

No. 45961-2-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Glenn Hansen,**

Appellant.

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Grays Harbor County Superior Court Cause No. 13-1-00330-1

The Honorable Judge David Edwards

**Appellant's Opening Brief**

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## ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Hansen's conviction violated his Sixth and Fourteenth Amendment right to an adequate charging document.
2. Mr. Hansen's conviction violated his state constitutional right to an adequate charging document under Wash. Const. art. I, §§ 3 and 22.
3. The charging document was deficient because it failed to allege critical facts identifying the charge and allowing Mr. Hansen to plead a former acquittal or conviction in any subsequent prosecution for a similar offense.

**ISSUE 1:** In addition to specifying the essential elements of an offense, a charging document must set forth any critical facts necessary to identify the particular crime charged. Here, the Information included only the essential legal elements of trafficking, but failed to specifically describe the property he allegedly trafficked. Did the omission of critical facts infringe Mr. Hansen's right to an adequate charging document under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§3 and 22?

4. Mr. Hansen's conviction violated his Fourteenth Amendment right to due process.
5. Mr. Hansen's conviction was based on insufficient evidence.
6. The prosecution failed to establish the *corpus delicti* of trafficking in stolen property by *prima facie* evidence independent of Mr. Hansen's statements.
7. The prosecution failed to prove that the copper wire Mr. Hansen sold was stolen.
8. The prosecution failed to prove that Mr. Hansen acted knowingly or recklessly.
9. The trial court erred by adopting Finding of Fact No. 5.
10. The trial court erred by adopting Finding of Fact No. 7.
11. The trial court erred by adopting Conclusion of Law No. 2.

12. The trial court erred by adopting Conclusion of Law No. 3.

**ISSUE 2:** An accused person's statement may not be considered by the trier of fact unless the prosecution establishes the *corpus delicti* of the charged crime by independent evidence. In this case, the prosecution did not provide independent evidence to support each element of trafficking. Did Mr. Hansen's trafficking conviction violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

**ISSUE 3:** A conviction for trafficking in stolen property requires proof that the property is stolen. Absent Mr. Hansen's statements, the prosecutor failed to prove that the copper wire Mr. Hansen sold as scrap metal was stolen property. Did Mr. Hansen's trafficking conviction violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

**ISSUE 4:** A conviction for trafficking in stolen property requires proof that the accused person acted recklessly. Here, the prosecutor failed to produce independent evidence suggesting that Mr. Hansen knew of and disregarded a substantial risk that the copper wire was stolen property. Did Mr. Hansen's trafficking conviction violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?

13. Mr. Hansen was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.

14. Defense counsel was ineffective for failing to object to the court's consideration of Mr. Hansen's statement under the *corpus delicti* rule.

**ISSUE 5:** Counsel provides ineffective assistance by rendering deficient performance that prejudices his/her client. Defense counsel noted a *corpus delicti* issue, but never asked the court to dismiss the case under the *corpus delicti* rule. Was Mr. Hansen denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

15. The trial court violated RCW 9.94A.753 by ordering Mr. Hansen to pay more than \$134,000 in restitution without providing notice and an opportunity to be heard.
16. The trial court violated Mr. Hansen's Fourteenth Amendment right to due process by imposing more than \$134,000 in restitution without holding a restitution hearing.
17. The trial court violated RCW 9.94A.753 by imposing restitution for losses that were not causally connected to the crime charged.

**ISSUE 6:** In determining restitution, a sentencing court may rely on no more information than is admitted, acknowledged, or proved. Here, although both the prosecutor and defense counsel believed no restitution should be ordered, the court imposed more than \$134,000 in restitution without holding a hearing. Did the sentencing court violate Mr. Hansen's statutory and due process rights to a hearing by imposing restitution without taking evidence or providing notice and an opportunity to be heard?

**ISSUE 7:** A sentencing court may only impose restitution for damages causally connected to the charged crime. Mr. Hansen's conviction rested on proof that he sold wire to a scrap metal processor. Did the trial court exceed its statutory authority by imposing restitution for the alleged theft of the wire, even though the theft was not causally related to the trafficking offense?

18. The order imposing \$500 in attorney fees violated Mr. Hansen's Sixth and Fourteenth Amendment right to counsel.
19. The trial court erred by imposing attorney fees without finding that Mr. Hansen had the present or likely future ability to pay.
20. The trial court erred by imposing attorney fees in the absence of any evidence showing that Mr. Hansen had the present or likely future ability to pay.

