

NO. 47286-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN ROBERT BOWEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00928-1

BRIEF OF RESPONDENT

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SERVICE	Jodi R. Backlund Po Box 6490 Olympia, WA 98507-6490 Email: backlundmistry@gmail.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED: October 27, 2015, Port Orchard, WA <i>J. Backlund</i> Original e-filed at the Court of Appeals; Copy to counsel listed at left. Office ID # 91103 kcpa@co.kitsap.wa.us
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TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUES..... 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT..... 6

A. THE CHARGE OF POSSESSION OF A STOLEN VEHICLE DID NOT INCLUDE ALL ESSENTIAL ELEMENTS BUT DID NOT PREJUDICE THE DEFENSE..... 6

B. THE CHARGE OF POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE CONTAINED ALL ESSENTIAL ELEMENTS OF THE CRIME, PROVIDED ADEQUATE NOTICE OF THE ACTS CHARGED AND PROVIDED DOUBLE JEOPARDY PROTECTION BECAUSE IT CHARGED THE PROPER UNIT OF PROSECUTION..... 8

C. BOWEN’S GUILTY PLEA TO POSSESSION OF METHAMPHETAMINE WAS KNOWING INTELLIGENT, AND VOLUNTARY, ENTERED TO GAIN ADVANTAGE IN THE LITIGATION, AND WAS SUPPORTED BY SUFFICIENT FACTS UNDER ALL THE CIRCUMSTANCES..... 12

D. EVIDENCE OF THE BURGLARIES FROM WHICH THE STOLEN PROPERTY THAT WAS THE BASIS OF THE CHARGES WAS RELEVANT TO A MATERIAL ELEMENT OF THE STATE’S CASE AND AS SUCH NOT SUBSTANTIALLY PREJUDICIAL, AND DID NOT RAISE AN ISSUE AS TO BOWEN’S CHARACTER OR CRIMINAL PROPENSITY. 20

1. The evidence was relevant to a material issue in the case and its probative value was not outweighed by substantial prejudice.....21

2. Relevant evidence of criminal acts of another does not implicate ER 404(b) nor does it establish that the defendant, not alleged to be the perpetrator of the acts, acted in conformity therewith.....25

E. BOWEN’S COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING TO RELEVANT, ADMISSIBLE EVIDENCE..... 29

F. BOWEN FAILED TO OBJECT TO THE TRIAL COURT’S LEGAL FINANCIAL ORDER..... 32

IV. CONCLUSION.....	34
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TABLE OF AUTHORITIES

CASES

<i>Garceau v. Woodford</i> , 275 F.3d 769 (9th Cir. 2001)	27, 28
<i>In re Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992).....	31
<i>State v. Cronin</i> , 142 Wn.2d 568, 14 P.3d 752 (2000).....	20
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002).....	20
<i>State v. Davis</i> , 6 Wash.2d 696, 108 P.2d 641 (1940).....	22
<i>State v. Flint</i> , 4 Wn. App. 545, 483 P.2d 170 (1971).....	24
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	32
<i>State v. Gottfreedson</i> , 24 Wash. 398, 64 P. 523 (1901).....	22
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	31
<i>State v. Hubbard</i> , 106 Wn. App. 149, 22 P.3d 296 (2001).....	18
<i>State v. Hughes</i> , 118 Wn.App., 713, 77 P.3d 681 (2003).....	27
<i>State v. Kjorsvic</i> , 117 Wn.2d 93, 812 P.2d 86 (1991)	7, 31
<i>State v. Kjorsvik</i> , 117 Wn.2d 93, 812 P.2d 86 (1991).....	9
<i>State v. Lillard</i> , 122 Wn. App. 422, 93 P.3d 969 (2004).....	27
<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991), <i>cert. denied</i> , 506 U.S. 856 (1992).....	31
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	30

<i>State v. McReynolds</i> , 117 Wn. App. 309, 71 P.3d 663 (2003)	9, 10, 11
<i>State v. Morris</i> , 70 Wn.2d 27, 422 P.2d 27 (1966)	23, 24
<i>State v. Newton</i> , 87 Wn.2d 363, 552 P.2d 682 (1976)	14, 18
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994)	19
<i>State v. S.M.</i> , 100 Wn.App. 401, 996 P.2d 1111 (2000)	13, 16
<i>State v. Satterthwaite</i> , 186 Wn. App. 359, 344 P.3d 738 (2015)	7, 32
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	33
<i>State v. Smith</i> , 134 Wn.2d 849, 953 P.2d 810 (1998)	13
<i>State v. Tesenriter</i> , 101 Wn.App. 486, 4 P.3d 145 (2000)	9, 10
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	30, 31
<i>United States v. Torres-Vazquez</i> , 731 F.3d 41 (1st Cir. 2013)	15
<i>Woodford v. Garceau</i> , 538 U.S. 202 (2003)	28

STATUTORY AUTHORITIES

RCW 69.50.430	12
RCW 69.50.4013(2)	12

RULES AND REGULATIONS

ER 401	20, 21
ER 403	17, 20, 24
ER 404(b)	passim
RAP 2.5	32
RAP 2.5(a)	33

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the Possession of Stolen Vehicle charge contained all essential elements.
2. Whether the charge of Possession of Stolen Property contained all essential elements and allowed for adequate notice and protection from double jeopardy.
3. Whether evidence of the underlying thefts from which the stolen property came is admissible in a prosecution for possession of stolen property.
4. Whether under all the circumstances there was an adequate factual basis to support an *Alford* plea of guilty to possession of methamphetamine.
5. Whether ER 404(b) applies to the bad acts of other persons, not the defendant.
6. Whether admission of evidence of the bad acts of others establishes the defendant's propensity to so act.
7. Whether counsel was ineffective for failing to object to admissible evidence.
8. Whether the Court should review the trial court's legal financial order when defendant did not object in the trial court.

