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A. APPELLANT’S ASSIGNMENTS OF ERROR

- 1.) The trial court erred in not taking the count I, theft in the first degree, case from the jury for lack of sufficiency of the evidence.
- 2.) The trial court erred in improperly commenting on the evidence and thereby relieved the State of its burden of proving an essential element of the crime of theft in the first degree beyond a reasonable doubt in violation of Washington Constitution Art. 4, Sec. 16 by court’s instruction 21.
- 3.) The trial erred in permitting Hermann to be represented by counsel who provided ineffective assistance by failing to provide any authority when objecting to court’s instruction 21.
- 4.) The trial court erred in calculating Hermann’s offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1.) Whether there was sufficient evidence to convict for Theft in the First Degree. [Assignment of Error 1].
- 2.) Whether instruction 21 constitutes an improper comment on the evidence. [Assignment of Error 2].
- 3.) Whether defense counsel was ineffective for being unable to provide citation to caselaw in opposition to proposed, and adopted, instruction 21. [Assignment of Error 3].
- 4.) Whether the trial court erred by including the community placement offender score point. [Assignment of Error 3].

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts recitation of the procedural and substantive facts set forth in his opening brief.

D. ARGUMENT

1. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR THEFT IN THE FIRST DEGREE.

State v. Holt, 119 Wn.App. 712, 82 P.3d 688 (2004) succinctly sets out the considerations when sufficiency of the evidence is raised on appeal:

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delamarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, we give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992) *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992).

Hermann here contests only that there is insufficient value to support the jury's determination of guilt as to Theft in the First Degree. As defense counsel noted in closing, the only issue as to the theft charge was whether there the correct result would be a finding of guilt for first or second degree theft, not whether Hermann committed a theft. [RP 291].

Hermann's partial citation to *State v. Melrose* 2 Wn.App. 824, 831, 470 P.2d 552 (1970) is far more instructive if the full discussion is considered:

Evidence of value in criminal cases is proved in the same way as in civil cases. *State v. Romero*, 95 N.J.Super. 482, 231 A.2d 830 (1967); 52A C.J.S. Larceny s 118 (1968). The price paid for an item of property, if not too remote in time, is proper evidence of value. Due allowance can be made by the jury for changes in the condition of the property which affect its market value. Admissible evidence of price paid is entitled to great weight. See *Epstein v. City and County of Denver*, 133 Colo. 104, 293 P.2d 308, 55 A.L.R.2d 783 (1956); Annot., 155 A.L.R. 262, 276 (1945). It is not essential that there be direct evidence of value--a fact in issue--because reasonable inferences from substantial evidence may suffice. *Thomson v. Virginia Mason Hospital*, 152 Wash. 297, 300, 277 P. 691 (1929); *State v. Martin*, 73 Wash.2d 616, 625, 440 P.2d 429 (1968). Reasonable inferences from substantial evidence in a criminal case may be relied on to prove the crime. *State v. Uglem*, 68 Wash.2d 428, 413 P.2d 643 (1966); *State v. Palmer*, 1 Wash.App. 152, 459 P.2d 812 (1969).

When substantial evidence is present, the drawing of reasonable inferences therefrom and the doing of some conjecturing on the basis of such evidence is permissible and acceptable. *Lavender v. Kurn*, 327 U.S. 645, 90 L.Ed. 916, 66 S.Ct. 740 (1946).

The item in question in *Melrose* was a camera, an item even the victim testified was a type of thing that depreciated in value quickly. *Melrose* at 830-831. That is a far different type of item than jewelry consisting of gold, diamonds and other precious stones which are frequently purchased because they hold their value or even appreciate. What is "too remote in

time” for an item subject to rapid depreciation is clearly not the same as “too remote in time” for an item that tends to hold value or appreciate.

