

NO. 43453-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

CHASE CUTTS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA  
COUNTY

THE HONORABLE BRIAN ALTMAN

---

**BRIEF OF RESPONDENT**

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## **A. ISSUES PRESENTED**

1. Viewed in the light most favorable to the State, did the evidence presented at the appellant's trial entitle the jury to find the appellant guilty of Trafficking in Stolen Property in the Second Degree beyond a reasonable doubt?
2. Did the trial court abuse its discretion when it allowed the confidential informant and officers to testify that, in advance of the planned transaction, the confidential informant identified the property as stolen?

## **B. STATEMENT OF THE CASE**

### **1. PROCEDURAL FACTS**

On February 27, 2012, the appellant was charged by information with one count of Trafficking in Stolen Property in the First Degree and one count of Possession of Stolen Property in the Second Degree. CP 1-2. Count Two (Possession of Stolen Property in the Second Degree) was dismissed by oral motion of the State on May 9, 2012. RP 20-21. The written order of dismissal is on page 8 of the Judgment and Sentence. CP 10.

On May 3, 2012, a hearing under CrR 3.5 was held. RP 1-8. Deputy Mike Hepner testified for the State that after the appellant

was arrested and advised of his Miranda rights, the appellant said, "I was – I was expecting this. I've already spoke to my attorney, and he advised me to remain silent when I was arrested." RP 5.

The State argued that the statement, "I was expecting this," (and nothing more) should be admissible in the State's case-in-chief in that it was made before the statement invoking his right to remain silent. RP 12-14. The Court disagreed, ruling "that the statement, I was expecting this, is not rationally severable from his immediate invocation shortly thereafter," and suppressed the entire statement. RP 16, 78, CP 63.

On May 9, 2012, a hearing was held on both the State's and the appellant's motions in limine. RP 19-71.

Most relevant to this appeal, the State moved to be allowed to elicit testimony that the confidential informant stated to officers before the transaction that the items were stolen in a burglary from the Skamania Lodge. RP 39-43. The State argued that this was not hearsay because it was being offered not for the truth of the matter asserted but for proof that the confidential informant *knew* the items were stolen from the Skamania Lodge. RP 41. As far as relevance, the State argued that the confidential informant's knowledge the items were stolen "is probative that this was not an

innocent transaction, but was one that was done with knowledge, or at least with recklessness,” RP 41.

The appellant moved that this proposed testimony be excluded, arguing that it was being offered for the truth of the matter asserted and therefore was hearsay, that it was irrelevant and prejudicial, that it was speculative and not based on personal knowledge, and that it was based merely on the confidential informant’s inadmissible opinion that the appellant is a thief, CP 54, RP 43-46, 63-65.

The Court granted the State’s motion, allowing the State to elicit testimony that the confidential informant stated to officers before the transaction that the items were stolen. RP 46. The Court ruled that the statement was not hearsay because it was not being offered for the truth of the matter asserted and was “clearly relevant” because it “leads the officers to do other things,” RP 46.

This issue was raised again by the appellant just prior to the start of jury trial, RP 79-85, 88-89. At this point, the State agreed with the appellant that the knowledge of the confidential informant was not itself relevant but argued that the testimony was relevant as *res gestae* evidence in that it was a necessary link in how the criminal transaction came about. RP 85-87. Furthermore, the

State argued that the testimony was not prejudicial for the same reason, i.e., it merely showed that the confidential informant made an inference, not that the appellant had guilty knowledge. RP 86.

The trial court again ruled that the evidence was admissible, again finding it not hearsay and relevant as to *res gestae*. RP 89.

Jury trial was held on May 14, 2012-May 15, 2012. RP 91-370. The State called as witnesses Chad Allen Hayes, RP 92-145, Detective Tracy Wyckoff, RP 145-166, Detective Tim Garrity, RP 166-190, Deputy Mike Hepner, RP 190-213, 269-274, Brian Nicklaus, RP 213-227, Kevin R. Bligh, RP 227-241, 252-269, and Deputy Christopher Helton, RP 274-286. The appellant called Brian Nicklaus, RP 289-298.

