No. 31762-5 consolidated with No. 31763-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

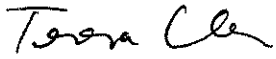
RICHARD EUGENE CORNWELL, JR.,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Does the State have any obligation to prove surplusage in the charging information which is not included in the to-convict instruction?
2. Has the Defendant waived a challenge that his intent to deliver different drugs to different customers in different transactions should be counted as same criminal conduct by failing to raise the issue in the superior court and failing to demonstrate manifest constitutional error?
3. Did the Defendant receive effective assistance of counsel where counsel did not make the challenges which are now brought on appeal?
4. Is there sufficient evidence that the Defendant knew the guns were

stolen, when the guns were actually stolen, were antique guns of unassessed value, were given in exchange for drugs, and were among the two truckloads of stolen items which the Defendant accumulated in trade for drugs?

5. Is there sufficient evidence that the Defendant intended to transfer the stolen goods when the Defendant had been dealing drugs for a year and a half and was able to accumulate a garage full of random stolen items (like china and dolls) in a period of three days in trade for drugs?

6. Did the prosecutor err by inviting the jury to consider other admitted, relevant, and related circumstances surrounding the Defendant's extensive trafficking business when determining whether the Defendant knew the antique guns were stolen?

IV. STATEMENT OF THE CASE

The Defendant Richard Cornwell is convicted of:

1. delivery of methamphetamine (school zone enhancement),
2. possession with intent to deliver heroin (school zone and firearm enhancements),
3. possession with intent to deliver methamphetamine (school

zone and firearm enhancements),

4. possession with intent to deliver dihydrodeinone (school zone and firearm enhancements),
5. possession with intent to deliver methadone (school zone and firearm enhancements),
6. use of drug paraphernalia,
7. possessing stolen property in the second degree,
8. possessing a stolen firearm,
9. a second count of possessing a stolen firearm,
10. possessing an unlawful firearm,
11. trafficking in stolen property in the first degree,
12. and attempted escape in the second degree.

I CP 175-76; II CP 24.[1] The last conviction resulted from his flight from the courtroom following the jury's verdict on the other counts. II CP 1-2, 8-9. The Defendant ran from the courtroom and struggled with five officers before his arrest. II CP 1-2, 8-9. On these facts, he pled guilty and was sentenced for attempted escape in the second degree. II CP 24.

The conviction and sentence in the escape case, COA No. 31762-5/

[1] I CP indicates the clerk's papers for Walla Walla Superior Court No. 12-1-00430-4/ Court of Appeals No. 31763-3. II CP indicates the clerk's papers for Walla Walla Superior Court No. 13-1-00206-7/ Court of Appeals No. 31762-5.

Walla Walla Superior Court No. 13-1-00206-7, is unchallenged on appeal. Although the cases are consolidated, this appeal only challenges the convictions and sentence arising in Walla Walla Superior Court No. 12-1-00430-4/COA No. 31763-3.

That case began when a person found in possession of heroin and methamphetamine approached police and offered to participate in controlled buys of the Defendant in order to avoid charges of his own. RP 28-29, 45, 213-16.[2]

On December 7, 2012, under the observation and control of police, the informant purchased methamphetamine from the Defendant at his Walla Walla home for $40. RP 30-42, 59-66, 70-78, 216-35, 282-89. The Defendant's home is 240 feet (property edge to property edge) or 385 feet (center point to center point) from Lincoln High School. RP 299-303. The informant passed through the Defendant's bedroom to get to his office and observed a single rifle displayed. RP 223, 227. The informant asked to purchase $40 of methamphetamine, and the Defendant retrieved the methamphetamine from a small lock box and packaged it in a little Ziploc baggie with a seal. RP 225-26, 231, 287.

On December 9, 2012, the informant returned to the Defendant's

[2] RP refers to the trial transcript in 12-1-00430-4 prepared by Tina Steinmetz.

home on his own and observed a clean and uncluttered garage. RP 237-38 ("there wasn't much stuff in there").