**ISSUE 8:** A trial court may only order an offender to pay attorney fees upon finding that s/he has the present or likely future ability to pay. Here, the court imposed \$500 in defense

costs without finding that Mr. Hansen had the ability to pay them. Did the trial court violate Mr. Hansen's Sixth and Fourteenth Amendment right to counsel?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Glenn Hansen has worked in the salvage business for many years, first for a family-owned corporation, and then, after his nephew's death, with a man named Eric Maki. RP (2/5/14) 53, 57. It was not unusual for him to obtain large amounts of copper wire to sell as scrap. RP (2/5/14) 56.

In July of 2013, Mr. Hansen was 63 years old. He had never been convicted of any crime. RP (2/24/14) 4; CP 11, 14.

On July 26, 2013, Mr. Hansen brought Maki a length of insulated copper wire. RP (2/5/14) 56. According to an experienced commercial electrician, the wire (designated "750 MCM") was of a kind that would be "fairly common in most industrial sites." RP (2/5/14) 27-28, 33. The same kind of wire could be found at industrial sites throughout Washington State. RP (2/5/14) 33.

Under their usual division of labor, Maki stripped the wire. RP (2/5/14) 56-57. The two then took the wire to a recycling business called Butcher's Scrap. RP (2/5/14) 57. Mr. Hansen sold the wire to Butcher's. He made the sale under his own name, and he provided his driver's license as identification. RP (2/5/14) 5-6; Ex. 11.

A few weeks later, Mr. Hansen was contacted by a police detective to discuss the copper wire he'd sold to Butcher's Scrap. Mr. Hansen immediately said he'd "made a mistake, and he wasn't going to contest what he had done, and [the detective] might as well go ahead and take him to jail." RP (2/5/14) 65. He went on to say that "he knew it was wrong, but he was trying to help a friend, and that he couldn't tell [the detective] all the details about it." RP (2/5/14) 66. Later, he told the detective that Maki had called him after midnight, and that he'd gone to pick up Maki from the side of the road "south of Carlson's Mill." RP (2/5/14) 69. He said Maki had the wire with him. RP (2/5/14) 69.

The detective spoke to Maki, who denied this account. The detective then brought Maki and Mr. Hansen together and told them "somebody is not telling the truth, and [I would] like to get to the bottom of it." Mr. Hansen immediately told the detective that he had lied. When asked why, Mr. Hansen asked to speak to an attorney. RP (2/5/14) 69-70.

The state charged Mr. Hansen with second-degree trafficking in stolen property. CP 1. The Information alleged that Mr. Hansen "did [recklessly] traffic in stolen property."<sup>1</sup> CP 1. It did not specifically describe the property. CP 1. The prosecution's theory at trial was that the

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<sup>1</sup> The prosecutor inadvertently alleged that Mr. Hansen *knowingly* trafficked in stolen property. CP 1; RP (2/24/14) 2-3.

wire sold to Butcher's Scrap had been stolen from Carlson's Mill. RP (2/5/14) 2-4, 70-71,

Mr. Hansen waived his right to a jury. CP 4. At his bench trial, the prosecution presented the testimony of PUD workers, who had taken 750 MCM copper wire (and other PUD property) from Carlson's Mill. RP (2/5/14) 35-38, 43-44. This operation took place in May of 2012, and involved recovering the wire leading to and from several underground vaults.<sup>2</sup> RP (2/5/14) 46. During the operation, PUD workers removed electrical equipment sitting on top of each vault, and replaced each piece of equipment with a solid concrete lid. RP (2/5/14) 46. The lids were large enough and heavy enough that a forklift was used to move them.<sup>3</sup> RP (2/5/14) 52.

More than a year later, an employee of the bank that owned Carlson's Mill<sup>4</sup> discovered that several of the concrete vaults had been uncovered. RP (2/5/14) 20-22. He looked in the vaults and concluded that "the wiring was missing."<sup>5</sup> RP (2/5/14) 21. He had no personal knowledge that there had ever been wire inside the vaults. RP (2/5/14) 24-

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<sup>2</sup> A supervisor testified that the work crew had been unable to remove one segment of wire leading from the PUD substation to one of the vaults. CP 17; RP (10/14/13) 48.

<sup>3</sup> The forklift was used later, during the police investigation. RP (10/14/13) 52.

<sup>4</sup> The bank had obtained the mill in a foreclosure action three years prior. RP (10/14/13) 16-18.

25. He had not opened the vaults or otherwise checked to determine if the wire had been in place on his previous visit on July 6, 2013. RP (2/5/14) 23-24.

