

NO. 34064-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

WOO JUNG YUN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 05-1-00879-6

HONORABLE GARY R. TABOR, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether the trial in this case was within the applicable speedy trial period.

2. Considering the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to conclude that the defendant was guilty beyond a reasonable doubt of the crime of theft in the second degree.

3. Whether Jury Instructions Nos. 19, 21, and 23 each contained a judicial comment on the evidence resulting in prejudicial error.

4. Whether the defendant's two convictions for first-degree trafficking in stolen property, based on two separate pieces of property used as collateral for two separate loans from a pawnbroker, said transactions occurring at the same time, violated constitutional protections against double jeopardy.

B. STATEMENT OF THE CASE

The defendant, Woo Jung Yun, and Jenny Yun married in 1997. Jenny had two children from a prior relationship. The defendant adopted those two children, and he and Jenny had an additional child. Trial RP 194-196. The defendant and Jenny then separated in 2000. They remained separated from 2000 to 2005. Trial RP 196-198. Despite the separation, the defendant was frequently at

Jenny's residence. In fact, he had a key to her residence. Trial RP 198.

In March, 2005, Jenny and her children moved to an apartment in the Meadows complex on Littlerock Road. Trial RP 199. The defendant helped Jenny move into that residence. During the move, Jenny took off her wedding ring and put it in a ring box on the kitchen counter. The defendant was present when she did this. Later, after the defendant and other helpers had left, Jenny found that the ring was no longer in the ring box, and she could not find it anywhere. Trial RP 205-206.

Jenny questioned all of those who had been at the residence, but no one could tell her where the ring was. The defendant stated that he had seen her son playing with the ring, and suggested she had accidentally thrown it out with garbage put into the dumpster. He added that she must not have cared much about him or the ring to have been so careless with it. Trial RP 206.

However, Jenny had purchased the ring

herself. She had originally paid \$1,500 for it, at a time when it contained a number of cubic zirconia stones. Trial RP 207-208. Then, in 1997, she had the jeweler install real diamonds in place of the cubic zirconia stones, leaving only the center stone in the ring as a cubic zirconia. She paid \$2,800 to have that done. Trial RP 209-209. Finally, in April 2000, she had the center stone in the ring replaced with a one carat diamond. She paid \$2,000 to have that center diamond added to the ring. Trial RP 209-210.

Shortly after Jenny moved into the Meadows Apartment Complex, she became friends with Candice Main and Candice's boy friend, Brandon. They lived in a neighboring apartment. The defendant became convinced that Jenny, who also went by the name Becky, was having a sexual relationship with Brandon. The defendant became obsessed with this idea, sometimes calling Jenny over and over again by phone, demanding to know if Jenny was having such a relationship, and using disrespectful language toward Jenny in the process. Trial RP

214-215.

On the evening of May 6, 2005, Jenny and her children stayed over at the apartment of Candice and Brandon. The next morning, Jenny went to her apartment and found that her residence had been trashed. Trial RP 216-217. She asked Candice to go inside with her in order to inspect the damage. Trial RP 134.

They found that the refrigerator had been flipped over, and its contents were all over the floor. A couch had been slashed. Bleach had been poured over her clothes and the clothes of her children. Lipstick had been used to draw a penis and a smiling face on her mirror. Trial RP 247. Water had been poured into her piano, located on her carport, destroying the piano. Trial RP 114-115, 218. Flour, sugar, and coffee grounds had been poured into the gas tank of her truck. Trial RP 255. Words had been etched into her entertainment center and a vanity in the bathroom. Trial RP 217, 112. At trial, Jenny estimated the overall damage to be far above \$250. Trial RP

256.

Etched into the entertainment center were the words: "Cum in, Cum in my mouth. Please. I love to swallow lots of cum in my mount, delicious, and Becky will suck and swallow any man, any time in the mouth, please, please, who loves to swallow, you can, Becky loves to swallow and suck dick." Similar words had been carved onto the bathroom vanity. Trial RP 38, 223.

Jenny contacted law enforcement that same day. Trial RP 218. Thurston County Sheriff's Deputy Dave Odegaard responded to her residence that afternoon. Trial RP 32-33. He observed the damage summarized above, and made note of the words carved into the entertainment center. Trial RP 33-39. Odegaard did not find any evidence of a forced entry. Trial RP 34.

