

No. 89647-0

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TERRY EUGENE GAINES,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 43170-0-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 10-1-00422-1
The Honorable Kathryn Nelson, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Terry Eugene Gaines, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division II, case number 43170-0, which was filed on October 29, 2013. (Attached in Appendix B) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the affidavit contained in the complaint for search warrant fail to establish probable cause to believe that Terry Gaines was engaged in criminal conduct, and was it based on mere supposition and personal belief, where the affidavit concluded that Terry Gaines must be knowingly selling stolen Xerox ink sticks because he is selling the ink sticks online for less than retail, and because several other individuals who engaged in the same practice had been arrested (but not yet convicted) of selling stolen ink sticks?
2. Did the State prove all the elements of trafficking in stolen property where the evidence did not support a conclusion that Gaines knew the property was stolen?
3. Did the State prove all the elements of money laundering where the evidence did not support a conclusion that Gaines knew the proceeds were obtained from the sale of stolen property?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Terry Eugene Gaines by Amended Information with eight counts of money laundering (RCW 9A.83.010, .020) and 34 counts of trafficking in stolen property (RCW 9A.82.050). (CP 2682-2705) The State also alleged in each count that the offense was aggravated because it was “a major economic offense or series of offenses” (RCW 9.94A.535(3)(d)). (CP 2682-2705) The State alleged that, over a five year period, Gaines sold printer ink sticks stolen from the Xerox Corporation, and used the proceeds from the sales for personal purchases. (CP 26-31, 2682-2705).

Prior to trial, Gaines moved to suppress evidence collected during a search of his home, arguing that the facts alleged in the State’s request for a search warrant were insufficient to support the issuance of a warrant. (CP 56-66; RP 70-73, 76-77) Gaines also moved to dismiss the charges, pursuant to Knapstad, arguing that the State’s evidence did not establish that the ink sticks were stolen and/or that Gaines knew they were stolen. (CP 111-2681; RP 145-49, 158-59) Both motions were denied. (RP 77-78, 160) Gaines unsuccessfully renewed his motion to dismiss at the conclusion of

the State's case-in-chief. (RP 1021-25)

The jury convicted Gaines on all counts, and found that the "major economic offense" aggravator applied to all of the counts except money laundering charged in count one. (RP 1277-1292; CP 2824-2907) The trial court imposed an exceptional sentence totaling 108 months, and ordered restitution in the amount of 1.8 million dollars. (CP 2949, 2950, 2952-53, 2959-2962; RP 1317-19) Gaines timely appealed. (CP 2931) The Court of Appeals affirmed Gaines' convictions.

B. SUBSTANTIVE FACTS

The Xerox Corporation manufactures a line of wax-like ink sticks for use in its business printers. (RP 865-66) These "Phaser" ink sticks are manufactured in only one location, Wilsonville, Oregon. (RP 200, 862) The Wilsonville plant manufactures approximately 12 million Phaser ink sticks per year. (RP 868) There are tight controls in place to oversee the manufacture and inventory of the ink sticks. (RP 868, 895, 896) If any ink sticks are not up to standard, they are either re-melted and remanufactured, or are transported and disposed of by a professional waste management company. (RP 868, 869-70, 872)

The salable ink sticks are sent off-site to be placed by threes

into pre-printed and branded cardboard boxes. (RP 876-77, 897-98) Xerox then sells the packaged ink sticks to large distributors, who sell the ink to retail vendors for eventual sale to business consumers. (RP 920-21) Xerox does not sell the ink sticks at a discount, and also keeps track of all of their distributors. (RP 925, 926)

A Research and Development team is also located at Xerox's Wilsonville campus. (RP 893) The team works in close proximity to the manufacturing operation. (RP 893) The team uses a great deal of ink in their work, so they have access to a large storage area filled with loose, unpackaged sticks. (RP 893, 897-98, 899)

Keith Cutri worked as a theft and fraud investigator for Xerox corporation. (RP 190-191) In early 2008, Cutri received a tip that Xerox employees stationed at the Microsoft campus in Redmond, Washington, were stealing ink sticks out of a storeroom and reselling them online. (RP 199) He went to several online auction sites, such as eBay, looking for anyone selling large volumes of Xerox ink sticks. (RP 200) He came across one seller doing business as RAM_98405. (RP 200) Cutri monitored RAM_98405's account, and noted a consistent pattern of large volume sales at prices well below the normal retail price. (RP 200, 202, 203)

Cutri also engaged in three transactions with RAM_98405 for

the purchase of Phaser ink sticks, so that he could inspect the product and obtain the address of the seller. (RP 206) Cutri determined that RAM_98405 was the username of Terry Gaines, and the associated address was 3843 South 8th Street in Tacoma, Washington. (RP 199, 207, 333-34)

Cutri purchased 12 sticks for \$233.00, but 12 sticks would usually sell at the retail price of about \$450.00. (RP 203, 209) The ink sticks arrived unwrapped and without the usual retail packaging. (RP 211-12, 214) This indicated to Cutri that RAM_98405 was not a legitimate distributor. (RP 214)

Then, in early 2009, Cutri learned of allegations that Xerox employees at the Wilsonville campus were stealing and selling ink sticks. (RP 204) Because RAM_98405 was still engaged in selling a large volume of ink sticks, Cutri suspected a connection and contacted the Tacoma Police Department to file a complaint. (RP 204, 216)

Tacoma Police Detective Scott Shafner received Cutri's complaint and began an investigation. (RP 332-33, 337) Shafner went to the South 8th Street address and spoke to Gaines. (RP 338-39) Gaines confirmed that RAM_98405 was his eBay and PayPal username, and acknowledged that he sold Xerox ink sticks on eBay.

