

NO. 44385-6

---

---

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

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL ROBERT GARBER, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Frederick Fleming

No. 12-1-01516-5

---

**BRIEF OF RESPONDENT**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
KIMBERLEY DEMARCO  
Deputy Prosecuting Attorney  
WSB # 39218

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

    1. Did the trial court properly admit defendant’s confession where the totality of the circumstances supported a finding that defendant’s will was not overborne? ..... 1

    2. Should this court decline to consider defendant’s forfeiture argument where it was not raised below, is not a manifest error affecting a constitutional right, and is not ripe for review? ..... 1

B. STATEMENT OF THE CASE. ..... 1

    1. Procedure ..... 1

    2. Facts ..... 3

C. ARGUMENT..... 8

    1. THE TRIAL COURT PROPERLY DENIED DEFENDANT’S MOTION TO SUPPRESS HIS CONFESSION AS THE TOTALITY OF THE CIRCUMSTANCES FAILED TO SHOW THAT HIS WILL WAS OVERBORNE..... 8

    2. THIS COURT SHOULD DECLINE TO CONSIDER DEFENDANT’S ARGUMENT REGARDING FORFIETURE OF PROPERTY AS HE FAILED TO OBJECT TO THE FORFEITURE BELOW AND HAS NOT ATTEMPTED TO RECOVER ANY OF THE PROPERTY TO WHICH HE MIGHT BE ENTITLED. ... 17

D. CONCLUSION. ..... 20

## Table of Authorities

### State Cases

<i>State v. Alaway</i> , 64 Wn. App. 796, 798, 828 P.2d 591, <i>review denied</i> , 119 Wn.2d 1016, 833 P.2d 1390 (1992).....	18
<i>State v. Armenta</i> , 134 Wn.2d 1, 9, 948 P.2d 1280 (1997) .....	11
<i>State v. Broadaway</i> , 133 Wn.2d 118, 132, 942 P.2d 363(1997).....	8, 9, 10
<i>State v. Burkins</i> , 94 Wn. App. 677, 694, 973 P.2d 15 (1999) .....	8
<i>State v. Halstien</i> , 122 Wn.2d 109, 129, 857 P.2d 270 (1993).....	11
<i>State v. Hill</i> , 123 Wn.2d 641, 644, 870 P.2d 313 (1994) .....	10
<i>State v. Jasper</i> , 174 Wn.2d 96, 120, 271 P.3d 876 (2012).....	16
<i>State v. Kirkman</i> , 159 Wn.2d 918, 935, 155 P.3d 125 (2007).....	17
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....	17
<i>State v. O’Hara</i> , 167 Wn.2d 91, 99, 217 P.3d 756 (2009).....	17
<i>State v. Reuben</i> , 62 Wn. App. 620, 624, 814 P.2d 1177 (1991) .....	8
<i>State v. Rupe</i> , 101 Wn.2d 664, 678–79, 683 P.2d 571 (1984).....	9
<i>State v. Sterling</i> , 23 Wn. App. 171, 177, 596 P.2d 1082 (1979).....	18
<i>State v. Thompson</i> , 73 Wn. App. 122, 131, 867 P.2d 691 (1994) .....	8
<i>State v. Unga</i> , 165 Wn.2d 95, 102, 196 P.3d 645 (2008) .....	9, 10, 11, 12, 13

**Federal and Other Jurisdiction**

*Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408,  
57 L. Ed. 2d 290 (1978).....8

*Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602,  
16 L. Ed. 2d 694 (1966).....7, 12

*Schneekloth v. Bustamonte*, 412 U.S. 218, 225, 93 S. Ct. 2041,  
36 L. Ed. 2d 854 (1973).....8

*United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir.1995),  
*vacated on other grounds*, 517 U.S. 1231, 116 S. Ct. 1873,  
135 L. Ed. 2d 169 (1996), *adhered to on remand*,  
124 F.3d 205 (7th Cir.1997).....10

*United States v. Guerrero*, 847 F.2d 1363, 1366 n. 1 (9th Cir.1988).....9

*United States v. Walton*, 10 F.3d 1024, 1029 (3d Cir.1993).....9

**Rules and Regulations**

CrR 3.5.....7, 10

RAP 2.5(a).....17, 19

RAP 2.5(a)(3) .....17

RAP 9.6(a).....4

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly admit defendant's confession where the totality of the circumstances supported a finding that defendant's will was not overborne?
2. Should this court decline to consider defendant's forfeiture argument where it was not raised below, is not a manifest error affecting a constitutional right, and is not ripe for review?

