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COURT OF APPEALS
DIVISION II
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NO. 34064-0-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,
Respondent,
vs.
WOO JUNG YUN,
Appellant,

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause No. 05-1-00879-6

BRIEF OF APPELLANT

THOMAS E. DOYLE, WSBA NO. 10634
PATRICIA A. PETHICK, WSBA 21324
Attorney for Appellant

P.O. Box 510
Hansville, WA 98340-0510
(360) 638-2106

pm 6/20/06

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in continuing Yun's trial.
02. The trial court erred in failing to dismiss with prejudice Yun's convictions where he did not receive a timely trial under CrR 3.3.
03. The trial court erred overruling Yun's objection to Jenny Yun testifying that her daughter's rings were taken without her daughter's permission.
04. The trial court erred in not taking, count III, theft in the second degree, from the jury for lack of sufficiency of the evidence.
05. The trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 19.
06. The trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 21.
07. The trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 23.
08. The trial court erred in permitting Yun to be represented by counsel who provided ineffective assistance by failing to object to or by agreeing to the court's instruction 19.

09. The trial court erred in permitting Yun to be represented by counsel who provided ineffective assistance by failing to object to or by agreeing to the court's instruction 21.
10. The trial court erred in permitting Yun to be represented by counsel who provided ineffective assistance by failing to object to or by agreeing to the court's instruction 23.
11. The trial court violated Yun's double jeopardy rights by overruling his objection to dismiss one of the counts of trafficking in stolen property in the first degree.
12. The trial court violated Yun's double jeopardy rights by entering judgment against him for two trafficking in stolen property in the first degree offenses where he was convicted of a single statute.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in continuing Yun's trial and in failing to dismiss with prejudice Yun's convictions where he did not receive a timely trial under CrR 3.3? [Assignments of Error Nos. 1 and 2].
02. Whether the trial court erred overruling Yun's objection to Jenny Yun testifying that her daughter's rings were taken without her daughter's permission? [Assignment of Error No. 3].
03. Whether the trial court erred in not taking, count III, theft in the second degree, from the jury for lack of sufficiency of the evidence? [Assignment of Error No. 4].

04. Whether the trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 19? [Assignment of Error No. 5].
05. Whether the trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 21? [Assignment of Error No. 6].
06. Whether the trial court erred in improperly commenting on the evidence in violation of Washington Constitution Art. 4, Sec. 16 by giving instruction 23? [Assignment of Error No. 7].
07. Whether the trial court erred in permitting Yun to be represented by counsel who provided ineffective assistance by failing to object to or by agreeing to the court's instruction 19? [Assignment of Error No. 8].
08. Whether the trial court erred in permitting Yun to be represented by counsel who provided ineffective assistance by failing to object to or by agreeing to the court's instruction 21? [Assignment of Error No. 9].
09. Whether the trial court erred in permitting Yun to be represented by counsel who provided ineffective assistance by failing to object to or by agreeing to the court's instruction 23? [Assignment of Error No. 10].
10. Whether the trial court violated Yun's double jeopardy rights by overruling his objection to dismiss one of the counts of trafficking in stolen property in the first degree? [Assignment of Error No. 11].

11. Whether the trial court violated Yun's double jeopardy rights by entering judgment against him for two trafficking in stolen property in the first degree offenses where he was convicted of a single statute? [Assignment of Error No. 12].

C. STATEMENT OF THE CASE

01. Procedural Facts

Woo Jung Yun (Yun) was charged by fourth amended information filed in Thurston County Superior Court on November 3, 2005, with theft in the first degree/domestic violence, count I, malicious mischief in the second degree/domestic violence, count II, theft in the second degree/domestic violence, count III, two counts of trafficking in stolen property in the first degree, count IV and V, and possession of 40 grams or less of marijuana, count VI, contrary to RCWs 9A.94A.510, 9A.48.080(1)(a), 9A.56.030(1)(a), 9A.56.040(1)(a), 9A.82.050, 10.99.020 and 69.50.4014. [CP 72-73].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 11]. Trial to a jury commenced on November 2, 2005, the Honorable Gary R. Tabor presiding.

