

**NO. 44525-5-II**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**ROBIN LAVIN,**

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PACIFIC COUNTY

The Honorable Michael J. Sullivan, Judge

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**OPENING BRIEF OF APPELLANT**

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LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1396  
Longview, WA 98632  
(360) 425-8155

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**A. ASSIGNMENTS OF ERROR**

1. The evidence is insufficient to support a conviction for trafficking in stolen property in the second degree.

2. The prosecutor committed misconduct in closing argument by arguing facts not in evidence.

3. Defense counsel denied Mr. Lavin effective counsel by his failure to object to inadmissible hearsay that a hoe pack was stolen.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Sufficient proof of trafficking in stolen property in the second degree requires evidence that the trafficker of the stolen property knew it was stolen. Here the evidence does not establish Mr. Lavin knew a hoe pack he sold was stolen. Is the proof that Mr. Lavin trafficked in stolen property insufficient?

2. It is reversible error, even when the defendant does not object, for the prosecutor to argue facts not in evidence during closing argument if the argument likely affected the jury's verdict. Here the prosecutor in closing argument affected the verdict by adding facts that changed occurrence dates, impeached Mr. Lavin's version of events, and contradicted other testimony. As the prosecutor's added facts likely changed the outcome of Mr. Lavin's trial, should Mr. Lavin's conviction be reversed?

3. Defense counsel provides ineffective assistance of counsel when an objection to inadmissible hearsay would have been sustained and the outcome of the trial different. Here, defense counsel failed to object to inadmissible hearsay that provided the only evidence of an element of the crime. Was defense counsel ineffective?

**C. STATEMENT OF THE CASE**

1. Procedural overview

The State charged Robin Lavin with a single count of trafficking in stolen property in the second degree for selling what turned out to be a stolen hoe pack. CP 1-2, 4-5. A jury found Mr. Lavin guilty as charged. CP 3. Post sentencing, Mr. Lavin filed a notice of appeal. CP 6-16, 17-18.

2. Theft, sale, and return of Rognlin's hoe pack

Kirk Hollatz is a project manager for Rognlin's, a Pacific County construction company. RP<sup>1</sup> 31. In October 2011, crew members told him that Rognlin's property had been stolen. Hollatz testified, "The report I got from the crew was a laser, a hoe pack, and I believe it was a cut-off saw" were stolen.<sup>2</sup> RP 28. Mr. Hollatz did not specify when the property was stolen and under what circumstances. None of the reporting crew members testified.

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<sup>1</sup> There is just a single volume of verbatim report of proceedings for this appeal.

<sup>2</sup> Defense counsel did not object to this testimony.

A hoe pack is an attachment for either an excavator or a rubber tire backhoe. It attaches to the back and is used for compacting trenches or other material. RP 28. A hoe pack weighs about 400-500 pounds and fits in an uncovered bed of a pick up. It takes more than two people to lift it or it can be moved using a fork lift. RP 28, 34, 37, 44.

Dave Frasier worked for Rognlin's in October 2011. Around that time, Mr. Frasier heard a hoe pack was for sale. RP 34. His boss asked him to check into it. Mr. Frasier did so by calling contractor Dan Bayne. RP 34. At Mr. Bayne's direction, a friend of his notified Rognlin's that Mr. Bayne had a hoe pack for sale. RP 42. After looking over the hoe pack Mr. Bayne had for sale, Mr. Frasier loaded it into his truck and took it to Rognlin's. RP 34. Rognlin's had a few hoe packs at the time and Mr. Frasier did not immediately recognize it as one of their packs. RP 35.

When Rognlin's acquires new equipment, it records the acquisition and stamps the equipment with its name and address. The stamp is approximately 10 x 12 inches.<sup>3</sup> RP 34. After a further examination of the hoe pack, Mr. Frasier noticed Rognlin's stencil on the pack and realized it was the stolen hoe pack. RP 35.

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<sup>3</sup> Mr. Hollatz could not say if the stamp is removed when Rognlin's sells or otherwise disposes of unwanted property. RP 32.

