

Original

80245-9
Court of Appeals No. 34445-9-II

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

KEVIN LAWRENCE HENDRICKSON,

Defendant/Appellant.

OPENING BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 04-1-04088-6
The Honorable D. Gary Steiner, Presiding Judge**

STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II

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I. ASSIGNMENTS OF ERROR

1. There was insufficient probable cause to arrest Mr. Hendrickson.
2. There was insufficient probable cause to issue the search warrant for the trailer.
3. There was insufficient admissible evidence to convict Mr. Hendrickson of any crime.
4. The trial court erred in denying Mr. Hendrickson's *Knapstad* motion.
5. The trial court erred in not granting Mr. Hendrickson's motion for directed verdict on all counts.
6. Mr. Hendrickson received ineffective assistance of counsel when trial counsel failed to object to the hearsay testimony of Joseph Rogers.
7. It was prosecutorial misconduct for the prosecutor to knowingly elicit hearsay evidence from Joseph Rogers.
8. It was prosecutorial misconduct for the prosecutor to file charges where no facts supported those charges.
9. There was insufficient evidence in the record to support the "Reasons for Admissibility or Inadmissibility of the Evidence" contained in the Findings and Conclusions on Admissibility of Evidence CrR 3.6 which read as follows:

The officer had probable cause to arrest the defendant for possessing the stolen trailer, based on his proximity to it and suspicious activity the witnesses had seen him engage in which related to the trailer. The keys which were on the defendant's belt were recovered incident to his lawful arrest.

The officer had probable cause to arrest the defendant for possessing stolen property based on the evidence that the witnesses had seen him acting suspiciously around the trailer during the morning. Since the defendant was under arrest, the officer had authority to search him incident to arrest. The removal of the keys from the defendant's belt was lawful.

The detectives subsequently got a search warrant to search the trailer. The warrant was proper and the later search of the trailer was lawful. The keys recovered from the defendant and the documents which were contained in the back of the trailer were lawfully seized and are admissible at trial.

II. ISSUES PRESENTED

1. Does Mr. Hendrickson's act of placing a box on the ground next to a stolen trailer create sufficient probable cause to arrest him for possession of that trailer? (Assignment of Error No. 1)
2. Was there sufficient probable cause for a search warrant to issue for the trailer? (Assignments of Error Nos. 1 & 2)
3. Is there sufficient evidence to convict Mr. Hendrickson of identity theft for the possession of personal information of other people where there was no evidence establishing what Mr. Hendrickson intended to do with that information, where no evidence was introduced that the individuals whose information Mr. Hendrickson possessed had been victims of identity theft, and where no evidence linked Mr. Hendrickson to the theft of the identity of the one victim whose identity had actually been stolen? (Assignments of Error Nos. 1, 2, & 3)

4. Did the trial court abuse its discretion in denying Mr. Hendrickson's *Knapstad* motion? (Assignments of Error Nos. 1, 2, 3 & 4)
5. Did the trial court abuse its discretion in failing to grant Mr. Hendrickson's motion for a directed verdict on all counts? (Assignments of Error Nos. 1, 2, 3, 4, & 5)
6. Does a defendant receive effective assistance of counsel where trial counsel fails to object to the incriminating hearsay testimony of a witness? (Assignment of Error No. 6)
7. Is it misconduct for a prosecutor to knowingly elicit hearsay evidence from a witness? (Assignment of Error No. 7)
8. Is it misconduct for a prosecutor to file charges which are not supported by the facts? (Assignments of Error Nos. 1, 2, 3, 4, 5, 8, & 9)
9. Was there a sufficient factual basis to support "Reasons for Admissibility or Inadmissibility of the Evidence" contained in the Findings and Conclusions on Admissibility of Evidence CrR 3.6. (Assignment of Errors Nos. 1, 2, & 9)

III. STATEMENT OF THE CASE

Factual and Procedural Background

In May or June of 2004, Leo Brutsche had a trailer stolen from his business in Auburn. RP 47-49. In August of 2004, Leo Brutsche's grandson, Michael Brutchse, was driving through Tacoma when he saw the trailer parked in a parking lot. RP 52-53, 82. Michael called Leo and the police, and Leo arrived and they both waited for the police to show up. RP 52-54, 83-84. While waiting for the police, the Brutsches saw Mr.

Hendrickson walk up to the trailer, put a box on the ground towards the back of the trailer, then walk into an auto body shop nearby. RP 54, 84-85. Mr. Hendrickson did not open any lock on the trailer. RP 55.

When the police arrived, the Brutsches verified with the police officer that the trailer belonged to Leo Brutchse. RP 56, 86, 99. The Brutsches gave the police officer, William Budinich, a description of Mr. Hendrickson. RP 102-103. Officer Budinich went into the auto body shop and arrested Mr. Hendrickson for possession of stolen property. RP 103-104.

After being handcuffed, placed in Officer Budinich's patrol car, and Mirandized, Mr. Hendrickson told Officer Budinich that he stored things inside the trailer and that other people stored things in the trailer as well. RP 105.

Leo Brutsche wanted to see whether or not a cement cutter he had stored in the trailer when it was stolen was still in the trailer (RP 59), but there were several sets of locks on the trailer as well as a chain around the wheels. RP 108. Officer Budinich removed a large set of keys from Mr. Hendrickson's belt and discovered that some of the keys unlocked a padlock on the rear of the trailer, the padlock on the chain around the wheels of the trailer, and a padlock on the hitch of the trailer. RP 107-108. Leo Brutsche, Michael Brutsche, and Officer Budinich all looked in the

trailer. RP 59, 87-88, 120-121. Leo Brutsche's saw was not in the back of the trailer, but there was "a bunch of other stuff in it." RP 59-60, 88, 121.

Officer Budinich impounded the trailer and it was towed to the police impound yard. RP 124-125.