B. STATEMENT OF THE CASE.

1. Procedure

On April 30, 2012, the State charged DANIEL ROBERT GARBER, hereinafter "defendant," with two counts of theft of a motor vehicle and one count of unlawful possession of a stolen vehicle. CP<sup>1</sup> 1-2. On July 17, 2012, the State filed an amended information with the same counts, but added two aggravators to each count. CP 6-7. The State alleged that defendant had committed multiple current offenses and his high offender score would result in some of the current offenses going unpunished and that he committed the current offenses shortly after being

---

<sup>1</sup> Citations to Clerk's Papers will be to "CP." The verbatim report of proceedings are numbered by volume, but are not sequentially numbered. Citations to the transcripts will be to the volume number, followed by "RP" and the page number.

released from incarceration. CP 6-7. A corrected information was filed in open court on November 1, 2012, to correct the offense dates. CP 13-14.

On November 1, 2012, bench trial commenced before the Honorable Frederick Fleming. 1RP 1, 23-24. Pretrial, defendant moved to suppress statements he made during a police interrogation, claiming that his confession was coerced. CP 15-19, 1RP 26-98, 2RP 1-58. The court heard evidence from Lakewood Police officer Jeff Hall and Pierce County sheriff detective Shaun Darby, who were the officers involved in the interview, as well as Pierce County sheriff deputy Douglas Maier, who had interviewed defendant prior to his being a suspect. 1RP 26-82. Defendant testified on his own behalf. 2RP 5-42. The trial court denied defendant's motion, finding that under the totality of the circumstances his will had not been overborne. CP 55-58; 2RP 56-57.

On November 9, 2012, the court found defendant guilty of the two counts of theft of a motor vehicle, but not guilty of unlawful possession of a stolen vehicle. CP 33-38; 4RP 8-9, 20-21, 31. The court also found the aggravating factor of rapid recidivism beyond a reasonable doubt. 4RP 40.

On December 21, 2012, despite the court finding that defendant's high offender score would cause some of his current crimes to go

unpunished, the court sentenced defendant to a high-end, standard-range<sup>2</sup> sentence of 57 months, together with restitution to be determined and standard fees. 5RP 14. As a condition of sentence, the court ordered defendant to forfeit “any property seized by law enforcement in this matter.” CP 42-54.

Defendant filed a timely notice of appeal. CP 59-60.

## 2. Facts

On April 23, 2012, Matthew Cowan drove his 1894 Oldsmobile to his job at the Target store in Lakewood, Washington. 2RP 65-66. He parked his car in the lot when he started his shift at 3:30 p.m. 2RP 65. When he left the store at 10:30 p.m., his car was gone. 2RP 66. Mr. Cowan does not know defendant, or anyone by the name of D Shot, and did not give either permission to take his car. 2RP 67.

Law enforcement recovered Mr. Cowan’s car. 2RP 69. The car’s passenger side door lock had been punched out, the steering column had been broken, and the gearshift knob had been pulled off. 2RP 68. The car had not been damaged before it was stolen. 2RP 68-69. There was also a screwdriver that did not belong to Mr. Cowan lying on the floor beneath the steering wheel. 2RP 72.

---

<sup>2</sup> Defendant had an offender score of 15, giving him a standard range of 43-57 months on each count.

Kaiya Rose Stewart was the loss prevention manager at Target. 2RP 59. On April 24, 2012, she received a report that an employee's car had been stolen the night before. 2RP 61. She reviewed the parking lot surveillance video, which showed<sup>3</sup> the employee's vehicle being stolen. 2RP 61-62.

