No. 46145-5-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

JOHN R. RING, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 12-1-00398-0, 12-1-00408-14, and 12-1-00406-4

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

B. FACTS AND STATEMENT OF CASE 3

C. ARGUMENT 3

1. Ring contends that he was denied due process because the information charging him with three counts of forgery did not allege legal efficacy as an element of forgery. *The State counters that legal efficacy pertains only to the definition of the term "instrument" as it applies to the offense of forgery and that because charging documents are not required to include definitions of relevant terms, no error occurred where the State did not specifically allege the legal efficacy of the written instruments that Ring forged*........................3

2. Detectives searched Ring's property under the authority of a search warrant that the trial court later ruled to be partially overbroad because it authorized a search for drugs even though the warrant application provided no facts to support probable cause for a search for drugs. *Where the trial court correctly struck the overbroad portion of the warrant, did the trial court err by thereafter allowing drug evidence that officers inadvertently discovered in plain view while they were legitimately engaged in conducting the search that was authorized by the legitimate parts of the warrant?*............8

3. Ring challenges two of his convictions for possessing stolen property in the first degree because the to-convict

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

jury instructions related to those convictions referenced the word "concealed." Ring contends that inclusion of this term created an alternative means of committing the charged offense, and he alleges that there is insufficient evidence to show that he concealed the stolen property at issue. *Did inclusion of the term "concealed" in the to-convict jury instruction establish an alternative means of committing the charged offense, and if so, was there sufficient evidence to sustain the jury's verdicts?* 15

4. The State erroneously used the word "and" rather than the word "or" in relation to two alternative means of committing the crime when charging Ring with the crime of trafficking stolen property in count VI of case no. 12-1-00398-0. The word "and" rather than "or" was also used in the to-convict jury instruction related to this charge. *Accordingly, the law of the case doctrine required the State to prove both means beyond a reasonable doubt, but there was insufficient evidence to prove one of the two required means*..19

5. The State charged Ring with possession of stolen property in the first degree because he possessed a stolen generator. To prove the degree of the charge, the State was required to prove that the value of the generator was more than $5,000.00. *Where the only evidence of the value of the generator was one witness's short answer that the value was $25,000.00, was the evidence legally sufficient to establish the value?*..22

6. Ring had four separate cases tracking together in superior court. He was release on all four cases with an order to appear at a subsequent date. He failed to appear as ordered, so the State charged Ring with four separate counts of bail jumping – one count for each court order – based on the one failure to appear. Ring was convicted on all four counts. *Should three of these four convictions be dismissed because they violate double jeopardy?*..................25

7. One of the judgment and sentence orders sets forth the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

wrong year of the offense for two of Ring's current offenses. *The State agrees that the trial court should correct the judgment and sentence to reflect the correct offense dates*..29

D. CONCLUSION...30

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

TABLE OF AUTHORITIES

Page

Table of Cases

State Cases

In re Pers. Restraint of Jeffries,
110 Wn.2d 326, 752 P.2d 1338 (1988)....................18

State v. Adel,
136 Wn. 2d 629, 965 P.2d 1072 (1998)....................28

State v. Barringer,
32 Wn. App. 882, 650 P.2d 1129 (1982)....................21

State v. Clark,
13 Wn. App. 782, 537 P.2d 820 (1975)....................23

State v. Daniels,
106 Wn. App. 571, 23 P.3d 1125 (2001)....................4

State v. Delmarter,
94 Wn.2d 634, 618 P.2d 99 (1980)....................22, 25

State v. Ehrhardt,
167 Wn. App. 934, 276 P.3d 332 (2012)....................25, 26

State v. Hickman,
135 Wn.2d 97, 954 P.2d 900 (1998)....................21

State v. Johnson,
180 Wn.2d 295, 325 P.3d 135 (2014)....................6, 7, 8, 9

State v. Kennedy,
107 Wn.2d 1, 726 P.2d 445 (1986)....................13, 15

State v. Kleist,
126 Wn.2d 432, 895 P.2d 398 (1995)....................23, 24

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

State v. Kuluris,
132 Wash. 149, 231 P. 782 (1925) 6, 7, 12

State v. Lillard,
122 Wn. App. 422, 93 P.3d 969 (2004) 17

State v. Maddox,
152 Wn.2d 499, 98 P.3d 1199 (2004)..11, 12

State v. Morse,
38 Wn.2d 927, 234 P.2d 478 (1951)...6

State v. O'Brien,
164 Wn. App. 924, 267 P.3d 422 (2011).......................................28, 29

