

No. 65456-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

**JASON KILLINGSWORTH,**

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Thomas Wynne  
The Honorable Joseph Wilson

---

APPELLANT'S OPENING BRIEF

---

OLIVER R. DAVIS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

*Handwritten notes:*  
2011 January 20, 2011  
OL

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR .... 1

C. STATEMENT OF THE CASE ..... 2

    1. Procedural history. ..... 2

    2. Facts. ..... 3

D. ARGUMENT ..... 5

    1. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. KILLINGSWORTH KNEW THE PROPERTY HE PAWNED WAS STOLEN. .... 5

        a. The State must prove knowledge that the property in question was stolen. ..... 5

        b. The State failed to prove that Jason Killingsworth knew that the property was stolen. ..... 6

    2. THE JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. KILLINGSWORTH KNEW THE PROPERTY HE PAWNED WAS STOLEN. . . 8

        a. The matter was brought to the court's attention below and in any event constitutes manifest constitutional error under RAP 2.5(a)(3). ..... 8

*Objection to Instruction 18.* ..... 8

*Objection to Instruction 9.* ..... 9

        b. The jury instructions relieved the State of its burden to prove knowledge that the items were stolen. ..... 11

        c. The error was not harmless. ..... 16

3. THE PROSECUTOR COMMITTED MISCONDUCT IN  
CLOSING ARGUMENT. . . . . 18

E. CONCLUSION . . . . . 23

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

State v. Anderson, 153 Wn.App. 417, 220 P.3d 1273 (2009). . . . 21

State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000) . . . . . 12

State v. Ashby, 77 Wn.2d 33, 459 P.2d 403 (1969). . . . . 22

State v. Bennett, 20 Wn. App. 783, 582 P.2d 569 (1978) . . . . . 20

State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) . . . . . 17

State v. Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978) . . . . . 21

State v. Cleveland, 58 Wn. App. 634, 794 P.2d 546, review denied,  
115 Wn.2d 1029, 803 P.2d 324 (1990) . . . . . 22

State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991) . . . . . 21

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984) . . . . . 25

State v. Davis, 154 Wn.2d 291, 111 P.3d 844 (2005) . . . . . 10

State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953). . . . . 15

State v. Fiallo-Lopez, 78 Wn. App. 717,  
899 P.2d 1294 (1995) . . . . . 21,22

State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996) . . . . . 19

State v. French, 101 Wn. App. 380, 4 P.3d 857 (2000) . . . . . 24

State v. Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979). . . . . 18

State v. Gallagher, 112 Wn. App. 601, 608, 51 P.3d 100, review  
denied, 148 Wn.2d 1023, 66 P.3d 638 (2002). . . . . 16

<u>State v. Gentry</u> , 125 Wn.2d 570, 888 P.2d 1105 (1995) . . . . .	24
<u>State v. Goble</u> , 131 Wn. App. 194, 126 P.3d 821 (2005) . . . . .	17
<u>State v. Golladay</u> , 78 Wn.2d 121, 470 P.2d 191 (1970). . . . .	17
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980) . . . . .	7
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 1182 (1985) . . . . .	17,25
<u>State v. Harris</u> , 122 Wn. App. 547, 90 P.3d 1133 (2004). . . . .	13,16
<u>State v. Hermann</u> , 138 Wn. App. 596, 158 P.3d 96 (2007). . . . .	6,11
<u>State v. Jennings</u> , 35 Wn. App. 216, 666 P.2d 381, <u>review denied</u> , 100 Wn.2d 1024 (1983) . . . . .	11
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993). . . . .	19
<u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008). . . . .	17
<u>State v. LeFaber</u> , 128 Wn.2d 896, 913 P.2d 369 (1996) . . . . .	6
<u>State v. Lynn</u> , 67 Wn. App. 339, 835 P.2d 251 (1992). . . . .	10
<u>State v. Pirtle</u> , 127 Wn.2d 628, 904 P.2d 245 (1995), <u>cert. denied</u> , 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996). . . . .	11,13
<u>State v. Ramirez</u> , 49 Wn. App. 332, 742 P.2d 726 (1987) . . . . .	20
<u>State v. Reed</u> , 25 Wn. App. 46, 604 P.2d 1330 (1979) . . . . .	19,20,23
<u>State v. Rivas</u> , 126 Wn.2d 443, 896 P.2d 57 (1995). . . . .	12
<u>State v. Smith</u> , 131 Wn.2d 258, 930 P.2d 917 (1997) . . . . .	16
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997). . . . .	25
<u>State v. Stein</u> , 144 Wn.2d 236, 27 P.3d 184 (2001) . . . . .	10