Detective Christie Yglesias of the Tacoma Police Department was assigned to the case and obtained and served a search warrant for the trailer. RP 135-136. There were quite a few items inside of the trailer, including plastic totes belonging to neither Mr. Hendrickson nor Leo Brutsche. RP 137-138. Detective Yglesias found numerous documents strewn about the floor of the trailer and in a filing cabinet found inside the trailer. RP 139, 141, 144. Among the documents found were a "Safe-light Auto Glass" tablet with several pages of people's names and personal information (RP 146-149), a social security card issued to Don Robert Noe (RP 166), and a social security card issued to Rodrigo Castro Velazco. RP 168.

On August 24, 2004, Mr. Hendrickson was charged with one count of possession of stolen property for possessing the trailer. CP 1-2. On August 18, 2005, the charges were amended to one count of possession of stolen property, fifteen counts of identity theft in the second degree, and one count of unlawful possession of fictitious identification. CP 3-10. On January 4, 2005, the charges were amended to one count of possession of

stolen property and sixteen counts of identity theft in the second degree.
CP 24-31.

On October 6, 2005, Mr. Hendrickson moved to dismiss all charges pursuant to *State v. Knapstad* and to suppress all evidence discovered following the seizure of Mr. Hendrickson's keys. CP 11-16. The trial court denied the motions. RP 101-103, 10-17-05.¹

At trial, Mr. Jaime Salazar-Guerrero testified that the "Safe-light" tablet contained his name and social security number. RP 343. Mr. Salazar-Guerrero testified he did not write his name on the tablet and had never seen the tablet prior to testifying at trial. RP 343-344. Mr. Salazar-Guerrero testified that when he retired, the IRS notified him that someone was using his social security number to work somewhere else. RP 347-348. If Mr. Salazar-Guerrero had not retired, he never would have found out about the unauthorized use of his social security number. RP 348. The IRS did not tell Mr. Salazar-Guerrero where the other person had the job or the name of the person using Mr. Salazar-Guerrero's social security number. RP 350-351.

¹ The Report of Proceedings is numbered in two sections, the first being pre-trial motions and proceedings held on or before October 17, 2005, and the second being trial beginning on January 3, 2006. Reference will be made by giving the RP cite followed by the date the hearing was held.

Mr. Joseph Rogers also testified at trial. RP 66. Mr. Rogers is a special agent with the Social Security Administration Office of the Inspector General. RP 67. Mr. Rogers conducts criminal investigations related to social security fraud and misuse of social security numbers and identity theft. RP 67. Mr. Rogers testified that he contacted Mr. Noe and spoke with him on two occasions. RP 69. Mr. Rogers testified that Mr. Noe told him that Mr. Noe had lost his social security card when he lost his wallet while attending Evergreen State College in Olympia in the spring of 2004. RP 69, 78. Mr. Rogers testified that Mr. Noe told him nobody else had permission to possess Mr. Noe's social security card. RP 69.

Mr. Rogers testified that the social security card with the name of Rodrigo Castro Velazco was a counterfeit card. RP 69-70. Mr. Rogers testified that he queried the social security database and learned that the number on the card is a valid social security number, but that it is not assigned to Rodrigo Castro Velazco. RP 70. Mr. Rogers testified that the social security number was actually assigned to an eight year old child in Florida. RP 70. Mr. Rogers did not ascertain if Rodrigo Castro Velazco was the name of a true person. RP 70.

The State voluntarily dismissed five counts of identity theft. CP 41.

At the close of the State's case, Mr. Hendrickson moved for a directed verdict on all charges on grounds that the State had failed to

introduce any evidence from which the jury could infer Mr. Hendrickson knew the trailer was stolen or that Mr. Hendrickson possessed the information relating to the individuals named in the identity theft charges with the intent to commit any crime. RP 380-381. The trial court granted Mr. Hendrickson's motion for a directed verdict on all charges except the charge of possession of stolen property and the charges of identity theft relating to Mr. Noe, the unknown boy in Florida, and Mr. Salazar-Guerrero. RP 398-399. The trial court ruled that the State had failed to introduce any evidence from which the jury could infer the required mens rea with regard to the dismissed counts of identity theft, specifically that Mr. Hendrickson possessed the information with the intent to commit a unlawful act or aid or abet an unlawful act. RP 400. The trial court also ruled that there was insufficient evidence to support those charges because the investigating officers presented with the evidence relating to the counts did not infer that there was any criminal activity. RP 401.

The trial court explained its denial of the motion for directed verdict with regards to the charge of identity theft of Mr. Salazar-Guerrero by emphasizing that the other alleged victims of identity theft all testified that they had not had their identities stolen, but Mr. Salazar-Guerrero's social security number had been used by someone else and it was therefore

possible for the jury to infer that Mr. Hendrickson aided in the transmittal of Mr. Salazar-Guerrero's social security number. RP 401.

The trial court denied the motion for directed verdict with respect to the charges involving Mr. Noe and the boy from Florida because Mr. Rogers testified that the social security cards related to these two charges could be used for improper purposes and that since no evidence had been presented establishing an innocent explanation as to why Mr. Hendrickson had these cards in his possession, the jury could infer that Mr. Hendrickson possessed the cards for an unlawful purpose. RP 401-402.

Mr. Hendrickson was convicted of the counts of identity theft, based on the charges relating to Mr. Noe, Mr. Salazar-Guerrero, and the unknown boy from Florida. CP 66-68. The jury hung on the charge of possession of stolen property. RP 463.

Notice of appeal was timely filed on February 22 and 27, 2006. CP 86-89.

IV. SUMMARY OF TESTIMONY

Leo Brutsche

In May or June of 2004, a trailer was stolen from Leo Brutsche's business in Auburn. RP 47-49. Leo Brutsche reported it stolen, and in August of 2004 Leo Brutsche's grandson was driving through Tacoma when he saw the trailer in a parking lot. RP 52-53. Leo Brutsche drove

to the location where his grandson saw the trailer and watched the trailer while he waited for police to arrive. RP 53. While waiting for the police, Leo Brutsche observed Mr. Hendrickson walk to the back of the trailer and put a box on the ground before walking into a nearby auto body shop. RP 54. The trailer had padlocks on the doors and chains around the wheels. RP 54. Mr. Hendrickson did not open any of the padlocks. RP 54.