(RP 339, 340)

Gaines agreed to let Shafner inside the home to see the ink. (RP 340) Shafner noticed three large bins filled with individual blister packs of ink sticks. (RP 340) He estimated that Gaines had about 500 ink sticks. (RP 340) According to Shafner, Gaines became “uncomfortable” when asked how he obtained the ink sticks. (RP 341) Gaines told Shafner that he got them from an online auction site from a user called “angeleyes.” (RP 341)

After this visit, Shafner obtained a search warrant for Gaines' house and his eBay and PayPal records.¹ (RP 346) When Shafner and other officers searched Gaines' house in April of 2009, they seized 328 individual ink sticks. (RP 348, 363, 373) Shafner also told Gaines that he believed the ink had been stolen, and Gaines replied, “Really?” (RP 348)

Shafner sent samples of the seized ink sticks to the Xerox plant in Wilsonville for examination and testing. (RP 353) Testing of the ink confirmed that it was genuine Xerox Phaser ink, manufactured at the Wilsonville, Oregon plant. (RP 853, 858, 859,

¹ PayPal and eBay are jointly owned. (RP 562) Through PayPal, anyone can set up an account to make or receive payments via credit card or wire transfer to or from any other individual or business. (RP 562) PayPal is not a bank, but a PayPal account can be used like a bank account by the account holder. (RP 566-57)

860-862) A visual inspection of the ink sticks indicated that the sticks were all from the same batch, and were manufactured within minutes of each other. (RP 892)

Cutri reviewed the eBay and PayPal records that Shafner obtained, and noticed several payments to a person named Tom Long. (RP 291, 375-76) He ran that name through Xerox's human resources database, and found that Long was employed at Xerox's Wilsonville campus. (RP 220) Long worked in the Research and Development engineering support group, which is responsible for testing Phaser printer products. (RP 220, 893) Long would have had access to ink sticks but would not have had permission to take them off site. (RP 222, 897-98, 899)

Shafner then obtained a search warrant for all of Gaines' financial records. (RP 380) A forensic accountant, William Omatís, reviewed Gaines' Washington Mutual bank, Chase bank, eBay and PayPal records from 2005-2009. (RP 391, 726, 736-39, 743) Omatís did not find any reference to payments for, or purchases of, ink sticks by Gaines. (RP 743, 805) But he did notice a number of payments made to or purchases made on behalf of Tom Long. (RP 799-800, 801-03))

Omatís estimated that Gaines' ink sales totaled approximately

\$900,000 between 2005 and 2009, but Xerox estimated their revenue loss at approximately \$1.8 million. (RP 253-54, 806, 928)

A portion of Gaines' sales were conducted through the internet and eBay and a portion were conducted offline. (RP 747, 752-53, 758-59)

Between 2005 and 2009, Gaines did not report the income or wages earned from selling the ink sticks on his Washington business tax returns or to the State Employment Security Department. (RP 553, 555, 593-94) And there are no notations in Gaines' financial records of payments to the Internal Revenue Service in connection with the ink sale income. (RP 806-08) But Gaines did report some non-ink related income from various sources. (RP 768-70)

As far as expenditures, Omatis noted that Gaines transferred money from his PayPal account into his personal bank accounts, but also made several consumer purchases directly from his PayPal account. (RP 755, 776) During the period between 2005 and 2009, Gaines made significant purchases from Lowes and Home Depot and paid for construction labor; purchased a \$4,000 home security safe; made mortgage payments; purchased several automobiles, including a 2008 Infinity; made investments in stocks and precious metals; and took several vacations and a cruise. (RP 643-44, 717-

18, 721, 776, 777, 791-95)

As the investigation continued, Shafner collected evidence that Gaines was continuing to sell ink on eBay in the months following the first search of his home. (RP 388-39) Shafner executed a second search warrant at Gaines' house in January of 2010. (RP 400) The officers seized computers, an Infinity automobile, a large safe that contained weapons, collectible coins, a large silver bar, and expensive cameras. (RP 415, 487) During the search, Shafner noticed that Gaines' basement appeared to have been recently renovated. (RP 428-29) Gaines was placed under arrest and taken into custody. (RP 40, 617)

Gaines' son, Devon Gaines, testified that Long and his father were very close, like brothers. (RP 678) Long would bring ink sticks to the house, and Gaines sold the sticks on eBay. (RP 667-69) Gaines' daughter, Alexis Gaines, also testified that her father got the ink sticks from Long. (RP 284) She testified that she overheard Gaines telling Long what colors and amounts of ink sticks Long should get for him. (RP 291-92) She also testified that Gaines gave her a box of ink sticks to store at her house after the first search of his home. (RP 297)

