

COURT OF APPEALS  
DIVISION II

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**41417-1-II**

STATE OF WASHINGTON

BY   
DEPUTY

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

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State of Washington  
Respondent

v.

**JAMES RAY VAN RENSELAAR**

Appellant

41417-1

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On Appeal from Lewis County Superior Court  
Cause Number 09-1-00095-1

The Honorable Judge Richard L. Brosey

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**BRIEF OF APPELLANT**

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## II. ASSIGNMENTS OF ERROR AND ISSUES

### A. Assignments of Error

1. The State prosecuted Appellant for taking forest products from public lands but erroneously charged him under the general theft statute instead of a concurrent specific statute defining theft of forest products from public lands.
2. The State failed to prove the essential element of the general theft statute that Appellant took “property of another.”
3. The State failed to allege or prove that Appellant trespassed on public lands, which is an essential element of theft of public timber from public lands.
4. The Information failed to inform Appellant of the nature and cause of the charges he faced.
5. The To-Convict instructions for second degree theft and first degree trafficking in stolen property omit the essential element of trespass on public lands.
6. The evidence is insufficient to support Appellant’s convictions for second degree theft and first degree trafficking in stolen property.

### B. Issues Pertaining to Assignments of Error

1. Did the State charge Appellant under the wrong statute where a specific statute expressly provides that trespass on public lands is a predicate element of a prosecution under the general statute for theft of timber from public lands?

2. Is public timber on public lands “property of another” the taking of which constitutes theft under the general theft statute, RCW 9A.56?
3. To prove theft of public timber is the State required to prove beyond a reasonable doubt that Appellant trespassed on public lands?
4. If theft is not proved, can the State prove trafficking in stolen property based on the same conduct?
5. Are to-convict instructions for theft and trafficking in stolen property fatally deficient where the essential element of trespassing on public lands is omitted?
6. Is the evidence insufficient to support the convictions for theft and trafficking where the essential predicate element of trespass was neither alleged nor proved?

### III. STATEMENT OF THE CASE

The State charged Appellant, James Ray Van Renselaar, with first degree theft under RCW 9A.56.020(1), and first degree trafficking in stolen property under RCW 9A.82.050(1).<sup>1</sup> CP 57-58. He was convicted by jury of second degree theft and first degree trafficking.<sup>2</sup> CP 107-08.

Federal park rangers Robert Tokach and Jeff Summers came upon Van Renselaar's pick-up truck in the woods. It was not occupied and was parked off to the side of the road. The officers suspected someone was fishing because it was next to the river. 8/17am RP 32.<sup>3</sup> Therefore, they approached vehicle and looked inside. Through the open back window they saw what looked like a cedar bolt and wood debris. They followed footprints leading into the woods. 8/17am RP 32.

Tokach smelled fresh-cut cedar. He spotted Van Renselaar and another man throwing cedar bolts down a slope. 8/17am RP 33. Tokach knew Van Renselaar from prior cordial contacts over the years. 8/17am RP 34.

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<sup>1</sup> A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree. RCW 9A.82.050(1).

<sup>2</sup> Two unrelated driving with suspended license charges were joined. CP 58-61. Van Renselaar is not challenging these.

<sup>3</sup> The verbatim reports of proceedings are designated by date. On August 17, 2010, two separately paginated reports were prepared, one for morning (am) and one for the afternoon (pm).

Van Renselaar told Tokach he did not have a permit to remove cedar. He said he did not think he could get a permit so he was taking the fallen wood because he could not find work and needed the money. 8/17am RP 35-36. Van Renselaar was allowed to leave. The next day, Tokach and Summers called on Van Renselaar at his home and asked him how he disposed of the wood. 8/17am RP 41. Van Renselaar gave them the name of Donald Sargent and told them which mill bought the bolts. 8/17am RP 34.

The court ruled that nothing Van Renselaar said after admitting he had no permit was admissible; but anything he said before that, including that he intended to sell the wood, was admissible; Sargent's testimony would be admissible. 8/17am RP 53-57.

Tokach checked the records and confirmed that Van Renselaar did not have a federal permit to remove wood. 8/17pm RP 12; 8/18 RP 24-25.

At the jury trial, Tokach testified that his job was to enforce federal regulations. 8/17am RP 74. He testified that a federal permit was required to remove wood from national forest land. 8/17am RP 75; 8/18 RP 28. He said cedar was regulated by the state and the county as well as the federal government, and that both state and federal permits were required to sell the wood. 8/17am RP 76-77.

