

NO. 43170-0

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TERRY EUGENE GAINES, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn Nelson

No. 10-1-00422-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether probable cause supports the search warrant?
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B. STATEMENT OF THE CASE.

1. Procedure

On January 27, 2010, the State charged Terry Gaines, defendant, with eight counts of money laundering and 34 counts of trafficking in stolen property.¹ CP 1–25; RCW 9A.93.020; RCW 9A.82.050. The State alleged that each count was aggravated because each offense was a major economic offense or series of offenses pursuant to RCW 9.94A.535(3)(d). CP 1–25.

¹ The information was amended on January 23, 2012, to add defendant's middle name. CP 2682–2705.

On January 26, 2012, the Honorable Kathryn J. Nelson presided over a 3.5 hearing in which the court ruled that statements made by defendant to Tacoma Police Department Detective Scott Shafner were admissible. 1 RP 79 ln. 5–7; 105 ln. 5–9.² CP 2734–2737. Also on January 26, 2012, the court presided over a 3.6 hearing in which the court denied defendant’s motion to suppress evidence obtained during the search of his house. 1 RP 69, ln. 23–24; 78, ln. 4–5.³

On February 1, 2012, the court heard oral argument on defendant’s motion to dismiss the charges pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986). 4 RP 145, ln. 8–12. The court denied the motion. 4 RP 160, ln. 5–10. CP 2733.

Trial began on February 6, 2012, before the Honorable Kathryn J. Nelson. 5 RP 165, ln. 8. On February 22, 2012, the jury returned guilty verdicts for all 42 counts. 15 RP 1277–1292. CP 2824–2906. The jury answered “yes” to the special verdict form for counts 2 through 42, indicating that each respective crime was a major economic offense or series of offenses. 15 RP 1278–1292. CP 2824–2906.

² The State will refer to the verbatim report of proceedings as follows: The nine sequentially paginated volumes referred to as 1–16 will be referred to by the volume number followed by RP.

³ On December 3, 2012, the court found that no evidentiary hearing was required pursuant to CrR 3.6(a), and that, therefore, no Findings of Fact and Conclusions of Law were required pursuant to CrR 3.6(b). CP 2967–2969.

On March 2, 2012, the court sentenced defendant to an exceptional sentence of 108 months on counts two through 42, and sentenced defendant to 68 months on count one, to be served concurrently. 16 RP 1317, ln. 10 –13. This appeal was timely filed on March 2, 2012. CP 2931.

2. Facts

a. Facts in probable cause declaration for search warrant

The following facts are transcribed verbatim from the search warrant written on May 14, 2009 by Tacoma Police Detective Scott Shafner:

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 Gnau 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 coverts [sic] 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 names Ayad Al-Masawi 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 [sic] 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 Gnau (dob 5/20/1955) who was using the username “angel1955.” Xerox Corporate Security first became suspicious of “angel1955” 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 B560/8560MFP 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 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 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 [sic] 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 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.

CP 78-80.

b. Facts at trial

In early 2008, Xerox Corporation (“Xerox”) was investigating a claim that its employees responsible for Microsoft’s printer maintenance in Redmond, WA, were stealing Xerox ink. 5 RP 198–199, ln. 6–22. This led Xerox to identify sellers on eBay that were selling high volumes of Xerox ink at well below the market value. 5 RP 200, ln. 1–4.

Defendant Terry Gaines was identified as one such seller due to the “ridiculously low” price at which he was selling Xerox ink. 5 RP 202, ln. 2–14; 203, ln. 1-4. Defendant was selling Xerox “Phaser” ink, which is a solid, wax-based ink marketed toward business users. 5 RP 200 line 21–25; 201 line 1–6; 10 RP 866, ln. 15–24. Where the market value for Xerox ink was estimated at \$115 for three sticks, defendant was selling 12 sticks for approximately \$233. 5 RP 203, ln. 7–9, 12–20. Thus, defendant was selling Xerox ink at about half of its market value. Defendant’s selling practices raised a “huge red flag” that “would shock the conscience of a reasonable person that understood the economics of how Xerox did business.” 5 RP 203, ln. 23–25.

eBay, aware of the potential for its website to be used to sell stolen merchandise, has a “Verified Rights Owner” (VeRO) program by which brand owners can receive an eBay user’s personal information if suspected of fraudulent activity. 5 RP 196, ln. 17–25, 197, ln. 1–3, 198, ln. 20–22.

