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NO. 36799-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

VERNON BOGAR,  
Appellant.

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

The Honorable Scott R. Sparks, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion when it admitted a list of stolen items and their estimated replacement values because the state failed to lay sufficient foundation to admit the list as a business record under RCW 5.45.020.
2. The trial court's admission of a list of stolen items and their estimated replacement values violated Vernon's right to confrontation because the list was produced in anticipation of a future prosecution and Vernon never had an opportunity to cross-examine the records custodian who produced it.
3. Vernon received ineffective assistance of counsel when his trial counsel failed to object to the admission of the state's list of stolen items on hearsay grounds when the list contains multiple instances of written hearsay that are crucial to proving the elements of theft in the first degree.

Issues Presented on Appeal

1. Did the trial court abuse its discretion when it admitted

a list of stolen items and their estimated replacement values and the state failed to lay sufficient foundation to admit the list as a business record under RCW 5.45.020?

2. Did the admission of the list of stolen items and their estimated replacement values violate Vernon's right to confrontation when the list was produced in anticipation of a future prosecution and Vernon never had an opportunity to cross-examine the records custodian who produced it?
3. Did Vernon received ineffective assistance of counsel when his trial counsel failed to object to the admission of the state's list of stolen items on hearsay grounds when the list contains multiple instances of written hearsay that are crucial to proving the elements of theft in the first degree?

B. STATEMENT OF THE CASE

Substantive Facts

The Cle Elum Fish Hatchery consists of several buildings within an outer gate and is owned and operated by the Yakima

Nation. RP 107. The hatchery property contains a main office, a workshop, a feeding facility, an incubation facility, and housing for hatchery employees. RP 55-56. When closed, the outer gate can only be opened with an automatic opener or by entering a numerical code on a keypad. RP 107. The workshop door is also locked and must be opened with a key issued to hatchery employees. RP 108.

On February 21, 2016, Deputy Mark McBride of the Kittitas County Sheriff's Department responded to a reported burglary at the Cle Elum Fish Hatchery. RP 54. Upon arriving at the hatchery, Deputy McBride contacted Andrew Lewis, who identified himself as an employee of the hatchery. RP 55. Mr. Lewis reported that he was working security at the hatchery the night before and had not noticed anything unusual. RP 105.

Mr. Lewis explained that when he returned to work that morning, he noticed that several power tools were missing from the hatchery's workshop and other pieces of equipment were out of their normal place. RP 109. Deputy McBride did not observe any signs of forcible entry into the workshop and Mr. Lewis confirmed that the outer gate and door to the workshop were both locked the

night before. RP 66, 105-08.

Charles Strom is the hatchery's complex manager. RP 171. Charles<sup>1</sup> compiled a list of all the equipment that was missing from the workshop and provided it to Kittitas County detectives. RP 156-57. As detectives attempted to track the property taken from the hatchery workshop, Charles's nephew, Theodore Strom, contacted him about the burglary. RP 162-63, 234. Theodore confessed that he had stolen tools from the workshop on two separate occasions and claimed that brothers Robert and Vernon Bogar were also involved. RP 220-26.

Theodore is a longtime friend of Robert and Vernon Bogar. RP 218-19. Vernon Bogar was a hatchery employee and lived in the employee housing located on hatchery property. RP 106, 128. According to Theodore, he and Robert Bogar decided that they should perform a burglary and Robert suggested that they steal tools from the hatchery's workshop. RP 220-21. Theodore testified that Robert suggested the hatchery because Vernon lived there, knew the security protocols, and had keys to access the workshop. RP 222. Theodore agreed to burglarize the workshop with Robert.

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<sup>1</sup> This case involves two sets of family members who share common last names. We refer to them by their first names solely to avoid confusion. We intend no disrespect.

RP 222.

Theodore testified about two separate burglaries where he and Robert followed identical procedures to gain access to the hatchery. According to Theodore's testimony, he and Robert drove to the hatchery at around 1 or 2 in the morning. RP 229. When they arrived, Robert called Vernon, who provided the gate code over the phone. RP 224. Theodore and Robert drove to Vernon's house and retrieved the workshop keys from him. RP 225. Theodore claimed that Vernon agreed to receive a portion of the proceeds from the burglary at the time he gave them the keys. RP 225-26.