The jury was never shown a picture of the hoe pack, Rognlin's identification stamp, or the stamp on the stolen hoe pack. The State never moved to admit any exhibits at trial.

Mr. Frasier testified he bought the hoe pack from Robin Lavin sometime in October 2011. RP 40-41. Mr. Frasier could not recall if it was early or late October. RP 43. He paid Mr. Lavin \$1,800 cash for the pack. RP 41. Mr. Frasier also bought a walk behind compactor from Mr. Lavin.<sup>4</sup> RP 41. Mr. Lavin also offered to sell Mr. Bayne a generator. RP 41. Mr. Frasier hoped to turn around and sell the hoe pack for a profit. RP 48.

In negotiating for the purchase of the hoe pack, Mr. Bayne met with Mr. Lavin twice. Mr. Lavin never tried to conceal the hoe pack. The hoe pack was uncovered and in the back of Mr. Lavin's pickup. Both of the meetings were in open areas and during daylight hours. RP 45-46. Mr. Lavin drove on Highway 101 to get to the first meeting. Nothing about the deal suggested to Mr. Frasier that the hoe pack was stolen. RP 44-47. He never saw a Rognlin's property stamp on the hoe pack. RP 46. Mr. Bayne told the jury what Mr. Lavin told him about how he acquired the hoe pack: "He'd gotten it from a friend of his whose father had died

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<sup>4</sup> The Information listed both the hoe pack and the compactor as stolen property. CP 1-2. Late in the State's case, the State moved to file an amended information deleting the compactor as a stolen item. CP 4-5; RP 79, 96.

and they were selling their equipment. He was in the construction business.” RP 41.

Mr. Lavin did not testify and presented no defense witnesses. RP 74.

3. Property damage at Rognlin’s construction site

Around 6:30 a.m. on October 16, 2011, Raymond Police Officer Robert Verboomen was dispatched to a Rognlin’s construction site just off of Highway 101. On the site was a large Conex storage container. The container’s doors had been ripped off with some type of heavy equipment. RP 59-60.

Gary Habenetzer, who lived nearby, heard out-of-the-ordinary loud noises coming from the site early that morning. He saw a pickup seemingly illuminating the container with its headlights. He figured someone used a chain and backhoe to tear the container door off the container. RP 52-55.

No one from Rognlin’s testified about the Conex container or its contents.

4. The “to convict” instruction

Although there was no testimony about when in October Mr. Lavin had the hoe pack, the court gave Instruction 11, the “to convict”

instruction, as to the elements of trafficking in stolen property in the second degree.

To convict the defendant of trafficking in stolen property in the second degree, each of the following elements must be proved beyond a reasonable doubt:

(1) That on or about October 27, 2011, the defendant recklessly trafficked in stolen property;

(2) That the acts occurred in the State of Washington.<sup>5</sup>

Supplemental Designation of Clerk's Papers, Court's Instructions to the Jury, Instruction 11 (sub. nom. 39).

Mr. Lavin did not object to this, or any, of the jury instructions.

RP 95.

The Information and Amended Information under which Mr. Lavin was tried charged that Mr. Lavin trafficked in stolen property on or about October 27, 2011. CP 1-2, 4-5.

5. Closing arguments

During closing arguments, the prosecutor made statements about "facts" that were not part of the evidence at trial. The prosecutor argued that Rognlin's employees testified, "their place was broken into, the job site, on the 16<sup>th</sup> and that a laser level, a Honda generator, and a Teledyne Hoe Pack were taken." RP 101. Also, "Mr. Baynes testified that Mr.

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<sup>5</sup> The balance of the instruction is of no consequence so it is not included.

Lavin told him, oh, no, it's not stolen. I – I got it out of an estate sale.”

RP 103.

And,

Now the hoe pack was stolen on October 16<sup>th</sup>. We don't know that Mr. Lavin stole it. He's not charged with stealing it so, you know, that's – that's not one of the elements that has to be proven. And we don't have the evidence that he was there that day but we do know that within a week he went to Mr. Bayne and got \$1,800 cash for it claiming he got it at an estate sale and we know that in big letters was the information for the owner. What do we expect as member of society to do when there's big letters indicating how to return a piece of property to its owner?