After all the evidence was presented, the Court heard argument on jury instructions, RP 299-320. The State offered instructions on the lesser included crime (Trafficking in Stolen Property in the *Second Degree*), to which the appellant objected. RP 312-318. The Court ruled that the lesser included instructions were properly offered and included these instructions, RP 318-319, CP 81-87.

Closing arguments were then held, RP 326-368.

The jury returned no verdict as to the crime charged (Trafficking in Stolen Property in the First Degree), RP 372, CP 88, but returned a verdict of guilty of the lesser included crime of Trafficking in Stolen Property in the Second Degree, RP 372, CP 89.

The appellant was sentenced on May 17, 2012 within the standard range, RP 386, CP 3-21. This appeal follows.

## **2. SUBSTANTIVE FACTS**

On October 30, 2011, the Skamania Lodge was burglarized, RP 191. Someone broke into the maintenance shop and stole some Stihl chain saws and weed eaters. RP 191. All of the five Stihl chain saws were stolen, RP 234-235, 239, 268, 273, as were some of the seven weed eaters, RP 239-240, 267-268. The majority of the Lodge's weed eaters were Stihl brand, though two old ones were Echos, RP 235.

Kevin Bligh, a mechanic at the Lodge responsible for maintenance, repair, and record-keeping for mechanical items used by the Lodge, RP 227-228, reported the burglary, RP 234, 268. Skamania County Sheriff Deputy Mike Hepner was the assigned case deputy, responding to the call and speaking to Bligh. RP 191-192.

Bligh maintained an inventory list of all equipment possessed in the past or currently by the Lodge. RP 229. Bligh was responsible for maintaining this list. RP 229-230. Nobody else made changes to it. RP 230-231.

Bligh gave Deputy Hepner the stolen items' serial numbers, which were entered into national and state databases. RP 193. In October 2011, they were also recorded in Deputy Hepner's own report, specifically a Property Supplemental Report, RP 193-194.

Chad Hayes was working with police officers for the purposes of "working off charges", doing "the right thing," RP 94, and reducing his sentence, RP 127-128. There was, however, no written deal regarding the charges, only a written set of basic rules requiring him to obey the law, not use narcotics, inform the detective if he gets into trouble, and not possess weapons. RP 150-151. Orally, there was an understanding that the detective "would make recommendations based on what he is looking for," as to his own charges, RP 151. He was subject to random urinalysis, RP 94-95, 119-120, 142, 151.

According to Hayes, in January 2012, RP 98, Skamania County Sheriff Detective Tracy Wyckoff asked him to locate some "high-dollar items that were taken from the Skamania lodge," RP

96. They were name brand Stihl, which Hayes believed was "one of the better brands," RP 97. Detective Wyckoff, however, did not think he specifically mentioned the Skamania Lodge but only that they were looking for some items involved in burglaries. RP 152-153. Det. Wyckoff did not recall if he mentioned what the items were. RP 153-154.

Hayes had heard that the appellant, whom he had known for "[e]ight months to a year," RP 97, 120, had chain saws and weed eaters to sell, RP 98. Hayes spoke with Detective Wyckoff on January 25, 2012 and indicated that he had spoken with the appellant about purchasing chain saws and weed eaters. RP 152. Hayes claimed that these were the items stolen from the Skamania Lodge. Id. Det. Wyckoff told him to go ahead and make the arrangements to purchase them, find out how much they would be sold for, and report back to Det. Wyckoff. RP 152, 154.

Hayes called the appellant, asked him about these items, and arranged a price, RP 99. The appellant wanted \$300 for a chain saw and two weed eaters, RP 99-100. Hayes agreed to that price, explaining that he was buying the items for his uncle and that he (Hayes) would be making "an extra \$50 on the deal," RP 100-

101. This was not true but stated "to make it sound more believable," RP 101.

It was arranged that the deal occur at the appellant's home in Stevenson, RP 103. This is in Skamania County, Washington. RP 170. (The home actually belonged to his girl-friend's father, RP 123.) This location was chosen by the appellant who stated that he first had to pick up the items at his grandparents' home in Carson, RP 104, 131. Hayes told the appellant to move the tools inside so the appellant would not be able to see who was in the car with Hayes. RP 104, 124.

