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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
[Signature]

MOTION FOR DISCRETIONARY REVIEW OF THE
OPINION FILED MAY 30, 2007 FROM THE COURT
OF APPEALS DIVISION II.

CASE #34445-9-II AND #35060-2-II WHICH
ARE CONSOLIDATED. THE PERSONAL RESTRAINT
PETITION FILED BY KEVIN L. HENDRICKSON
PRO-SE, AND THE DEPRO-SE, AND THE DIRECT APPEAL FILED BY
HIS ATTORNEY, SHERI ARNOLD.

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A. IDENTITY OF PETITIONER

KEVIN L. HENDRICKSON DOC #909340

CEDAR CREEK CORRECTION CENTER

OLYMPIC UNIT

LITTLE ROCK, WA. 98556

I COME BEFORE THIS COURT ASKING FOR REVIEW OF THE OPINION ISSUED BY THE COURT OF APPEALS. I ASK FOR REVIEW OF THE DIRECT APPEAL, ADDITIONAL GROUNDS, PERSONAL RESTRAINT PETITION, RESPONSE AND ANSWERING BRIEF, AND CLOSING RESPONSE.

B. ISSUES THAT WERE RAISED

1. PROBABLE CAUSE FOR ARREST
2. PROBABLE CAUSE FOR SEARCH AND SEIZURE ABSENT A WARRANT
3. EXIGENT CIRCUMSTANCES/LACK OF
4. AFFIDAVIT OF PROBABLE CAUSE FOR SEARCH WARRANT
5. LACK OF SUFFICIENT EVIDENCE TO CONVICT
6. ABUSE OF DISCRETION IN DENYING KNAPSTAD MOTION
7. ABUSE OF DISCRETION/FAILURE TO GRANT DIRECTED VERDICT ON ALL COUNTS
8. EFFECTIVE ASSISTANCE OF COUNSEL/LACK OF
9. MISCONDUCT OF PROSECUTOR
10. SUFFICIENT FACTUAL BASIS IN FINDINGS/3.5 & 3.6 HEARING/LACK OF
11. HEARSAY EVIDENCE ABOUT 'LEE JOSEPH FARRELL'
12. COURT OF APPEALS FAILER TO GIVE OPINION ON DISMISSAL OF CASE
13. JOINDER/MISJOINDER
14. DOMINION AND CONTROL
15. CONSTRUCTIVE POSSESSION
16. RULE 404 (B) RULES OF EVIDENCE
17. LOSS AND/OR DESTRUCTION OF EVIDENCE
18. LOSS OF JURISDICTION BY THE TRIAL COURT/CASE DISMISSED
19. CONFLICTING TESTIMONY

20. UNCONSTITUTIONALLY VOID FOR VAGUENESS
21. VIOLATION OF ART.I,sec.22 OF THE WASHINGTON STATE CONSTITUTION
22. MALICIOUS PROSECUTION
23. WRONGFUL CHARGE
24. FRUIT OF THE POISONOUS TREE DOCTRINE

DECISION BY THE COURT OF APPEALS CONCERNING THESE ISSUES WAS:

ON MAY 30,2007,DIVISION II OCURT OF APPEALS ISSUED A PUBLISHED OPINION [IN PART] DISMISSING HENDRICKSON'S PERSONAL RESTRAINT PETITION,STATING THAT HE FAILED TO OFFER ADDITIONAL EVIDENCE TO SUPPORT HIS ALLEGATIONS. (COURT OF APPEALS AT 15-16)

IN ADDITION,THE COURT FAILED TO ISSUE ANY OPINION ON HENDRICKSON'S CLAIM THAT ON MARCH 13,2006,THE TRIAL COURT SIGNED A MOTION AND ORDER DISMISSING THIS ENTIRE CASE,AND HAS YET TO FILE INFORMATION OR INDICTMENT AGAINST HIM TO REGAIN JURISDICTION. AT THIS TIME HENDRICKSON IS HELD UNLAWFULLY WITH NO VALID JUDGEMENT AND SENTENCE TO HOLD HIM.

FURTHERMORE,THE COURT OF APPEALS DENIED DISMISSAL OF COUNTS 12 AND 18,RELYING ON THE DIRECT APPEAL ONLY FOR THE DISMISSAL OF COUNT 16.

I FEEL THERE HAS BEEN ERROR BY THE COURT OF APPEALS AND THEIR DECISION DOES NOT FOLLOW ALONG THE PATH OF THE DECISIONS IN OTHER COURT RULINGS,AND OTHER COURTS IN WASHINGTON STATE AS WELL AS THE UNITED STATES.

C. ISSUES PRESENTED FOR REVIEW

A.) THE COURT OF APPEALS ERRED WHEN DISMISSING HENDRICKSON'S PERSONAL RESTRAINT PETITION BASED ON HIS FAILURE TO OFFER ADDITIONAL EVIDENCE TO SUPPORT HIS ALLEGATIONS. BECAUSE HENDRICKSON PRESENTED CONCRETE EVIDENCE TO SHOW (1) INSUFFICIENT EVIDENCE TO SUPPORT THE INTENT ELEMENT OF SECOND DEGREE IDENTITY THEFT; (2) IMPROPER FAILURE TO CALL A MISTRIAL ON ALL CHARGES AFTER THE JURY WAS UNABLE TO REACH A VERDICT ON COUNT ONE OF THE INFORMATION AND THE TRIAL COURT DIRECTED A VERDICT ON SEVERAL IDENTITY THEFT COUNTS, (3) PREJUDICE TO DEFENDANT CAUSED BY LOSS AND/OR DESTRUCTION OF EVIDENCE, (4) ILLEGAL SEARCH AND SEIZURE BASED ON THE ABSENCE OF A WARRANT BY POLICE TO ENTER PRIVATE PROPERTY AND CONDUCT A SEARCH OF A BOX AND A CARGO TRAILER WHEN THERE WAS CLEARLY NO EXIGENT CIRCUMSTANCES TO DO SO.

B.) THE COURT OF APPEALS FAILED TO GIVE OPINION OR EVEN ACKNOWLEDGE THE ISSUE RAISED IN THE PERSONAL RESTRAINT PETITION AS WELL AS THE EMERGENCY MOTION FOR RELEASE ON THE FACTUAL MATTER THAT THE ENTIRE CASE WAS DISMISSED MARCH 13, 2006, AND HE IS NOW HELD WITH NO VALID JUDGEMENT AND SENTENCE.

D. STATEMENT OF CASE

IN AUGUST OF 2004 I WAS ARRESTED AT MY PLACE OF EMPLOYMENT. THIS WAS DOWNTOWN AUTOBODY LOCATED AT 4340 SOUTH TACOMA WAY IN TACOMA. THE OWNER OF THE BUSINESS IS SCOTT MARTIN.

A TACOMA POLICE OFFICER, OFFICER BUDINICH MADE CONTACT WITH ME AT THE BODY SHOP. HE ASK ME FOR IDENTIFICATION. I PRODUCED MY WASHINGTON STATE DRIVERS LICENSE. HE LOOKED AT IT AND PLACED ME UNDER ARREST.

AFTER PLACING HANDCUFFS ON ME, HE TOOK ME TO THE NEIGHBORING PARKING LOT, ADDRESS 4326 SOUTH TACOMA WAY. (OWNED BY MR. GENE PICKENS) THE OFFICER ASK ME WHAT I KNEW ABOUT A DOUBLE AXLE CARGO TRAILER THAT WAS PARKED ON THE PARKING LOT. I SAID I KNEW NOTHING ABOUT IT. IT WAS NOT MINE, AND IT WAS NOT MY PROPERTY IT WAS PARKED ON. HE ASK ME IF I HAD ANYTHING INSIDE OF IT. I STATED YES, I HAD SOME CLEANING EQUIPMENT STORED INSIDE OF IT. HE STATED THAT I HAD BEEN OBSERVED PLACING A BOX OF TOOLS BY THE DOOR OF THE TRAILER. I STATED "YES", THAT I WAS RETURNING SOME TOOLS THAT I HAD BORROWED. THE TRAILER WAS LOCKED, AND THE GUYS THAT HAD KEYS TO IT WERE NOT AROUND SO I PLACED THEIR TOOLS BY THE DOOR SO THEY WOULD SEE THEM WHEN THEY CAME TO THE LOT.

