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COURT OF APPEALS
DIVISION II

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No. 34037-2-II

STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

David Cain,

Appellant.

Grays Harbor Superior Court

Cause No. 05-1-00410-2

The Honorable Judge David E. Foscue

Appellant's Reply Brief

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ARGUMENT

RESPONDENT'S FAILURE TO DIRECTLY ADDRESS MR. CAIN'S ARGUMENT REQUIRES REVERSAL AND REMAND FOR A NEW TRIAL.

The Supreme Court has disallowed the use of mandatory presumptions, regardless of how reasonable they might seem. *State v. Deal*, 128 Wn.2d 693, 911 P.2d 996 (1996). Furthermore,

[t]he standard for clarity in a jury instruction is higher than for a statute; while we have been able to resolve [ambiguous wording] via statutory construction, a jury lacks such interpretive tools and thus requires a manifestly clear instruction. *State v. Lefaber*, 128 Wn.2d 896 at 902, 913 P.2d 369 (1996).

The instruction here was not manifestly clear.

Respondent argues that the instructions “simply instruct the jury that if, based on the evidence presented, they find that the defendant had actual knowledge that the property he sold was stolen, then, as a matter of law, he also acted recklessly.” Brief of Respondent, p. 3. This is incorrect because the instructions were not limited in this way.

The last sentence of Instruction No. 5 provides that “Recklessness also is established if a person acts knowingly.” CP 19. The instruction does not inform the jury what kind of knowing action is sufficient to establish recklessness. The jury may have believed that Mr. Cain knowingly sold scrap metal, and presumed from this (under Instruction No. 5) that he acted recklessly with regard to whether or not it was stolen.

This is similar to the mandatory presumption in *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). In that case, the jury was permitted to presume knowledge (that the victim was a law enforcement officer) from any intentional act (including the alleged assault). The error required reversal. *Goble, supra*.

Respondent does not appear to have fully grasped Mr. Cain's argument, and has not addressed it directly. Respondent insists (without any apparent basis) that the only possible application of the instruction was to a finding that Mr. Cain knowingly trafficked in stolen property: "A finding by the jury that the defendant knowingly trafficked in stolen property necessarily includes a finding that the defendant recklessly trafficked in stolen property." Brief of Respondent, p 4. Respondent does not explain how a finding that Mr. Cain knowingly sold scrap metal could, by itself, constitutionally allow the jury to presume that he recklessly trafficked in stolen property. Brief of Respondent, pp. 2-4.

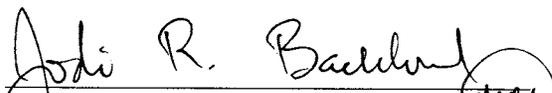
Respondent's failure to directly address Mr. Cain's primary argument requires reversal.

CONCLUSION

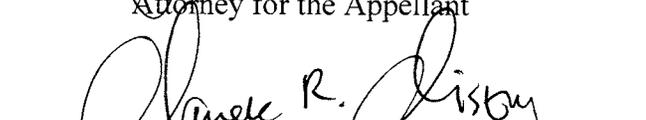
For the foregoing reasons, the conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on September 14, 2006.

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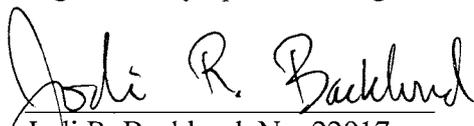
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and to the Grays Harbor Prosecuting Attorney, and that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 14, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 14, 2006.



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