The jury returned verdicts of guilty as charged on counts II-VI but reached no verdict on count I. [RP 11/04/05 8; CP 79-83].

At sentencing, the trial court determined that the two convictions for trafficking in stolen property in the first degree encompassed the same

criminal conduct [RP 11/23/05 5] and sentenced Yun as a first-time offender. [CP 141-42].

Timely notice of this appeal followed. [CP 137].

02. Substantive Facts¹

On May 7, 2005, Thurston County Sergeant Dave Odegaard was dispatched to “a burglary clear call” at a local apartment complex. [RP 11/02/05 32-33]. He contacted Jenny Yun, Yun’s ex-wife, and was directed to her apartment, which had sustained “considerable damage.” [RP 11/02/05 33; RP 11/03/05 197].

As part of a follow-up investigation, Deputy Michael Hazlett contacted Jenny Yun at her apartment the following May 15th, at which point he learned that certain jewelry and other personal property had been removed from her apartment, which had been further damaged, within the last day or two. [RP 11/02/05 46, 51, 75, 77, 81]. Ms. Yun also provided the deputy with two pawn slips from Cash Northwest, Inc., showing Yun had pawned two rings. [RP 11/02/05 54-56].

Yun was subsequently taken into custody by Hazlett at Yun’s parents’ residence. [RP 11/02/05 79]. When Hazlett mentioned the rings to Yun, he said “they were his rings” and that “he was awarded those

¹ The facts are limited to the charges for which Yun was convicted.

during the divorce.” [RP 11/02/05 63]. A DVD player and what subsequently tested positive for marijuana were sized from the partitioned area where Yun was staying at his parents’ house. [RP 11/02/05 59, 68-69, 86; RP 11/03/05 183].

While being transported to jail, Yun mentioned to Deputy Kenneth Clark that he would not “have taken the stuff” if he’d known it would lead to this before saying “that Mrs. Yun gave him the property.” [RP 11/02/05 95-96].

(W)hile we’re still en route to the jail, he said, and I quote, “If I get all the stuff out of the pawn shop and give it back to her, will the judge not charge me with a felony?”

He then later, while we’re still en route to the jail, he said, “Will the prosecutor look more favorably on me if I get the stuff out of pawn?”

[RP 11/02/05 96].

On May 6th or 7th, Candice Main, who lived in the same apartment complex, observed water damage to Jenny Yun’s piano [RP 11/02/05 115], which was stored under the carport, in addition to damage inside Jenny Yun’s apartment:

(T)here was carvings in her entertainment center, and upstairs on the mirror there was also lipstick drawings and there was carvings in the cupboard doors in the bathroom.

[RP 11/02/05 112].

When Yun later came to the apartment, he gave Jenny “her pawn slips for her stuff.” [RP 11/02/05 120, 139-40]. Main was aware that Jenny had an off-an-on conflict with another tenant in the complex, which took the form of water fights. [RP 11/02/05 132-33].

William Dobbs, the owner of Cash Northwest, a pawnshop, identified two loan contracts his business entered on May 12, 2005, showing the customer as Woo J. Yun, who was identified with a driver’s license. [RP 11/03/05 151, 157-160, 164, 170, 229; State’s exhibits 7-8]. Exhibit 7 was a loan for a diamond wedding ring and Exhibit 8 for a green marquis ring. [RP 11/03/05 161, 164-66].

On May 6th or 7th, 2005, Jenny Yun discovered that her apartment had been “totally trashed.” [RP 11/03/05 216-17].

I saw the refrigerator was flipped and the eggs were everywhere and there was mayonnaise and ketchup and mustard everywhere all over my stuff. My couch was slashed, my entertainment center had stuff carved in it. My bathroom had stuff carved in it. There was stuff wrote in lipstick all over my windows and my mirrors.