Brenda Diettrich dated Gaines for about a year and a half

during the time that Gaines was selling the ink sticks. (RP 636, 638) According to Dietrich, Gaines told her that he obtained the ink from an online auction, and that it was being stored in a barn outside of Portland. (RP 640) Gaines would get the ink from a man named Tom. (TP 640-41) He also told her that Tom got the ink from the trash dumpsters at Xerox. (RP 643)

Gaines did not deny selling the ink sticks, but denied that he knew or suspected that they were stolen. (RP 1103, 1105, 1109) He testified that Long is a good friend who approached him with a business proposition to sell ink that Xerox was throwing away. (RP 1102-1103, 1104)

Gaines first researched asking prices for ink sticks on eBay, and saw that a lot of people were selling ink sticks at below retail. (RP 1103-04, 1106) Gaines then began selling Long's ink sticks on eBay at competitive prices. (RP 1103-04, 1106) He shared the proceeds with Long. (RP 1106, 1162)

Cutri confirmed in his testimony that many people sell Xerox ink sticks on eBay, and that Gaines' prices are consistent with the prices paid to the other sellers. (RP 234-35) It is not uncommon for eBay sales to be below retail prices. (RP 235)

It did not occur to Gaines that the ink sticks were stolen

because he did not think that was something Long would ever do, and because there were so many sellers on eBay doing the same thing. (RP 1106, 1107, 1108, 1109)

V. ARGUMENT & AUTHORITIES

The issues raised by Terry Eugene Gaines' petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. THE TRIAL COURT ERRED BY FAILING TO SUPPRESS EVIDENCE COLLECTED AS A RESULT OF A SEARCH OF GAINES' HOUSE BECAUSE THE SEARCH WARRANT AFFIDAVIT DID NOT SUPPORT A PROBABLE CAUSE DETERMINATION

Detective Shafner submitted a complaint for search warrant to the Pierce County Superior Court. (CP 64-66; a copy of the complaint is attached Appendix A) In the search warrant affidavit, Shafner asserted that:

- Cutri contacted him and informed him that Gaines is selling stolen ink sticks on eBay. Cutri "knows they are stolen because of the discrepancy in how much these ink strips cost on the market and how much he's selling them for on eBay."
- A factory worker at the Wilsonville, Oregon manufacturing plant was arrested for stealing and selling ink sticks.
- Gaines sold a pack of three ink sticks to Cutri for \$233.25, when three ink sticks would generally retail for \$425.96.

- Other individuals are suspected of selling large amounts of stolen ink sticks on eBay at reduced prices, including one individual with a username of "angel955."
- Gaines had a large quantity of ink sticks in his house, and said he bought them through an auction from someone with the username "angeleyes."
- In order for Gaines to make a profit, "he must have bought these for much less than he's selling them for. He is reluctant to tell your affiant exactly where he got the ink and how much he paid for the ink. All of this leads one to believe Terry Gaines knows the Xerox ink in his possession is stolen."

(CP 64-66) Based on this complaint, a search warrant for Gaines' house was issued and executed. (RP 346-47)

Gaines moved to suppress the fruits of the search, arguing that the search warrant affidavit did not support a probable cause determination. (CP 56-66; RP 70-73, 76-77) The trial court orally denied the motion, stating:

That sentence [stating that Cutri knows they are stolen because they are being sold for less than retail value,] in and of itself may not be complete support for the reasonable inference but there are numerous other paragraphs in this search warrant, and those numerous other paragraphs, as explained by the detective, is -- goes to why Mr. Cutri believes the item is stolen. So I am denying the motion to suppress.

(RP 77-78) Contrary to the Court of Appeals' opinion (at 5-8), it is clear that the trial court erred when it denied Gaines' motion to suppress because Detective Shafner's affidavit did not establish

probable cause because it is based on supposition not facts.

Appellate courts generally review the issuance of a search warrant for an abuse of discretion. State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Although deference is given to the probable cause determination of the issuing judge or magistrate, a reviewing trial court's assessment of probable cause is a legal conclusion reviewed de novo. State v. Chamberlin, 161 Wn.2d 30, 40-41, 162 P.3d 389 (2007); State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

The warrant clause of the Fourth Amendment to the United States Constitution and article I, section 7 of our state constitution require that a trial court issue a search warrant only upon on a determination of probable cause. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58 (2002); State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). 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. Cole, 128 Wn.2d at 286; State v. Dalton, 73 Wn. App. 132, 136, 868 P.2d 873 (1994). 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.” State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citing WAYNE R. LAFAVE, SEARCH AND SEIZURE § 3.7(d), at 372 (3d ed.1996)).

An application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate an independent and objective evaluation of the evidence by the issuing magistrate. State v. Smith, 93 Wn.2d 329, 352, 610 P.2d 869 (1980); State v. Helmka, 86 Wn.2d 91, 92-93, 542 P.2d 115 (1975). Furthermore, before a magistrate issues a search warrant, there must be an adequate showing of “circumstances going beyond suspicion and mere personal belief that criminal acts have taken place and that evidence thereof will be found in the premises to be searched.” State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981) (quoting State v. Patterson, 83 Wn.2d 49, 58, 515 P.2d 496 (1973)). And statements regarding common habits or behavior of other suspected or known criminal types cannot form the basis of probable cause. State v. Johnson, 104 Wn. App. 489, 500, 17 P.3d 3 (2001).

