

COURT OF APPEALS  
DIVISION II

07 APR -6 PM 1:22

STATE OF WASHINGTON  
BY: *[Signature]*  
TITLE

NO. 35440-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD LLOYD YANAC,

Appellant.

---

APPELLANT'S BRIEF

---

James L. Reese, III  
WSBA #7806  
Attorney for Appellant

612 Sidney Avenue  
Port Orchard, WA 98366  
(360)876-1028

*pm 4/3/07*

TABLE OF CONTENTS

	Page
A. ASSIGNMENTS OF ERROR	
Assignments of Error .....	
No. 1- No. 4 .....	1
Issues Pertaining to Assignments of Error .....	
No. 1 .....	1
No. 2- No. 4 .....	2
B. STATEMENT OF THE CASE .....	2
<i>CrR 3.5 Hearing</i> .....	3
<i>Trial Testimony</i> .....	4
C.. ARGUMENT .....	8
I. THE TRIAL COURT ERRED WHEN IT GRANTED THE PROSECUTOR’S MOTION IN LIMINIE AND RULED THAT THE DEFENDANT COULD NOT QUESTION THE COMPLAINING WITNESS ABOUT THE REASON WHY SHE CALLED 911. ....	8
<i>Constitutional Right to Impeach</i> .....	12
<i>State v. Spencer</i> .....	13
II. THE TRIAL COURT ERRED WHEN IT SUSTAINED THE PROSECUTOR’S OBJECTION WHEN THE DEFENDANT TESTIFIED TO THE VERBAL RESPONSE FROM A PERSON WHO GAVE HIM A TELESCOPE AND WHO SAID “I HAVE NO IDEA” WHETHER IT WAS STOLEN OR NOT. ....	15
III. THE TRIAL COURT’S ERROR IN EXCLUDING THE ABOVE STATED TESTIMONIES WAS NOT HARMLESS. ....	20

IV. THE DEFENDANT’S CONVICTIONS SHOULD BE REVERSED BASED ON THE CUMULATIVE ERROR DOCTRINE. ....	22
V. THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT WITH POSSESSION OF STOLEN PROPERTY. ....	24
D. CONCLUSION .....	27
E. APPENDIX	
Prosecution’s Motions in Limine .....	A
Instruction No. 7 .....	B
ER 801 .....	C
ER 803 .....	D
RCW 9A.56.140(1) .....	E
RCW 9A.56.150(1) .....	F
Fourteenth Amendment .....	G

TABLE OF AUTHORITIES

TABLE OF CASES

<i>Betts v. Betts</i> , 3 Wn.App. 53, 473 P.2d 403, <i>review denied</i> , 78 Wn.2d 994 (1970) .....	14
<i>CHG international Inc. V. Robin Lee</i> , 35 Wn.App. 512, 667 P.2d 1127 (1983) .....	10,11
<i>Fenimore v. Donald Drake Construction Co.</i> , 87 Wn.2d 85, 549 P.2d 483 (1976) .....	11
<i>State v. Alexander</i> , 64 Wn.App. 147, 822 P.2d 1250 (1992) .....	22
<i>State v. Alvarez</i> , 45 Wn.App. 407, 726 P.2d 43 (1986) .....	18

<i>State v. Badda</i> , 63 Wn.2d 1276, 385 P.2d 859 (1963) .....	22
<i>State v. Bingham</i> , 105 Wn.2d 820, 719 P.2d 109 (1986) .....	26
<i>State v. Bixby</i> , 27 Wn.2d 144, 177 P.2d 689 (1947) .....	18
<i>State v. Coe</i> , 101 Wn.2d 772, 684 P.2d 668 (1984) .....	22
<i>State v. Dickerson</i> , 48 Wn.App. 457, 740 P.2d 312 (1987) .....	12
<i>State ex rel. Carrol v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971) .....	16
<i>State v. Gonzales</i> , 90 Wn.App. 852, 954 P.2d 360 (1998) .....	21
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	25
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020 (1986) .....	20,23
<i>State v. Halstein</i> , 122 Wn.2d 109, 857 P.2d 270 (1993) .....	23
<i>State v. Hughes</i> , 106 Wn.2d 176, 721 P.2d 902 (1986) .....	26
<i>State v. Johnson</i> , 90 Wn.App. 54, 950 P.2d 981 (1998) .....	12,16,20
<i>State v. Larry</i> , 108 Wn.App. 894, 34 P.3d 241 (2001) .....	12

<i>State v. Mounsey</i> , 31 Wn.App. 511, 643 P.2d 892, <i>review denied</i> , 97 Wn.2d 1028 (1982) .....	17,18
<i>State v. Ortiz</i> , 119 Wn.2d 294, 831 P.2d 1060 (1992) .....	16
<i>State v. Peterson</i> , 2 Wn.App. 464, 469 P.2d 980 (1970) .....	12,13,21
<i>State v. Rempel</i> , 114 Wn.2d 77, 785 P.2d 1134 (1990) .....	26
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994) .....	22
<i>State v. Spencer</i> , 111 Wn.App. 401, 45 P.3d 209 (2002) .....	13,14,15,20
<i>State v. Tharp</i> , 96 Wn.2d 591, 637 P.2d 961 (1981) .....	23
<i>State v. Wanrow</i> , 88 Wn.2d 221, 559 P.2d 548 (1977) .....	20
<i>State v. Whelchel</i> , 115 Wn.2d 708, 810 P.2d 948 (1990) .....	23
<i>State v. Williams</i> , 85 Wn.App. 271, 932 P.2d 665 (1997) .....	19
<i>Coleman v. Alabama</i> , 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970) .....	20
<i>Davis v. Alaska</i> , 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) .....	13
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) .....	26

<i>Jackson v. Virginia</i> , 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979) .....	25,26
--	-------

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment .....	1,2
----------------------------	-----

STATUTES

RCW 9A.56.140(1) .....	2,3,24,27
RCW 9A.08.010(1)(b) .....	25
RCW 9A.08.010(2) .....	25
RCW 9A.56.150(1) .....	2,3
RCW 9A.56.160(1)(a) .....	24

RULES AND REGULATIONS

CrR 4.7(b)(1) .....	8
ER 401 .....	9
ER 402 .....	8
ER 801 .....	18
ER 801(c) .....	15
ER 803(a)(3) .....	11,16
WPIC 10.02 .....	25

OTHER AUTHORITIES

Teglund, Karl B., <i>5 Washington Practice 4<sup>th</sup> Ed.</i> , N. 18 (2006) .....	12
Teglund, Karl B., <i>5A Washington Practice 320</i> (4 <sup>th</sup> ed. 1999) .....	12,13
Teglund, Karl B., <i>5B Washington Practice</i> (4 <sup>th</sup> ed. 1999) .....	17

## A. Assignments of Error

### Assignments of Error

1. The trial court erred when it granted the prosecutor's motion in limine and ruled that the defendant could not examine the complaining witness, Vanessa Ann Hannigan, about why she contacted 911 based on what she was told by Mike Blithe about a telescope being stolen.
2. The trial court erred when it sustained the prosecutor's objection to the defendant's testimony that another person, Mike Blithe replied, "I have no idea." when Blithe was asked by the defendant whether a telescope the defendant took possession of was stolen or not.
3. The defendant's conviction for possession of stolen property in the first degree should be reversed based on the cumulation of errors doctrine.
4. There was not sufficient evidence to convict the defendant of possessing stolen property "knowing that it had been stolen" and withholding or appropriating "...the same to the use of any person other than the true owner or person entitled thereto...." in violation of the due process clause of the Fourteenth Amendment.

### Issues Pertaining to Assignments of Error

1. Whether the trial court abused its discretion when it granted the prosecutor's motion in limine No. 13 and ruled that the defense could not examine the complaining witness about what she was told by another party

that the property the defendant possessed- a telescope- was stolen and that she should call the police in order to get the defendant into trouble?

(Assignment of Error 1).

2. Whether the defendant was denied the constitutional right to present a defense to the charge of unlawful possession of stolen property in the first degree where he was not allowed to testify that the person who gave him a telescope said "I have no idea." when he was asked by the defendant at the time he obtained possession: "Well, is it stolen?" (Assignment of Error 2).

3. Whether, the defendant's conviction for possession of stolen property in the first degree should be reversed based on the cumulation of errors doctrine in violation of the due process clause of the Fourteenth Amendment?. (Assignment of Error 3).