Xerox received defendant's information through the VeRO program. 5 RP 200, ln. 5–6.

Xerox conducted a “covert purchase” of ink from defendant to confirm that the ink was genuine Xerox ink; to observe any “anomalies” with the ink; and to confirm defendant's address that was obtained through eBay's VeRO program. 5 RP 206, ln. 11–25, 207, ln. 1–5.

The ink was tested and confirmed to be genuine Xerox Phaser ink, manufactured only at the Xerox plant in Wilsonville, Oregon. 10 RP 862, ln. 14–19. The Xerox plant in Wilsonville, Oregon, is the only place in the world that manufactures Xerox solid ink. 10 RP 909, ln. 19–23. Xerox noted one significant anomaly, that defendant shipped the ink without its usual retail packaging. 5 RP 211, ln. 9–25; 212, ln. 1–4. This deviation was significant because it represented a “clue” that the ink was not sold in the manner that a legitimate distributor would sell the ink. 5 RP 214 ln. 10–16. Xerox confirmed defendant's address. 5 RP 207, ln. 6–8.

Approximately 90% of the ink sold by Xerox is distributed to four major distribution partners. 11 RP 920, ln. 23, 921, ln. 23–35. At most, 10% is sold through the Xerox website. 11 RP 921, ln. 18–22.

When Xerox solid ink sticks are not able to be melted and reused, the ink is either shipped to a “co-generation” facility North of Salem,

Oregon, or to a landfill in Arlington.⁴ 10 RP 869, ln. 7–17. Xerox contracts with a trucking company for ink disposal, whereby the ink is tracked and stored in a locked trailer until it is disposed of at the landfill. 10 RP 869, ln. 18–25, 870, ln. 1–7. Even before the ink is prepared for disposal, there are strict inventory controls during the manufacturing process at the Xerox plant in Wilsonville, Oregon. 10 RP 894, ln. 15–18.

Xerox did not, however, have significant control over its research and development group's ink access. 10 RP 898, ln. 12–21. Xerox employed a man named "Tom Long" in its research and development group. 10 RP 898, ln. 12–21. Tom Long and defendant have known each other for 29 years. 13 RP 1102, ln. 11–21. Tom Long has been "like an Uncle" to defendant's son Devon Gaines, who has known Tom Long "since [he] could remember." 8 RP 678, ln. 14–24.

In March of 2009, Tacoma Police Department Detective Scott Shafner received an email from Xerox's manager of brand protection for North America, describing defendant's activities on eBay. 6 RP 332, ln. 23–25; 333, ln. 1–3, 20–25; 334, ln. 1–12. Detective Shafner visited defendant's house as part of the investigation and was invited inside. 6 RP 340, ln. 7–8. Detective Shafner observed about 500 sticks of ink and defendant confirmed that he was selling ink on eBay. 6 RP 340, ln. 5–6,

⁴ The record is unclear as to which State the city of Arlington is in, but this presumably refers to the landfill in Arlington, Oregon.

21–22. When asked where he obtained the ink, defendant stated that, “I get it from an online auction site like Craigslist,” but then said, “Oh, must have been eBay.” 6 RP 341, ln. 13–14, 17. Defendant then claimed that he obtained the ink from “Angeleyes” but did not have her phone number. 6 RP 341, ln. 18–22; 342, ln. 2–4.