Jenny and her children stayed with Candice and Brandon the night of May 7th. The next day, Jenny returned to her apartment and found that the refrigerator had been put back to a standing position, and some cleaning had been done in the

apartment. Trial RP221. Later, the defendant called and said he was the one who had done this cleanup, and added that he was sorry. Trial RP 223.

Between May 7, 2005 and May 14, 2005, Jenny and her children continued to stay with Candice and Brandon. On May 14th, Jenny took her daughter to the park. When she returned, she found that the front door to her apartment had been carved up, again with words etched into the surface. Trial RP 224-225. Those words were as follows: "I want to swallow your cum, please fill my mouth with your cum, lots of delicious cum, more cum in my mouth, blow job, I swallow, slut love to swallow." Trial RP 50.

Jenny also found that property was missing from her apartment: a DVD player, a cordless telephone set, a Playstation, and a jewelry box containing 15 to 20 rings which Jenny had given to her daughter. Each of the rings had a gemstone, ranging from emeralds and diamonds to topaz. Trial RP 51-52, 225-226. Jenny had spent around

\$2,000 to purchase these rings for her daughter. Trial RP 226-227. Jenny could not be sure whether the rings had been stolen on May 14th, or whether they had been stolen some time between May 7th and May 14th. Trial RP 248-249.

Suspecting that the defendant was responsible for the missing property, Jenny contacted the defendant by phone and pretended that law enforcement had found out the defendant had pawned her property. The defendant reacted by asking Jenny to meet him by the mailboxes for her apartment complex so that he could give her the pawn slips. Trial RP 227. Candice accompanied Jenny to meet with the defendant at that location. The defendant handed over two pawn slips. Trial RP 227-228. He told Jenny that he had traded the DVD player and the telephone set for drugs. Trial RP 231.

The pawn slips were for items pawned by the defendant at Cash Northwest, a pawn shop in Lacey. Each slip was for a single item of property. Both pawns had occurred at the same time on May 12,

2005. Trial RP 159-160, 170. One pawn slip was for the wedding ring that had been missing since the day Jenny moved into her apartment at the Meadows complex. The other was for one of the rings Jenny had given to her daughter. Trial RP 229.

Thurston County Deputy Sheriff Michael Hazlett responded to Jenny's residence on May 14th in response to her request. He observed the damage and obtained information concerning the missing property. Jenny also handed to him the two pawn slips. Trial RP 47-55.

Hazlett then contacted the defendant at the residence of the defendant's parents. The defendant's mother allowed Hazlett to enter the residence, Hazlett proceeded to the basement, and there he encountered the defendant. He also observed a DVD player matching the description Jenny had given for the one missing from her apartment. This DVD player was not hooked up. Hazlett confirmed it had the same serial number as the one stolen from Jenny. 59-61.

The defendant was placed under arrest and was informed of his Miranda warnings. The Deputy told the defendant about the missing property, including the missing rings. The defendant responded that those were his rings. Trial RP 61-63.

Deputy Hazlett also located green vegetable matter in that basement area which appeared to be marijuana. That substance was seized. Trial RP 65. Later analysis by a trained examiner confirmed that the substance was 3.1 grams of marijuana. Trial RP 181-183.

The defendant was then transported to the Thurston County Jail by Thurston County Sheriff's Deputy Ken Clark. During that transport, the defendant expressed his concern about having been placed under arrest. He then made the unsolicited statement that he would not have taken the stuff if he had known it would lead to this. Trial RP 95. He followed that by claiming that Jenny had given him the property. However, he then proceeded to ask whether the judge would refrain

from charging him with a felony if he got the stuff from the pawn shop and gave it back to Jenny. Trial RP 95.

After, May 14, 2005, Jenny and her children moved to a confidential location so that she could protect herself from the defendant. However, in August, 2005, she found that a copy of her marriage certificate, a picture of her son, and a picture of herself had been placed in the mailbox of her new residence. Trial RP 72, 233-234.

