

No. 48295-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Darnell Parks Jr.,

Appellant.

Pierce County Superior Court Cause No. 15-1-00901-1

The Honorable Judge Stanley Rumbaugh

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence to convict Mr. Parks of burglary, car prowling, and theft related to the Les Schwab location.
2. The convictions in Counts 1, 2, 4, 5, 6 violated Mr. Parks's Fourteenth Amendment right to due process.

ISSUE 1: Without more, an accused person's possession of stolen property does not prove theft or burglary. Did the state present insufficient evidence to prove that Mr. Parks committed burglary, vehicle prowling, and theft in a fenced yard of a Les Schwab store based only on circumstantial evidence that he possessed items previously stolen from the yard?

3. The state presented insufficient evidence that someone unlawfully entered or remained in the Les Schwab fenced yard.

ISSUE 2: A burglary conviction requires the state to prove that the accused unlawfully entered or remained in a building. Was there insufficient evidence to support Mr. Parks's conviction for burglarizing the Les Schwab yard when there was no evidence of forced entry, countless people had the key or combination to the yard, and there was no evidence that the items stolen from inside were taken when the business was closed to the public?

4. The state presented insufficient evidence to convict Mr. Parks of second-degree malicious mischief.
5. The state failed to prove that Mr. Parks or an accomplice caused damage in excess of \$750 to support his conviction for second degree malicious mischief.

ISSUE 3: To convict Mr. Parks for second-degree malicious mischief, the state must prove that he or an accomplice caused more than \$750 worth of damage to someone else's property. Did the state fail to prove that charge against Mr. Parks when it only reached the \$750 threshold by adding damage that it had not proved was caused by Mr. Parks or an accomplice?

6. The court erred by giving jury instruction number 19.

7. There was insufficient evidence to convict Mr. Parks of second-degree malicious mischief under an aggregation theory because there was no evidence that “a person” individually caused over \$250 worth of damage to multiple items, as required under RCW 9A.48.100(2).

ISSUE 4: A person may only be convicted of felony malicious mischief for damage to less than \$750 worth of damage when “a person” causes more than \$250 worth of damage to multiple items of property. Was there insufficient evidence to convict Mr. Parks of malicious mischief in the second degree based on evidence that he *or* an accomplice caused more than \$250 worth of damage?

8. The trial court violated Mr. Parks’s Sixth and Fourteenth Amendment right to counsel.
9. The court erred by failing to conduct a meaningful inquiry into Mr. Parks’s claim that communication with appointed attorney had completely broken down.

ISSUE 5: When an accused person informs the court that the attorney/client relationship has completely broken down, the court must conduct a meaningful inquiry. Did the court violate Mr. Parks’s right to counsel by failing to inquire into the breakdown of his relationship with counsel before denying his motion for a new attorney?

10. The Information was constitutionally deficient under the Sixth and Fourteenth Amendments.
11. The charging language for Mr. Parks’s theft, vehicle prowling, and malicious mischief charges was constitutionally deficient because it failed to allege any critical facts.

ISSUE 6: The constitutional right to notice of the charges against an accused person requires the state to allege “critical facts” necessary to prepare a defense and defend against future violations of double jeopardy. Was the Information charging Mr. Parks constitutionally deficient when it failed to include any critical facts for four out of the six charges?

12. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

ISSUE 7: If the state substantially prevails on appeal and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Parks is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

1. The Tacoma Antique Center was burglarized.

Tacoma Antique Center is a large antique mall that rents space to numerous vendors. RP (9/24/15) 15.

One night, around one o'clock in the morning, two people broke into the mall, broke the glass on three display cases, and took some silver jewelry and glass or crystal items. RP (9/24/15) 24, 27-28, 30; RP (9/28/15) 143-147.

A surveillance video showed at least two men in the antique mall during the break-in. RP (9/24/15) 77; Ex. 41. The video shows one of the display cases being broken but the other two are not visible. RP (9/24/15) 134.

The amount of damage to the display cases totaled \$725. RP (9/24/15) 32; RP (9/28/15) 142.¹

2. Some tools and other items were stolen from a nearby Les Schwab Tire Center around the same time as the antique mall burglary.