Detective Shafner later returned with a search warrant for the ink inside defendant’s house and informed defendant that he had reason to believe that the ink was stolen. 6 RP 348, ln. 3–9. Although Detective Shafner removed the Xerox ink which was the subject of the search warrant from defendant’s house, defendant continued to sell ink on eBay. 7 RP 388, ln. 8–25; 6 RP 297, ln. 22–24. After police seized the Xerox ink that was at defendant’s house, he chose to store subsequent shipments of ink at his daughter Alexis’s apartment. 6 RP 297, ln. 2–4, 9–11. Defendant periodically visited Alexis’s apartment to pick up ink to sell on eBay, until defendant was arrested at which point he instructed Alexis to get rid of the ink. 6 RP 297, ln. 15–19.

Tom Long shipped ink to defendant from Oregon. 6 RP 290, ln. 9–12. Tom Long would personally deliver “a couple boxes of ink” “maybe once a month.” 8 RP 669, ln. 5–10.

Defendant’s girlfriend in 2008, Brenda Diettrich, claimed that defendant purchased some of the ink from an online auction, but that he also bought some of the ink offline. 8 RP 640, ln. 7–13. She claimed that Tom Long would dumpster dive at Xerox to obtain the ink. 8 RP 643, ln.

11–15. However, defendant testified and admitted that he obtained the ink from Tom Long and that he lied to Detective Shafner about obtaining the ink from “Angeleyes” because he was nervous. 13 RP 1103, ln. 21–25; 13 RP 1157, ln. 2–12.

Defendant claimed that he “can’t believe that Tom would steal from an employer, now or then.” 13 RP 1106, ln. 20–23. Though, defendant agreed that it seemed odd that he was putting a product into commerce that he never had to pay for. 13 RP 1165, ln. 7–11. Defendant agreed that over the several years he was selling ink, he was essentially receiving free money. 13 RP 1165 21–24.

Defendant also stated that he did not feel that it was appropriate for him to pay taxes on his income from selling ink, and that he had no excuse for failing to do so. 13 RP 1165, ln. 25, 1166, ln. 1–8. Defendant several times claimed that he wondered whether his ink selling activity was too good to be true because “the money kept coming in.” 13 RP 1166, ln. 12–19.

Forensic accountant Mr. Bill Omatis testified that defendant made about \$900,000 from selling ink between May, 2005, and June, 2009. 9 RP 806, ln. 22–25. Defendant sent Tom Long payments totaling \$115,959.54 in the form of money or items purchased in his behalf. 9 RP

799, ln. 1–3, 15–17. Defendant made cash withdrawals of \$467,601.16. 9 RP 786, ln. 18–21. Defendant also invested a total of \$82,149 in several different companies, made monthly home mortgage payments totaling \$71,338.35, purchased a new 2008 model Infinity M35 for \$43,454.17, made \$20,900 in purchases at Home Depot and Lowe’s for home improvements, and purchased a security safe for \$4,100. 9 RP 795, ln. 20–25, 796, ln. 1–3; 9 RP 777, ln. 1–2; 9 RP 718, ln. 1–7;⁵ 9 RP 776, ln. 6–8; 9 RP 776, ln. 14–16.

Between April, 2005 and June 2009, defendant received a total of \$182,588.98 from non-ink related sources.⁶ 9 RP 768, ln. 21–23. These included funds from the Veterans Administration, the Washington Department of Social and Health Services, The U.S. Department of Treasury, IndyMac Mortgage Services, and AllState Insurance, as well as \$10,471.54 from his employment at “Northwest Sharpening.” 9 RP 768, ln. 12–23; 9 RP 770, ln. 1–9.

⁵ As part of the Infinity M35 purchase on October 31, 2008, defendant traded in a 2007 Saab 95 for \$18,500. 9 RP 717, ln. 17,18; 718, ln. 12–13. Defendant purchased the Saab on August 25, 2008 for \$29,250. 9 RP 791, ln. 22–25.

⁶ Averaging approximately \$45,000 per year.