On April 26, 2012, Jamal Robinson parked his 1976 Chevy Caprice in the parking lot of his apartment complex. 2RP 98. When he went out to check his mail, he discovered that his car was missing. 2RP 99. Mr. Robinson did not know defendant or anyone by the name of D Shot and did not give either permission to take his car. 2RP 101. When Mr. Robinson recovered his vehicle a couple of days later, there was damage to the steering column, the battery was disconnected, the speakers and amplifier had been ripped out, some of his military employment paperwork was missing, and the locks were broken. 2RP 102.

Roman Fesemko is a maintenance worker for Mr. Robinson's apartment complex. 2RP 89. He reviewed a surveillance video of Mr. Robinson's car being stolen. 2RP 90.

---

<sup>3</sup> Surveillance videos were admitted as evidence in this case, but as the issues raised in this appeal do not raise any issue regarding the sufficiency of the evidence, the State has not designated them as Clerk's Papers per RAP 9.6(a). 2RP 62 (Exhibit 37), 91-92 (Exhibit 36).

Also on April 26, 2012, Dana Lemos called to report her father-in-law's Nissan Quest stolen. 3RP 3-4. When her father-in-law came to her apartment, he asked her where the car was, because it was not parked in its usual spot. 3RP 4. She confirmed that the vehicle was missing and called the police. RP 4-5. When she recovered the vehicle a week later, the middle seat was missing and the van was full of garbage that was not hers. 3RP 10. The stereo was missing and the ignition and door locks were broken. 3RP 11. She does not know defendant or David Finn and did not give either man permission to take the van. 3RP 12.

Stephen Garber lives in Tacoma with his family, including defendant, his son. 3RP 20. On April 26, 2012, at approximately 2:20 p.m., Mr. Garber called the police to report an abandoned car. 3RP 21. A Chevrolet Caprice was parked in his cul-de-sac, but he had seen it in his own driveway the day before. 3RP 21, 22. He knew it was not defendant's car, because defendant drives a red Ford Fusion. 3RP 21. Defendant told him that he was planning to help his friend, D Shot, fix the car. 3RP 23-24. The responding police officer informed Mr. Garber that the Caprice had been stolen. 3RP 22.

Mr. Garber called defendant, who told him that he (defendant) had driven D Shot to where the car was to be picked up. 3RP 27. Defendant returned to the house before D Shot arrived with the car. 3RP 27.

Lakewood Police Officer Jeff Hall was assigned to work the theft of the Oldsmobile from the Target parking lot. 3RP 31. Through routine inter-departmental cooperation, Officer Hall was made aware of the theft of the Chevrolet Caprice, and discovered that a dark red or maroon Ford Fusion with black rims and wheels was involved with both thefts. 3RP 32. On April 26, 2013, he and Detective Shaun Darby were on a surveillance checking local areas in an attempt to identify suspects when they were informed that the Caprice had been recovered. 3RP 33, 83. They were informed that a man called "D Shot" was a suspect and that the car had been recovered in University Place. 3RP 33.

The officers were heading to University Place when they came upon a maroon Ford Fusion with black wheels traveling in the opposite direction. 3RP 34, 83. When they turned to follow, they noticed that the Fusion was being closely followed by a Nissan Quest van. 3RP 34, 83. A records check revealed that the van had been recently reported stolen. 3RP 34. Both vehicles turned into an alleyway and the officers were able to see the drivers. 3RP 35. Defendant was driving the Fusion. 3RP 35.

The officers called for back up before driving down the alley. 3RP 37. They saw both vehicles parked in a driveway, and defendant and the other driver were both out of the vehicles and were in the process of removing a rear wheel from the van. 3RP 37, 84. The other driver was

later identified as David Finn. 3RP 37, 86. Both men were arrested and the vehicles impounded. 3RP 40, 86.

Officer Hall and Detective Darby interviewed<sup>4</sup> defendant. 3RP 41, 86; *see also* Exhibit 33. Defendant was advised of his *Miranda*<sup>5</sup> rights, which he waived and agreed to speak to the officers. 3RP 42. Defendant also consented to his interview being audio and video recorded. 3RP 46, 86. Defendant initially denied involvement, but later admitted taking D Shot to steal the Oldsmobile and the Caprice. 3RP 46-50, 84-90. Ultimately defendant identified D Shot as Damien L. Hudson. 3RP 49. Defendant stated that he had received a small amount of money and some narcotics for the thefts. 3RP 51. Defendant did not admit to knowing the Nissan Quest was stolen. 3RP 55. Defendant claimed that he had some property stolen from Mr. Finn's residence and that Mr. Finn was giving him the wheels off of the Quest to repay him. 3RP 55-56, 91-92.