On January 27, 2012, Hayes spoke briefly to Det. Wyckoff, who referred him to Skamania County Sheriff Detective Tim Garrity or Deputy Hepner, since he (Det. Wyckoff) was on his way out of town. RP 101-102, 154. Hayes then spoke about the proposed deal first to Deputy Hepner and then to Detective Garrity, RP 101-102.

Hayes told Deputy Hepner that he was working with Det. Wyckoff about purchasing some stolen items, RP 198. Specifically, Hayes said that he had made arrangements to purchase some chain saws stolen from the Skamania Lodge. RP 198-199. Deputy Hepner contacted his chief. RP 199.

Det. Garrity was formally assigned by the Sheriff's Chief Criminal Deputy to meet with Hayes and bring him to purchase two Stihl brand weed eaters and one Stihl brand chain saw, the three items for \$300. RP 168-169, 184. Det. Garrity agreed that Stihl is a high end brand. RP 170.

Detective Garrity was issued the \$300 from the drug fund by the Civil Chief and the Chief Criminal Deputy. RP 170-171. He (Det. Garrity) signed a receipt for the money. RP 171.

Detective Garrity picked Hayes up in an unmarked car off Vancouver Avenue, RP 106, 172-173. Skamania County Sheriff Deputy Brian Salwasser was also in the car. RP 105, 173. First, Hayes was taken to a secluded area where Det. Garrity searched him, RP 106, 173-174. Nothing was found during the search. RP 174. This occurred during daylight hours. RP 175. Detective Garrity issued Hayes the \$300 buy money, RP 106, 174.

Det. Garrity then drove with Hayes to the appellant's residence, backing in the vehicle, RP 110, 281. They arrived at 2:28 P.M. RP 178, 185. Det. Garrity was able to watch the residence through his rear view and side mirrors. Id.

Hayes got out of the passenger seat and headed toward the shop area, which is "pretty much the first thing you see on the

house,” RP 179. In front of the shop were the appellant and Brian Nicklaus, the appellant’s girl-friend’s father (who owned the home), RP 179, 187, 218.

Nicklaus had arrived home earlier in the day and had seen the two chain saws and two weed eaters in his shop. RP 215. He had never seen them before. RP 215, 220. Shortly after he arrived home, the appellant arrived. RP 217. Nicklaus asked him about the two chain saws and two weed eaters. Id. The appellant told him that he had them stored at his grandparents, who lived in Carson. RP 218, 220, 293. Apparently, the appellant indicated that “they had been at his grandparents and he brought them over because they had been snowed in or something underneath the roof,” RP 293.

The appellant also told Nicklaus that these chain saws had been the ones he (the appellant) had been using the previous summer for woodcarving downtown, RP 223.<sup>1</sup> Nicklaus had seen

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<sup>1</sup> Initially, Nicklaus denied that the appellant had made any connection between the chain saws in the shop and the ones he had used the previous summer, but upon being impeached with a prior inconsistent statement, Nicklaus agreed that to his best recollection, the appellant told him the chain saws were the ones he (the appellant) had used the previous summer. RP 221-223. Upon being recalled by the appellant, he agreed (on a leading question) that it was “safe to say” he “had to maybe deduce maybe these were something to do with the wood carvings because that’s the only thing that relates to it,” RP 294. Upon being cross-examined, he then denied that the appellant told him the chainsaws were the ones the appellant was using the previous summer, claiming it was only an

the appellant doing this woodcarving downtown with chainsaws before September (2011). RP 220-221.

After shaking hands with Hayes, Nicklaus walked away towards the residence area of the home, RP 180, 188, 224. Hayes and the appellant then entered the shop area of the home together, without Nicklaus, shutting the door behind them. RP 181-182, 218, 224.

Hayes had to use the bathroom inside the home. RP 111, 124, 218. When he got out of the bathroom, Hayes, the appellant, and Brian Nicklaus (the home-owner) were standing in the living room, RP 112.