The threshold for a Theft in the First Degree is \$1500. RCW 9A.56.030(1)(a). The proof of price paid for the stolen items far exceeded \$1500. The testimony of the pawn operators placed the value of the pawned items at \$915.00 [RP 216]. This value was based only on the weight of gold and the diamonds. [RP 213-214]. This did not include any value for other types of precious gems found in the rings. [RP 213-214, 216] or, of course, for items which were taken but not pawned.

According to *Melrose*, price paid is entitled to great weight and reasonable inferences may be drawn from the evidence. Jurors may rely on their life experiences in evaluating the evidence presented at trial. *Richards v. Overlake Hospital Medical Center*, 59 Wn.App. 266, 274, 796 P.2d 737 (1990). Further, jurors are expected to bring opinions, common sense and everyday life experience into the deliberative process. *State v. Carlson*, 61 Wn.App. 865, 878, 812 P.2d 536 (1991).

The jury here was presented with evidence of price paid in excess of \$5000. Further evidence placed a floor value of \$915 which specifically did not include value for certain stones, only a weight value for the gold and these values were for the rings that were pawned, some were not recovered. [RP 292]. In looking at the evidence in the light most

favorable to the State, there is sufficient evidence for the jury to determine that the value of the stolen jewelry exceeded \$1500. Even assuming a total value of \$915 for the pawned items, there is sufficient evidence as to the value of the still-missing items for the jury to end up over \$1500 in value. The evidence is sufficient for a finding of guilt as to Theft in the First Degree.

2. INSTRUCTION 21 CORRECTLY STATES THE LAW AND ALLOWS BOTH SIDES TO ARGUE THEIR POSITIONS WITHOUT MISLEADING THE JURY OR MAKING ANY INAPPROPRIATE COMMENT ON THE EVIDENCE.

Alleged errors of law in jury instructions are reviewed de novo. Jury instructions are proper when they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

Court's instruction 21 advised the jury that "Evidence of a retail price may be sufficient to establish value." [RP 274]. The court did not direct the jury that evidence of retail price absolutely was sufficient to prove value. The jury was in fact presented with two widely divergent values and the court's instruction did not direct them to adhere to either value.

As argued above, price paid is entitled to “great weight”, a standard that the instruction doesn’t even approach. Instead, the instruction leaves the weight of the evidence to the jury’s determination. Also, as argued above, there need not be a specific proof of value and the jury is entitled to use its own experiences and to draw reasonable inferences from the evidence. Even if the only evidence was that of the pawn operators, the jury could still have found sufficient value. The instruction correctly stated the law and was not misleading. If anything, the instruction by leaving out any reference to “great weight” significantly softened any impact the instruction may have had.

The instruction also allowed for each side to argue their respective cases. Defense counsel argued that retail price comes into play when you don’t have the stolen item. “When you have the item in front of you, you can have it appraised and you can determine what the value is.” [RP 292]. And then counsel followed up to argue there was insufficient proof that Hermann had stolen the items not yet recovered—after all Hermann admitted stealing the recovered jewelry but didn’t admit taking the unrecovered items. [RP 293].

Counsel then points to other times the rings disappeared at the hands of another person and argued that perhaps that individual had struck

again—reasonable doubt that Hermann had taken the other missing rings.
[RP 294].

The instruction was properly given.

Hermann also asserts the instruction was an improper comment on the evidence. Not every statement by the trial court constitutes a comment on evidence. “[A] statement by the court will constitute a comment on the evidence only if the court’s attitude toward the *merits* of the case or the court’s evaluation relative to a *disputed issue* is inferable from the statement.” *State v. Hansen*, 46 Wn.App. 292, 300, 730 P.2d 706 (1986) citing to *State v. Louie*, 68 Wn.2d 304, 413 P.2d 7 (1966).

As argued above, the instruction correctly states the law and does not direct the jury in any particular direction in its deliberation. If anything, by omitting any reference to price paid evidence being entitled to “great weight”, the trial court minimized any potential for the jury being able to infer the court’s position—minimized to the benefit of the defendant. The instruction is not an impermissible comment on the evidence.