Defendant did not offer evidence or testify on his own behalf during the trial.

---

<sup>4</sup> This information was taken from trial testimony. Details of the interview from the pretrial CrR 3.5 hearing regarding the admissibility of the statements can be found in the argument section of the State's brief.

<sup>5</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTION TO SUPPRESS HIS CONFESSION AS THE TOTALITY OF THE CIRCUMSTANCES FAILED TO SHOW THAT HIS WILL WAS OVERBORNE.

Due process requires that a confession be voluntary and not the product of police coercion. *State v. Reuben*, 62 Wn. App. 620, 624, 814 P.2d 1177 (1991). A coerced confession may not be introduced against a defendant for any purpose. *Mincey v. Arizona*, 437 U.S. 385, 398, 98 S. Ct. 2408, 57 L. Ed. 2d 290 (1978). The test for voluntariness is whether the defendant made the free and unconstrained choice to confess. *State v. Thompson*, 73 Wn. App. 122, 131, 867 P.2d 691 (1994) (quoting *Schneckloth v. Bustamonte*, 412 U.S. 218, 225, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973)). A confession is coerced if, based on the totality of the circumstances, the defendant's will was overborne. *Mincey*, 437 U.S. at 402. Courts may consider factors such as the defendant's physical condition, age, mental abilities, physical experience, as well as police conduct. *State v. Burkins*, 94 Wn. App. 677, 694, 973 P.2d 15 (1999). In addition, "In assessing the totality of the circumstances, a court must consider any promises or misrepresentations made by the interrogating officers." *State v. Broadway*, 133 Wn.2d 118, 132, 942 P.2d 363(1997).

Whether any promise has been made must be determined and, if one was made, the court must then apply the totality of the circumstances test and determine whether the defendant's will was overborne by the promise, i.e., there must be a direct causal relationship between the promise and the confession. *Broadaway*, 133 Wn.2d at 132; see *State v. Rupe*, 101 Wn.2d 664, 678–79, 683 P.2d 571 (1984); *United States v. Walton*, 10 F.3d 1024, 1029 (3d Cir.1993) (“the real issue is not whether a promise was made, but whether there was a causal connection between [the promise] and [the defendant's] statement”).

This causal connection is not merely “but for” causation; the court does “not ask whether the confession would have been made in the absence of the interrogation.” *State v. Unga*, 165 Wn.2d 95, 102, 196 P.3d 645 (2008)). “If the test was whether a statement would have been made but for the law enforcement conduct, virtually no statement would be deemed voluntary because few people give incriminating statements in the absence of some kind of official action.” *United States v. Guerrero*, 847 F.2d 1363, 1366 n. 1 (9th Cir.1988).

A police officer's psychological ploys such as playing on the suspect's sympathies, saying that honesty is the best policy for a person hoping for leniency, or telling the suspect that he could help himself by cooperating may play a part in a suspect's decision to confess, “but so long as that decision is a product of the suspect's own balancing of

competing considerations, the confession is voluntary.” *Unga*, 165 Wn.2d at 102. “The question ... [is] whether [the interrogating officer’s] statements were so manipulative or coercive that they deprived [the suspect] of his ability to make an unconstrained, autonomous decision to confess.” *Unga*, 165 Wn.3d at 102; see *United States v. Baldwin*, 60 F.3d 363, 365 (7th Cir.1995) (“the proper test is whether the interrogator resorted to tactics that in the circumstances prevented the suspect from making a rational decision whether to confess or otherwise inculcate himself”), *vacated on other grounds*, 517 U.S. 1231, 116 S. Ct. 1873, 135 L. Ed. 2d 169 (1996), *adhered to on remand*, 124 F.3d 205 (7th Cir.1997).