Theodore and Robert drove to the workshop and entered using the key. RP 227. They loaded power tools into their vehicle and then stopped at Vernon's house on the way out to return the keys. RP 227. They stored the stolen items in Robert's garage. RP 228. Theodore testified that he and Robert returned a day or two later and followed the same process to steal another set of power tools. RP 229-232.

Robert testified that he and Theodore carried out the burglaries and that Vernon was not involved. RP 272-75. Robert testified that he knew the gate code at the time and that the

workshop door was unlocked. RP 276-77.

Detectives discovered that Robert pawned some of the items claimed to have been stolen from the hatchery. RP 72. Based on this discovery and Theodore's statements, police attempted to arrest Robert while he was Vernon's house in October of 2016. RP 73-74. When the police arrived, Vernon answered the door and exited the house to speak with them. RP 75.

The police asked if Robert was there. RP 75. Vernon shouted for someone in the back of the house to come out to meet the police. RP 75. When the police mentioned that they were there to arrest Robert, Vernon claimed that Robert was not actually there. RP 76. Vernon turned around and walked back towards the house. RP 78. The police prevented Vernon from returning to his house, explaining they were securing a warrant to enter and arrest Robert. RP 77. When Vernon continued towards the house, police arrested him. RP 78. After Vernon was arrested, Robert emerged from the house and surrendered to police. RP 79.

#### Procedural Facts

The state originally charged Vernon with one count of theft in the first degree, two counts of burglary in the second degree, and

one count of rendering criminal assistance in the second degree. CP 1-2. The state amended the information before trial to add one count of bail jumping based on Vernon's failure to appear for a pretrial court hearing. CP 60-61. Vernon elected to proceed to a jury trial. RP 19. The state later amended the information again to change the rendering criminal assistance charge to obstructing a law enforcement officer during the state's case-in-chief. CP 150-51.

The state also charged Theodore Strom with several felonies but allowed him to plead guilty to one count of burglary second degree and serve 30 days on house arrest as part of an agreement to testify against Vernon. RP 234-35, 253. Robert did not make an agreement with the state and instead pleaded guilty to theft in the first degree, burglary in the second degree, and trafficking in stolen property, resulting in a 15-month prison sentence. RP 271-72.

During the state's case-in-chief, it sought to admit through Charles Strom, a list of items stolen from the hatchery workshop with their estimated value. RP 143-45; Ex. 27. Vernon objected to its admission based on lack of foundation because Charles did not prepare the list himself and did not have personal knowledge of how the hatchery had determined the estimated values:

[PROSECUTOR]: And on that document, it appears that there are figures as to estimated values of the different items. Did you provide that information to law enforcement?

[C. STROM]: No, I didn't.

[PROSECUTOR]: You didn't provide those dollar figures?

[C. STROM]: No. That was done through our Yakima Nation Property and the insurance. As you turn it in, they will give you a value.

[PROSECUTOR]: Did they provide that to you?

[C. STROM]: I'm not sure if I'm understanding your question, but the value that was generated – yeah, they probably gave me a list, you know?

RP 145-46. The trial court refused to admit the list based on this testimony and began to ask Charles questions about the list:

[TRIAL COURT]: Is any of that information that would be exact particular (indiscernible) – would that be something you would have known? Or did all that come from the Yakima Nation Property?

[C. STROM]: That would be probably Yakima Nation Property.

[TRIAL COURT]: All right. So is it a fair assessment that pretty much everything on this list is – was generated by the Yakima Property?

[C. STROM]: Yeah. Well, yeah, what we found was missing and then that property list was then checked out and then passed (indiscernible).

[TRIAL COURT]: Can I ask – so you had an inventory list of things that you thought you should have at your shop?

[C. STROM]: Correct.

[TRIAL COURT]: And then you went through that and checked which ones you did have?

[C. STROM]: Yeah.

[TRIAL COURT]: And then the ones you didn't have, that's – those are the numbers that you told Yakima County and then they generated a report?

[C. STROM]: Yeah. That's how I would assume, I guess.

RP 145, 151, 154-59. Over Vernon's objection, the trial court admitted the list. RP 160.

The jury found Vernon guilty of theft in the first degree, two counts of burglary in the second degree, and bail jumping while acquitting him of obstructing a law enforcement officer. CP 153-57. The trial court sentenced Vernon to a standard range sentence. RP 398. Vernon filed a timely notice of appeal. CP 176.