Some items went missing at a nearby Les Schwab Tire Center around the same time. RP (9/29/15) 9-10, 60-66. The day after the

¹ A third display case was also broken, but the state did not call its owner to testify about the value of the damage or that the s/he had not given anyone permission to break the glass. RP (9/24/15) 28; RP (9/29/15) 78-79.

antique mall incident, a Les Schwab employee noticed that a sledgehammer and another tool were missing out of a Les Schwab semi truck that was parked inside a fenced yard. RP (9/29/15) 9-10.

Sometime between four o'clock pm and four o'clock am on the night of the burglary, someone also broke the window to a private vehicle parked in the fenced yard belonging to Les Schwab. RP (9/29/15) 60-61. A toolbox, GPS system, and satellite radio were missing from that vehicle. RP (9/29/15) 62-66.

Some of the tools from the Les Schwab yard were found at the antique mall after the burglary. RP (9/28/15) 22, 30; Ex. 6, 24.

3. Darnell Parks was arrested because he matched the description of someone who had been shopping in the antique mall the day before the burglary.

Robin Gorne, who worked at the antique mall, watched a surveillance video of the burglary. RP (9/28/15) 109-110. Gorne thought she recognized one of the two men in the video as a customer she had helped the previous day. RP (9/28/15) 110-111.

The video of the burglary is very dark, but Gorne thought she recognized the jacket that the customer had been wearing and "the way he moved." RP (9/28/15) 110.

Gorne reviewed the surveillance footage from the day before the burglary and provided a description based on that and her memory of working with the customer during business hours. RP (9/28/15) 114-115.

Darnell Parks was eventually arrested because he matched the description Gorne had given. RP (9/28/15) 40, 65.

Mr. Parks admitted that he had been shopping at the antique mall a few days before but said that he did not know anything about the burglary. RP (9/28/15) 77.

The police did not find any stolen items or cash on Mr. Parks, in his bag, or in the room where he was staying.

4. The state charged Mr. Parks with six offenses related to the incidents at the antique mall and Les Schwab.

The state charged Mr. Parks with second degree burglary, second degree theft, and second degree malicious mischief related to the incident at the antique mall.² CP 1-2.

The state charged Mr. Parks with second degree burglary, second degree theft, and vehicle prowling for the incidents at Les Schwab. CP 2-3.

² The Information did not enumerate which charges related to which incident, except that it provided the addresses for the burglary charges. CP 1-3. The clarification regarding which incident corresponded to each charge came during trial. RP (10/5/15) 29-48.

The charging language for the two theft offenses was identical, without any specification regarding where the alleged acts took place or any description of the property allegedly taken. CP 1-3.

The charging language for malicious mischief and vehicle prowling, likewise, parroted the language of the statutes without providing any clarifying facts. CP 2-3.

5. Before trial, Mr. Parks moved for substitution of counsel, based on the breakdown of communication with his appointed attorney and his attorney's racist remarks.

Mr. Parks asked the court, pretrial, to remove his appointed attorney. RP (7/17/15) 3; RP (7/24/15) 3-4. He told the court that his counsel had not gone over the discovery with him, had not returned his calls, and had walked out of their last meeting. RP (7/24/15) 3-4. Mr. Parks explained that he did not want his appointed attorney to have anything to do with his case. RP (7/24/15) 4.

Still, the court did not ask defense counsel about the breakdown in communication. RP (7/24/15) 5. He only asked Mr. Parks's attorney one question, which was whether there were any ethical constraints preventing him from continuing on the case. RP (7/24/15) 5.

When counsel said there were no ethical issues, the court denied Mr. Parks's motion. RP (7/24/15) 5.

Mr. Parks tried to explain that his attorney had also told him that “black people are so difficult,” but the judge cut him off.³ RP (9/24/15) 5. The court did not ask defense counsel about the racist remarks and refused to revisit the ruling. RP (9/24/15) 5-6.

Mr. Parks proceeded to trial with the same appointed attorney. *See* RP (9/24/15).

6. The only evidence purporting to tie Mr. Parks to the stolen property was testimony that he had possessed one (or maybe more than one) silver chain(s).

At trial, the state did not offer into evidence any of the allegedly stolen items. No witness testified that any jewelry, tools (besides those at the antique mall), GPS, or satellite radio were ever recovered.

None of the fingerprints that were collected at the antique mall matched Mr. Parks. Ex 52.