On the marriage certificate was written: "I don't want this anymore. I figured you would want it to burn in hell." In addition, the following had been written on the document: "I love you Brandon especially your huge big, big dick, your true love dog." Trial RP 235.

On the picture of the son was written: "Dog, dog, I love you Brandon". On the back of the picture was written: "I praise your heavenly and huge dick". The picture of Jenny had been cut into the shape of a heart. Trial RP 236. This matter was reported to the Thurston County

Sheriff's Office. Trial RP 237.

On May 18, 2005, an Information was filed in Thurston County Superior Court charging the defendant with one count of Theft in the First Degree, Domestic Violence, alleged to have occurred between March 1, 2005 and March 15, 2005; one count of Malicious Mischief in the First Degree, Domestic Violence, alleged to have occurred on or about May 7, 2005; and one count of Theft in the Second Degree, Domestic Violence, alleged to have occurred on or about May 14, 2005. CP 14-15.

Trial in this cause was originally scheduled for August 22, 2005. 6-1-05 Hearing RP 4. However, on August 24, 2005, an Agreed Order of Continuance was entered continuing the trial date to September 26, 2005. CP 13. Then on September 26, 2005, another Agreed Order of Continuance was entered continuing the trial until October 3, 2005. CP 16. On October 3, 2005, an Order was entered expressing the parties' agreement to continue the trial until October 17, 2005. CP 17.

On October 17, 2005, the court continued the trial date an additional week to October 25, 2005. The defendant did not object.

On October 25, 2005, the defendant was served with a Second Amended Information. The charges in this document were: Count 1, Theft in the First Degree, Domestic Violence; Count 2, Malicious Mischief in the First Degree, Domestic Violence; Count 3, Theft in the Second Degree, Domestic Violence; Count 4, Trafficking in Stolen Property in the First Degree; Count 5, Residential Burglary, Domestic Violence; and Count 6, Possession of 40 Grams or less of Marijuana. CP 18-19; 10-25-05 Hearing RP 3-4. On that same day, the court determined that the trial of this cause would have to be delayed again because a judge was not available to hear the case. 10-25-05 Hearing RP 5.

The defendant objected to the further continuance of the trial. Nevertheless, the trial was continued until October 31, 2005. 10-25-05 Hearing RP 5-6. Trial actually began on November

2, 2005.

On November 2, 2005, a Third Amended Information was served upon the defendant at the start of the trial. It removed the charge of residential burglary and in its place added a second count of first-degree trafficking in stolen property. CP 21-22; Trial RP 6-7. A Fourth Amended Information was filed during the trial on November 3, 2005. The sole purpose of that amendment was to allege in Count 4, Theft in the Second Degree Domestic Violence, that the owner of the stolen property was the defendant's daughter, whereas the charging document had previously alleged Jenny Yun to be the owner. CP 72-73.

At the end of this trial, the jury was unable to reach a verdict on Count 1, first-degree theft. However, the defendant was found guilty of all the other counts, including first-degree malicious mischief, second-degree theft, 2 counts of first-degree trafficking in stolen property, and possession of marijuana.

On November 23, 2005, a sentencing hearing

was held. The court found that the two convictions for first-degree trafficking in stolen property constituted the same criminal conduct. 11-23-05 Hearing RP 4-5. The court then chose to treat the defendant as a first-time offender, sentenced him to 90 days in jail and two years of community supervision. 11-23-05 Hearing RP 18, 22.

C. ARGUMENT

1. The defendant's trial date was well within the applicable speedy trial period.

Under CrR 3.3, a defendant must be brought to trial within 60 days of the commencement date specified in the rule if the defendant is in custody, or within 90 days of the commencement date if the defendant is out of custody, minus any period of time which is excluded in computing the time for trial and minus a period of 30 days beyond any such excluded period. CrR 3.3(b) and (e). Any delay in the form of a continuance granted by the court pursuant to CrR 3.3(f) constitutes such an excluded period. CrR

3.3(e)(3).

Under CrR 3.3(f), a continuance may be granted by a written agreement of the parties signed by the defendant. CrR 3.3(f)(1). The court can also continue the trial date without agreement of both parties if the court determines that the continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his defense. CrR 3.3(f)(2).