## C. ARGUMENT

1. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED A LIST OF ITEMS STOLEN FROM THE WORKSHOP AND THEIR ESTIMATED VALUES BECAUSE THE STATE FAILED TO LAY SUFFICIENT FOUNDATION AS TO HOW THOSE VALUES WERE CALCULATED

The trial court admitted a list of items believed to have been

stolen from the hatchery workshop that included a description of each item and its estimated replacement value. RP 152-53; Ex. 27. Defense counsel objected on grounds the state failed to lay a proper foundation. RP 145.

Business records are admissible as evidence. RCW 5.45.020. To establish the foundation for admission as a business record, the evidence (1) must be in record form, (2) be of an act, condition, or event, (3) be made in the regular course of business, (4) be made at or near the time of the fact, condition, or event; and (5) the court must be satisfied that the sources of information, method, and time of preparation justify admitting the evidence. *State v. Fleming*, 155 Wn. App. 489, 499, 228 P.3d 804 (2010) (citing *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990)).

While it is not necessary to introduce a business record through the person who created it, there must be testimony establishing that the witness had custody of the record as a regular part of his work or supervised its creation to admit it into evidence. *Fleming*, 155 Wn. App. at 499 (citing *State v. Iverson*, 126 Wn. App. 329, 337-38, 108 P.3d 799 (2005)). A trial court's decision to admit a document pursuant to RCW 5.45.020 is reviewed for an

abuse of discretion. *Fleming*, 155 Wn. App. at 499 (citing *Ziegler*, 114 Wn.2d at 538).

The trial court admitted a list of items believed to have been stolen from the hatchery workshop that included a description of each item and its estimated replacement value. RP 152-53; Ex. 27. The trial court's decision to admit this list constitutes an abuse of discretion because the State failed to lay sufficient foundation to satisfy the requirements contained in RCW 5.45.020

RCW 5.45.020 provides that "[a] record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." RCW 5.45.020.

The State did not comply with these criteria because it did not establish that the list was made in the regular course of business or that the sources of information, method, and time of preparation justify admitting the evidence. In *State v. Quincy*, 122

Wn. App. 395, 95 P.3d 353 (2004), the defendant was convicted of theft in the first degree for shoplifting merchandise from a Fred Meyer. *Quincy*, 122 Wn. App. at 397-98. To prove the value of the stolen items, the state relied on a computer-generated list of the merchandise and its corresponding value created by scanning the uniform product code (UPC) for each individual item. *Quincy*, 122 Wn. App. at 400.

A loss prevention officer testified that he scanned the UPCs of stolen items any time a theft occurred at the store, and that the store's computer system matched those UPCs to a price from its inventory to provide a value. *Quincy*, 122 Wn. App. at 400. The defendant appealed the trial court's decision to admit the list and the Court of Appeals upheld its admission based on the loss prevention officer's testimony outlining the process by which he or another employee supervised the creation of such a list in every instance of theft at the store. *Quincy*, 122 Wn. App. at 400.

Here, distinguishable from *Quincy*, the record shows that the list of items was not produced in the regular course of business, but rather was produced for the specific purpose of aiding the investigation of the burglary at issue in this case. RP 143-44, 153-

54. The list was produced after the burglary occurred, it only contained items believed to have been stolen during the burglary, and it was provided to the Kittitas County Sheriff's Department. RP 144. Unlike the loss prevention officer in *Quincy*, Charles Strom did not provide any testimony regarding the Yakima Nation's normal procedures for handling theft of its property and had to rely on assumptions about its processes to explain how the list was created. RP 154-59.

The record also fails to show that the sources of information, method, and time of preparation justify admission. The state introduced the list through Charles, who admitted that he did not create the list but testified that he provided information about what was missing to the Yakima Nation and someone else produced the list. RP 144-45, 147-49. Charles's testimony establishes that he has a general understanding of how the list was produced, but it also shows that he does not have personal knowledge of how the values were calculated. In both instances, he describes a process that was "probably" used to determine the values of the items or one that he "assumes" was used. RP 145-46, 154.

The trial court only admitted the list after the state introduced

an inventory list from the Yakima Nation that listed all property housed at the Cle Elum Hatchery and its estimated value. RP 160; Ex. 30. While this inventory list provided a source of the values listed on exhibit 27, the record does not show that Charles was involved in producing the list or determining the values listed on it.