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004). . . . . 13

State v. Traweek, 43 Wn. App. 99, 715 P.2d 1148 (1986),  
overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816  
P.2d 718 (1991) . . . . . 19

State v. Walden, 131 Wn.2d 469, 932 P.2d 1237 (1997). . . . . 16

**UNITED STATES SUPREME COURT CASES**

Doyle v. Ohio, 426 U.S. 610, 96 S.Ct. 2240 (1976) . . . . . 18

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106  
(1965). . . . . 19,20

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d  
35 (1999). . . . . 17

In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368  
(1970). . . . . 5,11

**CONSTITUTIONAL PROVISIONS**

U.S. Const. amend 14 . . . . . passim

U.S. Const. amend. 5 . . . . . 18,20

Wash. Const, article 1, sec. 9 . . . . . 18,20

**STATUTES AND COURT RULES**

RCW 9A.82.050 . . . . . passim

RCW 9A.82.010 . . . . . passim

RCW 9A.82.055 . . . . . 7

RCW 9A.88.010(19) . . . . . 15

CrR 6.15(c) ..... 10

RAP 2.5(a)(3) ..... 10

**TREATISES AND REFERENCE MATERIALS**

Fine and Ende, Washington Practice, Criminal Law, sec. 2617 at  
p. 147 (2d. ed. 1998). ..... 9

Washington Pattern Jury Instructions, Criminal ..... 12

## **A. ASSIGNMENTS OF ERROR**

1. The evidence was insufficient to prove that the defendant knew the items he pawned were stolen.

2. The jury instructions relieved the State of its burden to prove every element of the offense of “knowingly trafficking in stolen property” (first degree trafficking).

3. The prosecutor committed misconduct in closing argument.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was the evidence insufficient to convict the defendant of first degree trafficking (“knowingly trafficking in stolen property”) by pawning property, where the defendant was acquitted on the charge of theft of the vehicle in which certain items had been present, and where the State only showed that the car was later found with a receipt inside reflecting the defendant’s purchase of a beer during the time the vehicle was missing, which fails to prove that he knew the property he pawned was stolen?

2. The jury instructions given by the court over defense objection relieved the State of any requirement of showing that the defendant pawned property that he knew was stolen. Where such knowledge is an essential element of first degree trafficking in stolen

property, was the State relieved of its burden to prove every element of the crime?

3. Can the instructional error be deemed harmless beyond a reasonable doubt where the evidence of knowledge, if any, was weak, and sharply conflicting?

4. Did the prosecutor commit flagrant reversible misconduct in closing argument, by improperly faulting the defendant for failing to provide a “reasonable explanation” as to how he could have come into possession of the property without knowing it was stolen, shifting the burden of proof, and commenting on the defendant’s failure to testify, or to present evidence?

### **C. STATEMENT OF THE CASE**

**1. Procedural history.** A vehicle owner’s brother saw two unidentifiable figures prowling near her Volkswagen Jetta, and in the morning the car, and its key that had been hidden in another vehicle, were gone. CP 74; 5/10/2010RP at 59-62. The car owner discovered that an iPod music player worth \$50 and a portable GPS device were missing from the vehicle. The State showed the property was later pawned by Jason Killingsworth at a shop where he provided his identification for the transaction, just as he had done when he had

properly sold multiple items there in the past, none of which were ever found to be stolen. CP 74; 5/10/2010RP at 129, 137.

The jury properly acquitted Mr. Killingsworth on a charge of Theft of a Motor Vehicle (Count 1), and could not agree on a charge of Taking a Motor Vehicle (same car) (Count 3). CP 44.

On Count 3, a charge of Trafficking in Stolen Property in the First Degree, the jury found the defendant guilty following closing argument by the State that improperly faulted the defendant for failing to provide a "reasonable explanation for why -- for how he would get this [item(s)] without knowing it was stolen." 5/11/2010RP at 173.