When an appellate court examines whether a defendant's trial occurred beyond the speedy trial period, such an examination requires an application of the court rule to particular facts. Therefore, the issue is a question of law, and so the appellate court determines de novo whether the speedy trial period was exceeded. State v. Swenson, 150 Wn.2d 181, 186, 75 P.3d 513 (2003).

In the present case, the defendant contends on appeal that the last day of his speedy trial period was October 26, 2005, and so his trial date of November 2, 2005 violated the rule. While

acknowledging that the trial court continued the trial beyond October 26th, the defendant argues that the continuance was improperly based upon court congestion, that it was therefore not a valid continuance pursuant to CrR 3.3(f), and so did not operate as an excluded period to extend the speedy trial deadline.

However, regardless of the accuracy of the defendant's argument concerning the validity of the trial court's final continuance in this case, the defendant's argument is in error because its basic premise is in error. Applying CrR 3.3 to the facts of this case, October 26, 2005 was not the speedy trial deadline. Rather, that deadline was November 16, 2005, and so the trial in this case took place well within the speedy trial period.

The arraignment in this cause took place on June 1, 2005. Thus, that became the commencement date pursuant to CrR 3.3(c)(1). Since the defendant was out of custody, the trial was initially set for August 22, 2005, within a 90-

day period from the commencement date. 6-1-05 Hearing RP 4. As of August 24, 2005, 84 days of the defendant's speedy trial period had elapsed. On that day, an agreed order of continuance signed by the defendant extended the trial date to September 26, 2005. CP 13. Pursuant to CrR 3.3(e)(3), the period from 8-24-05 through 9-26-05 must be excluded from any speedy trial calculation.

Because the 9-26-05 trial date was the result of the application of an excluded period, the deadline for speedy trial in this case could not be less than 30 days after the end of that excluded period; in other words, no less than 30 days after 9-26-05. CrR 3.3(b)(5). The 8-24-05 Order of Continuance accurately noted that the last allowable date for trial was the later of either 30 days following the 9-26-05 trial date or 60/90 days following the commencement date minus any excluded periods. CP 13; CrR 3.3(b) and (e). Ninety days after the arraignment minus the excluded period of continuance would have been

October 2, 2005. Therefore, the later date was 30 days after the 9-26-05 trial date, and thus the speedy trial deadline became October 26, 2005.

On September 26, 2005, a further continuance was entered by agreement of the parties and signed by the defendant. This Order of Continuance extended the trial date to October 3, 2005. CP 16. Thus the period from 9-26-05 through 10-3-05 became a second excluded period pursuant to CrR 3.3(e)(3). The speedy trial deadline was therefore extended to 30 days following that excluded period, and so was extended to November 2, 2005. CrR 3.3(b)(5).

On October 3, 2005, an additional Order of Continuance was entered by agreement of the parties and with the signature of the defendant. This continuance extended the trial date to October 17, 2005. CP 17. Thus, the period from 10-3-05 through 10-17-05 became a third excluded period. CrR 3.3(e)(3). The speedy trial deadline was necessarily also extended to 30 days following that excluded period, and so was extended to

November 16, 2005. CrR 3.3(b)(5).

The 10-3-05 Order of Continuance again accurately stated that the last allowable date for trial was the later of either 30 days following the 10-17-05 trial date or 60/90 days following the commencement date minus any excluded periods. However, that last date for trial was then identified as October 26, 2005. CP 17. This was an obvious error on the face of the Order itself, since October 26, 2005 was obviously not 30 days after the 10-17-05 trial date.

This error proceeded to cause further confusion for the trial court in subsequent hearings. For example, at the hearing on October 17, 2005, defense counsel erroneously informed the court that the last day for trial was October 26, 2005. 10-17-05 Hearing RP 4. Having been given that erroneous information, the trial court then stated later in the hearing, ". . . apparently, your speedy trial right requires trial before October 26, unless you give up your trial right . . ." 10-17-05 RP 10. The court then continued

to make further observations based on that erroneous assumption. 10-17-05 Hearing RP 16-17.

As noted above, it is the responsibility of the appellate court to make its own application of CrR 3.3 to the facts of this case in order to determine if the speedy trial period was exceeded. As discussed above, such a de novo analysis will show that the speedy trial deadline in this case, at the time the trial took place, was November 16, 2005. Thus, the extension of trial from October 17, 2005 to November 2, 2005 was well within the speedy trial period.