The only evidence potentially linking Mr. Parks to any of the allegedly stolen property was testimony from a man he had stayed with that he had possessed one (or possibly more than one) silver chain at some point. RP (9/24/15) 97, 102.

³ Mr. Parks is African-American. CP 1.

The state also did not present evidence that Mr. Parks had any cash, made any bank deposits, or ever possessed money that could have been from the sale of the property.

7. The state did not present any evidence regarding when the items were stolen from Les Schwab or how the thief got into the fenced yard.

The state did not offer any surveillance footage from the Les Schwab location. RP (9/29/15) 97-98. The police testified that they did not find any evidence of forced entry at Les Schwab or ever figure out how the alleged thief had gotten inside. (9/29/15) 94.

The state did not call any witnesses from Les Schwab to testify regarding what went on in the fenced yard between four o'clock (when the private vehicle was parked there) and six o'clock (when the business closed).

The Les Schwab employee who did testify said that he did not know when the items went missing from the semi truck. RP (9/29/15) 26. He said only that he was told they were gone the day after the antique mall burglary. RP (9/29/15) 9.

He also said that well over ten people have the combination to the lock on the gate to the fenced yard, including an unknown number of employees for a trucking company that rents parking space inside the fence. RP (9/29/15) 23-25. The yard is also accessible through the Les

Schwab warehouse. RP (9/29/15) 23. At least six people have keys to the warehouse. RP (9/29/15) 23.

8. The court instructed the jury that it could find Mr. Parks guilty of malicious mischief in the second degree if it found that he – or an accomplice – damaged more than one item of property and that the total damage exceeded \$250.

Over Mr. Parks’s objection, the court’s to-convict instructions informed the jury that it should find him guilty of malicious mischief if it found:

- (1) That ... the defendant or a person to whom the defendant was an accomplice caused damage to more than one item of property of another;
- (2) That the damage to any individual property is less than \$750.00 in value, but the sum of the value of all the physical damage exceeds \$250.00;
- (3) That the damage is part of a common scheme or plan...
CP 46.

During closing argument, the prosecutor told the jury that it could convict Mr. Parks of felony malicious mischief because he or an accomplice caused more than \$750 worth of damage when the \$725 worth of damage in the antique mall was aggregated with the \$150 it cost to repair the car window broken at Les Schwab. RP (10/5/15) 46.

The prosecutor argued that the jury could also convict Mr. Parks for malicious mischief because he or an accomplice damaged more than one item in the antique mall alone and the damage totaled to more than \$250. RP (10/5/15) 46.

The jury convicted Mr. Parks of two counts of burglary, second degree theft, third degree theft⁴, second degree malicious mischief, and vehicle prowling. RP (10/6/15) 3-4.

This timely appeal follows. CP 128.

ARGUMENT

I. NO RATIONAL JURY COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT MR. PARKS COMMITTED THE OFFENSES AT LES SCHWAB.

- A. The state did not present any evidence that Mr. Parks or an accomplice had ever been to the Les Schwab yard in order to commit the offenses alleged inside.

There were no fingerprints or surveillance footage from Les Schwab offered into evidence. No witness claimed to have ever seen Mr. Parks at Les Schwab. Indeed, there was no evidence at all that he had been there.

The police did not find any of the items allegedly taken from Les Schwab on Mr. Parks or in the room where he was staying. No one testified that they had ever seen him with those stolen items.

⁴ The prosecutor conceded during closing that there was no evidence to meet the \$750 threshold for the second degree theft charge related to the incidents at Les Schwab. RP (10/5/15) 50.

The state never identified the other man on the antique mall surveillance video of the burglary. Nor did the state present evidence linking Mr. Parks to the Les Schwab incidents.

Still, the state charged Mr. Parks with theft, burglary, and car prowling at Les Schwab because some of the tools that had been taken from there were used to break into the antique mall. CP 2-3; RP (9/28/15) 22, 30; Ex. 6, 24.

But the evidence that Mr. Parks may have possessed some stolen tools does not prove that he actually stole them – much less that he broke into a tire yard, shattered a car window, or stole other items that he never even possessed.

No rational jury could have found beyond a reasonable doubt that Mr. Parks was guilty of the offenses related to the incidents that took place in the Les Schwab yard.