On December 12, 2012, police executed a search warrant on the Defendant's residence. RP 79. The Defendant ran downstairs where police found him with several guns. RP 331; III RP[3] 28. In one room, police found an illegal sawed off shotgun, a .270 Savage rifle with a scope, an AR-10 rifle, a muzzle loader, and other rifles and a portable safe. RP 83-84, 140-43, 266, 314-17; Supp. RP 28-30. There was marijuana on the floor. RP 268. The safe held drugs (methamphetamine, heroin, hydrocodone, methadone, and marijuana), $1159 in bills, a glass pipe, and jewelry. RP 85-86, 144-45, 160, 169 (drugs in significantly larger quantities than typically purchased by a user). Police could find no prescription bottles for the hydrocodone or methadone. RP 159. A wallet under the bed held $840. RP 145-46. There was a collection of smoking devices in the dresser. RP 146. The pipes had drug residue. RP 159-60. In the garage, there were scales used in drug transactions, packaging materials (plastic baggies), and a loaded syringe. RP 146-48, 166-68 (scales of the type used by dealers for larger quantities, not by users). Police also found property matching the description of items taken in

[3] III RP refers to a supplemental transcript of Detective Steve Harris' trial testimony as prepared by Official Court Report Linda Latham.

burglaries around the Walla Walla valley, including televisions, power tools, other electronic items, several compound bows, a sword, a grandfather clock, and "a lot of bicycles." RP 87, 150, 152-53.

Police obtained a second search warrant for the outbuilding, a stolen car (holding oxy acetylene tanks suspected to be stolen), and for other stolen property. RP 88, 317-18; III RP 31-32. Three days after the informant had viewed a clean and uncluttered space, the two-car garage was now so full that there was very little room to walk through. RP 151. Among the stolen items recovered there was a trophy show saddle, a bench stolen from a van, totes full of china, a whole tub of air tools, "hundreds if not thousands" of collector beer items, totes with items from a train antique shop, a bag of cameras, fishing poles, many laptops, and pressure washers. RP 355-61. The police seized so many items that it took two U-Haul trucks to move the property. RP 88, 332. The execution of the search warrants took all day. RP 81, 89. The fruits of the search were presented to the jury in fifty exhibits. RP 5. After speaking with the Defendant's wife, police returned to her only one tool box, two bicycles, one piece of jewelry, a display case, and some remote controlled cars and helicopters. RP 89, 363.

When police informed the Defendant that they had discovered

drugs and stolen property, he tried to offer up his source, someone with the Mexican mafia who could provide cocaine, heroin, and methamphetamine in "any amount I want." RP 320-21; III RP 34, 38-39. He admitted that all the drugs and stolen property belonged to him, not his son or his wife. RP 321; III RP 35. He claimed he only used methamphetamine and marijuana, and the other drugs were for friends. RP 322-25; III RP 35-37. He said he had been using methamphetamine for about a year and a half in order to get his wife to spend less time with gang bangers and more time with him. III RP 37.

The Defendant initially claimed that he had purchased the stolen items. RP 321; III RP 35. He denied knowing the property was stolen, but added "you can assume anything." RP 324. When the detective asked if the Defendant were trading the stolen items "for drugs," the Defendant readily admitted that he was. RP 321, 323, 329-30; III RP 35, 40-41; III RP 36-37 ("He indicated to me that he was. He said, I just like to help people out."). The Defendant said he obtained the short barrel "sawed off" shotgun from Lincoln White and altered its appearance. RP 325, 330; III RP 38. He was unable to say where he obtained many of the guns. RP 330-31; III RP 43 ("he didn't have a clue"). He "couldn't remember" how he obtained several snow boards. III RP 44. He admitted that the three

laptops might be stolen. RP 332; III RP 44. He claimed that the cash in his wallet was money he had taken out of the bank for his house payment ... two years before the police search. RP 327, 331; III RP 40, 44. Alternately he offered, "Dad gives me money and I just put it in the wallet." III RP 44. He could not explain the cash in the safe. RP 327.

In a subsequent interview, the Defendant gave police a long list of names of the people who brought the stolen items to him. RP 352-53. Some he only knew by first name or nickname; others he could not identify at all. RP 353-57, 360; III RP 40-44. For example, the Defendant said he believed "Vivitar" had stolen some new tools that he traded for pills. RP 353. Police recognized many of the names as people involved in the drug culture. RP 354. The Defendant had previously said he suspected Shortie Mack stole the laptops he traded to him. RP 332. The Defendant told police that the stolen truck parked nearby was traded by the owner to pay off a drug debt and then falsely reported as stolen. RP 360-61.