Hayes and the appellant moved into the garage (accessible from the home area), where the transaction was done, RP 112-113, 125, 219. Nicklaus remained in the home. RP 113, 219. Only the appellant and Hayes were in the closed-off garage when the transaction was done. RP 115, 125, 131, 220. Hayes gave the appellant the money issued by Detective Garrity (\$300) and in

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inference he (Nicklaus) had made. RP 297. Nicklaus agreed, however, that this was at odds with his previously signed statement and with his testimony of the previous day. RP 297-298. He also agreed that he had had time to look over his statement and verify that it was accurate and even complimented the deputy prosecutor for having put it together well. RP 296. He agreed that when signing it, he believed it accurately represented what he had told the deputy prosecutor over the phone. RP 296. He agreed he had signed it under penalty of perjury. RP 297.

return, got the items. RP 111, 115, 126. (According to Nicklaus, the money was handed over to the appellant in his (Nicklaus's) presence, before the appellant and Hayes went into the shop. RP 219-220.)

The items given to Hayes in the transaction consisted of two chain saws and two weed-eaters. RP 114. While the deal was originally for only *one* chain saw and two weed-eaters, the appellant, after giving Hayes those three items (including the *larger* chain saw), said Hayes could take an extra chain saw as well. RP 114-115. This was "[t]he littlest chain saw," RP 143.

Hayes took all four items and went to the car driven by Detective Garrity. RP 115-116. Hayes exited first, followed by the appellant, within speaking distance, RP 182. From Detective Garrity's perspective, they appeared to be speaking to each other a little, RP 182-183. According to Hayes, as they were walking out the door, he (Hayes) mentioned that his uncle thought the items were stolen. RP 116, 126. The appellant replied, "no, no, these aren't stolen" or something to that effect. Id.

The appellant tried to follow Hayes, but Hayes declined his offers to help, RP 111, 116. Hayes then loaded the four items into

the back of Detective Garrity's vehicle, and they departed. RP 117, 183.

After several minutes, Nicklaus entered the shop and saw that the two chain saws, the two weed eaters, the appellant, and Hayes were all gone. RP 219.

A short ways away, at the same secluded location, Hayes was searched again, and nothing of note was found. RP 117, 183. The money was no longer on Hayes' person, RP 183.

The residence was also watched from a distance by Skamania County Sheriff Chief Criminal Deputy Pat Bond and Deputy Chris Helton, RP 175. They actually went there ahead of time to see when the appellant would show up. RP 199. The location was across from the home and slightly to the west of it, RP 276, about 100 or 200 feet away, RP 277. Deputy Helton was using binoculars. RP 278.

Chief Bond and Deputy Helton arrived at their observation location at about 2:15 PM. RP 278. A couple of minutes later, they saw a white pickup truck arrive and Nicklaus get out of it. Id. He went into the house. RP 279.

A short time later, a conversion van pulled into the driveway. Id. The appellant got out of it, opened a slide siding door, went into

the residence, and came back outside. Id. The appellant pulled aside a blue tarp in the van, removed a weed eater, and took it into the shop. RP 279-280. He then removed a chain saw and took it into the shop. RP 280.

A few minutes later, at 2:28 or 2:30 PM, Deputy Helton saw Det. Garrity and Hayes arrive. RP 280-281. There was no other traffic in the interim. RP 281.

After Det. Garrity's vehicle departed, Deputy Helton saw the van operated by the appellant depart. RP 283-284.

Afterward, Det. Garrity met with Deputy Hepner, who was the case officer, and gave Deputy Hepner all four items sold in the transaction. RP 184, 200-201. Deputy Hepner preserved these items by putting them into a secure evidence facility, RP 201, after getting the numbers off of them, RP 202.

The larger chain saw and one of the weed eaters had the same serial numbers as one chain saw and one weed eater that were recorded as having been stolen from the Skamania Lodge back in October 2011. RP 205-206, 253-255, 271-272.