Reviewing courts will not disturb a trial court’s determination that statements were voluntary if there is substantial evidence in the record from which the trial court could have found voluntariness by a preponderance of the evidence. *Broadaway*, 133 Wn.2d at 129. Findings of fact entered following a CrR 3.5 hearing are verities on appeal if unchallenged; and, if challenged, they are verities if supported by substantial evidence in the record.” *Broadaway*, 133 Wn.2d at 131. “Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding.” *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) (citing *State v. Halstien*, 122 Wn.2d 109, 129, 857 P.2d 270

(1993)). The reviewing court also determines whether the trial court derived proper conclusions of law from its findings of fact. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). The trial court's conclusions of law are reviewed de novo. *Armenta*, 134 Wn.2d at 9.

In *Unga*, the defendant was in a custodial interrogation regarding a vehicle vandalism. 165 Wn.2d at 98. An elementary school teacher's car had been stolen. *Unga*, 165 Wn.2d at 98. When the car was recovered, graffiti had been written on the dashboard which threatened a sheriff deputy who worked as a school resource officer. *Unga*, 165 Wn.2d at 98. During the interrogation, an officer told Unga that he "wouldn't charge him with malicious mischief . . . if he would tell me about another crime[.]" *Unga*, 165 Wn.2d at 98-99. The officer admitted he probably used the word "vandalism," rather than "malicious mischief." *Unga*, 165 Wn.2d at 99. Unga gave a written statement indicated that he was in the car, knew it had been stolen, and had written the words, but did not intend them to be a threat. *Unga*, 165 Wn.2d at 99. Unga testified that he understood the officer's statement to mean that he would not be charged for any crime relating to the car. *Unga*, 165 Wn.2d at 99. Unga was charged with one count of taking a motor vehicle without permission in the second degree and one count of vehicle prowling in the second degree. *Unga*, 165 W.2d at 99. Unga unsuccessfully moved to suppress his

confession, claiming he was coerced by the promise not to be charged with a crime. *Unga*, 165 Wn.2d at 99-100. On direct appeal, Unga's convictions were affirmed. *Unga*, 165 Wn.2d at 104. On review, our Supreme Court held that the officer's promise did not render Unga's confession involuntary under the totality of the circumstances, which included his waiver of *Miranda* rights and his familiarity with the criminal system. *Unga*, 165 Wn.2d at 108. The Court also considered several other factors:

The questioning was of short duration, lasting only 30 minutes. Unga was questioned in a small room containing a table and two chairs, where the door was left open. The interviewing officer was not in uniform and did not wear a firearm. There is no evidence that Mikulcik used a threatening tone, raised his voice, badgered Unga, attempted to intimidate him, or engaged in other similar tactics. Unga was not subjected to lengthy, prolonged questioning, nor with repeated rounds of questioning. There is no evidence that he was deprived of any necessities such as food, sleep, or bathroom facilities. In *LeBrun*, 363 F.3d at 726, the court found the defendant's confession was voluntary, noting among other things that it placed "substantial weight on the fact that [the defendant] confessed after a mere thirty-three minutes" and the situation was not one where officers wore down the defendant's will with persistent questioning over a considerable length of time. Cf. *Haley*, 332 U.S. 596, 68 S.Ct. 302 (confession involuntary where 15-year-old was arrested at midnight, held incommunicado, subjected to continuous interrogation by a rotation of police officers until he confessed after having been shown alleged confessions of two others involved in the robbery, not informed of right to counsel, and, when his mother brought

fresh clothing for him, she found his old clothing was torn and bloody).

*Unga*, 165 Wn.2d at 108-09.

Here, there is no evidence that defendant's will was overborne. Looking at the totality of the circumstances, defendant's confession was voluntary. Defendant understood that he had the right to remain silent and chose to waive that right. Exhibit 33. As defendant had a lengthy criminal history and had recently been released from incarceration he clearly had substantial experience with the criminal justice system and understood that he was being questioned regarding a crime. Exhibit 33. The questioning was of short duration, lasting approximately one hour. Exhibit 33. Defendant's confession occurred within 20 minutes of commencement. Exhibit 33. The officers were in plain clothes and if they were armed, it would not have been visible to defendant as both officers were wearing long shirts that were untucked and covering their waists. Exhibit 33. Neither officer ever displayed a weapon. Exhibit 33. Defendant was questioned in a small room and the officer sat on the opposite side of the table from him. Exhibit 33. Neither officer invaded defendant's personal space or behaved in an aggressive fashion, but rested their elbows on the table or leaned back in their chairs. Exhibit 33. Neither officer raised his voice to defendant, but did use language similar

