

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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

NO. 40936-4

STATE OF WASHINGTON,

Respondent.

vs.

ARNETTE ELAINE AULIS,

Appellant.

On Appeal from the Superior Court of Lewis County

STATE'S RESPONSE BRIEF

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STATEMENT OF THE CASE

On September 4, 2010, Arnette Aulis sold a stolen television and stolen digital camera to the Twin Cities Trading Post, a pawn shop, Located in Chehalis, Washington State.¹ On September 8, 2010, Aulis sold stolen antique silverware and two stolen routers to the same Twin Cities Trading Post. Aulis knew these items were stolen because she had been informed of that fact by Brandon Perrot, who had given these items to her and to her husband, Vance Aulis. Arnette Aulis's knowledge regarding the ownership of the items also came from other circumstances, including the facts that Vance and Arnette had been at the premises where the items were stolen from, and Brandon Perrott had no visible means of purchasing these items himself.

Arnette Aulis pawned the aforementioned items at the request of Brandon Perrott. She received money from the pawn shop for selling these items to the pawn shop. All of these items were, in fact, stolen. The victim in this case, Ms. Janet Plumb, identified the items from photographs shown to her by Detective Kimsey.

¹ CP 4-5. All the facts in the first two paragraphs of this brief were taken from the trial court's findings of fact, CP 4-5.

At trial confirmation, Ms. Aulis waived her right to jury trial.² She signed her written waiver and submitted it to the court.³ The court specifically asked the defendant if she wanted a judge to hear the case instead of a 12 person jury.⁴ The defendant said, “Yes.”⁵

ARGUMENT

I. The charging document contained all the elements of the crime.

All elements of a crime must be included in the charging document.⁶ While the constitutionality of a charging document can be first raised on appeal, it will be more liberally construed in favor of its validity if not challenged until after the verdict.⁷ If the validity of the charging document is raised for the first time on appeal, as in this case, the Court applies a two-prong *Kjorsvik* test: (1) do the necessary elements appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the

² RP 3 (May 20, 2010). In all fairness to counsel for the appellant, the record for May 20, 2010, has recently been corrected by the trial court’s reporter. The corrected record includes the colloquy between the court and defendant regarding her waiver of jury trial.

³ RP 2 (May 20, 2010)

⁴ RP 2-3 (May 20, 2010)

⁵ RP 3 (May 20, 2010)

⁶ *Auburn v. Brooke*, 119 Wn.2d 623, 636, 836 P.2d 212 (1992)

⁷ *Brooke*, 119 Wn.2d at 624, citing *State v Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991)

defendant show that he or she was nonetheless actually prejudiced by the unartful language in the document.⁸

The first prong of the test looks to the face of the charging document itself. The defendant/appellant must show there is some minimal indication of a missing element.⁹ The second prong is not even reached unless the defendant can show which element is missing.¹⁰

The elements of Trafficking in Stolen Property, First Degree, include the following:

- 1) on or about _____(date), the defendant
- 2) knowingly
- 3) trafficked
- 4) in stolen property,
- 5) in Lewis County, Washington.¹¹

“Stolen property” is property that has been obtained by theft, robbery or extortion.¹² The elements of the crime do not require that the precise items of stolen property be identified, but merely that whatever the defendant trafficked was, in fact, stolen. Likewise, the word “traffic” is a verb that means to sell, transfer,

⁸ *State v. Greathouse*, 113 Wn.App. 889, 900, 56 P.3d 569 (2002); *Brooke*, 119 Wn.2d at 636, citing *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991)

⁹ *Brooke*, 119 Wn.2d at 636

¹⁰ *State v. Sloan*, 149 Wn.App. 736,741, 205 P.3rd 172 (2009).

¹¹ RCW 9A.82.050(2)

¹² RCW 9A.82.010(16)

distribute, dispense or otherwise dispose of stolen property to another person.¹³

The charging language used in Arnette Aulis' information was:

On or about and between the 24th day of August, 2009, and the 23rd day of September, 2009, in the County of Lewis, State of Washington, the above-named defendant did.....knowingly traffic in stolen property.¹⁴

Ms. Aulis knew from the language in the information the dates, the county and the criminal conduct she was accused of committing. No request for a bill of particulars or other challenge to the sufficiency of the information was made prior to this appeal. The defendant's burden on appeal is to point out to the court specifically what facts are missing under the first prong.¹⁵ She has not done so. This is analogous to the argument the appellant made in *State v. Sloan*, 149 Wn.App. 736, 205 P.3d 172 (2009).