As far as the smaller chain saw, it had the number 59 on it. RP 207-208, 258. This is a number applied by the Skamania Lodge, and it matched to the number of a chain saw taken in the

Skamania Lodge burglary.<sup>2</sup> RP 207-208, 258-259. These numbers are assigned in chronological order as the Lodge acquires new equipment, with no number ever being re-used. RP 228-229. They are applied by sticker. RP 264. The serial number for Item 59 was reported on October 30 as having been stolen, RP 259-260, 268, 271. However, the actual serial number of the item was different. RP 259.

Bligh explained that when establishing his list, for items already possessed by the Lodge he may have taken what he thought was the serial number "off of a sales receipt or something" and not actually off the item. Id. Nevertheless, with the unique Skamania Lodge identification number, Bligh was "real confident" that it was one of the items stolen. Id.

Finally, Bligh was able to confirm that the other weed eater was stolen from the Skamania Lodge. RP 208. While it was not initially reported to Deputy Hepner as stolen, RP 270-272, Bligh was able to confirm by serial number that it belonged to the Lodge, RP 257.

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<sup>2</sup> Deputy Hepner also testified during cross examination that another item seemed to have had such a number on it, but it looked like it had "been kind of peeled off," RP 211.

Bligh explained that some equipment is scrapped in which case it is put "upstairs for parts", after which pieces are used as needed, Id. Especially for weed eaters, he explained, parts are taken off one to make another one, RP 261. He also explained that initially, only a quick list was done of what was noticed missing but that later, he discovered another one missing, RP 258.

Bligh also indicated that he was aware of no other burglaries at the Lodge besides the one on October 30, 2011. RP 260. Bligh was confident that all four items were taken from the Lodge at the October 30, 2011 burglary. RP 261. He also testified that he did not know the appellant and did not, as the person in charge of equipment for the Lodge, give the appellant permission to possess the four stolen items. RP 261-262.

### **C. ARGUMENT**

- 1. THE EVIDENCE PRESENTED AT THE APPELLANT'S TRIAL DID ENTITLE THE JURY TO FIND THE APPELLANT GUILTY BECAUSE, VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, IT ESTABLISHED THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.**

The appellant challenges the guilty verdict on the grounds of sufficiency of the evidence, arguing that there was insufficient evidence he acted recklessly. Brief of Appellant at 5-7.

Recklessness is an element of Trafficking in Stolen Property in the Second Degree, RCW 9A.82.055(1), about which the jury was properly instructed, CP 83.

In this context, acting recklessly would mean that he knew of and disregarded a substantial risk that the property he sold to Hayes was stolen and that his disregard was "a gross deviation from conduct that a reasonable person would exercise in the same situation," RCW 9A.08.010(1)(c). The appellant argues there was no evidence establishing his actual knowledge of the substantial risk the property was stolen. Brief of Appellant at 6-7.

It should however be noted that if it was established that the appellant had "information which would lead a reasonable person in the same situation to believe that facts exist" which establish the substantial risk, the jury was entitled to find that he knew of the risk. RCW 9A.08.010(b)(ii). The jury was properly instructed on this part of the definition of knowledge. CP 76.

The appellant has a heavy burden to establish that the evidence was insufficient to support a conviction:

In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

[citation omitted] "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." [citation omitted]

State v. Washington, 135 Wn. App. 42, 48-49, 143 P.3d 606

(2006), Petition for Review denied, 160 Wn.2d 1017, 161 P.3d

1028 (2007), quoting State v. Salinas, 119 Wn.2d 192, 201, 829

P.2d 1068 (1992).

Here, the evidence that the appellant knew of the risk (or that a reasonable person in his situation would have believed there was a risk) is largely circumstantial. Indeed it would be odd were this element proven by direct evidence since that would require either proof that the appellant committed the actual burglary (in which case he would have been charged with burglary) or an admission that he knew or suspected the property was stolen (which is unlikely, especially if given to Hayes, who was buying the property).

However, as the jury was properly instructed,

[t]he law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

CP 71. Here, when the circumstantial evidence is viewed in the light most favorable to the State and with all reasonable inferences drawn in favor of the State, it is abundantly clear that a rational juror could have found the appellant to have known of the risk.