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On September 16, 2014, Kevin Robert Bowen was charged by information with possession of controlled substance [methamphetamine] and possession of a stolen vehicle. CP (Supp.) 341. A probable cause certificate was attached. CP (Supp.) 344. At arraignment on September 17, 2014, Bowen stipulated to probable

cause for those two charges. RP (9/17/14) 2. At that hearing, Bowen was advised of and acknowledged his rights. RP Id. at 3.

Several continuances were had and on January 12, 2015 the matter was called for a status hearing at which Bowen was arraigned on the first amended information. RP (1/12/15) 3-4; CP 1-4. In addition to the two original charges, the first amended information added possession of stolen property second degree and two additional counts of possession of a stolen vehicle. CP Id. Bowen stipulated to probable cause on the drug possession, first stolen vehicle (count II), and possession of stolen property counts. RP (1/12/15) 4. He objected to probable cause on the additional possession of stolen vehicle charges (counts IV and V). Id.

On counts IV and V the state made an oral offer of proof to establish probable cause. Argument was had and the trial court did not find probable cause for those counts. RP (1/12/15) 18. The parties agreed that counts IV and V should be severed at that time and the trial court so ordered. RP (1/12/15) 24. Those two counts were later dismissed. CP 71-72.

Also on January 12, 2015, Bowen answered count I of the first amended information, possession of controlled substance, with a plea of guilty. RP (1/12/15) 19-23; CP (supp.) 346-355 (statement of defendant on plea of guilty). A complete colloquy was undertaken with Bowen advising that he understood all aspects of his plea. Id. The trial court found the plea to be “knowing, voluntary, and with full understanding.” RP (1/12/15) 23. The plea was in the form of an *Alford plea*: Bowen did not admit the underlying facts agreeing instead that the trial court could review the probable cause certificate to establish a factual basis. Id. at 22.

The matter proceeded to trial on possession of stolen property and possession of stolen vehicle counts. During motions *in limine*, the parties argued under ER 404(b) as to the admissibility of the methamphetamine possession to which Bowen had just pled guilty. RP 32-36. The trial court reserved ruling on that issue until the next day. RP Id. at 36. Next day, January 13, 2015, the state added to the argument the items of drug paraphernalia found in the stolen vehicle. RP (1/13/15) 50-51. Defense counsel conceded the admissibility of the paraphernalia as relevant to Bowen's knowledge. RP (1/13/15) 52. The trial court ruled that the paraphernalia is admissible as probative of the use of and dominion and control of the car. RP (1/13/15) 52-53. But the court excluded the methamphetamine in Bowen's pocket as more prejudicial than probative, rejecting the state's *res gestae* argument. Id.

The jury found Bowen guilty on both counts tried. RP (1/20/15) 399; CP 70 (verdict form). Judgement and Sentence was entered on February 27, 2015. CP 308. Bowen was sentenced with a 34 offender score on count II. CP 310. Given that score, the trial court pronounced an exceptional sentence with the otherwise concurrent counts being ordered to run consecutively for a total of 93 months. CP 310-11. The trial court entered findings and conclusions for that exceptional sentence on the same day. CP 320-22.

B. FACTS

On March 8, 2015, Kevin Bowen was stopped for speeding in a dark green Ford Explorer. RP (1/14/15) 156. There was a female passenger in the car. Id. at 157. The Ford was loaded with a lot of

property. Id. Bowen stated to the officer that Kevin Kinslow, the registered owner, had allowed him to use the car to move some things. Id. at 158. The officer received information that the car was stolen. Id. at 159. Bowen was taken from the car and arrested. Id. at 160. Among items found by police in the car was a bag containing 31 vehicle, padlock and House keys. Id. at 167. Bolt cutters were also found. Id. at 168. The officer testified that the radio scanner, bolt cutters and keys found were items commonly possessed by people engaged in committing burglaries and thefts. Id. at 171.

Witness Everett Kinslow testified that he is the father of Kevin Kinslow. RP (1/14/15) 114. He was watching Kevin's home while Kevin was stationed away in the Navy. Id. at 115. Kevin was gone from the home for approximately six years. Id. at 116. On March 5, 2015, Everett visited Kevin's home and found that the house was "sort of like ransacked a little bit," and "[t]hings were missing." Id. at 119. Everett went to the garage and found that two cars and other things were missing and the back door of the garage was kicked in. Id. A third car, a Ford Explorer, was still there. Id.

Two days later, Everett returned to the house and once again found that things were not as they had been left two days earlier. Id. at 127.

Among other things, including a Honda lawn mower, Everett found that the Ford Explorer was now gone. *Id.* The keys to the Ford were also gone. *Id.* at 128. Upon retrieving the Ford, Everett found that the interior was packed with things that had not been there before, including the Honda lawn mower. *Id.* He also found tools, binoculars, jewelry, welding machines, and other items. *Id.* at 132-33.

Gregory Hawkins testified that he worked at a plumber and pipefitter training facility located on Eldorado Boulevard in Bremerton. RP (1/14/15) 191. Hawkins discovered that three welding machines were missing from the facility. *Id.* at 194. Hawkins provided law enforcement with the serial numbers of the machines. *Id.* at 195. David McMichael, an administrator at the facility, valued the three welding machines at \$1,748.25 each.