Several times during trial, defense counsel referred to the *corpus delicti* rule. At a pretrial hearing, he told the court “[T]here may be [insufficient] corpus delicti...” RP (10/14/13) 1. At the beginning of trial, he twice noted that Mr. Hansen had preserved a *corpus delicti* issue when he waived a CrR 3.5 hearing. RP (2/5/14) 3. Despite this, defense counsel did not object to the admission of Mr. Hansen’s statements under the *corpus delicti* rule. RP (2/5/14) 65-70. Nor did he mention the *corpus delicti* rule or Mr. Hansen’s statements in his argument to the judge after the evidence had been presented. RP (2/5/14) 72-77.

The court convicted Mr. Hansen of second-degree trafficking. Based primarily on Mr. Hansen’s statements, he concluded that the wire was stolen and that Mr. Hansen knew it.<sup>6</sup> RP (2/5/14) 79.

The court’s written findings noted that the wire sold to Butcher’s Scrap was “consistent with the copper wire known to have been at the mill site.” CP 18. The court also found that Mr. Hansen lived “approximately

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<sup>5</sup> According to the bank employee, the wire was missing “from the PUD transformer going in to these vaults, and then going out.” RP (10/14/13) 21.

<sup>6</sup> In his oral ruling, the judge noted that the state was not required to prove that the wire came from Carlson’s Mill. RP (10/14/13) 79.

three to four miles from the mill premises.” CP 18. Four of the court’s ten written findings related to Mr. Hansen’s statements to police.<sup>7</sup> CP 18-19.

At sentencing, both parties agreed that the court could not impose restitution. RP (2/24/14) 3-4; CP 12. Despite this, and without a hearing or further input from either party, the court imposed more than \$134,000 in restitution. RP 5-6; CP 24. The court apparently based the restitution figure on an unsworn written estimate submitted by the bank. Victim Statement, Supp. CP.

Mr. Hansen timely appealed. CP 29.

## **ARGUMENT**

### **I. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT BECAUSE IT FAILED TO INCLUDE CRITICAL FACTS.**

#### **A. Standard of Review**

Challenges to the sufficiency of a charging document are reviewed *de novo*. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied*, 176 Wn.2d 1007, 297 P.3d 68 (2013). Such challenges may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991).

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<sup>7</sup> One finding erroneously indicated that the detective had told Mr. Hansen he’d come to talk “about the stolen wire from the mill...” CP 18. In fact, the detective had testified that he’d told Mr. Hansen he’d come to talk “about the wire that had been sold to Butcher’s Scrap Metal.” RP (2/5/14) 64-5.

Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Rivas*, 168 Wn. App. at 887. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.*

If the Information is deficient, prejudice is presumed. *Id.*, at 888. The remedy for an insufficient charging document is reversal and dismissal without prejudice. *Id.*, at 893.

- B. A charging document must allege the essential elements and any critical facts necessary to allow the accused person to prepare a defense and to plead an acquittal or conviction as a bar against a second prosecution for the same crime.

The Sixth Amendment right “to be informed of the nature and cause of the accusation” and the federal guarantee of due process impose certain requirements on charging documents. U.S. Const. Amends. VI, XIV.<sup>8</sup> A charging document “is only sufficient if it (1) contains the elements of the charged offense, (2) gives the defendant adequate notice of the charges, and (3) protects the defendant against double jeopardy.” *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005). The charge must include more than “the elements of the offense intended to be charged.” *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962) (citations and internal quotation marks omitted).

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<sup>8</sup> Wash. Const. art. I, §§3 and 22 impose similar requirements.

Any offense charged in the language of the statute “must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense.” *Id.* (citations and internal quotation marks omitted). The charge must also be specific enough to allow the defendant to plead the former acquittal or conviction “in case any other proceedings are taken against him for a similar offense.” *Id.* (citations and internal quotation marks omitted).

Any “critical facts must be found within the four corners of the charging document.” *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004). Thus, for example, a charging document for violation of a domestic violence protection order must specifically identify the order allegedly violated. *Id.*

In cases involving stolen property, the Information need not name the owner of the property, but must “clearly” charge the accused person with a crime relating to “specifically described property.” *State v. Greathouse*, 113 Wn. App. 889, 903, 56 P.3d 569 (2002). When the charging document includes “not a single word to indicate the nature, character, or value of the property,” the charge is “too vague and indefinite upon which to deprive one of his [or her] liberty.” *Edwards v. United States*, 266 F. 848, 851 (4th Cir. 1920).

- C. The Information did not include critical facts because it failed to specifically describe the property trafficked.