It should first be noted that Hayes was properly impeached by the appellant's trial counsel with his use of marijuana, RP 119, his conviction for Trafficking in Stolen Property, RP 127, 139-140, his current criminal charges and resulting motivation for working with police, RP 127-130, 135-139, his memory issues, RP 130, and his feelings toward the appellant, RP 131-135. However, in the context of this appeal, if Hayes' testimony was contradicted by another witness, the jury must be assumed to have believed Hayes, if Hayes' testimony was favorable to the State.

The first piece of circumstantial evidence that the appellant actually knew of the risk the property was stolen was the circumstances of the sale. While it was Hayes who told the appellant to move the tools inside, RP 104, 124, the *location* of the deal at his home in Stevenson was chosen by the appellant who told Hayes that he first had to pick up the items at his grandparents' home in Carson, RP 103-104, 131. However, he told Brian Nicklaus (the homeowner and his girl-friend's father, RP 123) that

“they had been at his grandparents and he brought them over because they had been snowed in or something underneath the roof,” RP 293.

Furthermore, the appellant apparently accepted Hayes’ representation that he (Hayes) would be making “an extra \$50 on the deal,” RP100-101, a circumstance that suggests the appellant was not uncomfortable with dishonesty associated with the transaction.

Proceeding to the sale itself, while Hayes and the appellant were initially inside the home in the presence of Nicklaus, they moved into the garage/shop to make the transaction, outside of Nicklaus’s presence. RP 115, 125, 131, 220. While Nicklaus testified that the money was handed over in his presence, RP 219-220, the jury should be assumed for the purposes of this appeal to have believed Hayes, who testified that it all occurred outside of Nicklaus’s presence. RP 115.

Hayes maintained this stance upon being cross-examined. When asked “you hadn’t given him [the appellant] any money at that time [i.e. before entering the garage],” Hayes replied, “No” and “Not that I recall, no.” RP 125. When asked, “You didn’t give him any money in the house?” he replied, “I’m not...” at which point the

appellant's trial counsel asked, "There was nobody else around when you gave the money?" to which Hayes replied, "I don't believe so, no." Id. When later asked, "And you said that when you handed over the money Brian Nicklaus wasn't around?" he replied, "Not that I can recall, no." RP 131.

There was admittedly no direct evidence as to how the appellant got the stolen items in the first place. However, as the jury was properly instructed, it was entitled based on "common sense and experience" to "reasonably infer" some facts about how the appellant received the items, CP 71.

It was proven that all four of these items had been stolen in one burglary from the Skamania Lodge on October 30, 2011. RP 205-208, 228-229, 253-261, 268, 270-272. This was less than three months from the transaction at issue (January 27, 2012). RP 168.

The items were sold at 100 Iman Cemetery Road in Stevenson, Skamania County, Washington. RP 170. While there is no evidence in the record as to how far this is from the Skamania Lodge, it is clearly in the same county (as shown not only by the name but by the fact that a Skamania County deputy investigated the original burglary there, RP 190-191). Furthermore, a rational

juror from Skamania County would know from "common sense and experience," CP 71 that the two are only several miles apart.

Thus, the items clearly could not have been bought at a retail store. They could not have been bought at a garage sale, as the appellant's trial counsel argued, RP 351, because it is not realistic someone from Skamania County would happen to buy at a garage sale items recently stolen in Skamania County and nor is it likely someone in Skamania County would offer such items for sale.

It is also unlikely in the extreme that the items were purchased on the Internet since it would be highly unusual for someone to be offering on the Internet items stolen from Skamania County and to have them purchased less than three months after the theft by someone who happens also to live in Skamania County. Once again, a rational juror from Skamania County would know, from "common sense and experience," CP 71, that Skamania County is a small, rural county of some 11,000 residents.

With the timing of the sale (less than three months from the theft/burglary), the location of the sale (merely miles away from the theft/burglary), and the fact that all items came from one distinct burglary/theft, the jury was entitled rationally to infer that the appellant must have either committed the burglary himself or to

have received the stolen items in somewhat suspicious circumstances, circumstances that at minimum would have led the appellant (or a reasonable person in his position) to believe there was a substantial risk they were stolen.