Charles's limited knowledge concerning the alleged value of the stolen items does not contain sufficient information about the method of calculation to justify admission under RCW 5.25.020. The state failed to show that Charles possessed the list of stolen items as a regular part of his work and also failed to demonstrate that he supervised its creation. The individuals responsible for determining the value of Yakima Nation property did not testify at trial, therefore the state was insulated from cross-examination concerning the estimated values.

The record does not contain any testimony about the Yakima Nation business practice for preparing and maintaining or producing similar documents, nor does any witness discuss the regular process for addressing theft at the hatchery. The state's evidence is insufficient to find that the list was made in the regular course of business and therefore it cannot constitute a business

record under RCW 5.45.020.

In sum, the state failed to lay sufficient foundation to admit the list of stolen items on two fronts. First, it failed to provide evidence that list was produced in the regular course of the hatchery's business. This fact alone is sufficient to find that the trial court abused its discretion in admitting the list because showing that the record was produced in the regular course of business is a prerequisite for admission under the business record exception. RCW 5.45.020; *Fleming*, 155 Wn. App. at 499.

Second, the state failed to produce a witness with sufficient knowledge of the information and methods used to prepare the list to justify admission under RCW 5.45.020. Charles did not have custody of the list in the normal course of his duties at the hatchery and did not have personal knowledge of how the Yakima Nation calculated the values listed on it. The state's foundation for admitting the list of stolen items was insufficient and the trial court abused its discretion by admitting it.

The erroneous admission of evidence is reversible error and grounds for a new trial if there is a reasonable probability that the error affected the outcome of the trial. *State v. Bourgeois*, 133

Wn.2d 389, 403, 945 P.2d 1120 (1997) (citing *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

There is a reasonable probability that the trial court admitting the list of stolen items impacted the outcome of Vernon's trial. The information on the list provided the jury with an enumerated list of property alleged to have been stolen and a corresponding monetary value for each item. Ex. 27. The state charged Vernon with theft in the first degree and bore the burden of proving that Vernon was an accomplice to the theft of property exceeding \$5,000 in value. RCW 9A.56.030(1)(a). The list the trial court admitted is the only evidence in the record regarding the value of the items alleged to have been stolen. Thus, the trial court's erroneous admission of the list provided the state with its only evidence of value, an essential element of theft in the first degree. In the absence of this evidence, the outcome of Vernon's trial would likely have been different. This court should reverse his convictions and order a new trial.

2. THE TRIAL COURT'S ADMISSION OF A LIST OF STOLEN ITEMS AND THEIR ESTIMATED REPLACEMENT VALUES VIOLATED VERNON'S RIGHT TO CONFRONTATION BECAUSE THE VALUES CONSTITUTE TESTIMONIAL HEARSAY AND VERNON NEVER HAD AN OPPORTUNITY TO CROSS-EXAMINE THE DECLARANT

The Sixth Amendment guarantees all criminal defendants the right to confront the witnesses against them. U.S. Const. Amend. VI. The admission of testimonial hearsay without the opportunity for cross-examination violates a defendant's right to confrontation. *Fleming*, 155 Wn. App. at 501 (citing *State v. Hopkins*, 134 Wn. App. 780, 790, 142 P.3d 1104 (2006)). Out-of-court statements constitute testimonial hearsay if they are offered to prove the truth of the matter asserted and were "made under circumstances that would lead an objective witness reasonably to believe that the statements would be available for use at a later trial." *Hopkins*, 134 Wn. App. at 790-91 (citing *Crawford v. Washington*, 541 U.S. 36, 51-52, 124 S.Ct. 1354, 158 L. Ed. 2d 177 (2004)).

The circumstances analyzed in *Hopkins* are analogous to those present in this case. In that case, the state charged the

defendant with child rape and child molestation. *Hopkins*, 134 Wn. App. at 784. A nurse practitioner interviewed the alleged victim and produced a report. *Hopkins*, 134 Wn. App. at 784. When the nurse practitioner was unable to testify at trial, her supervising doctor testified in her place based on the nurse practitioner's report. *Hopkins*, 134 Wn. App. at 784.