C. ARGUMENT.

1. PROBABLE CAUSE SUPPORTS THE WARRANT.

When a search warrant has been properly issued by a judge, the party attacking it has the burden of proving its invalidity. *State v. Fisher*, 96 Wn.2d 962, 639 P.2d 743 (1982).

The appellate court reviews a judge's determination that a warrant should issue for abuse of discretion. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008) (citing *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)); *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). Great deference is afforded the issuing magistrate. *Neth*, 165 Wn.2d at 182 (citing *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)).

When reviewing probable cause at either a suppression hearing or on appeal, both the trial court and the appellate are limited to a review of the facts contained within the four corners of the search warrant declaration itself to support probable cause. *State v. Neth*, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

At a suppression hearing, the trial court reviews the magistrate's determination of probable cause in a quasi-appellate capacity. *Neth*, 165 Wn.2d at 182 (citing *Young*, 123 Wn.2d at 195). The appellate court is

also limited to a review of the four corners of the affidavit's supporting probable cause, so that appellate review consists of reviewing the trial court's legal determination of probable cause *de novo*. See *Neth*, 165 Wn.2d at 182 (citing *Young*, 123 Wn.2d at 195); *State v. Chamberlin*, 161 Wn.2d 30, 41 n. 5, 162 P.3d 389 (2007) (quoting *Ornelas v. United States*, 517 U.S. 690, 697, 116 S. Ct. 1657, 134 L.Ed.2d 911 (1996)); see also *In re Det. of Petersen*, 145 Wn.2d 789, 799, 42 P.3d 952 (2002) (clarifying that the *de novo* standard of review as appropriate for appellate review of the probable cause determinations).

For this reason, any findings of fact made by the trial court regarding whether or not the declaration supports probable cause would ordinarily be irrelevant, nor are the trial court's conclusions binding upon this court.⁷ What does matter at both a suppression hearing and on appellate review is the deference given to the decision of the issuing magistrate, because for all intents and purposes in the warrant context, it is the issuing magistrate that is the judicial authority entitled to find facts and draw inferences.

⁷ While the trial court's findings of fact are normally irrelevant for determinations of whether the declaration supports probable cause, they would be relevant in the context of a *Franks* or *Quasi-Franks* challenge to whether material was properly included or omitted from the declaration in the first place. See *Franks v. Delaware*, 438 U.S. 154, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

The issuing magistrate is entitled to draw commonsense and reasonable inferences from the facts and circumstances set forth. *State v. Yokley*, 139 Wn.2d 581, 596, 989 P.2d 512 (1999); *State v. Helmka*, 86 Wn.2d 91, 93, 542 P.2d 115 (1975). “[D]oubts as to the existence of probable cause [will be] resolved in favor of the warrant.” *State v. J-R Distribs., Inc.*, 111 Wn.2d 764, 774, 765 P.2d 281 (1988)); *State v. Casto*, 39 Wn. App. 229, 232, 692 P.2d 890 (1984) (citing *State v. Partin*, 88 Wn.2d 899, 904, 567 P.2d 1136 (1977)).

[W]hen a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. *State v. Walcott*, 72 Wn.2d 959, 962, 435 P.2d 994 (1967)(quoting, with approval from *United States v. Ventresca*, 380 U.S. 102, 13 L.Ed.2d 684, 85 S.Ct. 741 (1965); *State v. Chamberlin*, 161 Wn.2d 30, 162 P.3d 389 (2007)).

Probable cause to search is established if the affidavit in support of the warrant sets forth sufficient facts for a reasonable person to conclude that the defendant is probably involved in criminal activity, and that

evidence of a crime can be found at the place to be searched. *State v. Maxwell*, 114 Wn.2d 761, 791 P.2d 223 (1990). Facts that, standing alone, would not support probable cause can do so when viewed together with other facts. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995).

When evaluating the determination of probable cause, “[t]he experience and expertise of an officer may be taken into account ... In fact, what constitutes probable cause is viewed from the vantage point of a reasonably prudent and cautious police officer.” *State v. Remboldt*, 64 Wn. App. 505, 510, 827 P.2d 505, *review denied*, 119 Wn.2d 1005 (1992).