Pearl Funk identified items recovered from the Defendant's home which had been stolen from her antique store. RP 123-26. A year after the burglary, the items still had her store's price tags attached. RP 126. She made two trips to the police station to recover "boxes and boxes of

stuff," including a case of fifty cigarette lighters, a train lantern, dolls, silverware, and trays. RP 127-33.

Duane Depping reported that in the last year his rental property had been ransacked of firearms, stereo equipment, a digital TV camera, china, stereo equipment, tools, a bicycle, a wake board, and several clocks including a grandfather clock. RP 177-80. Mr. Depping recovered some of his possessions from those items seized from the Defendant's home. RP 181-84. His name plate had been pried off a mantle clock. RP 184.

Barton Harvey reported a brand new, large tool cabinet stolen from the lift gate of his tool truck. RP 171-73. He recovered it a month later from the items seized from the Defendant's home. RP 173-74. He had purchased the item on sale for $6715, but due to the damage to the box, it could only be resold for $3700. RP 175.

In September of 2012, Jack McCaw reported a burglary and the theft of ten guns and sterling silver. RP 270-71. He recovered two of his guns from the items seized from the Defendant's home: a World War II Japanese rifle (restored as a .257 Rollins sporting gun) which Mr. McCaw brought back with him from the war and his grandfather's restored 1897 model Winchester shotgun. RP 271-73.

Elizabeth Carillo's home had been burglarized in 2012. RP 276-

77. Her family lost televisions and a lockbox with credit cards, a passport, naturalization paperwork, birth certificates, and financial paperwork. RP 277. She recovered the paperwork from the Defendant's seized property. RP 161, 278-79.

The Defendant made no objection at his sentencing hearing to the offender score. II RP 25-28.[4]

V. ARGUMENT

A. SURPLUS LANGUAGE NOT INCLUDED IN THE TO-CONVICT INSTRUCTIONS ARE NOT ELEMENTS WHICH NEED TO BE FOUND BY A JURY.

The Defendant argues that the State added an element to counts 2, 3, 4, and 5 by including language in the information describing the drug possessions as knowing and unlawful. Appellant's Brief at 14 ("The State thus placed upon itself the burden to do so"). This is not so. At jury trial, the surplus allegations only become an additional element of the case when they are included in the jury's ***to-convict*** instructions. *State v. Hickman,* 135 Wn.2d 97, 102–03, 954 P.2d 900 (1998).

> The law of the case is an established doctrine with roots reaching back to the earliest days of statehood. Under the doctrine jury instructions not objected to become the law of the case. ***In criminal cases, the State assumes the burden***

[4] II RP refers to the transcript in 12-1-00430-4 prepared by official court reporter Linda Latham.

> ***of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the "to convict" instruction.***

State v. Hickman, 135 Wn.2d at 101-02 (emphasis added) (citations omitted). And here, the to-convict instructions do not include this surplusage. CP 39.

The charging "information must state all the essential statutory and nonstatutory elements of the crimes charged." *State* v. *Tvedt, 153* Wn.2d 705, 718, 107 P.3d 728 (2005). But the inclusion of extra language alleging an unnecessary fact in an information is surplusage unless that language is incorporated into the jury instructions. *State* v. *Crittenden,* 146 Wn. App. 361, 368-69, 189 P.3d 849 (2008) (citing *State* v. *Rivas,* 49 Wn. App. 677, 683, 746 P.2d 312 (1987)). In other words, where unnecessary language is included in the information, the surplus language is not an element of the crime that must be proved unless it is repeated in the jury instructions. *State v. Tvedt,* 153 Wn.2d at 718; *State* v. *Miller,* 71 Wn.2d 143, 146, 426 P.2d 986 (1967).

The State notes that, even if the surplusage had been added to the to-convict instructions, the Defendant's proposition is that the true mental state of "intent" under the statute should have been reduced to "knowing" or the jury should have been confused with conflicting mental states. The

mental state for possession with intent is not merely "knowing" but possessing with "intent" to deliver. This mental state is a higher burden and is plainly within the to-convict instructions. I CP 73-76.

There is no error in the jury instruction.