The trial court had previously rejected the defense arguments that the jury was being given instructions for trafficking that failed to even require proof by the State that Mr. Killingsworth knew the items he sold to the pawn shop were stolen. 5/11/2010RP at 160.

The sentencing court refused to impose a DOSA sentence and instead Jason was ordered incarcerated for 68 months on an agreed criminal history and offender score of 9. CP 44; 5/19/2010RP at 13. He appeals. CP 2-13.

**2. Facts.** When Trista Lemmons noticed her Jetta was missing, she reported the incident to police, and later that day she

discovered the car in a ditch nearby to her home, with some damage to it. 5/10/2010RP at 60-62.

Lemmons and her brother also located a beer can at the scene, along with a receipt for Haggen's food store, dated sometime after midnight on July 13. 5/10/2010RP at 45-46. The beer can was found outside the car on the ground, and the receipt was found in the compartment of the passenger side door. 5/10/2010RP at 54, 85-86. A police investigation concluded that the person purchasing the can of beer had used a discount card number for the store, which was traced to one Ms. Bowen, a woman who had lived recently in the home of the defendant and his parents. 5/10/2010RP at 8, 27.<sup>1</sup>

Lemmons later reported that her iPod music player and Tom-Tom navigational device were missing from the Jetta. 5/10/2010RP at 68-70. She provided the serial numbers for the items and police learned they had been sold to a pawn shop by Mr. Killingsworth. 5/10/2010RP at 101-03.

---

<sup>1</sup> Several witnesses (including a police officer) who had used "discount cards" agreed that one can simply use the phone number associated with the card to gain a store discount, as opposed to having the card itself, and Ms. Bowen admitted she had used the Killingsworth family's phone number in activating her discount card. 5/10/2010RP at 9, 115-16. A Haggen's employee also noted that customers are provided with several discount cards for distribution to others in the same household, using the same telephone number. 5/11/2010RP at 148-49.

Mr. Killingsworth had used his own driver's license as identification to pawn the property. 5/10/2010RP at 113. Detective Timothy Bayler agreed that pawning an item at a pawn shop was not criminal conduct:

**Q:** Just because an item is pawned does not mean that a crime has been committed; is that correct?

**A:** Correct.

5/10/2010RP at 114. The Detective also agreed that nothing uncovered in his investigation, including any fingerprints, indicated to him that Jason Killingsworth could be placed inside Ms. Lemmons' Jetta. 5/10/2010RP at 118.

#### **D. ARGUMENT**

**1. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. KILLINGSWORTH KNEW THE PROPERTY HE PAWNED WAS STOLEN.**

**a. The State must prove knowledge that the property in question was stolen.**

Under the Fourteenth Amendment's Due Process Clause, criminal defendants are presumed innocent, and the government must prove guilt on the charged offense beyond a reasonable doubt. U.S. Const. amend 14; In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

Proof of first degree trafficking in stolen property as charged in the present case required proof beyond a reasonable doubt that Jason Killingsworth knew the property he pawned was stolen property. RCW 9A.82.050; RCW 9A.82.010; State v. Hermann, 138 Wn. App. 596, 604, 158 P.3d 96 (2007).

**b. The State failed to prove that Jason Killingsworth knew that the property was stolen.**

There was no proof that the defendant knew the property he pawned was stolen. Notably, the jury acquitted Mr. Killingsworth on the charge of theft of a motor vehicle, and could not agree on the charge of taking a motor vehicle, despite the State's repeated claims in closing argument that the defendant was the person who stole the vehicle -- and therefore that he must have known the items that were in it when it was taken were stolen. 5/11/2010RP at 168-69, 170-74.

No evidence showed that this property was obtained in some chain of events that indicated the defendant knew, or even must have known, that it was stolen. In fact, the defense elicited evidence at trial that the steering column of Lemmons' vehicle had not been damaged in any way, thereby demonstrating that a person riding in the car would not have any way of knowing it had been taken improperly. 5/10/2010RP at 77-78.

