IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JODIE D. GRAGG, Appellant.	No. 42271-9-II Consolidated with
In re the Personal Restraint Petition of JODIE D. GRAGG, Petitioner.	No. 42062-7-II UNPUBLISHED OPINION

Worswick, C.J. — Jodie Gragg appeals his conviction of first degree trafficking in stolen property. He claims that his jury trial waiver was invalid under article I, sections 21 and 22 of the Washington State Constitution and that the charging document heightened the State's burden of proof and provided inadequate notice of the charge. In a personal restraint petition consolidated with this appeal, Gragg claims that he was denied an opportunity to challenge the declaration for an arrest warrant, which he claims contains false and misleading information. We affirm his conviction and deny his personal restraint petition.

FACTS

Richard Gates owns Universal Refiner Corporation in Montesano, Washington. On Saturday, February 5, 2011, he discovered that several pieces of fabricated steel were missing

from a pallet on his business's property. On Monday morning, Gates and one of his employees went to Twin Harbors Recycling to see if anyone had sold it similar steel products. There, Gates approached Gragg and Marshall Gosney, assuming they were Twin Harbors Recycling employees, and asked them to keep an eye out for his steel, showing Gragg and Gosney pieces of metal that were similar to those stolen.

Gates then went to the Twin Harbors Recycling office to talk with Mark Doyle. He explained to Doyle why he was there and that he had asked the employees to keep an eye out for his steel. When Doyle responded that Gragg and Gosney were not employees, Gates went back to talk to the two but they were gone. Gates then got into his truck and caught up with them on the highway where they all pulled over to talk. When Gragg and Gosney denied that they had stolen his steel and claimed to have brought in only metal shavings and scrap metal, Gates went back to Twin Harbors Recycling to see what the men had sold.

When Twin Harbors Recycling employee Jose Isidro showed Gates the steel that Gragg and Gosney had brought in, Gates called the police because it was his stolen steel. Grays Harbor Sheriff's Deputy David Iverson stopped Gragg and Gosney as they were driving past him. He arrested Gosney for driving without a valid operator's license and detained Gragg while he investigated Gates's claim.

The State charged Gragg with first degree trafficking in stolen property committed as follows:

> That the said defendant, Jodie D. Gragg, in Grays Harbor County, Washington, on or about February 7, 2011, did knowingly initiate, organize, plan, finance, direct, manage, and supervise the theft of property, *to wit*: metal stolen from 458

> Wynoochee Valley Road, Montesano, Washington, for sale to others, and did knowingly traffic in stolen property.

Clerk's Papers (CP) at 1. Before trial, Gragg waived his right to a jury trial. The superior court had the following colloquy with Gragg:

> THE COURT: Now, you are Jodie Gragg, correct?
> THE DEFENDANT: Yes.
> THE COURT: Mr. Gragg, I have a document entitled waiver of trial by jury. Now, do you understand that you have the right to be tried by a jury of citizens to determine your guilt or innocence, and this right is protected by the constitution and the laws of the United States and the State of Washington?
> THE DEFENDANT: Yes, I do.
> THE COURT: Do you understand that in a jury trial the State must convince all of the 12 citizens or jurors of your guilt beyond a reasonable doubt, and in a trial by judge, the State must only convince the judge beyond a reasonable doubt; do you understand that?
> THE DEFENDANT: Yes, I do.
> THE COURT: I have signed this document. You are waiving your right to a jury trial and asking that the case be tried by a judge without a jury; is that correct?
> THE DEFENDANT: Yes.
> THE COURT: Did you sign this freely and voluntarily?
> THE DEFENDANT: Totally.
> THE COURT: It will be so ordered.

Report of Proceedings (Apr. 19, 2011) at 3-4. Gragg moved to dismiss following the State's case in chief, arguing that there was no evidence to support the elements charged in the information. The trial court agreed that the State had not proven the seven listed ways of committing the offense but examined the statute, the pattern instructions, and the information and concluded that the State had proven the alternative means, that of knowingly trafficking in stolen property. The trial court then found Gragg guilty, entered findings of fact and conclusions of law, and sentenced Gragg to a prison-based drug offender sentencing alternative. Gragg appeals.

ANALYSIS

I. State Constitutional Right to a Jury Trial

A. *Gunwall*[1]

Gragg first argues that we should reverse his conviction because the Washington Constitution requires a jury trial in all felony criminal cases and thus his jury trial waiver was invalid. Our State Constitution provides:

> The right of trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Wash. Const. art. I, § 21. It also provides:

> In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed . . . .

Wash. Const. art. I, § 22.