Lori Winn testified that on March 7 her daughter discovered that their home had been burglarized. RP (1/14/15) 212. Winn discovered that her TV, a purse and backpack, some jewelry and a couple of cameras were missing. *Id.* at 213-14. Winn was called the next day, March 8, by law enforcement and was told that her property had been recovered. *Id.* at 214. She recovered a camera, a wedding set, and “a lot of miscellaneous stuff.” *Id.* at 215.

Deputy Sonya Matthews testified that Everett Kinslow had identified property that did not belong to him or his son. RP (1/14/15) 219. Among the items found was paperwork belonging to Bowen. Id. A service form from a truck dealer signed “K. Bowen” and an automobile insurance card naming Kevin Bowen as the insured were found. Id. at 224. Hundreds of items had been recovered.¹ Id. at 225. In particular, Matthews identified Exhibit 72—a box with drug paraphernalia in it, including hypodermic needles, straws, and dirty spoons (exhibit 74 is a picture of the box contents). Id. at 232. Matthews testified that the paraphernalia could be used to ingest narcotics such as methamphetamine or cocaine. Id. at 232-33.

III. ARGUMENT

A. THE CHARGE OF POSSESSION OF A STOLEN VEHICLE DID NOT INCLUDE ALL ESSENTIAL ELEMENTS BUT DID NOT PREJUDICE THE DEFENSE.

Bowen was charged with Possession of a Stolen Vehicle as follow

On or about March 8, 2014, in Kitsap County, State of Washington, the above named Defendant did knowingly

¹ Deputy Matthews describes the items at RP (1/14/15) 228-232.

possess a stolen motor vehicle; contrary to Revised Code of Washington 9A.56.068.

CP 2. Resort to the statutory citation reveals that “[a] person is guilty of possess of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.” RCW 9A.56.068. The First Amended Information so charging was filed on January 12, 2015. CP 2. Trial commenced the same day after arraignment on the First Amended Information. Bowen asserted no objection to the language of the charge nor the probable cause supporting it.

But in March, this Court held that the above charging language is insufficient. *State v. Satterthwaite*, 186 Wn. App. 359, 344 P.3d 738 (2015). A possession of a stolen vehicle charge now is required to include the language of RCW 9A.56.140(1), to wit, that one must “withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” *Id.* at 365. Since Bowen’s charge did not include this language, the charge is insufficient under the case.

However, as argued *infra* with regard to the Possession of Stolen Property charge, when a challenge to a charging document is raised for the first time on appeal the document must be liberally construed and appellate should be required to show prejudice. *State v. Kjorsvic*, 117 Wn.2d 93, 103-105, 812 P.2d 86 (1991). This primarily because of the

ease with which the problem could be corrected in the trial court if the defense objects or is otherwise confused as to the charge. Id.

Herein, as noted, Bowen made no objection and nowhere in the record is there any indication that Bowen was confused or confounded by the way the charge was stated. In short, Bowen shows no prejudice from the manner that the offense was charged. He should be required to do so under these circumstances.

B. THE CHARGE OF POSSESSION OF STOLEN PROPERTY IN THE SECOND DEGREE CONTAINED ALL ESSENTIAL ELEMENTS OF THE CRIME, PROVIDED ADEQUATE NOTICE OF THE ACTS CHARGED AND PROVIDED DOUBLE JEOPARDY PROTECTION BECAUSE IT CHARGED THE PROPER UNIT OF PROSECUTION.

Bowen also argues that the Possession of Stolen Property Second Degree count (herein after PSP) is mischarged because it lacks sufficient “critical facts.” Appellant’s Opening Brief at 10. Bowen maintains that this deficiency fails to give adequate notice of the charge and exposes him to the possibility of double jeopardy. Id.

First, the timing of Bowen’s claim drives the standard of review. Bowen did not object to the wording of the PSP charge in the trial court. In 1991, our Supreme Court announced the following rule in such circumstances:

A different standard of review should be applied when no challenge to the charging document has been raised at or before trial because otherwise the defendant has no incentive to timely make such a challenge, since it might only result in an amendment or a dismissal potentially followed by a refile of the charge. Applying a more liberal construction on appeal discourages what Professor LaFave has described as “sandbagging”. He explains this as a potential defense practice wherein the defendant recognizes a defect in the charging document but foregoes raising it before trial when a successful objection would usually result only in an amendment of the pleading.

We hereby adopt the federal standard of liberal construction in favor of the validity of charging documents where challenges to the sufficiency of a charging document are initially raised after verdict or on appeal, but we further include in that standard both an essential elements prong and an inquiry into whether there was actual prejudice.

State v. Kjorsvik, 117 Wn.2d 93, 103-05, 812 P.2d 86 (1991) (internal footnotes omitted). Under this rule of liberal construction of the charging document, “even if there is an apparently missing element, it may be able to be fairly implied from the language within the charging document” and the document upheld on appeal. *Id.* at 104.

In *State v. Tesenriter*, 101 Wn.App. 486, 4 P.3d 145 (2000), appellant claimed that the information charging PSP was insufficient. *Id.* at 494. There, the charge read “[i]n that the defendant, Michael Jay Tesenriter...did knowingly possess property of a value greater than \$250 knowing it was stolen.” *Id.* Tesenriter argued insufficiency because the charge failed to identify the stolen property, where the stolen property was

when possessed, or its connection with theft or burglary. *Id.* at 495. The Court of Appeals responded that “none of these are elements of the crime of possession of stolen property.” 101 Wn App. at 495. Further, “[i]t has long been the rule in Washington that the identity of the property's owner is not an element of crimes involving larceny or theft.” *State v. McReynolds*, 117 Wn. App. 309, 335, 71 P.3d 663 (2003). These seem to be the missing, but unnecessary, pieces of the charge that Bowen complains of.

