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COURT OF APPEALS
STATE OF WASHINGTON

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STATE OF WASHINGTON

BY:  DEPUTY

No. 34037-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

DAVID J. CAIN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID E. FOSCUE, JUDGE

BRIEF OF RESPONDENT

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Prosecuting Attorney
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BY: 
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RESPONDENT'S COUNTERSTATEMENT OF THE CASE

The defendant was charged by information on July 21, 2005, with Trafficking in Stolen Property in the Second Degree, RCW 9A.82.050. (CP 1-2). The matter was tried to a jury commencing on October 11, 2005. The jury returned a verdict of guilty. The defendant was sentenced on October 31, 2005. (CP 3-10).

The underlying facts are as follows. Kevin Young works at the fish hatchery maintained by the Department of Fish and Wildlife at Humptulips. When he left work on Friday, June 24, 2005, everything was secure. (RP 19). He came to work on June 27, 2005, and found that the premises had been entered by someone who had broken off the lock on a gate. (RP 19). He found that large aluminum frames that were used at the fish hatchery were now missing. (RP 20-21). Dan Evans, an employee at the fish hatchery contacted Butcher's Scrap Metal, a business in Hoquiam, and told them to be on the lookout for the property. (RP 27).

Evans is related to the defendant. (RP 28). Evans had seen the defendant fishing on the hatchery grounds several days prior to the theft. The two of them spoke to each other. (RP 28). The defendant fished at the creek near the hatchery often during the season. (RP 32).

The following day, Evans received a phone call from Ron Butcher

of Butcher Scrap Metal. The stolen aluminum frames were recovered by Mr. Evans at Butcher Scrap Metal. (RP 29-30). As it turned out, the defendant sold the stolen property to Butcher Scrap Metal on June 27, 2005, the day that the theft was discovered. (RP 37-38).

RESPONSE TO ASSIGNMENT OF ERROR

The court properly instructed the jury regarding knowledge and recklessness.

Instructions were submitted to the jury without exception.

Instruction No. 4 set forth the elements of the crime of Trafficking in Stolen Property in the Second Degree. This included the requirement that the defendant acted recklessly. The jury was instructed concerning the definition of recklessness in the express language of WPIC 10.03.

Instruction 5. The instruction contained the explanation that recklessness is a lesser mental element of knowledge. The jury was instructed regarding the mental element of knowledge in the express language of WPIC 10.02.

Neither definition carries any type of mandatory presumption. The knowledge instruction is set forth in terms that expressly avoids any unconstitutional mandatory presumption. State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980). The knowledge instruction as set forth in the instructions herein has been expressly approved by the Washington

Supreme Court. State v. Leech, 114 Wn.2d 700, 710, 790 P.2d 160 (1990).

For a jury to determine that an individual acted knowingly, they must find, beyond a reasonable doubt, actual subjective knowledge. State v. Vanoli, 86 Wn.App. 643, 646-47 (1997). A jury may, but need not, find actual knowledge if the defendant has information which would lead a reasonable person in the same situation to believe that such facts exist which are described by law as being a crime.

The two instructions, when read together, 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. There is nothing herein that relieved the State from proving beyond a reasonable doubt that the defendant acted recklessly. By statute, if the jury finds beyond a reasonable doubt that the defendant acted with actual knowledge, that necessarily includes a finding that he acted with the lesser included mental intent of recklessness. This is quite unlike Shipp in which the jury was told they were required to find actual knowledge if they determined that the defendant knew certain facts.

State v. Goble, 131 Wn.App. 194 (2005), cited by the defendant, is not on point. In Goble, the defendant was charged with Assault in the Third Degree. One of the elements of the instruction was that the defendant knew that the victim, Deputy Riordan, was a law enforcement officer who was performing his official duties. In Goble, a majority of the

court held that somehow the giving of WPIC 10.02 including a paragraph that instructed that acting knowingly or with knowledge is established if a person acts intentionally was misleading in that it directed the jury to presume knowledge that the victim was a police officer from the act of the intentional assault. This simply is not the case at hand.

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. This is not a presumption. This is simply a statement that a finding of knowledge includes the lesser mental element of recklessness.

There is certainly ample evidence from which the jury could have concluded that the defendant had actual knowledge that the property was stolen. The property was of a particular specialized nature. The defendant had been in the immediate vicinity of where the property was located on numerous occasions. The defendant was on the premises several days prior to the discovery of theft. The defendant was in possession of the property within approximately two days of the theft of the property.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

Respectfully Submitted,

By: *Gerald R Fuller*
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

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DECLARATION OF MAILING

DAVID J. CAIN,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 23rd day of August, 2006, I mailed a copy of Respondent's Brief to Jodi R. Backlund and Manek R. Mistry; Attorneys at Law; 203 Fourth Avenue East Suite; Olympia, WA 98501-1189, and David J. Cain 745667; Stafford Creek Correction Center; 191 Constantine Way; Aberdeen, WA 98520, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Barbara Chapman