The police eventually arrived and Leo Brutsche and the police confirmed that the trailer belonged to Leo Brutsche by examining the VIN number on the trailer. RP 56-57. Leo Brutsche wanted the police to look in the back of the trailer to determine if a cement cutter Mr. Brutsche had stored in the trailer was still there. RP 59. The police officer used keys from the box Mr. Hendrickson put on the ground to open the padlocks on the trailer then opened the back of the trailer. RP 59. Mr. Brutsche's saw was not in the trailer, but the police officer took the trailer to the police compound and Leo Brutsche got his trailer back after the police had unloaded it. RP 59-61.

Joseph Rogers

Mr. Rogers is a Special Agent with the Social Security Administration Office. RP 67. He conducts criminal investigations related to social security fraud, misuse of social security numbers, and identity

theft. RP 67. Mr. Rogers looked at social security information in relation to this case. RP 67-68.

Mr. Roger's testified that plaintiff's exhibit one is an authentic social security card issued to Don Robert Noe. RP 68. Mr. Rogers spoke to Mr. Noe and Mr. Noe told Mr. Rogers that he had lost his wallet while attending Evergreen State College in Olympia in the spring of 2004. RP 69. Mr. Noe told Mr. Rogers that nobody had his permission to possess his social security card. RP 69.

Mr. Rogers testified that plaintiff's exhibit 2 is a counterfeit social security card issued to Rodrigo Castro Velazco and using the valid social security number of an eight year old boy born in Florida. RP 69-71. Mr. Rogers was not able to tell if Rodrigo Castro Velazco was the name of a real person. RP 70.

Michael Brutsche

Michael Brutsche is the secretary for his grandfather, Leo Brutsche, at Leo Brutsche's business. RP 80-81. Michael Brutsche is familiar with the trailer his grandfather bought because Michael Brutsche performed repairs on it. RP 81. The trailer was stolen, but several months later Michael Brutsche saw the trailer in Tacoma. RP 81-82. Michael Brutsche called the police and his grandfather and then watched the trailer. RP 83. Leo Brutsche arrived and he and Michael Brutsche observed Mr.

Hendrickson walk to the back of the trailer, place a box on the ground, then walk into the auto body shop. RP 83-85.

The police eventually arrived and confirmed that the trailer belonged to Leo Brutsche by comparing the serial numbers on the trailer to the registration for the trailer owned by Leo Brutsche. RP 86. The police then went into the auto body shop and came out with Mr. Hendrickson. RP 86-87. The police officer opened up the trailer because Leo Brutsche asked him to do so. RP 87. Michael Brutsche looked into the trailer and didn't see Leo Brutsche's saw, but did see other things that did not belong to the Brutsches. RP 87-88.

When the police officer arrived, the Brutsches pointed Mr. Hendrickson out to the officer because, in Michael Brutsche's opinion, Mr. Hendrickson acted as if he knew something about the trailer and treated it like it was in his possession. RP 88-89. This opinion was based on Mr. Hendrickson putting the box down in front of the door and walking around the trailer. RP 89.

Officer William Budinich

Officer Budinich is a police officer with the Tacoma Police Department. RP 98. On August 23, 2004, Officer Budinich was dispatched to a call regarding a stolen trailer. RP 98-99. Officer Budinich arrived at the location and contacted Leo and Michael Brutsche, as well as

another individual named Lee Farrell. RP 99. Officer Budinich confirmed that the trailer belonged to Leo Brutsche. RP 99-101.

Officer Budinich spoke to the Brutsches and they gave him a description of Mr. Hendrickson as the man they had seen drop the box off by the trailer. RP 101-103. Officer Budinich went into the auto body shop and identified Mr. Hendrickson with the help of Mr. Farrell. RP 103-104. Officer Budinich asked Mr. Hendrickson for identification then arrested him for possession of stolen property. RP 104.

Officer Budinich put Mr. Hendrickson into his patrol car, Mirandized him, and Mr. Hendrickson told Officer Budinich that he, as well as other people, stored things in the trailer. RP 104-106. Officer Budinich then removed a large set of keys from Mr. Hendrickson's belt and used them to unlock the padlocks on the trailer and the chain around the wheels of the trailer. RP 107-108.

Officer Budinich then impounded the trailer and had it towed to the police impound yard. RP 124.

Detective Christie Yglesias

Detective Yglesias is a detective for the Tacoma Police Department auto theft unit. RP 136. Obtained a search warrant for Leo Brutsche's trailer and served the warrant at the police impound lot. RP 136-137. In the trailer, Detective Yglesias found many items, including items not

belonging to Mr. Hendrickson or Leo Brutsche. RP 137-139. During the search, Detective Yglesias found numerous documents that had people's name on them on the floor of the trailer and in a filing cabinet located in the trailer. RP 139-144. The documents recovered from the trailer included: Plaintiff's exhibit 4, a "Safe-light Auto Glass" tablet containing the names and personal information of several people; a temporary vehicle permit; a Liability Responsibility Declaration with the name Sterling Bronson on it; a vehicle transfer of ownership from Mr. Hendrickson to Ricky Corley, a vehicle purchase order signed by Mr. Hendrickson for an '85 Honda Accord; a buyer's guide with vehicle information for a '94 Pontiac; a vehicle title to a '88 Taurus in Mr. Hendrickson's name; a vehicle renewal notice for a Ford pickup sent to Mr. Hendrickson; a vehicle report of sale to Mr. Hendrickson signed by Travis Dean; a vehicle renewal notice for an '85 Subaru sent to Mr. Hendrickson; a title for a '88 Chevy Camaro in the name of Sydney Meade; a vehicle title for an '85 Honda Accord with the registered owner listed as Mr. Hendrickson; a social security card issued to Don Robert Noe; a social security card issued to Rodrigo Castro Velazco; mail, bills, unopened summonses, a traffic infraction, and a criminal citation for a Joel Rivers; a blue folder with "ID Info Credit Union" written on it; an internet printout for an application for a Mastercard with Mr. Hendrickson's name and information in it; a King County District Court