But in this case, the State’s charge included all the essential elements:

On or about March 8, 2014, in the County of Kitsap, State of Washington, the above-named Defendant did, knowingly receive, retain, possess, conceal, or dispose of stolen property, knowing that it had been stolen, and did withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto, said property being in excess of seven hundred fifty dollars (\$750.00) in value, contrary to the Revised Code of Washington 9A.56.140(1) and RCW 9A.56.160(1)(a).

CP 2. Here, the language was more informative than the charge upheld in *Tesenriter*. Here, all essential elements were charged. Bowen’s claim to insufficiency fails the essential elements test. Bowen had adequate notice of the charge.

Further, Bowen’s perceived risk of double jeopardy is also misplaced. In *State v. McReynolds*, *supra*, husband and wife were each

charged, *inter alia*, with eleven counts of Possession of Stolen Property. They claimed that the multiple counts violated double jeopardy. *Id.* at 331-32. The Court of Appeals considered the “unit of prosecution” for PSP. The Court analyzed this question, in part, with reference to the above noted rules that identity of the property owner and the property are not elements of the charge. 117 Wn.App. at 335-36. The Court reversed each defendant’s eleven PSP convictions, holding that “each may be convicted of only one count of possession of stolen property.” *Id.* at 344.

This holding rests on the principle that “when a statute defines a crime as a course of conduct over a period of time, it is a continuous offense and any conviction or acquittal based on a portion of that course of action will bar prosecution on the remainder.” *Id.* at 339 (internal quotation and citation omitted); *see also, State v. Ose*, 156 Wn.2d 140, 124 P.3d 635 (2005) (allowing multiple counts of theft of access device because statute refers to “a” stolen access device in particular and not stolen property in general).

In the present case, Bowen was discovered with many items of stolen property. The State, following *McReynolds*, charged but one count. Under *McReynolds*, Bowen is protected from further prosecution for any particular piece of stolen property that he was found in possession of on

March 8, 2014. Thus, Bowen was adequately notified of the essential elements of the charge under circumstances evincing no danger of multiple prosecutions for the same behavior. This claim fails.

C. BOWEN'S GUILTY PLEA TO POSSESSION OF METHAMPHETAMINE WAS KNOWING INTELLIGENT, AND VOLUNTARY, ENTERED TO GAIN ADVANTAGE IN THE LITIGATION, AND WAS SUPPORTED BY SUFFICIENT FACTS UNDER ALL THE CIRCUMSTANCES.

At the doorstep of trial, Bowen entered a guilty plea to Count I of the First Amended Information—Possess of Controlled Substance [Methamphetamine]. CP 2. The full charge reads

On or about March 8, 2014, in the County of Kitsap, State of Washington, the above-named Defendant did possess a controlled substance, to-wit: Methamphetamine, including its salts, isomers, and salts of isomers; contrary to the Revised Code of Washington 69.50.4013 and 69.50.206(d)(2). (MAXIMUM PENALTY—Five (5) years imprisonment and/or a fine of not less than \$1000 nor more than \$10,000 fine pursuant to RCW 69.50.4013(2) and RCW 69.50.430, plus restitution and assessments.)

CP 2. It is clear that this charge is adequate to enlighten Bowen as to the nature of the charge and the consequences of it. Bowen asserts no claim that that charge is not adequate to its purpose or that Bowen was in any way confused or unintelligent as to the charge he was pleading guilty to.

The plea colloquy shows that the trial court asked the right questions—understanding of the charge, rights being waived, and

consequences of the plea—and received appropriate responses from Bowen. RP (1/12/15) 20-23. Bowen made no assertion of misunderstanding. This allowed the trial court to accurately find that the plea was made “knowingly, voluntarily, and with full understanding.” RP (1/12/15) 23. Neither did Bowen behave equivocally—he made no protestation of innocence on the record. Also, the record is clear that Bowen had the assistance of counsel for his plea. RP (1/12/15) 23 (defense counsel states that there is no reason the court should not accept the plea).

In addition to the colloquy, Bowen asserted his Statement of Defendant on Plea of Guilty. CP 346. There again we find him reciting that he understands the charge and the consequences of his plea. In subsection 5 of the plea statement, Bowen acknowledges that “I understand I have the following important rights, and I give them up by pleading guilty.” CP 346. Subsection 5(e) recites that those waived rights include “[t]he right to be presumed innocent unless the State proves the charge beyond a reasonable doubt or I enter a plea of guilty.” CP 347(emphasis added). Thus by his own statement, signed by he and his attorney (CP 354), Bowen advised he knew that his plea would absolve the state of its burden to prove the clearly stated and clearly understood charge beyond a reasonable doubt. “When a defendant completes a plea

statement and admits to reading, understanding, and signing it, this raises the presumption that the plea is voluntary.” *State v. S.M.*, 100 Wn.App. 401, 413-14, 996 P.2d 1111 (2000), citing *State v. Smith*, 134 Wn.2d 849, 852, 953 P.2d 810 (1998).

For the first time on appeal, Bowen argues that the plea is infirm because it lacks a sufficient factual basis. Bowen does not assert that there is “no” factual basis; he argues that this one is inadequate. Appellant’s Opening Brief at 23. The plea did proceed as an *Alford* plea in that Bowen made no factual admission at paragraph 11 of the Statement, saying rather that “instead of making a statement, I agree that the court may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” CP 354. The Certificate of Probable Cause upon which the trial court relied was appended to the Information originally filed in the matter on September 16, 2014. CP 345. Bowen was aware of that document having stipulated to probable cause at his first arraignment. RP (9/17/14) 2.