After the jury found the defendant guilty, he appealed, and the Court of Appeals held that admitting testimony from the supervising doctor in lieu of the nurse practitioner violated the defendant's right to confrontation. *Hopkins*, 134 Wn. App. at 791. The court cited the fact that the nurse practitioner "was aware that her report was relevant to an ongoing legal investigation and could be used prosecutorially" as determinative in holding that the information in her report was testimonial hearsay. *Hopkins*, 134 Wn. App. at 791. After making this determination, the court held that the error violated the defendant's right to confrontation because he never had an opportunity to cross-examine the nurse practitioner. *Hopkins*, 134 Wn. App. at 791.

Here, the state sought to admit the list of stolen items to prove an essential element of theft in the first degree: that the

cumulative value of the items exceeded \$5,000. The list here, like the nurse report in *Hopkins*, constitutes testimonial hearsay because the Yakima Nation, like the nurse, prepared the list in response to the burglary, meaning they were aware it was related to an ongoing investigation and could be used at a later trial. RP 144. *Hopkins*, 134 Wn. App. at 791.

The record demonstrates that Vernon never had an opportunity to cross-examine whoever prepared the list of stolen items. Charles Strom was not personally familiar with the listed values and testified several times that someone from the Yakima Nation compiled the information and produced the list admitted at trial. RP 145-46, 148, 153.

Since the state did not call the person who actually determined the values and produced the list as a witness, Vernon never had an opportunity to cross-examine this individual. The trial court's admission of the list denied Vernon the opportunity to test the accuracy and reliability of the values and the methods used to calculate them. In this way, the trial court denied Vernon the opportunity to confront a witness against him in violation of the Sixth Amendment's Confrontation Clause.

When a trial court admits evidence in violation of the defendant's right to confrontation, the error warrants a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *Hopkins*, 134 Wn. App. at 792 (citing *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)).

“An error is harmless beyond a reasonable doubt if untainted evidence properly admitted at trial was so overwhelming that it necessarily leads to a finding of guilt.” *Hopkins*, 134 Wn. App. at 792 (citing *State v. Thompson*, 151 Wn.2d 793, 808, 92 P.3d 228 (2004)). Here, the untainted evidence fails to establish a comprehensive list, with values, of everything that was stolen. The evidence presented without the list fails to establish the essential elements of theft in the first degree even when viewed in a light most favorable to the state. The error in admitting the state's list of stolen items was not harmless and warrants a new trial.

3. VERNON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL COUNSEL FAILED TO OBJECT TO ADMISSION OF THE LIST OF STOLEN ITEMS ON THE BASIS OF IT BEING INADMISSIBLE HEARSAY

A defendant's right to effective assistance of counsel is constitutionally guaranteed at all “critical stages” of a criminal

proceeding. *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005) (citing *State v. Rupe*, 108 Wn.2d 734, 741, 743 P.2d 210 (1987)). Counsel is considered ineffective if (1) their performance was deficient, and (2) the deficient performance prejudiced the defendant. *In re Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it falls below an "objective standard of reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To prove prejudice, the defendant must demonstrate that there is a reasonable probability the outcome of the proceeding would have been different but for counsel's deficient performance. *Kylo*, 166 Wn.2d at 862 (citing *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988)). A defendant must prove both deficient performance and prejudice to prevail on a claim of ineffective assistance of counsel. *Kylo*, 166 Wn.2d at 862.

A statement is hearsay if it is made outside of court and is offered into evidence to prove the truth of the matter asserted. ER

801(c). The written statements on the list of stolen items constitute hearsay because they were made outside of court and were offered into evidence to prove the replacement cost of each item listed. Despite the fact that the written statements constitute hearsay, trial counsel only objected to its admission based on lack of foundation. RP 145.

Trial counsel's decisions regarding when and how to object typically fall in the category of trial tactics. *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007) (citing *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989)). However, the failure to object can constitute deficient performance when the testimony at issue is central to the state's case. *Johnston*, 143 Wn. App. at 19 (citing *Madison*, 53 Wn. App. at 763). A defendant can show deficient performance by proving that an unmade objection likely would have been sustained if made during trial. *Johnston*, 143 Wn. App. at 19 (citing *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 748, 101 P.3d 1 (2004)).

While Vernon's trial counsel objected to the trial court admitting the list, he limited the scope of his objection to foundation despite the fact that the list contains multiple instances of hearsay

that were highly prejudicial to Vernon's defense. For the reasons outlined previously, a hearsay objection to admitting the list of stolen items would likely have been sustained because the state failed to qualify the list as a business record under RCW 5.45.020. The state did not have any evidence that the Yakima Nation made the list in the regular course of business. The record fails to show that any other exception to the prohibition on hearsay applies.