document and a Department of Licensing Letter, both addressed to Stephen Dugan; a blank novelty photo identification card order form from Blackfeet Custom Graphic; 17 abandoned vehicle Affidavits of Sale indicating vehicle were sold either to Mr. Hendrickson or Ikan Auto Wrecking at the same address as that listed for Mr. Hendrickson; a folder marked "John Armstrong, '92 Saturn" on the front, containing a bill of sale for a '92 Saturn to Joel Rivers and an Abandoned Vehicle Affidavit of Sale with the purchaser listed as Mr. Hendrickson, a handwritten contract for the sale of the '92 Saturn with Mr. Hendrickson listed as the seller and John Armstrong listed as the buyer; a Geico insurance card issued to Robert and Jessica Hoffman; an expired Idaho driver's license issued to Gary Osborn; a folder marked "Titles" containing lots of vehicle titles and a few registrations with the vehicle registered to numerous different people, including Mr. Hendrickson; a folder titled, "Miscellaneous Insurance Card Forms, Temporary License for Vehicles" containing different insurance cards issued to several different people, including Mr. Hendrickson, Christopher Alvontas, Maria Ball, and Gary Houston, as well as temporary vehicle permits; carbon copies from a checkbook issued to Kelly Reich; an itemization of a check for "Rocky Mountain Merchandise"; numerous Geico insurance cards issued to Delphino Cobianponce; an invoice for a check from the Thurston County Clerk in the amount of \$110 issued to

Sharon D. Cobianponce; a '99 vehicle registration sticker; a checkbook issued to Tony Pham containing three unused checks; a Les Schwab tire receipt, a vehicle title, Capital One credit card receipt, bank employer information including a social security number, and pay stub, all issued to Kimberly Holly; a wallet belonging to Brandy Wagner containing a paystub with her social security number on it as well as other various cards and ID cards; a pay stub for Steven Schrei; a wallet containing a Washington ID card for Gavin Barrett and a payroll advance for Gavin Barrett; an earning statement for April Kinser; mail addressed to Brian Phillips; letters from Timberline Bank addressed to Cory Burnham; a lab sheet, traffic infraction, and letters from the State Department addressed to Dennis Ward; unopened mail addressed to Sean DeMarco; a pay stub belonging to Alicia Stoltz; a JC Penney paystub with no name on it; a birth certificate for Charles Scott Deschner; an employment application, a letter from a church to Nicole Lundbeck, and a letter from Nicole Lundbeck; Visa personal identification numbers without names or credit card numbers; Employment Security Department stubs belonging to Iman Carter; a daily time record listing the name and social security number of Rafael Romero; and a Bank of America check issued by Calvin Springer. RP 144-151, 166-182, 212-222. In addition to these documents, Detective Yglesias also recovered

notebooks and a piece of paper with things written on them that didn't have any evidentiary value. RP 224.

Detective Yglesias unsuccessfully attempted to contact some of the people whose documents were found. RP 222.

Detective Yglesias also found numerous license plates and VIN plates from different vehicles. RP 183-186. The license plates were for vehicles all registered to Mr. Hendrickson. RP 185-186. None of the VIN numbers were registered to any stolen vehicles. RP 272-273. Detective Yglesias' investigation revealed that most of the license plates and all of VIN numbers came from vehicles either registered to or purchased by Mr. Hendrickson. RP 280-281. The plates that did not come back registered to Mr. Hendrickson were not in the system as being stolen. RP 280-281.

In Detective Yglesias' experience it is common to find all sorts of documents containing personal information, including social security numbers and bank account numbers, in recovered stolen vehicles. RP 228-229.

In her report, Detective Yglesias concluded that most of the documents had probably been left in vehicles by people who had had their cars sold. RP 232-233. Detective Yglesias did not see evidence of any crime being committed in any of the documents or evidence recovered from the trailer. RP 233-280. All the documents found in the trailer were

consistent with items that would be kept in normal business records or would be found in abandoned, impounded, or towed vehicles. RP 280.

After a thorough investigation of the evidence and documents collected from the trailer, Detective Yglesias forwarded the information to the prosecutor's office without a recommendation that charges be filed. RP 281.

Jeffrey Chaney

In late 2003, Mr. Cheney was driving his '94 Pontiac Grand Prix when he blew a tire, drove into a ditch, and wrecked the car. RP 152-153.

The Pontiac was towed away by someone in Gig Harbor. RP 153-154. Mr. Cheney was not able to retrieve his possessions from the inside of the vehicle, and he was notified that the vehicle was sold at auction. RP 153-154.

Plaintiff's exhibit 4 contains Mr. Chaney's name, social security number, bank account number, two Visa account numbers, and Mr. Cheney's then current place of employment and home address. RP 154-155. Mr. Cheney does not know Mr. Hendrickson. RP 155. Mr. Cheney testified that he had never been the victim of identity theft. RP 156.

Robert Phillips

In 2004 Mr. Phillips had a 1984 Mercury Cougar towed. RP 159-160. When it was towed there was a vehicle registration and some receipts

in the glove box. RP 160. Mr. Phillips also had a 1984 Cadillac Sedan Deville towed in late 2003 or early 2004. RP 160. When the Cadillac was towed it had a bill of sale or the title in it. RP 160-161.

Plaintiff's exhibit 4 contains Mr. Phillips' name, previous address and social security number. RP 161. Mr. Phillips does not know Mr. Hendrickson. RP 162.

Both the Mercury and the Cadillac had paperwork in them which had Mr. Phillips' social security number. RP 162-163. Both the Mercury and the Cadillac were auctioned off after they were towed. RP 163.

Joshua Robertson

In October of 2003, Mr. Robertson had a '89 Mustang towed in Pierce County. RP 200. Mr. Robertson was not able to remove his personal documentation from inside the vehicle before it was towed. RP 200. Mr. Robertson might have left credit cards, credit card receipts, bank statements, bank deposits, and mail in the car. RP 200-201. Mr. Robertson retrieved his car the day after it was towed from a lot somewhere in Pierce County and paid for his car with a credit card. RP 201-202.

In late April of 2004, Mr. Robertson gave the Mustang to his son's mother but the vehicle was towed and auctioned off. RP 202-203. When

it was auctioned the vehicle did not have any of Mr. Robertson's personal information in it. RP 203.