State v. Ong,
88 Wn. App. 572, 945 P.2d 749 (1997)...21

State v. Richards,
109 Wn. App. 648, 36 P.3d 1119 (2001)...6

State v. Salinas,
119 Wn.2d 192, 829 P.2d 1068 (1992)..22, 24

State v. Scoby,
57 Wn. App. at 809, 790 P.2d 226 (1990)..5

State v. Smith,
159 Wn.2d 778, 154 P.3d 873 (2007)..18, 19

State v. Smith,
72 Wn. App. 237, 864 P.2d 106 (1993)...4, 7

State v. Temple,
170 Wn. App. 156, 285 P.3d 149 (2012).................................13, 14, 15

State v. Villanueva-Gonzalez,
180 Wn. 2d 975, 329 P.3d 78 (2014)..27, 28

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Statues

RCW 9.41.010 19

RCW 9A.56.010 5

RCW 9A.56.010(21)(a) 23

RCW 9A.56.140 19

RCW 9A.56.150 .... 19, 23

RCW 9A.60.010 5

RCW 9A.60.020 7

RCW 9A.60.020(1) 3, 5

RCW 9A.76.170 27

RCW 9A.82.050 20

RCW 9A.82.050(1) 20, 21

Court Rules

RAP 10.3(b) 3

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Ring contends that he was denied due process because the information charging him with three counts of forgery did not allege legal efficacy as an element of forgery. *The State counters that legal efficacy pertains only to the definition of the term "instrument" as it applies to the offense of forgery and that because charging documents are not required to include definitions of relevant terms, no error occurred where the State did not specifically allege the legal efficacy of the written instruments that Ring forged.*

2. Detectives searched Ring's property under the authority of a search warrant that the trial court later ruled to be partially overbroad because it authorized a search for drugs even though the warrant application provided no facts to support probable cause for a search for drugs. *Where the trial court correctly struck the overbroad portion of the warrant, did the trial court err by thereafter allowing drug evidence that officers inadvertently discovered in plain view while they were legitimately engaged in conducting the search that was authorized by the legitimate parts of the warrant?*

3. Ring challenges two of his convictions for possessing stolen property in the first degree because the to-convict jury instructions related to those convictions referenced the word "concealed." Ring contends that inclusion of this term created an alternative means of committing the charged offense, and he alleges that there is insufficient evidence to show that he concealed the stolen property at issue. *Did inclusion of the term "concealed" in the to-convict jury instruction establish an alternative means of committing the charged offense, and if so, was there sufficient evidence to sustain the jury's verdicts?*

4. The State erroneously used the word "and" rather than the word "or" in relation to two alternative means of committing the crime when charging Ring with the crime of trafficking stolen property in count VI of case no. 12-1-00398-0. The word "and" rather than "or" was also used in the to-convict jury instruction related to this charge. *Accordingly, the law of the case doctrine required the State to prove both means beyond a reasonable doubt, but there was insufficient evidence to prove one of the two required means.*

5. The State charged Ring with possession of stolen property in the first degree because he possessed a stolen generator. To prove the degree of the charge, the State was required to prove that the value of the generator was more than $5,000.00. *Where the only evidence of the value of the generator was one witness's short answer that the value was $25,000.00, was the evidence legally sufficient to establish the value?*

6. Ring had four separate cases tracking together in superior court. He was release on all four cases with an order to appear at a subsequent date. He failed to appear as ordered, so the State charged Ring with four separate counts of bail jumping – one count for each court order – based on the one failure to appear. Ring was convicted on all four counts. *Should three of these four convictions be dismissed because they violate double jeopardy?*

7. One of the judgment and sentence orders sets forth the wrong year of the offense for two of Ring's current offenses. *The State agrees that the trial court should correct the judgment and sentence to reflect the correct offense dates.*

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

B. <u>FACTS AND STATEMENT OF THE CASE</u>

1 & 2. <u>Procedural History & Statement of Facts</u>. Pursuant to RAP 10.3(b), the State accepts Ring's recitation of the procedural history and facts, with the exception of additional facts as needed to develop the State's arguments, below.