In this case, the Information passes only the first of the three requirements set forth above: it charges in the language of the statute, and thus “contains the elements of the offense intended to be charged.” *Russell*, 369 U.S. at 763-64. It fails the other two requirements because it includes no critical facts. In the absence of any critical facts, the Information does not provide adequate notice of the charges; nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

The Information does not mention the copper wire Mr. Hansen allegedly trafficked. Accordingly, even when liberally construed, it does not charge Mr. Hansen with trafficking in “specifically described property.” *Greathouse*, 113 Wn. App. at 903. In fact, the charging document includes “not a single word to indicate the nature, character, or value of the property.” *Edwards*, 266 F. at 851. Because of this, the allegation is “too vague and indefinite upon which to deprive [Mr. Hansen] of his liberty.” *Id.* It provides neither notice nor protection against double jeopardy. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631.

The Information is constitutionally deficient. Mr. Hansen's trafficking conviction must be reversed, and the charge dismissed without prejudice. *Rivas*, 168 Wn. App. at 893.

**II. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. HANSEN OF TRAFFICKING IN STOLEN PROPERTY.**

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013). The sufficiency of the evidence may always be raised for the first time on appeal. *State v. Fleming*, 155 Wn. App. 489, 506, 228 P.3d 804 (2010).

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

B. The state did not prove the elements of trafficking in stolen property because it failed to *prima facie* establish the *corpus delicti* of the crime by independent evidence.

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on

insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

To be sufficient, evidence must be more than substantial. *Vasquez*, 178 Wn.2d at 6. On review, inferences drawn in favor of the prosecution may not rest on evidence that is “patently equivocal.” *Id.*, at 8. To establish even a *prima facie* case, the prosecution must present evidence that is consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Brockob*, 159 Wn.2d 311, 328-29, 150 P.3d 59 (2006).

The *corpus delicti* rule is both a rule of admissibility and a rule of evidentiary sufficiency. *State v. Dow*, 168 Wn.2d 243, 251, 227 P.3d 1278 (2010). Because evidentiary sufficiency may be raised for the first time on review, an appellant may argue violation of the sufficiency aspect of the *corpus delicti* rule even absent an objection below. *See Fleming*, 155 Wn. App. at 506.

A factfinder may not consider an accused person’s statements unless the prosecution *prima facie* establishes the *corpus delicti* of the charged crime by evidence independent of those statements. *Dow*, 168 Wn.2d at 255; *Brockob*, 159 Wn.2d at 328. The prosecution must present evidence to corroborate “*the specific crime with which the defendant has been charged...*” *Brockob*, 159 Wn.2d at 329 (emphasis in original). The independent evidence must support each element of the charged crime.

*Id.; Dow*, 168 Wn.2d at 251, 254. The independent evidence must be consistent with guilt and inconsistent with a hypothesis of innocence.<sup>9</sup> *Brockob*, at 329. If the independent evidence supports reasonable and logical inferences of both guilt and innocence, it is insufficient. *Id.*, at 329-330.

A conviction for second-degree trafficking in stolen property requires proof that the accused person recklessly trafficked in stolen property. RCW 9A.82.055. A person acts recklessly when s/he “knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.” RCW 9A.08.010. Recklessness therefore requires proof of both subjective and objective components: “[w]hether an act is reckless depends on both what the defendant knew and how a reasonable person would have acted knowing these facts.” *State v. R.H.S.*, 94 Wn. App. 844, 847, 974 P.2d 1253 (1999).

Here, the prosecution alleged that Mr. Hansen recklessly<sup>10</sup> trafficked in stolen copper wire. To convict Mr. Hansen, the prosecution was required to prove (1) that the copper wire was stolen, (2) that Mr.

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<sup>9</sup> In this context, “innocence” refers to innocence of the charged crime, rather than blamelessness. *Brockob*, 158 Wn.2d 311.

Hansen knew of and disregarded a substantial risk that it was stolen, (3) that his disregard of this risk was a gross deviation from conduct that a reasonable person would exercise in the same situation, and (4) that he knew of and disregarded this risk at the time he sold the wire to Butcher's Scrap. RCW 9A.08.010.

1. Without considering Mr. Hansen's statements, no trier of fact could find that the common industrial copper wire Mr. Hansen sold was stolen, either from Carlson's Mill or from some other owner.

Wire of the sort Mr. Hansen sold to Butcher's Scrap is common. Copper 750 MCM wire is widely used in industry. RP (2/5/14) 27-28, 33. Industrial sites throughout the state make use of such wire. RP (2/5/14) 33.