to the language defendant was using during the interview. Exhibit 33. Finally, there is no evidence that he was deprived of food, water, or restroom facilities. Exhibit 33. Defendant does claim that he was deprived of sleep, yet he makes no claim that it was the police that caused the deprivation. 2RP 8. In fact, defendant stated that he was able to sleep in a cell prior to the interview. 2RP 11. Moreover, while defendant exhibited some tiredness, he never stated that he was too tired to continue the interview, never told the officers that he had been awake for eight days, and his answers were coherent, responsive, and appropriate. Exhibit 33. While defendant did appear to “nod off” in the interview room, this occurred only during periods where he was left alone in the room for ten minutes at a time, and only after his confession. Exhibit 33.

Defendant claims that Detective Darby threatened to charge him with assault if he did not confess to the vehicle thefts. During the interview, defendant revealed the fact that he drove D Shot to UPS on a night which the officers knew there had been a shooting. Exhibit 33. As they suspected defendant and his passenger of stealing cars, the UPS incident appeared to be a case of car theft gone wrong, and defendant admitted having been in the area at the time, the officers attempted to follow up. Exhibit 33. Defendant indicated that he was unaware of the shooting, but continued to minimize his involvement with D Shot. Exhibit

33. Finally, when he claimed to not know D Shot's real name despite

knowing him for almost a decade, Detect Darby stated:

Come on man. I'm not buying that. You know a dude for five, ten years and you've called him nothing but D Shot? Okay. Here's the deal. We're going to cut through the bullshit. You need to look out for yourself. D Shot might have fucking shot at a guy over at UPS. Okay. And you dropped him off there. You need to understand what side of the fence you want to be on this thing. Now, I understand you're going through some shit with your girl. You want D Shot...your girl doesn't want D Shot around the fucking house. It's not like your doing the shooting or doing the boosting. I fucking get that. But to sit over on the side of the table and go "I don't know shit that is going on" is not the side of the fence you want to be on this thing because D Shot has got himself in a lot of fucking trouble. Now, if D Shot is going to take you down. He says give me a ride and then boosts this fucking car and I'll give you're the 22's off it or we'll sell the 22's and we'll split the money, whatever, fine. I can fucking deal with that. That's not like shooting at some fucking security guy at UPS, okay? You need to figure out where you want to be on this thing, because you're either going to be with D Shot on that whole fucking thing or you're going to come clean on this [the Oldsmobile] and the Caprice. Now when you drove him to Target. Target has very good fucking video surveillance. Okay. You parked, it was your car, your plate, and you waited until dude got it started. And then you guys followed one another out of there. So we got to drop the "I don't knows" and the "five bucks for gas," thing.

Tell me what happened with that car. Why that one? Does D Shot just because he is old school have a way...or D Shot have a way of getting into these older rigs versus ...I mean, what makes him an Olds '98 guy and a Caprice guy versus a Honda guy?

Exhibit 33. This statement clearly informed defendant that he could be an accomplice to the assault if he was aware of D Shot's actions and that he could help himself by cooperating. It also informed him that the surveillance video from Target undermined his claims that he did not know that D Shot was stealing cars. There was no threat to charge defendant with assault if he did not confess to vehicle theft, nor was there a promise not to charge him if he did confess. Defendant could have ended the questioning, but he chose to admit that he was aware that D Shot was stealing the cars, but continued to deny any direct involvement. Exhibit 33. Substantial evidence exists to support the trial court's finding that the confession was voluntary and the statements were properly admitted.

Even if this court finds that the confession was improperly admitted, defendant's request for relief is inappropriate. When improper evidence is admitted at trial, the appropriate remedy is remand for retrial without such evidence. *State v. Jasper*, 174 Wn.2d 96, 120, 271 P.3d 876 (2012) (When evidence is admitted at trial and later held to violate the confrontation clause, the proper remedy is to remand for retrial). As a challenge to the sufficiency of the evidence accepts the truth of *all* evidence presented by the State, defendant's request that this court review the sufficiency of the evidence after suppressing a portion is incorrect.