2. Considering the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find it proved beyond a reasonable doubt that the defendant was guilty of theft in the second degree.

The defendant contends that there was insufficient evidence for the jury to find it proved beyond a reasonable doubt that the defendant had committed the crime of theft in the second degree. The evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a

rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The defendant first argues that there was not sufficient evidence to prove that the defendant's

possession of rings belonging to his daughter was without the daughter's permission since the daughter did not testify. During the trial, Jenny Yun gave the following testimony:

Q. Okay. To the best of your knowledge, did your - did the defendant ever have permission from your daughter to take her stuff?

A. No.

Trial RP 230. The defendant argues there was no basis to find that Jenny had personal knowledge of what she testified to at that point. However, that is not correct. Jenny was the child's mother and sole custodial parent. The child was 14 years old. Trial RP 194. Jenny was the one who had given her daughter all of the rings over time. Trial RP 220. Given these circumstances, Jenny testified to what personal knowledge she had on the question of whether her daughter had given the rings to the defendant. Further, her personal knowledge on this point was relevant because it was reasonable to conclude that a 14-year-old daughter would not give a collection of 15 to 20 rings worth thousands of dollars to her

noncustodial father without the mother knowing something about this.

The defendant then argues that even if this evidence was competent and relevant, it was not sufficient to alone establish that the defendant did not have the daughter's permission to possess the rings. However, this was no the only pertinent evidence.

Jenny testified that the rings had been at the apartment prior to the damage done on May 6-7, 2005. Thus, they had been taken some time between May 7th and the discovery they were missing on May 14th. Trial RP 248-249. As of May 14th, it was discovered that other property had been taken by the defendant without permission, such as the DVD player and the telephone set. The DVD player was found where the defendant was living. In addition, the defendant told Jenny he had traded the DVD player and the telephone set for drugs, thereby implicitly admitting he had stolen the telephone set as well. Trial RP 231. The fact that he had taken these other items without

permission around the same time the rings were missing, and one of the rings was pawned by the defendant, constituted some evidence that the defendant had taken the rings without the daughter's permission.

Even more importantly, Deputy Hazlett told the defendant about the missing rings when he explained to the defendant why the defendant had been arrested. In response, the defendant did not claim his daughter had given him those rings. Rather, he claimed the rings were his because he had been awarded them in the divorce. Trial RP 62-63. Jenny's testimony about having been the one who purchased all the rings and about having given them all to her daughter was competent evidence contradicting that claim.

Further, having heard from Deputy Hazlett he was being accused of stealing these rings, the defendant then stated to Deputy Clark that he would not have taken the stuff if he had known it would lead to his arrest. Trial RP 95. Then, the defendant contradicted that statement by saying

that Jenny had given him the property, rather than saying that his daughter had given him the property. Trial RP 95.

Finally, the defendant asserted still another version at trial. He stated that he had possessed just one ring, and that he had purchased this ring for his daughter, but had never given it to her. Trial RP 268. Thus, he made no claim that his daughter had given him permission to have one of her rings. Furthermore, this version he testified to at trial was so much at odds with his prior statements that a reasonable juror could easily infer that the defendant was simply making up stories as he went along, looking for one that would effectively hide his guilt.

Considering all of this evidence together, and drawing all reasonable inferences in favor of the State's charge, there clearly was sufficient evidence for the jury to find it proved that the defendant had taken the rings without the daughter's permission.

Next, the defendant argues that the evidence

was insufficient to show that the value of the stolen property was over 250 dollars. Jenny testified that these rings, 15 to 20 of them, all had gem stones, such as diamonds, emeralds, citrus, and topaz. Jenny had spent a couple of thousand dollars buying these rings. Trial RP 226-227. Thus, the evidence was sufficient to show that the rings collectively had a value over 250 dollars.

However, the defendant argues that since he pawned only one ring he could only be found to have stolen the one ring. On the contrary, the evidence was sufficient to prove he stole all of the missing rings.