C. <u>ARGUMENT</u>

1. Ring contends that he was denied due process because the information charging him with three counts of forgery did not allege legal efficacy as an element of forgery. *The State counters that, because legal efficacy pertains only to the definition of the term "instrument" as it applies to the offense of forgery and because charging documents are not required to include definitions of relevant terms, no error occurred where the State did not specifically allege the legal efficacy of the written instruments that Ring forged.*

In counts II, III, and IV of the information in case no. 12-1-00398-0, the State charged Ring with forgery under RCW 9A.60.020(1). CP 68-69. Ring contends that "legal efficacy" is a common law element of forgery and that error occurred in the instant case because the charging information did not specifically allege "legal efficacy" as an element of forgery.

The State contends that legal efficacy is a rule that is applicable to the offense of forgery, known as the "rule of legal efficacy," rather than an element of the offense. *See, e.g., State v. Smith*, 72 Wn. App. 237, 239, 864 P.2d 106 (1993) ("[W]e refer to this proposition as the rule of legal efficacy. Under former RCW 9.44, in effect from 1909 until 1975, the rule of legal efficacy was part of Washington law"); *State v. Daniels*, 106 Wn. App. 571, 574, 23 P.3d 1125 (2001) ("The rule of legal efficacy provides that forgery requires a "'writing which, if genuine, might apparently be of legal efficacy or the foundation of legal liability.'"" Quoting *Smith* at 239 (quoting 4 William Blackstone, *Commentaries* 247 (1765)) (further citations omitted)).

The statutory language constituting the charges of forgery in the instant case reads as follows:

> (1) A person is guilty of forgery if, with intent to injure or defraud:
> (a) He or she falsely makes, completes, or alters a written instrument or;
> (b) He or she possesses, utters, offers, disposes of, or puts off as true a written instrument which he or she knows to be forged.

RCW 9A.60.020(1). The statute does not define the term "instrument," but the term "written instrument" is defined by a separate statute, as follows:

> The following definitions and the definitions of RCW 9A.56.010 are applicable in this chapter unless the context otherwise requires:...
>
> (7) "Written instrument" means: (a) Any paper, document, or other instrument containing written or printed matter or its equivalent; or (b) any access device, token, stamp, seal, badge, trademark, or other evidence or symbol of value, right, privilege, or identification.

RCW 9A.60.010.

Because the statutory definition of "written instrument" does not adequately define the term "instrument," our State Supreme Court has directed that we look to the common law for the *definition* of the term "instrument." *State v. Scoby*, 117 Wn. 2d 55, 57, 810 P.2d 1358, amended, 117 Wn. 2d 55, 815 P.2d 1362 (1991). Under the common law, "instrument" *is defined as* "something which, if genuine, may have legal effect or be the foundation of legal liability[,]" on in other words, a document that has "legal efficacy." *Id.* at 57-58, quoting *State v. Scoby*, 57

Wn. App. at 809, 811-812, 790 P.2d 226 (1990) (further citations omitted).

Thus, the *definition* of the term "written instrument" includes "the common-law requirement that the written instrument have 'legal efficacy.'" *State v. Richards*, 109 Wn. App. 648, 653-54, 36 P.3d 1119 (2001), quoting *State v. Morse*, 38 Wn.2d 927, 929, 234 P.2d 478 (1951). Our State Supreme Court recently held that "[t]he State need not include definitions of elements in the information." *State v. Johnson*, 180 Wn.2d 295, 302, 325 P.3d 135 (2014).

Ring cites the 1925 case of *State v. Kuluris*, 132 Wash. 149, 231 P. 782 (1925), to support his contention that the legal efficacy rule is, in effect, a common law element of the crime of forgery that must be specifically alleged in the information. In *Kuluris*, the Court held that "the information must contain a statement of fact which shows that the inst[ru]ment was something more than a mere request, made without right, which might or might not be complied with at the option of the person to whom it was given." *Kuluris* at 151. But the decision in *Kuluris* came a full 50 years before the modern-day codification of the crime of forgery at

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

RCW 9A.60.020. Laws of 1975, 1st Ex.Sess., ch. 260, § 9A.60.020 at p. 847.