The State does not concede error in this case, but if the court finds error, the appropriate remedy is remand for retrial.

2. THIS COURT SHOULD DECLINE TO CONSIDER DEFENDANT'S ARGUMENT REGARDING FORFEITURE OF PROPERTY AS HE FAILED TO OBJECT TO THE FORFEITURE BELOW AND HAS NOT ATTEMPTED TO RECOVER ANY OF THE PROPERTY TO WHICH HE MIGHT BE ENTITLED.

Under RAP 2.5(a) The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise for the first time on appeal a manifest error affecting a constitutional right. RAP 2.5(a)(3). A constitutional error is manifest if actual prejudice results from the error. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The burden is on the defendant to identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights at trial. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). "[T]here must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case." *O'Hara*, 167 Wn.2d at 99 (internal quotation marks omitted) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice focuses on "whether the error is so obvious on the record that the error warrants appellate review." *O'Hara*, 167 Wn.2d at 99–100. "[S]peculation or

possibility is insufficient to show prejudice.” *State v. Sterling*, 23 Wn. App. 171, 177, 596 P.2d 1082 (1979).

Here, defendant asserts that the court-imposed condition of forfeiting all property seized exceeds the statutory authority of the court. Defendant has not shown that this issue is of constitutional magnitude. Moreover, the only record of property in evidence is the list of exhibits received in the vault of the Superior Court Clerk’s Office. CP 66-69. The record does indicate that, at one time, defendant’s red Ford Fusion was located in the Lakewood Police Department’s impound yard, but there is no information regarding whether the vehicle was actually seized as evidence or if it was merely impounded when defendant was arrested. *See* 3RP 43-44. Moreover, there is no evidence suggesting that the car is still located in the impound yard. The vehicle may be there, but it may also have already been released to defendant’s father. In short, we can only speculate and this issue is not manifest.

With regard to the items contained on the exhibit list, the court did not exceed its statutory authority in ordering forfeiture, as defendant has no claim to the photographs taken by the investigating officer, the officers’ reports, copies of the surveillance or interview videos, or any of the other items admitted as evidence. *See State v. Alaway*, 64 Wn. App. 796, 798, 828 P.2d 591, *review denied*, 119 Wn.2d 1016, 833 P.2d 1390 (1992) (“A

court may refuse to return seized property no longer needed for evidence . . . if the defendant is not the rightful owner[.]”). There some possibility that defendant is entitled to the screwdriver contained in Exhibit 31, yet defendant never claimed ownership of the property at trial and it was found inside a car that did not belong to him. 3RP 52. As defendant did not object below, the court was unable to make a factual finding of ownership. In addition, nothing in the record indicates that defendant has sought the return of the screwdriver or that he has any interest in its return.

Defendant has recourse to claim the property by requesting a hearing in the Superior Court for the return of the screwdriver and his car, if it is still in the Lakewood Police Department impound yard. If the court refuses their return, he could appeal that decision. Until defendant seeks return of this property, any issue arising from their forfeiture is entirely speculative and cannot be raised in this appeal under RAP 2.5(a).

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's convictions and sentence.

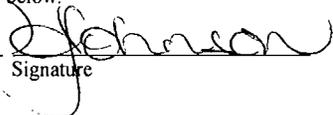
DATED: DECEMBER 10, 2013

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
KIMBERLEY DEMARCO  
Deputy Prosecuting Attorney  
WSB # 39218

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

  
Date: 12/13/13 Signature

# PIERCE COUNTY PROSECUTOR

## December 10, 2013 - 1:24 PM

### Transmittal Letter

Document Uploaded: 443856-Respondent's Brief.pdf

Case Name: STATE V. DANIEL GARBER

Court of Appeals Case Number: 44385-6

**Is this a Personal Restraint Petition?** Yes  No

#### The document being Filed is:

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

#### Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: [hjohns2@co.pierce.wa.us](mailto:hjohns2@co.pierce.wa.us)

A copy of this document has been emailed to the following addresses:  
[KARSDROIT@AOL.COM](mailto:KARSDROIT@AOL.COM)