Although there may be cases where one piece of 750 MCM copper wire can be individually identified, the prosecution presented no such evidence in this case. *See RP generally.* Neither the bank employee nor the PUD witnesses were able to say that the wire sold to Butcher's Scrap was the same wire taken from Carlson's Mill. RP (2/5/14) 18-26, 35-49. No one testified that either wire had peculiar markings, or some other individualized characteristics that allowed a positive identification. *See RP generally.*

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<sup>10</sup> The Information erroneously alleged that he knowingly trafficked in stolen property. CP 1.

Furthermore, apart from Mr. Hansen's statements, the circumstantial evidence did not *prima facie* establish the prosecution's case. The two facts the state used to equate the wire stolen from Carlson's with the wire sold to Butcher's Scrap were (1) that Mr. Hansen lived about four miles from Carlson's Mill, and (2) that he sold wire during the month-long period when the wire might have been taken from the mill.<sup>11</sup> RP (2/5/14) 5-7, 18-19, 50, 54-55.

But this geographical and temporal proximity is so inexact as to support reasonable and logical inferences of both guilt and innocence. *Brockob*, 159 Wn.2d at 329-330. This is especially true given Maki's statement that he'd seen Mr. Hansen "many times" with even larger quantities of wire than that sold on July 26<sup>th</sup>. RP (2/5/14) 56. The loose evidence of approximate geographical and temporal proximity cannot provide the independent evidence sufficient to establish the *corpus delicti*. *Id.* Mr. Hansen's statements may not contribute to a finding of his guilt. *Id.*

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<sup>11</sup> The court made two findings that contradicted the evidence. Finding No. 5 erroneously indicates that Maki and Mr. Hansen sold the wire "the following day." CP 18. In fact, the wire was sold the same day Maki stripped it. RP (2/5/14) 56-57. Finding No. 7 erroneously indicates that the detective asked to speak with Mr. Hansen "about the stolen wire from the mill." CP 18. In fact, the detective asked him about the wire sold to Butcher's Scrap. RP (2/5/14) 65. Because these two findings are unsupported they must be vacated. *See e.g. State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011) (A court errs by entering a factual finding that does not have adequate support in the record).

Because 750 MCM copper wire is common and generally fungible, and because the state failed to prove that the wire Mr. Hansen sold was the same wire taken from Carlson's Mill, the evidence does not prove that Mr. Hansen trafficked in stolen wire. His conviction must be reversed and the charge dismissed with prejudice. *Smalis*, 476 U.S. at 144.

2. Without considering Mr. Hansen's statements, no rational trier of fact could have found beyond a reasonable doubt that he knew of and disregarded a substantial risk that the wire was stolen at the time he sold it.

The prosecution also failed to prove that Mr. Hansen acted recklessly. Aside from Mr. Hansen's statements, no evidence in the record showed how the wire came into Mr. Hansen's possession. *See RP generally*.

Under the state's theory, the wire could have been taken any time between July 6<sup>th</sup> and July 26<sup>th</sup>. RP (2/5/14) 5-7, 18-19, 54-55. During that time frame, it might have been stolen by a third party and sold to Mr. Hansen in what appeared to be a legitimate sale.<sup>12</sup> If Mr. Hansen believed he'd bought the wire from its owner, he would not know of and disregard a substantial risk that the property had been stolen.

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<sup>12</sup> Because the wire might have been taken at any time between July 6<sup>th</sup> and 26<sup>th</sup>, the state did not prove that it was "recently stolen." Absent such proof, the court could not draw an adverse inference from Mr. Hansen's mere possession. *See, e.g., State v. Terry*, 328 P.3d 932, 940 (Wash. Ct. App. 2014).

Alternatively, Mr. Hansen might have reasonably believed he had the owner's permission to salvage the wire. For example, Robert Carlson<sup>13</sup> may have told Mr. Hansen that he still owned the mill, and asked him to salvage the copper wire from the property. Similarly, a PUD official might have told him that the wire belonged to the PUD but was unrecoverable, and sold him the salvage right. Under either of these circumstances, a reasonable person would believe he'd undertaken a legitimate salvage operation.

The prosecution failed to prove how the wire came to Mr. Hansen. Because of this, it did not show that Mr. Hansen knew of and disregarded a substantial risk that the property was stolen. Absent such proof, the conviction was based on insufficient evidence. It must be reversed and the case dismissed with prejudice. *Smalis*, 476 U.S. at 144.