A finding of probable cause must be grounded in fact, not supposition. Cole, 128 Wn.2d at 286; Smith, 93 Wn.2d at 352; Helmka, 86 Wn.2d at 92-93. Absent a sufficient basis in fact from

which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law. See, e.g., Smith, 93 Wn.2d at 352 (“if the affidavit or testimony reveals nothing more than a declaration of suspicion and belief, it is legally insufficient”); Helmka, 86 Wn.2d at 92 (“Probable cause cannot be made out by conclusory affidavits.”); Patterson, 83 Wn.2d at 52 (record must show objective criteria going beyond the personal beliefs and suspicions of the applicants for the warrant).

In this case, the known facts presented in the affidavit are that other individuals are suspected of stealing and selling ink sticks, that Gaines has ink sticks in his home, and that Gaines is selling ink sticks at below retail prices. Both Cutri and Shafner then conclude that Gaines must be selling ink sticks that are stolen, and that Gaines must know they are stolen. This conclusion is based on suspicion and belief, and on what other individuals are suspected of doing. It is not based on verified facts regarding Gaines’ actions.

The personal beliefs expressed in Shafner’s affidavit do not establish probable cause that a crime has been committed, let alone support the issuance of a search warrant. If they did, then anyone who sells items on-line for less than retail prices may be subject to a search of their homes and businesses.

All evidence obtained directly or indirectly through the exploitation of an illegal search must be suppressed. Wong Sun v. United States, 371 U.S. 491, 501, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983); State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Therefore, all of the items recovered from Gaines' house during the first search, and any evidence obtained as a direct result of that search, should have been suppressed.

B. THE STATE FAILED TO PROVE ALL THE ELEMENTS OF TRAFFICKING IN STOLEN PROPERTY AND MONEY LAUNDERING BECAUSE THE EVIDENCE DID NOT SUPPORT A CONCLUSION THAT GAINES KNEW THE INK STICKS WERE STOLEN

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a reasonable doubt." City of Tacoma v. Luvone, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201.

To convict Gaines of trafficking in stolen property, the State had to prove Gaines knew the property he sold was stolen. RCW 9A.82.050; RCW 9A.82.010(19); State v. Michielli, 132 Wn.2d 229, 236, 937 P.2d 587 (1997). Likewise, in order to convict Gaines of laundering money, the State had to prove that he conducted financial transactions using proceeds that he knew were obtained from trafficking in stolen property. RCW 9A.83.020; State v. Casey, 81 Wn. App. 524, 531, 915 P.2d 587 (1996).

Tom Long provided the ink sticks to Gaines. (RP 1103, 1105) Gaines told Dietrich, and also testified at trial, that Long told him the ink sticks had been discarded by Xerox. (RP 643, 1103) Gaines testified that he did not think that they were stolen, and did not believe that Long would have stolen them. (RP 1106, 1108)

To establish guilty knowledge, the State relied in part on the fact that the ink sticks were sold at far below retail value. But Gaines' testified that many sellers on eBay were and are selling ink sticks at prices similar to his. (RP 1103-04) This fact was confirmed by Cutri. (RP 234-35)

The State also relied in part on the fact that Gaines did not declare the proceeds of the ink sales on his taxes. But many otherwise legitimate businesses and individuals alike refrain from

declaring income in order to avoid paying taxes, or because they are simply confused by the tax code. (RP 1056-57) Avoiding the payment of taxes on income does not prove that the income is ill-gotten.

The State also presented evidence showing that Xerox did not simply discard unused ink sticks, and that Xerox kept tight controls over its ink stick inventory. (RP 868, 869-70, 872, 895) But this information about the manufacturing process and internal workings of Xerox would not have been known to Gaines, who was not a Xerox employee. Thus, while the State may have proved that the ink sticks were likely stolen, it did not prove that Gaines knew they were stolen.

The State presented a great deal of evidence to show that Long likely stole the ink sticks, and to show that Gaines sold the ink sticks. But the State did not prove, beyond a reasonable doubt, that Gaines knew that the ink sticks he sold were stolen property. Therefore, the State failed to prove an essential element of trafficking in stolen property and of money laundering, and Gaines' convictions should be reversed. The Court of Appeals' opinion to the contrary (at 8-11) is incorrect.

VI. CONCLUSION

The affidavit in the complaint for the search warrant did not

present sufficient facts, as opposed to mere speculation and opinion, to establish probable cause to believe that Gaines was engaged in criminal activity. The trial court should have granted Gaines' motion to suppress. Furthermore, the State failed to prove, beyond a reasonable doubt, that Gaines knew the ink sticks that he sold were stolen property. This Court should grant review and reverse all of Gaines' convictions should be reversed.

DATED: November 27, 2012



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Terry Eugene Gaines

CERTIFICATE OF MAILING

I certify that on 11/27/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Terry Eugene Gaines, DOC#356395, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX A
COMPLAINT FOR SEARCH WARRANT

Affiant verily believes the above evidence is concealed in or about a particular house or place, to-wit:

1. 3843 South 8th Street, Tacoma, Washington, 98405. 3843 South 8th Street, Tacoma, Washington, 98405, is a light-blue colored, one-and-a-half story, wood-framed, single-family dwelling with white trim. It is on the northeast corner of South 8th and Proctor Streets in Tacoma, Washington. It is on the north side of South 8th Street and the front door faces south.

