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DIVISION II  
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STATE OF WASHINGTON  
BY:   
DEPUTY

NO. 45749-1-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

BRYAN PATRICK BEST,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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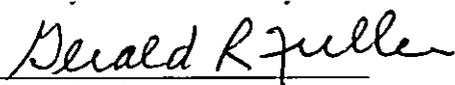
THE HONORABLE DAVID L. EDWARDS, JUDGE

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BRIEF OF RESPONDENT

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## RESPONDENT'S COUNTERSTATEMENT OF THE CASE

### **Factual Background**

On January 4, 2013, William Dotson returned to his home in Elma and discovered that his house, barn, and two outbuildings had been burglarized (RP trial 2013 at 55-57). Personal property items belonging to Mr. Dotson and his wife, Amy Sakson, were strewn about through the home, other buildings on the premises and in the yard (RP trial, 55-58). Deputy Richard Ramirez of the Grays Harbor County Sheriff's Department responded. He spoke with Mr. Dotson and his wife. Together, the couple put together a preliminary list of missing property items that they provided to Deputy Ramirez (RP trial 83).

Around 1:00 a.m. later that evening Elizabeth Miller returned home from work to her residence in the Devonshire area near Montesano (RP trial 51). She saw a truck being pushed by four or five people and thought that it was strange enough that she should call Harbor 911 (RP trial 52, 53).

Deputy Ramirez responded. He looked into the open bed of the truck and it was immediately apparent to him that many items of stolen property listed by Mr. Dotson and his wife were in the truck (RP trial 87).

Ramirez observed the defendant standing at the driver side door of the truck looking nervous (RP 87).

Deputy Ramirez had brief conversation with the defendant in which the defendant stated that he owned the truck and that the property in the truck belonged to his deceased grandfather. The defendant told Deputy Ramirez that he had taken the property from his grandfather's storage unit in Westport (RP trial 88). The defendant could not provide the specific location nor did he have a key to the unit (RP trial 88). Mr. Dotson and Ms. Sakson were called. They arrived a short time later and immediately recognized much of what was in the truck as their stolen property (RP trial 62-63, 74, 91).

Deputy Ramirez placed the defendant under arrest and took him to the Grays Harbor County Jail. A short time later the defendant stated that he would like to speak to Deputy Ramirez (RP trial 93). The defendant provided a written statement in which he explained that others who were present, Matthew Smith and Suzy Rin, had offered to get him high in exchange for driving them around. He explained that Smith had him drive to a rural home near Elma (the Dotson's) and directed him to park some distance away (RP trial 94).

According to the defendant he sat in the truck for about an hour. Smith called Best and told him to drive to the house and park behind the barn (RP trial 95). At this point, according to the defendant, Smith had property stacked up and ready to load into the truck which the defendant helped Smith to load. According to the defendant Smith also went into the house and came out with a box of frozen food. The box broke open and the food scattered in the yard (RP 95). Deputy Ramirez had noticed these items when he first responded to the burglary.

Ultimately, the defendant admitted helping Smith load a number of items that belonged to Dotson including two cardboard boxes of items, two flat screen televisions, two golf bags, two laptop computers, and other items. These items were in his truck when he was contacted by Deputy Ramirez.

### **Procedural Background**

The defendant was charged by Information on January 7, 2013, with Residential Burglary, RCW 9A.52.025. Eventually, the Information was amended to charge Residential Burglary and Possession of Stolen Property in the Second Degree, RCW 9A.56.160 (CP 1-2).

The case was tried to a jury. Following *voir dire*, peremptory challenges were exercised by the parties. The attorneys walked up to the

podium in front of the bench and were handed the jury list. Each party exercised the peremptories alternatively by striking a name from the list and writing the name of the stricken juror in the space provided (RP trial 42-43 CP 23-24, 25). Upon completion of this process, the list was handed to the judge who called out the names of the jurors who had been selected to serve.

The evidence was heard. Mr. Dotson and Ms. Sakson testified at trial concerning their opinion of a value of the property stolen from their house, some of which was recovered. The jury returned verdicts of guilty on both counts.