He repeated his testimony about tracking Van Renselaar from his truck and seeing him throwing cedar bolts down a slope. 8/17am RP 81. He testified that Van Renselaar said he was doing it for the money. 8/17pm RP 88. The State showed the jury photographs of the downed tree with the middle section cut out. 8/17am RP 87; 8/17pm RP 64-66. Van Renselaar did not cut down this tree. It was a blow-down. 8/17pm RP 14. It had been on the ground for many years, and the top was rotted away. 8/18 RP 21, 25. Tokach testified that a permit was necessary even for blown down trees. The State showed the jury photographs of the tree with the middle section cut out. 8/17am RP 14. The officers measured the diameter of both cuts and the distance between them. 8/17pm RP 7.

Donald Sargent testified that he helped Van Renselaar clean up the cedar bolts so they would be accepted for milling. 8/17pm RP 32. He helped load up the truck and drove it to the mill where he negotiated with the mill owner for a price. The mill owner measured the wood at a half cord and paid them \$562.03, of which Sargent's take was \$100. 8/17pm RP 34-36, 46.<sup>4</sup> Sargent was convicted of misdemeanor trafficking for his participation. 8/17pm RP 48.

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<sup>4</sup> Half a cord is 64 cubic feet. 8/17 pm RP 52. The official unit of wood volume is the MBF. One MBF is one thousand board feet measured by the Scribner Decimal C Log Scale Rule. WAC 458-40-610(16).

Steve Hanson testified. He is an expert estimator of wood volume, employed mostly in valuing standing timber for sale to loggers. 8/17pm RP 69. He uses a formula from the Scribner Decimal C Volume Table to calculate market value from volume. 8/17pm RP 72. From the photographs, Hanson determined that the total amount of wood in the cut portion of the cedar was 2,600 board feet. 8/17pm RP 74. At that time, cedar was selling for just over \$1,000 for a thousand board feet, so the 2,600 would have a value of \$2,659.77. Hansen did not visit the site and could not say how much of the wood was actually removed from the site. 8/17pm RP 75. Tokach testified that, of the 2,600 or so board feet that was cut, a significant amount remained on the ground. All the bolts with knot-holes were left as waste. 8/18 RP 22. This could not be used because a timber saw was required to process it and there was no timber saw in the area. 8/18 RP 26-27.

Tokach said he knew that different forest areas had different logging practices classifications. 8/18 RP 27. One classification Tokach called "matrix," in which he said no restrictions apply and no permit is required. He did not know the classification of the area where Van Renselaar took the cedar. 8/18 RP 27. Tokach did testify that the U.S. Department of Agriculture managed the land where this tree fell down. It

was the public's property, merely managed by the U.S. Forest Service.  
8/18 RP 29.

At the close of the State's case, the defense moved to dismiss the charges. 8/18 RP 29. Counsel argued that the only evidence either of trafficking or of theft was Sargent's testimony and that was inadmissible as fruit of the poisonous tree. 8/18 RP 33, 43. The court denied the motions. 8/18 RP 48-49.

The jury rejected the State's valuation of the wood taken and convicted Van Renselaar of second degree theft. He was also convicted of first degree trafficking in stolen property. He was also convicted of a couple of driving with license suspended counts. 8/18 RP 96.

Van Renselaar was sentenced on an offender score of 6. CP 117; 9/21 RP 101, 115. He received 36 months on the trafficking charge. Sentences of 12 months and one day for the theft and 90 day for each of the two DWLS counts were to be served concurrently. CP 118; 9/21 RP 120. He appeals. CP 126.

#### IV. **ARGUMENT**

**Summary of the Argument:** The downed cedar was on public land. Therefore, the State could not prove the essential element of common law theft that it was the property of another. Instead, the only

justiciable theft charge was theft as defined by the Public Lands Management statute, RCW 76.02. An essential element of that offense is that the perpetrator was a “trespasser on public land.” RCW 76.02.310. Trespass on public land requires proof that a permit was required for the conduct alleged to constitute the offense. The State neither alleged nor proved a trespass on public land.

Without proof of this essential element, the theft conviction cannot stand. Without proof of theft, the trafficking in stolen property conviction likewise fails. The charging error results in various constitutional errors that require automatic reversal:

The Information does not advise the accused what law applies and does not allege the essential element of trespass on public land. The to-convict instructions for theft and trafficking omit the essential trespass element. The evidence is insufficient to support the convictions.

The remedy is to reverse the theft and trafficking convictions and order those prosecutions dismissed on remand.

1. **A SPECIFIC STATUTE TRUMPS THE GENERAL THEFT STATUTE.**

The State charged Van Renselaar under the wrong statute.

If conduct violates both a general and a more specific statute, the Legislature is assumed to intend that only the specific statute will apply.

*State v. Datin*, 45 Wn. App. 844, 845-46, 729 P.2d 61 (1986). It is well established that, when a special statute punishes the same conduct as a general statute, the State can enforce only the specific statute. *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). This rule of statutory construction applies whenever a general and particular statute are concurrent. *Datin*, 45 Wn. App. at 845-46.

Statutes are concurrent if the general statute is violated in each instance where the special statute is violated. It is irrelevant that a special statute may contain additional elements not contained in the general statute. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). The special statute supersedes the general whenever 'it is not possible to commit the special crime without also committing the general crime.' *State v. Aitken*, 79 Wn. App. 890, 896, 905 P.2d 1235 (1995); *State v. Williams*, 62 Wn. App. 748, 753-54, 815 P.2d 825 (1991), quoting *Shriner*, 101 Wn.2d at 583. That is the case here. The Legislature has enacted a specific statute governing prosecutions for taking timber from public lands:

Every person who **willfully commits any trespass** upon any public lands of the state **and** cuts down, destroys, or injures any timber, or any tree... standing or growing thereon, or takes, or removes, or **causes to be taken, or removed, therefrom any wood or timber lying thereon**, or maliciously injures or severs anything attached thereto, or the produce thereof, or digs, quarries, mines, takes or

removes therefrom any earth, soil, stone, mineral, clay, sand, gravel, or any valuable materials, **is guilty of theft under chapter 9A.56 RCW.**

RCW 79.02.310 (emphasis added.) By the plain language of this statute, theft under RCW 9A.56 occurs every time it is violated. Moreover, as discussed in Issue 2, it is not possible for the State to prove theft under RCW 9A.56 without invoking RCW 79.02.310. But an essential element of RCW 79.02.310 is a willful trespass on public lands.

The State erroneously prosecuted Van Renselaar under the general crime of theft, disregarding the specific legislative scheme governing public lands, including forests. As a result, the State failed to prove either the “property of another element” of the general statute or the “trespass on public lands” element of the specific statute. The implications of this error are reflected in multiple due process violations that require reversal of Van Renselaar’s convictions for second degree theft and first degree trafficking in stolen property.

2. THE STATE DID NOT SHOW THE DOWNED CEDAR WAS “PROPERTY OF ANOTHER.”

The State charged Van Renselaar with theft in violation of RCW 9A.56.030(1)(a). That statute defines “theft” as the wrongful acquisition

of the “property of another.” RCW 9A.56.020(1)(a).<sup>5</sup> But, by definition, “property of another” must have an identifiable “owner.” *State v. Longshore*, 141 Wn.2d 414, 420-421, 5 P.3d 1256 (2000). An owner is “a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services.” *Longshore*, 141 Wn.2d at 421, quoting former RCW 9A.56.010(10), now RCW 9A.56.010(9).<sup>6</sup>

Natural resources on public lands, however, are the property of the State in its sovereign capacity. They are not “property of another” until reduced to possession. *Longshore*, 141 Wn.2d at 421. (At issue in *Longshore* were clams that were not on state tidelands but on private property such that the elements of theft were satisfied.)

Here, the State neither alleged nor proved that the downed cedar was the “property of another.” Rather, the State made a hand-waving argument that the cedar was on public land.<sup>7</sup> If so, it was the property of

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<sup>5</sup> RCW 9A.56.020(1)(a): “Theft” means to “wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.”

<sup>6</sup> RCW 9A.56.010(9) “Owner” means a person, other than the actor, who has possession of or any other interest in the property or services involved, and without whose consent the actor has no authority to exert control over the property or services[.]

<sup>7</sup> See Issue 6. The question of whose property the cedar was is a question of law, for which the State produced no evidence except the opinion testimony of a forest ranger.

the State in its sovereign capacity. Timber harvested from federal, state, county, municipal, or other government-owned lands is public timber by definition. WAC 458-40-610(21).<sup>8</sup>

Accordingly, the “property of another” element was not proved and could not possibly have been proved.

Therefore, the convictions for theft and trafficking in stolen property must be reversed and dismissed.

3. THE ONLY JUSTICIABLE THEFT CHARGE  
REQUIRED PROOF OF A TRESPASS ON  
PUBLIC LANDS.

“Public lands” are lands of the state of Washington administered by the department [of natural resources] including but not limited to state forest lands. RCW 79.02.010(10). The Legislature has endowed the department of natural resources with the power to enact regulations governing forestry practices on public lands. RCW 79.22.070(1).<sup>9</sup>

In this capacity, the department has cured the “property of another” problem by enacting a specific statute under which the State can prosecute people for taking timber from public lands:

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<sup>8</sup> WAC 458-40-610(21): Public timber. Timber harvested from federal, state, county, municipal, or other government owned lands.

<sup>9</sup> RCW 79.22.070(1): State forest lands shall be logged, protected, and cared for in such manner as to ensure natural reforestation of such lands, and to that end the department shall have power, and it shall be its duty to adopt rules, and amendments thereto, governing logging operations on such areas... . All such rules, or amendments thereto, shall be adopted by the department under chapter 34.05 RCW.

Every person who **willfully commits any trespass** upon any public lands of the state and cuts down, destroys, or injures any timber, or any tree... standing or growing thereon, or takes, or removes, or causes to be taken, or removed, therefrom any wood or timber lying thereon, or maliciously injures or severs anything attached thereto, or the produce thereof, or digs, quarries, mines, takes or removes therefrom any earth, soil, stone, mineral, clay, sand, gravel, or any valuable materials, **is guilty of theft under chapter 9A.56 RCW.**

RCW 79.02.310 (emphasis added.)

Accordingly, to convict a person of theft under RCW 79.02.310, the State must prove beyond a reasonable doubt that the accused willfully committed a trespass upon public lands. If the State fails to prove the essential element of a “trespass,” the prosecution for theft fails. *State v. Kenney*, 23 Wn. App. 220, 224, 595 P.2d 52 (1979).

Here, the State overlooked the essential element of trespass on public lands and proceeded on a theory of general theft based on taking property of another. This error relieved the State of its burden to prove the essential elements of the crime and resulted in Van Renselaar’s being wrongfully convicted of theft and trafficking the stolen property.

4. THE INFORMATION FAILED TO ALLEGE THE ESSENTIAL ELEMENT OF TRESPASS ON PUBLIC LANDS.

In all criminal prosecutions, the accused has the right to be informed of the nature and cause of the accusations against him. Const.

art. I, § 22; U.S. Const. amend. VI; *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). This constitutional right to know the nature and cause of the accusation means that every material element of the offense must be included in the charging document ‘with definiteness and certainty.’ *Kjorsvik*, 117 Wn.2d at 101. The primary goal of the charging document is to supply the accused with notice of the charge he must prepare to meet. Defendants should not have to research the statutes they are accused of violating. *Kjorsvik*, 117 Wn.2d at 102.

Therefore, all essential elements of the alleged crime must be included in the Information. *State v. Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); *Kjorsvik*, 117 Wn.2d at 101-02. “‘Elements’ are the facts that the State must prove beyond a reasonable doubt to establish that the defendant committed the charged crime.” *State v. Recuenco*, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008) (Recuenco III). The State must identify the crime charged and allege facts supporting every element of the offense in the charging document. *Recuenco III*, 163 Wn.2d at 434. All essential statutory and nonstatutory elements of the crimes charged must be included. *State v. Tvedt*, 153 Wn.2d 705, 718, 107 P.3d 728 (2005).

In addition to stating the applicable law, the Information must also constitute “a plain, concise and definite written statement of the essential facts constituting the offense charged.” CrR 2.1(e)(1). That is, in addition

to adequately identifying crime charged, it must allege facts supporting every element of offense. *State v. Pollnow*, 69 Wn. App. 160,163, 848 P.2d 1265, *review denied*, 121 Wn.2d 1030 (1993); *State v. Williamson*, 84 Wn. App. 37, 42, 924 P.2d 960 (1996). The manner of committing an offense is an element, and the defendant must be informed of this element in the information. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988).

Here, the Information does not inform Van Renselaar of the nature and cause of the charges against him. It does not inform him of any part of the public lands element. It fails to allege a trespass and does not identify the nature of public lands — whether local, state or federal — and does not state the governing law in the form of statutes and regulations defining what would constitute a trespass upon those lands.

A charging instrument that fails to set forth the essential elements of a crime and to notify the accused of the crime with which he is charged and the alleged illegal conduct is constitutionally defective, and requires dismissal. *State v. Hopper*, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). Accordingly, the Court should reverse and dismiss.

5. THE TO-CONVICT INSTRUCTIONS FOR THEFT AND TRAFFICKING OMIT THE ESSENTIAL ELEMENT OF TRESPASS ON PUBLIC LANDS.

Jury instructions are insufficient unless they inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Failure to instruct the jury on every element of a charged crime is an error of constitutional magnitude that may be raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 5, 109 P.3d 415 (2005). This Court reviews the adequacy of “to-convict” instructions de novo. *Mills*, 154 Wn.2d at 7-8; *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

“To-convict” instructions purport to be a complete statement of the charged crime and must therefore include every element of the crime. *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). Generally, every element of the crime must appear in the to-convict instruction, because it is the yardstick the jury uses to measure the evidence and determine guilt. *Mills*, 154 Wn.2d at 7; *State v. Lorenz*, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). This includes statutory elements of the crime. *State v. Fisher*, 165 Wn.2d 727, 754, 202 P.3d 937 (2009). Failure to include an essential element in a to-convict instruction is reversible error. *State v. Williams*, 158 Wn.2d 904, 917, 148 P.3d 993 (2006).

Here, the to-convict instructions for theft and for trafficking omit any reference to the trespass element. This relieves the State of its burden

of proof. Therefore, the error cannot be deemed harmless, and reversal is required. *Clausing*, 147 Wn.2d at 628; *State v. Brown*, 147 Wn.2d 330, 339-40, 58 P.3d 889 (2002).

6. THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ESSENTIAL TRESPASS ELEMENT.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); *In re Winship*, 397 U.S. 358, 363, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Evidence is sufficient to support a conviction only if a rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably to be drawn from it. *Thomas*, 150 Wn.2d at 874.

Here, granting the truth of the State's evidence, without proof of a trespass on public lands, it is not sufficient to prove any degree of theft under RCW 9A.56. *Kenney*, 23 Wn. App. at 224. Likewise, without proof that the disputed property was stolen, the evidence was insufficient to support a conviction for trafficking in stolen property.

To “trespass” in this context means to use public lands without authorization; that is, without a required permit. *See, e.g., Northlake Marine Works, Inc. v. State Dept. of Natural Resources*, 134 Wn. App. 272, 290, 138 P.3d 626 (2006). Here, the State failed to prove that Van Renselaar needed a permit to remove the downed cedar from that particular spot. Without such proof, there was neither a trespass on public lands nor a taking of property of another. Accordingly, the charged conduct did not constitute theft under RCW 9A.56.

The State’s evidence simply failed to establish that Van Renselaar engaged in conduct for which a permit was required in a location subject to a permit requirement. The State’s only evidence that governing law required a permit was lay opinion testimony from Officer Tokach. But whether a particular forestry activity in a particular location requires a permit is governed by statutes and administrative regulations (WACs). That is, it is a matter of law, not a question of fact. And no fact witness — even an expert — may testify to matters of law. *Clausing*, 147 Wn.2d at 628. To do so usurps the role of the judge. *Id.* “[It] is the judge’s province alone to instruct the jury on relevant legal standards.” *State v. Berg*, 147 Wn. App. 923, 935-36, 198 P.3d 529 (2008).

Here, the judge correctly instructed Van Renselaar’s jury on this very point. “[I]t’s your job as jurors to accept the law from the court.”

8/17am RP 20. Moreover, the statutory regulatory scheme requires the department to investigate alleged trespasses and to rule on them. “The department is authorized and directed to investigate all trespasses and wastes upon, and damages to, public lands of the state, and to cause prosecutions for, and/or actions for the recovery of the same, to be commenced as provided by law.” RCW 79.02.300(3), emphasis added. This case demonstrates the wisdom of the Legislature in imposing this requirement: forestry practices rules and regulations are complex and virtually impenetrable to the lay person.

Under the authority of RCW 79.22.070(1), the department enacted RCW 76.09, the Forest Practices Act, which creates four classes of forest practices and sets forth different rules for each of them. These rules are set forth at WAC 222-16-050. It appears that certain practices — especially where, as here, the volume is less than five MBF — do not require any permit whatsoever.

For example, the classes of forest practices include the following:

(1) “Class IV - special” WAC 222-16-050(1)(c):

[A permit is required for] harvesting... on all lands **within the boundaries of any national park**, state park, or any park of a local governmental entity, **except harvest of less than five MBF** within any developed park recreation area and park managed salvage of merchantable forest products. (Emphasis added).

If Van Renselaar's cedar was within a national or state park, this seems to say he did not need a permit to harvest timber worth less than \$250 (the amount supported by the jury's second degree theft verdict).

Moreover, if "Class IV – special" does not render a permit unnecessary, certain operations may be commenced anywhere without notification or application because they have been determined to have no direct potential for damaging a public resource. They are "Class I" practices which include WAC 222-16-050(3)(k):

Cutting and/or removal of less than five thousand board feet of timber (including live, dead and down material) for personal use (i.e., firewood, fence posts, etc.) in any twelve-month period, if not within the CRGNSA special management area.<sup>10</sup>

Officer Tokach himself testified that certain areas he called "matrix" areas do not require any permit. 8/18 RP 27. Neither Tokach nor any other witness was able to testify as to the classification of the location of this particular wind-fall cedar. No Washington rule uses the term "matrix", so it appears Tokach was referring to federal rules applicable within national forests. Regardless, the State failed to offer any evidence that Van Renselaar trespassed in the sense that either a state or federal permit was required for what he did.

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<sup>10</sup> CRGNSA is the "Columbia River Gorge National Scenic Area Act," a compact between the states of Washington and Oregon, with the consent of the Congress of the United States of America. P.L. 99-663. RCW 43.97.015.

Possibly, the State could have proved the trespass element, but this is not sufficient to sustain a conviction. The burden was on the State to allege and prove beyond a reasonable doubt that Van Renselaar's conduct required a permit. Specifically, that taking a half-cord of downed cedar from that particular place falls in a classification category that requires a permit. On this record, Van Renselaar's cedar may or may not even have been on land within the boundaries of any national park.<sup>11</sup> It was certainly less than five MBF.

As a matter of law, insufficient evidence requires reversal. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). Moreover, where the State fails to produce sufficient evidence to support a conviction, the charge cannot be retried and the appropriate remedy is to dismiss the prosecution. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998), quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

Here, the trafficking in stolen property conviction must fall with the theft conviction. No stolen property was trafficked if no property was stolen.

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<sup>11</sup> Again, we have only Tokach's word for this. Surely, the boundaries of national parks are written down somewhere, which is to say, are a matter of law, not fact or expert opinion.

V. CONCLUSION: The Court should reverse Van Renselaar's convictions for second degree theft and first degree trafficking and dismiss those prosecutions with prejudice.

Respectfully submitted this 10<sup>th</sup> day of March, 2011.



Jordan B. McCabe, WSBA No. 27211  
Counsel for James Van Renselaar

**CERTIFICATE OF SERVICE**

Jordan McCabe certifies that she deposited this day in the U.S. mail, first class postage prepaid, copies of this Appellant's Brief to:

Sara L. Beigh  
Lewis County Prosecutor's Office  
345 West Main Street, Second Floor  
Chehalis, WA 98532-4802

and to:

James R. Van Renselaar, DOC # 783892  
Washington Corrections Center  
PO Box 900  
Shelton, WA 98584

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Jordan B. McCabe, WSBA No. 27211  
Bellevue, Washington

Date: March 10, 2011

**State v. James R. Van Renselaar**  
**Appeal No. 41417-1**

**CORRECTED CERTIFICATE OF SERVICE**

Jordan McCabe certifies that On March 10, 2011, she deposited in the U.S. mail, first class postage prepaid, copies of the Appellant's Opening Brief to:

Sara L. Beigh  
Lewis County Prosecutor's Office  
345 West Main Street, Second Floor  
Chehalis, WA 98532-4802

On March 11, 2011, a copy was sent by U.S. mail, first class postage prepaid addressed to:

James R. Van Renselaar, DOC # 783892  
Monroe Corrections Complex  
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*Jordan McCabe*

Date: March 11, 2011

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