- C. If the state's failure to prove the *corpus delicti* by independent evidence is not preserved for review, Mr. Hansen received ineffective assistance of counsel.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person.

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<sup>13</sup> The man who lost the mill during foreclosure proceedings. RP (2/5/14) 17-18.

*Kyllo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend. VI; *Kyllo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *Id.*

As outlined above, the state failed to prove the *corpus delicti* of trafficking. Absent consideration of Mr. Hansen's statements, the state's evidence did not establish that the copper wire was stolen or that Mr. Hansen knew of and disregarded a substantial risk that it was stolen.

Mr. Hansen's attorney recognized the existence of an issue under the *corpus delicti* rule. RP (10/14/13) 1; RP (2/5/14) 3. Despite this, he failed to raise the *corpus delicti* issue, either when Mr. Hansen's statements were offered or when he argued the evidence to the court at the end of trial. RP (2/5/14) 64-70, 72-77.

Had counsel pointed out the state's failure to prove the *corpus delicti* by independent evidence, the court would have dismissed the charge with prejudice. Thus, counsel had no strategic reason to withhold argument, and his failure to raise the issue prejudiced Mr. Hansen.

If the *corpus delicti* issue may not be raised for the first time on review, Mr. Hansen was deprived of the effective assistance of counsel. *Kyllo*, 166 Wn.2d at 862. His conviction must be reversed and the case remanded for a new trial. *Id.*

**III. THE TRIAL COURT ERRED BY ORDERING MR. HANSEN TO PAY MORE THAN \$134,000 IN RESTITUTION.**

A. Standard of Review

A restitution order is reviewed for an abuse of discretion. *State v. Deskins*, 180 Wn.2d 68, 77, 322 P.3d 780 (2014), as amended (June 5, 2014). A court abuses its discretion when its decision “is manifestly unreasonable or based on untenable grounds or untenable reasons.” *Id.* (internal quotation marks and citation omitted).

B. The trial court infringed Mr. Hansen’s right to due process and his statutory right to an evidentiary hearing by imposing restitution without providing an opportunity to be heard.

A fundamental requisite of due process is notice and an opportunity to be heard. *In re Det. of Morgan*, 180 Wn.2d 312, \_\_\_, 330 P.3d 774, 779 (2014). Failure to hold a restitution hearing before imposing restitution violates due process. *State v. Raleigh*, 50 Wn. App. 248, 254, 748 P.2d 267 (1988).

Furthermore, by statute, when an offender objects to the imposition of restitution, the court “must hold a hearing.” *State v. Gray*, 174 Wn.2d 920, 925-26, 280 P.3d 1110 (2012). At the hearing, the state must prove the restitution amount by a preponderance of the evidence. *Deskings*, 180 Wn.2d at 82.

Here, Mr. Hansen objected to the imposition of restitution. RP (2/26/14) 3-4. Despite this, the court imposed restitution in an amount exceeding \$134,000 without holding a hearing, receiving evidence, or allowing defense counsel to present argument. RP (2/26/14) 5-6. This violated Mr. Hansen’s right to due process, and his statutory right to an evidentiary hearing. *Morgan*, 180 Wn.2d at \_\_\_; *Gray*, 174 Wn.2d at 925-26. The restitution order must be vacated. *Gray*, 174 Wn.2d at 925-26.

C. The trial court lacked authority to order Mr. Hansen to pay restitution to Carlson’s Mill for theft of the copper wire.

A trial court’s authority to impose restitution is derived from statute. *State v. Griffith*, 164 Wn.2d 960, 965, 195 P.3d 506 (2008).

Restitution is allowed only for losses that are causally connected to the crime charged. *Id.* A loss is causally connected “if, but for the charged crime, the victim would not have incurred the loss.” *Id.*, at 966.

An offender “may not be required to pay restitution beyond the crime charged or for other uncharged offenses...” *State v. Dauenhauer*,

103 Wn. App. 373, 378, 12 P.3d 661 (2000). Restitution “cannot be imposed based on a defendant's ‘general scheme’ or acts ‘connected with’ the crime charged, when those acts are not part of the charge.” *State v. McCarthy*, 178 Wn. App. 290, 297, 313 P.3d 1247 (2013) (internal quotation marks omitted) (citing *Dauenhauer*, 103 Wn. App. 373) An order that violates these principles is void. *Dauenhauer*, 103 Wn. App. at 378

In this case, Mr. Hansen was charged with selling stolen copper wire to Butcher’s Scrap. Both the prosecutor and defense counsel agreed that the court lacked authority to order Mr. Hansen to pay for the theft of copper wire from Carlson’s Mill. RP (2/26/14)3-4. Any loss suffered by Carlson’s Mill was not causally connected to the sale of copper wire to Butcher’s Scrap. It cannot be said that Carlson’s Mill “would not have incurred the loss” but for Mr. Hansen’s sale to Butcher’s Scrap. *Griffith*, 164 Wn.2d at 966.