THE OFFICER ASK ME IF I HAD A KEY TO THE DOOR OF THE TRAILER AND I STATED "NO". THE OFFICER THEN REMOVED MY PERSONAL KEYS FROM MY BELT AND TRIED TO OPEN THE TRAILER DOOR. NONE FIT. I ASK HIM IF HE HAD CONTACTED THE OWNER OF THE PROPERTY, OR IF HE HAD A SEARCH WARRANT TO BE THERE. HE JUST TOLD ME TO SHUTUP. HE TOLD ME I WAS UNDER ARREST FOR TWO WARRANTS OUT OF THURSTON COUNTY. I TOLD HIM THAT WAS NOT POSSIBLE, THAT I HAD NEVER EVEN HAD A TRAFFIC TICKET IN THURSTON COUNTY. HE THEN PUT ME IN THE POLICE CAR AND READ ME MY RIGHTS.

NEXT, HE BROKE INTO THE CARGO TRAILER, WENT INSIDE OF IT, AND HAD GENES TOWING OF TACOMA IMPOUND IT.

AFTER THAT HE WENT OUT TO THE REAR STREET, WASHINGTON STREET, WHERE I HAD PARKED MY TRUCK WHEN I CAME TO WORK THAT MORNING. HE SEARCHED MY TRUCK, THE CAR HAULER ON THE REAR OF IT, AND THE PONTIAC CAR THAT WAS ON THE HAULER. AFTER THE SEARCH, HE HAD GENES TOWING IMPOUND THESE AS WELL.

THE NEXT EVENT WAS TO BE TAKEN TO THE TACOMA JAIL. AT BOOKING I WAS TOLD I HAD A NO-BAIL HOLD IN THURSTON COUNTY FOR TWO COUNTS OF POSSESSION OF STOLEN PROPERTY, AND BAIL JUMPING. I TOLD THE BOOKING DESK THAT I WAS SURE IT WAS A MISTAKE, TO PLEASE CHECK IT OUT. THEY REFUSED. THE OFFICER TOLD THE BOOKING DEPARTMENT TO HOLD ME ON \$10,000.00 BAIL FOR ONE COUNT OF POSSESSION OF STOLEN PROPERTY CONCERNING THE CARGO TRAILER THAT WAS IMPOUNDED FROM MR. PICKENS PROPERTY.

I POSTED THE BAIL ON THE TACOMA CHARGE, AND AFTER 12 DAYS OF BEING IN JAIL I WAS TRANSPORTED TO THURSTON COUNTY. ONCE I MADE IT INTO THE BOOKING AREA AT THURSTON COUNTY, IT WAS DISCOVERED THAT SOME ONE HAD USED MY NAME AND PERSONAL INFORMATION TO GET BOOKED INTO THE JAIL, AND THEN BAIL OUT.

THEY SAID "SORRY ABOUT THAT", GAVE ME SOME PAPERS TO CARRY IN MY WALLET, AND RELEASED ME.

INFORMATION AND PROBABLE CAUSE FOR THIS CASE WERE FILED AUGUST 24, 2004. ONE COUNT OF POSSESSION OF STOLEN PROPERTY.

AFTER MANY DELAYS BY REQUEST OF THE STATE, AN AMENDED INFORMATION WAS FILED ON AUGUST 18, 2005. THIS ADDED 16 COUNTS OF SECOND DEGREE IDENTITY THEFT TO THE INFORMATION. THESE CHARGES STEMMED FROM THE CONTENTS (IN PART) OF THE CARGO TRAILER. IT WAS GARBAGE OUT OF SCRAP CARS, AND AUCTION CARS.

TRIAL STARTED IN DECEMBER OF 2005, AND CONTINUED INTO JANUARY OF 2006. AS THE TRIAL PROGRESSED, THE STATE AND THE TRIAL COURT DISMISSED MOST OF THE IDENTITY THEFT CHARGES. BY THE TIME THE JURY DELIBERATED THEY WERE LEFT WITH COUNT 1, THE PSP CHARGE FOR THE CARGO TRAILER, AND COUNTS 12, 16, AND 18 WHICH WERE FOR IDENTITY THEFT. (THINGS FOUND INSIDE OF THE TRAILER)

WHEN THE JURY RETURNED THEY STATED THEY HAD NO VERDICT ON COUNT 1, THE PSP CHARGE, BUT FOUND THE DEFENDANT GUILTY OF THE 3 IDENTITY THEFT COUNTS.

THE DEFENSE OBJECTS TO THE HUNG JURY. THE DEFENSE'S STANDING IS THAT WITHOUT POSSESSION, CONTROL, OR DOMINION OF THE TRAILER, THERE CANNOT BE A FINDING OF GUILT FOR POSSESSION OF THE CONTENTS.

THE JUDGE DENIES THE OBJECTION.

FURTHER MOTIONS FOR DISMISSAL AND MISTRIAL ARE MADE BY THE DEFENSE. THE STATE REFILED COUNT 1, THE PSP CHARGE, AS COUNT XIX STATING THEY WILL RETRY THIS COUNT.

NO FURTHER ACTION WAS EVER TAKEN BY THE STATE TOWARDS RETRIAL.

ON FEBRUARY 3, 2006, THE DEFENDANT WAS SENTENCED TO 4 YEARS IN PRISON. FURTHER ARGUMENT IS MADE FOR DISMISSAL, MISTRIAL, BAIL PENDING APPEAL, ETC., ALL DENIED BY THE COURT.

NOTICE OF APPEAL WAS FILED ON FEBRUARY 22, 2006.

THE DEFENDANT WAS RETURNED TO THE TRIAL COURT ON MARCH 13, 2006, AND THE STATE BROUGHT FORWARD A MOTION AND ORDER TO DISMISS THE ENTIRE CAUSE NUMBER WITHOUT PREJUDICE, STATING THEY WERE CONSIDERING THE POSSIBILITY OF A RETRIAL. THE MOTION AND ORDER FOR DISMISSAL WERE SIGNED BY THE TRIAL JUDGE IN OPEN COURT AND I WAS PRESENT.

I WAS RETURNED TO COURT APRIL 14, 2006. THE STATE HAS CHANGED THEIR MIND AND THEY WISH TO CHANGE THE MOTION AND ORDER FOR DISMISSAL TO READ "DISMISS COUNT ONE ONLY". THEY ASK THE JUDGE TO REGAIN JURISDICTION IN THE CASE AND CONTINUE TO HOLD HENDRICKSON IN PRISON BY WAY OF A NUNC PRO TUNC ACTION. THE JUDGE USED NUNC PRO TUNC TO CHANGE THE MOTION AND ORDER AND REGAIN JURISDICTION BY BACKDATING THE MOTION AND ORDER TO MARCH 8, 2006.

HENDRICKSON FILED A PERSONAL RESTRAINT PETITION IN THE SUPREME COURT ON APRIL 28, 2006. CASE #78619-4

HENDRICKSON THEN FILED AN EMERGENCY MOTION FOR RELEASE IN THE SUPREME COURT ON MAY 18, 2006.

THIS MOTION RECEIVED THE SAME NUMBER.

AFTER ALL PARTIES RESPONDED, THE SUPREME COURT TRANSFERRED THESE TO THE COURT OF APPEALS DIVISION II. THE COURT OF APPEALS GAVE THESE DOCUMENTS THE NEW NUMBER OF 35060-2-II.

