiated and improbable story that coworker, identified only as “Bill,” loaned him the car while “Bill” was on vacation). Therefore, possession combined with “slight corroborative evidence” may justify a conviction. *State v. Portee*, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946) (quoting 4 Clark A. Nichols, *Applied Evidence Possession of Stolen Property* § 293, at 3664 (1928)). One circumstance that may corroborate the State's claim that a defendant knew property was stolen is if the defendant offers an explanation of how he came to possess the property which a “jury could regard as improbable.” *Portee*, 25 Wn.2d at 254. It is generally held that proof of such possession, explained falsely or unreasonably, or accompanied by other guilty circumstances, is sufficient to carry the case to the jury and to support a conviction.

Here, the trial court set forth in its findings of fact a number of circumstances that support its conclusion that Mr. Dunbar knew the vehicle he was driving was stolen. First and foremost, the defendant gave law

enforcement a false explanation for the disappearance of the chrome wheels that had been on the car at the time the Suburban was stolen. Mr. Dunbar explained that one of the tires had gone flat, and that he replaced that tire with a spare. Then, while the spare was on the Suburban, the other three wheels were stolen off of the Suburban, and the fourth tire was stolen out of the back of the vehicle.

However, this complicated story was patently untrue. Mr. Myers saw an advertisement on Craigslist for the same wheels, and the contact person was Mr. Dunbar's then-girlfriend, Ms. Snow. Ms. Snow indicated that she had placed the wheels for sale on Craigslist, but Mr. Dunbar ultimately sold them to his brother for \$800.

The trial court heard testimony from Detective Steven White that automobile thieves "often switch license plates, change accessories or otherwise alter a vehicle's appearance to avoid detection." CP 30 (FF 46). The switched license plate (belonging to the Yukon), the Cliff's Auto license plate "surround" which had not been in circulation since 1986, the missing chrome wheels (that defendant claimed were stolen but that he actually sold), and the altered grille, are all facts the court used to make its determination that Mr. Dunbar knew the Suburban was stolen.

Furthermore, while the defendant claimed to Trooper Bart that he had purchased the Suburban from Cliff's Auto, he was never able to produce

any paperwork proving ownership, despite directing law enforcement officers where to search for that documentation. Although the defendant has no burden of proof at trial, this documentation was never produced at trial, (despite the fact that his belongings were returned to him via Ms. Snow) and the documentation that *was* produced, which apparently indicated Mr. Dunbar had some sort of business dealings with Cliff's Auto, could not be authenticated by either Mr. Grout or Mr. Dunn. The trial court did not allow admission of this evidence because the defendant failed to demonstrate its authenticity.

Lastly, the defendant reported the Suburban stolen in November of 2016 (at least two weeks after he had been arrested for possessing it). This evidence could reasonably be inferred to be nothing more than an attempt by the defendant to create exculpatory evidence for himself, knowing that he had already been found to be in possession of a stolen car.

Defendant contends that the evidence demonstrates that he was openly using the Suburban and activated its On-Star capabilities, which, in turn, shows that he had no knowledge that the Suburban was stolen. In sufficiency of the evidence review, however, the court must look at the facts in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The trial court considered the contention that Mr. Dunbar's open use, as evidenced, for example, by the activation of the

vehicle's On-Star capabilities, and rejected it. *See, e.g.*, CP 30 (FF 47). Instead, the trial court determined that the defendant's knowledge the vehicle was stolen, and that conclusion was amply supported by the court's findings of fact as discussed above.

Furthermore, the defendant contends that the State failed to demonstrate that Cliff's Auto did not sell Mr. Dunbar the Suburban. Appellant's Br. at 14. Even without regard to any of the evidence pertaining to the VIN number search, however, Mr. Dunn testified, when asked if Cliff's Auto had ever sold a vehicle to Mr. Dunbar, that "in our system [Mr. Dunbar's] name doesn't show up as sold a vehicle to and under sold anything old like old deals, nothing." This evidence alone is sufficient, without regard to the VIN number search for the court, to determine that Mr. Dunbar never purchased a vehicle, including the Suburban, from Cliff's Auto.

The trial court did not err in entering its findings of fact, conclusions of law, or its verdict finding Mr. Dunbar guilty of knowingly possessing a stolen motor vehicle.

V. CONCLUSION

The trial court properly entered its findings of fact and conclusions of law. The court's verdict of guilt is supported by its findings of fact and conclusions of law. The trial court did not err in determining that the

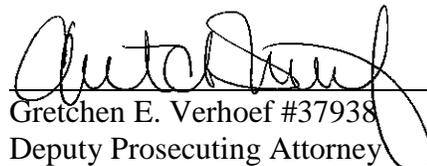
defendant had knowledge that he was in possession of a stolen motor vehicle.

Additionally, any error with regard to the defendant's waiver of a jury trial is unpreserved, was not prejudicial (and therefore, not manifest) and was, in any event, invited error. Furthermore, the record reflects an informed acquiescence to the waiver of jury trial and, ultimately, a written waiver ratifying that decision.

For these reasons, the State respectfully requests this Court affirm the lower court's verdict and judgment.

Dated this 16 day of July, 2018.

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

NO. 35352-4-III

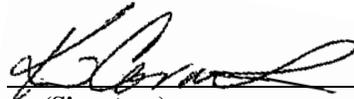
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 16, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kate Benward
wapofficemail@washapp.org

7/16/2018
(Date)

Spokane, WA
(Place)


(Signature)