The trial court exceeded its statutory authority by imposing restitution for an uncharged crime. *Id.* The restitution order is void and must be vacated. *Dauenhauer*, 103 Wn. App. at 378.

**IV. THE COURT VIOLATED MR. HANSEN’S SIXTH AMENDMENT RIGHT TO COUNSEL BY IMPOSING ATTORNEY’S FEES IN A MANNER THAT IMPERMISSIBLY CHILLS THE EXERCISE OF THAT RIGHT.**

A. Standard of Review.

Constitutional errors are reviewed *de novo*. *Zillyette*, 178 Wn.2d at 158.

B. The court violated Mr. Hansen’s right to counsel by ordering him to pay attorney fees without inquiring into his present or future ability to pay.

The Sixth Amendment guarantees an accused person the right to counsel. U.S. Const. Amends. VI; XIV. A court may not impose costs in a manner that impermissibly chills an accused’s exercise of the right to counsel. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974). Under *Fuller*, the court must assess the accused person’s current or future ability to pay prior to imposing costs. *Id.*

In Washington, the *Fuller* rule has been implemented by statute. RCW 10.01.160 limits a court’s authority to order an offender to pay the costs of prosecution:

The court *shall not order* a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3) (emphasis added).

Nonetheless, Washington cases have not required a judicial determination of the accused's actual ability to pay before ordering payment for the cost of court-appointed counsel. *State v. Blank*, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997) (discussing *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992)); *see also, e.g., State v. Smits*, 152 Wn. App. 514, 523-524, 216 P.3d 1097 (2009); *State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811 (2008). This construction of RCW 10.01.160(3) violates the right to counsel.<sup>14</sup> *Fuller*, 417 U.S. at 45.

In *Fuller*, the U.S. Supreme Court upheld an Oregon statute that allowed for the recoupment of the cost a public defender. *Id.* The court relied heavily on the statute's provision that "a court may not order a convicted person to pay these expenses unless he 'is or will be able to pay them.'" *Id.* The court noted that, under the Oregon scheme, "no requirement to repay may be imposed if it appears *at the time of sentencing* that 'there is no likelihood that a defendant's indigency will end.'" *Id.* (emphasis added). Accordingly, the court found that "the [Oregon] recoupment statute is quite clearly directed only at those convicted defendants who are indigent at the time of the criminal proceedings against them but who subsequently gain the ability to pay the

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<sup>14</sup> In addition, the problem raises equal protection concerns. Retained counsel must apprise a client in advance of fees and costs relating to the representation. RPC 1.5(b). No such obligation requires disclosure before counsel is appointed.

expenses of legal representation.... [T]he obligation to repay the State accrues only to those who later acquire the means to do so without hardship.” *Id.*

Oregon’s recoupment statute did not impermissibly chill the exercise of the right to counsel because “[t]hose who remain indigent or for whom repayment would work ‘manifest hardship’ are forever exempt from any obligation to repay”. *Fuller*, 417 U.S. at 53. The Oregon scheme also provided a mechanism allowing an offender to later petition the court for remission of the payment if s/he became unable to pay. *Fuller*, 417 U.S. at 45.

Several other jurisdictions have interpreted *Fuller* to require a finding of ability to pay before ordering an offender to reimburse for the cost of counsel. *See e.g. State v. Dudley*, 766 N.W.2d 606, 615 (Iowa 2009) (“A cost judgment may not be constitutionally imposed on a defendant unless a determination is first made that the defendant is or will be reasonably able to pay the judgment”); *State v. Tennin*, 674 N.W.2d 403, 410-11 (Minn. 2004) (“The Oregon statute essentially had the equivalent of two waiver provisions—one which could be effected at imposition and another which could be effected at implementation. In contrast, the Minnesota co-payment statute has no similar protections for the indigent or for those for whom such a co-payment would impose a

manifest hardship. Accordingly, we hold that Minn. Stat. § 611.17, subd. 1 (c), as amended, violates the right to counsel under the United States and Minnesota Constitutions”); *State v. Morgan*, 173 Vt. 533, 535, 789 A.2d 928 (2001) (“In view of *Fuller*, we hold that, under the Sixth Amendment to the United States Constitution, before imposing an obligation to reimburse the state, the court must make a finding that the defendant is or will be able to pay the reimbursement amount ordered within the sixty days provided by statute”).