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3. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO PRESENT CITATION TO CASELAW IN OPPOSITION TO INSTRUCTION 21 WHEN THERE IS NO CASELAW HE COULD HAVE PROVIDED.

An appellate court will presume the defendant was properly represented. *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A criminal defendant's must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e. that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. .

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940 P.2d 299 (1997). The defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at 77.

A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

The test of incompetence is after considering the entire record, can it be said that the accused was not afforded effective representation and a fair and impartial trial. *State v. Johnson*, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980).

For the second part, the defendant must show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second-guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978). As argued above, Instruction 21 correctly states the law and was properly given. Even if trial counsel could have reported the cases cited here by Hermann to the trial court, the result would have been the same. Hermann cannot show failure of counsel to act appropriately nor can he show prejudice.

4. THE TRIAL COURT DID NOT ERR BY INCLUDING A COMMUNITY PLACEMENT POINT IN HERMANN'S OFFENDER SCORE.

At sentencing on November 14, 2005, defense counsel objected to the inclusion of a point in Hermann's offender score based on being on community placement at the time of the offense, referring to "the two cases that are out there." [RP 319]. Those two cases presumably were *State v. Jones*, 126 Wn.App. 136, 107 P.3d 755, *review granted*, 124 P.3d 659 (2005) out of Division I and *State v. Hunt*, 128 Wn.App. 535, 116 P.3d 450 (2005) with Division I holding that the question of an offender point for community placement, if contested, is a jury question and Division III holding that it is a judicial determination. At the time of Hermann's sentencing, Division II had not decided the issue.

Since Hermann's sentencing, Division II has issued two cases on the question of whether this is a jury or judicial determination. In *State v. Hochhalter*, 131 Wn.App. 506, 128 P.3d 104 (2006), this Division in a 2-1 ruling agreed with Division I. Subsequently however, another Division II

panel issued *State v. Giles*, ___ Wn.App. ___, 132 P.3d 1151 (2006) ruling 3-0 that the determination is a judicial determination. The Court in *Giles* specifically noted that it was publishing *Giles*:

[b]ecause a majority of the court at Division Two disagrees with *Hochhalter*, we have decided to file our *Giles* opinion now in order to provide guidance to Division Two trial courts pending the Supreme Court's decision in *Jones*.

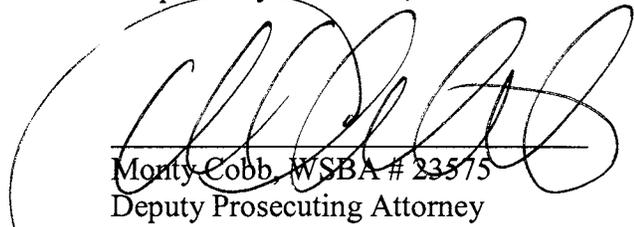
Giles at 1152, note 5. This trial court's actions are within the dictates of the *Giles* ruling¹ and there is no error in the calculation of Hermann's offender score.

E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm the conviction and the sentence imposed.

DATED this 25 day of July, 2006.

Respectfully submitted,


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Deputy Prosecuting Attorney
Attorney for Respondent

¹ And the trial court is internally consistent in its application of the community placement offender score point as the *Giles* matter originated from the same trial court as this appeal.

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 NATHAN W. HERMANN,)
)
 Appellant,)
 _____)

No. 34161-1-II

DECLARATION OF
FILING/MAILING
PROOF OF SERVICE

BY _____
DEPUTY

STATE OF WASHINGTON

06 JUL 28 PM 12:06

FILED
COURT OF APPEALS
DIVISION II

I, TRICIA KEALY, declare and state as follows:

On July 27, 2006, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (STATE'S BRIEF OF RESPONDENT), to:

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

I, Tricia Kealy, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 27th day of July, 2006, at Shelton, Washington.



Tricia Kealy