Indeed, the employee of the shop where Mr. Killingsworth pawned the property testified to the procedures required for a person to attest that items are not stolen, and Mr. Killingsworth had met all of them. 5/11/2010RP at 129-30. Mr. Killingsworth had in fact pawned multiple items in her shop in the past, and none of them had ever been found to be stolen, under the careful system of assurances that the shop cooperated with police to monitor, which includes law enforcement use of modern internet technology to check pawned property against police records. All of this showed the defendant's consciousness of innocence, rather than guilt. 5/11/2010RP at 137-39; 5/10/2010RP at 103-04.

It is true that in a sufficiency challenge, the evidence and all reasonable inferences therefrom are taken in a light favorable to the State. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). But here, absent any indication that the defendant even could have known the property was stolen, there is certainly no proof "beyond a reasonable doubt" that he did know it was stolen, a state of affairs that impelled the prosecutor to secure (over defense objection) a lesser offense instruction on second degree trafficking. 5/11/2010RP at 153-54. See RCW 9A.82.055 ("A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second

degree”). The conviction in Count 3 for “knowing” trafficking in stolen property must be reversed for insufficiency of the evidence.

**2. THE JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE THAT MR. KILLINGSWORTH KNEW THE PROPERTY HE PAWNED WAS STOLEN.**

- a. **The matter was brought to the court’s attention below and in any event constitutes manifest constitutional error under RAP 2.5(a)(3).**

***Objection to Instruction 18.*** In discussing the jury instructions, the defendant first objected to the State's proposed use of certain language in WPIC 10.02, which defines the term “knowingly,” and which language states that “[i]t is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.” 5/11/2010RP at 157. Counsel stated that this particular language was inappropriate given the charge and the facts in front of the jury. 5/11/2010RP at 157. This discussion was just shortly after the defense examination of the pawn shop employee and the defense’s emphasis on her testimony demonstrating that Mr. Killingsworth did not behave like someone who knew the property he pawned was stolen. See 5/11/2010RP at 129-30, 137.

The court rejected the defense argument without comment and used the State's proposed instruction, which includes the challenged language.<sup>2</sup> 5/11/2010RP at 158; CP 55.

***Objection to Instruction 9.*** The defense further objected that the "to-convict" instruction for trafficking failed outright to make clear the requirement of proof that one must know the property in question is stolen, and improperly allowed the jury to find guilt simply if it concluded the defendant sold an item, "and it [the item] was stolen." 5/11/2010RP at 159; CP 46.

The trial court initially said it would put together a packet of instructions for final review by the parties and further argument, but then the prosecutor noted that since there was no WPIC for trafficking, the State had used the "to-convict" example from "Mr. Fine's textbook."<sup>3</sup> 5/11/2010RP at 160. The court and the prosecutor together agreed:

---

<sup>2</sup> The challenged portion of the instruction reads as follows (underscored):

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

CP 55.

<sup>3</sup> The sample "to-convict" instruction in Washington Practice states the element(s) of the charged offense of trafficking in stolen property as follows:

THE COURT: If Mr. Fine says so --  
MR. SOWA: That establishes that.  
THE COURT: All right. Good enough. We'll be in  
recess.

5/11/2010RP at 160. The defendant, however, re-asserted that he  
"maintain[ed] the previous objections noted when discussing the jury  
instructions." 5/11/2010RP at 160. After indicating it would use the  
State's proposed instructions and reject the defense objections, the  
court stated that the "objections and exceptions that were previously  
discussed then will be of record." 5/11/2010RP at 160-61.

The defendant brought the deficiencies in the jury instructions  
to the trial court's attention in the proper manner at the proper time.  
CrR 6.15(c). In addition, the instructional error in the present case,  
which relieved the State of its burden of proof on the element of  
knowledge, was a "manifest error affecting a constitutional right."

RAP 2.5(a)(3); State v. Davis, 154 Wn.2d 291, 305-06, 111 P.3d 844  
(2005); State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001); State  
v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

---

To convict the defendant of the crime of trafficking in stolen  
property in the first degree, each of the following elements of the  
crime must be proved beyond a reasonable doubt:

- (1) That on or about (date), the defendant: Knowingly trafficked in  
stolen property; and
- (2) That the acts occurred in the State of Washington.

Fine and Ende, Washington Practice, Criminal Law, sec. 2617 at p. 147 (2d. ed.  
1998).