Modern-day cases such as *State v. Scoby*, 117 Wn. 2d 55, 810 P.2d 1358 (1991), and *State v. Smith*, 72 Wn. App. 237, 864 P.2d 106 (1993), have compared and contrasted the older, common law rule with the modern statute and have concluded that legal efficacy has survived the modern codification of the offense of forgery. But rather than commenting on legal efficacy as if it were an element of forgery, these cases appear to regard the legal efficacy requirement as a rule that defines the term instrument. In conclusion, the State contends that the modern-day interpretation of the legal efficacy rule is that, rather than adding an element to the offense of forgery, the rule merely defines an element of the offense of forgery by supplying the definition of the term instrument. Thus, under the recent holding of *State v. Johnson*, 180 Wn. 2d 295, 302, 325 P.3d 135 (2014), the charging information is not insufficient merely because the charging information does not specifically allege "legal efficacy" as an element of forgery.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

2. Detectives searched Ring's property under the authority of a search warrant that the trial court later ruled to be partially overbroad because it authorized a search for drugs even though the warrant application provided no facts to support probable cause for a search for drugs. Where the trial court correctly struck the overbroad portion of the warrant, did the trial court err by thereafter allowing drug evidence that officers inadvertently discovered in plain view while they were legitimately engaged in conducting the search that was authorized by the legitimate parts of the warrant?

When investigating this case, Detective Jeff Rhoades of the Mason County Sheriff's Office petitioned the Mason County District Court for a warrant to search Ring's property for specific evidence related to specified property crimes. Pretrial Ex. 2. Detective Rhoades provided an itemized list, numbered 1 through 7, that specified the evidence he expected to find on Ring's property. *Id.* Items 1 thorough 6 all pertained to the property crimes under investigation. *Id.* Inexplicably, however, item 7 specified "contraband (including controlled substances), fruits of crime or things otherwise unlawfully possessed, weapons or other things that which a crime has been committed or reasonable appears to be committed." *Id.*

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

The District Court judge granted the search warrant. Pretrial Ex. 1. The search warrant specified the items to be seized by including the 7-item list from the search warrant application, including the inexplicable item 7, for which there was no probable cause. *Id.* The specific search warrant at issue is dated September 21, 2012, is related to case number 12-12154, and is identified as SW0-1276 (and also erroneously identified as 5101276). RP 64.

During execution of the search warrant, Deputy Sisson was an assistant to a detective. RP 56-57. Deputy Sisson "assisted at a couple different levels that day. There was a general search of... the area to begin with," and afterward deputies broke off into groups to search specific areas. RP 56. Deputy Sisson was unaware of the exact purpose of the warrant. RP 58. He would later testify that he did not read the search warrant, that it was a "general search," and that he was just "assisting detectives." RP 59. Deputy Sisson testified that no one told him to do a general search; instead, he was just there helping the detective. RP 59.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Deputy Sisson assisted in the search of a Conex shipping container. RP 56-57, 62. Deputies found some possible stolen tools in the container. RP 59. The deputies inventoried the tools and documented the serial numbers "and anything illegal." RP 59. During the search of the Conex shipping container, Deputy Sisson found an aluminum can with a white powder on it, and he immediately recognized the can as drug paraphernalia. RP 57. He didn't have to pick it up or turn it over or examine it more closely; when he saw it, he immediately recognized it as drug paraphernalia. RP 60. This evidence is identified as item "J70" in the inventory of evidence seized pursuant to the warrant. RP 64.

Ring's trial counsel brought a pretrial motion to suppress all evidence seized under the warrant. CP 84-96. The trial court found that the search warrant was overbroad because there was no probable cause to search for contraband. RP 37-38. The trial court found that item 7 of the warrant was overbroad as to controlled substances. RP 40-41. The court accordingly struck item 7 from the warrant and suppressed evidence of the drug paraphernalia, but the court found the remainder of the warrant to be valid. RP 40-41.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

At a later hearing, however, the trial court reconsidered its prior ruling and found that the drug paraphernalia was admissible under the plain view exception. RP 70-72. The trial court reasoned that Deputy Sisson was legally searching the Conex container for items that were authorized by the search warrant, at least as far as the search for stolen tools or other stolen property was concerned. RP 71. During this search he stumbled upon the drug paraphernalia, and although a search for drug paraphernalia was not authorized by the search warrant, the deputy immediately recognized the paraphernalia for it was, drug paraphernalia. RP 70-72. It was therefore proper for the deputy to seize the drug can, because he knew it to be an illegal substance, and he discovered it while he was in a place where he had legal authority to be. RP 71-72.

Ring avers that "the trial court correctly found the search warrant was partially overbroad." Br. of Appellant at 27. The State does not challenge the trial court's ruling on this issue, and the State agrees that striking item-7 from the warrant was appropriate on the facts of this case. But the State did not proffer the drug-can evidence based on a claim that it was admissible under *State v. Maddox*, 152 Wn.2d 499, 98 P.3d 1199

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

(2004). Instead, the State avers that the drug-can evidence was lawfully seized and was lawfully admitted as evidence because it was lawfully discovered when it was found in plain view. RP 63.