RP 104.

In rebuttal,

That there's a big stencil that says it belongs to Rognlin's and you disregard it, that that might put someone on notice that this item was hot. He disregarded that. He didn't contact them. He didn't – didn't try to return it. Instead he went and sold it for cash claiming that he got it at an estate sale.

RP 115.

Defense counsel did not object to any of these statements of “fact.”

RP 100-05, 114-16.

**D. ARGUMENT**

**1. THE EVIDENCE DOES NOT SUPPORT A FINDING OF GUILT FOR TRAFFICKING IN STOLEN PROPERTY IN THE SECOND DEGREE.**

The State is burdened with proving that Mr. Lavin recklessly trafficked in stolen property. The State failed to prove that Mr. Lavin

knew or should have known the hoe pack was stolen. Consequently, the evidence of the crime is insufficient and Mr. Lavin's conviction for trafficking in stolen property in the second degree must be reversed and dismissed with prejudice.

- a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt.

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); RCW 9.94A.100(1). The allocation for the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I, Section 3 of the Washington Constitution and the 14<sup>th</sup> Amendment of the federal constitution. *Sandstrom v. Montana*, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984).

On a challenge to the sufficiency of the evidence, this Court must reverse a conviction unless, after viewing the evidence most favorable to the State, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). “[A]ll reasonable inferences

from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence carry equal weight. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). However, when an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. *United States v. Bautista-Avila*, 6 F.3d 1360, 1363 (9<sup>th</sup> Cir. 1993) “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt. *United States v. Lopez*, 74 F.3d 575, 577 (5<sup>th</sup> Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. *State v. Prestegard*, 108 Wn. App. 14, 22-23, 28 P.3d 817 (2001).

A challenge to the sufficiency of the evidence may be raised for the first time on appeal as manifest constitutional error. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

- b. In order to prove Mr. Lavin guilty of trafficking in stolen property in the second degree, the State was required to prove beyond a reasonable doubt that he acted recklessly.

Specifically, the jury was instructed that, to convict, the following elements had to be proved beyond a reasonable doubt:

(1) That on or about October 27, 2011, the defendant recklessly trafficked<sup>6</sup> in stolen property; and

(2) That the acts occurred in the State of Washington.

Supp. DCP, Court's Instructions to the Jury, Instruction 11.

The jury was further instructed on the definition of recklessness, as follows:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness as to a particular result or fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that result or knowingly as to that fact.

Supp. DCP, Court's Instructions to the Jury, Instruction 6.

That Mr. Lavin "trafficked" the hoe pack by selling it to Mr. Bayne is not in dispute. The issue is whether there was sufficient proof that Mr. Lavin acted knowingly or intentionally – or that he disregarded a substantial risk that a wrongful act might occur – in possessing and selling what in reality was a stolen hoe pack.

The State premised its argument that Mr. Lavin knew, or should have known, the hoe was stolen on three things: the Roglin's stamp on

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<sup>6</sup> To traffic means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of he property to another person. Supp. DCP, Court's Instructions to the Jury, Instruction 9.

the hoe pack, Mr. Lavin's statement to Mr. Bayne that the hoe pack was part of a friend's father's estate, and the timing of Mr. Lavin's possession of the hoe pack. None of these arguments though provide even the "slight corroborative evidence of other inculpatory circumstances tending to show ... guilt" to support a conviction for a crime requiring proof of reckless possession of stolen property. *State v. Hatch*, 4 Wn. App. 691, 694, 483 P.2d 864 (1971).

Although Rognlin's 10 x 12 inch property stamp was somewhere on the hoe pack, the evidence failed to prove the stamp was readily visible. Rognlin's employee, Mr. Frasier, did not see the stamp when he was looking to acquire the hoe pack Mr. Bayne had for sale. The prosecutor never asked Mr. Frasier where the stamp was on the hoe pack and what condition the stamp was in. The stamp could have been covered in mud. It could have been so light that only someone familiar with the stamp would see it. As the hoe pack weighed 400-500 pounds, it would not be easily manipulated and a stamp on the underside of the pack easily missed.