[RP 11/03/05 217].

My clothes were ruined too, all of them. They were in the bathroom, and somebody dumped bleach all over mine and my kids’ clothes.

[RP 11/03/05 217].

Her piano had been damaged to the extent that it was not fixable. [RP 11/03/05 218]. She placed the damage to her personal property in excess of \$250. [RP 11/03/05 256].

Jenny also explained that 15 to 20 rings she had purchased for her daughter “for a couple thousand” were also later discovered missing. [RP 11/03/05 226-27].

When Jenny later met with Yun, he gave her the pawn slips, State’s exhibits 7 and 8, which she turned over to the police. [RP 11/03/05 229]. “One is for my wedding ring and one is or my daughter’s birthstone ring.” [RP 11/03/05 229]. She eventually recovered the two rings from the pawnshop. [RP 11/03/05 230, 239].

Yun denied damaging the apartment or writing things on the windows and mirrors or trashing the truck or the piano or taking any rings from his children. [RP 11/03/05 265-67]. He did admit to signing the pawn slips but stated Jenny had given him the wedding ring. [RP 11/03/05 268, 290]. The other ring he had purchased for his daughter “but ... didn’t give to her because of the problems that me and her had.” [RP 11/03/05 268, 278-79]. Yun did not recall making the comments to Clark on the way to jail [RP 11/03/05 287] and had no idea how the marijuana got into the room at his parents’ house. [RP 11/03/05 288-89].

D. ARGUMENT

01. YUN'S SPEEDY TRIAL RIGHT WAS VIOLATED AND HIS CONVICTIONS MUST BE REVERSED AND DISMISSED WITH PREJUDICE.

01.1 Procedure

Following his arraignment on June 1, 2005, Yun's trial was set for August 22, under CrR 3.3(b)(2)(i). [CP 8]. On August 24, an agreed order was entered continuing the trial date to September 26, noting "(t)he last allowable date for trial pursuant to CrR 3.3 is Oct. 26, 2005." [CP 13]. On September 26, another agreed order was entered continuing the trial to October 3, which was within the last allowable date of October 26. [CP 16]. Again on October 3, another order was entered continuing the trial to October 17, noting "(t)he last allowable date for trial pursuant to CrR 3.3 is October 26, 2005." [CP 17]. On October 17, the trial date was bumped to October 24, and the trial court advised Yun that "your speedy trial right requires trial before October 26th(.)" [RP 10/17/05 10]. The court went on to declare that "(t)his case needs to be given a priority setting for trial next week, commencing the 24th." [RP 10/17/05 17].

THE COURT: And whoever is representing the office of the prosecuting attorney - -

(DEFENSE COUNSEL): That would be Mr. Graham, Your Honor.

THE COURT: He may be in trial, but there's more than one deputy. This case needs to go to trial Monday, and so I want representatives of the prosecutor - - I see one, two, three, four deputy prosecutors - - you get the word to staff that this case needs to go to trial.

....

THE COURT: And I will confirm with Mr. Graham this needs a priority setting....

[RP 10/17/05 17-18].

01.2 Objection

On October 25, 2005, the trial court yet again continued Yun's trial, this time to October 31, which was beyond the last allowable date for trial of October 26. [CP 20]. Yun objected:

With regard to the trial, Mr. Yun does not agree to setting over the trial. It's been set over a number of times now, and he'd just like to state for the record that he is ready and anxious to have this matter resolved.

....

Your Honor, there are a couple of things I want to put on the record.

First of all, Mr. Yun, as I have mentioned this morning, is quite impatient to get this matter resolve (sic). Mr. Graham has prepared an order. I crossed out agreed - - the word that says agreed, it says, to the order of trial continuance which sets the trial for next Monday, October 31st." [See CP 20].

Mr. Yun has indicated he does not wish to sign the order. He does not agree with the continuance, he wants to get this done and over as soon as possible. I want to put that on the record.

....