The Defendant states that these same four counts should be dismissed under "principles of double-jeopardy." Appellant's Brief at 16. Other than this conclusory sentence, the Defendant offers no support for his proposition. The absence of argument unfairly prejudices the State and also waives the challenge. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). *See also State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970, *abrogated on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (the court "will not review issues for which inadequate argument has been briefed of only passing treatment has been made"). Nor is the challenge included in the assignments of error as required under RAP 10.3(a)(4). *State v. Applegate*, 147 Wn. App. 166, 177 n. 26, 194 P.3d 1000 (2008) (declining to review a claim where there was no assignment of error as required under RAP 10.3(a)).

B. BY FAILING TO RAISE THE FACTUAL QUESTION TO THE SUPERIOR COURT, THE DEFENDANT WAIVED ANY CHALLENGE THAT HIS INTENT TO DELIVER DIFFERENT DRUGS TO DIFFERENT PEOPLE IN SEPARATE TRANSACTIONS ENCOMPASSED THE SAME CRIMINAL CONDUCT.

The Defendant argues for the first time on appeal that counts 2, 3, 4, and 5 encompassed the same criminal conduct under RCW 9.94A.589(1). Appellant's Brief at 16-17. Under RAP 2.3(a), a reviewing court should refuse to review a matter raised for the first time on appeal if the appellant cannot show manifest constitutional error. The question of same criminal conduct is fact-based. The Defendant has the burden of establishing whether offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539, 295 P.3d 219 (2013). The Defendant's failure to make objection or argument on a factual matter waives the challenge on appeal. The Defendant's remedy must be before the superior court. The Defendant's failure to demonstrate manifest constitutional error waives the challenge on appeal.

The Defendant relies upon *State v. Garza-Villareal*, 123 Wn.2d 42, 864 P.2d 1378 (1993). The case is distinguishable on its facts. First, the issue was preserved at the trial level in both cases consolidated in this opinion. *State v. Garza-Villareal*, 123 Wn.2d at 44-46. Second, the

defendant Casarez was charged with two counts of delivery for selling $20 of cocaine and $20 of heroin in a single transaction. *State v. Garza-Villareal*, 123 Wn.2d at 45. Separate transactions to separate buyers, however, are a different matter. *State v. Vanoli*, 86 Wn. App. 643, 651-52, 937 P.2d 1166 (1997) (delivery to three different persons victimizes the public on three distinct occasions so as to be different criminal conduct), ("[T]o the extent that the public at large may be the only victim of any particular illegal drug sale, the fact remains that here, the public was victimized three separate times, once with each separate transaction.")

The *Garza-Villareal* opinion looked at whether one offense furthered the other or if the intent changed from one crime to the next. *State v. Garza-Villareal*, 123 Wn.2d at 46. When crimes are committed at separate times and are separately realized so as to not further each other, they are not part of the same criminal conduct. *State v. Garza-Villareal*, 123 Wn.2d at 48. The relevant inquiry is the extent to which the criminal intent, objectively viewed, changed from one crime to the next. *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994).

In this case, the Defendant possessed a variety of drugs in a lock box in his home. He admitted that the different drugs were for *different* friends and that he traded them for different items of personal property.

They were not delivered to only a single purchaser. So high volume were the Defendant's drug sales that, in the span of three days, his garage was filled with the items he received in trade for drugs. Those were separate sales not occurring at the same time. Therefore, his intent to distribute was not singular but multiple. The Defendant said the "black" (heroin) was for his "friends" plural. RP 325. In negotiations with police, the Defendant named a number of different people who brought him the stolen items which filled his home in trade for drugs. He identified Rich Caberly, Lincoln Mike, Shorty Mack, Daniel, Pierre, Orin McIntosh, Delbert, Kyle (or Carl), Josh McIntosh. RP 323-37; III RP 37-40, 42-44. Nor were these one-time customers. For example, the informant had "been buying" (in the present perfect continuous tense) methamphetamine from the Defendant and he knew he could again. RP 216. The intent for multiple transactions demonstrates different criminal conduct.

C. THE DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The Defendant reframes his arguments (I, II, and V), claiming that his counsel's performance was defective for failing to challenge jury instructions, to argue that several counts encompassed the same criminal conduct, and to object to the prosecutor's closing argument. Appellant's

Brief at 19-20.