Mr. Bayne never saw the Rognlin's stamp on the hoe pack.

The prosecutor argued in closing that there were "big letters" with the owner's information on the hoe pack, RP 104, and that there was a "big stencil" on the pack identify it as belonging to Rognlin's. But the

prosecutor failed to show that to the jury. The jury never saw a picture of a stamp on the hoe pack or even a picture of the hoe pack itself. Without that evidence, and based on the testimony of Mr. Frasier and Mr. Baynes, the Rognlin's stamp was located on the hoe pack in a place not readily visible to an observer. Consequently, the property stamp did not put Mr. Lavin on notice that the hoe pack was "hot." RP 115.

Additionally, Mr. Hollatz could not say Rognlin's removed the identification stamp when it disposed of its equipment. Thus, a Rognlin's identification stamp told a future owner nothing other than the equipment was once owned by Rognlin's.

Mr. Lavin did not testify. The only statement attributed to Mr. Lavin came from Mr. Bayne's testimony. Mr. Lavin told Mr. Bayne, "He'd gotten [the hoe pack] from a friend of his that's father had died and they were selling their equipment. He was in the construction business." RP 41. An account of how the defendant acquired stolen property that is false or cannot be checked or rebutted is sufficient corroborative evidence to sustain a finding of guilt. *Hatch*, 4 Wn. App. at 694. But there is nothing about Mr. Lavin's statement, in the context of the entire record, to suggest the statement is untrue or what Mr. Lavin reasonably believed to be true.

The testimony established that the hoe pack was stolen in October 2011 and sold to Mr. Bayne in October 2011. Nothing precludes the hoe pack from being stolen on October 1 and sold to Mr. Bayne on October 31. That would give the friend's father time to acquire the hoe pack by whatever means, die, have his family sell off his belongings, and have Mr. Lavin unwittingly acquire the stolen hoe pack and sell it to Mr. Bayne. Alternately, there may never have been a deceased father but Mr. Lavin unwittingly bought the hoe pack from the friend who told Mr. Lavin the deceased father story to explain disposing of the hoe pack.

There is also nothing in the record to show that Mr. Lavin's acquisition of the hoe pack could not be checked or rebutted. Law enforcement knew from Mr. Bayne how Mr. Lavin acquired the hoe pack. Pacific County law enforcement could have looked into whether a contractor in the local or surrounding communities had died and the family was disposing of his property.

Since this all happened in October 2011, the window of time for the death and sales was narrow. No law enforcement person testified at trial about any effort to undermine Mr. Lavin's acquisition of the hoe pack. Instead, the prosecutor attempted to discredit Mr. Lavin's statement by mischaracterizing what Mr. Lavin said. In closing argument, the prosecutor repeatedly claimed Mr. Lavin acquired the hoe pack in at an

estate sale. RP 103, 104, 115. In reality, Mr. Lavin acquired the hoe pack from a friend who represented he was selling his deceased father's equipment.

Finally, the prosecutor argues timing of Mr. Lavin's possession of the hoe pack as evidence of his reckless possession of it.

Now the hoe pack was stolen on October 16<sup>th</sup>. We don't know that Mr. Lavin stole it. He's not charged with stealing it so, you know, that's – that not one of the elements that has to be proven. And we don't have the evidence that he was there that day but we do know that within a week he went to Mr. Bayne and got \$1,800 cash for it claiming he got it at an estate sale....

RP 104.

The problem with the prosecutor's assertion is that it is not supported by the evidence. The only witness to provide evidence about when the hoe pack was stolen was Mr. Hollatz. Mr. Hollatz testified his crew told him the hoe pack was stolen in October. Mr. Hollatz did not testify to any of the circumstances surrounding the theft of the hoe pack and no such testimony was attributed to his crew. The prosecutor argued the hoe pack was stolen on October 16, 2011. But the record only established damage to the doors of a Conex storage container at a Rognlin's construction site on that day. No witness claimed anything was stolen from the Conex container. None of this evidence provided the

“slight corroborative evidence of other inculpatory circumstances” tending to show guilt. *Hatch*, 4 Wn. App. at 694.