And one final desire. He would like the Court to put on the record the reason why this matter is getting set over from this week to next.

[RP 10/25/05 4-5].

01.3 Oral Ruling

The court explained its ruling:

It's my understanding that the reason your matter is not happening this week is because we don't have a judge available to hear your case. We had many cases scheduled for this week, and your case was lower in priority than Mr. Lobe's because he's in custody and you're out of custody.² I don't know about the rest of mix of cases, but there wasn't a judge available to hear your case.

[RP 10/25/05 5].

01.4 Argument

A criminal charge must be dismissed with prejudice if it is not brought to trial within the time limit determined under CrR 3.3. CrR 3.3(h). The trial court bears the ultimate responsibility to ensure that

² The court had previously noted that "(i)t looks like the Lobe case is proceeding this afternoon so we won't get to Mr. Yun's case. [RP 10/17/05 4].

the trial is held within the speedy trial period. CrR 3.3(a)(1); State v. Jenkins, 76 Wn. App. 378, 383, 884 P.2d 1356 (1994).

In reviewing an alleged violation of the speedy trial rule, the court applies the rule to the particular facts to determine whether there exists a violation that mandates dismissal. State v. Carlyle, 84 Wn. App. 33, 35, 925 P.2d 635 (1996). The application of a court rule to particular facts is a question of law reviewed de novo. Carlyle, 84 Wn. App. at 35.

The courts have “consistently interpreted CrR 3.3 so as to resolve ambiguities in a manner which supports the purpose of the rule in providing a prompt trial for the defendant once prosecution is initiated.” State v. Edwards, 94 Wn.2d 208, 216, 616 P.2d 620 (1980).

. . . [P]ast experience has shown that unless a strict rule is applied, the right to a speedy trial as well as the integrity of the judicial process, cannot be effectively preserved.

State v. Striker, 87 Wn.2d 870, 876-77, 557 P.2d 847 (1976) (citations omitted).

A defendant who has not been brought to trial within the time limits of CrR 3.3(b) is not required to show actual prejudice or prosecutorial misconduct. Instead, failure to comply with the speedy trial rule requires dismissal, regardless of whether the defendant can show

prejudice. State v. Ralph Vernon G., 90 Wn. App. 16, 20-21, 950 P.2d 971 (1998).

As the record demonstrates that the continuance of the trial beyond the last allowable date for trial of October 26 was not required for the administration of justice and was done without “good cause,” dismissal with prejudice is the remedy. See State v. Mack, 89 Wn.2d 788, 794, 576 P.2d 44 (1978). Court congestion and/or courtroom unavailability do not constitute good cause to continue a criminal trial beyond the prescribed time period. State v. Mack, 89 Wn.2d 788, 794, 576 P.2d 44 (1978).

In State v. Warren, 96 Wn. App. 306, 309, 979 P.2d 915 (1999), this court noted:

Court congestion is not “good cause” to continue a criminal trial beyond the prescribed time period. State v. Mack, 89 Wn.2d 788, 794, 576 P.2d 44 (1978). And courtroom unavailability is synonymous with “court congestion,” State v. Kokot, 42 Wn. App. 733, 737, 713 P.2d 1121 (1986). Further, without “‘good cause’ for the delay, dismissal is required.” Mack, 89 Wn.2d at 794 (citing State v. Williams, 85 Wn.2d 29, 32, 530 P.2d 225 (1975)).

In order to comply with Mack in granting continuances beyond the speedy trial period, this court went on to hold that the trial court must consider the length of the continuance, the likelihood of additional delays, establish on the record why each superior court department is unavailable,

and whether a pro tempore could be used. State v. Warren, 96 Wn. App. at 310.

Despite the fact that Yun's "speedy trial right require(d) trial before October 26th [RP 10/17/05 10](,)" and despite the fact that his case was to "be given a priority setting for trial [RP 10/17/05 17](,)" the trial court improperly continued the trial beyond the required speedy trial limit based on an assertion of courtroom unavailability, that is, that there was no superior court department available to hear the case. [RP 10/25/055].