All of these rings were kept in a jewelry box, and both the box and all the rings were discovered gone at the same time. Trial RP 226. They disappeared between Mar 7 and May 14, 2005 and the one ring was pawned on May 12, 2005, and so that pawn was contemporaneous with the disappearance of the others. Moreover, when Deputy Hazlett explained to the defendant that he

was being accused of having stolen his daughter's rings, the defendant's response was that the "rings" were his, not that he had only possessed one. Trial RP 62-63. The defendant's claim that he had only one ring came much later, and so a reasonable juror could have discounted the credibility of this claim. Thus, the evidence was sufficient to prove that the defendant had taken all of the missing rings, and so the value of the stolen property was over 250 dollars.

3. While Jury Instructions No. 19, 21, and 23 each contained a "to-wit" phrase that could be interpreted as a comment on the evidence, the record shows that no prejudice could have been the result.

Article IV, section 16 of the Washington Constitution prohibits a judge from commenting on the evidence. Therefore, a court cannot instruct a jury that certain matters of fact have been established as a matter of law, since such an instruction directs the jury on how to resolve such factual issues. State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997).

In the present case, the defendant challenges

three jury instructions as improper comments on the evidence. The first of these is Jury Instruction No. 19, the "to convict" instruction for Count 3, Theft in the Second Degree. That instruction stated, in pertinent part:

... That on or about March 1, 2005 and March 15, 2005, the defendant wrongfully obtained or exerted unauthorized control over property of another [to wit: assorted rings] in an amount exceeding \$250, with the intent to deprive the person of the property.

CP 96-97. The second is Jury Instruction No. 21, the "to convict" instruction for Count 4, Trafficking in Stolen Property in the First Degree. That instruction stated, in pertinent part:

. . . That on or about the 12th day of May, 2005, the defendant knowingly trafficked in stolen property [to wit: a wedding ring] . . .

CP 97. The third is Jury Instruction No. 23, the "to convict" instruction for Count 5, Trafficking in Stolen Property in the First Degree. That instruction stated, in pertinent part:

. . . 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]. . .

CP 98.

As regards Jury Instruction No. 19, the defendant argues that a factual issue in the case was whether the defendant took his daughter's rings without her permission. That is correct. He then asserts that the use of the phrase "to wit: assorted rings" after "property of another" directed the jury to conclude that the defendant had taken the rings without the daughter's permission. This claim is certainly not correct.

At the most, the use of the phrase "to wit: assorted rings" after "property of another" could have directed the jury to conclude that the assorted rings were the property of the daughter rather than the defendant's own property. While any comment on the evidence is error, such error is not prejudicial if the record affirmatively shows that no prejudice could have resulted. State v. Levy, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

It is true that at one point, the defendant claimed that the daughter's rings were actually

his rings in that he had been awarded that property in the divorce. Trial RP 62-63. However, at trial, the defendant abandoned that claim. Instead, he asserted that he had not taken his daughter's rings, and that the ring he had pawned had been a separate ring which he had purchased for his daughter but had never given her. Trial RP 267-268. Thus, as to the rings which Jenny testified were missing from the apartment, there was no dispute at trial that those rings had belonged to the daughter. The defendant simply denied any responsibility for their disappearance. Consequently, the use of the "to-wit" phrase in Instruction No. 19 was error, but was not prejudicial error

As to Jury Instruction No. 21, the defendant argues that the use of the phrase "to wit: a wedding ring" after "stolen property" could have directed the jury to conclude that the wedding ring was stolen property, rather than have the jury require the State to prove that was the case.

First, it should be noted that the use of a

"to wit" phrase in each of the "to convict" instructions for the two counts of first-degree trafficking in stolen property was to distinguish which piece of property each count referred to. Two items had been pawned and so there were two counts, but the jury needed to be clear which item of property was the subject of Count Four and which was the subject of Count Five. Given this need for clarification, a juror could easily understand that this was the purpose of each "to wit" phrase, as opposed to directing the jury to conclude that something was stolen property.

Second, with regard to the use of the phrase "to wit: a wedding ring" in Jury Instruction No. 21, the record demonstrates that the jury was not led to assume by this phrase that the wedding ring was stolen property. Count I, charging Theft in the First Degree, alleged that the defendant had stolen this same wedding ring. See Jury Instruction No. 9 in CP 93-94. Thus, had the jury felt directed to conclude that this wedding ring was stolen property, as the defendant contends, it

would surely follow that the defendant would then have been found guilty of Count One.