**b. The jury instructions relieved the State of its burden to prove knowledge that the items were stolen.**

The “to-convict” instruction failed to require proof that Mr. Killingsworth knew the property in question was stolen. The State must prove guilt on the charged offense beyond a reasonable doubt. U.S. Const. amend 14; In re Winship, 397 U.S. at 362. This requirement demands that juries be instructed on every element of the crime and the State’s burden to prove all of them. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996).

First, the trafficking statute plainly requires proof of an element that the defendant knew the property in question was stolen. Although the language of the first degree trafficking in stolen property statute is of course different than that of the possession of stolen property statute, the Washington courts agree that it is a required element of both offenses that one must know the property in question is stolen.<sup>4</sup> See State v. Hermann, supra, 138 Wn. App. at 604 (“A reasonable jury could conclude beyond a reasonable doubt that Hermann knew the rings were stolen when he pawned them. The evidence sufficiently supported the trafficking conviction.”); State v. Jennings, 35

---

<sup>4</sup> RCW 9A.82.055(1); RCW 9A.56.150(1).

Wn. App. 216, 219, 666 P.2d 381, review denied, 100 Wn.2d 1024 (1983) (knowledge that property is stolen is an essential element of possession of stolen property).

It is untenable to suggest that possession of stolen property requires proof of knowledge, but that trafficking in stolen property was meant by the Legislature to be a strict liability offense requiring no proof of mental culpability. See State v. Anderson, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); State v. Rivas, 126 Wn.2d 443, 452, 896 P.2d 57 (1995). A defendant accused of “trafficking” in the first degree plainly must know the property is stolen.

The WPIC pattern instructions make the legal intricacies of this knowledge requirement clear with respect to the crime of possession of stolen property. See Washington Pattern Jury Instructions, Criminal 77.02 (requiring proof of the element that “the defendant [possessed the property] with knowledge that the property had been stolen”).

There is no WPIC pattern instruction for trafficking in stolen property. But the elements in a to-convict instruction do not depend on the Pattern Instructions, and, simply, must accurately state the elements required for proof of the charged crime. Furthermore, jury instructions, as a whole, must make the relevant legal standard manifestly apparent to the jury. See infra.

In the present case, there was an omission and misstatement of the law in the jury instructions that failed to convey the law adequately and ultimately relieved the State of its burden to prove every element of the offense, which violates due process. State v. Pirtle, 127 Wn.2d at 656; State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). The “to-convict” instruction read as follows:

To convict the defendant of the crime of trafficking in stolen property in the first degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 13<sup>th</sup> day of July, 2009, the defendant knowingly trafficked in stolen property; and
- (2) That the acts occurred in the State of Washington.

CP 46 (Instruction 9). This instruction, to a lay jury, does not in any comprehensible way communicate that the defendant must know the property is stolen. Rather, common understanding of the language above indicates that the defendant need only “knowingly” pawn, sell or dispose of property – and he is guilty if it was stolen property. Jury instructions, in respect to requiring proof of every element, must make the law “manifestly clear,” since juries lack the tools of statutory construction available to courts. See, e.g., State v. Harris, 122 Wn. App. 547, 554, 90 P.3d 1133 (2004). The “to-convict” instruction omitted an element and was a clear misstatement of the law.

This defective jury instruction alone requires reversal, as it was affirmatively incorrect to a lay jury, or deeply confusing at best, with regard to the element of knowledge necessary to render the defendant's conduct a wrongful act.

This constitutional deficiency of the "to-convict" instruction was exacerbated in the instructions as a whole by the use of the challenged language in instruction 8, the definition of "knowingly." This instruction told the jury that that "[i]t is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime." 5/11/2010RP at 157. Lawyers can discern what this means. But to a jury of laypersons, in the context of this case, and given the dictate of the faulty "to-convict" instruction, this language reinforced the idea that Mr. Killingsworth did not need to know the items he pawned were stolen – it affirmatively indicated to the jurors that the defendant must be found guilty even if he did not know of the fact that the items were stolen and he was committing an unlawful act.