In failing to comply with Mack, and in failing to establish unavoidable circumstances beyond the control of the court or the parties to justify the continuance beyond Yun's speedy trial limit, or to establish that the administration of justice required such a continuance, the trial court made no mention as to why each superior court department in Thurston County was unavailable to hear Yun's case.³ What is more, the record is void of any consideration of a pro tempore hearing the case, as required by Warren, in order to afford Yun his right to a speedy trial.

Like Warren, Yun's trial was continued beyond the speedy trial time limit based on an assertion that there was no superior court

³ There are seven superior court departments in Thurston County and five of those departments heard proceedings in this case. [RP 06/01/05; RP 09/26/05; RP 10/03/05; RP 10/17/05; RP 10/25/05].

department available to hear his case. Like Warren, the record does not adequately explain why no courtroom was available to hear the case. And like Warren, Yun's convictions must be reversed and dismissed with prejudice because he did not receive a timely trial. Ralph Vernon G., 90 Wn. App. at 20-21.

02. THERE WAS INSUFFICIENT EVIDENCE TO UPHOLD YUN'S CRIMINAL CONVICTION FOR THEFT IN THE SECOND DEGREE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

The elements of the crime are: (1) On or between May 6, 2005 and May 12, 2005, (2) in the State of Washington, (3) Yun, (4) with intent to deprive the other person of the property, (5) wrongfully obtained or exerted unauthorized control over the property and (6) the value of the property exceeded \$250 in value. [CP 72, 84].

The circumstances of this case do not evince proof beyond a reasonable doubt that Yun was guilty of theft in the second degree of his daughter's rings. As set forth above, the State was required to prove that Yun wrongfully obtained or exerted unauthorized control over this property and it failed to do so. In a motion to exclude testimony, the court overruled Yun objection to Jenny Yun testifying that her daughter's rings were taken without her daughter's permission, that is, that Yun wrongfully obtained or exerted unauthorized control over the rings. [RP 11/03/05 186, 190-92].

At trial Jenny Yun answered "No" when asked, "To the best of your knowledge, did your - - did the defendant ever have permission from your daughter to take her stuff?"⁴ [RP 11/03/05 230]. To admit such evidence, the trial court must first determine whether the evidence is relevant. ER 401; State v. Kelly, 102 Wn.2d 188, 198, 685 P.2d 564 (1984).

⁴ Because of Yun's objection in his motion to exclude testimony and the court's ruling, he had no obligation to renew her objection at trial to the admission of the testimony here at issue. State v. Powell, 126 Wn.2d 244, 256-57, 893 P.2d 615 (1995).

Concomitantly, no witness may testify “to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. ER 602. As argued by Yun in his motion to excluded testimony, while Jenny Yun may testify that her daughter’s rings were taken without permission, “she would only know that through hearsay and I don’t think that’s appropriate.” [RP 11/03/05 189]. As no evidence was introduced to establish that Jenny Yun had personal knowledge that her daughter’s rings were taken without her daughter’s permission, her testimony in this regard was prohibited by ER 601 and was thus not relevant to these proceedings under ER 401.

In any event, with or without Jenny Yun’s testimony regarding whether her daughter’s rings were taken without her daughter’s permission, there was insufficient evidence under the facts of this case that Yun wrongfully obtained or exerted unauthorized control over the alleged 15 to 20 rings reported missing from his daughter.

In addition, there was insufficient evidence connecting Yun to the theft of his daughter’s rings or that the value of the rings exceeded \$250. Although Jenny Yun testified that she spent “a couple thousand” in purchasing the 15 to 20 rings for her daughter that were alleged missing [RP 11/03/05 226-27], only one of these rings was recovered from the pawnshop and no value was placed on this ring demonstrating it exceeded

\$250. And since the only evidence linking Yun to the theft of the rings was the one ring recovered from the pawnshop, it cannot be said he was responsible for the theft of the other rings allegedly missing.