4. Whether there was sufficient evidence that the defendant possessed a telescope "knowing that it had been stolen" and "did withhold or appropriate "...the same to the use of any person other than the true owner or person entitled thereto as required elements of RCW 9A.56.140(1) and RCW 9A.56.150(1)? (Assignment of Error 4).

#### B. Statement of Case

Richard Lloyd Yanac was charged by information with Possession of Stolen Property in the Second Degree on January 12, 2006. CP 1.

Thereafter, a First Amended Information was filed alleging Possession of Stolen Property in the First Degree contrary to RCW 9A.56.140(1) and RCW 9A.56.150(1). CP 10.

*CrR 3.5 Hearing*

Kitsap County Sheriff's Deputy Eric Janson testified that on August 5, 2005 he contacted the defendant at approximately 12:30 noon at his residence in Kitsap County, Washington. I RP 31. The deputy asked the defendant if he had a telescope and he replied: "Yes". I RP 37. The defendant allowed the deputy to look at the telescope. At no time was the defendant arrested, handcuffed or told that he was not free to leave. RP 33.

On cross examination, the deputy testified that he asked Mr. Yanac where he got the telescope. I RP 34. The defendant replied, "Mike gave it to me,". id. Previously, the deputy had advised Yanac "...that it was possible that it was stolen." id. When the defendant was in the process of unbolting the telescope from inside a bus in order for the deputy to take possession of the telescope, the deputy asked the defendant whether he thought that it might be stolen when Mike gave it to him. Deputy Janson testified: "He said he thought it might be." RP 35.

The trial court ruled that the statement was voluntary and that *Miranda* warnings were not required to be given to the defendant before investigatory questioning was begun because he was not in custody. RP

40-2; CP 24-6.

*Trial Testimony*

Skip Ferrucci testified that in August 2005 he was Superintendent of Parks for Pierce County. RP 49. Part of his duties included involvement with the Tacoma Narrows Park. The park is located just across the Narrows Bridge on the east side of the Gig Harbor peninsula. RP 50. It includes about 1,200 of saltwater shoreline. Included in the park were two telescopes. Exhibit 1 was a picture of the telescope in the parking lot area of the park. RP 52.

A telescope was reported stolen by a citizen tenant that lived on the property. It was stolen on “the night of May 6 or early in the morning on May 7.” RP 53. The model number of the ADA accessible telescope was *KE1693*. RP 57. He testified that the telescope had been returned and reinstalled at the park. RP 65. It was worth “approximately \$3,500 and was manufactured by Seacoast Manufacturing. id.

On cross-examination superintendent Ferrucci admitted that the number on the telescope was a model number for the type of telescope and not a “unique identifier.” RP 67-8.

Deputy Janson also testified during the trial. On August 5, 2005 he went to the defendant’s residence and asked him if he had a telescope. Mr. Yanac said, “Yes.” and informed the deputy that it was in his bus. I RP 77.

Yanac gave the officer permission to look at it. id. The telescope was in the rear of “an old diesel transit bus.” The telescope was bolted to the bus. Yanac advised the deputy that he obtained it “from a man named Mike.” RP 78.

Officer Janson testified that he asked Yanac, “If he thought that telescope might be stolen?” According to the deputy he replied, “Yes, he did.” id. After removal, the officer inspected the telescope. He observed a number that was stamped into the telescope. It read “KE 1693” or “KE 1698”. The deputy could not discern the last number.

Richard Lloyd Yanac testified that he had previously been convicted of forgery in May 23, 1999, on April 9, 2000 and on February 16, 2000 as well as Possession of Stolen Property in the Second Degree on September 1, 2002. II RP 105.

He testified that he was a mechanic and that he had a trading post in Southeast Oregon. II RP 106. In July 2005 he received a telescope from another party. Yanac had done some work on a motor vehicle for the third party’s wife. He was at their home when he saw a telescope that was lying on the ground outside of a shed. II RP 107. Yanac asked if he could have it because he had worked on their cars when they were in need. id.

Yanac testified on direct examination as follows:

“Q. Did you take a look at this telescope?”

A. Yes. After he said I could have it I said,  
“Well, is it stolen?” And he goes, “I have no idea.”  
II RP 107-8

The prosecutor’s objection on the basis of hearsay was sustained. The trial court struck the defendant’s statements. And the jury was instructed to disregard Mr. Yanac’s entire response. *id.* By doing so, the trial court eliminated Mr. Yanac’s only defense.

Yanac continued to testify that when he obtained the telescope “it was a fairly new looking telescope, and I started looking for serial numbers on it because I was going to have it checked out.” II RP 108. The scope did not have any identifying markers except a mold number. Yanac, a second hand dealer, testified that a mold number was not a legal serial number that could be used to find out whether an article was stolen or not. II RP 109. He also testified that there was no placard on the telescope. *id.*

Yanac was asked on direct examination:

“Q. (By Mr. Purves) did you have any concern at the time Mike gave you this telescope that it might be stolen?”

A. It entered my mind. Of course, any time I pick up anything you know, it always crosses my mind could it be stolen or not, but that is why I check it out to look for a serial number. And when it didn’t have that, I - - you know, I felt that I was safe because if I was to bring that into a pawn shop they would take it.”

II RP 109-11.

Thereafter, Yanac testified that he stored the telescope in a bus on his

property. He bolted it to the floor because it was top heavy.

Then, on August 5, 2005 he was visited by Deputy Janson. When asked if he had a telescope, Mr. Yanac testified that he replied that he did and cooperated with the deputy by showing him where it was located. When asked by the deputy whether he thought it might be stolen, he testified that he said: "It entered my mind, you know. I thought that it could have been stolen." II RP 112. However, he stated there were no identifying marks, other than the mold mark, which is on every telescope.

Yanac was asked directly:

"Q. Okay. Now, on August 5, 2005 did you think that that property was stolen?

A. I didn't think it was stolen. It entered my mind it could be, but there is no way of checking that.

Q. Now, did it enter you mind on August 5 or back when you received the telescope?

A. Back when I received it.

Q. Okay. Mr. Yanac, did you know that the telescope was stolen?

A. No, I did not."

Q. Is there any way for you to find out if the telescope was stolen?

A. No." II RP 112-113.

The jury convicted the defendant on one count of possession of stolen property in the first degree. CP 14. On October 6, 2006 the defendant appealed to the Court of Appeals. CP 27.

### C. Argument

#### I. THE TRIAL COURT ERRED WHEN IT GRANTED THE PROSECUTOR'S MOTION IN LIMINE AND RULED THAT THE DEFENDANT COULD NOT QUESTION THE COMPLAINING WITNESS ABOUT THE REASON WHY SHE CALLED 911.

In order to defend against the accusation that Yanac knowingly possessed stolen property, the defense advised the court before trial that it intended on calling the complaining witness, Ms. Vanessa Ann Hannigan. The objective was to elicit testimony that she contacted the police to advise them that the defendant was in possession of stolen property in order "to show Ms. Hannagan's state of mind and the reason why she called the police, 911." I RP 8.

The prosecutor filed its motions in limine including No. 13 which stated:

"13. Ruling by the Court on admissibility of the testimony of Defense Witness Vanessa Hannegan pursuant to CrR 4.7(b)(1) and ER 402. The Defense is obligated to disclose the names and the substance of any oral statements of such witnesses."

(See appendix: Prosecution's motions in Limine).

The defendant's attorney argued:

"And with regard to the offer of proof, Ms. Hannagan would be able to testify that Mike Blithe, the individual that Mr. Yanac received the telescope from, told her that this telescope was at Mr. Yanac's property, and that it was stolen, and that she should call the police to get back at him. She

was in a relationship with Mr. Yanac , and apparently there has been a falling out. He told her to call the police and tell them there was a stolen telescope on his property to get him into trouble.” I RP 7.

The state argued that this testimony was hearsay and was also irrelevant.<sup>1</sup>

I RP 8-9

At first, the trial court decided that it would admit the testimony.

I RP 10. Then the court listened to the offer of proof:

Q. Ms. Hannagan, do you recall the date of August 5, 2005?

A. Yes.

Q. Did you make a report to CENCOM on that date?

A. Yes, I did.

Q. And what did you report to CENCOM on that date?

A. I reported that Richard Yanac has stolen a telescope.

Q. Okay. And why did you do that?

A. I was angry, jealous, mad. Jealousy of another girl, and I was told to.

Q. And who told you to report this?

A. Mike Blithe suggested that I do that. It would be a good way for me to get even and him to kind of get even, too, because he was jealous also.