Plaintiff's exhibit 4 contained Mr. Robertson's name, possible Visa card number, driver's license number, bank account number, and previous home address. RP 204-206. Mr. Robertson did not recognize Mr. Hendrickson. RP 207.

Mr. Robertson has never been the victim of identity theft. RP 207-208.

Robert Collier

Plaintiff's exhibit 4 is not in Mr. Collier's nor his wife's handwriting, but it contains his name, former address, social security number, bank number, partial credit card number, and his wife's name. RP 298-303.

Robert Hausman

Mr. Hausman had never seen plaintiff's exhibit 4 before, and had to ask the prosecutor if it contained his personal information. RP 309. Plaintiff's exhibit 4 contains Mr. Hausman's name, social security number, his mother-in-law's name, his wife's name, his old address, and an old bank account number. RP 309-312. In February of 2004, Mr. Hausman's car was towed before he had a chance to clean out his personal information

from inside the car. RP 311. Mr. Hausman had never seen Mr. Hendrickson before trial and did not know who he was. RP 312-313.

Sterling Bronson

Plaintiff's exhibit 4 has Mr. Bronson's name, old address, social security number, his daughter's name, and his wife's name and birthday on it. RP 317-320.

Mr. Bronson has purchased four vehicles from Mr. Hendrickson. RP 321. Mr. Hendrickson owned and operated a tow company and repaired vehicles and sold them for cheap. RP 321. Plaintiff's exhibits 35 and 36 are the Bill of Sale and Assumption of Liability signed by Mr. Bronson when he purchased a Dodge Caravan from Mr. Hendrickson. RP 324, 334. Mr. Bronson purchased the Caravan on an installment plan and Mr. Hendrickson may have asked for Mr. Bronson's social security number during the purchase of the Caravan. RP 325-326.

Jaime Salazar-Guerrero

Plaintiff's exhibit 4 has Mr. Salazar-Guerrero's name, social security number, and his wife's name on it. RP 343-345. Plaintiff's exhibit 4 is not in Mr. Salazar-Guerrero's handwriting. RP 343. Mr. Salazar-Guerrero bought two cars on South Tacoma way, but does not recall ever meeting Mr. Hendrickson. RP 346. When Mr. Salazar-Guerrero purchased the vehicles, he financed the car through the dealer and had to

give his name, address, and social security number for the financing. RP 349-350.

When Mr. Salazar-Guerrero retired, the IRS notified him that somebody else had used his social security number to get a job. RP 347-348.

Tyrone Long

Plaintiff's exhibit 4 contains Mr. Long's name, previous address, Washington State issued ID number, date of birth, and physical description. RP 355-358.

Mr. Long did not learn he was a potential victim of identity theft until the prosecutor's office sent him documents asking him to come to testify. RP 358-359. As far as Mr. Long knows, nobody has ever used any of his financial information. RP 359.

Debra Tainter

Plaintiff's exhibit 4 contains Ms. Painter's name, her husband's name and her address. RP 368-370. Ms. Tainter did not recognize Mr. Hendrickson at trial. RP 370.

Wanda Klewin

Ms. Klewin lives with Mr. Hendrickson. RP 375. Ms. Klewin guessed that plaintiff's exhibit 4 was written in Mr. Hendrickson's handwriting. RP 376.

V. ARGUMENT

A. The State presented insufficient admissible evidence to convict Mr. Hendrickson of any count of identity theft.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case. *State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346

(1971), *review denied*, 80 Wn.2d 1004 (1972), *cited in Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

RCW 9.35.020(1) provides, “No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.”

1. There was no probable cause to arrest Mr. Hendrickson; therefore all evidence seized subsequent to his arrest was inadmissible

When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986). Under article 1, section 7, suppression is constitutionally required. *State v. White*, 97 Wn.2d 92, 110-112, 640 P.2d 1061 (1982). This constitutionally mandated exclusionary rule “saves article 1, section 7 from becoming a meaningless promise.” *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Exclusion provides a remedy for the citizen in question and saves the integrity of the judiciary by “not tainting our proceedings by illegally obtained evidence.” *Ladson*, 138 Wn.2d at 359-360, 979 P.2d 833. “It is elementary that if the initial stop was unlawful, the subsequent search and fruits of that search are inadmissible.” *Ladson*, 138 Wn.2d at 360, 979 P.2d 833.

Probable cause for an arrest exists when “the facts and circumstances within the arresting officer’s knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been...committed.” *State v. Herzog*, 73 Wn.App. 34, 53, 867 P.2d 648, *review denied*, 124 Wn.2d 1022, 881 P.2d 255 (1994).

Here, Officer Budinich arrested Mr. Hendrickson for possession of stolen property based solely on the fact that Mr. Hendrickson had been seen walking up to the stolen trailer and placing a box on the ground next to the trailer. Placing a box on the ground next to a trailer does not warrant a belief of possession of that trailer, nor does it warrant a belief of any criminal act being committed. The facts and circumstances known to Officer Budinich at the time he arrested Mr. Hendrickson were *not* sufficient to warrant a man of reasonable caution to believe that Mr. Hendrickson was committing *any* offense.

All evidence discovered in this case subsequent to the arrest of Mr. Hendrickson is tainted by the lack of probable cause for his arrest and was therefore inadmissible. “Poison fruit” resulting from the invalid arrest includes the information discovered pursuant to the search warrant obtained for the trailer after it was impounded since the complaint uses information regarding Mr. Hendrickson’s prior convictions, current

outstanding warrants, and possession of keys which unlocked locks on the trailer as facts to establish probable cause to issue the warrant.

2. Even if this court finds probable cause existed to arrest Mr. Hendrickson, the complaint for the search warrant does not establish probable cause to issue the search warrant for the trailer.

A search warrant may issue only upon a determination of probable cause. *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). An application for a warrant must state the underlying facts and circumstances on which it is based in order to facilitate a detached and independent evaluation of the evidence by the issuing magistrate. *State v. Smith*, 93 Wn.2d 329, 352, 610 P.2d 869, *cert. denied*, 449 U.S. 873, 101 S.Ct. 213, 66 L.Ed.2d 93 (1980). Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *Cole*, 128 Wn.2d at 286, 906 P.2d 925. Accordingly, “probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *State v. Goble*, 88 Wn.App. 503, 509, 945 P.2d 263 (1997).