#### **RESPONSE TO ASSIGNMENTS OF ERROR**

**The State presented sufficient evidence to establish value of the stolen property in excess of \$750.00. (Response to Assignment of Error 1).**

The defendant was found in possession of numerous items of stolen property taken in the burglary. These were identified, in part, as a ten year old set of golf clubs that were originally purchased for \$900.00 (RP 75), two televisions that were purchased three to four years prior for \$400.00 and \$200.00 (RP 71), a two year old Dyson vacuum cleaner that

was originally purchased for \$399.00, two three year old laptop computers purchased for \$2,000.00 and \$1,400.00. (RP 85, 86).

The standard for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). There is overwhelming evidence that the defendant possessed stolen property. The question is whether the witnesses provided sufficient information from which a jury could determine that the property, in total, was of a value in excess of \$750.00.

The original retail value of the major items listed was over \$4,000.00. The jury was entitled to use its common sense and find beyond a reasonable doubt that the present value was over \$750.00.

The courts have long acknowledged that the owner of property may testify concerning his estimate of its worth without being qualified as an expert. State v. Hammond, 6 Wn.App. 459, 461, 493 P.2d 1249 (1972):

The prevailing rule is that the owner of a chattel may testify as to its market value without being qualified as an expert in this regard. McCurdy v. Union Pac. R.R., 68 Wash.2d 457, 413 P.2d 617 (1966).

Professor Wigmore states the rule to be:

The Owner of an article, whether he is generally familiar with such values or not, ought certainly to be allowed to estimate its worth; the weight of his testimony (which often would be trifling) may be left to the jury; and courts have usually made no objections to this policy.

(Footnote omitted.) 3 J Wigmore, Evidence s 716, 56 (1970).

In *Wicklund v. Allraum*, 122 Wash. 546, 211 P. 760 (1922) the court, in additions to citing the Wigmore rule, further stated that the general rule requiring that a proper foundation be laid, showing the witness to have knowledge upon the subject before he can qualify to testify as to market value, does not apply to a party who is testifying to the value of property which he owns. The owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales.

In *State v. McPhee*, 156 Wn.App. 44, 50, 230 P.3d 284 (2010), the defendant was charged with, among other things, second-degree possession of stolen property for taking tusks and field binoculars. The rightful owner of the items testified that he obtained the binoculars by trading two salmon charter license permits, each worth \$250.00, with a

friend who ran a local sporting goods store. Further, the state offered and the trial court admitted into evidence the binoculars and tusks as evidence. *Id.* at 65. The Court granted the defendant's motion to dismiss the charge of possession of stolen property in the second degree after the State's case in chief, holding that the State failed to establish the value of the binoculars at the proximate time and area of the act. *Id.* at 55. On cross-appeal, the State asserted that the trial court abused its discretion when it dismissed the charge. *Id.* at 65. The court ultimately held that the victim's testimony and the physical evidence were more than sufficient to meet the prima facie standard to send the case to the jury. *Id.* at 66.

Both McPhee and Hammond indicate that, in order for the question of value to go to the jury, the State must prove a prima facie case. As a matter of law, the Court must determine that a prima facie case has not been made out to be able to dismiss a charge based on the premise that the evidence did not warrant a verdict. RCW 4.56.150. Here, the Court held that the State provided sufficient evidence to prove a prima facie case, thus, the factual determination of market value was properly sent to the jury.

While it certainly would have been better to directly ask the witness his or her opinion of the fair market value, this does not preclude the jury from making a reasoned decision regarding the value.

Here, the State provided much more evidence than was available to the jury in McPhee or Hammond. Not only did the State offer testimony of what the owners originally paid, but also when the owners originally purchased each of the items. They also testified as to the make and/or models and the cost of replacement of one or the laptops. The jury was also provided photos of most of the items by which they could make their own visual observation of the condition of the items. Further, the items in this case are much more familiar to the average person than the items stolen in McPhee or Hammond. Here, the stolen property consisted of every day household items like flat screen televisions and vacuums, items that the average juror has a basic knowledge of.

The defense was provided ample opportunity to scrutinize the basis of the victims' valuation of the property via cross-examination, which the defendant did by asking questions regarding the age and condition of the items. With this information, the jury determined that the items were valued at an amount greater than \$750.00.

In any event, if the court finds that the proof value is insufficient, this court should remand the matter back to Superior Court for entry of judgment on the lesser included offense of Possession of Stolen Property in the Third Degree.