Q. And who is Mike Blithe?

A. I thought he was a friend of mine and Richard’s.

Q. And how long have you known Mike Blithe?

A. About a year.

Q. And are you formally [sic?] Mr. Yanac’s girlfriend?

A. Yes. I RP 13-14.

The trial court then ruled that the defendant could call Ms.

---

<sup>1</sup> ER 401 states: “Relevant evidence” means having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence.”

Hannigan to testify that she contacted 911 and told CenCom that the defendant was in possession of stolen property. However, she could not be examined with regard to what she was told by Mr. Blithe. The trial court based its decision on *CHG International Inc. v. Robin Lee*, 35 Wn.App. 512, 667 P.2d 1127 (1983). I RP 18-19.

The trial court's ruling was as follows;

THE COURT: The reasons set for (sic) in that case CHG International, the Court concludes that this witness's state of mind is not relevant, so she may not testify regarding what she was told by Mr. Blithe.

She may testify that she called 911. I think the jury has a right to know that is how this got started. She called 911 and reported that the defendant had a stolen telescope. That will be the Court's ruling on No. 13.

MR. PURVES: To be clear, only testimony regarding her calling 911 is what the Court will allow?

THE COURT: That she called 911 stating that the defendant had –she was reporting the fact that the defendant had a stolen telescope.

MR. PURVES: Thank you.

THE COURT: You can cross-examine and can examine her on the relationship, but I am just saying that you cannot ask her about what Mr. Blithe told her. Okay?

Did the defense have any motions in limine to bring up at this time?" I RP 18-19.

*GHG International v. Robin Lee, Inc.*, 35 Wn.App. 512 (1983) is distinguishable. There, the plaintiff attempted to submit a letter by a non-party family member that stated the defendant's offer was unreasonable and that the defendant's president was acting unfairly and

dishonestly. The letter was rejected by the trial court as hearsay when it was offered against the defendant.

The Court of Appeals affirmed and held that “[the statements contained in the letter] do not fall within the “state of mind” exception to the hearsay rule. ER 803(a)(3) because the author’s state of mind was not in issue”.

*CHG International*, supra, is more in point with regard to the first assignment of error than as authority to exclude Hannigan’s testimony of the reason why she initially contacted the police. Any party may impeach any witness it calls to the stand. A witnesses’ interest and bias in the case is always permitted to be shown.

Also, Hannigan’s testimony was not hearsay. She would have been testifying to her motive or reason for contacting the police in the first instance i.e., because she wanted to get back at the defendant and Mike Blithe wanted to get the defendant into trouble.

Generally, granting or denying motions in limine are reviewed for an abuse of discretion. *Fenimore v. Donald Drake Construction Co.*, 87 Wn.2d 85, 549 p.2d 483 (1976). However, as in the case at bench, when the defendant argues that a ruling excluding evidence also violated a constitutional right, an appellate court will review the constitutional issue de novo. *State v. Larry*, 108 Wn.App. 894, 34 P.3d

241 (2001) (quoted in Karl B. Teglund, 5 *Washington Practice* 4<sup>th</sup> Ed., pocket part at 18, n. 18 (2006) (“We review de novo alleged violations of the confrontation clause”).

### *Constitutional Right to Impeach*

The constitutional right to confront witnesses requires that the accused be granted a wide latitude to impeach state’s witnesses. *State v. Dickerson*, 48 Wn.App. 457,469, 740 P.2d 312 (1987); *State v. Johnson*, 90 Wn.App. 54, 70, 950 P.2d 981 (1998).

According to Teglund:

“The courts tend to favor impeachment by demonstrating bias, particularly in criminal cases, where the defendant enjoys nearly an absolute right to demonstrate bias on the part of prosecution witnesses.”<sup>FN</sup>

Karl B. Teglund, 5*A Washington Practice* 320 (4<sup>th</sup> ed. 1999) (note omitted). The above note does include the following: “*State v. Peterson*, 2 Wn.App. 464, 469 P.2d 980 (1970) (in prosecution for indecent liberties, error to refuse to permit defendant to cross-examine complainant’s mother in an effort to develop theory that charges were fabricated at the insistence of complaint’s older sister).”

The Court of Appeals reversed the defendant’s conviction in *State v. Peterson*, supra, and held in part:

“In the instant case, the questions put to the mother upon cross-examination attempted to elicit testimony to establish

an inference that the prosecution was initiated by the complaining witness [a female child under age 15] for reasons which would tend to establish his innocence. Failure to permit the defendant reasonably to pursue a valid theory constituted error which seriously jeopardized his defense to a heinous crime....” *id.* at 467.

*Peterson* is solid authority for admission of Hannigan’s testimony.

Although neither she nor Mike Blithe were called as witnesses by the State, the defendant was still entitled “to pursue a valid theory” through his proposed examination as the offer of proof indicates.

Also appearing in Teglund is the following statement that is nearly contradictory to the trial court’s ruling in this case, except that Mike Blithe did not testify:

**“Hearsay issue**

Witness A may recount a statement by Witness B, offered to show bias on the part of Witness B, without violating the hearsay rule. The statement is not hearsay because it is not offered to prove the truth of the matter asserted. It is instead offered as proof of Witness B’s state of mind. *State v. Spencer*, 111 Wn.App. 401, 45 P.3d 209 (2002).”

Teglund, *5A Washington Practice 84-5*; 2006 Pocket Part.

*State v. Spencer*

In *Spencer*, *supra*, the Court of Appeals began its decision with the statement: “We first note that a defendant has a constitutional right to impeach a prosecution witness with bias evidence. *Davis v. Alaska*, 415 U.S. 308, 316-18, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

The scenario in *Spencer* was stated by the court:

“Here, Spencer’s offer of proof regarding Schmidt’s testimony indicates that Schmidt would have testified about McMullen’s state of mind:

Karen Schmidt would testify that Leanne [McMullen] told her Leanne knows that Henry did not do this and she did that because she was scared for herself and for her child, that the police threatened her that CPS would be involved and they would take her to jail...unless the police were told what they wanted to hear. She will also testify about how Leanne was angry about the second girlfriend situation.”

id. at 408-9.

The Court of Appeals ruled that Schmidt’s testimony was not hearsay because she was testifying to Ms. Mullen’s state of mind. In the case at bench, the defendant has an even better argument because he wanted to admit Hannigan’s testimony to show her state of mind. According to the unanimous decision in *Spencer*: “First, Schmidt’s testimony would not have been hearsay because it was not being offered for the truth of the matter asserted. ER 801(c) n.7 ; *see also Betts v. Betts*, 3 Wn.App. 53, 59, 473 P.2d 403 (statements offered to show mental state, rather than the truth of the assertions made, are not hearsay), *review denied*, 78 Wn.2d 994 (1970).” *Spencer*, *supra* at 408 (note 7 is set

forth below).<sup>2</sup>

In addition, Yanac should have been afforded broader latitude to show any bias or motive by Hannigan when she placed the 911 telephone call. See *Spencer* “...the defendant should be afforded broad latitude in showing the bias of opposing witnesses.” id. at 411.

II. THE TRIAL COURT ERRED WHEN IT SUSTAINED THE PROSECUTOR’S OBJECTION WHEN THE DEFENDANT TESTIFIED TO THE VERBAL RESPONSE FROM A PERSON WHO GAVE HIM A TELESCOPE AND WHO SAID “I HAVE NO IDEA” WHETHER IT WAS STOLEN OR NOT.

The trial court erred when it sustained the prosecutor’s objection to the defendant’s statement while testifying that a third person replied, “I have no idea.” when he was asked by the defendant “Well, is it stolen?”.

II RP 108.

Mr. Yanac was asked on direct examination during the trial:

“Q. Did you take a look at this telescope?

A. Yes. After he said I could have it I said, “Well, is it stolen?”

And he goes, “I have no idea.”

MS. HATHORN: Objection, Your Honor; hearsay.

THE COURT: Excuse me. When she says “objection,” you need to stop for a moment, please.

MS. HATHORN: This is hearsay, your Honor.

THE COURT: Hang on. Read back that question, please.

(Reporter read back last question and answer by the Court.)

---

<sup>2</sup> “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c)....”

THE COURT: You can't testify as to what Mike told you, okay?

MS. HATHORN; Your honor, the State would ask the Court to instruct the jury that those statements are stricken.