2. All the persons present at the time of warrant execution for the purpose of officer safety and the purpose of identification.

That affiant belief is based upon the following facts and circumstances:

On 3/6/09 your affiant received a complaint from Keith Cutri, the Manager of Corporate Security at Xerox Corporation in Webster, New York. He said a Tacoma resident named Terry Gaines is selling expensive stolen Xerox printer ink on eBay, an online auction site. He knows they are stolen because of the discrepancy in how much these ink strips cost on the market and how much he's selling them for on eBay. Also, Washington County Sheriff's Office in Oregon has completed a couple investigations where one Xerox ink factory worker was arrested for stealing and selling thousands of dollars worth of expensive Xerox ink. Their plant in Wilsonville, Oregon, is the only factory in the world that manufactures this ink. In a related investigation a woman named Angel Gnanu was arrested for selling stolen Xerox ink on eBay. Terry Gaines is the next big seller of Xerox ink on eBay.

When Xerox ink strips are manufactured they are in a 6-strip configuration. When they are boxed up for distribution centers around the world, they are broken into 3-strip configurations. Keith Cutri made three covert purchases on eBay from "ram 98405" (Terry Gaines of Tacoma) and bought back their own ink strips below market value. He provided a photograph of the ink he bought in one covert buy. Gaines was selling it in 3-strip configurations. In each covert buy they bought Xerox Phaser 8400 black, magenta, yellow, and cyan ink. They made covert buys on 5/29/08, 5/30/08, and 6/2/08. Each time Terry Gaines charged \$233.25 (including shipping) for four 3-strip packs of Xerox Phaser 8400 ink. Today that same order on the market is worth \$425.96 to Xerox.

Keith Cutri contacted Detective Scott Cater of Washington County (Oregon) Sheriff's Office. He investigated a former Xerox employee named Ayad Al-Musawi from Aloha, Oregon. He had been working at the Xerox plant in Wilsonville, Oregon. While employed there he stole thousands of dollars worth of Xerox ink strips and sold them online. Detective Scott Cater made the arrest and seized 9,946 ink sticks worth over \$275,000.00. A press released was issued on 4/9/09. (Washington County Sheriff's Office case # 09-503644.)

The next largest eBay seller of Xerox Phaser ink was a person named Angel Gnanu (dob 5/20/1955) who was using the username "angell955." Xerox Corporate Security first became suspicious of "angell955" in June of 2005. (Washington County (Oregon) Sheriff's Office case number 2008-519082.) In one 90 day period she held 12 auctions for Xerox Phaser 8560/8560MFP and Phaser 8500/8550 ink. The least amount of money she made on each of those auctions was \$425.00 and the most was \$510.00. On just those 12 auctions she made \$5,661.55.

On or about 4/30/09 your affiant went to Terry Gaines' address at 3843 S 8th St Tacoma, WA, 98405, where eBay records indicated Gaines lived. Your affiant met Terry Gaines and interviewed him. He said he is selling Xerox Phaser ink on eBay now. He confirmed his online

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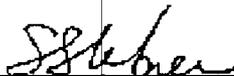
username is "ram_98405." He said he got a "palette of ink at an online auction, maybe craigslist or something, I don't remember." Your affiant reminded him craigslist is not an auction site and he said maybe it was eBay. Your affiant asked who he got them from and he said a user named "angeleyes" sold them to him. Your affiant noted this is similar to "angel1955." Your affiant asked to see the ink and he willingly showed them to your affiant in his house. Your affiant saw ink strips of different configurations in different colors. They looked similar to the ones bought in the covert buys by Keith Cutri. There were approximately 500 of them in several bins in his living room. Your affiant believes they were the same type that "angel1955" was arrested with per the arrest report. Gaines told your affiant that he is out of work and this is partially how he supports himself. He said he sells them for \$220 for 12 (4 packages of 3) (market value is \$425.96, a savings of \$205.96). Based on Detective Cater's investigations and Keith Cutri's complaint, your affiant believed these ink strips were stolen and Terry Gaines knew it. Terry Gaines said he would find the information on who he bought the ink from and call me. Your affiant left a phone number but he never called back. Your affiant left this ink in his house.

On 5/13/09 your affiant searched "ram_98405" on eBay and confirmed Terry Gaines is selling four 3-strip Xerox Phaser 8500/8550 color ink sticks for \$225.00. Market value is \$350.00+tax. (\$125 savings). He lists he has more than 10 available at this price. Terry Gaines is also selling on eBay a 3-strip stick of "8560" cyan for \$60 and magenta "8560" for \$60. (market price = \$99.99 ea.) He lists he has more than 10 available. He is selling a 3-strip stick of black "8560" ink for \$45.00. (market price = \$66.99.) He says he has 9 available.

In order for him to make a profit he must have bought these for much less than he's selling them for. He is reluctant to tell your affiant exactly where he got the ink and how much he paid for the ink. All of this leads one to believe Terry Gaines knows the Xerox ink in his possession is stolen.