Evidence is insufficient to support a conviction if, taking the evidence in the light most favorable to the state, no rational jury could have found each element proved beyond a reasonable doubt. *State v. Larson*, 184 Wn.2d 843, 855, 365 P.3d 740, 745 (2015).⁵

There was no evidence that Mr. Parks unlawfully entered or remained in the tire yard, that he ever touched the private car parked

⁵ The Court of Appeals reviews the evidence *de novo*. *Larson*, 184 Wn.2d at 855.

inside, or that he stole the tools and other items. The state's evidence showed – at most – that Mr. Parks possessed some of the property that had been taken from Les Schwab.

But mere possession of stolen property is insufficient to prove burglary. *State v. Mace*, 97 Wn.2d 840, 843, 650 P.2d 217, 219 (1982). This is particularly true when the possession is established only by inference and circumstantial evidence, as in Mr. Parks's case. *Id.*

There was, likewise, no evidence that Mr. Parks did anything to facilitate the crimes inside the Les Schwab yard, aided in their planning, or solicited, commanded, encouraged, or requested someone else to commit them. Accordingly, there was no evidence to convict Mr. Parks of those offenses as an accomplice. RCW 9A.08.020(2).

The state's circumstantial evidence of possession of stolen property was insufficient to prove the burglary, vehicle prowling, and theft charges against Mr. Parks. *Mace*, 97 Wn.2d at 843. Those convictions must be reversed.

B. The state did not present any evidence that anyone unlawfully entered or remained in the Les Schwab yard.

The items stolen from the Les Schwab yard could have been taken during business hours. The state did not call any witnesses to testify regarding what was going on in the area between when the private vehicle

was parked there and when the store closed two hours later. No witness testified s/he was watching the area and that no one broke the window of the car or stole the items while the store was open. No one said that the window was still intact or that the items were still in their rightful places when Les Schwab closed at 6pm.

Countless people also had the combination to open the gate to the yard. RP (9/29/15) 23-25. Even the manager of the business did not know exactly how many people had access to the yard because Les Schwab rented space inside to a trucking company that gave the combination to its own employees. RP (9/29/15) 23-25.

To convict Mr. Parks of burglary for the Les Schwab incident, the state was required to prove beyond a reasonable doubt that he unlawfully entered or remained in the fenced yard. RCW 9A.52.030.

Here, the state did not prove that *anyone* entered or remained unlawfully in the Les Schwab yard.

There was no damage to the fence or gate, no surveillance footage showing someone in the yard afterhours, and the police did not determine how the alleged burglar had gotten in. (9/29/15) 94. The state did not present any fingerprint evidence from the Les Schwab site.

Indeed, the lack of evidence of unlawful entry makes perfect sense considering that countless people had lawful access to the area where the car window was broken and the items were taken.

An element has not been proved beyond a reasonable doubt if the state presents only equivocal evidence. *State v. Vasquez*, 178 Wn.2d 1, 14, 309 P.3d 318, 324 (2013). The state's evidence that a car window was broken and some items were missing from the Les Schwab yard *could have* been evidence of a burglary. Then again, it could have been evidence that an employee of either Les Schwab or the trucking company saw the opportunity to steal the items while the yard was un-supervised and took it. Even still, it also could have been evidence that a member of the public had simply walked into the yard during business hours, broken the car window, and stolen the property. The evidence was equivocal at best.

No rational jury could have found beyond a reasonable doubt that someone had unlawfully entered or remained in the Les Schwab yard, as required to support Mr. Parks's burglary conviction. RCW 9A.52.030; *Larson*, 184 Wn.2d at 855; *Mace*, 97 Wn.2d at 843. Mr. Parks's conviction for burglarizing Les Schwab must be reversed. *Id.*

II. NO RATIONAL JURY COULD HAVE FOUND MR. PARKS GUILTY OF FELONY MALICIOUS MISCHIEF BEYOND A REASONABLE DOUBT.

During closing argument, the prosecutor argued that the jury should convict Mr. Parks of felony malicious mischief *either* because (a) the total of the damage caused (including that to the vehicle window in the tire yard) totaled to more than \$750; *or* because (b) he and an accomplice had caused more than \$250 worth of damage to multiple items of property in the antique shop alone. RP (10/5/15) 46.

But no rational jury could have found Mr. Parks guilty beyond a reasonable doubt as to either of those prongs.