Washington courts have erroneously interpreted *Fuller* to permit a court to order recoupment of court-appointed attorney’s fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. *See e.g. Blank*, 131 Wn.2d at 239-242. This scheme turns *Fuller* on its head and impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

Here, the court did not find that Mr. Hansen had the present or future ability to pay LFOs. CP 21-28. Indeed, the court found Mr. Hansen indigent at beginning and at the end of the proceedings. Order Appointing Attorney, Supp. CP; CP 30-32. Mr. Hansen’s felony conviction will also negatively impact his prospects for employment.

Despite this, the trial court ordered Mr. Hansen to pay \$500 toward the cost of his defense without conducting any inquiry into his present or

future ability to pay. This violated his right to counsel. Under *Fuller*, the court lacked authority to order payment for the cost of court-appointed counsel without first determining whether he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring Mr. Hansen to pay \$500 in defense costs must be vacated. *Id.*

C. Erroneously-imposed legal financial obligations may be challenged for the first time on appeal.

Although most issues may not be raised absent objection in the trial court, illegal or erroneous sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d 427, 477-78, 973 P.2d 452 (1999) *see also*, *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (erroneous condition of community custody could be challenged for the first time on appeal). An offender may challenge imposition of a criminal penalty for the first time on appeal. *State v. Moen*, 129 Wn.2d 535, 543-48, 919 P.2d 69 (1996).<sup>15</sup>

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<sup>15</sup> *See also*, *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997) (explaining improperly calculated standard range is legal error subject to review); *In re Personal Restraint of Fleming*, 129 Wn.2d 529, 532, 919 P.2d 66 (1996) (explaining “sentencing error can be addressed for the first time on appeal even if the error is not jurisdictional or constitutional”); *State v. Hunter*, 102 Wn. App. 630, 9 P.3d 872 (2000) (examining for the first time on appeal the validity of drug fund contribution order); *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994) (holding “challenge to the offender score calculation is a sentencing error that may be raised for the first time on appeal”); *State v. Paine*, 69 Wn. App. 873, 884, 850 P.2d 1369 (1993) (collecting cases and concluding that case law has “established a common law rule that when a sentencing court acts without statutory authority in imposing a sentence, that error can be addressed for the first time on appeal”).

All three divisions of the Court of Appeals have held that LFOs cannot be challenged for the first time on appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013) *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013); *State v. Calvin*, --- Wn. App. ---, 316 P.3d 496, 507 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). But the *Duncan*, *Blazina*, and *Calvin* courts dealt only with factual challenges to the court's finding that the accused had the present or future ability to pay LFOs. *Id.*

Those cases do not govern Mr. Hansen's claim that the court lacked constitutional authority to order him to pay. The issue here may be reviewed, even though Mr. Hansen did not object in the trial court. *Bahl*, 164 Wn.2d at 744.

### **CONCLUSION**

The Information failed to allege critical facts, and violated Mr. Hansen's constitutional right to an adequate charging document. His conviction must be reversed and the case dismissed without prejudice.

The state failed to prove the elements of the offense beyond a reasonable doubt, because it failed to *prima facie* establish the *corpus*

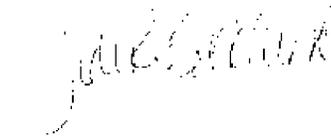
*delicti* of trafficking in stolen property. The conviction must be reversed and the charge dismissed with prejudice.

The trial court violated Mr. Hansen's right to due process and his statutory right to an evidentiary hearing before setting restitution. The court also exceeded its statutory authority by imposing restitution for a crime not causally connected to Mr. Hansen's trafficking charge. The restitution order is void.

The trial court infringed Mr. Hansen's right to counsel by imposing attorney fees in the absence of evidence and a finding that he has the present or likely future ability to pay. The order imposing attorney fees must be vacated.

Respectfully submitted on September 8, 2014,

**BACKLUND AND MISTRY**



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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Glenn Hansen  
24 Old Mill Lane  
Neilton, WA 98566

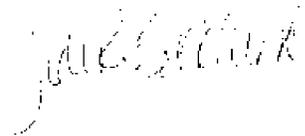
And:

Grays Harbor County Prosecuting Attorney  
102 W. Broadway Ave, #102  
Montesano, WA 98563

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on September 8, 2014.



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Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

## BACKLUND & MISTRY

September 08, 2014 - 3:49 PM

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