CONSOLIDATION OF CASES WAS SET ON 8-23-2006.

DIRECT APPEAL FILED SEPT. 20, 2006 AS CASE #34445-9-II.

ADDITIONAL GROUNDS FOR APPEAL FILED OCT. 23, 2006.

RESPONSE BRIEF WAS FILED DEC. 4, 2006.

ORAL ARGUMENT WAS ON MARCH 19, 2007.

COURTS OPINION WAS FILED MAY 30, 2007.

ARGUMENT

I. COURT OF APPEALS FAILURE TO GIVE OPINION CONCERNING ISSUE RAISED
IN THE PERSONAL RESTRAINT PETITION AND EMERGENCY MOTION FOR RELEASE.

THE PRP AND THE EMERGENCY MOTION FOR RELEASE WERE FILED IN THE WASHINGTON STATE SUPREME COURT. AFTER ALL PARTIES RESPONDED, THESE WERE TRANSFERRED THE COURT OF APPEALS DIVISION II AND CONSOLIDATED WITH THE DIRECT APPEAL. THEY WERE ASSIGNED NEW NUMBER FROM S.C. # 78619-4 TO COURT OF APPEALS #35060-2-II.

ON MAY 30, 2007, THE COURT OF APPEALS RELEASED THEIR OPINION CONCERNING THE DIRECT APPEAL AND THE PRP.

THEIR OPINION FAILED TO RESPOND TO THE FACT THAT THE SUPERIOR COURT CASE 04-1-04088-6, THAT THIS APPEAL IS FROM, WAS DISMISSED ON MARCH 13, 2006. THE ISSUE WAS RAISED, AND THE ISSUE WAS IGNORED.

THIS ISSUE IS VALID AND RIPE FOR REVIEW.

FACTS OF THIS ISSUE.

ON MARCH 13, 2006, THE STATE BROUGHT FORTH A MOTION AND ORDER TO DISMISS CAUSE # 04-1-04088-6 BEFORE SUPERIOR COURT JUDGE FRANK CUTHBERTSON. THIS WAS SIGNED IN OPEN COURT, DISMISSING THE CASE WITHOUT PREJUDICE.

SEE: Fed.R.Crim.P.29 (a) (rule 29) DISMISSING AN INFORMATION IS EQUIVALENT TO DISMISSING THE CASE BECAUSE WHEN THE INFORMATION IS DISMISSED, NOTHING REMAINS AND THE PROSECUTION IS EFFECTIVELY ENDED. [at 17]

EVEN THOUGH I ENTERED COPIES WITH SUPPORTING DOCUMENTS IN THE PRP AND THE EMERGENCY MOTION, THE ISSUE WAS NOT ADDRESSED IN THE COURT'S OPINION ISSUED MAY 30, 2007.

AFTER THE DISMISSAL OF THE ENTIRE CASE ON MARCH 13, 2006, THE STATE AND COURT ATTEMPTED TO REGAIN JURISDICTION BY PRESENTING A NEW 'AMENDED' MOTION AND ORDER TO DISMISS. THIS MOTION CONTAINED WORDING THAT WAS ALTERED TO READ 'DISMISSAL OF COUNT ONE ONLY'. THE STATE ASK THE JUDGE TO MAKE THIS MOTION EFFECTIVE BY WAY OF 'NUNC PRO TUNC'.

JUDGE FRANK CUTHBERTSON BACKDATED THE REVISED MOTION AND ORDER TO MARCH 8, 2006 AND SIGNED IT IN OPEN COURT. THIS WAS DONE ON APRIL 14, 2006, ONE MONTH AFTER THE ENTIRE CASE HAD BEEN DISMISSED.

IN THE COURT OF APPEALS, DIVISION II, THE COURTS RULING IN THE CASE OF STATE V. CORRADO, 78 Wn.App. 612, 898 P.2d 860 (1995), MADE IT CLEAR THAT ONCE A CASE IS DISMISSED, THE ONLY WAY TO REGAIN JURISDICTION IS BY FILING NEW INFORMATION OR INDICTMENT.

ROYCE A. FERGUSON, JR. WASH. CRIM. PRAC. and PROC., sec. 2218 (1984) TO DISMISS AN INDICTMENT OR INFORMATION WITHOUT PREJUDICE "LEAVES THE MATTER IN THE SAME CONDITION IN WHICH IT WAS BEFORE THE COMMENCEMENT OF THE PROSECUTION".

NUNC PRO TUNC

THE COURTS HAVE CLEARLY STATED THAT A NUNC PRO TUNC ACTION WILL NOT BRING BACK, OR EXTEND, JURISDICTION TO THE COURT.

IN STATE V. CORRADO, THE COURT STATES THAT ONCE A COURT LOSES JURISDICTION, THEY ARE BARRED FROM FURTHER ACTION.

BLACKS LAW DICTIONARY REFERS TO NUNC PRO TUNC AS 'AN ENTRY MADE NOW OF SOMETHING ACTUALLY DONE PREVIOUSLY TO HAVE EFFECT OF FORMER DATE!'. THERE WAS NO COURT ACTION ON MARCH 8, 2006.

ALSO, THE COURT SHOULD NOTE THAT THE ORIGINAL INFORMATION, COUNT ONE, WAS POSSESSION OF STOLEN PROPERTY OF THE CARGO TRAILER.

THIS COUNT ENDED WITH NO VERDICT BY THE JURY. IT WAS REFILED ON JAN. 20, 2006 AS COUNT XIX, SO THERE WAS IN FACT (a) NO COUNT ONE TO DISMISS (b) AND NO FURTHER ACTION WAS EVER TAKEN PERTAINING TO THIS COUNT.

IN STATE V. WATSON, NO. 28993-8-II Wn.App.Div.II (7-29-2003) at [23] "THE PURPOSE OF NUNC PRO TUNC IS NOT TO CHANGE AN ORDER BUT TO CORRECT AN ORDER TO REFLECT WHAT THE COURT INTENDED AT THE TIME".

AGAIN, THERE WAS NO COURT ACTION AT 'THAT TIME'.

WASHINGTON V. ROSENBAUM, 56 Wn.App. 407, 784 P.2d 166 (1989)

IN THE STATE V. ROSENBAUM THE COURT RULED THAT "A NUNC PRO TUNC ORDER PURPORTING TO EXTEND JURISDICTION WAS INVALID". IN THAT CASE, ROSENBAUM CONTENDED THAT A COURT CANNOT REGAIN JURISDICTION ONCE IT IS LOST.

A NUNC PRO TUNC ORDER TO REGAIN JURISDICTION WAS "MANIFESTLY UNREASONABLE". "THE AUTHORITY OF THE COURT IS LIMITED TO RECORDING JUDICIAL ACTION ACTUALLY TAKEN. STATE V. RYAN, 146 Wash. 114, 116-17 261 P.775 (1927)

"ABSENT A PREVIOUSLY WRITTEN ORDER EXTENDING JURISDICTION AN ORDER MUST BE ENTERED TO REVERSE THE TRIAL COURT AND VACATE THE NUNC PRO TUNC ORDER". STATE V. NICHOLSON JR., 925 P.2d 637, 84 Wn.App. 75 (1996) NO. 20686-2-II

II. ARREST

IN THE COURT OF APPEALS OPINION DATED MAY 30, 2007, THEY STATE THERE WAS PROBABLE CAUSE FOR THE ARREST OF KEVIN HENDRICKSON. OTHER COURT OPINIONS AND CASE LAW DO NOT SUPPORT THIS OPINION.

JUST BECAUSE HENDRICKSON WALKED THROUGH A PARKING LOT AND PLACED A BOX OF TOOLS IN THE AREA CLOSE TO A STOLEN CARGO TRAILER IS NOT A CRIME AND WAS NOT ENOUGH FOR AN ARREST.