The State failed to establish sufficient evidence that Yun committed the crime of theft in the second degree, with the result that this conviction should be reversed.

03. THE TRIAL COURT IMPERMISSIBLY COMMENTED ON THE EVIDENCE IN VIOLATION OF WASHINGTON CONSTITUTION ART. 4, SEC. 16 BY GIVING INSTRUCTIONS 19, 21 AND 23.

The trial court impermissibly commented on the evidence concerning counts III, theft in the second degree, and IV and V, trafficking in stolen property in the first degree, when it submitted instructions 19, 21 and 23 to the jury, which state, in relevant part:

INSTRUCTION 19: THEFT IN THE SECOND DEGREE

(1) That on or between May 6, 2005 and May 12, 2005, the defendant wrongfully obtained or exerted unauthorized control over property of another [to wit: assorted rings] in an amount exceeding \$250, with intent to deprive the person of the property(.) [Emphasis added].

[CP 84].

//

//

INSTRUCTION 21: TRAFFICKING IN STOLEN
PROPERTY IN THE FIRST DEGREE

(1) That on or about the 12th day of May, 2005, the defendant knowingly trafficked in stolen property [to-wit: a “wedding” ring](.) [Emphasis added].

[CP 97].

INSTRUCTION 23: TRAFFICKING IN STOLEN
PROPERTY IN THE FIRST DEGREE

(1) That on or about the 12th day of May, 2005, the defendant knowingly trafficked in stolen property [to-wit: a ring with a green stone](.) [Emphasis added].

[CP 98].

These instructions relieved the State of its burden of proving every essential element of the three crimes beyond a reasonable doubt in violation of Art. 4, sec. 16 of the Washington Constitution. An instructional error requires reversal when it relieves the State of its burden of proving every essential element of the crime. State v. DeRyke, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003).

Art. 4, sec. 16 of the Washington Constitution provides:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses. State v. Crotts, 22

Wash. 245, 250-51, 60 P. 403 (1900). It is error for a judge to instruct the jury that “matters of fact have been established as a matter of law.” State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). And while a defendant on appeal is ordinarily limited to specific objections raised before the trial court, he or she may, for the first time on appeal, argue that an instruction was an improper comment on the evidence. State v. Tili, 139 Wn.2d 107, 126 n.9, 985 P.2d 365 (1999) (citation omitted); RAP 2.5(a)(3). A judicial comment in a jury instruction is an error of constitutional magnitude that is properly raised for the first time on appeal. State v. Jackman, 156 Wn.2d 736, 743, 132 P.3d 136 (2006) (citing State v. Levy, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006)).

It was manifest error for the court to submit instructions 19, 21 and 23 to the jury. To convict Yun of theft in the second degree under instruction 19, the State, in part, was required to prove beyond a reasonable doubt that he wrongfully obtained or exerted unauthorized control over property of another, that is, as previously set forth herein, that his daughter’s rings were taken without her permission. Absent that fact, Yun’s actions were not illegal. In this context, by stating that the property of another was in fact the assorted rings, the trial court conveyed the impression that whether these rings had been wrongfully obtained had

been proved to be true, with the result that instruction 19 was a judicial comment on the evidence.

Similarly, to convict Yun of trafficking in stolen property in the first degree under instructions 21 and 23, the State, in part, was required to prove beyond a reasonable doubt that he knowingly trafficked in stolen property. By stating that the wedding ring (instruction 21) and the ring with a green stone (instruction 23) were in fact stolen property, the trial court conveyed the impression that whether these rings had been stolen had been proved to be true, with the result that instructions 21 and 23 amounted to judicial comments on the evidence.

Instructions 19, 21 and 23 effectively removed the above factual concerns from the jury's consideration, and amounted to unconstitutional comments on the evidence in violation of Art. 4, sec. 16 of the Washington Constitution.