THE COURT: Those remarks/statements are stricken. Disregard his response. The objection is sustained. You may proceed.

II RP 108

Examination of the record reveals that the trial court not only struck the defense to the charge of possession of stolen property, but the court also struck the defendant's testimony that he inquired and asked "Mike" whether the telescope was stolen or not. This was prejudicial to the defendant because the struck testimony eliminated any testimony to the jury regarding his state of mind at the time of the exchange and eliminated his testimony that, being a secondhand goods dealer he was cautious about accepting the telescope into his possession.

An appellate court reviews a trial court's evidentiary rulings for an abuse of discretion. *State v. Ortiz*, 119 Wn.2d 294, 308, 831 P.2d 1060 (1992). According to *State v. Johnson*, 90 Wn. App. supra at 69: "Discretion is abused if it is based on untenable grounds or for untenable reasons. *State ex rel. Carrol v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

According to ER 803 (a)(3) the testimony was admissible. That evidentiary rule states in pertinent part as follows:

**Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial.**

**(a) Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness...

*(3) Then Existing Mental, Emotional, or Physical Condition.*

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

According to Karl B. Teglund, *5B Evidence Law and Practice*

448-49 (4<sup>th</sup> ed. 1999) the defendant's testimony was admissible:

**"Generally.** An out of court statement offered to prove the mental or emotional effect upon the hearer or reader is not objectionable as hearsay. The result is usually based not upon the theory that any particular hearsay exception applies, but upon the theory that the statement is not hearsay in the first place. FN The statement is offered not to prove the matter asserted, but as circumstantial evidence of the state of mind of the hearer or reader."

**Illustrative cases.** Perhaps most commonly, out-of-court statements have been admitted [sic] show that the hearer or reader received notice of some fact, or had knowledge of some fact, as a result of the statement in question. The notion has been employed in both civil FN and criminal FN cases." (Footnotes omitted).

In support of this rule, Teglund cites *State v. Mounsey* 31 Wn.

App. 511, 643 P.2d 892, *review denied*, 97 Wn.2d 1028 (1982). 5B

*Washington Practice* 453-54, n. 13. *Mounsey* was a case where the

defendant was prosecuted for burglary and for rape. The defendant was not allowed to testify that he had heard from a female friend-who did not testify- that the victim was used to late night visitors and he could expect to be welcome.

Teglund's note concludes with a quote from that opinion which indicates that it was error to exclude the defendant's testimony:

““The testimony would have been proper pursuant to ER 801 and would not have been hearsay because it would have been intended to go to Mounsey's state of mind and not to stand for the truth of the matter stated....””

*id.* at 454 (quoting *Mounsey* at 522).

There are a multitude of cases supporting this proposition:

In *State v. Alvarez*, 45 Wn. App. 407, 726 P.2d 43 (1986) the defendant was charged with being an accomplice to murder. A statement by the accused murderer made in the presence of the defendant that he and Alvarez intended to kill the victim was ruled admissible. It was admissible in part to prove the underlying charge and to prove the defendant's knowledge of the planned murder. The court ruled the admission for the latter purpose was not hearsay.

In *State v. Bixby*, 27 Wn.2d 144, 177 P.2d 689 (1947) statements made to the defendant by a third party were held admissible to show knowledge and good faith on the part of the defendant concerning certain

facts.

A more recent case is *State v. Williams*, 85 Wn.App. 271, 932 P.2d 665 (1997). There, the state sought to revoke the defendant's driver's license because he refused to submit to a breath test. The appellate court held that the trial court did not err when it admitted out-of-court statements by a guard- stationed at a gate where the defendant was stopped- to the arresting officer, to the effect that the defendant smelled of alcohol. The reasoning was that the statement was admitted not to prove the truth of the matter asserted: that the defendant smelled of alcohol. Rather, the statement was admitted to show that the arresting officer had reason to believe that Williams might be intoxicated and that a sobriety test should be administered. Both courts determined that the police officer's state of mind was relevant to rebut the contention that he lacked sufficient grounds to detain the defendant for investigation.

Arguably, if the state can introduce and admit evidence of statements from a third party to show a police officer's state of mind, without offending hearsay, surely an accused should be able to introduce evidence to support his contention that he did not know certain property was stolen when he received it from a third party who stated "I have no idea."when asked by the defendant at the time he took possession of the telescope.

III. THE TRIAL COURT'S ERROR IN EXCLUDING THE ABOVE STATED TESTIMONIES WAS NOT HARMLESS.

The *Spencer* court stated the general rule:

“Any error in excluding such evidence is presumed prejudicial but is subject to the harmless error analysis; reversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place. *State v. Johnson*, 90 Wn.App. 54, 69, 950 P.2d 981 (1998).”

According to *Coleman v. Alabama*, 399 U.S. 1,11, 90 S.Ct. 1999, 26 L.Ed. 2d 387 (1970) and *State v. Guloy*, 104 Wn.2d 412,425, 705 P.2d 1182 (1985), *cert denied*, 475 U.S. 1020 (1986), the harmless error doctrine allows a conviction to stand, even if it follows a denial of an accused's constitutional rights, if the State is able to prove beyond a reasonable doubt that the unconstitutional act did not prejudice the defendant and he or she would have been convicted even if the error had not taken place. Otherwise, the defendant's due process rights are violated.

Put another way:

“A harmless error is one which is trivial, formal, or merely academic and which in no way affects the outcome of the case.” FN <sup>3</sup>

---

<sup>3</sup> (note includes citation to *State v. Wanrow*, 88 Wn.2d 221, 237, 559 P.2d 548 (1977)).

*State v. Gonzales*, 90 Wn.App. 852, 855, 954 P.2d 360 (1998).

In the case at bench, it cannot be argued by the State that Yanac was not prejudiced and that he would have been convicted even if the errors had not taken place. In *State v. Peterson*, 2 Wn.App., supra at 467, the trial court's evidentiary error required reversal and remand for a new trial. The court stated: "Failure to permit the defendant reasonably to pursue a valid theory constituted error which seriously jeopardized his defense to a heinous crime. The defendant should be granted an opportunity to pursue this defense on retrial of this matter."

The state did not call either Vanessa Hannigan or Mike Blithe as witnesses to show that the defendant knew the telescope was stolen when he obtained possession of the item. Instead, the Superintendent of Parks was called to identify the telescope as missing from the park. Also, deputy Jansen testified that the defendant was asked "If he thought that telescope might be stolen?" And the defendant's response was "Yes, he did." I RP 78. Contrarily, Mr. Yanac testified; "I didn't think it was stolen. It entered my mind it could be, but there was no way of checking that."<sup>4</sup> II RP 112-113. He testified that he did not know the telescope was stolen. *Id.*

---

<sup>4</sup>Yanac was a second hand dealer. He testified that the mold number on the telescope was not a legal identifying marker or serial number. The mold number could not be used to find out whether an article was stolen or not. II RP 109.

Yanac testified that he attempted to determine whether the telescope was stolen property since he deals in second hand goods. He attempted to testify about his inquiry of Blithe, who as it turned out knew the telescope was stolen property. But, the trial court denied this testimony. He attempted to convey to the jury Hannigan's state of mind, after she had been prodded by Blithe to contact the police.

It cannot be said that without this excluded testimony the jury would have convicted Yanac of possession of stolen property.

#### IV. THE DEFENDANT'S CONVICTIONS SHOULD BE REVERSED BASED ON THE CUMULATIVE ERROR DOCTRINE.

It may be argued that standing alone, none of the errors discussed above requires reversal. However, it does appear reasonably probable that the cumulative effect of those errors may have materially affected the outcome of this case. See, *State v. Russell*, 125 Wn.2d 24,93, 882 P.2d 747 (1994).

It was stated in *Russell* as follows:

“ It is well accepted that reversal may be required due to the cumulative effects of trial court errors, even if each error examined on its own would otherwise be considered harmless. See *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 1276, 183, 385 P.2d 859 (1963); *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992).”

*State v. Russell*, 125 Wn.2d at 93-4.

The nature of the evidentiary errors by the trial court were of constitutional magnitude. Based on this standard a different result would most likely have been reached by a reasonable jury had the evidence been admitted. There was not overwhelming evidence of Yanac's guilt. *State v. Whelchel*, 115 Wn.2d 708, 728, 810 P.2d 948 (1990); *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985); *cert. denied*, 475 U.S. 1020 (1986).