Here, it is important to note that the solicitude of the courts to defendant’s entering “equivocal” pleas, i.e., pleas of guilty contemporaneous with protestations of innocence, does not apply. See e.g., *State v. Newton*, *infra* at 14. Bowen made no assertion of innocence

to that charge. It is under all these circumstances that the trial court's factual basis finding must be considered. In all circumstances

The factual basis requirement of CrR 4.2(d) does not mean the trial court must be convinced beyond a reasonable doubt that defendant is in fact guilty. It should be enough if there is sufficient evidence for a jury to conclude that he is guilty.

State v. Newton, 87 Wn.2d 363, 370, 552 P.2d 682 (1976). As one United

State Court of Appeals recently put it

To establish a sufficient factual foundation for a plea, the government need only show a rational basis in fact for the defendant's guilt. This showing can be achieved even if the government does not support every element of the charged crime by direct evidence. After all, [a] Rule 11 inquiry is not designed to prove a criminal defendant's guilt beyond all doubt. As long as the record evinces some basis for thinking that the defendant is at least arguably guilty, no more is exigible.

U.S. v. Torres-Vazquez, 731 F.3d 41, 44-45 (1st Cir. 2013) (internal quotation marks and citations omitted). This holding gives content to the somewhat confounding notion that the trial court need not be convinced beyond a reasonable doubt but a jury should be.

State v. Colquitt, 133 Wn. App. 789, 137 P.3d 892, does not change this standard and the circumstances of that case are clearly distinguishable from the present case. There, Colquitt was tried to the bench in a drug court revocation hearing. In the drug court stipulation, "Colquitt never stipulated to the sufficiency of the evidence presented in

the police report.” *Id.* 795. That case, then, proceeds in the manner of considering the sufficiency of evidence in a bench trial, not on a plea of guilty. Here, by his plea of guilty and agreement that the court may refer to the Certificate of Probable Cause, Bowen essentially made the agreement to the facts that Colquitt did not.

Moreover, that difference in procedural posture, the difference between a bench trial and a plea of guilty, matters. In the drug court revocation trial, the defendant waived only those particular rights included in the drug court stipulation. A plea of guilty, however, has the effect of admitting all the material facts alleged in the proceeding.

Thus, a guilty plea waives claims that the prosecution obtained evidence unlawfully or violated its discovery or Brady obligations; that the defendant was illegally detained; that he was denied a speedy trial; that the grand jury process was tainted; that the preliminary hearing procedures were defective; that venue was improper; that the government's evidence was insufficient to sustain a conviction; that defendant never properly waived his right to proceed by indictment; or that raise other challenges, except to the extent that these challenges may go to the voluntariness of the plea. In many circuits a guilty plea waives a statute of limitations challenge, although the courts are not uniform on this point. Courts also appear divided on whether an unconditional guilty plea waives the defendant's right to challenge the factual basis for the plea.

Right, Leipold, Henning, Welling, *Fed. Prac. & Proc. Crim.*, Sec. 172 (4th Ed.).

Bowen focuses on the voluntariness of the plea exception stated by these commentators. He baldly asserts that *State v. S.M.*, 100 Wn. App.

401, 414, 996 P.2d 1111, establishes the proposition that “a guilty plea is not voluntary if it is not supported by sufficient factual basis.” Appellant’s Opening Brief at 23. In *S.M.*, the Court was addressing an uncounseled plea of guilty to a sex offense. Counsel had met with S.M. only once, “just before entering the courtroom for the plea hearing.” *Id.* at 407. S.M. had previously met with counsel’s legal assistant only. *Id.* The Court noted that “a guilty plea is not truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.” *Id.* at 414. Finding that the record did not affirmatively show that S.M. understood that relationship, the Court reversed the trial court’s denial of S.M.’s motion to withdraw his plea. *Id.* at 415. Under the circumstances in the present case, there is no argument that Bowen was similarly uncounseled and similarly lacking in understanding of the consequences of his plea.

Bowen is simply mistaken with regard his assertion that a laboratory analysis is always required to support a drug possession conviction. In the case he cites for that proposition, *Colquitt*, the Court said “[g]enerally, a chemical analysis is not vital to uphold a conviction for possession of a controlled substance.” 133 Wn. App. at 797. In the context of Bowen’s guilty plea, the trial court, which is not required to be convinced beyond a reasonable doubt, should be allowed reasonable

inferences from the facts presented. It is entirely reasonable to infer on this record that Bowen was completely advised, knew what he possessed, and admitted guilt to that possession.

This admission was made to Bowen's advantage. The record is clear that Bowen entered this guilty plea in order to remove proof of his methamphetamine possession from his trial. By taking that allegation off the table, Bowen removed obviously negative information from the jury's view. Further, the long term result of this strategy can be seen in the present appeal: Bowen can and does argue irrelevance of the paraphernalia found in the Ford Explorer because the trial court excluded the obviously related drug possession under ER 404(b) and ER 403 considerations. RP (1/13/15) 53-55 (trial court's ruling *infra* at 27-28).

A holding in Bowen's favor on this issue may have far-reaching consequences. A drug possession defendant may wish to plead guilty at her arraignment. Her right to do so is statutory only:

There is no constitutional right to plead guilty. But a defendant has the right in Washington to plead guilty by court rule-CrR 4.2(a). A defendant's right to plead guilty is lost once the defendant enters a not guilty plea that complies with CrR 4.2.