WONG SUN V. U.S., 371 U.S. 471, 479 (1963) "IT IS BASIC THAT AN ARREST MUST STAND ON FIRMER GROUND THAN MERE SUSPICION".

BROWN V. TEXAS, 443 U.S. 47, 52 (1979) "GENERALIZED FEAR OF CRIMINAL ACTIVITY AND THE PRESENCE OF A SUSPECT IN A HIGH CRIME NEIGHBORHOOD ARE FACTORS THAT, STANDING ALONE, DO NOT JUSTIFY SEIZURE".

STATE V. TURNER, 103 Wn.App. 515, 521, 13 P.3d 234 (2000) "A DEFENDANTS CLOSE PROXIMITY TO AN OBJECT IS INSUFFICIENT ALONE TO ESTABLISH CONSTRUCTIVE POSSESSION".

WARDEN V. HAYDEN, 387 U.S. 294, 307 (1967) THE FOURTH AMENDMENT REQUIRES "A NEXUS... BETWEEN THE ITEM OR PERSON TO BE SEIZED AND CRIMINAL BEHAVIOR".

STATE V. HUGHLETT, 124 Wash. 366, 214 Pac. 841 "AN ARREST MADE WITHOUT A WARRANT, ON SUSPICION THAT A FELONY HAS BEEN COMMITTED, IS ILLEGAL... IT FOLLOWS THAT SEARCH OF THE PERSON ARRESTED IS ILLEGAL UNLESS THE OFFICER IS JUSTIFIED IN MAKING THE ARREST".

III. SEARCH AND SEIZURE

THE COURT OF APPEALS DIVISION II HAS THE OPINION THAT THE OFFICER WAS JUSTIFIED IN ENTERING PRIVATE PROPERTY, SEARCHING THE BOX HENDRICKSON PLACED ON THE PROPERTY, BREAKING INTO THE CARGO TRAILER, AND IMPOUNDING THE TRAILER, ALL ABSENT A WARRANT.

I FEEL THIS CONFLICTS WITH OTHER COURT RULINGS AND THE LAW.

IN KATZ V. UNITED STATES, THE SUPREME COURT STATED THE BASIC CONSTITUTIONAL RULE THAT WARRANTLESS SEARCH "ARE PER SE UNREASONABLE UNDER THE FOURTH AMENDMENT SUBJECT ONLY TO A FEW SPECIFICALLY ESTABLISHED AND WELL-DELINEATED EXCEPTIONS".

HICKS, 480 U.S. 321, 328 (1987) " AN OFFICER LAWFULLY ON THE DEFENDANTS PREMISES MOVED STERIO COMPONENTS, WHICH HE HAD A REASONABLE SUSPICION BUT NOT PROBABLE CAUSE TO BELIEVE WERE STOLEN, TO VIEW THEIR SERIAL NUMBERS. CONCLUDING THAT THIS MOVEMENT WAS A SEARCH, THE COURT HELD THAT THE PLAIN VIEW DOCTRINE COULD NOT JUSTIFY THE SEARCH OR SEIZURE OF THE COMPONENTS BECAUSE THE POLICE LACKED PROBABLE CAUSE TO BELIEVE THEY WERE STOLEN". Id at 324-26, 329.

IN HOLDING THAT PROBABLE CAUSE WAS NECESSARY FOR THE "SEARCH" OF THE COMPONENTS AND THE SUBSEQUENT SEIZURE, THE COURT STATED IT COULD FIND NO REASON THAT AN ITEM IN PLAIN VIEW CAN BE SEIZED ON "LESSER GROUNDS".

THERE WAS NO TESTIMONY GIVEN TO BASE EXIGENT CIRCUMSTANCES THAT WOULD ALLOW A LEGAL SEARCH AND SEIZURE ON MR. PICKENS PROPERTY ABSENT A PROPER SEARCH WARRANT. THE POLICE ACTED IN VIOLATION OF THE FOURTH AMENDMENT AS OUTLINED IN COURT RULINGS OF"

KATZ V. UNITED STATES, 389 U.S. 347 (1967)

JOHNSON V. UNITED STATES, 333 U.S. 10, 13, 14 (1948)

STEAGALD V. U.S., 451 U.S. 204, 212 (1981)

IV. AFFIDAVIT FOR SEARCH WARRANT

THE COURT OF APPEALS DIVISION II GIVES THE OPINION THAT EVEN THOUGH THE AFFIDAVIT FOR SEARCH WARRANT CONTAINED ALL FALSE INFORMATION, IT WAS STILL VALID. THEY CLAIM IT DID NOT INFRINGE ON THE DEFENDANTS RIGHTS BECAUSE A WARRANT WOULD HAVE ISSUED AT SOME POINT IF FOR NO OTHER REASON THAN TO INVENTORY AND LIST THE CONTENTS.

NO INVENTORY LIST HAS EVER BEEN PRESENTED BY THE POLICE OR BY THE STATE,SO IT WOULD MAKE THIS ARGUMENT MUTE.

WHEN I WAS ARRESTED,AND WHEN I WAS AT BOOKING IN THE TACOMA JAIL, I INSISTED TIME AFTER TIME THAT I HAD NEVER BEEN ARRESTED IN THURSTON COUNTY AND THERE HAD TO BE SOME MISTAKE. THE ARRESTING OFFICER,OTHER POLICE,AND BOOKING PERSONEL CHOSE NOT TO PAY ATTENTION TO MY PLEA FOR THEM TO INVESTIGATE FURTHER. THIS NEGLIGENCE RESULTED IN MY (a) BEING HELD ILLEGALLY FOR 12 DAYS DUE TO A MISTAKE IN IDENTITY,AND (b) AN AFFIDAVIT FOR SEARCH WARRANT WITH ALL FALSE INFORMATION TO BE PRESENTED TO A JUDGE,AND GRANTED.

FRANKS 438 U.S. at 165 "INFORMATION SUPPORTING PROBABLE CAUSE MUST ALSO BE TRUTHFUL".

"STATEMENTS THAT ARE KNOWINGLY FALSE OR EXHIBIT DISREGARD FOR THE TRUTH MUST NOT BE USED BY THE MAGISTRATE TO DETERMINE PROBABLE CAUSE".

IN THIS CASE,DISREGARD FOR THE TRUTH RESULTED FROM NEGLIGENCE BY THE POLICE AND BOOKING PERSONEL.

V. LACK OF EVIDENCE TO CONVICT,DOMINION AND CONTROL,JOINDER/MISJOINDER

THE COURT OF APPEALS DIVISION II CONTENTS THERE WAS SUFFICIENT EVIDENCE TO UPHOLD CONVICTION ON TWO COUNTS OF THE INTENT TO COMMIT IDENTITY THEFT. THERE SIMPLY IS NO SUCH EVIDENCE TO SUPPORT ANY CONVICTION.

DURING TRIAL,80% OF THE IDENTITY THEFT CHARGES WERE DISMISSED. THE JURY DELIBERATES WITH COUNT ONE,THE POSSESSION OF STOLEN PROPERTY CHARGE CONCERNING THE LOCKED CARGO TRAILER,AND THREE COUNTS OF INTENT TO DO IDENTITY THEFT. THE JURY RETURNS WITH NO VERDICT ON COUNT ONE, THE POSSESSION CHARGE ON THE TRAILER,BUT GUILTY FOR THE THREE COUNTS OF POSSESSION PERTAINING TO THINGS LOCKEDUP INSIDE OF THE TRAILER.

THIS CANNOT BE.

U.S. V. BELTRAN,UNITED STATES COURT OF APPEALS,NINTH CIRCUIT NO. 04-10099 DECIDED JUNE 14,2005.