Conversely, if the nature of the error was of nonconstitutional dimensions, then based on this standard the trial court's exclusion of testimony materially affected the outcome of the trial. *State v. Halstein*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993); *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981).

Yanac testified to the circumstances of acquiring the telescope:

“Q. How did you come to receive this telescope from Mike?

A. Well, I gave him a goo deal on a car for just a couple of hundred dollars because they really needed one, and I was over there at their place one day, and I had seen the telescope there because it was laying on the ground outside his shed.

And I asked, “What are you doing with that,” you know, me being a – looking for stuff all of the time to buy, sell and trade.

And he said, “oh, it's just an old telescope that somebody left here.” Well, not an old telescope, but somebody had left it there. He wasn't sure where it came from exactly. He said f I like it, you know, I could have it because I had given then – you know, worked on their cars when they needed it and been there for them.

Q. Did you take a look at this telescope?

A. Yes. After he said I could have it I said, "Well, is it stolen?"

And he goes, "I have no idea."

MS. HATHORN: Objection, Your Honor; Hearsay.

II RP 107-8.

First, the exclusion of the testimony from Hannigan that she had been told by Blithe that the telescope was stolen and that she should contact the police raises the inference that Blithe knew at the time he gave the telescope to Yanac that it was indeed stolen.

Secondly, when Yanac attempted to explain to the jury what he asked Blithe at the time he received the telescope: "Well, is it stolen?" exclusion of this question itself undercut his defense that he did not know the telescope was stolen when Blithe told him, "I have no idea.", which was also excluded.

The jury could have reasonably reached a contrary verdict absent these combined errors.

**V. THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT WITH POSSESSION OF STOLEN PROPERTY.**

The defendant was charged with knowingly receiving, retaining possessing or concealing stolen property, "knowing that it had been stolen". CP 1; RCW 9A.56.140(1) and RCW 9A.56.160(1)(a).

The person who gave him the subject telescope was not called as a witness by the prosecution. Instead, the state relied on the defendant's own statement to the investigating officer that at the time he received the telescope from Mike Blithe that he might have had a notion that the telescope was stolen when he obtained possession.

Instruction No. 7 states the definition of "knowledge."<sup>5</sup> The defendant testified that he did not know the telescope was stolen. The only way he could have been convicted was for the jury to make a permissive inference that he should have known the telescope was in fact stolen property.

"The constitutional standard for reviewing the sufficiency of the evidence in a criminal case is "Whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)."

---

<sup>5</sup> "A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally." Supp.CP; WPIC 10.02, RCW 9A.08.010(1)(b), RCW 9A.08.010(2).

*State v. Bingham*, 105 Wn.2d 820, 823, 719 P.2d 109 (1986). See also, *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990); *State v. Hughes*, 106 Wn.2d 176, 721 P.2d 902 (1986).

It was stated in *Jackson v. Virginia*:

“In short, *Winship*, presupposes as an essential of the due process guaranteed by the Fourteenth Amendment that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof-defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense.”

443 U.S. at 316, 99 S.Ct. At 2787 (citing *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

Looking at the evidence in a light most favorable to the state, deputy Janson testified that he asked Mr. Yanac where he got the telescope. I RP 34. The defendant replied, “Mike gave it to me,”. *id.* Previously, the deputy had advised Yanac “...that it was possible that it was stolen.” *id.* When the defendant was in the process of unbolting the telescope from inside the bus in order for the deputy to take the telescope into custody, the deputy asked the defendant: “If he thought that telescope might be stolen?”. According to the deputy Yanac replied: “Yes, he did.”

RP 78.<sup>6</sup>

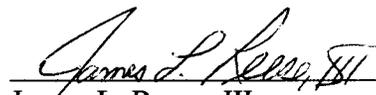
Another argument is that the state had to prove beyond a reasonable doubt that Yanac “...”did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto....” CP 10; RCW 9A.56.140(1). Yanac testified that e was going to have the telescope checked out. But, the telescope was not traceable to anyone because the mold number was not a serial number that could be used to determine whether the telescope was stolen or not. II RP 109.

D. Conclusion

The defendant’s conviction should be reversed and the case remanded for a new trial.

Dated this 2<sup>nd</sup> day of April 2007.

Respectfully Submitted,



James L. Reese, III  
WSBA #7806  
Court Appointed Attorney  
For Appellant

---

<sup>6</sup> By comparison, during the CrR 3.5 hearing Deputy Janson testified “He said he thought it might be.” in response to this question. I RP 35. See also, CrR 3.5 Findings of Fact V: “That deputy Janson asked the Defendant if he thought the telescope might be stolen. The Defendant replied that he had an idea it might be stolen.” CP 25.

ORIGINAL

RECEIVED AND FILED  
IN OPEN COURT

AUG 24 2006

DAVID W. PETERSON  
KITSAP COUNTY CLERK

- I deposited this document in the mails of the United States of America with a properly stamped and addressed envelope, by first class mail, postage prepaid, directed to the following person-
- This document was placed in the recognized system for interoffice written communication with local law offices, directed to the following person-

Amy I. Muth

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, information and belief.

Dated: August 22, 2006  
Place: Port Orchard, WA

\_\_\_\_\_  
[advocate name]

IN THE KITSAP COUNTY SUPERIOR COURT

STATE OF WASHINGTON, )

Plaintiff, )

v. )

RICHARD LLOYD YANAC, )  
Age: 45; DOB: 09/29/1960, )

Defendant. )

No. 06-1-00070-4

PROSECUTION'S MOTIONS IN LIMINE

COMES NOW the Plaintiff, STATE OF WASHINGTON, by and through its attorney, KARI E. HATHORN, Deputy Prosecuting Attorney, with the following motions in limine for trial in the above-entitled matter-

1. Filing of jury instructions on or before the first day of trial. Kitsap County Superior Court Local Rule 51.
2. Exclusion of witnesses so that they cannot hear the testimony of other witnesses, with the exception of lead investigator. ER 615.
3. The Court to direct the attorneys for each party to clearly instruct their witnesses that they "are not to discuss the case or what their testimony has been or would be or what occurs in the courtroom with anyone other than counsel for either side." *United States v. Buchanan*,<sup>1</sup> citing ER 615.

<sup>1</sup> *United States v. Buchanan*, 787 F.2d 477, 485 (10th Cir. 1986), grant of post-conviction relief reversed,



37

1 4. No reference or description of a character trait of a person, unless previously approved by  
2 the Court via offer of proof. ER 404(a), 404(b), 405(a), 405(b), 608.

3 a. The scope of this motion includes evidence that Defendant is a "law-abiding" citizen  
4 or opinions of the Defendant's character, as discussed in *State v. Mercer-Drummer*<sup>2</sup>–

5 Character is an "essential element" in comparatively few cases. In  
6 criminal cases, character is rarely an essential element of the charge,  
7 claim, or defense. For character to be an essential element, character  
8 must itself determine the rights and liabilities of the parties.<sup>[3]</sup>

9 Because character does not determine a party's rights and liabilities incident to an  
10 assault, obstruction of a law enforcement officer, or resisting arrest, character  
11 therefore is not an essential element of any charge, claim, or defense to the  
12 crimes with which Mercer-Drummer was charged. Thus, the trial court correctly  
13 excluded Mercer-Drummer's evidence of being a "law abiding citizen" under ER  
14 405(b) ...

15 ER 405(a) does not permit proof of character in the form of an opinion,  
16 especially a defendant's own opinion. "The rule requires, therefore, the proof be  
17 by evidence of reputation" in the community.<sup>[4]</sup>

18 b. If the Court admits reputation evidence, the prosecution asks the Court to require the  
19 procedure cited in Karl Tegland's courtroom handbook, with modifications--

20 Before inquiring about a witness's reputation, counsel must lay a foundation by  
21 asking the impeaching witness questions designed to show that the witness  
22 knows of the reputation of the witness to be impeached, that the reputation to be  
23 described relates solely to truth and veracity, that the reputation to be described is  
24 in the community of the witness to be impeached, and that the reputation to be  
25 described is not simply the witness's own opinion. The time-honored script is:

26 Q. *Yes or no*, do you know the general reputation at the present time of  
27 William Witness, in the community in which he lives, for truth and veracity?