Furthermore, all four items were Stihl brand, RP 203-204. There was testimony from Hayes that the Stihl brand was "one of the better brands," RP 97 and from Det. Garrity that it is a high end brand, RP 170. A rational juror could infer that the appellant knew there was a substantial risk the items were stolen from the low price (\$300) that the appellant wanted for a Stihl chain saw and two Stihl weed eaters, RP 99-100. Even more probative of this knowledge was the fact that at the last minute, the appellant threw in an extra Stihl chain saw without charging anything more. RP 114-115.

The jury could have rationally inferred that the appellant was especially concerned about getting rid of this additional item, "[t]he littlest chain saw," RP 143, because this was the item that contained the number 59 stuck on by the Skamania Lodge, RP 207-208, 258-259, 264. Certainly a reasonable person in the appellant's position would have believed there was a substantial risk that a large tool containing a stuck-on number was stolen.

Perhaps a bit paradoxically, the jury could also have inferred that the appellant knew there was a substantial risk the items were stolen from his response to Hayes' remark that his (Hayes') uncle thought the items were stolen, RP 116, 126. The appellant replied, "no, no, these aren't stolen" or something to that effect. Id. Since as shown above, the appellant could not have gotten these items in other than suspicious circumstances, he could not have been so confident they were not stolen and his too confident assurance about it is itself probative he knew there was a substantial risk they were in fact stolen.

Finally, there is the testimony of Brian Nicklaus, the father of the appellant's girl-friend, RP 179. He testified that the appellant told him the chain saws had been the ones the appellant had been using the previous summer for woodcarving downtown. RP 223. This referred to what Nicklaus had seen the appellant doing before September 2011. RP 220-221. The appellant's making this claim is highly probative of guilty knowledge since the burglary/theft did not occur until October 30, 2011. RP 191.

Nicklaus initially denied the appellant said this until impeached with a prior inconsistent statement, RP 221-223. He later backtracked upon being re-called as a witness by the

appellant's attorney, claiming that the connection was one he (Nicklaus) deduced or inferred on his own, RP 294, 297.

However, the jury was entitled to disregard his denials as based on his bias towards his daughter's boyfriend. The jury was properly instructed that this is something which may be taken into account when evaluating credibility. CP 66. For purposes of this appeal, it must be assumed the jury accepted the version of Nicklaus's testimony that is favorable to the State, i.e. that the appellant *did* make the statement that is provably false and thus probative of his guilty knowledge.

It should finally be noted that the jury's failure to return a verdict on the crime as charged, RP 372, CP 88, itself shows that the jurors did not rush to judgment but carefully considered all the evidence or lack thereof, as was their charge, CP 70. In so doing, they obviously could not reach a unanimous determination that the appellant actually knew the property was stolen, an element of the crime as charged, CP 75, but did unanimously determine that he knew of and disregarded a substantial *risk* the property was stolen, CP 83, 84. Their carefully considered verdict should stand.

**2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION  
WHEN IT ALLOWED THE CONFIDENTIAL  
INFORMANT AND OFFICERS TO TESTIFY THAT, IN**

**ADVANCE OF THE PLANNED TRANSACTION, THE  
CONFIDENTIAL INFORMANT IDENTIFIED THE  
PROPERTY AS STOLEN**

The appellant argues that it was prejudicial error for the trial court to have allowed testimony that Hayes identified the property to be purchased from the appellant as stolen prior to the transaction, Brief of Appellant at 8-9.

Under ER 402, "[a]ll relevant evidence is admissible, except as limited by . . . these rules [of Evidence]." Evidence is "relevant" if it has

any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 401. One limitation to the general admission of all relevant evidence is contained in ER 403, which allows the court to exclude evidence "if its probative value is *substantially* outweighed by the danger of unfair prejudice . . ." (emphasis added).

However, our courts recognize that "nearly all evidence will prejudice one side or the other" and that "[e]vidence is not rendered inadmissible under ER 403 just because it may be prejudicial." Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994). "The court's decision on the relevance and prejudicial effect of the

evidence may only be reversed upon a manifest abuse of discretion." State v. Rice, 48 Wn. App. 7, 11, 737 P.2d 726 (1987).