The State will inevitably contend that the jury *should have smartly deduced* the requirement of knowledge from the language of another instruction, 15 (defining trafficking as to "sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another

person”), and from the definition of trafficking in the first degree in instruction 8. See CP 52 (Instruction 15); RCW 9A.88.010(19); CP 45 (Instruction 8) (“A person is guilty of trafficking in stolen property in the first degree if he or she knowingly trafficks in stolen property”).

But this argument fails. None of this other language cures the fact that the ultimate “to-convict” instruction, 9, does not make it clear that the “knowledge” that is required for guilt is knowledge as to the stolen nature of the property.

First, of course, the elements of the crime must be correctly included in the “to-convict” instruction, and jurors are not to be required to search through other instructions, in order to deduce what the elements of the charge might be. State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953).

Second, lawyers could argue at length about what words in the “to-convict” instruction are or are not modified by the word “knowingly,” and determine the elements by cross-incorporating the language of other definitional instructions, and by employing various rules of statutory construction – although, as noted, the Washington courts agree that knowledge of the property’s stolen character is indeed a required element.

But lay juries are not capable of such legalistic arguments of statutory construction. State v. Harris, 122 Wn. App. at 554; State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Nor of course do we want jurors to have to speculate during deliberations about what the law “is.”

Instead, the applicable rule demands that “[r]ead as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror.” Harris, at 554; see also State v. Walden, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997).

This did not occur, and a defendant cannot be said to have had a fair trial “if the jury might assume [from the instructions] that an essential element need not be proved.” State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (citing State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)).

**c. The error was not harmless.**

Instructional error will be presumed prejudicial unless it affirmatively appears harmless. State v. Gallagher, 112 Wn. App. 601, 608, 51 P.3d 100, review denied, 148 Wn.2d 1023, 66 P.3d 638 (2002). Here, because the evidence of knowledge that the property was stolen (*if any*, see Part D.1, supra) was conflicting, and far from overwhelming in any sense, the constitutional error of relieving the

State of its burden to prove the missing essential element is not harmless “beyond a reasonable doubt.” State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005) (citing State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)); State v. Brown, 147 Wn.2d 330, 339-41, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

Certainly, the instructional error in this case was not “trivial, or formal, or merely academic,” particularly given the extreme paucity of proof on the missing element of the crime. State v. Golladay, 78 Wn.2d 121, 139, 470 P.2d 191 (1970).

Furthermore, although the State contended in closing argument that the defendant knew the property was stolen, a prosecutor’s remarks in closing argument cannot cure this sort of fundamental inadequacy in the crucial instructions of law. State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008).<sup>5</sup>

Indeed, Mr. Killingsworth’s jury was told specifically and properly by the trial court that it was its “duty to accept the law from my instructions,” and was further commanded by the court to not be misled by statements about the law in closing argument that conflicted

---

<sup>5</sup> In the same breath the deputy prosecutor confusingly and categorically announced, “Pawning, [is a] classic kind of trafficking.” 5/11/2010RP at 168.

with those instructions:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence [and the] law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

(Emphasis added.) CP 35-36.

The inadequate jury instructions in this case failed to make it apparent to the jury that "knowledge that the property was stolen" is a required element of trafficking in the first degree, and thus relieved the State of its burden to prove every element of the crime beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d at 656; U.S. Const. amend. 14. Due process was violated, and the defendant's conviction on Count 3 was the result.

### **3. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.**

U.S. Const. amend. 5, and the Washington Constitution, article 1, sec. 9, prohibit a State's attempt, at trial, to use a defendant's silence against him by implying to the jury that such silence shows that he is guilty. Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240 (1976); State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979). Thus the State may not attempt to prove guilt by commenting in front

of the jury on the defendant's decision to exercise his constitutional privilege. Griffin v. California, 380 U.S. 609, 613, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

Relatedly, a prosecutor also commits misconduct by misstating the law regarding the burden of proof. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996); U.S. Const. amend. 14. A prosecutor may not suggest to the jury that it should find the defendant guilty because he did not present evidence. State v. Traweck, 43 Wn. App. 99, 106-07, 715 P.2d 1148 (1986), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991); U.S. Const. amend. 14.

The prosecutor was of course not rebutting any contention the defendant raised in his closing argument. See State v. Jones, 71 Wn. App. 798, 809, 863 P.2d 85 (1993). It was in the State's opening remarks of closing argument that the prosecutor mocked the idea that the defendant could have come by the items of property in any innocent way, and, critically, faulted him for failing to provide a "reasonable explanation" otherwise. 5/11/2010RP at 171.