Probable cause requires “sufficient facts to lead a reasonable person to conclude that there is a probability that the defendant is involved in criminal activity.” *State v. Gentry*, 125 Wn.2d 570, 607, 888 P.2d 1105, *cert. denied*, 516 U.S. 843 (1995). *See also State v. Bellows*, 72 Wn.2d 264, 266, 432 P.2d 654 (1967) citing *State v. Green*, 70 Wn.2d 955, 958, 425 P.2d 913 (1967).

“Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” *State v. Thein*, 138 Wn.2d 133, 140, 977

P.2d 582 (1999). “It is only the probability of criminal activity, not a *prima facie* showing of it, that governs probable cause.” *Maddox*, 152 2d at 505.

Probable cause for a search warrant requires two nexuses: First, a nexus between criminal activity and the item to be seized; and Second, a nexus between the item to be seized and the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Where each nexus is established, the warrant is valid.

Here, the probable cause declaration contains information establishing probable cause to believe that Gaines was trafficking in stolen property. The Xerox plant in Wilsonville, Oregon, is the only plant in the world that manufactures a kind of solid ink blocks or “strips” for color printing. “Sticks” of the ink are manufactured in six “strip” configurations, which are then divided into a three “strip” configuration when they are boxed up for distribution centers around the world.

Xerox corporate security personnel were investigating the sale of stolen ink online through eBay. The Sheriff’s Office in Washington County conducted investigation into the theft and sale of ink from the factory. That led to the arrest of one Xerox ink factory worker, Ayad Al-Masawi, who stole thousands of dollars in Xerox ink strips and sold them online. When Al-Masawi was arrested, officers seized over 9,946 ink

sticks, worth over \$275,000. Washington County Officers also arrested another person, Angel Gnau, for the sale of stolen Xerox ink on eBay. Gnau sold the ink under the user name "Angell1955."

The defendant here, Gaines, was the next largest seller of Xerox ink after Gnau. Xerox corporate security purchased ink from Gaines on three separate occasions from May 29 to June 2, 2008. On each occasion, they were able to buy the ink from Gaines for \$233.25 (including shipping), even though the market value of the ink to Xerox was \$425.96.

On about April 30, 2009, Tacoma Police Detective Shafner went to Gaines's home address in Tacoma to interview him. Gaines acknowledged selling the ink on eBay and confirmed the username from which Xerox personnel purchased the ink was in fact his user name. He claimed he got a palette of ink at an online auction, maybe Craigslist or something, and claimed he didn't remember where he got it. When Deputy Shafner pointed out that Criagslist was not an auction site, he said that maybe he got it from eBay. Despite claiming not to remember where he got the ink, Gaines did tell Detective Shafner that he bought the ink from a user with the name "Angeleyes." Deputy Shafner noted the similarity of this username and the name "Angell1955" used by Angel Gnau who had been arrested for the illegal sale of the ink. Gaines also

voluntarily showed Detective Shafner a bin of ink in his living room that contained some 500 items of ink.

Gaines indicated that he was unemployed and partially supporting himself through the sale of the ink. In order to profit from the sale, Gaines would have had to have purchased the ink for significantly less than he was selling it for. Gaines was reluctant to tell Deputy Shafner where he got the ink or how much he paid for it.

When the facts in the declaration are construed together as a whole, and all the facts and inferences are construed in the light most favorable to the validity of the warrant, these facts establish probable cause.

The issuing magistrate was entitled to find that Gaines was not credible and that he lied when he knew the user name of the seller he got the ink from, but didn't know what web site he got it from. Gaines was also not credible when he suggested Craigslist as an auction site, even though it is not. When these statements are combined with the fact that Gaines was selling the ink well below market value, and would have had to purchase the ink at a price substantially lower than his selling price in order to profit from it, the court could draw the reasonable inference that Gaines knew the ink was stolen.