In order to show ineffective assistance of counsel, the Defendant has the burden of showing both (1) that his attorney's performance was deficient and (2) that this deficiency prejudiced him. *State* v. *Nichols,* 161 Wn.2d 1, 8, 162 P.3d 1122 (2007); *State v. Reichenbach,* 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State* v. *McFarland,* 127 Wn.2d 322, 334-35, 899 P .2d 1251 (1995). Prejudice exists if the defendant can show that "there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *State v. Nichols,* 161 Wn.2d at 8. If a party fails to satisfy one element, a reviewing court need not consider both *Strickland* prongs. *State v. Foster,* 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

This Respondent's Brief (sections A, B, and E) demonstrates that the challenges would have failed if timely raised. Therefore, counsel's performance was not defective and did not prejudice the client.

D. THERE IS SUFFICIENT EVIDENCE THAT THE DEFENDANT KNEW THE ITEMS HE WAS TAKING IN TRADE FOR DRUGS WERE STOLEN AND THAT HE INTENDED TO TRANSFER THEM.

The Defendant argues that there is insufficient evidence for certain elements. The standard of review: After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The Defendant claims that there is insufficient evidence that he *knew* that the 1897 shotgun and World War II Japanese rifle were stolen. Appellant's Brief at 21. He acknowledges that there is sufficient evidence that the guns were stolen and that the guns were obtained in exchanged for drugs. Appellant's Brief at 21. He fails to acknowledge the inferences which the standard of review explicitly interprets in favor of the State and most strongly against the Defendant.

The jury may find that the Defendant knew property was stolen if he had information which would lead a reasonable person to believe the items were stolen. CP 99. The law does not require an admission from a

criminal defendant in order to determine knowledge. Rather juries and courts look to the inferences in the evidence.

The State did not charge the Defendant with a count for every stolen firearm. For example, the Defendant told police that he had reason to believe the shotgun he received from Orin McIntosh was not stolen, because Mr. McIntosh said he had retrieved it from a pawn shop. RP 330; III RP 43. However, as to other guns, the Defendant "didn't have a clue." RP 331. He remembered that "Brian Beatty" brought him the Japanese gun. RP 358, 366. He acknowledged that "you can assume anything" about whether the items were stolen or not. RP 324.

The Defendant admitted knowing or suspecting that the items he was receiving in exchange for drugs had been stolen. RP 332, 353. His clients were drug users who purchased their drugs with trade of goods. Since they were unable to pay in cash, it is reasonable to infer that they were addicts who could not afford the cash for the drugs. It is reasonable to infer that addicts struggle with or give up on employment. It is reasonable to infer that addicts support their habit in a variety of untraditional ways, including trade of goods. It is reasonable to infer that the items that addicts trade, particularly the more expensive items (RP 175 - $6715 tool cabinet), do not all belong to them. It is particularly

reasonable to infer this where the Defendant was accepting boxes of items with the price tags still attached (RP 126) and lockboxes holding a family's birth certificates and naturalization paperwork (RP 277).

And the Defendant admitted that he knew items he received were stolen. RP 353.

In the case of the two guns, so rare were these war era weapons that the true owner himself could not hazard a guess at their value. RP 274. So rare and old was the Japanese weapon, that without an expert assessment police were unable to identify even its country of origin. RP 366. If the Defendant's clients could have sold the guns lawfully to a gun dealer with knowledge about their actual value, they would have. Instead, they brought them to the Defendant. The Defendant would reasonably believe that these antique items, which would be highly prized and highly valuable to collectors and would need to be assessed to determine their actual value, would not have been traded to him for drugs but for the fact that they were stolen.

The Defendant argues that it is improper to infer his knowledge from evidence regarding other stolen property. Appellant's Brief at 22. But that is not the law. The jury is instructed to decide counts separately such that the verdict on one count does not control the verdict on another.

CP 62. This does not mean that evidence related to one count may not also relate to another count. "Each party is entitled to the benefit of all of the evidence." CP 58. The jury may consider "all" of the evidence which "relates" to a proposition before them. WPIC 3.01. The fact that the Defendant sold drugs to addicts whom he knew or suspected were supporting their habit with stolen property is evidence related to his knowledge about the stolen character of the various items.

The Defendant argues that there is insufficient evidence that he intended to transfer the two U-Haul truckloads of stolen property that he had received in three days. Appellant's Brief at 23. The Defendant readily admitted that he was trading the property for drugs to "help people out." III RP 36-37.