Here, Detective Yglesias applied for a search warrant to search the trailer after it had been impounded. Detective Yglesias sought the warrant

to recover (1) property belonging to Leo Brutsche, (2) documents of dominion and control including documents belonging to Mr. Hendrickson, and (3) any other item determined to be stolen property at the time of service of the warrant. CP 97-100. The underlying facts that Detective Yglesias cited to establish probable cause to authorize the search of the trailer for these items are as follows:

On 8/23/04 the relatives of a victim of a theft of a utility trailer and contents observed what they believed to be the stolen trailer in the parking lot of 4340 S. Tacoma Way. Officer Budinich responded and contacted the victim who identified the trailer as his. A comparison of the VIN on the trailer to the registration that the victim possessed confirmed the identity of the trailer. Officer Budinich was told by a witness that a white male was seen putting tools by the trailer. The witness was able to identify the male and Officer Budinich contacted him. The male identified himself as Kevin Hendrickson. Post Miranda, Hendrickson denied involvement with the trailer, but then stated that he did store items inside. Officer Budinich noticed several locks on the trailer. Hendrickson was asked if he had keys to the locks and he denied that he did. Officer Budinich noticed numerous keys that were attached to Hendrickson's belt. Officer Budinich took the keys and matched some of them to the locks on the trailer. Officer Budinich impounded the trailer and arrested Hendrickson for possession of stolen property. It was later revealed at the jail the Hendrickson's true name is Robert Christensen. Christensen had a warrant for two counts of possession of stolen property.

The affiant checked the criminal history on Robert Christensen and found five arrests for possession of stolen property in addition to arrests for theft, forgery [sic] taking a motor vehicle, and trafficking in stolen property. Detective Krause spoke with the victim and learned that the value of the trailer is in excess of \$3,000. The affiant also

makes mention in this affidavit of actions taken by Officer Budinich, not to assist with establishing probable cause, but to make the judge aware of the actions of Officer Budinich and the facts of the case. Officer Budinich, with the victim present, used the keys to open the back door of the trailer, and a knife to pry a door that didn't have a key. Officer Budinich observed vehicle license plates and VIN plates in a small bag in the trailer while doing so. Officer Budinich then contacted a supervisor and was told to impound the vehicle for a warrant.

CP 97-100.

It is important to note that the complaint for the search warrant misrepresents the order of events leading up to Mr. Hendrickson's arrest and the initial search of the trailer. The facts as stated in the complaint suggest that Mr. Hendrickson was not placed under arrest until after Officer Budinich had taken the keys from Mr. Hendrickson's belt and unlocked the trailer. As indicated above, this is not what happened. Mr. Hendrickson was arrested immediately after identifying himself, and the trailer was searched only after Mr. Hendrickson was handcuffed and placed in the back of Officer Budinich's patrol car.

The only item identified in the complaint as belonging to Leo Brutsch was the trailer itself. The trailer had already been recovered, obviating the need to search the trailer for any more of Leo Brutsche's stolen property. The complaint failed to set forth any facts to support the

inference that any evidence of stolen property belonging to Leo Brutsche would be found inside the trailer.

The only facts cited to support the inference that documents of dominion and control including documents belonging to Mr. Hendrickson would be found in the trailer were that Mr. Hendrickson was seen putting tools by the trailer, and that Mr. Hendrickson had keys which opened padlocks on the outside of the trailer. The complaint failed to set forth any facts to support the inference that any documents of dominion and control, much less documents of dominion and control belonging to Mr. Hendrickson, would be found inside the trailer.

Finally, the complaint failed to cite any fact which might support the inference that any other stolen property might found inside the trailer. The only other items listed as being located in the trailer were the license plates and VIN numbers seen by Officer Budinich when he performed the previous search of the trailer. While it is true that prior convictions of a suspect may be used in determining probable cause, particularly when a prior conviction is for a crime of the same general nature (*State v. Clark*, 143 Wn.2d 731, 749, 24 P.3d 1006, *cert. denied*, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001)), the complaint fails to set forth sufficient information to support an inference that any stolen items would be found inside the trailer.

Further, the complaint contains the statement that Detective Yglesias “makes mention in this affidavit of actions taken by Officer Budinich, not to assist with establish probable cause, but to make the judge aware of the actions of Officer Budinich and the facts of the case.” CP 97-100. It is unclear specifically what actions of Officer Budinich Detective Yglesias wanted the court to disregard in making its determination of probable cause; however, immediately following this statement Detective Yglesias relates how Officer Budinich used the keys recovered from Mr. Hendrickson to open the trailer and observed the VIN plates and license plates. CP 97-100.

If these were the actions the court was not supposed to consider, then the only evidence given to support the search warrant was that Mr. Hendrickson was seen placing tools on the ground next to the trailer, he was arrested for possessing the stolen trailer, he had warrants out for his arrest for possession of stolen property, and he had previous convictions for crimes similar to possession of stolen property.

This information is not “sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched” much less “a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.”

The facts set forth in the complaint for the search warrant for the trailer were insufficient to establish probable cause to issue the warrant. All evidence seized pursuant to the search warrant was inadmissible.

3. The State failed to present any evidence to establish that Mr. Hendrickson possessed the information with the intent to commit or aid and abet any crime.

Here, it is undisputed that Mr. Hendrickson possessed the personal information of Mr. Noe; however, the State failed to produce any evidence whatsoever establishing that Mr. Hendrickson possessed the information with the intent to “commit, or to aid or abet, any crime,” one of the elements of identity theft. RCW 9.35.020.

The trial court dismissed eight counts of identity theft specifically because the State failed to introduce any evidence that Mr. Hendrickson possessed the information with the intent to commit a crime. RP 399-400. The trial court denied the motion for directed verdict with regards to the charge of identity theft of Mr. Salazar-Guerrero because Mr. Salazar-Guerrero’s social security number had been used by someone else and it was therefore possible for the jury to infer that Mr. Hendrickson aided in the transmittal of Mr. Salazar-Guerrero’s social security number. RP 401.