- c. The prosecution’s failure to prove all essential elements requires reversal.

By failing to offer sufficient evidence that Mr. Lavin acted in a manner that disregarded a substantial risk that a wrongful act might occur, or acted intentionally or knowingly, the jury erred in finding sufficient evidence to render a verdict of guilt. Where, as here, the State fails to prove all essential elements beyond a reasonable doubt, this Court must reverse the conviction. *Green*, 94 Wn.2d at 221; *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy for conviction unsupported by sufficient evidence). The prohibition against double jeopardy forbids retrial. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

## **2. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT DENIED MR. LAVIN A FAIR TRIAL.**

In closing argument, the prosecutor argued “facts” about the theft of the hoe pack that were not in evidence. Even though defense counsel failed to object to the improper argument, no instruction could have cured the error. Mr. Lavin’s right to a fair trial was violated. His conviction must be reversed.

- a. Prosecutor's have a special duty which limit their advocacy.

A prosecutor's misconduct in closing argument may deny a defendant his right to a fair trial as guaranteed by the Sixth Amendment and Article I, Section 22 of the Washington Constitution. *State v. Monday*, 171 Wn.2d 667, 676-77, 297 P.3d 551 (2011). A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In *State v. Huson*, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse....

73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert denied*, 393 U.S. 1096 (1969) (citation omitted); see also *State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

- b. Prosecutorial misconduct in closing argument can be raised for the first time on appeal.

Although Mr. Lavin's attorney did not object to the improper argument, Mr. Lavin may raise the issue because his constitutional right to a fair trial was violated by the prosecuting attorney's misconduct.

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and, if so, whether a “substantial likelihood” exists that the comments affected the jury. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003); *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where the defendant does not object to the misconduct, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice could not have been cured by a limiting instruction. *Id.*

During closing argument, Mr. Lavin did not object to the prosecutor arguing facts not in evidence. However, due to the flagrant nature of the prosecutor’s argument, this issue may be raised for the first time on appeal. *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076, *review denied*, 131 Wn.2d 1018 (1997); RAP 2.5(a).

c. The prosecutor argued facts not in evidence.

In closing argument, the prosecutor argued four “facts” that were not in evidence.

First, the prosecutor argued a “laser level, a Honda generator, and Teledyne Hoe Pack” were stolen from the Rognlin’s Conex container on October 16, 2011. RP 101. He linked the October 16 incident to Mr. Hollatz’s testimony that he learned from his crew that specific property

was stolen. “Well, people who work for the owner testified that they were stolen.” RP 101. The problem with the prosecutor’s statement is that Mr. Hollatz never testified that the items were stolen on October 16. No one testified that any items were stolen on October 16.

Two witnesses were called as to the events of October 16. Neighbor Gary Habensetzer testified to hearing a lot of noise, seeing a truck illuminating the Conex container with its lights, two or three people in the area, and that someone ripped the doors off the container using a backhoe and a chain. Raymond Police Officer Robert Verboomen testified that Rognlin’s keep tools stored in the Conex container and that he responded at 6:30 a.m. on October 16 to find the doors of the container ripped off. RP 60. Absent from Officer Verboomen’s testimony was anything about taking a burglary or theft report.

Second, the prosecutor misstated as fact that Mr. Lavin claimed he got the hoe pack in an estate sale. RP 103, 104. “[W]e do know that within a week he went to Mr. Bayne and got \$1,800 cash for it claiming he got it at an estate sale.” RP 104. As noted under Argument 1, Mr. Lavin never claimed to have purchased the hoe pack at an estate sale. Instead, he acquired the hoe pack from a friend who explained he was getting rid of his deceased father’s equipment.