The jury found beyond a reasonable doubt that the defendant possessed the victim's stolen property. No one disputes that this determination was supported by ample evidence. The only challenge is to the value. The trier of fact herein, the jury, was instructed as to the lesser degree crime of Possession of Stolen Property in the Third Degree. This is specifically authorized by statute, RCW 10.61.003. The jury determined that there was sufficient evidence of value in excess of \$750.00.

In State v. Jones, 22 Wn.App. 447, 591 P.2d 796 (1979) the defendant was convicted of Possession of Stolen Property in the Second Degree. Upon appeal the Court of Appeals determined that a portion of the recovered stolen property was subject to suppression and that the remaining property had a value of less than \$250.00. Accordingly the court in Jones directed that the matter be remanded to the Superior Court for entry of judgment on the crime of Possession of Stolen Property in the Third Degree since the jury found beyond a reasonable doubt that the defendant possessed the stolen property. Jones, 22 Wn.App. at page 454:

By removing some of the property, without identifying which items, we simply have no way of knowing how the jury would resolve “value” issue, an essential element of the crime charged. However, consistent with the trial court’s instructions, the jury could have found the defendant guilty of the lesser-included offense of possessing stolen property in the third degree (value less than \$250.00). . . without the necessity of resolving the value issue. . . indeed, we know that the jury did resolve all other issues of the lesser included offenses against the defendant. Accordingly, we remand with direction to resentence Mr. Jones for the crime of possessing stolen property in the third degree.

This assignment of error must be denied.

**The trial court did not violate the defendant’s Constitutional right to a public trial. (Response to Assignment of Error 2).**

The facts concerning the *voir dire* process are undisputed. Each party conducted *voir dire* examination. Upon completion of the examination, the parties were given the list of jurors and each side made its peremptory challenges by striking the names from the list. (CP 23-34, 25). This was all done in the open courtroom. There was no “closure” of the courtroom. The doors were not locked. Spectators were neither sent out nor kept out. The only effect of this was that those who were present

in the courtroom did not hear, out loud, each peremptory challenge as it was made.

The law regarding this issue is now well settled. This process did not violate any right to public trial of the defendant. State v. Dunn, 180 Wn.App. 570, 321 P.3d 1283 (2014). In Dunn the court found that the exercise of peremptory challenges at a sidebar in the courtroom did not violate the defendant's right to a public trial. What happened here was not even, technically, a sidebar. The parties stood at the podium in front of the bench and exchanged a list, each alternatively marking their peremptory challenges. The same result was reached by Division III of the Court of Appeals, State v. Love, 176 Wn.App. 911, 309 P.3d 1209 (2013).

Most recently the Washington Supreme Court has held that a sidebar, conducted in the presence of all the parties, including the defendant, during trial, does not violate the defendant's right to a public trial. State v. William Glen Smith, Supreme Court Number 85809-8, decided September 25, 2014. The court in Smith found that there was no "closure" when the trial court conducted the sidebar in the hallway outside the courtroom. A closure occurs only "when the courtroom is completely

and purposely closed to spectators so no one may enter and no one may leave. State v. Lormor, 172 Wn.2d 85, 93, 257 P.3d 624 (2011).

The court in Smith found, also, that sidebars are not subject to the public trial right under the experience and logic test set forth in State v. Sublett, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). In particular, the Supreme Court found that public access to the sidebar did not play a significant positive role in the functioning of the process. Smith, supra, at page 12.

For the reasons set forth, this Assignment of Error must be denied.

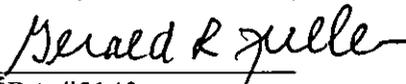
#### CONCLUSION

For the reasons set forth, the defendant's convictions must be affirmed.

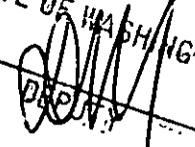
DATED this 6 day of October, 2014.

Respectfully Submitted,

GERALD R. FULLER  
Interim Prosecuting Attorney  
for Grays Harbor County

  
WSBA #5143

GRF/lh

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**DECLARATION OF MAILING**

BRYAN PATRICK BEST.

Appellant.

**DECLARATION**

I, Sarah L. Wisdom, hereby declare as follows:

On the 6<sup>th</sup> day of October, 2014, I mailed a copy of the Brief of Respondent to Lisa Elizabeth Tabbut, Attorney at Law, PO Box 1396, Longview, WA 98632-7822 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 6<sup>th</sup> day of October, 2014, in Montesano, Washington.