Here, the trial court only allowed this testimony not for the truth of the matter asserted but because it "leads the officers to do other things," RP 46. As the trial court later stated in denying the appellant's motion for reconsideration:

Some lay witness out there says, I saw John Jones kill Mary Smith, that's not offered necessarily to prove that that occurred, or as proof that that actually occurred, but for another purpose. And that is in this case what the officers did next, how they proceeded in their tactics to investigate the crime.

RP 89.

In the context of ER 404(b) evidence, this is known as the *res gestae* rule which allows evidence of other acts of misconduct

to complete the crime story by establishing the immediate time and place of its occurrence. [citations omitted]. Where another offense constitutes a 'link in the chain' of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible 'in order that a complete picture be depicted for the jury'" [citations omitted].

State v. Hughes, 118 Wn. App. 713, 725, 77 P.3d 681 (2003)

(quoting State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981).

Similarly, in this case, the testimony was necessary in order for the

jury to understand how the whole transaction came about. Its admission was not a manifest abuse of discretion.

The appellant argues that even if relevant, the testimony should have been excluded as prejudicial under ER 403:

...[I]n the absence of proof as to Hayes' basis of knowledge, the jury was left to speculate that Mr. Cutts had told Hayes the property was stolen, or that Hayes somehow knew Mr. Cutts had been involved in its theft.

Brief of Appellant at 9. However, as the appellant's trial counsel noted, Hayes may also have had

some different and distinct knowledge completely different than what Mr. Cutts has. If he was involved in the burglary and stole the items, obviously his knowledge that these items are stolen is going to be different than somebody else, which is something that the State is going to have to prove. So the knowledge of the confidential informant is not important.

RP 80.

While the State *initially* argued that Hayes' knowledge was in and of itself relevant, RP 41, it later agreed with the appellant's trial counsel "that the confidential informant's knowledge of whether they [the items] are stolen is not itself relevant" but argued that the testimony "is important in terms of the overall *res gestae* ...," RP 85. "Without that sort of missing link," the State continued, "it

leaves sort of a missing link in the story,” RP 86. It was on this basis only that the trial court admitted the testimony, RP 89.

As the State ultimately argued to the trial court, the evidence only shows “that the confidential informant [Hayes] found out about the burglary . . . and then sort of made that connection himself,” RP 86. For this reason, it was not unduly prejudicial.

Finally, if there was any error, it was harmless. “The error is harmless if the evidence is of minor significance compared to the overall evidence as a whole,” State v. Everybodytalksabout, 145 Wn.2d 456, 469, 39 P.3d 294 (2002).

Here, the State did not attempt to make *any* argument linking Hayes’ knowledge or suspicions with what it had to prove, i.e. the *appellant’s* knowledge. See RP 327-342, 362-368. As outlined in Section 1 above, there was ample proof of the appellant’s knowledge already.

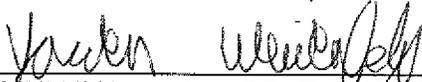
The testimony about what led up to the transaction at issue was left where it belonged—as mere background information to explain how the controlled transaction came about. It was of minor significance when analyzed in the context of all the evidence and was therefore, even if erroneously allowed, harmless.

D. CONCLUSION

For the above reasons, this Court should uphold the appellant's conviction.

DATED this 14<sup>th</sup> day of January, 2013.

RESPECTFULLY submitted,

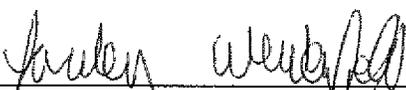
By:   
YARDEN WEIDENFELD, WSBA 35445  
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CERTIFICATE OF SERVICE

Electronic service of the original brief was effected on January 14, 2013 via the Division II upload portal upon opposing counsel. On January 16, 2013, the brief was again served by email attachment with two slight corrections of typos in the Table of Contents.

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# SKAMANIA COUNTY PROSECUTOR

**January 14, 2013 - 4:52 PM**

## Transmittal Letter

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