28 A. Yes.

29 Q. *What is it, good or bad?*

30 A. It is bad.<sup>[5]</sup>

---

31 891 F.2d 1436 (10th Cir. 1989), *cert. denied*, 494 U.S. 1088, 110 S.Ct. 1829, 108 L.Ed.2d 958 (1990).  
<sup>2</sup> *State v. Mercer-Drummer*, 128 Wn.App. 625, 116 P.3d 454 (Div. 2 2005).  
<sup>3</sup> *Mercer-Drummer*, 128 Wn.App. at 632 (citing *State v. Kelly*, 102 Wn.2d 188, 196-97, 685 P.2d 564  
(1984) (citations omitted)).  
<sup>4</sup> *Mercer-Drummer*, 128 Wn.App. at 632 (citing *State v. O'Neill*, 58 Wn.App. 367, 370, 793 P.2d 977  
(1990)).  
<sup>5</sup> 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence*, at 301  
(2006), modified by *State v. Argentieri*, 105 Wash. 7, 177 P.690 (1919). [modifications in italics]



**Russell D. Hauge, Prosecuting Attorney**  
Adult Criminal and Administrative Divisions  
614 Division Street, MS-35  
Port Orchard, WA 98366-4681  
(360) 337-7174; Fax (360) 337-4949  
[www.kitsapgov.com/pros](http://www.kitsapgov.com/pros)

1 5. No examination inviting one witness to comment on another witness' accuracy or  
2 credibility. ER 404, ER 405; *State v. Wright*.<sup>6</sup>

3 6. No reference to Defendant's self-serving hearsay statements to potential witnesses, unless  
4 previously approved by the Court via offer of proof. ER 801(1)(a)(b)(c), ER 802. Such  
5 statements are inadmissible, unless offered by the State as statements against a party  
6 opponent, as held in *State v. Finch*<sup>7</sup>—

7 Out-of-court admissions by a party, although hearsay, may be admissible  
8 against the party if they are relevant. However, if an out-of-court admission by a  
9 party is self-serving, and in the sense that it tends to aid his case, and is offered  
10 for the truth of the matter asserted, then such statement is not admissible under  
11 the admission exception to the hearsay rule.<sup>8</sup>

12 7. No reference to "other suspect" evidence without prior finding by the trial court that the  
13 other suspect evidence is established by proper foundation, as held in *State v. Mak*<sup>9</sup>—

14 Before such testimony can be received, there must be such proof of  
15 connection with the crime, such a train of facts or circumstances as tend clearly  
16 to point out someone besides the accused as the guilty party.<sup>10</sup>

17 8. No reference to consequences of punishment from conviction [and/or of answering a  
18 special verdict in the affirmative, e.g. imprisonment or status of charge(s) as a sex offense  
19 or most serious offense] under Washington law [or affect upon the Defendant's military  
20 career.]. ER 401, 402, 403. This includes arguments such as "Defendant's life is in your  
21 hands" or "Defendant's freedom is at stake." Argument concerning punishment is limited  
22 to the scope of WPIC 1.02, which reads in pertinent part—

23 You have nothing whatever to do with any punishment that may be imposed in  
24 case of a violation of the law. The fact that punishment may follow conviction  
25 cannot be considered by you except insofar as it may tend to make you careful.

26 9. No reference to the procedural history of this action, including but not limited to  
27 amendments to the charging document, if any, plea negotiations or the amount of any

28 <sup>6</sup> *State v. Wright*, 76 Wn.App. 811, 821, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995)

29 <sup>7</sup> *State v. Finch*, 137 Wn.2d 792, 824, 975 P.2d 967, cert. denied, 528 U.S 922 (1999).

30 <sup>8</sup> *Finch*, 137 Wn.2d at 824 (citations omitted).

31 <sup>9</sup> *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986), cert. denied, 479 U.S. 995 (1986), sentence vacated  
on writ of habeas corpus sub nom., *Mak v. Blodgett*, 754 F.Supp. 1490 (W.D.Wash.1991), aff'd, 970 F.2d  
614 (9th Cir.1992), cert. denied, 507 U.S. 951, 113 S.Ct. 1363, 122 L.Ed.2d 742 (1993), quoting *State v.*  
*Downs*, 168 Wash. 664, 667, 13 P.2d 1 (1932).

<sup>10</sup> *Mak*, 105 Wn.2d at 716.



1 time the Defendant or any other person spent in custody pending trial. ER 401, 402, 403,  
2 410.

3 10. No argument regarding a "missing witness" or a party's "failure to produce a witness",  
4 unless previously approved by the Court with instruction under WPIC 5.20. *State v.*  
5 *Blair*,<sup>11</sup> (missing witness rule applies to the defense as well as to the prosecution); see  
6 comment to WPIC 5.20 (2nd ed. 1994).<sup>12</sup>

7 No use of "speaking objections", or of objections stating more than the basic grounds for  
8 the objection. ER 611. Regarding speaking objections, Karl Tegland writes:

9 The term *speaking objection* is not a precisely defined term of art, but is  
10 generally taken to mean an objection that is phrased in a manner intended to  
11 intimidate the witness, or to otherwise influence the witness's answer. An  
12 example might be, "Objection, the witness cannot possibly answer that question  
13 without speculating." Or, "Objection, the witness has already been through this  
14 before. Do we really need to hear it again?"

15 Speaking objections are neither authorized nor prohibited by the Evidence  
16 Rules. The rules leave it to the individual trial judge to decide the propriety of a  
17 speaking objection. As a practical matter, most trial judges believe speaking  
18 objections should be used sparingly, if at all. Most trial judges prefer that  
19 attorneys phrase objections in terms of the applicable rule of evidence-- hearsay,  
20 opinion on character, privilege, or the like. In addition, a speaking objection,  
21 without referring to a specific rule of evidence, is unlikely to provide a sufficient  
22 foundation for later challenging the court's ruling by post-trial motion, or on  
23 appeal.<sup>[13]</sup>

24 12. Ruling by the Court on admissibility of adult convictions or juvenile adjudications  
25 pursuant to ER 609. The Plaintiff is aware of the following convictions of persons  
26 identified as potential lay witnesses:

Criminal History For Richard Yanac (d.o.b. 09/29/1960)	Date of Crime	Date of Sentence	Sentencing Court	Juv (x)
Forgery	2/16/00	06/15/01	Kitsap	

26 <sup>11</sup> *State v. Blair*, 117 Wn.2d 479, 488, n.1, 816 P.2d 718 (1991); see e.g. *State v. French*, 101 Wn.App. 380,  
27 4 P.3d 857 (Div. 3 2000), review denied sub nom. in *State v. Barraza*, 142 Wn.2d 1022, 20 P.3d 945  
28 (2001).

29 <sup>12</sup> Comment to WPIC 5.20 provides these limitations to the missing witness rule for failure of a party to call  
30 a particular witness: (1) the witness must be peculiarly available to the party; (2) the testimony must  
31 relate to an issue of fundamental importance as contrasted to a trivial or unimportant issue; and (3) the  
circumstances must establish, as a matter of reasonable probability, that the party would not knowingly  
fail to call the witness in question unless the witness' testimony would be damaging.

<sup>13</sup> 5 Karl B. Tegland, *Washington Practice, Evidence* § 103.8 (4th ed. 1999).



Criminal History For Richard Yanac (d.o.b. 09/29/1960)	Date of Crime	Date of Sentence	Sentencing Court	Juv (x)
Forgery	04/09/00	06/15/01	Kitsap	
Forgery	04/09/00	06/15/01	Kitsap	
PSP 2	09/01/02	08/28/03	Kitsap	
Forgery	05/23/99	06/23/99	Kitsap	
Forgery	05/23/99	06/23/99	Kitsap	

13. Ruling by the Court on admissibility of the testimony of Defense Witness Vanessa Hannegan pursuant to CrR4.7(b)(1) and ER402. The Defense is obligated to disclose the names and addresses of witnesses, together with any written or recorded statements and the substance of any oral statements of such witnesses.

DATED this 22nd day of August, 2006.

STATE OF WASHINGTON

  
 KARI E. HATHORN, WSBA NO. 35897  
 Deputy Prosecuting Attorney

Prosecutor's File Number-05-116439-13



INSTRUCTION NO. 7

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Acting knowingly or with knowledge also is established if a person acts intentionally.

own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross examination by each party, including a party calling the witness.

(b) **Compensation.** Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. Except as otherwise provided by law, the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **Disclosure of Appointment.** In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(d) **Parties' Experts of Own Selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

[Amended effective September 1, 1992.]

**Comment 706**

This rule is the same as Federal Rule 706, except that a provision in section (b) for compensating experts from public funds was deleted. Rule 706 does not apply to the appointment of defense experts in indigent criminal cases. That practice is governed by a more specialized rule, CrR 3.1.