There is no question that Gaines was selling the ink, as he acknowledged as much. There is also no question that there was a nexus between Gaines engaging in trafficking in stolen property, and that evidence of such trafficking would be found at his residence. Gaines voluntarily showed the bin of ink sticks to Detective Schafner and continued to sell them online after the interview.

Thus, the totality of the facts and inferences are sufficient to overcome the low threshold to establish probable cause. For this reason, the issuing magistrate properly issued the warrant, which is valid. Nor did the trial court err by denying the motion to suppress the evidence. Indeed, two different judges concluded that the declaration supported a reasonable inference that Gaines was engaged in trafficking in stolen property.

Accordingly, this claim is without merit and should be denied.

2. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT GUILTY OF TRAFFICKING IN SOLEN PROPERTY.

Defendant claims the State failed to establish sufficient evidence that defendant knew the ink sticks were stolen. Brief of Appellant, 17. Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v.*

Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

[...]great deference [...] is to be given the trial court's factual findings. It, alone, has had the opportunity to view the witness' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted).

In the present case, defendant was charged with 34 counts of trafficking in stolen property. CP 2682–2705. A person commits trafficking in stolen property if:

(1) A person knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or knowingly traffics in stolen property.

RCW 9A.82.050(1). To “traffic” means to:

[S]ell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

RCW 9A.82.010(19). And, a person knows or 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(1)(b). “The jury is permitted to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists.” *State v. Johnson*, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992). “Possession of recently stolen property in connection with other evidence tending to show guilt” is sufficient to infer knowledge. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). A jury may reasonably infer guilty knowledge from false statements given to a police officer. *State v. Moon*, 45 Wn. App. 692, 726 P.2d 1263 (1986), *abrogated on other grounds by State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003); *see also State v. DeVries*, 149 Wn.2d 842, 859 72 P.3d 478 (2003) (Madsen concurring/dissenting). A jury may also infer guilty knowledge from other false statements. *State v. Donald*, 68 Wn. App. 543, 844 P.2d 447 (1993) (citing *State v. Bundy*, 21 Wn. App. 697, 701, 587 P.2d 562 (1978)). Similarly, a jury is entitled to infer evidence of consciousness of guilt from the defendant’s other conduct, destruction of evidence, attempts to flee, etc. *See State v. Sanchez*, --- Wn. App. ---, 288 P.3d 351 (2012).

Here, the State presented sufficient evidence from which the jury could reasonably infer that defendant knew the ink sticks were stolen.

Defendant lied to Detective Shafner about the source of his ink. 13 RP 1158, ln. 2–8. Defendant lied about his rank in the military in a letter that he wrote in behalf of Tom Long regarding a child custody dispute. 13 RP 1140, ln. 4–17, 1141, ln. 8–10. Defendant also chose not to report, on a bankruptcy form, his alleged income of \$35,000 from his employment at “Northwest Sharpening,” despite signing to its accuracy under penalty of perjury. Defendant estimated that he was paid \$35,000 yearly in cash and that he paid taxes when he thought doing so was necessary. 13 RP 1148, ln. 1–16. He did this, supposedly, on the advice of an attorney whose name he cannot remember nor whom he could afford to hire. 13 RP 1145, ln. 2–25, 1146, ln. 1–6.

Defendant also falsified information on documents used in refinancing his house. Defendant prepared a W-2 in 2006 in which he reportedly made \$67,000. 13 RP 1149, ln. 15–23; 1151, ln. 18–19. This salary, according to the W-2 form, is from working at “Ram Tech,” a company defendant created. 13 RP 1146, ln. 22–25; 1150, ln. 3–5. At trial, however, defendant testified that in 2006 he was working for Northwest Sharpening, and that he was “not sure” what he did to make the \$67,000. 13 RP 1147, ln. 6–15; 1149, ln. 21–23. Nevertheless, defendant

later testified that the \$67,000 income in 2006 came from selling ink, but, that the ink sales were not done under the umbrella of Ram Tech. 13 RP 1151, ln. 23–25, 1152, ln. 1–3. Defendant claims that he falsified information on his W-2 to obtain a refinance on his house at the recommendation of his loan broker. 13 RP 1151, ln. 20–21; 1152, ln. 11–17. Defendant had “no idea” who the loan broker was. 13 RP 1152, ln. 14–17.