"...NOT RESPONSIBLE FOR CONTENTS THAT YOU ARE NOT IN DIRECT CONTROL OF....LACK OF KNOWLEDGE EQUALS LACK OF INTENT TO COMMIT A CRIME... RESULTING IN EVIDENCE INSUFFICIENT TO SUPPORT A CONVICTION".

THE INFORMATION CHARGED HENDRICKSON WITH 'POSSESSION' OF ANOTHER PERSONS PERSONAL INFORMATION WITH THE 'INTENT' TO DO HARM. I HAD NO POSSESSION OF THESE ITEMS.

FURTHERMORE, THE STATE AND THE COURT OF APPEALS BOTH ADMIT THAT COUNT 1 OF THE INFORMATION, THE POSSESSION OF STOLEN PROPERTY, WAS DISMISSED.

THE PROPERTY WHERE THE CARGO TRAILER WAS PARKED BELONGS TO MR. GENE PICKENS OF RENTON WASHINGTON, A FRIEND OF KEVIN HENDRICKSONS, THE DEFENDANT. HENDRICKSON HAD NO LEGAL TIE TO SAID PROPERTY. NO LEASE, NO DOMINION AND CONTROL.

RULE 404 (B) STATE V. LITTLE, 87 Ariz. 295, 350 P.2d 756, 86 2d 1120
"IT IS RECOGNIZED THAT THE PROBATIVE VALUE OF EVIDENCE OF AN OFFENSE IS NECESSARILLY OUTWIGHED BY ITS PREJUDICIAL IMPACT WHERE THERE HAS BEEN AN ACUTIAL OR DISMISSAL OF THE OTHER OFFENSES, AND, ACCORDINGLY, SUCH EVIDENCE IS NEVER TO BE ADMITTED". MOORE V. STATE, 254 Ga 674 333 SE 2d 605, ON REMAND 176 Ga App 314, 336 SE 2d 619

THERE WAS NO TESTIMONY TO SHOW OR PROVE INTENT TO COMMIT A CRIME.

STATE V. MOLES, 130 Wn.App. 461, 123 P.3d 132 (2005) "WHEN THE STATE FAILS TO PROVE THE INTENT FACTOR, CONVICTION MUST BE REVERSED AND VACATED".

ALSO: STATE V. COBELLI, 56 Wn.App. at 922-925

ALSO: STATE V. WHALEN No. 31931-4-II (Dec. 28, 2005)

"EVIDENCE OF TEMPORARY RESIDENCE OR THE MERE PRESENCE OF PERSONAL POSSESSIONS IS, HOWEVER, NOT ENOUGH", FOR PROOF OF DOMINION AND CONTROL, OR POSSESSION. STATE V. PARTIN, 88 Wn.2d at 902

ALSO: STATE V. COLLINS, 76 Wn.App. at 501

STATE V. ALVAREZ....."WE ACCEPT THE COURTS FINDINGS OF FACT AS VERITIES AND GIVE THEM THE BENEFIT OF ALL FAVORABLE INFERENCES, AND DOING SO, THE FEELINGS AND FINDINGS HERE ARE INSUFFICIENT TO CONCLUDE MR. ALVAREZ EXERCISED DOMINION AND CONTROL OVER THE PREMISES. WE REVERSE AND DISMISS THE CONVICITON FOR 2ND DEGREE UNLAWFUL POSSESSION OF A FIREARM". KURTZ, C.J., and SCHLTHEIS, J., CONCUR.

STATE V. CORPENING, NO. 32477-6-II, Wash. App. Div. II (12-28-2005) IN THIS CASE, AS IN MINE, THERE WAS NO EVIDENCE PRESENTED IN TRIAL TO SHOW OR PROVE ANY ELEMENT OF IDENTITY THEFT. "THE TRIAL COURT DID NOT MAKE ANY FINDINGS TO SUPPORT OR PROVE AN ELEMENT OF IDENTITY THEFT". NO FACTUAL EVIDENCE OR PROOF. NO INTENT. NO CRIME.

STATE V. CALLAHAN, 77 Wn.2d, 459 P.2d 400 (1969) "...MUST HAVE DOMINION AND CONTROL OVER THE SURROUNDING CONTAINMENT AREA TO BE RESPONSIBLE FOR THE CONTENTS OF A CONTAINED AREA".

U.S. V. JENKINS, 90 F.3d 814, 820-21 (3rd Cir. 1996) "PROSECUTION FAILED TO PROVE BEYOND A REASONABLE DOUBT DOMINION AND CONTROL OR CONSTRUCTIVE POSSESSION"...REQUIRED REVERSAL OF CONVICTION FOR INTENT TO DISTRIBUTE.

RETROACTIVE MISJOINDER ARISES WHEN PREJUDICE RESULTS FROM PROPER JOINDER LATER RENDERED IMPROPER BY DEVELOPMENTS SUCH AS A COURTS DISMISSAL OF SOME COUNTS FOR LACK OF EVIDENCE OR AN APPELLATE COURTS REVERSAL OF FEWER THAN ALL CONVICTIONS. SINCE 80% OF THE IDENTITY THEFT CHARGES WERE DISMISSED FOR LACK OF EVIDENCE BEFORE THE JURY EVEN DELIBERATED, AND ANOTHER COUNT WAS DISMISSED BY THE COURT OF APPEALS, THE ISSUE IS DIRECTLY ON-POINT.

U.S. V. ADKINSON, 135 F.3d 1363, 1374-1375 (11th Cir. 1998) "RETROACTIVE MISJOINDER BECAUSE CENTRAL CONSPIRACY COUNT IN INDICTMENT DISMISSED AFTER GOVERNMENT CASE, MAKING CONSPIRACY TRIAL UNFAIR AND DENYING DEFENDANTS DUE PROCESS OF LAW".

U.S. V. ALDRICH, 169 F.3d 526, 528-29. " RETROACTIVE MISJOINDER BECAUSE CONVICTIONS ON TWO COUNTS, WHICH WERE VACATED, WERE BASED ON EVIDENCE THAT WAS PREJUDICIAL TO THIRD COUNT".

STATE V. ROTH, 131 Wn.App. 556 (Feb. 7, 2006) Div. III No. 23503-3-III "TO BE HELD ACCOUNTABLE FOR CONTENTS, YOU MUST HAVE POSSESSION OF THE CONTAINER".

IN THE CASE AT HAND, NO PROOF OF DOMINION, CONTROL, OR POSSESSION OVER THE PROPERTY (REAL ESTATE) OR THE CARGO TRAILER WAS EVER ESTABLISHED.

WASHINGTON V. THORPE, 51 Wash.App. 582, 754 P.2d 1050 (1988) at [34]
[T]HE STATE IS BOUND BY THE CHARGE AS MADE, AND MUST PROVE THE
OFFENSE TO HAVE BEEN COMMITTED AS THEY ALLEGED, IN ORDER TO SUSTAIN
A CONVICTION". 1 WARTON, CRIMINAL EVIDENCE, § 92 ; 13 ENCY. EVIDENCE, 640;
STATE V. CLIFFORD, 19 Wash. 464, 53 P. 709.

STATE V. CAROTHERS, 84 Wash. 2d 256, 265, 525 P.2d 731 (1994) "SINCE IT
CANNOT BE ASCERTAINED UPON WHICH OF THE STATES THEORIES THE GENERAL
VERDICT THAT WAS RENDERED IN THIS CASE BASED, THE VERDICT MUST
BE SET ASSIDE".

HERE, IN STATE V. CAROTHERS, THERE WAS QUESTION OF HOW THE VERDICT
THAT WAS REACHED, COULD HAVE BEEN REACHED, AND WHAT IT WAS BASED ON.
IN MY CASE, THE JURY FAILED TO FIND ME GUILTY OF POSSESSION OF THE
CARGO TRAILER, YET FOUND ME GUILTY OF 'POSSESSION OF ANOTHERS PERSONAL
INFORMATION WITH THE INTENT TO COMMIT A CRIME'. THIS DECISION IS
CONFLICTING, AND THE VERDICT CANNOT STAND.