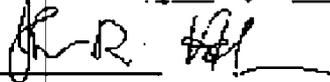
TRAINING AND EXPERIENCE

Your affiant has been employed by the Tacoma Police Department since April 5, 1999. Your affiant has been assigned to the Tacoma Police SWAT Team since August 2003. Your affiant received 66 hours of instruction at SWAT Basic School in Richland, WA, in September 2003. Your affiant was assigned to investigate narcotics traffickers in the Special Investigations Division from January 2004 to March 2006. Your affiant has completed the 80-hour DLA Basic Drug Enforcement Course. Your affiant has completed an 80-hour Basic Undercover Course by Seattle PD. In the course of my duties your affiant has assisted with high-risk narcotics and persons search warrants and locating and processing evidence of all kinds. Your affiant has completed a 40 hour Interviewing & Interrogation course by John E Reid and Associates in May 2008. Your affiant is currently assigned to the Criminal Investigations Division of the Tacoma Police Department as a detective and has been assigned to investigate financial crimes.



Detective Shafer #035

SUBSCRIBED AND SWORN to before me this 14 day of May, 2009.



SUPERIOR COURT JUDGE

PIERCE COUNTY, WA

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APPENDIX B

COURT OF APPEALS OPINION IN STATE V. TERRY E. GAINES, 43170-0-II

FILED
COURT OF APPEALS
DIVISION II

2013 OCT 29 AM 9:47

STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

TERRY EUGENE GAINES,

Appellant.

No. 43170-0-II

UNPUBLISHED OPINION

QUINN-BRINTNALL, P.J. — A jury convicted Terry E. Gaines of multiple counts of first degree trafficking in stolen property and money laundering for selling stolen sticks of Xerox brand ink on eBay. Gaines appeals, arguing that (1) there was not probable cause to support the search warrant and (2) there was insufficient evidence to support the jury's verdicts finding him guilty of first degree trafficking in stolen property and money laundering because the State did not prove he knew the ink sticks were stolen. Both of Gaines's arguments fail, and we affirm.

FACTS

In early 2008, Keith Cutri, the manager of the North American Brand Protection Group at Xerox, began investigating reports of employees stealing Xerox printer ink. As part of the investigation, Cutri compiled a list of "high volume sellers on eBay that are selling well below

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the normally expected price.” 5 Report of Proceedings (RP) at 200. Gaines was identified as one of the sellers on Cutri’s list of “targets.” 5 RP at 200. Cutri monitored Gaines’s eBay sales from 2008 through 2009 and found Gaines continued to consistently sell large amounts of ink at well below retail prices. During his investigation, Cutri performed three covert buys from Gaines.

After performing the covert buys, Cutri contacted Detective Scott Shafner of the Tacoma Police Department to file a complaint. Cutri requested that Shafner follow up with the investigation and determine whether there was a reason to believe that Gaines was selling stolen ink. Shafner confirmed Gaines’s identity and address, then went to speak to Gaines at his home. Gaines voluntarily told Shafner that he was selling ink on eBay and showed Shafner three bins full of ink. Shafner asked Gaines where he got the ink from and Gaines told Shafner he thought he got “it from an online auction site like Craigslist” but could not specifically remember. 6 RP at 341. When Shafner pointed out that Craigslist was not an auction site, Gaines stated he got it from an online seller called “angeleyes” but he could not give Shafner any additional information about where he got the ink. 6 RP at 341.

After the initial contact with Gaines, Detective Shafner obtained a search warrant for Gaines’s house. Shafner seized the ink that Gaines had at his house. Shafner also executed a search warrant for Gaines’s eBay and Paypal records, as well as search warrants for Gaines’s financial records. Shafner also obtained a second search warrant for Gaines’s house. In total, Shafner obtained and executed 13 search warrants related to the Gaines investigation. Gaines was arrested on January 28, 2010.

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The State charged Gaines with 8 counts of money laundering and 34 counts of first degree trafficking in stolen property. Gaines filed a motion to suppress evidence, arguing that the first search warrant was not supported by probable cause. The trial court denied Gaines's motion. Gaines also filed a *Knapstad*¹ motion which the trial court also denied.

At trial, Cutri and Detective Shafner testified to the facts above. The State also introduced evidence about how Gaines obtained the ink. Gaines's daughter, Alexis Gaines, testified that Tom Long, a Xerox employee, was a close friend of Gaines and that Gaines got the ink from Long. Gaines's son, Devon Gaines, also testified that Long was close friends with Gaines and that Gaines got the ink from Long. Brenda Dietrich dated Gaines for approximately a year and a half during the time he was selling ink on eBay. Dietrich testified that at one time Gaines told her that the ink was stored in a barn in Portland and he went to pick it up when he needed more or he bought it off-line or through on-line auctions. Gaines also told her that Long got the ink by dumpster diving at Xerox. Long was employed by Xerox and had access to the type of ink Gaines was selling on eBay. Kelly Timmins, a product operations manager for Xerox, testified that ink would be allowed off the production campus in very limited situations and in small quantities. Gaines testified that he got the ink from Long, and he admitted that he lied to Shafner when Shafner asked him where he got the ink.

The State's forensic accountant, William Omatis, reviewed the records from Gaines's eBay and Paypal accounts, and his financial records. Omatis determined that from June 8, 2005 to May 1, 2009, the total of Gaines's eBay and non-eBay ink sales was approximately \$320,000.