Maddox establishes a five-factor test for determining whether the overbroad portions of an overbroad search warrant may be severed from the warrant so that the parts that are not overbroad may still remain valid. *Id.* at 807-08. Ring contends that the drug-can evidence in the instant case was not lawfully seized because, he contends, the State failed to establish the fourth and fifth *Maddox* factors. Br. of Appellant at 26. The fourth and fifth *Maddox* factors are as follows:

> Fourth, the searching officers must have found and seized the disputed items while executing the valid part of the warrant (i.e., while searching for items supported by probable cause and described with particularity)....
>
> Fifth, the officers must not have conducted a general search, i.e., a search in which they flagrantly disregarded the warrant's scope.

Maddox, 116 Wn. App. at 807-08.

The State contends that the *Maddox* factors are applicable to the severability doctrine, but not to the plain view exception. "Under the plain view doctrine, an officer must (1) have a prior justification for the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

intrusion, (2) inadvertently discover the incriminating evidence, and (3) immediately recognize the item as contraband." *State v. Temple*, 170 Wn. App. 156, 164, 285 P.3d 149 (2012), citing *State v. Kennedy*, 107 Wn.2d 1, 13, 726 P.2d 445 (1986).

In the instant case, police discovered the drug-can when they searched the Conex container for stolen tools and other stolen items authorized by the search warrant. RP 56-64, 70-72; Pretrial Ex. 1, Ex. 2. It is apparent that, with or without a separate authorization to search for drugs, police would have searched the Conex container for stolen tools. The Conex container was an appropriate place to search for stolen tools, and stolen tools were, in fact, found during the search. RP 59.

This was not a search where police searched a place where drug evidence might be found but where stolen tools could not logically be found. RP 59. If such were the case, then the State would contend that the fourth and fifth *Maddox* factor would apply to suppress the discovered evidence regardless whether it was drug evidence or stolen property.

Also, if police were searching a place where evidence authorized by the warrant was not likely to be found, which they were not, then

Deputy Sisson's unartful use of the terms "general search" and "anything illegal" would be more problematic. But when confronted with the language he used, Deputy Sisson clarified that "[n]obody told [him] to do a general search." RP 59. He clarified that the evidence sought "was outlined in a warrant" but that "without seeing the warrant" he couldn't "remember what the exact search was for that day." RP 59.

Here, the police inadvertently discovered evidence not specifically authorized by the search warrant while lawfully searching a place where evidence specifically authorized by the search warrant was likely to be found; hence, the State contends that the correct analysis is the plain view analysis rather than the *Maddox* factors. *State v. Higgs*, 177 Wn. App. 414, 433-34, 311 P.3d 1266 (2013), *as amended (Nov. 5, 2013), review denied*, 179 Wn.2d 1024, 320 P.3d 719 (2014); *State v. Temple,* 170 Wn. App. 156, 164, 285 P.3d 149 (2012).

Here, police had prior justification for the intrusion -- they had a valid warrant that authorized a search for stolen tools, and they were searching a place that was authorized by the warrant and was a place where stolen tools would be found. RP 56-64, 70-72; Ex. 1. Regardless

whether item-7 of the search warrant (which purported to authorize a search for drugs) would later be invalidated, the police would have nonetheless lawfully searched the Conex trailer for stolen tools (which was authorized by the warrant). *Id.* Thus, discovery of the drug-can was inadvertent, and the officer recognized it immediately for what it was – illegal contraband. RP 57, 60-61.

On these facts, discovery of the drug-can was a plain view discovery that is an exception to the search warrant requirement, and the trial court did not err by admitting this evidence at trial. *State v. Temple*, 170 Wn. App. 156, 164, 285 P.3d 149 (2012), citing *State v. Kennedy,* 107 Wn.2d 1, 13, 726 P.2d 445 (1986).

3. Ring challenges two of his convictions for possessing stolen property in the first degree because the to-convict jury instructions related to those convictions referenced the word "concealed." Ring contends that inclusion of this term created an alternative means of committing the charged offense, and he alleges that there is insufficient evidence to show that he concealed the stolen property at issue. *Did inclusion of the term "concealed" in the to-convict jury instruction establish an alternative means of committing the charged offense, and if so, was there sufficient evidence to sustain the jury's verdicts?*

Relevant to this issue, in case no. 12-1-00408-1 the State charged Ring with two counts of unlawful possession of stolen property in the first degree, in counts I, and III (which are among other charges, including other counts of possessing stolen property). CP 160-62. Count I alleged that Ring unlawfully possessed a stolen "Wacker Construction Generator[.]" CP 160. Count III alleged that Ring unlawfully possessed a stolen "Kubota tractor, irrigation pump with hoses and air compressor[.]" CP 161. Ring contends that the to-convict instructions related to counts I and III required the State to prove that Ring concealed this property, and he contends that there was insufficient evidence to prove that he concealed the property. Br. of Appellant at 28-29.