This misconduct occurred multiple times. The State, theorizing that there was no way the defendant could have come by the items except that he was the person that stole the vehicle, asked if

"[s]omebody s[old] it to him in the middle of the night?" 5/11/2010RP

at 172. The State then continued,

Nobody gives it to you in the middle of the night.  
There's no reasonable explanation for why -- for how  
he would get this without knowing it was stolen, either  
buying it too cheaply or stealing it himself or knowing  
it was stolen in a stolen car and pawning it.

5/11/2010RP at 173.

Because the State's closing argument in this case invited the jurors to conclude that the defendant was guilty because he failed to provide a "reasonable explanation" as to how he might have come into possession of the property, the remarks were an improper comment on Mr. Killingsworth's decision not to testify at trial. State v. Reed, 25 Wn. App. 46, 48, 604 P.2d 1330 (1979) (citing Griffin v. California, 380 U.S. at 613); State v. Bennett, 20 Wn. App. 783, 786, 582 P.2d 569 (1978); U.S. Const. amend. 5; Wash. Const. art. I, sec. 9. The Court of Appeals has stated that "[t]he test employed to determine if a defendant's Fifth Amendment rights have been violated is whether the prosecutor's statement was of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify." State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). Here, only Mr. Killingsworth could have provided the "reasonable explanation" that the State repeatedly argued was

lacking. The State's improper arguments cannot be deemed "so subtle and so brief that [they] did not naturally and necessarily emphasize defendant's testimonial silence." State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10 (1991).

The State is also prohibited from, but here violated, the rule against putting forward an inference of guilt from implications that the accused has "failed" to prove his innocence, because he is not required to do so. Reed, 25 Wn. App. at 48 (citing State v. Charlton, 90 Wn.2d 657, 662, 585 P.2d 142 (1978)); U.S. Const. amend. 14. Yet this is precisely what the State also did in this case, by these comments – shifted the burden of proof to the defendant, to prove his innocence. A prosecutor may comment on the quality of the defense's evidence in certain circumstances not present here, but it is a due process violation to imply that the burden of proof of guilt or innocence rests with the defense. State v. Anderson, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009).

For example, in State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1294 (1995), the Court of Appeals found error where the prosecutor stated in closing argument that there was no evidence to explain why the defendant was present at a scene where other

persons were negotiating a drug deal. State v. Fiallo-Lopez, 78 Wn. App. at 728.

The prosecutor argued that there was no attempt by the defendant to rebut the prosecution's evidence regarding his involvement in the drug deal. Despite the prosecutor's passing reference to the fact that the defense had no burden to explain Fiallo-Lopez's actions, the State's argument highlighted the defendant's silence.

State v. Fiallo-Lopez, 78 Wn. App. 729 (“Because the argument improperly commented on the defendant's constitutional right not to testify and impermissibly shifted the burden of proof to the defendant, it was misconduct.”); see also State v. Cleveland, 58 Wn. App. 634, 647-49, 794 P.2d 546, review denied, 115 Wn.2d 1029, 803 P.2d 324 (1990) (error for prosecutor to imply defendant had duty to present any favorable evidence in existence).

The prosecutor's extensive remarks in closing demonstrated a specific, and successful, intent to equate Mr. Killingsworth's failure to provide a “reasonable explanation” for having the items, with guilt on the charged crime. This is improper. The prosecutor's argument was a negative comment on the defendant's failure to support his defense with an affirmative defense case, and on his failure to testify at trial. The comments were unfavorable, because the State disparaged the lack of evidence, and only Mr. Killingsworth could have provided the

explanation the trial deputy faulted the defense for failing to put forth. Although the State may note that certain prosecution evidence is undisputed, it may not comment unfavorably on the absence of evidence from the defense side of the case – and certainly may not do so where the only person who could have provided the evidence is the non-testifying defendant. State v. Ashby, 77 Wn.2d 33, 37, 459 P.2d 403 (1969).