As noted in State v. Jones, 106 Wn. App. 40, 45, 21 P.3d 1172 (2001), Washington courts have repeatedly condemned the use of "to-wit" language in jury instructions. "Counsel would be well advised to avoid the use of 'to wit' language in future 'to convict' instructions." Id. The use of "to-wit" language runs the risk of constituting an improper comment on the evidence. The court's instructions here at issue are analogous to the "to-wit" language criticized as constituting a comment on

the evidence in Becker, wherein our Supreme Court ruled that when the trial court referred to a youth program as a school, it took a fundamental factual determination away from the jury. State v. Becker, 132 Wn.2d at 64-65.

Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). The record must affirmatively show that no prejudice could have resulted. State v. Levy, 156 Wn.2d at 725.

In this case, the fact of whether the assorted rings had been wrongfully obtained (instruction 19: theft second) or whether the wedding ring (instruction 21: trafficking) or the ring with a green stone (instruction 23: trafficking) had been stolen constituted threshold issues without which there were no crimes. It is conceivable that the jury could have determined that the assorted rings regarding the theft charge had not been wrongfully obtained and that the two rings regarding the trafficking charges were not stolen, if the court had not so specified in jury instructions 19, 21, and 23. Because these facts were removed from the jury's consideration, the record does not affirmatively show that no prejudice could have resulted, with the result that Yun's convictions for theft in the second degree, count III, and

two counts of trafficking in stolen property in the first degree must be reversed.

04. YUN WAS PREJUDICED AS A RESULT OF HIS TRIAL COUNSEL'S FAILURE TO OBJECT TO OR BY AGREEING TO THE COURT'S INSTRUCTIONS 19, 21 AND 23.⁵

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an

⁵ While it has been argued in the preceding section of this brief that giving this instruction constituted constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105 (1995)).

Although Yun did not propose the instructions here at issue, should this court find that trial counsel waived the issues relating to the court's instructions 19, 21 and 23 previously set forth herein by either affirmatively assenting to the instruction or by not objecting to the instruction, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have agreed to the instructions or would have failed to object to the instructions for the reasons set forth in the preceding section of this brief. Had counsel done so, the trial court would not have given instructions 19, 21 and 23, which, as previously argued herein, amounted to an unconstitutional comments on the evidence in violation of Art. 4, sec. 16 of the Washington Constitution.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self evident: but for counsel's failure to object to or by agreeing to the court's instructions 19, 21 and 23, the court would not have given the instructions and the jury would not have been provided with an untenable method to find that Yun committed the three offenses at issue.

05. THE TRIAL COURT VIOLATED YUN'S DOUBLE JEOPARDY RIGHTS BY ENTERING JUDGMENT AGAINST HIM FOR TWO TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE CHARGES CHARGES WHERE HE WAS CONVICTED OF VIOLATING A SINGLE STATUTE.

The double jeopardy clauses of the state and federal constitutions prevent the imposition of multiple punishments for the same offense. U.S. Const. amend. 5; Const. art. 1, § 9; North Carolina v. Pearce, 395 U.S. 711, 717, 23 L. Ed. 2d 656, 89 S. Ct. 2072 (1969); In re Fletcher, 113 Wn.2d 42, 46-47, 776 P.2d 114 (1989). As the Washington Supreme court observed, "[t]he United States Supreme Court has been especially vigilant of overzealous prosecutors seeking multiple convictions based upon

spurious distinctions between the charges.” State v. Adel, 136 Wn.2d 629, 635, 965 P.2d 1072 (1998).