With respect to the charges involving Mr. Noe and the boy from Florida, the trial court denied the motion for directed verdict because Mr. Rogers testified that the social security cards related to these two charges

could be used for improper purposes, and that since no evidence had been presented establishing an innocent explanation as to why Mr. Hendrickson had these cards in his possession, the jury could infer that Mr. Hendrickson possessed the cards for an unlawful purpose. RP 401-402.

An analysis of the trial court's reasons for denying the motion for directed verdict with respect to Mr. Salazar-Guerrero, Mr. Noe, and the unknown boy from Florida reveals that the trial court erred. A trial court's denial of a motion to dismiss is reviewed for abuse of discretion. *Quality Rock Prod., Inc. v. Thurston County*, 126 Wn.App. 250, 260, 108 P.3d 805 (2005). A trial court abuses its discretion when its decision is "manifestly unreasonable or based on untenable grounds." *Grandmaster Sheng-Yen Lu v. King County*, 110 Wn.App. 92, 99, 38 P.3d 1040 (2002). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Grandmaster Cheng-Yen Lu*, 110 Wn.App. at 99, 38 P.3d 1040.

While the trial court was correct that the jury might infer the Mr. Hendrickson had aided in the transmittal of Mr. Salazar-Guerrero's social security number, the State failed to produce any evidence from which the

jury could draw this inference. No evidence was presented that Mr. Hendrickson was actively or passively distributing social security numbers to anybody. Any inference that Mr. Hendrickson was distributing social security numbers could only have been based on “guess, speculation, or conjecture,” prohibited by *Carter, supra*.

The analysis for Mr. Noe and the unidentified Florida is very similar to that of Mr. Salazar-Guerrero. The jury might infer that Mr. Hendrickson possessed the social security cards for an unlawful purpose, but such an inference would be pure “guess, speculation, or conjecture” not based on any evidence introduced by the State.

The trial court was correct in ruling that the State failed to produce any evidence relating to Mr. Hendrickson’s intent in possessing the personal information. Mr. Roger’s testimony that Mr. Noe’s card and the card with the number of the boy in Florida *could* be used for illegal purposes does not support the inference that Mr. Hendrickson actually *did* possess the card with the intent to use them for illegal purposes.

Further, the trial court was incorrect in concluding that no evidence had been presented to establish an innocent explanation for Mr. Hendrickson’s possession of the two social security cards. Detective Yglesias testified that, in her experience, it is common to find all sorts of documents containing personal information, including social security

numbers and bank account numbers, in recovered stolen vehicles. RP 228-229. Further, Sterling Bronson testified that Mr. Hendrickson owned and operated a tow company and repaired vehicles and sold them "for cheap." RP 321. Detective Yglesias concluded in her report that most of the documents had probably been left in vehicles by people who had had their cars sold. RP 232-233. Detective Yglesias did not see evidence of any crime being committed in any of the documents or evidence recovered from the trailer (RP 233-280), and that all the documents found in the trailer were consistent with items that would be kept in normal business records or would be found in abandoned, impounded, or towed vehicles. RP 280. Finally, Detective Yglesias conducted a thorough investigation of the evidence and documents collected from the trailer and forwarded the information to the prosecutor's office without a recommendation that charges be filed. RP 281.

In the testimony of the police detective who investigated the case, no evidence indicated that any crime had been committed and Mr. Hendrickson's possession of all the documents found in the trailer, including the two social security cards, were consistent with documents kept for business purposes by someone in his line of work and/or documents found in vehicles which were towed and later sold.

Specific criminal intent may be inferred from the defendant's conduct where it is "plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d 634, 638, 619 P.2d 99 (1980). Here, the only conduct of Mr. Hendrickson of which there was evidence was the fact that he placed a box by the rear of the trailer then walked into the auto body shop. Mr. Hendrickson's intent to use the information found in the trailer in a criminal manner is not "plainly indicated as a matter of logical probability" from his act of dropping a box off at the end of the trailer.

Viewing all the evidence in a light most favorable to the State establishes only that Mr. Hendrickson possessed the information, but not what he intended to do with it. The State presented insufficient evidence to establish beyond a reasonable doubt the intent element of any of the charges of identity theft.

When reviewing a trial court's denial of a *Knapstad* motion, an appellate court conducts the same inquiry as when it reviews the sufficiency of the evidence to sustain a conviction. *State v. Israel*, 113 Wn.App. 243, 269 n. 6, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1013, 69 P.3d 874 (2003). For the reasons stated above, the trial court erred in denying Mr. Hendrickson's *Knapstad* motion.

B. Mr. Hendrickson received ineffective assistance of counsel where his trial counsel failed to object to Mr. Rogers' offering hearsay testimony.

In order to show that he received ineffective assistance of counsel, a appellant must show (1) that trial counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2005).

There is a strong presumption that defense counsel's conduct is not deficient, however, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2005).

Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

Here, Mr. Rogers was the only source for any evidence regarding Mr. Noe and his lost social security card. Mr. Noe did not testify. All of the evidence relating to Mr. Noe and his loss of his social security card was introduced through Mr. Rogers in the form of hearsay. *See* RP 68-69. Mr. Hendrickson's trial counsel did not once object to Mr. Rogers' repetition

of what Mr. Noe told him, despite Mr. Rogers' testimony clearly being hearsay. *See, e.g.*, RP 69 (“[Mr. Noe] stated to me that nobody had his permission to have his social security card.”)

Mr. Rogers' repetition of Mr. Noe's statements to him was clearly hearsay, and it was not objectively reasonable for Mr. Hendrickson's trial counsel to fail to object to such testimony. Trial counsel's failure to object to this testimony prejudiced Mr. Hendrickson since hearsay is not generally admissible. ER 802. The trial court relied on Mr. Rogers' testimony, specifically the hearsay statements of Mr. Noe that Mr. Hendrickson did not have permission to have Mr. Noe's social security card. The trial court also based its denial of Mr. Hendrickson's motion for a directed verdict on the charge of identity theft on Mr. Hendrickson's possession of Mr. Noe's social security card. RP 401-402.