Gragg argues that applying a *Gunwall* analysis to these provisions will define the scope of a valid waiver of these constitutional provisions. And he suggests, such an analysis will show that all felony cases in Washington must be tried to a jury, regardless of the party's wishes.

But *Gunwall* addresses "the extent of a right and not how the right in question may be waived." *State v. Pierce*, 134 Wn. App. 763, 773, 142 P.3d 610 (2006). In *Pierce*, we explained that although Washington's constitutional right is more expansive than the federal right, it does not follow that additional safeguards are required to validly waive the more expansive right.

[1] *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

Pierce, 134 Wn. App. at 773. Thus, the extent of protection offered under the state constitution has no bearing on the legal standard for waiving the right. *Pierce*, 134 Wn. App. at 773. Accordingly, a *Gunwall* analysis does not apply to the issue of waiver of a state or federal constitutional right. *Pierce*, 134 Wn. App. at 773.

We have repeatedly rejected the invitation to reconsider *Pierce*.[2] Washington law allows a defendant to waive a jury trial. *State v. Stegall*, 124 Wn.2d 719, 723, 881 P.2d 979 (1994); *see also State v. Forza*, 70 Wn.2d 69, 70-71, 422 P.2d 475 (1966) (right to a jury trial is subject to a knowing, intentional, and voluntary waiver); *State v. Lane*, 40 Wn.2d 734, 737, 246 P.2d 474 (1952) (defendant may waive 12 person jury and submit case to an 11 person panel).

We also reject Gragg's argument that by not applying *Gunwall*, we fail to provide any test for assessing waiver. As we said in *Pierce*, "Washington already has rules governing a defendant's waiver of the jury trial right." *Pierce*, 134 Wn. App. at 771 (discussing CrR 6.1(a)); RCW 10.01.060. Gragg's arguments fail.

B. *Waiver*

Gragg contends that to be valid, his jury waiver must affirmatively show that he was aware of the full extent of the right. Gragg reasons that because his state right is broader than the corresponding federal right, it requires a more extensive explanation than a federal right waiver. Gragg argues that neither the written waiver nor the court's colloquy demonstrate that he fully

[2] *See State v. Aulis*, noted at 165 Wn. App 1011 (2011); *State v. Gueller*, noted at 165 Wn. App. 1007 (2011); *State v. Hayter*, noted at 162 Wn. App. 1049 (2011); *State v. Rotchford*, noted at 163 Wn. App. 1021 (2011); *State v. Pagan*, noted at 159 Wn. App. 1025 (2011); *State v. Stallings*, noted at 157 Wn. App. 1011 (2010); *State v. Howe*, noted at 154 Wn. App. 1060 (2010).

understood: (1) that he could participate in jury selection, (2) that he had a right to a jury of twelve, (3) that the jurors were required to be fair and impartial, (4) that he would be presumed innocent by the jury, and (5) that the jury's verdict had to be unanimous.

We review the validity of a jury trial waiver de novo. *State v. Ramirez-Dominguez*, 140 Wn. App. 233, 239, 165 P.3d 391 (2007). A defendant may waive the right to a jury if he does so knowingly, intelligently, voluntarily, and without improper influences. *Stegall*, 124 Wn.2d at 724-25. We will not presume that a defendant waived his jury trial right unless the record adequately establishes a valid waiver. *Pierce*, 134 Wn. App. at 771. Although Washington's right to a jury trial is more expansive than its federal counterpart, there are no additional safeguards required for its waiver. *Pierce*, 134 Wn. App. at 773.

Washington requires a personal expression of waiver from the defendant. *Stegall*, 124 Wn.2d at 725. Although not determinative, we may consider several factors in deciding whether a defendant validly waived a jury trial: (1) whether the trial court informed the defendant of the right to a jury trial, (2) whether the defendant signed a written waiver, and (3) whether defense counsel affirmatively stated that the defendant waived the right. *Pierce*, 134 Wn. App. at 771. Also relevant is whether any colloquy between the court and the defendant occurred, although the court is not required to conduct an extended colloquy with the defendant. *Pierce*, 134 Wn. App. at 771.

Here, Gragg signed a written jury trial waiver, which states that he understands his right to a jury trial and waives that right, and it contains his attorney's averment that Gragg made his

decision to waive a jury voluntarily, knowingly, and intelligently. The record shows that trial counsel affirmatively represented that Gragg knew of his right to a jury and chose to waive it. The record also contains a colloquy between the judge and Gragg regarding the right to a jury trial by 12 citizens that had to unanimously agree that he was guilty beyond a reasonable doubt. The colloquy also shows that the trial court explained to Gragg that if he waived his jury trial right, the State would only have to convince one judge of his guilt. And Gragg assured the trial court that he wanted to waive his jury trial right. We reiterate that Washington does not require a more expansive explanation than a federal right waiver, and we conclude that Gragg validly waived his right to a jury trial.