THE COURTS OPINION THAT THERE WAS ANY PROOF OF INTENT TO COMMIT
A CRIME IS UNFOUNDED. NO ONE TESTIFIED AS TO ANY PLAN OR INTENT.
IN THE CASE OF STATE V. GILBERT, THE UPPER COURT RULED THAT TO PROVE
INTENT, YOU MUST MAKE STEPS TOWARDS THAT GOAL. VACATED FOR LACK OF
EVIDENCE TO CONVICT. STATE V. GILBERT, NO. 24100-9-III Wash.App.
Div III (07/06/2006)

THERE WAS LACK OF EVIDENCE TO CONVICT IN THE CASE AT HAND. THE COURT
OF APPEALS DIVISION II SHOULD HAVE VACATED ALL THREE CONVICTIONS,
RATHER THAT JUST ONE.

VI. CONCLUSION

THIS COURT SHOULD ACCEPT REVIEW FOR REASONS INDICATED IN ARGUMENT,
AND GRANT MOTION AND ORDER OF INDIGENCY, AND APPOINT COUNSEL SO THAT
DEFENDANT CAN GET A FAIR REVIEW OF HIS CASE.

K L Hendrickson
6-10-2007

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON

Respondent,

v.

KEVIN LAWRENCE HENDRICKSON,

Appellant.

In re Personal Restraint Petition of

KEVIN LAWRENCE HENDRICKSON,

Petitioner.

No. 34445-9-II
(consolidated with No. 35060-2-II)

PUBLISHED IN PART OPINION

QUINN-BRINTNALL, J. — Kevin Hendrickson is a tow truck driver who stored financial information, some belonging to clients, in a stolen trailer. He appeals his convictions for three counts of second degree identity theft on grounds of improper searches and arrest, ineffective assistance of counsel, insufficient evidence, and several other issues. Because his conviction for Count 16 rests solely on highly prejudicial hearsay testimony, we reverse his conviction for identity theft against Don Noe, affirm his convictions on Counts 12 and 18 in all other respects, and remand to the trial court for further proceedings.

FACTS

While driving through Tacoma, Michael Brutsche spotted his grandfather's trailer, which had been stolen months before, in an unfenced used car lot. He and his cousin, Lee Farro, pulled into the lot and called his grandfather and 911. The two waited for Michael Brutsche's grandfather, Leo Brutsche, and Officer William Budinich to arrive.

When Officer Budinich arrived, Michael Brutsche and Farro told him that, while they were waiting, they saw Hendrickson approach the trailer, put a box by it, and try to open a locked door on the trailer. They said that when Hendrickson saw that he was being watched, he dropped a set of keys into the box and left.

Officer Budinich verified that the trailer rightfully belonged to Leo Brutsche and had been stolen. He arrested Hendrickson, took a keychain from Hendrickson's belt loop, and used the keys to open several locks on the trailer. Leo Brutsche demanded that Budinich open the trailer so that he could see if a concrete cutter that was stolen with the trailer was still inside.

Officer Budinich conducted a quick sweep of the trailer's interior to ensure that no people or dangerous conditions, such as a portable methamphetamine laboratory, were present. He noted that there was no safety risk and that Leo Brutsche's concrete cutter was no longer in his trailer. During the cursory search for the cement cutter, Officer Budinich also saw that the trailer contained a box of vehicle identification number (VIN) plates, papers, and a file cabinet. Officer Budinich impounded the trailer and obtained a warrant to search it. Police searched the trailer and found numerous documents containing financial information.

The State charged Hendrickson with first degree possession of stolen property for the trailer and 16 counts of second degree identity theft. Before trial, Hendrickson challenged Officer

Budinich's initial search of the trailer and the search warrant. He also objected to admitting statements he made to police, but the trial court ruled that all were lawful.

At the close of its case, the State dismissed five of the identity theft counts because key witnesses were unavailable. Hendrickson urged the trial court to direct a verdict in his favor on all counts. The trial court dismissed eight of the remaining identity theft counts because the State failed to prove that Hendrickson possessed the financial information for illegal purposes.¹ The trial court then allowed four charges to go to a jury: first degree possession of stolen property (Count 1); possession of Jaime Salazar-Guerrero's identity information (Count 12); possession of Noe's social security card (Count 16); and possession of a forged social security card with the number of an unknown seven-year-old Florida boy and the name of a different person (Count 18).

The jury did not reach a unanimous verdict on the charge of possession of stolen property, Count 1, and the State dismissed that charge without prejudice. But the jury convicted Hendrickson on the three remaining counts of identity theft.

This appeal requires us to review: (1) the effectiveness of Hendrickson's counsel; (2) Hendrickson's arrest; (3) the search warrant; (4) sufficiency of the evidence; (5) issues raised in Hendrickson's statement of additional grounds (SAG);² and (6) issues raised in Hendrickson's personal restraint petition (PRP), which we consolidated with his direct appeal. In the published

¹ Hendrickson was a tow truck driver and several of the alleged victims testified that they were customers, Hendrickson had permission to have their financial information or to clean out their totaled vehicles, and they were not aware that any financial or identity crimes had been committed against them with the information that Hendrickson possessed.

² RAP 10.10.

portion of this opinion, we reverse for ineffective assistance of counsel. But we analyze the remaining issues without publication because we resolve those issues by following well-established legal principles that have no precedential value. RCW 2.06.040; *State v. Fitzpatrick*, 5 Wn. App. 661, 669, 491 P.2d 262 (1971), *review denied*, 80 Wn.2d 1003 (1972).

ANALYSIS

Ineffective Assistance of Counsel

Hendrickson urges that we reverse his conviction for identity theft of Noe's social security card on the ground of ineffective assistance of counsel. Hendrickson's counsel did not object to hearsay testimony by a criminal investigator that Noe lost his card and that no one had permission to use it. This key testimony is inadmissible hearsay and barred under *Crawford*,³ competent counsel would have objected, and Hendrickson suffered prejudice. Accordingly, we reverse this conviction.

Joe Rogers, a Social Security Administration special agent, testified that he conducts criminal investigations relating to identity theft and misuse of social security cards. He investigated the social security cards "in relationship to the case involving *State v. Kevin Hendrickson*," apparently at police request. 2 Report of Proceedings (RP) at 67. During trial, Special Agent Rogers testified as follows:

[State]: . . . Can you please tell the jurors whether you had any opportunity to attempt to contact the owner of that card, Don Noe?

A I did.

Q And what did you do then?

A I contacted Mr. Noe and spoke to him on two occasions, primarily to ask about his social security card, whether he ever lost it, a little bit of history about it. Mr. Noe explained to me that he was attending Evergreen State College in the Olympia area and sometime in the Spring of 2004, he wasn't

³ *Crawford v. Washington*, 541 U.S. 36, 59, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

sure of the exact date, he did lose his card. He lost his wallet somewhere around the campus and hadn't seen it since. In the fall of 2004, he applied for and received a replacement social security card.

Q And did you ask him whether anyone had permission to have his social security card?

A Yes, I did.

Q And what was his response?

A He stated to me that nobody had his permission to have his social security card, possess it.

2 RP at 68-69. Hendrickson's attorney did not object. Hendrickson now claims this failure to object constituted ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). Prejudice occurs when there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). These statements were hearsay and were offered to prove a material fact: that Noe did not consent to another person possessing or using his social security card.