Had trial counsel objected, this evidence would not have been introduced. Since Mr. Rogers was the only source of evidence relating to Mr. Noe, the trial court would have dismissed the charge of identity theft relating to Mr. Noe for insufficient evidence of intent absent Mr. Rogers' hearsay testimony.

Trial counsel's failure to object to the introduction of hearsay through Mr. Rogers was not objectively reasonable and prejudiced Mr. Hendrickson because had trial counsel objected, the charge of theft of Mr.

Noe's identity would have been dismissed since there was no other evidence offered by the state relating to Mr. Hendrickson's intent as to his possession of Mr. Noe's social security card.

C. The prosecutor committed misconduct and violated Mr. Hendrickson's due process rights to a fair trial by knowingly eliciting hearsay testimony

A prosecuting attorney is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). The Washington Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial.

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial instrument, however, will be permitted. His zealotry should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

As in *Huson*, we believe the prosecutor's conduct in this case was reprehensible and departs from the prosecutor's duty as an officer of the court to seek justice as opposed to merely obtaining a conviction.

State v. Coles, 28 Wn.App. 563, 573, 625 P.2d 713, *review denied*, 95 Wn.2d 1024 (1981) (citations omitted) (*quoting State v. Huson*, 73 Wn.2d

660, 663, 440 P.2d 192 (1968)).

Prosecutorial misconduct may violate a defendant's due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). In order for a defendant to obtain reversal of his conviction on the basis of prosecutorial misconduct, he must show the prosecutor's conduct was improper and the conduct had a prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996). A defendant must show that the conduct of the prosecutor had a substantial likelihood of affecting the verdict. *Brett*, 126 Wn.2d at 175, 892 P.2d 29.

Prosecutors are presumed to be aware of elementary rules of evidence. *See State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978) (prosecutor was presumably aware of marital privilege against testifying since privilege was elementary rule of evidence). Under ER 802, hearsay is generally inadmissible. While there are exceptions to the rule barring hearsay, the State never suggested that the statements of Mr. Noe were admissible under an exception to the hearsay rule.

Here, the prosecutor knowingly elicited the hearsay statements of Mr. Noe through Mr. Rogers in violation of ER 802. This was improper conduct and prejudiced the defendant, as discussed above, in that the hearsay was the basis for the trial court's denial of Mr. Hendrickson's

motion for directed verdict with regards to identity theft charge relating to Mr. Noe. The introduction of hearsay affected the verdict because without the hearsay, the charge would have been dismissed.

D. The prosecutor committed misconduct in bringing charges against Mr. Hendrickson which were not supported by the facts

It is firmly established that a prosecutor has wide discretion to charge or not to charge a suspect. The discretion lodged in the office necessarily assumes that the prosecutor will exercise it after an analysis of all available relevant information. This concept has recently been reiterated in another context by the United States Supreme Court:

The decision to file criminal charges, with the awesome consequences it entails, requires consideration of a wide range of factors in addition to the strength of the Government's case, in order to determine whether prosecution would be in the public interest. Prosecutors often need more information than proof of a suspect's guilt, therefore, before deciding whether to seek an indictment.

State v. Pettitt, 93 Wn.2d 288, 295, 609 P.2d 1364 (1980) (internal citations omitted), *citing United States v. Lovasco*, 431 U.S. 783, 794, 97 S.Ct. 2044, 2050-2051, 52 L.Ed.2d 752 (1977).

“The principal standard for the charging discretion is the prosecution's ability to prove all elements of the charge.” *State v. Knapstad*, 41 Wn.App. 781, 785, 706 P.2d 238 (1985), *affirmed*, 107

Wn.2d 346, 729 P.2d 48 (1986), *citing Lovasco*, 431 U.S. at 790-791, 97 S.Ct. at 2048-2049, 52 L.Ed.2d at 759-760.

This requirement of ability to prove the crime is also set forth in standard 3-3.9 of the American Bar Association standards on the prosecution function.

It is unprofessional conduct for a prosecutor to institute, or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction.

Knapstad, 41 Wn.App at 785-786, 706 P.2d 238, *citing* American Bar Ass'n, *Standards for Criminal Justice*, Std. 3-3.9(a) (2d.ed. 1980).

Similarly, Washington Rule of Professional Conduct 3.8 dealing with the special responsibilities of a prosecutor provides, "The prosecutor in a criminal case shall: (a) Refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."

Here, the police investigating the crime did not believe any crime had been committed and did not recommend to the prosecutor that charges be filed. As discussed above, at the close of the State's case, presumably after the State presented all the admissible evidence that Mr. Hendrickson had committed identity theft, the trial court granted a motion for directed

verdict for eight of the counts of identity theft after the State voluntarily dismissed five other counts due to the State inability to locate any witnesses to support those counts. CP 4I. Also as discussed above, the evidence presented by the State failed to establish the necessary element of intent as required by RCW 9.35.020.

The prosecutor knew all of the evidence the State would present at trial and therefore was aware that there was no evidence to support the inference that Mr. Hendrickson possessed the information with the intent to commit or aid and abet any crime. The prosecutor knew the evidence was insufficient to convict Mr. Hendrickson on any of the charges yet proceeded to charge him and bring him to trial anyway. This was prosecutorial misconduct and did not comport with "the prosecutor's duty as an officer of the court to seek justice as opposed to merely obtaining a conviction."

VI. CONCLUSION

This court should vacate Mr. Hendrickson's convictions and dismiss the charges against him. Alternatively, this court should remand for a new trial, with instruction that the hearsay testimony presented by Mr. Rogers is inadmissible.

DATED this 8th day of September, 2006.

Respectfully submitted,

Sheri Arnold

Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on September 11, 2006 she hand delivered to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by U.S. mail to appellant, Kevin L. Hendrickson, DOC # 909340, McNeil Island Corrections Center, Post Office Box 881000, Steilacoom, WA. 98388, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on September 11, 2006.


Norma Kinter

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