II. Charging Document

Gragg argues that the information's use of the conjunctive "and" rather than the disjunctive "or" required the State to prove that he committed all the listed elements. As we noted above, the information alleged that Gragg "did knowingly initiate, organize, plan, finance, direct, manage, and supervise the theft of property, *to wit*: metal stolen from 458 Wynoochee Valley Road, Montesano, Washington, for sale to others, **and** did knowingly traffic in stolen property." CP at 1 (emphasis added). RCW 9A.82.050 is nearly identical but uses the disjunctive rather than the conjunctive to introduce the last phrase.

A. *State's Burden of Proof*

Gragg argues that because he challenged the State's use of the conjunctive below, we must strictly construe the information. *State v. Vangerpen*, 125 Wn.2d 782, 787-88, 888 P.2d

1177 (1995). We disagree.

Generally, we examine the information to see if the State has alleged all the essential elements of the crime. *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P .2d 86 (1991). To satisfy this essential elements rule, the information must contain both the elements of the crime charged and the "facts supporting every element of the offense." *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (emphasis omitted). The rule's purpose is to give the defendant sufficient notice to adequately prepare a defense. *State v. Tandecki*, 153 Wn.2d 842, 847, 109 P.3d 398 (2005).

Because Gragg challenged the adequacy of the information below, we apply the strict construction standard to determine if the information omits an essential element of the crime and, if so, we must dismiss the case "'without prejudice to the State's ability to refile the charges.'" *State v. Phillips*, 98 Wn. App. 936, 940, 991 P.2d 1195 (2000) (quoting *State v. Ralph*, 85 Wn. App. 82, 86, 930 P.2d 1235(1997)).

Here, Gragg argues that because the information used "and" rather than "or" between the statutory elements, the information inadequately apprised him of the notice necessary to properly prepare a defense. He argues that because the information used the conjunctive, his defense was premised on the State having to prove both alternative statutory means of trafficking in stolen property. But strictly construing the information does not support this claim. As 40 years of case law has allowed the State to charge in the conjunctive and prove in the disjunctive, we will not construe the information as providing inadequate notice. [3] *State v. Dixon*, 78 Wn.2d 796, 802-03,

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[3] Gragg could have requested a bill of particulars if he felt the information inadequately identified the State's theory. CrR 2.1(c).

479 P.2d 931 (1971). The information, strictly construed, contained all the essential elements of the offense charged.

Gragg next argues that because the State charged in the conjunctive, it had a heavier burden of proof, requiring it to prove both alternative statutory means of trafficking in stolen property. We disagree.

In *State v. Dixon*, 78 Wn.2d at 802-03, the Court explained that it is permissible to charge in the conjunctive when there are alternative means of committing the offense:

> Acts or conduct described in a penal statute in the disjunctive or alternative may be pleaded in the conjunctive. If the charge is in the conjunctive, the information is held to charge a single crime committed in any one or all of the ways charged. Where, under a penal statute, a single offense can be committed in different ways or by different means and the several ways or means charged in a single count are not repugnant to each other, a conviction may rest on proof that the crime was committed by any one of the means charged.

(Citations omitted.)

In *State v. Ford*, 33 Wn. App. 788, 789, 658 P.2d 36 (1983), the State charged Ford with taking and riding a motor vehicle without owner's permission. Ford challenged the sufficiency of the evidence, claiming that the State's use of the conjunctive in the information required it to prove that he both took the vehicle and rode in it. Applying *Dixon*, the *Ford* court held that the State had only to prove that Ford was riding or taking a stolen vehicle not both. *Ford* stated, "The State is only required to prove either a taking or riding even though the information uses the conjunctive." 33 Wn. App. at 790.

And in *State v. O'Donnell*, 142 Wn. App. 314, 321-24, 174 P.3d 1205 (2007), the court

held that the trial court did not err in instructing on only one means of committing robbery even though the charging documents separated the alternatives with a conjunctive "and." Based on these authorities, we hold that the State's use of the conjunctive in charging alternative means did not increase the State's burden of proof.

B. *Law of the Case*

Gragg next argues, based on *State v. Hickman*, 135 Wn.2d 97, 101-03, 954 P.2d 900 (1998), that the charging document became the law of the case, requiring the State to prove the additional element that he did "knowingly initiate, organize, plan, finance, direct, manage, and supervise the theft of property . . . and did knowingly traffic in stolen property." CP at 1.