Relevant to these counts, the court instructed the jury as follows:

> A person commits the crime of possessing stolen property in the first degree when he knowingly possesses stolen property that exceeds $5,000 in value.
>
> Possessing stolen property means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

CP 50-51 (Jury Instruction No. 28). The corresponding *to-convict* instructions then stated, in relevant part, that an element that must be proved beyond a reasonable doubt in each count was that Ring "knowingly received, retained, possessed, concealed stolen property...." CP 61, 63 (Jury Instructions No. 45, 47). Hence, the definitional instruction (No. 28), contains the disjunctive "or" between "conceal" and "dispose," whereas the elements instructions (No.s 45 and 47) erroneously omit the word "or."

Ring contends that inclusion of the word "conceal" specified an alternative means of committing the offenses of possessing stolen property and that, therefore, to sustain the conviction there must be substantial evidence to support a finding that Ring *concealed* stolen property. Br. of Appellant at 32. To support this contention, Ring cites the 2004, Court of Appeals case of *State v. Lillard*, 122 Wn. App. 422, 93 P.3d 969 (2004). Br. of Appellant at 31-32.

In response, the State contends that there is substantial evidence in the record that Ring concealed the property at issue. Ring concealed the Wacker generator by storing it on a large acreage property that belonged

to another person, rather than storing it on his own property, and it was backed in under some alder trees on this large acreage property. RP 277. The Kubota tractor, also, was stored on this same property, disconnected from Ring. RP 323-24. The State contends that these facts constitute substantial evidence that Ring concealed the generator and backhoe. RP 277, 323-24, 386.

Additionally, the State contends that the 2007, Supreme Court case of *State v. Smith*, 159 Wn.2d 778, 154 P.3d 873 (2007), supports the proposition that inclusion of the term "conceal" in the jury instructions did not create an alternative means that the State was required to prove. *Smith* stands for the proposition that inclusion of the word "conceal" on the facts of the instant case created, at most, a "means within a means" for which "the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply." *Smith*, 159 Wn.2d at 783, (citing *In re Pers. Restraint of Jeffries*, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988)).

The statutory language that establishes the offense of possession of stolen property in the first degree reads as follows:

> (1) A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property, other than a firearm as defined in RCW 9.41.010 or a motor vehicle, which exceeds five thousand dollars in value.

RCW 9A.56.150. The term "conceal" does not appear in the statute creating the offense. Instead, the term "conceal" is derived from the statutory definition of the term "possessing stolen property[,]" as follows:

> (1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

RCW 9A.56.140.

The State contends that because the term "conceal" is derived from the statutory definition of "possessing stolen property," it is not an alternative means of committing the offense and, therefore, no error occurred in the instant case based upon inclusion of the term "conceal." *Smith*, 159 Wn.2d at 785-86.

4. The State erroneously used the word "and" rather than the word "or" in relation to two alternative means of committing the crime when charging Ring with the crime of trafficking

> stolen property in count VI of case no. 12-1-00398-0. The word "and" rather than "or" was also used in the to-convict jury instruction related to this charge. *Accordingly, the law of the case doctrine required the State to prove both means beyond a reasonable doubt, but there was insufficient evidence to prove one of the two required means.*

In count VI of case no. 12-1-00398-0, the State charged Ring with trafficking in stolen property in the first degree, a violation of RCW 9A.82.050. CP 69. The relevant language of RCW 9A.82.050 reads as follows:

> A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, *or* [emphasis added] who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050(1).

In the charging document, the State alleged in relevant part that Ring "did knowingly initiate, organize, plan, finance, direct, manage, and supervise the theft of property: to wit: 1968 GMC Truck... *and* [emphasis added] did knowingly traffic in stolen property...." CP 69 (Count VI).

The corresponding to-convict jury instruction also used the work "and" rather than "or". CP 49-50 (Jury Instruction 27 at subsection (1)).