Sloan argues that "[u]nder the two-prong test adopted in *Kjorsvik*, the amended information fails to meet the first prong because it lacks the necessary facts." Brief of Appellant at 8. But Sloan does not specify what facts he contends are missing under the first prong. And he

¹³ RCW 9A.82.010(19)

¹⁴ CP 2

¹⁵ *State v. Sloan*, 149 Wn.App. at 741.

expressly does not address the second prong or allege how the information prejudiced him.¹⁶

Likewise, Appellant Arnett Aulis argues that under the two-prong test adopted in *Kjorsvik*, the information fails to meet the first prong because it lacks the necessary facts. (Br. of Appellant Aulis at page 6). But Aulis does not specify what facts she contends are missing under the first prong. And she expressly does not address the second prong or allege how the information prejudiced her. She simply states she need not demonstrate prejudice. (Br. Appellant Aulis at page 6).

Aulis cites *State v. Brooke* for the proposition that the State must allege facts of specific conduct in addition to the elements of the crime. But *Brooke* is distinguishable from this case. In *Brooke*, the only charging language was "9.40.010(A)(2) Disorderly Conduct."¹⁷ The citation did not contain the essential elements of the crime. It only included the statute number and title of the offense. That is in stark contrast to the charging information Ms. Aulis received, which contained all of the essential elements of the crime including the dates and location.

¹⁶ *State v. Sloan*, 149 Wn.App. at 741.

¹⁷ *Brooke*, 119 Wn.2d at 636.

II. The defendant/appellant has shown no prejudice.

Having established the elements of the crime, the next inquiry is whether or not the defendant was prejudiced by “unartful” language. There is nothing unartful about its charging language in Aulis’ information. But for the sake responding to the appellant’s argument, if the court were to conclude the information was somehow unartfully drafted, there was nevertheless no prejudice. Prejudice is not even alleged by the appellant.

The Lewis County Superior Court still requires affidavits of probable cause to be prepared by the prosecuting attorney’s office. Such an affidavit was prepared in this case.¹⁸ These affidavits are prepared at the same time the Charging Information is prepared, and served on the defendant along with the State’s motion for a finding of probable cause. The affidavit of probable cause is a summary of the State’s evidence. In this case, the affidavit explains the burglaries in question and the specific items Ms. Aulis trafficked.¹⁹

Respondent brings the affidavit of probable cause to the Court’s attention to show that there can be no prejudice whatsoever from the form of the charging information in this case. While the

¹⁸ CP 35-37

¹⁹ CP 35-37

State is not suggesting that the affidavit of probable cause is somehow incorporated into the charging information, the fact that the affidavit was served on the defendant with the other discovery shows that the defendant was on notice as to the specific details of the allegations the defendant had to defend against, and that no prejudice whatsoever existed.

III. The defendant was not denied her right to a jury trial. She waived it.

The court and state are entitled to rely on affirmative representations that are made to the court by defense counsel. In this case, defense counsel represented to the court the following: “Your Honor, if you could recall, my client will waive jury.”²⁰

This affirmative statement by counsel, accompanied by the fact the defense took a recess to discuss trial options with his client, indicates there was some trial tactic involved in waiving the jury.

A written waiver, signed by the defense counsel, signed by the defendant and approved by the court, is in the court file.²¹ This waiver states, “I have fully discussed this waiver with my attorney and I want to waive my right to a jury trial in this matter.”²² Nothing

²⁰ RP page 2 (May 27, 2010)

²¹ CP 39

²² CP 39

in the record suggests that the waiver was involuntary or made without a full advisement of rights to the defendant by the defendant's attorney. Appellant's lengthy recitation of the *Gunwall* factors²³ misses the point: Ms. Aulis was not denied her constitutional right to a jury trial. She waived it.

Appellant seems to be arguing that there should be a constitutional prohibition against allowing a defendant to waive a jury in a criminal case. (Br. of appellant, page 12). However, there are many cases where a tactical reason may exist for a defendant and her attorney to waive jury. For example, in "fail to register as a sex offender" cases, a defendant may want a judge to hear the case. A judge has certain training that would allow him/her to discern the facts of the case without considering the underlying sexual offense. Or, as in Ms. Aulis' case, the State's primary witness was himself a criminal. A judge could determine the credibility of such a person to a greater degree than a lay person sitting on a jury.

Ms. Aulis now wants to have her cake and eat it too. She availed herself to a tactical option of trial without a jury. But after

²³ *State v. Gunwall*, 106 Wn.2d. 54, 720 P.2d 808 (1986).

being found guilty, she now wants to claim she should not have been permitted to make that tactical decision.

IV. The Court of Appeals should not reverse its ruling in *State v. Pierce*.

It appears from the argument in the appellant's brief that Aulis is using this opportunity to urge the court to reverse its ruling in *State v. Pierce*.²⁴ *Pierce* holds that a written waiver is strong evidence that the defendant validly waived the jury trial right.²⁵

An attorney's representation that his client knowingly, intelligently and voluntarily relinquished jury trial rights is also relevant.²⁶ Courts have not required an extended colloquy on the recording.²⁷ Instead, Washington requires only a personal expression of waiver from the defendant.²⁸ The right to waive jury trial is treated differently than other trial rights and is easier to

²⁴ *State v. Pierce*, 134 Wn.App. 763, 142 P.3d 610 (2006).