Defendant acknowledged that he was receiving official Xerox brand ink for free and that it was odd for him to sell a product that he did not have to pay for. 13 RP 1165, ln. 7–11.⁸ 13 RP 1165, ln. 7–11. Not only would any reasonable person question the legitimacy of a product obtained for free and sold for a profit of \$900,000 over five years, but a person with business experience has even more reason to ensure that a product is obtained legally.

Defendant had business experience, as the once successful owner of “Magoos Annex” and “Little Jim’s Pub.” 13 RP 1134, ln. 15–17; 1167, ln. 10–12. Defendant owned Magoos Pub from 1995 to 2000. 13 RP 1137, ln. 23–25, 1138 line 1. The pub suffered a fire and defendant did not have the finances to fix it. 13 RP 1138, ln. 2–5. Defendant owned

⁸ Not only was defendant receiving free ink, defendant admitted that he was essentially receiving free money during the time he was selling ink. 13 RP 1165, ln. 7–11.

Little Jim's Pub from 1977–1980. 13 RP 1138, ln. 9–19. Defendant was unable to identify any other legitimate business where the product of commerce is obtained for free. 13 RP 1164, ln. 15–18.

Defendant sold Xerox brand ink at about half of its normal value. 5 RP 203, ln. 18–20. Defendant claimed to have never learned what the retail price of the ink was, yet also admits to selling ink at about half of its retail price. 13 RP 1162, ln. 6–18. Defendant asserted he “wasn't interested” in the retail price because “it wasn't a part of what [he] was doing.” 13 RP 1162, ln. 22–25, 1162, ln. 1–3. However, it was necessarily relevant to the prices he could charge.

Defendant's unusually low prices allowed him to move high volumes of product and amass significant profits.

Defendant shipped the ink without its retail packaging. 5 RP 214, ln. 2–9. Every ink product that Xerox sells into the marketplace has retail packaging, and Xerox's distributors require retail packaging. 11 RP 931, ln. 20–25, 932, ln. 1–2.

Mr. John Hassold, Xerox's Vice President of Finance and Operations for the North American Resellers Sales Division, has never seen Xerox ink sold at 40 to 50 percent below estimated retail price. 11 RP 937, ln. 21–23.

From May 2005 to May 2009, defendant sent Tom Long payments totaling \$115,959.54 in the form of money or items purchased in his behalf. 9 RP 799, ln. 1–3, 15–17.

Mr. William (Bill) Omatis, forensic accountant, examined defendant's financial transactions and concluded that, given the large amounts of cash deposits and other evidence that he reviewed, the ink was stolen. 9 RP 841, ln. 18–25, 842, ln. 1–2. Mr. Omatis determined that, during the five year period of May 2005 to May 2009, defendant sold almost \$900,000 worth of Xerox ink. 9 RP 806, ln. 22-25; for a detailed breakdown, *see* 9 RP 752 line 25 (\$181,229.07); 9 RP 755 line 8 (\$149,946.51); and 9 RP 758 line 25 (\$563,193.40).

Defendant argues on appeal that the State failed to prove, beyond a reasonable doubt, that defendant knew the ink sticks were stolen.⁹ Brief of Appellant, 20. The evidence listed above, however, viewed in the light most favorable to the State, is sufficient for a jury to infer that defendant *knowingly* trafficked in stolen property.