Because the two clauses in the State's charging document are joined by the word "and," and because this error is repeated in the jury instructions, Ring contends that, notwithstanding the use of the word "or" in RCW 9A.82.050(1), the State was required in this case to prove both clauses beyond a reasonable doubt. Br. of Appellant at 34-35. Ring does not dispute that there was sufficient evidence to prove that he knowingly trafficked the stolen pickup truck, but he contends that the evidence was insufficient to prove that he was involved in the theft of the pickup truck. Br. of Appellant at 34-35.

The State agrees that Ring is correct that, because the charging document and the to-convict instruction used the word "and" rather than "or," the State was required to prove both clauses. *State v. Hickman,* 135 Wn.2d 97, 101–02, 954 P.2d 900 (1998) (jury instructions to which the State failed to object are the law of the case, and assignment of error may include a challenge to the sufficiency of evidence of an element added in the instruction); *State v. Ong,* 88 Wn. App. 572, 577–78, 945 P.2d 749 (1997) (same). *See also State v. Barringer,* 32 Wn. App. 882, 887–88, 650 P.2d 1129 (1982) (State assumed burden of proving unnecessary element

in its proposed instructions), *overruled in part on other grounds by State v. Monson,* 113 Wn.2d 833, 849–50, 784 P.2d 485 (1989).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff,* 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas,* 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Here, a review of the record does not reveal citations to sufficient evidence to show that Ring "did knowingly initiate, organize, plan, finance, direct, manage, *and* supervise the theft of the" truck. CP 69 (emphasis added). Accordingly, the State must concede error.

5. The State charged Ring with possession of stolen property in the first degree because he possessed a stolen generator. To

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> prove the degree of the charge, the State was required to prove that the value of the generator was more than $5,000.00. *Where the only evidence of the value of the generator was one witness's short answer that the value was $25,000.00, was the evidence legally sufficient to establish the value?*

In count I of case number 12-1-00408-1 the State charged Ring with possession of stolen property in the first degree, alleging that he possessed a stolen generator that was valued at more than $5,000.00. CP 160.

A conviction of first degree possession of stolen property requires proof that the value of the stolen property exceeds $5000. RCW 9A.56.150. "Value" means the market value of the property at the time and in the approximate area of the criminal act. RCW 9A.56.010(21)(a); *State v. Kleist*, 126 Wn.2d 432, 434, 895 P.2d 398 (1995); *State v. Longshore*, 97 Wn. App. 144, 148, 982 P.2d 1191 (1999), *aff'd*, 141 Wn.2d 414, 5 P.3d 1256 (2000). Market value is the price "a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction." *Kleist,* 126 Wn.2d at 435 (citing *State v. Clark,* 13 Wn. App. 782, 787, 537 P.2d 820 (1975)); see also *Longshore,* 97 Wn. App. at 148. Market value is determined by an

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objective standard; it is not based on the value of the goods to any particular person. *Longshore,* 97 Wn. App. at 148–49 (citing *Kleist,* 126 Wn.2d at 438).

In the instant case, evidence of the value of the stolen Wacker generator was limited to the testimony of a foreman from the company that owned the stolen generator. RP 201, 204. At trial, the prosecutor questioned the witness as follows: "What is the… value of that particular Wacker generator?" The witness answered, "$25,000.00." RP 204. The witness was the shop foreman at the company that owned the generator. RP 201. No other citation to the record was located where there is evidence of the value of the generator.

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d

1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter,* 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

There was no evidence in the instant case, either direct or circumstantial, to prove the market value of the generator. The only evidence of value was the foreman's opinion of a generic reference to "value." There is no evidence from which to discern whether that is the value to him alone, or whether that is the market value, or whether that is the cost of a new generator, or for any other measure of "value."

Ring cites *State v. Ehrhardt*, 167 Wn. App. 934, 276 P.3d 332 (2012), to support his contention that there was insufficient evidence in this case to prove the value of the generator. Because the only evidence of value of the generator is the foreman's naked assertion of $25,000.00, the State concedes error.

6. Ring had four separate cases tracking together in superior court. He was release on all four cases with an order to appear at a subsequent date. He failed to appear as ordered, so the State charged Ring with four separate counts of bail jumping – one count for each court order – based on the one failure to

appear. Ring was convicted on all four counts. *Should three of these four convictions be dismissed because they violate double jeopardy?*

Ring was under court order in four separate cases to appear in court on January 28, 2013. Ex. 101-33. When Ring failed to appear on January 28, 2013, he violated four separate court orders in four separate cases. *Id.*

In case no. 12-1-00398-0, count IX, the State accused Ring of failing to appear as required in case no. 12-1-00398-0. CP 70. In case no. 12-1-00408-1, court IV, the State accused Ring of failing to appear as required in case no. 12-1-00408-1. CP 161-62. In case no. 12-1-00406-4, count II, the State accused Ring of failing to appear as required in case no. 12-1-00406-4. CP 133. And in case no. 12-1-00407-2 (the subject of appeal no. 46148-0), the State accused Ring of failing to appear in case no. 12-1-00407-2.