However, that did not occur. The jury was deadlocked on this count, and so no verdict was rendered. Clearly, the jury perceived that whether the defendant had stolen the wedding ring was a substantial factual issue in the case, notwithstanding the language in Jury Instruction No. 21. Thus, the record in this case affirmatively shows no prejudice resulted from the use of the "to wit" phrase in Jury Instruction No. 21.

In regard to the use of the phrase "to wit: a ring with green stone" after "stolen "property" in Jury Instruction No. 23, the defendant again argues that the use of the "to wit" phrase directed the jury to find that this particular ring was stolen property, while the defendant contended that it was not. In response to this argument, Jury Instruction No. 23 should be evaluated in conjunction with Jury Instruction No. 21. The evidence is that the jury did not assume

the wedding ring was stolen property in response to the language of Jury Instruction No. 21. If that is so, then why would a juror make such an assumption for the ring with the green stone in response to the language of Jury Instruction No. 23?

Here, too, it is important that the purpose of referring to a specific piece of property in both Instruction No. 21 and Instruction No. 23 would have been apparent, in that Counts 4 and 5 were only distinguishable on the basis of the piece of pawned property that was the subject of each count. Consequently, jurors would have understood that the phrase "to wit: a ring with a green stone" was intended to modify the word "property" immediately before it, thereby causing the instruction to require that the State prove beyond a reasonable doubt that the defendant knowingly trafficked in a stolen ring with a green stone in order to prove Count Five, in contrast with the State's burden to prove that the defendant knowingly trafficked in a stolen wedding

ring to prove Count Four. With such an understanding, a juror would have held the State to its burden to prove each element of the charge.

The defendant has also claimed that his trial counsel rendered ineffective assistance in not objecting to Jury Instructions Nos. 19, 21, and 23. Apparently, this argument is raised in case it is found that the failure to object to these instructions at trial prohibits review of the defendant's claim that these instructions were in error as a comment on the evidence. However, the State does not dispute that the defendant's arguments concerning these instructions can be considered on appeal even though the objection was not made below. Levy, 156 Wn.2d at 719-720.

It is therefore unnecessary to separately address this claim of ineffective assistance of counsel. A finding of ineffective assistance requires that the defendant show not only deficient performance by his trial counsel but also a reasonable probability that the outcome of the trial would have been different but for the

errors of counsel. State v. McFarland, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). Thus, if the appellate court agrees, as is argued above, that any error in using a "to wit" phrase in Jury Instructions Nos. 19, 21, and 23 was harmless because the record shows no prejudice could have resulted, then necessarily there was no ineffective assistance in failing to object to those instructions. On the other hand, if the instructions are found to have been prejudicial error, it would be needlessly redundant to address the ineffective assistance claim.

4. Since the unit of prosecution for first-degree trafficking in stolen property consists of a particular act engaged in with regard to stolen property, and since the defendant in this case used two separate pieces of stolen property as collateral for two separate loans, two crimes were committed despite the fact that the two transactions were conducted at the same time.

The double jeopardy clause of the Fifth Amendment of the United States Constitution and Article I, section 9 of the Washington State Constitution protect a defendant from being punished multiple times for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072

(1998). Prosecutors have considerable latitude to decide whether violations should be charged separately or brought as a single charge. State v. Kinneman, 120 Wn. App. 327, 337, 84 P.3d 882 (2003). When a person has been charged with multiple violations of a single criminal statute, the proper inquiry is what "unit of prosecution" the Legislature intended to be punished under that statute. Adel, 136 Wn.2d at 633-634. Double jeopardy principles prohibit multiple convictions under the same statute if the defendant has committed only one unit of the crime. Adel, 136 Wn.2d at 634.

In the present case, the defendant objected at trial, and maintains his objection on appeal, that his two convictions for first-degree trafficking in stolen property violate double jeopardy protections. While each count referred to the pawn of a separate piece of stolen property, each piece of property had a separate owner, and each transaction involved a separate obligation to pay by Cash Northwest and therefore

a separate harm, the transactions took place at the same time and the property was received by the same business.