Because the Legislature is free to define crimes and fix punishments as it will, “the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense.” Brown v. Ohio, 432 U.S. 161, 165, 53 L. Ed. 2d 187, 97 S. Ct. 2221 (1977). Once the court determines that a double jeopardy violation has occurred, a concurrent sentence does not cure the violation. Ball v. United States, 470 U.S. 856, 865, 84 L. Ed. 2d 740, 105 S. Ct. 1668 (1985); State v. Adel, 136 Wn.2d at 632. Although Yun objected to the two trafficking charges stemming from a single incident at the pawnshop [RP 11/02/05 7; RP 11/03/05 258], a double jeopardy argument may be raised for the first time on appeal because it is a manifest error affecting a constitutional right. State v. Turner, 102 Wn. App. 202, 206, 6 P.3d 1226, reviewed denied, 143 Wn.2d 1009 (2001) (citing RAP 2.5(a) and State v. Adel, 136 Wn.2d at 631-31).

The “same evidence” or “same elements” test of Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932), and State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155 (1995), does not apply in situations where a defendant is convicted of violating one statute multiple times. State v. Adel, 136 Wn.2d at 633. Rather, the courts should employ the “unit of prosecution” test. State v. Adel, 136 Wn.2d at 634. If the Legislature has failed to denote the unit of prosecution, any ambiguity should be construed in the defendant’s favor. Bell v. United States, 349 U.S. 81, 84, 75 S. Ct. 620, 99 L. Ed. 905 (1955); State v. Adel, 136 Wn.2d at 634-35.

In determining the unit of prosecution, State v. Adel concluded that the proper inquiry for considering double jeopardy challenges where the defendant is convicted of violating the same statute multiple times is what unit of prosecution the Legislature intended as the punishable act under the statute. State v. Adel, 136 Wn.2d at 634.

Yun was convicted of two counts of trafficking in stolen property in the first degree under RCW 9A.82.050, which reads:

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

RCW 9A.82.010(19) defines “traffic” as follows:

“Traffic” means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain

control over stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

This statute is unclear whether multiple counts of trafficking in stolen property in the first degree under the facts of this case may be punished more than once. Because the statute is ambiguous as to the unit of prosecution in this context, the rule of lenity dictates that the ambiguity in the statute should be resolved in Yun's favor, thus precluding his conviction for multiple counts. See State v. Adel, 136 Wn.2d at 635 (where a statute does not indicate whether the Legislature intended to punish a person multiple times for possession of a controlled substance discovered in numerous places, lenity dictates that only one count of possession is permitted); State v. Turner, 102 Wn. App. at 209 (rule of lenity dictates that multiple convictions for theft by different schemes or plans against the same victim over the same period of time under theft statute that is ambiguous as to the unit of prosecution cannot stand because they violate double jeopardy); Prince v United States, 352 U.S. 322, 329, 77 S. Ct. 403, 407, 1 L. Ed. 2d 370 (1957) (where there are several alternative means of violating a single statute, the courts should not infer that Congress intended to impose multiple punishments); Bell, 349 U.S. at 84 (“[I]f Congress does not fix the punishment for a federal offense clearly and

without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses[.]”).

Here, the two counts of trafficking are not differentiated by time, location, or intended purpose. Both crimes were committed at the same time and place and involved the same criminal intent. [RP 11/03/05 170-71]. Though two pawn slips were used, the owner of the pawnshop confirmed that it was one simultaneous transaction. [RP 11/03/05 170]. Thus multiple convictions for the two counts under the single statute violate double jeopardy under the facts of this case.

This court should reverse and dismiss one of the convictions for trafficking in stolen property in the first degree.

E. CONCLUSION

Based on the above, Yun respectfully requests this court to reverse and dismiss his convictions.

DATED this 26th day of June 2006.

Respectfully submitted,

Thomas E. Doyle
THOMAS E. DOYLE
Attorney for Appellant, WSBA 10634

Patricia A. Pethick
PATRICIA A. PETHICK
Attorney for Appellant, WSBA 21324

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

James C. Powers
Senior Dep Pros Attorney
2000 Lakeridge Drive SW
Olympia, WA 98502

Woo Jun Yun
2332 Carpenter Road S.E.
Lacey, WA 98503

DATED this 26th day of June 2006.

Thomas E. Doyle
Thomas E. Doyle
Attorney for Appellant
WSBA No. 10634

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