In *Hickman*, the Court held that if the parties do not object to *jury instructions*, the instructions become the law of the case. *Hickman*, 135 Wn.2d at 102. In a criminal case, if the State adds an unnecessary element in the "to convict" instruction without objection, the added element also becomes the law of the case and the State assumes the burden of proving the added element. *Hickman*, 135 Wn.2d at 102.

But the law of the case doctrine applies only to jury instructions, not when there is a bench trial. *State v. McGary*, 37 Wn. App. 856, 860, 683 P.2d 1125 (1984). In *State v. Munson*, 120 Wn. App. 103, 83 P.3d 1057 (2004), a case similar to the present, Division Three addressed the State's burden of proof under a charge of leading organized crime. The information alleged that Munson "did intentionally organize, manage, direct, supervise, and finance three persons . . . in a pattern of criminal profiteering activity . . . Forgery . . . Theft . . . and Possession of a Controlled

Substance." 120 Wn. App. at 105 (quoting CP [*State v. Munson*] at 1) (emphasis omitted). Relying on *Dixon*, the court found that charging the various alternatives was permissible. 120 Wn. App. at 107. It then noted: "Moreover, there was no jury here. And the trial judge specifically found that the only underlying crime was forgery. The judge's finding evidences no confusion on the proof presented, or the means or underlying criminal activity alleged. And that confusion would be the test." 120 Wn. App. at 107. *See also State v. Hawthorne*, 48 Wn. App. 23, 737 P.2d 717 (1987) (when the State included an additional item in the information, the court refused to apply the law of the case doctrine because it was a bench trial); *State v. Hobbs*, 71 Wn. App. 419, 423, 859 P.2d 73 (1993) (surplusage in the information "need not be carried over into the 'to convict' instruction or proved beyond a reasonable doubt in a bench trial").

Gragg disagrees with these holdings and argues that applying the law of the case doctrine to jury trials but not bench trials violates the equal protection clause. He argues that "there is no reason it can't be applied when the accused person submits her or his case to a judge." Br. of Appellant at 27. He cites *State v. Smith*, 117 Wn.2d 263, 279, 814 P.2d 652 (1991). But *Smith* does not stand for the proposition that Gragg offers. His claim flies in the face of the authorities we cited above. Gragg's claim fails.

C. *Sufficiency of the Evidence*

Gragg argues that because the State had to prove both alternative means of committing the offense, the evidence presented was insufficient to support his conviction. But as we hold above, the State needed only to prove that Gragg knowingly trafficked in stolen property.

In determining whether sufficient evidence supports a conviction, "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)).

Here, the State presented evidence that Gragg possessed the steel stolen from Universal Refiner Corporation. He took it to Twin Harbors Recycling on Monday morning after it had been stolen two days earlier. After speaking with Gates, Gragg fled the scene without being paid for the metal he had turned in. And when Gates confronted Gragg about selling the steel, Gragg denied it and claimed that he had only sold metal shavings and scrap metal. This was sufficient evidence to prove that Gragg knowingly trafficked in stolen property.

III. Personal Restraint Petition

In his personal restraint petition, Gragg asks for release from confinement because the prosecutor's probable cause declaration contains allegedly false and misleading statements. Specifically, he argues four errors: (1) Gates did not say, "Jodie Gragg just sold metal at [T]win [H]arbors Recycling." Petition at 11; (2) Gosney was not identified by his Washington state driver's license because it was suspended; (3) Deputy Iverson did not contact Gragg in Officer Christelli's vehicle; and (4) Deputy Iverson did not get a copy of Gragg's Washington state driver's license from Isidrio because Gragg only has a Washington state identification card and what Isidrio gave Deputy Iverson was not a sales slip because it was not dated or signed.

When considering a personal restraint petition, we determine whether the petitioner made a prima facie showing of actual prejudice stemming from a constitutional error. *In re Pers. Restraint of Hews*, 99 Wn.2d 80, 93, 660 P.2d 263 (1983). "[T]o receive collateral review of a conviction on nonconstitutional grounds, a petitioner must establish that the claimed error constitutes a fundamental defect which inherently results in a complete miscarriage of justice." *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 812, 792 P.2d 506 (1990).

Gragg fails in this burden. Not only does he fail to provide reasoned argument for why his claims were either constitutional error or constituted a fundamental defect, he fails to explain why these alleged errors negated the probable cause supporting his arrest or why they would justify reversing his conviction. Gragg can show no prejudice because even after excising or correcting the alleged errors, the declaration still amply supports a finding of probable cause. CrR 2.2(a). Gragg's claim of unlawful restraint fails.

We affirm Gragg's conviction and deny his personal restraint petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

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Worswick, C.J.

We concur:

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Quinn-Brintnall, J.

Van Deren, J.