Defendant received shipments of a commercial product for free. 13 RP 1165, ln. 7–11. At market price, these products were worth well over one million dollars, and were approaching two million dollars in

⁹Defendant does not dispute that the ink sticks he sold were in fact stolen property, only that he knew they were. *See* Brief of Appellant, 17–20.

value. Defendant agreed that it was odd for him to sell a product that he obtained for free. 13 RP 1165, ln. 7–11. Indeed, defendant did admit that he wondered several times whether his ink selling activities were too good to be true. 13 RP 1166, ln. 12–17. From this the jury could infer that he was minimizing, and in fact knew, or reasonably should have known, that they were stolen. Defendant sold genuine Xerox ink at about half of its value. 5 RP 203, ln. 18–20. He made almost one million dollars in profits. Defendant did not sell the product with any retail packaging. 5 RP 214, ln. 2–9. His testimony was not credible. The State presented sufficient evidence from which a jury could infer that defendant knew the ink sticks were stolen.

3. THERE WAS SUFFICIENT EVIDENCE FOR THE JURY TO FIND DEFENDANT GUILTY OF MONEY LAUNDERING.

The defense claims the State also failed to establish sufficient evidence of money laundering where there was not sufficient evidence that defendant knew the ink was stolen. In the present case, defendant was charged with eight counts of money laundering. CP 2682–2705. A person commits money laundering, in relevant part, when:

(1) [...] that person conducts or attempts to conduct a financial transaction involving the proceeds of specified unlawful activity and:

(a) Knows the property is proceeds of specified unlawful activity[.]

RCW 9A.83.020(1)(a). The legislature has defined “financial transaction” as follows:

[A] purchase, sale, loan, pledge, gift, transfer, transmission, delivery, trade, deposit, withdrawal, payment, transfer between accounts, exchange of currency, extension of credit, or any other acquisition or disposition of property, by whatever means effected.

RCW 9A.83.010(3). “Knows the property is proceeds of specified unlawful activity” is defined as follows:

[B]elieving based upon the representation of a law enforcement officer or his or her agent, or knowing that the property is proceeds from some form, though not necessarily which form, of specified unlawful activity.

RCW 9A.83.010(4).

Here, defendant argues that because there is insufficient evidence of the predicate offense of trafficking in stolen property, there is also insufficient evidence of money laundering. Thus, the issue as to this claim is the same as the trafficking claim, and fails for the same reason.

Here, there was sufficient evidence for the jury to find that defendant was guilty of money laundering. As argued in the preceding section, the State presented sufficient evidence from which the jury could determine that defendant conducted financial transactions using proceeds

that he knew were obtained from selling stolen ink sticks. The State relies on that analysis for purposes of money laundering here.

Between April, 2005, and June, 2009, defendant made approximately \$900,000 from selling ink and \$182,588.98 from non-ink related sources. 9 RP 806, ln. 22–25; 9 RP 768, ln. 21–23. By simply depositing the proceeds from ink sales into his bank account, defendant conducted a financial transaction per RCW 9A.83.010(3).

On appeal, defendant does not dispute that he conducted a financial transaction using the proceeds from selling stolen ink sticks. Rather, the sole argument is that the money was not the proceeds of the crime of trafficking, because he did not knowingly traffic in the stolen property.

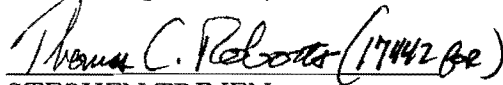
The State presented sufficient evidence from which the jury could infer that defendant knew the ink sticks were stolen. When sufficient evidence supported the jury finding that defendant trafficked in stolen property because he knew the ink sticks were stolen, the jury was also permitted to infer that defendant engaged in money laundering of the proceeds.

D. CONCLUSION.


For the reasons stated above, the State respectfully asks this Court to affirm defendant's conviction and sentence.

DATED: January 25, 2013.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

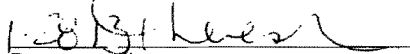
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STEPHEN TRINEN
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WSB # 30925


Chris Bateman
Legal Intern

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The undersigned certifies that on this day she delivered by U.S. mail^e or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1-28-13 
Date Signature

PIERCE COUNTY PROSECUTOR

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