State v. Hubbard, 106 Wn. App. 149, 153, 22 P.3d 296 (2001). Moreover, as *Newton* and *Alford* teach, this may be done by *Alford* plea. And this

plea may occur very soon after arrest. *See* CrR 3.2.1(f) (accused to be released within 72 hours if no information filed) *and* CrR 4.1(a) (accused must be arraigned within 14 days of filing of information). However, a defendant could not follow that procedure if the trial court is not allowed reasonable inferences from the probable cause certificate.

The upshot is that it is unlikely that at that point in the process the State will have had an opportunity to have lab testing done on the alleged contraband. Thus defense counsel attendant on the arraignment calendar could advise drug possession defendants to enter *Alford* pleas of guilty at arraignment, all the while aware of the inadequacy of field testing and aware that that issue can be successfully raised on appeal with a resulting dismissal with prejudice.

The Court would be caught in a conundrum: either recognize defendant's right to plead guilty and risk dismissal or deny the right until the State can have laboratory analysis completed. Either way, appealable issues may remain in the record. Such a result can be avoided if the trial court is allowed reasonable inferences from all the circumstances.

D. EVIDENCE OF THE BURGLARIES FROM WHICH THE STOLEN PROPERTY THAT WAS THE BASIS OF THE CHARGES WAS RELEVANT TO A MATERIAL ELEMENT OF THE STATE'S CASE AND AS SUCH NOT SUBSTANTIALLY PREJUDICIAL, AND DID NOT RAISE AN ISSUE AS TO BOWEN'S CHARACTER OR CRIMINAL PROPENSITY.

Bowen next claims that the trial court erroneously admitted evidence in the case. He argues that since he was not charged with or connected with the burglaries or thefts underlying his PSP conviction, evidence of those crimes was inadmissible. Appellant's Opening Brief at 12. He claims that that evidence is irrelevant, prejudicial, and amounts to propensity evidence. This claim is without merit because the evidence was relevant to the proof of an essential fact—that the property Bowen possessed was in fact stolen, because the probative value of the evidence was not substantially outweighed by prejudice and because ER 404(b) does not apply.

The trial court's evidentiary rulings are reviewed for abuse of discretion. *See State v. Russell*, 125 Wn.2d 24, 78, 882 P.2d 747 (1994). Under ER 401, the threshold for admitting relevant evidence is low and even minimally relevant evidence is admissible. *State v. Darden*, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). But relevant evidence may be excluded under ER 403 if its "probative value is substantially outweighed by the danger of unfair prejudice." Unfair prejudice is that which is more

likely to arouse an emotional response than a rational decision by the jury and which creates an undue tendency to suggest a decision on an improper basis. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

1. The evidence was relevant to a material issue in the case and its probative value was not outweighed by substantial prejudice.

The story of this case includes that there were three burglaries during several days in March, 2015. The penultimate point in the story is that Bowen was caught in a car that was taken in one of the burglaries and that the car was loaded with items stolen from the three burglaries. The operative word in the prosecution of this case is “stolen.” The jury was instructed that “Stolen means obtained by theft.” CP 66 (Instruction #15). Thus the State’s burden included proof beyond a reasonable doubt that the property involved was “obtained by theft.” *See State v. Plank*, 46 Wn. App. 728, 731, 731 P.2d 1170 (“to convict a defendant of possession of stolen property. . .the state must prove that the defendant possessed the property, that the property was in fact stolen, and that defendant knew the property was stolen.” (Emphasis added.)). Yet Bowen claims that the same is irrelevant and as such inadmissible.

Bowen’s argument begs a rhetorical question: How then would the State satisfy its burden of proof? ER 401 is by no means as narrow as

Bowen suggests. He asserts that evidence of the burglaries is “not relevant to any issue at trial,” and that it had “virtually no probative value.” Appellant’s Opening Brief at 13. The plain language of the rule allows admission of evidence “having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. As noted, the fact that the property involved was in fact stolen is a fact of consequence in this case. Moreover, evidence of the fact of the burglaries and the items taken in those burglaries proved the “stolen” fact over and above making it more or less likely. Had the State not proven that consequential fact, Bowen would now likely argue that the evidence was insufficient to sustain conviction.

Before the current rules of evidence were adopted, Washington courts recognized the correct answer to Bowen’s argument. In 1966, our Supreme Court considered an argument that introduction of evidence relevant to establish the crime charged should not have been admitted because it arguably included evidence of another crime. The Court said

That the evidence supplied by the young girl tended to prove appellant guilty of contributing to her delinquency gave the court no reason for excluding it if her testimony was material and relevant to the issues raised by the information or tended to prove any material fact in issue. On this point, we think that the rule

expressed in *State v. Davis*, 6 Wash.2d 696, 108 P.2d 641 (1940), declares the law:

In making its case, the state was entitled to introduce any evidence which was competent, relevant and material to the issue to be determined by the jury. That a portion of the evidence so offered might incidentally tend to show that appellant had been guilty of some other and separate offense is unimportant if the evidence tended to support the state's contention in the case being tried, and was admissible under the general rules of evidence. *State v. Thuna*, 59 Wash. 689, 109 P. 331, 111 P. 768; *State v. Macleod*, 78 Wash. 175, 138 P. 648.

We have never departed from the early statement in *State v. Gottfreedson*, 24 Wash. 398, 64 P. 523 (1901), reiterated in *State v. Davis*, *supra*, as follows:

The general rule is well established that proof of the commission of a separate and distinct crime will not be admitted for the purpose of aiding the conviction of defendant for the crime charged. There are exceptions, however, to this general rule, as where the testimony shows a connection between the transaction under investigation and some other transaction, and where they are so interwoven that the omission of the testimony in relation to the other crime would detract something from the testimony which the state would have a right to introduce as tending to show the commission of the crime charged by the defendant.