¹ *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

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Omatis also identified \$563,193.40 of ink sales to a group of people in Yorba Linda, California. Omatis identified significant cash withdrawals from Gaines's Paypal and checking accounts. He also identified large mortgage payments, home remodeling costs, and extensive financial investments. In addition, Omatis was able to identify significant payments to or purchases made on behalf of Long.

The jury found Gaines guilty of all charges. The jury also found that the major economic offense aggravating factor applied to all charges. The trial court sentenced Gaines to an exceptional sentence of 108 months total confinement. The trial court also imposed legal financial obligations including \$1.8 million dollars restitution to Xerox. Gaines timely appeals.

ANALYSIS

SEARCH WARRANT

A. WRITTEN FINDINGS

Gaines argues that the trial court's ruling should be reversed because the trial court failed to issue written findings of fact and conclusions of law. Gaines relies on *State v. Head*, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998), for the proposition that an oral ruling has no binding effect unless the trial court has issued a corresponding written order. But *Head* was addressing the requirements of CrR 6.1(d) which applies to bench trials, not suppression hearings. 136 Wn.2d at 622; *see also* CrR 6.1. Suppression hearings are governed by CrR 3.6, and under the plain language of CrR 3.6, written findings of fact and conclusions of law were not required because the trial court did not conduct an evidentiary hearing.

CrR 3.6 sets out the procedures the court is required to follow in a suppression hearing:

(a) **Pleadings.** Motions to suppress physical, oral or identification evidence other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will

be elicited at a hearing and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) **Hearing.** If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

Here, the trial court issued a ruling stating that no evidentiary hearing was necessary because the challenge to the search warrant was based on a challenge to the probable cause affidavit and, therefore, the trial court could decide the issue on the pleadings, warrant, and probable cause statement alone. The trial court's ruling also set forth, in detail, the reasons for denying Gaines's motion to suppress evidence.

Under the plain language of CrR 3.6, written findings of fact and conclusions of law are required only if the trial court holds an evidentiary hearing; if the trial court determines that an evidentiary hearing is unnecessary, the trial court does not have to issue written findings of fact or conclusions of law so long as the reasons an evidentiary hearing is not necessary are set out in writing. Here, the trial court's written order sets out the reasons an evidentiary hearing is not necessary, therefore the trial court complied with the requirements of CrR 3.6 and Gaines's argument that the trial court's decision must be reversed because of the trial court's failure to issue written findings of fact and conclusions of law lacks merit.

B. PROBABLE CAUSE

Gaines argues that the search warrant was not based on probable cause because the probable cause statement was based on "supposition not facts" which did not support the conclusion that "Gaines must be selling ink sticks that are stolen, and that Gaines must know they are stolen." Br. of Appellant at 14, 16. Gaines's argument implies that an officer must have

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proof that a crime has been committed in order to obtain a search warrant, but that is not the proper standard for determining whether a warrant was properly supported by probable cause. The affidavit of probable cause was sufficient to support the issuance of a search warrant, and therefore the trial court did not err by denying Gaines's motion to suppress.

Generally, we review the issuance of a search warrant for an abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). The reviewing court gives great deference to the probable cause determination of the issuing judge or magistrate. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). However, at a suppression hearing, the trial court's assessment of probable cause is a legal conclusion that we review de novo. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

Probable cause for a search warrant "requires a nexus between criminal activity and the item to be seized and between that item and the place to be searched." *Neth*, 165 Wn.2d at 183. There must be an adequate showing of "circumstances going beyond suspicion and mere personal belief that criminal acts have taken place and that evidence thereof will be found in the premises to be searched." *State v. Seagull*, 95 Wn.2d 898, 907, 632 P.2d 44 (1981) (quoting *State v. Patterson*, 83 Wn.2d 49, 58, 515 P.2d 496 (1973)). "General, exploratory searches are unreasonable, unauthorized, and invalid. . . . [G]eneralizations do not substitute for facts and investigation." *State v. Thein*, 138 Wn.2d 133, 149, 977 P.2d 582 (1999).

The affidavit for probable cause was based on the following facts:

1. The corporate security manager of Xerox contacted Detective Shafner and reported that he believed Gaines was selling stolen ink sticks because he was selling large quantities of ink sticks on eBay for significantly below retail price.
2. Two other sellers of Xerox ink sticks had been arrested for selling large amounts of stolen ink on eBay; Gaines was the next largest seller of the

same type of Xerox ink sticks on eBay. One of the arrests was the subject of a public press release.

3. Gaines voluntarily allowed Shafner into his home where Shafner observed approximately 500 ink sticks in Gaines's house. Gaines listed his home address as the address associated with his eBay account.
4. Gaines was reluctant to explain where he got the ink sticks he was selling or how much he paid for them.

Detective Shafner stated that based on the facts contained in the affidavit, he believed that Gaines was selling ink sticks that he knew were stolen and requested a search warrant to search Gaines's house for ink sticks, records related to the purchase and sale of the ink, computer records related to the purchase or sale of ink, and financial records.