Third, the prosecutor argued as fact that Mr. Lavin had the hoe pack for less than a week before selling it to Mr. Bayne. (See above paragraph.) There was no testimony establishing either when in October the hoe pack was stolen or when the hoe pack was sold to Mr. Bayne.

Fourth, the prosecutor argued the Rognlin's property stamp on the hoe pack could be easily seen. "And we know that in big letters was the information for the owner. What do we expect a member of society to do when there's big letters indicating how to return a piece of property to its owner?" RP 104. Mr. Frazier, who was familiar with the Rognlin's property stamp did not even see the stamp when he took the hoe pack from Mr. Bayne. Mr. Frazier did not see the property stamp until he had the hoe pack back at Rognlin's and had the time to look over the hoe pack. Mr. Bayne never saw the property stamp on the hoe pack. The reality is the prosecutor could have produced a picture of the property stamp on the hoe pack, failed to do so, and then capitalized on his failure to provide the evidence by mischaracterizing the evidence to the jury. The prosecutor used his rebuttal argument to continue the mischaracterization. "That there's a big stencil that says it belongs to Rognlin's and you disregard it, that might put someone on notice that this item was hot. He disregarded that." RP 115.

While attorneys have latitude to argue in closing reasonable inferences from the evidence presented at trial, counsel may not mislead the jury by misstating the evidence or arguing facts not in the record. *Dhaliwal*, 150 Wn.2d at 577; *State v. Rose*, 62 Wn.2d 309, 312, 382 P.2d 513 (1963); RPC 3.4(e). When the prosecutor argues facts outside the record, he becomes an unsworn witness against the defendant. *Belgarde*, 110 Wn.2d at 507 (conviction reversed because prosecutor essentially “testified” during argument regarding terrorist organization where no evidence to support argument).

d. The prosecutorial misconduct requires reversal.

What the prosecutor’s unsupported “facts” do in closing argument is fill in the gaps for the jury. Without the unsupported facts, all the jury has for evidence is a hoe pack and a couple of other items stolen from Rognlin’s sometime in October. At some other point in October, Mr. Lavin has a reasonable explanation for how he came into possession of the hoe pack he subsequently sold to Mr. Bayne for an unremarkable sum in a transaction that seemed totally on the up and up.

With just the few added “facts” from the prosecutor’s closing argument, a more compelling argument for Mr. Lavin’s guilt emerges. On October 16, 2011, two or three people showed up in a truck at a Rognlin’s construction site. They aggressively tear off the doors of a Rognlin’s

Conex container. They steal three items: a hoe pack, a generator,<sup>7</sup> and a laser level. A short time later, “on or about October 27, 2011,” per the “to convict” instruction, Mr. Lavin has met with Mr. Bayne twice and negotiated a sale of the hoe pack. Coincidentally, Mr. Lavin also offered to sell Mr. Bayne a generator. Mr. Lavin told Mr. Bayne he bought the hoe pack at an estate sale in contrast to Mr. Lavin’s other statement that he got the hoe pack from a friend who was disposing of equipment from his deceased father’s construction company. And finally, the Roglin’s property stamp was large and visible to anyone looking at the hoe pack.

The prosecutor’s closing and rebuttal arguments coupled with the “on or about October 27, 2011” in the “to convict” instruction created a specific and suspiciously short timeline for Mr. Lavin to come into possession of the stolen hoe pack and twice meet with Mr. Bayne before selling it to him. The prosecutor’s “facts” gave the October 16 incident relevancy where there had been none before. The prosecutor’s “fact” that a generator was stolen from the Conex container made the jury suspicious about the generator Mr. Lavin offered for sale to Mr. Bayne. The prosecutor even impeached the non-testifying Mr. Lavin’s statements to Mr. Bayne with his repeated assertion that Mr. Lavin acquired the hoe pack at an estate sale.

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<sup>7</sup> This is the first time the theft of a generator is mentioned in the record.