State v. Morris, 70 Wn.2d 27, 32-33, 422 P.2d 27 (1966). This holding bears a close resemblance to the *res gestae* rule upon which the trial court relied in this matter. In the present case, there is an obvious connection

between the burglaries and Bowen's possession, soon thereafter, of the loot from these burglaries. Clearly, that evidence tended to support the State's contention in the case.

Yet another pre-rules case held:

Flint's principal assignment of error is that evidence was admitted which established that the rifles found in his possession were the loot of a recently perpetrated burglary. The evidence could circumstantially connect Flint with the burglary. Flint complains that this forced him to defend against a crime with which he was not charged and therefore did not prepare to defend.

We find no merit in this contention. Evidence relevant and material in proving an element of a crime charged may also connect a defendant with another crime. The admission of evidence of an accused's participation in an unrelated crime is, however, prejudicial error. But such evidence is properly admissible if it tends to prove some essential element of the crime charged. Flint's knowledge that the rifles were stolen is an essential element of the crime of 'possession' with which he is charged. There could be no more convincing evidence as to the element of knowledge that the property was wrongfully appropriated than proof that the defendant himself had stolen it.

State v. Flint, 4 Wn. App. 545, 546-47, 483 P.2d 170 (1971) (internal citation omitted). Thus in a possessory case like Bowen's, the Court of Appeals found no error in admitting evidence of the underlying burglary. The tendency to prove the state's case made the evidence relevant. And, since relevant and material to a necessary piece of the State's proof in the case, the evidence should not be excluded under ER 403. When the

evidence is relevant and necessary to proof of the State's case, neither the *Morris* nor the *Flint* court took pause to consider prejudice.

2. *Relevant evidence of the criminal acts of another does not implicate ER 404(b) nor does it establish that the defendant, not alleged to be the perpetrator of the acts, acted in conformity therewith.*

Bowen claims that the relevant evidence should be excluded by ER 404(b). That rule provides

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Given the text of the rule, Bowen's argument ignores the fundamental target of the rule—that it applies to the particular defendant's crimes, wrongs or acts, not someone else's crimes, wrongs or acts. Moreover, since the State made no allegation that Bowen had committed the burglaries, it cannot be said that evidence of the burglaries was intended to prove his character or that he acted in conformity therewith or that he had a propensity to commit burglary.

This situation makes it at least difficult if not impossible to assail the trial court for not conducting the required inquiry for admissibility under an exception to 404(b). In fact, the trial court specifically excluded

404(b) evidence on Bowen's pretrial motion. RP (1/12/15) 32. But the State argued that the methamphetamine on Bowen at the time of his arrest should come in as *res gestae*. Id. The trial court then reserved ruling on that particular incident of Bowen's prior bad act (RP (1/12/15) 36) and, following further argument, rejected the state's *res gestae* argument, ruling the drug possession evidence inadmissible. Id. at 54-55. In this instance, the trial court excluded a wrongful act of Bowen that was actually offered by the State when the act occurred at the same time as the charged offenses. No other of Bowen's prior bad acts were offered at trial.

The fundamental misunderstanding is further manifest in Bowen's argument that it would be impossible to find that the misconduct actually occurred because "the state had no evidence linking Mr. Bowen to the prior thefts at the home." Appellant's Opening Brief at 15-16. This argument ignores that no one said Bowen committed the burglaries. That being the case, the State can concede that proof that he actually did do them might be considered at least improbable. Further, this argument is also factually incorrect: Bowen was in fact linked to the burglaries by the fact that he was captured in possession of hundreds of items that were loot from those burglaries, including the Ford Explorer.

Similarly, Bowen ignores that obvious link in arguing that “only speculation linked those other crimes to the theft of the Ford at all.” Appellant’s Opening Brief at 16. And, again, in arguing that he was convicted by propensity, he asserts that “there was no evidence that Mr. Bowen had been involved in the prior offenses in any way.” *Id.* at 18. Again, his possession of the loot of those burglaries was in no way speculative.

The *res gestae* rule allows admission of “evidence of other crimes or bad acts...to complete the story of a crime or provide the immediate context for events close in both time and place to the charged crime.” *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004). In *Lillard*, the Court was addressing the admission of evidence of other thefts in a prosecution for one count of PSP. The Court allowed this other crime evidence under the *res gestae* rule against arguments similar to Bowen’s arguments. 122 Wn.App. at 430. Thus the rule would similarly allow admission in the present case of his own prior crimes, not someone else’s prior crimes.

In another case, *State v. Hughes*, 118 Wn.App. 713, 77 P.3d 681 (2003), the Court of Appeals affirmed the trial court’s admission of uncharged burglary and weapons possession evidence under the *res gestae*

or “same transaction” rule. *Id.* at 725. But here again the application of the Court’s reasoning to the present case is difficult because that case as well involved the defendant’s bad acts and not those of another.

All the cases that the State could find are to the same affect-- the analysis is focused on admissibility of evidence of the defendant’s bad acts. It is difficult to see how Bowen’s propensity to steal is established by the acts of other thieves. Bowen’s attempt to elevate the question to a due process violation is thus misplaced. Bowen cites *Garceau v. Woodford*, 275 F.3d 769 (9th Cir. 2001) to establish that proposition. There, “[t]he question we must answer, therefore, is whether the express propensity instruction in this case by itself so infected the entire trial that the resulting conviction violates due process.” *Id.* at 775. There, evidence of manufacture of drugs and Murder (for which Garceau had been convicted) was admitted in a murder trial. The California trial court had instructed the jury that it could consider this evidence to establish “His character or any trait of his character.” The Court of Appeals noted that

The Supreme Court has held that it is not a violation of due process to admit other crimes evidence, for purposes other than to show conduct in conformity therewith, where the jury is given a limiting instruction that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried.