The Defendant was able to fill his garage with two truckloads of stolen items in the passage of three days. The Defendant was no hoarder. Only a few days before, his garage had been unusually clean and uncluttered. RP 237-38. Then suddenly it was full of stolen property. The Defendant had been selling drugs for about a year and a half. RP 323. He had a number of the same objects, more than one would need for personal use. III RP 42-43 (air compressors and pressure washers). And the items were not just the tools, guns, or toys that a 36 year old man

might collect. CP 4. They were items of every type, including boxes of china, silverware, trays, and dolls. He was collecting items at a rate of a garage full in three days. He could not sustain this volume of trade over a year and a half, if he was not also transferring or trafficking the items. In light of this evidence, it is reasonable to infer that the Defendant intended to transfer the items.

E. THE PROSECUTOR COMMITTED NO ERROR IN ARGUING THAT THE RELEVANT EVIDENCE SUPPORTED THE ELEMENTS.

The Defendant claims that the prosecutor's argument misstated the law by contradicting the jury instruction which required that jury consider each count separately. Appellant's Brief at 24-26.

A defendant claiming prosecutorial error must show both improper conduct and resulting prejudice. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). There is prejudice when there is a substantial likelihood that the misconduct affected the verdict. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Here the Defendant's complaint was not brought to the attention of the trial judge, but is raised for the first time on appeal. And when a defendant fails to object at trial, there is a heightened standard, which requires a showing that the error was so flagrant and ill-intentioned that even a judicial instruction could not have cured the

resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012).

The Defendant acknowledges that the jury instructions allow the jury to consider any evidence that "relates to" the individual count. Appellant's Brief at 22. The prosecutor argued that evidence which related to the Defendant's knowledge included his circumstance of being surrounded by two truckloads of stolen goods. If there were only two guns recovered, one might wonder whether the Defendant knew that they were stolen. RP 441-42. But there was significantly more than that.

> [W]hen you have the quantity, the mass quantity that we had here in this house, that belonged to more than a handful of victims and it was a multitude of items; a garage full, in the house, a grandfather clock and other things that would have sentimental value. The documents belonging to the Carrillo family. You know, why would Mr. Cornwell have in his residence citizen – citizenship paperwork, passport paperwork belonging to a complete stranger?

RP 442.

> And especially if it's in the quantity and the type of people that he was seeing. All of these different people bringing him all of these different things separately – tote full loads. Using your common sense and good judgment is that something that you see every day? Or that you hear about every day? That happens to you? The State submits no.
>
> What we did have was -- was that he would trade drugs on occasion for some of his product, that was some of the testimony. And so you decide whether or not he could claim that he didn't knowingly know that these items

were stolen.

RP 443.

> He had what we know is a lot of stolen property and he admitted to having -- knowing that some of it was stolen. He admits to buying some of that property.
>
> You decide whether or not we have to have an admission from him, a statement from him that says he knew all of that property was stolen. If you have to have that from an individual who was engaging in this activity as much as Mr. Cornwell was, if that's reasonable.

RP 469.

The Defendant did not object to this argument, nor could he object. It is not misconduct to ask the jury to consider the circumstances under which these two guns were recovered. *See supra* at 19. That evidence has relevance to more than one count. As to the counts of possessing stolen guns, the other stolen items which filled his home were relevant and related to what the Defendant knew about the items he was trading for drugs.

The Defendant did not then and does not now object to the argument under ER 404(b) (allowing a court to exclude evidence of other bad acts if offered to prove action in conformity with character). Nor did the Defendant ask for a limiting instruction on this basis. Even had such an objection been timely made, it would have been denied. Not only was

the evidence admissible in support of other counts, it is also proper to admit the evidence as to the counts of stolen firearms to demonstrate the Defendant's knowledge. ER 404(b) ("It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."); *State v. Johnson*, 159 Wn. App. 766, 247 P.3d 11 (2011) (finding it was proper to admit evidence of a defendant's sale of copper wire for the purpose of demonstrating that the defendant entered a railway car with intent to commit a crime therein). There was no error.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: June 20, 2014.

Respectfully submitted:

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Deputy Prosecuting Attorney

Dennis Morgan nodblspk@rcabletv.com Richard Cornwell, Jr. #367292 Washington State Penitentiary 1313 N. 13th Ave, Unit Victor, Cell B124 Walla Walla, WA 99362	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED June 20, 2014, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**