The first step in a "unit of prosecution" analysis is to examine the statute under which the charges arose. Kinneman, 120 Wn. App. at 334. A person is guilty of first degree trafficking in stolen property if that person knowingly traffics in stolen property. RCW 9A.82.050. The term "traffic" is defined 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 of stolen property with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

RCW 9A.82.010(19). Thus, a knowing transfer of stolen property to another person constitutes the crime of first degree trafficking in stolen property.

At the trial of this cause, Bruce Dobbs, owner of the pawn business, Cash Northwest, which received the stolen property from the defendant, testified about the nature of these transactions.

In each transaction, the business enters into a contractual agreement with an individual and makes a loan based on a particular piece of property. Trial RP 152, 155. The loan is typically for 90 days and in that time the person can pay the interest and principal of the loan and reclaim the property. In the alternative, the person can merely pay the interest and extend the loan for another 90 days. Trial RP 153-154. A failure to pay by the end of the loan period then results in the loan recipient losing title to the particular piece of property used as collateral for the loan. Trial RP 159.

Thus, while the two rings were transferred to Cash Northwest at the same time, each ring was definitely the basis of a separate transaction. Each transaction resulted in a separate contractual set of obligations between Yun and Cash Northwest. Given these circumstances, there is no material difference between the harm caused by the two transactions here that occurred simultaneously and that which would result from

the same two transactions spaced apart by some period of time, such as an hour or even a day. Therefore, there is no reason why the legislature would have intended the timing of these particular transactions to be the determining factor for a unit of prosecution analysis regarding the crime of trafficking in stolen property.

The State submits that the statutory definition of "traffic" shows unambiguously that the Legislature was focused on the particular action carried out with regard to stolen property. Each separate action constitutes a separate commission of this crime. If that is the case, then the focus must be on the particular facts constituting the alleged action in order to determine whether a separate offense has been committed.

Under such an approach, not every transfer of multiple items of stolen property at one time would constitute separate crimes. In some instances, such as a single sale of multiple items to a single buyer for a single amount, a single

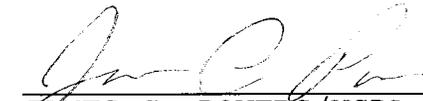
act of selling stolen property would exist, whereas separate acts would occur if instead some of the items were sold to the buyer at one time, and the rest were sold to the buyer at a different time. However, where a single piece of property is transferred as collateral for a loan, and another piece of property is transferred as collateral for a separate loan, two separate acts or transactions occur, regardless of whether the acts are committed simultaneously or at different points of time. Therefore, under the facts of this case, two crimes were committed and there was no violation of double jeopardy.

D. CONCLUSION

Based on the above, the State respectfully requests that the defendant's convictions in this case be affirmed.

DATED this 2nd day of November, 2006.

Respectfully submitted,



JAMES C. POWERS/WSBA #12791
DEPUTY PROSECUTING ATTORNEY

FILED
COURT OF APPEALS

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NO. 34064-0-II

STATE OF WASHINGTON

BY James C. Powers IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

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|----------------------|---|----------------|
| STATE OF WASHINGTON, |) | |
| Respondent |) | DECLARATION OF |
| |) | MAILING |
| v. |) | |
| |) | |
| WOO JUNG YUN, |) | |
| Appellant |) | |

| | | |
|---------------------|---|-----|
| STATE OF WASHINGTON |) | |
| |) | ss. |
| COUNTY OF THURSTON |) | |

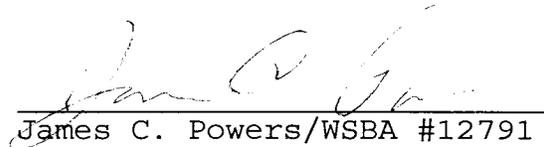
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 2nd day of November, 2006, I caused to be mailed to appellant's attorney, THOMAS E. DOYLE, a copy of the Respondent's Brief, addressing said envelope as follows:

Thomas E. Doyle,
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I certify (or 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.

DATED this 2nd day of November, 2006 at Olympia,
WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney