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

State of Washington
Respondent

v.

JAMES RAY VAN RENSELAAR
Appellant

41417-1

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

The Honorable Judge Richard L. Brosey

REPLY BRIEF

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II. SUMMARY OF THE CASE

Appellant James Van Renselaar removed a downed cedar from a forested area in Washington. He cut up the tree and sold the bolts to a mill. The State charged Van Renselaar with common law theft in violation of RCW 9A.56 and with trafficking in stolen property. But, because an essential element of common law theft is that the goods be property of another, the correct charge was under a specific statute, RCW 79.02.310, which substitutes trespass on public land for the property of another element. Therefore, Van Renselaar's convictions should be reversed for failure to allege or prove the essential element of trespass, and the consequent failure of the Information and the to-convict instructions to contain the applicable law.

III. STATEMENT OF THE CASE

The State charged 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).¹ CP 57-58. He was convicted by jury of second degree theft and first degree trafficking.² CP 107-08.

¹ 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).

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

Two federal park rangers saw what looked like a cedar bolt and wood debris in the bed of a pickup parked in the woods. A trail of footprints led them to where Van Renselaar and another man were throwing cedar bolts down a slope. 8/17am RP 33-33. Van Renselaar admitted he did not have a permit to remove the cedar. 8/17am RP 35-36. The rangers confirmed that Van Renselaar did not have a federal permit to remove wood. 8/17pm RP 12; 8/18 RP 24-25. Van Renselaar told the rangers the name of an associate who helped him market the wood and the name of the mill. 8/17am RP 34.

At the jury trial, a ranger testified that a federal permit was required to remove wood from national forest land. 8/17am RP 75; 8/18 RP 28. The witness 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.

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. The Ranger testified that a permit was necessary even for blown down trees. 8/17am RP 14.

Donald Sargent testified that he helped Van Renselaar clean up the cedar bolts and helped transport it to the mill where he negotiated with the mill owner for a price. 8/17pm RP 32. 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, 46.³ Sargent was convicted of misdemeanor trafficking for his participation. 8/17pm RP 48.

In support of the first degree property valuation, the State's expert estimated the total amount of wood in the cut portion of the cedar in the State's photographs as 2,600 board feet worth \$2,659.77. 8/17pm RP 74-75. The expert did not know how much of the wood was actually removed from the site. 8/17pm RP 75. The Ranger testified that a significant amount remained on the ground, including all the waste bolts with knot-holes. 8/18 RP 22, 26-27.

The Ranger testified about different logging classifications applicable to different forest areas. 8/18 RP 27. One classification was called "matrix," in which he said no restrictions applied and no permit was required. The witness did not know the classification of the area where Van Renselaar took the cedar. 8/18 RP 27. But the location was public property managed by the U.S. Forest Service. 8/18 RP 29.

The jury rejected the State's valuation of the wood. He was convicted of second degree theft and first degree trafficking in stolen property. 8/18 RP 96.

³ 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).

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 and 12 months and one day for the theft. CP 118; 9/21 RP 120.

IV. ARGUMENT

1. THE SPECIFIC STATUTE TRUMPS THE GENERAL THEFT STATUTE.

The State charged Van Renselaar under a general statute instead of the concurrent specific statute. The remedy is to dismiss the prosecution with prejudice.

Concurrent Statutes: It is well established that, when a specific statute punishes the same conduct as a general statute, the State can prosecute only under the specific statute. *State v. Cann*, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). The statutes are said to be concurrent, and only the specific statute applies. *State v. Datin*, 45 Wn. App. 844, 845-46, 729 P.2d 61 (1986).

Statutes are concurrent if the general statute is violated in each instance where the special statute is violated. *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. RCW 79.02.310 is a specific statute that governs prosecutions for taking timber from public lands. It provides that, whenever a person (1) commits a trespass upon public lands of the state, and (2) removes any wood or timber lying on the land, he is guilty of theft under the general theft statute, chapter 9A.56 RCW.

The State asks this Court to interpret RCW 79.02.310 so as to rescue its erroneous prosecution under RCW 9A.56. But a statute's plain language is not subject to judicial interpretation. "If the statute's plain language is unambiguous, then our inquiry ends, and we enforce the statute according to its plain meaning." *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Where statutory language is unambiguous, the Court accepts that "the legislature means exactly what it says." *State v. Marohl*, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). The Court will not add to or subtract from the clear language of a statute unless the statute is otherwise irrational. *State v. Sullivan*, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001). Legislative definitions provided by the statute are controlling. Only where the statute does not define an essential term will the Court turn to a standard dictionary for its ordinary meaning. *Id.*

The language of RCW 79.02.310 could not be plainer that it is concurrent with the general theft statute. RCW 79.02.310 has no other conceivable purpose than to state in plain language that every defendant who trespasses on public land and remove timber violates 9A.56 RCW. Where the specific statute specifically states that violating it violates the general statute every time, the specific and general statutes are concurrent by definition.

The plain language of RCW 79.02.310 substitutes a new set of additional elements of the crime theft of public timber. In addition to proving that timber was taken, the State must also prove that it was taken from public land on which the taker willfully “trespassed.” Far from leading to an absurd result, RCW 79.02.310 relieves the State of the burden to prove the inapposite “property of another” element of common law theft.

The State suggests that applying RCW 79.02.310 as written will cause the sky to fall because Sunday picnickers in our national parks will be subject to a felony prosecution for stepping on a twig. BR 18. This is a false dilemma. Only where a term is left undefined in a statute will the Court turn to other sources to determine its plain and ordinary meaning. *Sullivan*, 143 Wn.2d at 174–75

The State's Chicken Little argument rests on substituting a non-legal meaning of "trespass" for the specific term of art the legislature uses in this context. By any definition, to trespass is to enter or remain unlawfully. See, e.g., Black's Law Dictionary, 6th Ed. at 1502; Webster's New International Dictionary at 2439. To "trespass" in this context is a term of art that means to use public lands without the requisite 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). The regulations make clear that to trespass on public land means to use or occupy the land without authorization. That is, to engage in an activity for which a permit is required without obtaining a permit. See, e.g., RCW 79.02.300(1); RCW 79.02.320.⁴

The To-Convict Instruction Reflects the Charging Error: One unavoidable consequence of the fatal charging error is that the to-convict instruction also omits the additional elements of RCW 79.02.310.

⁴ Every person who, without authorization, uses or occupies public lands ... is liable to the state for treble the amount of the damages. RCW 79.02.310(1). Every person who shall cut or remove any timber growing or being upon any public lands of the state ... or who shall manufacture the same into logs, bolts, shingles, lumber or other articles of use or commerce, unless expressly authorized so to do by a bill of sale from the state ... shall be liable to the state for treble the value of the timber...to be recovered in a civil action[.] RCW 79.02.320.

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.

“To-convict” instructions must include every element of the crime. *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). The to-convict instruction is the yardstick used by the jury 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). All the statutory elements of the crime must be included. *State v. Fisher*, 165 Wn.2d 727, 754, 202 P.3d 937 (2009). The sole remedy for omitting an essential element from the to-convict instruction is reversal. *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 public lands or trespass elements. This relieved 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).

Defective Information: The pervasive effect of the charging blunder extends to the Information, which is insufficient as a matter of law.

The Information must inform the accused of the nature and cause of the accusations. Const. art. I, § 22; U.S. Const. amend. VI; *State v. Kjorsvik*, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). Thus, every material element of the offense must be included ‘with definiteness and certainty.’ *Kjorsvik*, 117 Wn.2d at 101; *State v. Goodman*, 150 Wn.2d 774, 784, 83 P.3d 410 (2004); *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); *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. *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). A charging document not challenged before the verdict is construed most favorably to its validity. *Kjorsvik*, 117 Wn.2d at 102.

Here, even under the most liberal interpretation in favor of the State, the Information is fatally defective. It does not inform Van

Renselaar of any part of the public lands element. It fails to allege a trespass and does not identify the nature of public lands — whether federal, state or local — and does not identify the governing statutes and regulations that define what constitutes 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.

2. THE ERROR IS MANIFEST AND CONSTITUTIONAL.

The State first objects to Van Renselaar's challenge to the sufficiency of the charges for the first time on appeal on public policy grounds. BR 15. The State does not cite the procedural rule it is relying on, and Van Renselaar is aware of none. In a civil case, defense counsel quite correctly waits until the day after the statute of limitations runs before informing the court the summons and complaint were left at an address that has not been the defendant's usual place of abode for a couple of years. And, because a sloppily crafted civil complaint is swiftly and ruthlessly dismissed under CR 12(b)(6), the civil rule requires a timely motion. In a criminal case, by contrast, the prosecutor gets to amend the

complaint ad infinitum until the jury retires to deliberate. Consequently, just as a defendant need not bring himself to trial, defense counsel need not collaborate with the prosecutor's office or come before the court to suggest modifying the charging decision to ensure a successful prosecution. "*Oh dear, we seem to be missing a couple of essential elements. Here, let me help you fix that. Check out this specific statute.*" A criminal defendant has no greater obligation (and even less incentive) than does a civil defendant to alert opposing counsel to a suicidal procedural error so long as jeopardy continues. Van Renselaar fully performed his duty as a defendant by showing up, submitting to the jurisdiction of the court, and entering a plea. It was the duty of the prosecutor to research the law and charge and prove facts sufficient to constitute an offense in the manner prescribed by the Legislature.

Next, the State argues that the charging error had solely statutory consequences. BR 15. The implications discussed above involving the to-convict instructions and the Information defeat this claim. The State also suggests the specific statute, RCW 79.02.310 creates a different crime with different proof requirements. BR 14, citing *State v. Darrin*, 32 Wn. App. 394, 396-97, 647 P.2d 549 (1982).

The State's reliance on *Darrin* is misplaced. That case concerns the situation where two statutes proscribe the same conduct but give

prosecutor discretion to charge either a felony or a gross misdemeanor, which may result in a constitutional equal protection violation. *Darrin*, 32 Wn. App. at 396; *State v. Farrington*, 35 Wn. App. 799, 802, 669 P.2d 1275 (1983), citing *Darrin*, at 397; *State v. Burley*, 23 Wn. App. 881, 883, 598 P.2d 428 (1979). But where, as here, the distinctive feature of a special statute is not to prescribe a different punishment but merely to define a specific way of committing the general offense, then there is no constitutional infirmity and the concurrence doctrine applies. *Darrin*, 32 Wn. App. 397, citing *Cann*, 92 Wn.2d at 197, and *State v. Walls*, 81 Wn.2d 618, 622, 503 P.2d 1068 (1972). That is the case here.

In *Darrin*, the problem was that cedar theft is proscribed both by RCW 76.48 and RCW 9A.56. 32 Wn. App. at 396. But the offense proscribed by RCW 76.48 is a gross misdemeanor, while a charge under RCW 9A.56 is a felony. Moreover, the elements of the proscribed offenses are different. *Darrin*, 32 Wn. App. at 397.

RCW 76.48 is entirely distinguishable from RCW 79.02.310. First, it is an entire chapter, not a specific statute addressing a single type of conduct. Second, it does not specifically identify the concurrent general statute by name and number. Third, according to *Darrin*, RCW 76.48 is not a special statute at all because, by contrast with RCW 79.02.310, it does not merely define a certain type of theft. In fact, the

State does not have even to prove theft in order to prove a violation.⁵ *Darrin*, 32 Wn. App. at 397. Finally, “[o]ne who violates RCW 76.48 does not necessarily violate RCW 9A.56.” *Darrin*, 32 Wn. App. 397. By contrast, RCW 79.02.310 says one thing and one only, and that is that one who violates it necessarily violates RCW 9A.56.⁶

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

Even if a prosecution under the general theft statute could be maintained, an essential element of RCW 9A.56.030(1)(a) is the wrongful acquisition of the “property of another.” But, by definition, “property of another” must have an identifiable “owner.” As discussed in Issue 1, the Legislature recognized this and enacted RCW 79.02.310 to fix the problem. Without charging and proving a trespass on public land, the State could not, as a matter of law, prove the essential elements of RCW 9A.56.030(1), specifically that the cedar was property of another.

State v. Longshore, 141 Wn.2d 414, 5 P.3d 1256 (2000), is directly on point. 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

⁵ A property owner can violate 76.48 by harvesting his own trees.

⁶ Moreover, the trial court in *Darrin* ruled that RCW 76.48, in the area of cedar thefts, repealed RCW 9A.56 by implication, which this Court found it necessary to reverse. *Darrin*, 32 Wn. App. at 397. Nothing of the sort occurred here.

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).⁷ Natural resources on public lands, however, are not “property of another.” They are the property of the State in its sovereign capacity until reduced to possession. *Longshore*, 141 Wn.2d at 421. In *Longshore*, pilfered clams 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.” Instead, the State alleged (without any evidence) that the cedar was on public land. Ranger Tokach testified it was owned by the U.S. government. BR 3. But the question of who owned the cedar was a matter of law, for which the State produced no evidence except the legal opinion of a forest ranger who was qualified solely as a fact witness. Likewise, whether a permit was required to harvest 2.6 MBF from that location was also a matter of law testified to solely by fact witnesses. BR 4.

Assuming for the sake of argument that the government did own the cedar, timber harvested from federal, state, county, municipal, or other government-owned lands is public timber by definition. WAC 458-40-

⁷ Now 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[.]

610(21). Accordingly, under *Longshore*, the wood was the property of the State in its sovereign capacity. Therefore, the State did not prove the “property of another” element and could not possibly have proved it.

The State’s contrary authorities are distinguishable. BR 10.

In re PRP of Tortorelli, 149 Wn.2d 82, 66 P.3d 606 (2003), concerns a different resource under different statutes and regulations. Tortorelli needed a permit and applied for one. *Tortorelli*, 149 Wn.2d at 87. The DNR advised him he needed an additional permit for which he also applied but did not wait. *Tortorelli*, 149 Wn.2d at 88. He was twice cited for operating outside his permits. *Id.* at 89.

Unlike Van Renselaar, Tortorelli did not challenge his prosecution under RCW 9A.56.020(1)(a). He also did not dispute that the submerged trees he took were property of another. *Tortorelli*, 149 Wn.2d at 89-90. Moreover, ownership of the property was vested in the state by the constitution — not because it was trees, but because it was located the shores and beds of navigable waters within the state. *Tortorelli*, 149 Wn.2d at 90.

Proof of Permit Requirement: Significantly, the State established the elements by offering the governing statute into evidence at Tortorelli’s trial. *Tortorelli*, 149 Wn.2d at 94. The State did not bother to do that in this case, relying instead on unsupported statements of personal belief by

the rangers as to the boundaries of the state park and the regulation category of the alleged activity. The *Tortorelli* Court stated unequivocally that Const. art. 4, § 16 places the obligation solely on the court to declare the law. *Tortorelli*, at 94-95. Tortorelli did not prevail on this assignment of error solely because the matter was before the Court on a PRP whereby the petitioner had the burden to prove actual prejudice or a complete miscarriage of justice. *Tortorelli*, 149 Wn.2d at 95.

Here, by contrast, the State has the burden on direct appeal of proving beyond a reasonable doubt that Van Renselaar was not prejudiced by the constitutional error, which is to say that the verdict was not affected. But the verdict here was entirely dependent on the unsupported and arguably erroneous speculation from the rangers about the law governing forestry practices.

Governing Law: The Forest Practices Act, RCW 79.22.070(1), was enacted by the department under the authority of RCW 76.09. It created four classes of forest practices, each with different rules which are codified at WAC 222-16-050. Under the regulations, certain practices where the volume is less than five MBF⁸ do not require a permit. For instance, a category called “Class IV – special” requires a permit to

⁸ That is five thousand board feet. The State claims Van Renselaar took no more than 2.6 MBF.

harvest on lands within the boundaries of a national, state, or local park, but with the exception of of less than five MBF. WAC 222-16-050(1)(c).

In addition to “Class IV – special” activities on government property, certain operations are lawful anywhere without restriction because they have no direct potential for damaging a public resource. These 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.⁹

The volume allegedly harvested by Van Renselaar was well under the five MBF limit. So, even if his cedar was within a national or state park, WAC 222-16-050(1)(c) and WAC 222-16-050(3)(k) say he did not need a permit to remove it.

Besides that, the State’s main witness, Ranger Tokach, testified that certain “matrix” areas did not require any permit. 8/18 RP 27. Neither Tokach nor any other witness testified as to the classification of the location of the particular wind-fall cedar that Van Renselaar removed. Appellate counsel finds no Washington rule using the term “matrix,” so it

⁹ 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.

appears Tokach was referring to federal rules rather than State rules which would apply to this prosecution in state court.

The State's only evidence that governing law required a permit was more lay opinion from Ranger Tokach. But whether a particular forestry activity in a particular location requires a permit is not a question of fact. It is governed by statutes and administrative regulations. Therefore it is a matter of law that cannot that a fact witness cannot establish. *State v. Berg*, 147 Wn. App. 923, 935-36, 198 P.3d 529 (2008). Here, the judge actually instructed Van Renselaar's jury that it could receive the law solely from the court. 8/17am RP 20.

The second case cited by the State is *State v. Holt*, 52 Wn.2d 195, 324 P.2d 793 (1958). BR 10. The offense in *Holt* was embezzlement by a federal employee of scrap metal from the U.S. government's surplus property warehouse. Aside from being defined as U.S. property, this was the property of the United States by statute. *Holt*, 52 Wn.2d at 197. *Holt* states the general rule that a theft charge does not require the State to identify the owner of property because it is sufficient to show that the property did not belong to the defendant. *Holt*, 52 Wn.2d at 199. The State cites several other cases for this proposition. BR 10.

But the general rule does not apply here. In Van Renselaar's case, the property at issue was public timber on public land. This is public

timber by definition. WAC 458-40-610(21). Accordingly, the State was required to prosecute an unauthorized taking under the specific statute, RCW 79.02.310, which was enacted precisely for this purpose. By its plain language, an essential element of theft under RCW 79.02.310 is that the accused willfully committed a trespass upon public lands. If the State fails to prove the essential element of a “trespass on public lands” the prosecution for theft fails. *State v. Kenney*, 23 Wn. App. 220, 224, 595 P.2d 52 (1979) (the State failed to prove the essential fact element of a “trespass upon public lands.”) The court will take note of “peculiar circumstances of the case at bench” in determining the essential elements of theft. *Kenney*, 23 Wn. App. at 225.

Here, the only justiciable theft charge was under RCW 79.02.310 which required proof of a trespass upon public lands, which in turn required the State to prove that the cedar was on public land and that not only did Van Renselaar not have a permit to take it but that the lack of a permit constituted a trespass.

Because the State dropped the ball on the charging decision, Van Renselaar’s convictions for theft and trafficking in stolen property must be reversed and dismissed.

4. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE TRAFFICKING CONVICTION.

Because the State failed to prove any degree of theft under RCW 9A.56, the conviction for trafficking in stolen property likewise cannot stand. The record contains no support for the State's claims (a) that this cedar was on federal land or (b) that a permit was required to remove it. BR 8. The fact that Van Renselaar did not have a permit is interesting, but irrelevant. BR 8. The State had to prove that he needed one.

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.

Moreover, according to the applicable statutory regulatory scheme, it is the function of the department to investigate alleged trespasses, to issue a ruling as to whether or not a trespass actually occurred, and to initiate any prosecution. RCW 79.02.300(3).

The State claims the jury could infer that the cedar was on federal property. BR 8. But in the absence of admissible evidence, the jury could only speculate. The State could at least have produced an official map that would have proved that the tree was in a national park rather than merely in the vicinity of one. Tokach's personal belief is not evidence beyond a reasonable doubt. The State had the burden to produce such evidence.

The State also implies that Van Renselaar's erroneous belief that he was guilty of something is sufficient reason to uphold the wrongful conviction. See, e.g. BR 8 ("He was conscious of the wrongfulness of his actions.") BR 9 (His taking was wrongful by his own admission.") This is not the standard.

The burden was on the State to allege and prove beyond a reasonable doubt that Van Renselaar needed a permit, not merely that he did not have one. BR 9. Specifically, the conviction fails for lack of actual evidence (rather than mere allegations) that taking half a cord of downed cedar from that particular place constituted activity that the regulations included within a classification category that required a permit. The record contains not a whit of evidence that Van Renselaar's cedar was on land within the boundaries of any state or national park.¹⁰ Moreover, the amount alleged to have been harvested was certainly less than five MBF, which presumptively places it outside permit requirements, absent proof to the contrary.

Insufficient evidence requires automatic reversal. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). Moreover, the charge cannot be retried, and the appropriate disposition is to dismiss the

¹⁰ Again, we have only Tokach's word for this. But the boundaries of national parks must be a matter of record, which is to say, a matter of law, not fact or opinion.

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.

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 27th day of June, 2011.

A handwritten signature in black ink, reading "Jordan B. McCabe". The signature is written in a cursive style with a horizontal line underneath it.

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