Here, Detective Shafner referenced facts beyond mere suspicion and belief. He noted that other people who sold large quantities of Xerox ink on eBay for significantly less than the retail price had been selling stolen ink. This pattern supports the belief that Gaines was also selling stolen ink. Shafner also noted that there had been a public press release stating that one of the other large sellers of ink had been arrested for selling stolen ink, that Gaines could not say how he got the ink, and he could not say whether or how much he paid for the ink. These are specific facts that support the belief that Gaines knew the ink was stolen. Finally, Shafner had seen large amounts of ink sticks in Gaines's house and his home address was the address associated with his eBay account. Therefore, Shafner had reason to believe that Gaines's house would contain evidence that the ink was stolen and that there would be records establishing Gaines was selling the stolen ink.

Shafner's affidavit relied on specific facts that supported both his belief that Gaines was engaged in criminal activity, specifically trafficking in stolen property, and that evidence of that criminal activity would be found in Gaines's house. *Seagull*, 95 Wn.2d at 907. Accordingly,

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probable cause supported the issuance of the search warrant and the trial court did not err by denying Gaines's motion to suppress evidence.

SUFFICIENCY OF THE EVIDENCE

Gaines argues that there is not sufficient evidence to support the jury's finding that he knew the ink sticks were stolen property. Therefore, he argues that the State failed to prove an essential element of first degree trafficking in stolen property; if there is insufficient evidence to support the jury's verdict for first degree trafficking in stolen property. And he argues that there is insufficient evidence to support the jury's verdict for money laundering because an essential element of money laundering is that the defendant knew that the financial transaction involved proceeds from first degree trafficking in stolen property.

Evidence is sufficient if, when viewed in the light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Our role is not to reweigh the evidence or substitute our judgment for that of the jury. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Instead, because the jurors observed the witnesses testify first hand, we defer to the jury's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness and the appropriate weight to be given the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

The essential elements of first degree trafficking in stolen property are (1) the defendant trafficked in stolen property, (2) the defendant acted with the knowledge that the property had

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been stolen, and (3) the acts occurred in Washington. RCW 9A.82.050. The essential elements of money laundering are (1) the defendant conducted a financial transaction, (2) the financial transaction involved the proceeds of the crime of first degree trafficking in stolen property, (3) the defendant knew the property was proceeds of first degree trafficking in stolen property, and (4) the acts occurred in Washington. RCW 9A.83.020.

A person acts knowingly or with knowledge when

(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or

(ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010(b). And the jury was instructed that

[a] person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly is required to establish an element of a crime, the element is also established if a person acts intentionally.

Clerk's Papers at 2768.

Possession of stolen property alone is not sufficient to prove the defendant knew the property was stolen. *State v. Scoby*, 117 Wn.2d 55, 61-62, 810 P.2d 1358, 815 P.2d 1362 (1991). However, possession of stolen property with slight corroborating evidence of knowledge can be sufficient. *Scoby*, 117 Wn.2d at 61-62. "[T]he giving of a false explanation or one that is improbable or is difficult to verify in addition to the possession is sufficient." *State v. Ladely*, 82 Wn.2d 172, 175-76, 509 P.2d 658 (1973) (citing *State v. Beck*, 4 Wn. App. 306, 480 P.2d 803

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(1971); *State v. Hatch*, 4 Wn. App. 691, 483 P.2d 864 (1971); *State v. Douglas*, 71 Wn.2d 303, 428 P.2d 535 (1967)).

Here, the State presented sufficient evidence to prove that the ink was stolen because employees from Xerox testified that Long worked at the sole manufacturing plant for this type of ink, Long worked in a division that had unregulated access to the ink, and that Long did not have permission to take any ink off the manufacturing plant premises. The State also presented a significant amount of testimony establishing that Gaines obtained the ink from Long. Although the State must prove more than that Gaines was in possession of stolen property, the State also provided corroborating evidence of knowledge. *Scoby*, 117 Wn.2d at 61-62. Detective Shafner testified that Gaines lied to him about where he got the ink. Diettrich testified that Gaines told her several different stories about where he got the ink including a barn in Portland, a train wreck, and his friend dumpster diving. By presenting evidence that Gaines lied about where he got the ink and provided several improbable explanations about where he got the ink is sufficient corroborating evidence to support the jury's finding that Gaines knew the ink was stolen. *Ladely*, 82 Wn.2d at 175 (holding possession of a stolen item combined with a false or improbable explanation is sufficient evidence to prove "guilty knowledge on the part of the appellant, that the [item] in question was stolen property").

Gaines makes several arguments about why the State's evidence was not sufficient to support the jury's verdict. However, all of Gaines's arguments must fail because they require us to second guess the jury's decisions on credibility or substitute our judgment for that of the jury's when making reasonable inferences from the evidence. See *Green*, 94 Wn.2d at 221; *Walton*, 64 Wn. App. at 415-16. Accordingly, there was sufficient evidence to support the jury's verdicts finding Gaines guilty of trafficking in stolen property. Because there was sufficient evidence to

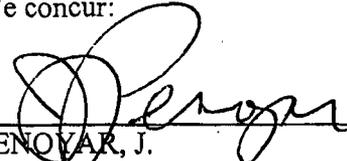
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support the jury's verdicts on the trafficking charges, there was sufficient evidence to support the jury's verdicts on the money laundering charges as well and we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


QUINN-BRINTNALL, P.J.

We concur:


PENOVAR, J.


MAXA, J.

CUNNINGHAM LAW OFFICE

November 27, 2013 - 1:34 PM

Transmittal Letter

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Court of Appeals Case Number: 43170-0

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Letter

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