275 F.3d at 774 (internal quotation and citation omitted). Thus the case was about a jury instruction that did not properly limit the jury's use of this defendant's otherwise properly admitted prior bad acts.² The case supplies no support for Bowen's claim. Nor can the evidentiary errors Bowen alleges, even supposing he is correct, be elevated to a constitutional due process violation.

E. BOWEN'S COUNSEL WAS NOT INEFFECTIVE FOR NOT OBJECTING TO RELEVANT, ADMISSIBLE EVIDENCE.

Bowen next claims that his counsel was ineffective for failing to object to the admission of drug paraphernalia found in the stolen Ford Explorer. The issue was raised by the State and argued in conjunction with argument about the admissibility of the drugs found in Bowen's pocket incident to arrest. RP (1/13/15) 50 *et seq.* Defense counsel objected to the drugs in the pocket but said of the paraphernalia

Well, Your Honor, I think there is a difference. I think the contents of the vehicle are fair game, the condition of the vehicle as found by law enforcement. I think all of that can be relevant to his knowledge. (RP (1/13/15) 52) I mean, my argument would just be the baggie in the pocket is just not probative of what the State is trying to prove here. The prejudice outweighs any probative value it might have. But I think the contents of the vehicle, I don't think

² It should be noted the United States Supreme Court reversed the case because Garceau's *habeus* petition was barred under AEDPA. *Woodford v. Garceau*, 538 U.S. 202 (2003).

there's an argument that the jurors shouldn't hear what was found in the vehicle.

Id. at 53. This is the concession complained of by Bowen.

The trial court ruled about these two items, the drugs in the pocket and the paraphernalia, as follows

Well, first of all, I agree with Mr. Lewis that whatever is in the vehicle, whether it's the drug paraphernalia or anything else, is something that can be testified to. The condition of the vehicle when the officers found it is relevant to the case.

It would seem to me that, when we look at the elements of the charge -- the charges, possession of stolen property in the second degree, as well as possession of a stolen vehicle, had it been simply a matter of the methamphetamine just on the defendant's person, I believe my decision would have been different today.

But now that I'm hearing that there's evidence of paraphernalia in the vehicle, I think that does make the vehicle. I believe it becomes more probative as to tying the defendant to the vehicle.

However, when I consider the probative nature versus the prejudice, I do agree with the defense that it is unfairly prejudicial to the defendant to allow for evidence of the meth on his person. And that weighing exercise must be done by the Court before determining whether or not the methamphetamine on his person is part of the res gestae.

The methamphetamine was found on his person incident to arrest. It is not necessary in order to complete the entire picture of the crimes at hand. And so I am going to deny the request to admit evidence regarding the meth on his person, but certainly anything that was found in the vehicle is subject to the testimony in court.

RP (1/13/15) 53-55. This ruling was not an abuse of discretion because a correct statement of the law with proper balancing of probative value

versus prejudicial effect. Thus counsel's agreement with that ruling is not deficient performance.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial

would have been different.” *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687. Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

In order to convict on a charge of possession of a stolen vehicle, the State must prove beyond a reasonable doubt that “the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto.” CP 62 (Instruction 11). A similar element, absent the word “vehicle,” is required for PSP. CP 67 (Instruction 16); *see WPIC 77.06*. As seen above the “withheld or appropriated” language is an essential element of Possession of a Stolen Vehicle. *State v. Satterthwaite, supra*. The trial court clearly had this element in mind when it ruled on the admissibility of the drug paraphernalia, ruling that the evidence is admissible on the point of “use” of the vehicle.

**F. BOWEN FAILED TO OBJECT TO THE TRIAL COURT’S
LEGAL FINANCIAL ORDER.**

In *Blazina*, the Washington Supreme Court specifically held that it is not error for this Court to decline to reach the merits on a challenge to the imposition of LFO’s made for the first time on appeal. *Blazina*, 182 Wn.2d at 832. “Unpreserved LFO errors do not command review as a

matter of right under *Ford* and its progeny.” *Blazina*, 182 Wn.2d at 833 (citing *State v. Ford*, 137 Wn.2d 472, 478, 973 P.2d 452 (1999)). The decision to review is discretionary with the reviewing court under RAP 2.5. *Blazina*, 182 Wn.2d at 835. In other words, *State v. Duncan*, 180 Wn. App. 246, 327 P.3d 699 (2014), remains good law. *Duncan*, 180 Wn. App. at 250, 253 (defendant’s failure to object was not because the ability to pay LFOs was overlooked, rather the defendant reasonably waived the issue, considering “the apparent and unsurprising fact that many defendants do not make an effort at sentencing to suggest to the sentencing court that they are, and will remain, unproductive”).

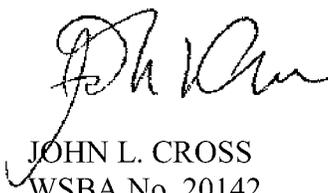
RAP 2.5(a) reflects a policy which encourages the efficient use of judicial resources and discourages late claims that could have been corrected with a timely objection. *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). *Duncan* appropriately balances the efficient use of judicial resources with fairness. Here there was no objection from Bowen at sentencing. Nor is there obvious error in the record. This court should decline to review this issue.

IV. CONCLUSION

For the foregoing reasons, Bowen's conviction and sentence should be affirmed.

DATED October 27, 2015.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

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KITSAP COUNTY PROSECUTOR

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