As to (a), there was no evidence that Mr. Parks (or an accomplice) had ever been in the tire yard or had broken the vehicle window inside.

As to (b), the damage in the antique mall alone totaled to less than \$750. RP (9/24/15) 32; RP (9/28/15) 142. Conviction for felony malicious mischief based on less than \$750 worth of damage is only permissible when multiple items of property are damaged “by a person.” RCW 9A.48.100(2). No rational jury could have found beyond a reasonable doubt that Mr. Parks damaged both of the display cases in the antique mall.

- A. Because there was no evidence that Mr. Parks or an accomplice was ever in the Les Schwab yard, there was insufficient evidence to find that he had caused more than \$750 worth of damage.

As outlined above, there was no evidence that Mr. Parks committed any of the offenses in the Les Schwab yard as either a principal or an accomplice.

Consequently, no rational jury could have found beyond a reasonable doubt that he broke the car window inside. Without the aggregation of the damage to the window in the Les Schwab yard, the state proved only that Mr. Parks or an accomplice had caused \$725 worth of damage inside the antique mall. RP (9/24/15) 32; RP (9/28/15) 142. The evidence was insufficient to convict Mr. Parks of second degree malicious mischief based on more than \$750 worth of damage.

- B. The jury should not have been permitted to convict Mr. Parks of felony malicious mischief based on proof of less than \$750 worth of damage.

9. The legislature only permits a conviction for felony malicious mischief based on less than \$750 worth of damage only when multiple items are damaged “by a person.”

Normally, a conviction for second degree malicious mischief requires the state to prove that the accused caused more than \$750 worth of damage to the property of another. RCW 9A.48.080.

There is an exception, however, for cases in which a single person causes damage to multiple items of property:

If more than one item of property is physically damaged as a result of a common scheme or plan *by a person* and the physical damage to the property would, when considered separately, constitute malicious mischief in the third degree because of value, then the value of the damages may be aggregated in one count. RCW 9A.48.100(2) (emphasis added).

In such cases, the total amount of damage the state must prove drops significantly, to \$250. RCW 9A.48.100(2).

When a statute's language is clear, it must be applied according to its plain meaning. *State v. Montejano*, 147 Wn.App. 696, 699, 196 P.3d 1083, 1084 (2008). A statute must be construed so that "no word, clause, or sentence is superfluous or insignificant." *Id.*

Here, the plain language of the statute permits a felony conviction for damage of less than \$750 only when damage to multiple items is caused "by a person." RCW 9A.48.100(2). Accordingly, the state cannot convict someone for felony malicious mischief by causing damage of less than \$250 when the evidence shows that the damage could have been caused by more than one person.⁶

⁶ The court found at Mr. Parks's trial that the general accomplice statute applied to the special provision elevating damage of \$250-750 to a felony when damage is caused to more than one item "by a person." RP (10/29/15) 22.

But the general complicity statute does not apply when a more specific statute outlines the culpable conduct required for conviction. *Montejano*, 147 Wn.App. at 703. The trial court erred by permitting the state to argue that the jury should convict Mr. Parks under the specific subsection of RCW 9A.48.100 for conduct by a single person by applying general accomplice liability.

Additionally, the rule of lenity requires this court to construe any statutory ambiguity in favor of the accused. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 978, 329 P.3d 78, 79 (2014). If this court does not consider the plain language of RCW 9A.48.100(2) to be clear, then it must, nonetheless, be interpreted in support as permitting a felony conviction for less than \$250 worth of damage only when a single person causes damage to more than one item of property. *Villanueva-Gonzalez*, 180 Wn.2d at 978.

The court erred by instructing the jury that it could find Mr. Parks guilty of second degree malicious mischief if it found that he *or an accomplice* committed more than \$250 worth of damage to more than one item of property. CP 46; RCW 9A.48.100(2).

10. The state failed to prove that all of the damage in the antique mall was caused by Mr. Parks.

The surveillance video shows the man whom the clerk believed to be Mr. Parks breaking the glass on one of the two damaged display cases. RP (9/24/15) 134; Ex. 41. It also shows another man involved in the burglary. (9/24/15) 77; Ex. 41.

The second display case for which the state presented evidence of the amount of damage was in the back of the antique mall. RP (9/24/15) 140. It was not shown on the surveillance video. Ex 41.