Since a hearsay objection likely would have been sustained, and the list was damaging to Vernon's case, the failure to object cannot be considered tactical. In *State v. Hendrickson*, 138 Wn. App. 827, 158 P.3d 1257 (2007), the state charged the defendant with identity theft and called a Social Security investigator to testify about his interviews with the victims. *Hendrickson*, 138 Wn. App. at 830.

The investigator's testimony included a hearsay statement where he quoted one of the victims as saying that no one else had permission to possess the victim's social security card. *Hendrickson*, 138 Wn. App. at 832. The defendant's trial counsel failed to object to this testimony and the Court of Appeals held that failing to object constituted deficient performance because the

statement was clearly testimonial hearsay and the victim never testified at trial. *Hendirckson*, 138 Wn. App. at 833. The defendant's trial counsel provided constitutionally deficient performance by failing to preserve his client's right to confrontation. *Hendrickson*, 138 Wn. App. at 833.

Furthermore, the court held that this deficient performance prejudiced the defendant because the statement admitted into evidence was necessary for the jury to convict. *Hendrickson*, 138 Wn. App. at 833. Because there was a reasonable probability that the defendant would have been acquitted had the statement been excluded, the court held that trial counsel's performance affected the outcome of the trial. *Hendrickson*, 138 Wn. App. at 833.

*Hendrickson* is analogous to this case because the written statements on the state's list of stolen items constitute testimonial hearsay and the person who prepared the list never testified at trial. The list was prepared at least in part for the purpose of future prosecution and the information it contains was compiled outside of court. As was the case in *Hendrickson*, a hearsay objection likely would have been sustained and would have preserved Vernon's right to confrontation. Trial counsel provided a deficient

performance by failing to object based on hearsay.

Like in *Hendrickson*, trial counsel's performance here was constitutionally deficient and affected the outcome of Vernon's trial. The list admitted into evidence provided direct evidence of the items alleged to have been stolen and the estimated replacement cost of each one. Ex. 27. This evidence bears directly on the essential elements of theft in the first degree, which include the theft of another person's property with value in excess of \$5,000. RCW 9A.56.030(1)(a).

The record does not contain any other evidence establishing the prices of the items, therefore if Vernon succeeded in having the list excluded from evidence the state would have insufficient admissible evidence to prove the essential elements of theft in the first degree. Trial counsel's performance prejudiced Vernon because it allowed the jury to see crucial evidence related to the most serious charge Vernon was facing. There is a reasonable probability that Vernon would have been acquitted of theft in the first degree had his trial counsel objected to the admission of the list based on it containing hearsay. Trial counsel's performance satisfies both prongs of the *Strickland* standard.

Trial counsel's failure to object to admission of the state's list of stolen items based on it containing hearsay constitutes constitutionally deficient performance. This list contained crucial evidence related to the charge of theft in the first degree in the form of written hearsay. Trial counsel's performance likely affected the outcome of Vernon's trial, therefore this court should reverse his conviction and order a new trial.

#### D. CONCLUSION

The trial court abused its discretion by admitting the list of stolen items pursuant to the business records exception to the hearsay rule and this error had a material effect on the outcome of Vernon's trial. Furthermore, the trial court violated Vernon's right to confrontation by admitting the list without any opportunity to cross-examine the records custodian who produced it. Finally, Vernon received ineffective assistance of counsel when his trial counsel failed to object to the state's list of stolen items based on hearsay. For these reasons, Vernon respectfully requests that this court reverse his convictions and remand his case for a new trial.

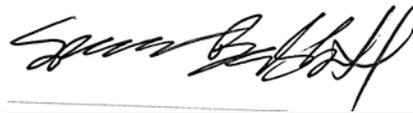
DATED this 4<sup>th</sup> day of December 2019.

Respectfully submitted,



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Attorney for Appellant



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Kittitas County Prosecutor's Office prosecutor@kittitas.wa.us and Vernon Bogar, 411 Spring Chinook Way, Cle Elum, WA 98922 a true copy of the document to which this certificate is affixed on December 4, 2019. Service was made by electronically to the prosecutor and Vernon Bogar by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**LAW OFFICES OF LISE ELLNER**

**December 04, 2019 - 2:36 PM**

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