Legal writers and revisers have long favored reforming trial practice by implementing the trial judge's common law power to call experts. Their imprecations against the "battle of experts" led to the drafting of the Uniform Expert Testimony Act in 1937, which later formed the basis for rules 403-410 of the Model Code of Evidence, for rules 59, 60, and 61 of the Uniform Rules of Evidence, and Federal Rule of Evidence 706. 3 J. Weinstein, *Evidence* ¶ 706[01] (1975).

There is dicta in the Washington cases suggesting that a judge may appoint an expert witness in nonjury cases. *Ramsey v. Mading*, 36 Wn.2d 303, 310-11, 217 P.2d 1041 (1950). (The dictum in *Ramsey* was inaccurately characterized as a holding in *State v. Swenson*, 62 Wn.2d 259, 277, 382 P.2d 614 (1963).) A relatively small number of rules and statutes relate to the appointment and compensation of experts in specific kinds of cases. Rule 706 codifies the common law power of the court to call an expert and defines a procedure applicable to all cases.

Expert witness fees in state condemnation proceedings are payable from public funds, as anticipated by Federal Rule 706, but only pursuant to a statutory scheme which imposes certain conditions and restrictions not found in the federal rule. See RCW 8.25.070. The statute does not mention the possibility of the expert being appointed by the court, and the statute does not authorize the disbursement of public funds for an appointed expert. The drafters of the Washington rule eliminated the language in Federal Rule 706 authorizing disbursement of public funds in deference to applicable statutes.

There is an obvious danger that the jury will be more impressed by an expert appointed by the court than by one called by a party. It has been argued that to disclose to the jury the fact that an expert was appointed by the court would violate the state constitutional prohibition against a judge commenting on the evidence. 5 R. Meisenholder, *Wash.Prac.* § 363 (1965); Const. art. 4, § 16. The court's discretion to make such a disclosure under section (c) should be used with extreme caution to avoid the possibility of commenting on the evidence.

**TITLE VIII. HEARSAY**

**RULE 801. DEFINITIONS**

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if—

(1) **Prior Statement by Witness.** The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testi-

mony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) **Admission by Party-Opponent.** The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

[Amended effective September 1, 1992.]

**Comment 801**

This rule is the same as Federal Rule 801, except that subsection (d)(2)(iv) has been modified with respect to the admissibility of statements by agents and servants.

**Section (a).** The definition of "statement" is consistent with previous Washington law. Oral assertions, written assertions, and assertive conduct all constitute statements, but acts of nonassertive conduct do not. 5 R. Meisenholder, Wash. Prac. § 387 (1965 & Supp.).

**Section (b).** Section (b) is self-explanatory.

**Section (c).** The definition of "hearsay" is substantially in accord with previous Washington law. See *Moen v. Chestnut*, 9 Wn.2d 93, 113 P.2d 1030 (1941).

**Section (d).** This section excludes from the definition of hearsay several types of statements which literally are within the definition. Statements excluded from the hearsay rule section (d) are admissible as substantive evidence. The rule does not affect the use of prior inconsistent statements to impeach a witness. The use of these statements for impeachment is governed by rule 613.

Subsection (d)(1) defines the extent to which prior out-of-court statements are admissible as substantive evidence if the declarant is presently available for cross examination at trial. One Washington case is in accord with the theory expressed by the rule. *State v. Simmons*, 63 Wn.2d 17, 385 P.2d 389 (1963). Other cases, however, are to the contrary. Meisenholder § 381. The rule clarifies the law by detailing the circumstances under which the statements are admissible and conforms state law to federal practice.

Subsection (d)(1)(i) provides that a witness' prior inconsistent statement is admissible as substantive evidence if it was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule does not require the statement to have been subject to cross examination at the time it was made. See 120 Cong. Rec. 2386 (1974), quoted in 4 J. Weinstein, *Evidence* 801-24 (1975). The rule would not, however, necessarily admit statements made in pretrial affidavits. The rule applies only to statements given in a trial, hearing, proceeding, or deposition. Although the meaning of "proceeding" is not yet clear, it has been observed that the words of limitation were designed in part to prevent the admission of affidavits given by a coerced or misinformed witness. 4 J. Weinstein, *Evidence* ¶¶ 801(d)(1)[01], 801(d)(1)(A)[01] (1975). The constitutionality of a California statute even less restrictive than rule 801(d)(1)(i) was upheld in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970).

Subsection (d)(1)(ii) makes statements admissible as substantive evidence which were previously admissible only to rehabilitate an impeached witness. See Meisenholder § 306.

Subsection (d)(1)(iii) is consistent with previous Washington law. See *State v. Simmons*, 63 Wn.2d 17, 385 P.2d 389 (1963).

Subsection (d)(2) differs from previous Washington law more in theory than in practice. Previous decisions have considered admissions by party-opponents to be hearsay but have admitted them as an exception to the hearsay rule. Meisenholder § 421. Rule 801 continues to admit the statements, not as an exception to the hearsay rule, but by excluding them from the definition of hearsay altogether.

Statements of others that are expressly adopted by a party have been held admissible as admissions. *State v. McKenzie*, 184 Wash. 32, 49 P.2d 1115 (1935). Statements by authorized persons have been similarly held to be admissions. *State ex rel. Ledger Pub'g Co. v. Gloyd*, 14 Wash. 5, 44 P. 103 (1896).

Federal Rule 801 provides in relevant part: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by his agent or servant

concerning a matter within the scope of his agency or employment, made during the existence of the relationship. . . ." The Washington cases have not adopted the rule of broader admissibility expressed by the federal rule. The traditional rule, which was applied in early Washington decisions, was that, "the acts and declarations of the agent, when acting within the scope of his authority, having relations to, and connected with, and in the course of, the particular transaction in which he is engaged, are, in legal effect, the acts or declarations of his principal." *Tacoma & E. Lumber Co. v. Field & Co.*, 100 Wash. 79, 86, 170 P. 360 (1918). This was known as the "res gestae" rule, and the admissibility of an agent's statement depended upon how closely the statement was related to the transaction in question. Meisenholder § 425(1).

Later decisions have phrased the rule not in terms of res gestae, but in terms of whether the agent was authorized to make the statement on behalf of the principal. Meisenholder § 425(1). This has become known as the "speaking agent" approach and has continued to be applied in relatively recent decisions. See, e.g., *Kadiak Fisheries Co. v. Murphy Diesel Co.*, 70 Wn.2d 153, 422 P.2d 496 (1967). Accord, Restatement (Second) of Agency §§ 286-288 (1958). The drafters of the Washington rule felt that existing Washington law, as exemplified by the later cases, reflected the better policy and deleted the language in the federal rule which would have broadened the admissibility of statements by agents.

The provision concerning statements by coconspirators is consistent with previous Washington law. Meisenholder § 430.

## RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

### Comment 802

The language of Federal Rule 802 is modified to adapt the rule to state practice. The rule preserves other court rules such as CR 43(e), authorizing the admission of hearsay evidence under particular circumstances.

## RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(a) **Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) **Present Sense Impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) **Excited Utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) **Then Existing Mental, Emotional, or Physical Condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or

believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of Regularly Conducted Activity.* [Reserved. See RCW 5.45.]

(7) *Absence of Entry in Records Kept in Accordance With RCW 5.45.* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public Records and Reports.* [Reserved. See RCW 5.44.040.]

(9) *Records of Vital Statistics.* Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of Public Record or Entry.* To prove the absence of a record, report, statement, or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with rule 902, or testimony, that diligent search failed to disclose the record, report, statement, or data compilation, or entry.

(11) *Records of Religious Organizations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, Baptismal, and Similar Certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been

issued at the time of the act or within a reasonable time thereafter.

(13) *Family Records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, tattoos, engravings on urns, crypts, or tombstones, or the like.

(14) *Records of Documents Affecting an Interest in Property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(15) *Statements in Documents Affecting an Interest in Property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* Statements in a document in existence 20 years or more whose authenticity is established.

(17) *Market Reports, Commercial Publications.* Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation Concerning Personal or Family History.* Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.

(20) *Reputation Concerning Boundaries or General History.* Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or state or nation in which located.

(21) *Reputation as to Character.* Reputation of a person's character among his associates or in the community.