This same type of error required reversal in State v. Charlton, where the prosecutor remarked only briefly on the defendant's spouse's failure to testify, an error which the Supreme Court analogized to a comment on the defendant's failure to come forward with evidence. The Court held such reference to be flagrant and ill intentioned and reversed the conviction in spite of a failure to object or request a timely curative instruction. State v. Charlton, 90 Wn.2d 657, 660-62, 585 P.2d 142 (1978).

And in State v. Reed, the Court also reversed for similar error, despite the absence of an objection. State v. Reed, 25 Wn. App. 46, 604 P.2d 1330 (1979). There, the prosecutor shifted the burden of proof and improperly commented on the defendant's exercise of his right to remain silent when he referred to the assertion that defendant had left the victim's farm without having been paid, and then stated

that this assertion was true because there had been no statement in opposition to it. State v. Reed, 25 Wn. App. at 48-49. Based on this and other errors, despite the fact that there was no objection, the Court of Appeals reversed under the constitutional error standard. State v. Reed, 25 Wn. App. At 49.

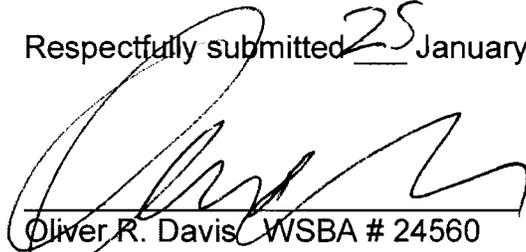
The present case is clearly controlled by Charlton and Reed in terms of reversible error. The Court of Appeals in Reed, supra, closely interlinked the prohibition on drawing negative inferences from an accused's exercise of his right to silence with prosecutorial misconduct of the "flagrant" variety, requiring no objection to be challenged on appeal. Reed, 25 Wn. App. at 48-50. Appellate challenge to a prosecutor's improper comments on the defendant's exercise of his right not to testify at trial have also been premised on RAP 2.5(a)(3), as manifest constitutional error. State v. French, 101 Wn. App. 380, 387, 4 P.3d 857 (2000); see, e.g., State v. Fleming, 83 Wn. App. at 213-15 (comments on failure to testify, and improper argument that acquittal required jury to conclude State's witnesses were lying, established manifest constitutional error, which was not harmless beyond a reasonable doubt). Either analysis permits Mr. Killingsworth to not only appeal the State's misconduct in closing, but also requires reversal.

When prosecutorial misconduct is alleged, the defendant bears the burden of establishing its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995). Flagrant and ill-intentioned prosecutorial misconduct is a Due Process violation. State v. Davenport, 100 Wn.2d 757, 762-63, 675 P.2d 1213 (1984); U.S. Const. amend. 14. There is no question that in the present case, the evidence, *if any*, on the issue of knowledge was not so overwhelming as to render the misconduct harmless beyond a reasonable doubt. See State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Additionally, this misconduct caused “enduring and resulting prejudice” to Mr. Killingsworth. State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). The State’s comments infused the entire trial. The State’s improper theme of faulting the defendant for failing to provide a reasonable explanation as to how he might have come by the property innocently, went to the crux of the case. This Court should reverse the first degree trafficking conviction for this additional reason.

**E. CONCLUSION**

Based on the foregoing, Jason Killingsworth respectfully requests that this Court reverse the judgment and sentence of the trial court as argued herein.

Respectfully submitted 25 January, 2011.



Oliver R. Davis WSBA # 24560  
Attorney for Appellant  
Washington Appellate Project - 91052

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 65456-0-I
	)	
JASON KILLINGSWORTH,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 25<sup>TH</sup> DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |     |  |                   |                                     |
|-----|--|-------------------|-------------------------------------|
| [X] | SETH FINE, DPA<br>SNOHOMISH COUNTY PROSECUTOR'S OFFICE<br>3000 ROCKEFELLER<br>EVERETT, WA 98201      | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | JASON KILLINGSWORTH<br>815127<br>OLYMPIC CORRECTIONS CENTER<br>11235 HOH MAINLINE<br>FORKS, WA 98331 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON, THIS 25<sup>TH</sup> DAY OF JANUARY, 2011.

X \_\_\_\_\_  
*[Handwritten Signature]*

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, Washington 98101  
☎(206) 587-2711

2011 JAN 25 4:14 PM  
JAN 25 4:14 PM '11