The second display case could have been damaged by the person on the video who was not identified as Mr. Parks. The state failed to prove beyond a reasonable doubt that more than \$250 worth of damage was done “by a person” in the antique mall. RCW 9A.48.100(2). Mr. Parks’s malicious mischief conviction must be reversed. *Larson*, 184 Wn.2d at 855.

III. THE COURT VIOLATED MR. PARKS’S RIGHT TO COUNSEL BY FAILING TO MEANINGFULLY INQUIRE INTO THE BREAKDOWN OF COMMUNICATION BETWEEN HIM AND HIS APPOINTED ATTORNEY.

Almost two months before trial began, Mr. Parks asked the court to remove his court-appointed attorney. RP (7/17/15) 3; RP (7/24/15) 3-4. He told the judge that his lawyer would not answer his calls and had walked out on their most recent meeting. RP (7/17/15) 6-7. He said that he had had no communication with counsel whatsoever. RP (7/24/15) 3.

In response, the court asked defense counsel only one question: whether he had any ethical issues that prevented him from continuing to represent Mr. Parks. RP (7/24/15) 4. Mr. Parks’s attorney said no and the court denied the motion for new counsel. RP (7/24/15) 4-5.

Mr. Parks said that he did not want to have anything else to do with his attorney. RP (7/24/15) 5-6. He told the judge that counsel had

told him that “black people are so difficult.” RP (7/24/15) 5.⁷ The court refused to revisit its ruling and Mr. Parks was forced to go to trial with the same attorney. RP (7/24/15) 6; RP (9/23/15); RP (9/24/15).

The court violated Mr. Parks’s right to counsel by failing to conduct any analysis into his the breakdown of communication between attorney and client or into counsel’s racist remarks.

Where the relationship between lawyer and client completely collapses, a refusal to appoint new counsel violates the accused’s Sixth Amendment right, even in the absence of prejudice. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006), *as corrected* (Apr. 13, 2006).

When an accused person alleges that his/her relationship with counsel has broken down, the trial court must inquire into the underlying issues. *Cross*, 156 Wn.2d at 607-610; *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008). An adequate inquiry must include a full airing of concerns and a meaningful evaluation of the conflict by the trial court. *Cross*, 156 Wn.2d at 610.

The court “must conduct ‘such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern.’ ...The inquiry must also provide a ‘sufficient basis for reaching an informed decision.’”

United States v. Adelzo-Gonzalez, 268 F.3d 772, 777 (9th Cir. 2001)

⁷ Mr. Parks is African-American. CP 1.

(quoting *United States v. McClendon*, 782 F.2d 785, 789 (9th Cir.1986)). Furthermore, “in most circumstances a court can only ascertain the extent of a breakdown in communication by asking specific and targeted questions.” *Adelzo-Gonzalez*, 268 F.3d at 776-777. The focus should be on the nature and extent of the conflict, not on whether counsel is minimally competent. *Adelzo-Gonzalez*, 268 F.3d at 776-777.

Here, the court failed to conduct such an inquiry into Mr. Parks’s concerns with appointed counsel. The judge did not ask specific and targeted questions or, indeed, ask anything about the alleged conflict. The court shut Mr. Parks down instead of doing anything to ease his dissatisfaction or to permit him to air his concerns. *See* RP (7/17/15); RP (7/24/15).

The trial court should have appointed new counsel. Failing that, the court should have asked specific and targeted questions, encouraging Mr. Parks to fully air his concerns. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779. The Sixth Amendment required the court to develop an adequate basis for a meaningful evaluation of the problem and an informed decision. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779.

The court violated Mr. Parks’s right to counsel by failing to inquire into the breakdown of his relationship with his appointed attorney. *Cross*,

156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779; *see also United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979)

IV. THE COURT VIOLATED MR. PARKS’S RIGHT TO NOTICE OF THE CHARGES AGAINST HIM BY FAILING TO ALLEGE ANY CRITICAL FACTS IN THE INFORMATION.

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.⁸ 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).⁹ 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).

⁸ Wn.Const. art. I, §§3 and 22 impose similar requirements.

⁹ 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 for the first time on appeal. *Id.*

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.

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.*

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.*

The language charging Mr. Parks with theft, vehicle prowling, and malicious mischief passes only the first of the three requirements: 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 whatsoever. In the absence of any critical facts, the Information does not give adequate notice of the charges; nor does it provide any protection against double jeopardy. *Id.*; *Valentine*, 395 F.3d at 631.