The State asserts that the testimony fits into the business or government records exceptions to the hearsay rule and is admissible. But the State did not introduce a business record or information contained in a public record but instead asked Rogers to testify from memory about a conversation he had during his criminal investigation. Thus, the testimony is clearly

hearsay and inadmissible under the rules of evidence.

In this case, admitting Rogers's testimony about Noe's statements violated the confrontation clause. The confrontation clause prohibits the admission of testimonial hearsay unless the defendant has an opportunity to cross-examine the declarant. *State v. Shafer*, 156 Wn.2d 381, 388, 128 P.3d 87, *cert. denied*, 127 S. Ct. 553 (2006) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)). A statement is testimonial if a reasonable person in the declarant's position would anticipate that his statement would be used against the accused in investigating or prosecuting a crime. *Shafer*, 156 Wn.2d at 389. Rogers is a government agent who was conducting a criminal investigation when he questioned Noe, so the hearsay was testimonial. And Hendrickson did not have the opportunity to cross-examine Noe because he did not testify. *Crawford* bars this testimony.

Hendrickson's attorney failed to object to this testimony, which was crucial to the State's case because it was the only evidence linking the social security card, Exhibit 1, to the geographic region where Hendrickson lived and was the only evidence that Hendrickson did not have a valid reason to possess the card. We can see no tactical reason for defense counsel's failure to object. And there is a reasonable probability that without this evidence Hendrickson would have been acquitted on this charge. We reverse and remand for retrial of this conviction.⁴

⁴ Hendrickson also frames this issue as one of prosecutorial misconduct for knowingly eliciting inadmissible hearsay testimony. We do not address this claim because we dispose this issue on the ground of ineffective assistance of counsel.

We analyze the remaining issues without publication because we resolve those issues by following well-established legal principles that have no precedential value. RCW 2.06.040; *Fitzpatrick*, 5 Wn. App. at 669. We affirm on those grounds.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Arrest

Hendrickson argues that Officer Budinich did not have probable cause to arrest him and, therefore, the trial court should have suppressed the evidence uncovered due to his arrest. But Hendrickson mischaracterizes the evidence, which establishes probable cause that Hendrickson possessed stolen property in violation of RCW 9A.56.140(1).

Once a trial court establishes the facts, we review de novo the determination of whether those facts constitute probable cause. *See In re Det. of Petersen*, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002); *State v. Nusbaum*, 126 Wn. App. 160, 166-67, 107 P.3d 768 (2005). A police officer has authority to arrest a person without a warrant when there is probable cause to believe that the person committed a felony. Former RCW 10.31.100 (2000). “Probable cause exists when the arresting officer is aware of facts or circumstances, based on reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed.” *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004) (emphasis omitted).

Hendrickson argues that Officer Budinich arrested him “based solely on the fact that Mr. Hendrickson had been seen walking up to the stolen trailer and placing a box on the ground next to the trailer.” Br. of Appellant at 25. The record belies this claim. The evidence presented at

Hendrickson's suppression hearing established that: (1) Hendrickson walked toward the trailer with a box and tried to unlock the trailer's side door; (2) when Hendrickson saw that Michael Brutsche and Farro were watching him, he backed away and left the box and key near the trailer, evincing guilty knowledge; (3) part of the trailer's VIN had been scratched off and its licensing tabs were expired; (4) the trailer was chained and locked and located in a different city from where it was stolen; (5) the trailer was quite large and had been expensively customized by its rightful owner, Leo Brutsche; and (6) Officer Budinich confirmed that the trailer was stolen property by checking the police report and comparing the VIN number with Leo Brutsche's vehicle registration.

These facts are sufficient to cause a reasonable officer to believe that Hendrickson knowingly possessed a stolen trailer worth over \$1,500 and withheld or appropriated the trailer for use by a person other than Leo Brutsche. RCW 9A.56.140-.150; *State v. Thomas*, 150 Wn.2d 821, 875, 83 P.3d 970 (2004).

In his SAG, Hendrickson also alleges that his arrest was premised on an erroneous arrest warrant for a crime committed by a man who stole his identity. But Officer Budinich did not discover that arrest warrant until after he properly arrested Hendrickson for possessing stolen property. The trial court did not err in ruling that Budinich lawfully arrested Hendrickson.

Search Warrant

Hendrickson next asserts that the trial court erred by admitting evidence seized by the police under a defective search warrant. In his direct appeal, he contends that the warrant application contained insufficient facts to support a finding of probable cause. And in his SAG, he adds that the warrant application contained false information about his criminal history because an

identity thief was arrested and convicted while impersonating Hendrickson.

We review conclusions of law in an order pertaining to evidence suppression de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). On appeal, Hendrickson challenges only the legal conclusion that probable cause supported the search warrant, so we review that conclusion de novo.

A search warrant may issue only upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *Thein*, 138 Wn.2d at 140. Accordingly, “probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *Thein*, 138 Wn.2d at 140 (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

A. False Information

The search warrant affidavit contains the following information:

It was later revealed at the jail that Hendrickson’s true name is Robert Christensen. Christensen had a warrant for two counts of possession of stolen property.

The affiant checked criminal history on Robert Christensen and found five arrests for possession of stolen property in addition to arrests for theft, forgery[,] taking a motor vehicle, and trafficking in stolen property.

Ex. 2.

In his SAG and PRP, Hendrickson insists that he is not Christensen but is the victim of Christensen’s impersonation of his identity. A court must void a search warrant if the defendant establishes that the supporting affidavit contains false information, critical to the determination of

probable cause, when the evidence demonstrates that the false information was submitted knowingly and intelligently or with reckless disregard for the truth. *State v. Selander*, 65 Wn. App. 134, 138, 827 P.2d 1090 (1992) (citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)). But Hendrickson did not present this argument to the trial court, does not support his claim on appeal,⁵ and has not demonstrated that Officer Budinich submitted false information “knowingly and intelligently or with reckless disregard for the truth.” *Selander*, 65 Wn. App. at 138.

Even if the police obtained the incorrect criminal history,⁶ the mistake was not “critical to the determination of probable cause” and did not affect the warrant’s validity. *Selander*, 65 Wn. App. at 138.

B. Probable Cause

Hendrickson also claims that the affidavit did not support a finding of probable cause to search the trailer’s contents. The affidavit requested a search for (1) property belonging to Leo Brutsche; (2) documents that may show that Hendrickson had dominion and control of the trailer; and (3) any other item determined to be stolen property when the warrant was executed. The warrant authorized police to search for these items.

The affidavit contained facts sufficient to support probable cause to issue a search warrant for the trailer. We read the statement of probable cause in support of a search warrant request as a whole, in a commonsense, nontechnical manner, and we resolve all doubts in favor of the

⁵ He attached to his PRP an arrest warrant for Christensen and asserted that the warrant proves that he is not Christensen. But standing alone, the document does not support this argument.

⁶ Hendrickson admitted during the suppression hearing that he had convictions for forgery, identity theft, and second degree theft.

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warrant's validity. *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002). The

following facts support probable cause: (1) the trailer was stolen property; (2) Hendrickson put tools by the trailer; (3) Hendrickson first said he did not store things in the trailer, but then admitted that he did; (4) Hendrickson first said he did not have keys to the trailer's locks, but then admitted that he did; (5) some of the keys on Hendrickson's belt loop fit the trailer's locks; (6) when the trailer was stolen, its contents were also stolen; and (7) according to Officer Budinich's best knowledge, Hendrickson had multiple arrests for property crimes, including forgery, theft, taking a motor vehicle without permission, and trafficking in stolen property. These facts support probable cause to believe that Hendrickson may have stored the following items in Leo Brutsche's trailer: (1) Leo Brutsche's property; (2) documents showing that Hendrickson had dominion and control of the trailer; and (3) other stolen property. The warrant was valid.