(22) *Judgment of Previous Conviction.* Evidence of a final judgment, entered after a trial or upon a plea of

guilty (but not upon a plea of *nolo contendere*), adjudging a person guilty of a crime punishable by death or imprisonment in excess of 1 year, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgment as to Personal, Family, or General History, or Boundaries.* Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

**(b) Other Exceptions.** [Reserved.]

[Amended effective September 1, 1992.]

**Comment 803**

This rule is the same as Federal Rule 803, except that one addition is made in subsection (a)(13), a minor editorial improvement is made in subsection (a)(22), and subsection (a)(24) is omitted.

**Subsection (a)(1).** This subsection is consistent with previous Washington law. *Beck v. Dye*, 200 Wash. 1, 92 P.2d 1113, 127 A.L.R. 1022 (1939).

**Subsection (a)(2).** This subsection is consistent with previous Washington law. *Beck v. Dye*, supra.

**Subsection (a)(3).** This subsection is a specialized application of the rule expressed in subsection (a)(1). Under previous law it was not clear whether statements to a physician of the declarant's present pain and suffering were admissible. See 5 R. Meisenholder, Wash.Prac. § 472 (1965 & Supp.). The statements are admissible under rule 803.

Statements of the declarant's then existing state of mind have been admissible in Washington if there is need for their use and if there is circumstantial probability of their trustworthiness. *Raborn v. Hayton*, 34 Wn.2d 105, 208 P.2d 133 (1949). The rule is substantially in accord.

The provision relating to wills appears to change Washington law. Cf. *Carey v. Powell*, 32 Wn.2d 761, 204 P.2d 193 (1949). This portion of rule 803 is based on practical considerations of necessity and expediency and conforms Washington law to the practice followed in a majority of American jurisdictions. 4 J. Weinstein, *Evidence* ¶ 803(3)[05] (1975).

**Subsection (a)(4).** This subsection changes Washington law. Under previous cases, statements of past symptoms and statements relating to medical history, even though made to a treating physician, have been inadmissible as independent substantive evidence. *Smith v. Ernst Hardware Co.*, 61 Wn.2d 75, 377 P.2d 258 (1962). Statements made to a treating or nontreating physician have been allowed into evidence, but only for the purpose of supporting the physician's medical conclusions. *Kennedy v. Monroe*, 15 Wn.App. 39, 547 P.2d 899 (1976). Rule 803 admits the statements for the purpose of proving the truth of the matter asserted. The justification for the rule, already followed in a number of states, is the patient's motivation to be truthful. Meisenholder § 472. Further, it is unrealistic to assume that a juror, instructed according to previous law, would be able to draw the distinction necessary to hear the statements in order to justify a medical conclusion but to disregard them as to the truth of the matter asserted.

The rule is subject to the restrictions imposed by the law of privileged communications.

**Subsection (a)(5).** This subsection codifies the familiar hearsay exception for past recollection recorded. Under previous Washington law, the exception only applied if the witness had no independent recollection of the facts. *State v. Benson*, 58 Wn.2d 490, 364 P.2d 220 (1961). Rule 803 is slightly broader in that it requires only that the witness must have insufficient recollection to testify fully and accurately.

**Subsection (a)(6).** Federal Rule 803(6) is deleted, not because of any fundamental disagreement with the rule, but because the drafters felt that the subject matter was adequately covered by statutes and decisions already familiar to the bench and bar. See Meisenholder, ch. 28.

**Subsection (a)(7).** Federal Rule 803(7) is modified to refer to RCW 5.45 rather than to subsection (a)(6). The rule resolves an issue which has not been addressed in this state's decisional law. Meisenholder § 516.

**Subsection (a)(8).** Federal Rule 803(8) is deleted, not because of any fundamental disagreement with the rule, but because the drafters felt that the subject matter was adequately covered by the statute and decisions already familiar to the bench and bar. See Meisenholder, ch. 29.

**Subsection (a)(9).** There do not appear to be any previous Washington cases or statutes directly bearing on the admissibility of vital statistics as a hearsay exception. RCW 5.44.040, preserved by subsection (a)(8), may be controlling in many instances.

**Subsection (a)(10).** A similar provision is found in CR 44(b). CR 44 is not superseded.

**Subsection (a)(11).** There do not appear to be any previous Washington cases or statutes directly in point, except to the extent that a religious organization may qualify as a "business" under RCW 5.45.010. Subsection (a)(11) clarifies the law by making specific records of religious organizations admissible as hearsay exceptions.

**Subsection (a)(12).** There do not appear to be any previous Washington cases or statutes directly in point, except to the extent that the statutes preserved by subsection (a)(6) and (8) may also cover the subject matter of subsection (a)(12).

**Subsection (a)(13).** This subsection conforms substantially to previous Washington law. Meisenholder § 542. Tattoos have been added to the items enumerated in the federal rule. The drafters felt that tattoos often reflect personal or family history and are apt to be as trustworthy as the other items listed in the rule.

**Subsection (a)(14).** The hearsay exception for records of documents affecting an interest in property has previously been recognized in Washington. Copies of all deeds which must be filed with the county auditor are admissible. RCW 5.44.070. Copies of city or town plats are admissible. RCW 58.10.020. "Whenever any deed, conveyance, bond, mortgage or other writing, shall have been recorded . . . in pursuance of law, copies of record of such deed, [etc.] . . . shall be received in evidence to all intents and purposes as the originals themselves." RCW 5.44.060. The rule does not conflict with the statutes. It supplements the statutes but does not supersede them.

**Subsection (a)(15).** There is little prior authority on the admissibility of evidence of statements in documents affecting an interest in property, but what little there is supports an exception to the hearsay rule in accord with the rule. In

**RCW 9A.56.140**

**Possessing stolen property – Definition – Presumption.**

(1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

(2) The fact that the person who stole the property has not been convicted, apprehended, or identified is not a defense to a charge of possessing stolen property.

(3) When a person has in his or her possession, or under his or her control, stolen access devices issued in the names of two or more persons, or ten or more stolen merchandise pallets, or ten or more stolen beverage crates, or a combination of ten or more stolen merchandise pallets and beverage crates, as defined under RCW 9A.56.010, he or she is presumed to know that they are stolen.

(4) The presumption in subsection (3) of this section is rebuttable by evidence raising a reasonable inference that the possession of such stolen access devices, merchandise pallets, or beverage crates was without knowledge that they were stolen.

(5) In any prosecution for possessing stolen property, it is a sufficient defense that the property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

[2004 c 122 § 2; 1998 c 236 § 3; 1987 c 140 § 3; 1975 1st ex.s. c 260 § 9A.56.140.]

**RCW 9A.56.150**

**Possessing stolen property in the first degree — Other than  
firearm.**

(1) A person is guilty of possessing stolen property in the first degree if he or she possesses stolen property other than a firearm as defined in RCW 9A.41.010 which exceeds one thousand five hundred dollars in value.

(2) Possessing stolen property in the first degree is a class B felony.

[1995 c 129 § 14 (Initiative Measure No. 159); 1975 1st ex.s. c 260 § 9A.56.150.]

**Notes:**

**Findings and intent -- Short title -- Severability -- Captions not law -- 1995 c 129:** See notes following RCW 9.94A.510.

## **AMENDMENT (XIV)**

### **ss. 1. Citizenship rights not be abridged by states**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

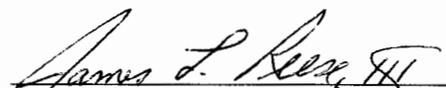
PROOF OF SERVICE

STATE OF WASHINGTON )  
COUNTY OF KITSAP )

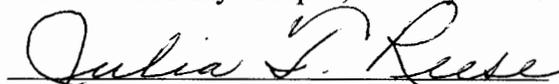
James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington over the age of eighteen years, not a party to the above-entitled action and competent to be a witness herein.

That on the 3rd day of April, 2007, he deposited in the mails of the United States of America, postage prepaid, the original and one (1) copy of Appellant's Brief in State of Washington v. Richard Lloyd Yanac, No. 35440-3-II, addressed to the office of David C. Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, Washington 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same addressed to Appellant, Richard Lloyd Yanac, at his last known address: Richard Lloyd Yanac, DOC #798249, Cedar Creek Corrections Center, P.O. Box 37, Little Rock, Washington 98556.

  
James L. Reese, III

Signed and Attested to before me this 3rd day of April, 2007 by James L. Reese, III.

  
Notary Public in and for the State of  
Washington, residing at Port Orchard.  
My Appointment Expires: 04/04/09