- A. The charging language for the theft allegations was insufficient because it did not “specifically describe” the property that Mr. Parks was accused of stealing.

The charging language for a theft offense must “clearly” allege that the accused exerted unauthorized control over some “specifically described property of another.” *State v. Greathouse*, 113 Wn.App. 889, 903, 56 P.3d 569, 577 (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).

The charging language for the two theft allegations in Mr. Parks’s case was identical. CP 1, 3. It alleged that Mr. Parks:

... did unlawfully and feloniously obtain or exert unauthorized control over property and/or services other than a firearm or a motor vehicle, belonging to another, of a value exceeding \$750 but that does not exceed \$5,000, with intent to deprive said owner of such property and/or services...
CP 1, 3.

The critical facts behind these theft allegations are absent even under the most liberal interpretation of the charging language. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631.

The language does not include any of the facts necessary for Mr. Parks to prepare a defense or to guard against future double jeopardy. It

does not allege that he took any “specifically described property” or detail where he is alleged to have taken it from. CP 1, 3; *Greathouse*, 113 Wn.App. at 903.

The charging language for the theft allegations against Mr. Parks violated his constitutional right to notice of the charges against him because it failed to include any critical facts. *Russell*, 369 U.S. at 763-64; *Valentine*, 395 F.3d at 631. Mr. Parks’s theft convictions must be reversed. *Id.*

B. The charging language for Mr. Parks’s malicious mischief and vehicle prowling charges was deficient because it did not provide any critical facts.

The charging language for Mr. Parks’s malicious mischief and vehicle prowling charges parroted the language of the statute without adding anything specific to the allegations against him except for the date. CP 2-3.

The Information did not charge him with damaging “specifically described property or tell him where he was alleged to have caused the damage to support the malicious mischief charge. CP 2. Regarding the vehicle prowling charge, it did not say anything about the vehicle he allegedly entered or where he was supposed to have done so. CP 3.

Even under a liberal construction, the facts necessary for Mr. Parks to prepare a defense and guard against subsequent prosecution in violation

of double jeopardy do not appear anywhere in the charging document. CP 2; *Russell*, 369 U.S. at 763-64.

The charging language for Mr. Parks’s malicious mischief offense was constitutionally deficient. *Id.* His conviction must be reversed. *Id.*

V. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THE COURT SHOULD NOT IMPOSE APPELLATE COSTS ON MR. PARKS, WHO IS INDIGENT.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).¹⁰

Appellate costs are “indisputably” discretionary in nature. , *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court’s discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

The trial court found Mr. Parks indigent at the end of the proceedings in superior court. CP 129-130. That status is unlikely to

¹⁰ Division II’s commissioner has indicated that Division II will follow *Sinclair*.

change, especially with the addition of numerous felony convictions and the imposition of a lengthy prison term. Mr. Parks also agreed to pay over \$1,200 in restitution. RP (11/18/15) 6.

The *Blazina* court indicated that courts should “seriously question” the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839.

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

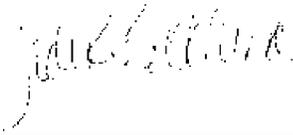
CONCLUSION

The state presented insufficient evidence to convict Mr. Parks of any of the offenses related to the Les Schwab location or the malicious mischief charge. The court violated Mr. Parks’s rights under the Sixth Amendment by failing to inquire into the alleged breakdown of communication with his appointed attorney. The charging document violated Mr. Parks’s constitutional right to notice of the allegations against him by failing to include any critical facts for four of the charges. Mr. Parks’s convictions must be reversed.

In the alternative, should the state prevail on appeal, this court should decline to impose appellate costs on Mr. Parks because of his indigency.

Respectfully submitted on May 24, 2016.

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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

Darnell Parks, DOC #943839
Olympic Corrections Center
11235 Hoh Mainline
Forks, WA 98331

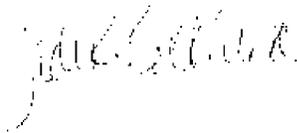
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Pierce County Prosecuting Attorney
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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 May 24, 2016.



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

BACKLUND & MISTRY

May 24, 2016 - 11:08 AM

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