Each of these four failures to appear occurred at the same time and place, in Mason County Superior Court on September 28, 2013, but each failure to appear related to a distinct and separate case. Thus, the State charged Ring with four separate counts of bail jumping. To prove the

charges in each case, it was not enough simply to prove that Ring failed to appear on September 28, 2013. The State also was required to prove separately in each case: 1) the class of the crime for which Ring was obligated to appear; 2) that he was released by court order or admitted to bail in that particular case; and, 3) that he had knowledge of the subsequent requirement to appear in court. RCW 9A.76.170. Thus, each case required proof of facts that were peculiar to that case, and each bail jumping charge, therefore, required proof of a fact not required by any of the others.

Where multiple convictions occur out of the same course of conduct, a different double jeopardy analysis applies depending on whether the multiple convictions occur for the same statutory provisions or the same statutory provision. *State v. Villanueva-Gonzalez*, 180 Wn. 2d 975, 980, 329 P.3d 78 (2014). In the instant case, each of Ring's four convictions for bail jumping, committed on September 28, 2013, result from the same criminal offense statute, RCW 9A.76.170. Therefore, the "unit of prosecution analysis" applies to double jeopardy analysis of the instant case. *Villanueva-Gonzalez* at 980. The unit of prosecution

analysis requires the reviewing court to determine '"what act or course of conduct has the Legislature defined as the punishable act."' *Villanueva-Gonzalez* at 980-81, quoting *State v. Adel*, 136 Wn. 2d 629, 634, 965 P.2d 1072 (1998).

Ring cites *State v. O'Brien*, 164 Wn. App. 924, 267 P.3d 422 (2011), for the proposition that his three of his four convictions for bail jumping violate double jeopardy. Br. of Appellant at 42. The operative facts of *O'Brien* are substantially similar to the operative facts of the instant case, in that in *O'Brien* the defendant was convicted of four separate counts of bail jumping after he was released in four separate cases with four separate court orders and then failed to appear as ordered. *Id.* at 927. Accordingly, *O'Brien* appears to be directly on point with the instant case.

The *O'Brien* court observed that "the statute is ambiguous as to whether the legislature intended to punish the single failure to appear or the violations of multiple court orders." *O'Brien* at 929–30. The court therefore applied the rule of lenity to the specific facts of the case and determined that the unit of prosecution in the case was the defendant's

single failure to report rather than the violation of four separate court orders. *O'Brien* at 930, 932–33.

Because *State v. O'Brien*, 164 Wn. App. 924, 267 P.3d 422 (2011), is controlling precedent in the instant case, and because no contrary authority has been located, the State respectfully concedes that three of Ring's four convictions for bail jumping in the instant case should be dismissed.

7. One of the judgment and sentence orders sets forth the wrong year of the offense for two of Ring's current offenses. *The State agrees that the trial court should correct the judgment and sentence to reflect the correct offense dates.*

The State agrees with Ring's summary of facts on this issue. A review of the record shows that a typographical error occurs in the judgment and sentence for cause no. 12-1-00408-1, where the offense dates for counts II and III are recorded as "2013" but the actual date should be "2012." CP 144. The State agrees that the trial court should be permitted or required to correct the judgment and sentence to reflect the correct date.

D. CONCLUSION

The State concedes error as alleged regarding count VI of case number 12-1-00398-0, as argued in issue 4, above.

The State concedes error as alleged regarding count I of case number 12-1-00408-1, as argued in issue 5, above.

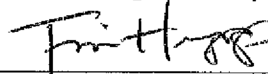
The State concedes that three of Ring's four convictions for bail jumping should be dismissed as argued in issue 6, above.

And the State agrees that the judgment and sentence should be amended or corrected to reflect the correct offense dates, as argued as issue 7, above.

The State asks that the Court deny all other aspects of Ring's appeal and affirm his other convictions.

DATED: January 23, 2015.

MICHAEL DORCY
Mason County
Prosecuting Attorney



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