Further, a search of the trailer was justified even if the police had not obtained a search warrant. The trailer's true owner, Leo Brutsche, consented to the search. Consent is an exception to the warrant requirement. *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). And a true owner's consent overcomes the protests of a person who is unlawfully using stolen property to store unlawfully obtained financial and identity information. Moreover, police would have lawfully searched the trailer after impounding it in order to list the contents. A routine inventory search is also a recognized exception to the warrant requirement. *Hendrickson*, 129 Wn.2d at 74. In short, in addition to a valid search warrant, at least two exceptions to the warrant requirement authorized the search. The trial court properly denied Hendrickson's arguments to suppress the lawfully seized evidence.

Sufficiency Of The Evidence

Hendrickson next argues that the evidence is insufficient to prove that he possessed the identification information “with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1). We disagree.

Hendrickson urges us to reverse the trial court’s denial of his motion to dismiss at the close of the State’s case. But after a verdict, we review the sufficiency of evidence supporting that verdict, not the propriety of the denial of the motion to dismiss. *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996), *review denied*, 131 Wn.2d 1006 (1997). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn from it. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385 (1980). Credibility determinations are for the trier of fact and are not subject to review. *Thomas*, 150 Wn.2d at 875.

A person is guilty of identity theft if he knowingly obtains, possesses, uses, or transfers a means of identification or financial information of another person, living or dead, “with the intent to commit, or to aid or abet, any crime.” RCW 9.35.020(1). Specific criminal intent may be inferred from the defendant’s conduct where it is “plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, the jury could infer intent to commit, aid, or abet a crime with these three financial documents. Count 12 related to a “profile” of Salazar-Guerrero’s financial information. For that count, the State presented Exhibit 4, a tablet of Hendrickson’s hand written notes. One page of

Exhibit 4 contained Salazar-Guerrero's name, address, social security number, wife's name, wife's social security number, and wife's birth date.⁷ And Salazar-Guerrero testified that his car was almost towed but that he claimed the car before it entered the tow truck operator's possession, thus Hendrickson never had legitimate possession of his financial information, and he testified that someone had unlawfully worked using his social security number. This evidence supports a finding or inference that Hendrickson's intention for possessing the documents was a criminal intent.

Count 18 related to Hendrickson's possession of a false social security card bearing the name "Rodrigo Velizco" but the number belonged to a seven-year-old Florida boy with a different name. Clerk's Papers (CP) at 62. The jury could properly infer criminal intent based on the fact that the card was falsified and could be used to commit social security fraud. The evidence was sufficient to support these convictions.⁸

SAG Issues

Hendrickson alleges numerous errors in his SAG. None warrants reversal.

Hendrickson first alleges that the evidence was insufficient to support his identity theft convictions, reasoning that because the jury did not convict him of possession of the stolen trailer, there was insufficient evidence that he had dominion and control over the identity items.

⁷ Other pages of Exhibit 4 contain similar "profiles" of other people, including names, birth dates, addresses, approximate height and weight, racial classification, driver's license and state identification numbers, social security numbers, credit card numbers and expiration dates, bank account numbers and bank names, and a telephone company account number.

⁸ Hendrickson also argues that the prosecutor committed misconduct by charging him with the counts that the trial court later dismissed on a directed verdict. Assuming, without holding that the charge was improper, the court directed a verdict in Hendrickson's favor and he did not suffer prejudice and cannot prevail on this ground. *See State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (ruling that to prove prosecutorial misconduct, the defendant must prove both improper conduct and prejudice).

The jury did not acquit Hendrickson of possession of stolen property but, instead, it failed to decide the issue unanimously. It is unknown whether the jury failed to reach a unanimous decision due to lack of dominion and control or some other reason such as lack of proof that Hendrickson knew the trailer was stolen. *See* RCW 9A.56.140(1). This argument fails.

Second, Hendrickson argues that the police were unlawfully present in the car lot and unlawfully took keys from the box in front of the trailer. But the trial court correctly ruled that Hendrickson had no expectation of privacy in an open lot with cars for public sale on it.

Third, Hendrickson asserts error because a box, chains, keys, and other physical evidence were not entered into evidence during trial. But this physical evidence is not required, and Hendrickson does not show that it would alter the outcome of his case.

Fourth, Hendrickson argues that testimonial evidence was required to prove that he intended to commit a crime with the identity documents. Testimony was not required because the jury may infer this intent from other evidence presented. *Delmarter*, 94 Wn.2d at 638.

Fifth, Hendrickson argues that he suffered malicious prosecution and says, without explanation, that the identity theft statute is void for vagueness. But these arguments do not inform us of the nature and occurrence of alleged errors and thus are unreviewable. RAP 10.10. He also alleges vindictive prosecution because he did not agree to the State's plea bargain. But the record contains no information about a proposed plea bargain and so we have no basis with which to review this claim.

Sixth, Hendrickson contends that the trial court was required to declare a mistrial on all charges when the jury was unable to reach a verdict on the possession of stolen property count or when the trial court granted a directed verdict on the ground that the jury would infer guilt on the

remaining charges from evidence relating to the dismissed charges. Seventh, Hendrickson alleges that the “to convict” instructions were somehow faulty. We note that the instructions track the statute and no error is apparent. The trial court instructed the jury that, “A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.” CP at 51. Juries are presumed to follow a court’s instructions. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Because the trial court properly instructed the jury that it could convict Hendrickson for each count based solely on the evidence of those counts, no error occurred.

Last, Hendrickson argues that the prosecutor commented on the evidence by stating that he “possessed” the identifications. But Hendrickson fails to show where in the record these alleged comments occurred and we have not found them. We cannot review this issue because Hendrickson has not told us the nature and occurrence of the alleged errors. RAP 10.10.

PRP Issues

We also consolidated Hendrickson’s PRP, in which he raises the following issues: (1) insufficient evidence to support the intent element of identity theft; (2) improper failure to call a mistrial on all charges after the jury was unable to reach a verdict on one count and the trial court directed a verdict on several identity theft counts; (3) prosecutorial misconduct, ineffective assistance of counsel, and insufficient evidence because the parties did not admit into evidence the box, keys, and chains; (4) illegal search and seizure of Hendrickson’s personal vehicles; and (5) lack of trial court jurisdiction because insufficient evidence supported his charges. We deny Hendrickson’s petition.

In order to be entitled to relief in a PRP, a petitioner must establish a constitutional error resulting in actual and substantial prejudice or a nonconstitutional error constituting a fundamental defect that inherently results in a complete miscarriage of justice. *In Re Pers. Restraint of Breedlove*, 138 Wn.2d 298, 304 n.1, 979 P.2d 417 (1999) (citing *In Re Pers. Restraint of Cook*, 114 Wn.2d 802, 811, 812, 792 P.2d 506 (1990)). Regardless of whether a petitioner bases his challenges on constitutional or nonconstitutional error, he must support his petition with facts or evidence on which his claims of unlawful restraint are based and not solely on conclusory allegations. *Cook*, 114 Wn.2d at 813-14. He must present evidence that is more than speculation, conjecture, or inadmissible hearsay; and, if his claimed evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say but must present their affidavits or other corroborative evidence. *In Re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086, *cert. denied*, 506 U.S. 958 (1992).

We reviewed the first three allegations through Hendrickson's SAG, and he does not offer additional evidence in his PRP. We are unable to review the fourth issue because Hendrickson does not provide any evidence regarding a search of his personal vehicles. The fifth argument fails because it does not state a cognizable legal argument; a court does not lack jurisdiction simply because the charges are not supported by sufficient evidence to support a conviction. Accordingly, we dismiss Hendrickson's PRP.

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We affirm Hendrickson's convictions on Counts 12 and 18, reverse the conviction on Count 16 for ineffective assistance of counsel, and remand.

QUINN-BRINTNALL, J.

We concur:

BRIDGEWATER, J.

VAN DEREN, A.C.J.