²⁵ *State v. Pierce*, 134 Wn.App. at 771, citing *State v. Woo Won Choi*, 55 Wn.App. 895, 903, 781 P.2d 505 (1989)

²⁶ *State v. Pierce*, 134 Wn.App. at 771

²⁷ *State v. Pierce*, 134 Wn.App. at 771, citing *State v. Stegall*, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994)

²⁸ *State v. Pierce*, 134 Wn.App. at 771

waive.²⁹ The court in *Pierce* also acknowledged that there might be a trial strategy in waiving jury.³⁰

Applying this to Ms. Aulis, the record reflects a colloquy between the court and the defendant. The defense attorney spoke with his client off the record, then indicated on the record that his client wanted to waive jury.³¹ This indicates a trial strategy in waiving jury. A written waiver signed by the defendant and her attorney is in the court file.³² A written waiver is a personal expression of waiver from the defendant, which is all that is required.³³ The defendant also told the court she wanted to waive the jury.³⁴

V. Finding of fact no. 3, is supported by the record. The defendant knew the items she trafficked were stolen.

No exception was taken to Finding of Fact No. 3.³⁵ Nevertheless, Appellant now challenges Finding of Fact 3, which states:

3. The defendant knew these items were stolen because she had been informed of that fact by Brandon Perrot, who

²⁹ *State v. Pierce*, 134 Wn.App. at 772

³⁰ *State v. Pierce*, 134 Wn.App. at 771

³¹ RP pages 2-3 (May 20, 2010)

³² Attachment 1

³³ *State v. Pierce*, 134 Wn.App. at 771, citing *State v. Stegall*, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994)

³⁴ RP pages 203 (May 20, 2010)

³⁵ RP 101 (June 30, 2010)

had given these items to her and to her husband, Vance Aulis. The defendant also knew of the items were stolen from other circumstances, including the fact that her husband was not a wood worker, they had been at the premises where the items were stolen from, and Brandon Perrott had no visible means of purchasing these times himself.³⁶

On Cross examination of Mr. Perrott, defense counsel asked the following:

Q. "You're saying when they came over to the house that you told them the items were stolen?"

A. "yes."³⁷

Mr. Vance Aulis, the defendant's husband, was called as a witness for the defense. Vance Aulis testified that Perrot had no hobbies besides drugs and he did not have a wood shop.³⁸ Vance Aulis testified that Perrott liked to "rip people off" and that he owed the Aulis' \$250 for a rent check.³⁹ Perrott testified that Vance and Arnette Aulis were over at the house where the items were stolen from.⁴⁰

From this testimony the Court correctly concluded that Brandon Perrot told Arnette Aulis that the items were stolen, that Vance and Arnette had been at the house where the items were

³⁶ CP 4-5

³⁷ RP 53 (May 27, 2010)

³⁸ RP 80 (May 27, 2010)

³⁹ RP 80 (May 27, 2010)

⁴⁰ RP 56 (May 27, 2010)

stolen from and that Perrot had no visible means of support. There was a mistake in the findings where the court found that Vance Aulis was not a wood worker. The testimony was that Brandon Perrott did not have a woodshop. This mistake is harmless because of the other evidence that supports that fact Arnette Aulis knew the items she sold on behalf of Brandon Perrott were stolen.

CONCLUSION

The charging language in the information includes all the necessary elements of the crime charged. No prejudice has been established by the Appellant. The charging information is therefore valid on its face.

All indications are that Ms. Aulis waived her right to jury knowingly and voluntarily, and with a particular trial strategy in mind. *State v. Peirce* should not be reconsidered and the trial court should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 17 day of March, 2011.

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COURT OF APPEALS
DIVISION II

11 MAR 18 PM 2:32
STATE OF WASHINGTON
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COURT OF APPEALS FOR THE STATE OF WASHINGTON
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STATE OF WASHINGTON,) NO. 40936-4
Respondent,)
vs.)
)
ARNETTE ELAINE AULIS,) DECLARATION OF
Appellant.) MAILING
)
)
_____)

Ms. Casey Cutler, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On March 18, 2011, the appellant was served with a copy of the **Respondent's Brief** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Jodi R. Backlund
Manek R. Mistry
PO Box 6490
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DATED this 18th day of March 2011, at Chehalis, Washington.


Casey L. Cutler, Paralegal
Lewis County Prosecuting Attorney's Office

Declaration of
Mailing