The prosecutor's added facts went well beyond the wide latitude afforded counsel in closing argument. No curative instruction could have cured the prosecutor's flagrant and ill-intentioned adding to and mischaracterization of the evidence. This Court cannot be convinced that Mr. Lavin received a fair trial. Reversal is required. *Reed*, 102 Wn.2d at 146-47.

**3. DEFENSE COUNSEL'S FAILURE TO OBJECT TO HEARSAY TESTIMONY ABOUT THE THEFT OF THE HOE PACK DENIED MR. LAVIN EFFECTIVE COUNSEL.**

The only evidence admitted at trial that the hoe pack was stolen was the hearsay testimony of Mr. Hollatz. Without proof that the hoe pack was stolen, Mr. Lavin could not be convicted of trafficking in stolen property. Defense counsel's failure to object to the hearsay denied Mr. Lavin effective assistance of counsel.

a. Mr. Lavin is entitled to effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defense.” U.S. Const. Amend VI. The provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend XIV: *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, § 22 of the Washington

Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, § 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *U.S. v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An ineffective assistance claim presents a mixed question of law and fact, requiring de novo review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 36, 146 P.3d 1227 (2006), *review denied*, 162 Wn.2d 1014 (2008).

- b. Without the hearsay testimony, the case against Mr. Lavin should have been dismissed for insufficient evidence.

When an ineffective assistance of counsel claim is based on failure to object, the defendant must show that (1) the failure to object fell below an objective standard of reasonableness, (2) the proposed objection would have been sustained, and (3) the result of the trial would have differed. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

The only witness to testify to that the hoe pack was stolen was Mr. Hollatz. He had no personal knowledge of the theft. The following exchange occurred between the prosecutor and Mr. Hollatz at trial:

PROSECUTOR: And so you were employed [at Rognlin’s] in October of 2011?

MR. HOLLATZ: Yes.

PROSECUTOR: Okay. And during that time, were some items stolen during the month?

MR. HOLLATZ: Yes.

PROSECUTOR: And what exactly was missing?

MR. HOLLATZ: The report I got from the crew was a laser, a hoe pack, and I believe it was a cut-off saw.

RP 28.

Mr. Hollatz's testimony that the crew told him what had been stolen was inadmissible hearsay. ER 801(c); ER 802. It was the only evidence produced at trial to prove the hoe pack was stolen. Had defense counsel objected to the hearsay, it is likely the trial court would have sustained the objection and excluded the hearsay. The failure to object prejudiced Mr. Lavin. Without proof the hoe pack was stolen, there was insufficient evidence that Mr. Lavin trafficked in stolen property. RCW 9A.82.055.

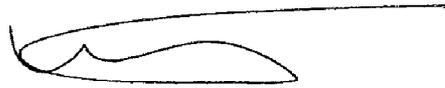
#### **E. CONCLUSION**

Mr. Lavin's conviction for trafficking in stolen property in the second degree must be reversed for insufficient evidence and remanded for dismissal with prejudice.

In the alternative, the prosecutor's arguing facts not in evidence during closing argument requires Mr. Lavin's conviction be reversed and remanded for retrial.

Also, in the alternative, defense counsel's failure to object to hearsay evidence that the hoe pack was stolen deprived Mr. Lavin effective assistance of counsel. Mr. Lavin's conviction must be reversed and remanded for retrial.

Respectfully submitted this 20<sup>th</sup> day of September 2013.



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LISA E. TABBUT/WSBA 21344  
Attorney for Robin Lavin, Appellant

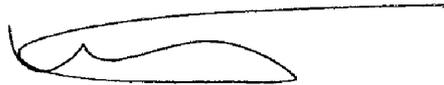
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed Appellant's Opening Brief to: (1) David Burke, Pacific County Prosecutor's Office, at [dburke@co.pacific.wa.us](mailto:dburke@co.pacific.wa.us); (2) the Court of Appeals, Division II; and (3) I mailed it to Robin Lavin, 5393 Highway 101, South Bend, WA 98586.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed September 20, 2013, in Longview, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Robin Lavin, Appellant

# COWLITZ COUNTY ASSIGNED COUNSEL

September 20, 2013 - 2:22 PM

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