SUPREME COURT NO. 89555-4
C.O.A. No. 43219-6-II
Cowlitz Co. Cause NO. 11-1-00721-6

SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY LEE LINDSEY, JR.,

Petitioner.

RESPONSE TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases

Statutes

Rules

I. IDENTIFY OF RESPONDENT

The respondent is the State of Washington, represented by Eric H. Bentson, Deputy Prosecuting Attorney for Susan I. Baur, Cowlitz County Prosecuting Attorney.

II. COURT OF APPEALS DECISION

The Court of Appeals correctly decided this matter, holding that RCW 9A.82.050 identifies two alternative means of trafficking in stolen property in the first degree, Lindsey failed to preserve his jury instruction issue for review, the trial court did not abuse its discretion when it refused to appoint Lindsey new counsel, and the information provided Lindsey sufficient notice of the charge against him. The respondent respectfully requests this Court deny review of the October 15, 2013, Court of Appeals' opinion in *State v. Gary Lee Lindsey, Jr.*, No. 43219-6-II, affirming Lindsey's conviction.

III. STATEMENT OF THE CASE

In July of 2011, Earl Teel, had possession of a large stainless steel tank belonging to Phil Lesowich at his business. RP at 35. Teel was attempting to sell it for Mr. Lesowich on Craigslist. RP at 35. Teel's company was called Day Break Transportation, and it was located at 114 East Industrial Way in Longview. RP at 34. Teel stored the tank outside of his warehouse by a dumpster. RP at 36. The tank itself was 5'8" tall,

24" in diameter, and weighed around 470 pounds. RP at 36. Because of the size and weight of the tank, Teel had moved it with a forklift. RP at 37.

On July 6, 2011, Teel observed a white Ford pickup truck drive onto his property toward the dumpster. RP at 37. On the side of the truck was a sign reading: "firewood for sale." RP at 38. The truck was driven by Gary Lindsey, who exited the truck and began going through Teel's dumpster. RP at 38-39. The steel tank was located 6' to 8' away from this dumpster. RP at 41. Teel asked Lindsey what he was doing. RP at 39. Lindsey told him that he and the other man who was in the truck were looking for cables to pull a log out of a ditch so they could cut it up for firewood. RP at 39. Because of the down economy, Teel agreed to allow Lindsey and the man to take cables, but also told Lindsey not to come back without talking to him first. RP at 39.

Two days later on July 8, 2011, Teel returned to his business and the tank was still sitting in the same location. RP at 41. Teel returned to his business again in the afternoon of Sunday July 10, 2011, and discovered the tank was missing. RP at 42-43. Teel reported the theft to the police. RP at 43. On Monday, July 11, 2011, at around 8:30-9:00 a.m., Deputy Gladson of the Cowlitz County Sheriff's Office met with Teel. RP at 43. Teel provided Gladson with pictures of the tank and its

serial numbers. RP at 44. Deputy Gladson went to GT Metal & Salvage on 38th Avenue in Longview and warned the owner, Marc Wallace, to be on the lookout for the steel tank. RP at 61.

Roughly 30-45 minutes later, Lindsey arrived at GT Metal & Salvage in his white Ford pickup truck with the lid to the tank saying he wanted to scrap it for money. RP at 63. Lindsey also told Wallace he had additional stainless steel to sell and went to retrieve it. RP at 64. Wallace then contacted the Cowlitz County Sheriff's Office to inform Deputy Gladson that Lindsey was potentially returning with the lid and steel tank that Deputy Gladson was looking for. RP at 64. Roughly 45 minutes to an hour later, Lindsey returned with the tank. RP at 65. Lindsey pulled his truck onto Wallace's scale to weigh the tank and lid. RP at 65. After Lindsey pulled off the scale, Deputy Gladson arrived. RP at 66.

Deputy Gladson observed Lindsey with the steel tank. RP at 77. Lindsey told Deputy Gladson that the pickup belonged to him. RP at 79. Lindsey told Deputy Gladson that he had bought the tank from Jack Patching for $100. Deputy Gladson explained to Lindsey that Jack Patching was deceased. RP at 79. Lindsey then told Deputy Gladson he had purchased the tank from "Jack Jr." RP at 79. Deputy Gladson told Lindsey there was a Jasper Patching, at which point Lindsey told him that it was Jasper Patching who he had bought the tank from. RP at 80.

Deputy Gladson asked Lindsey how much he expected to receive for the tank, and Lindsey estimated $150-$200. RP at 80. Deputy Gladson asked Lindsey if he knew that Jasper Patching was a thief. RP at 81. Lindsey told Deputy Gladson that Patching was a thief. RP at 81. Lindsey then admitted to Deputy Gladson that he knew the tank was probably stolen. RP at 81. Deputy Gladson asked Lindsey what Patching would say if he asked him whether he had sold Lindsey the tank. RP at 81. Lindsey told Deputy Gladson, "You know what he's going to say." RP at 81.

Deputy Gladson called Teel to come to GT Metal & Salvage, because the tank had been located there. RP at 81. While waiting for Teel to arrive, Lindsey told Deputy Gladson, "I might as well be honest with you. I took it. There is no sense in both of us going down for the same thing." RP at 82.

On July 14, 2011, Lindsey was charged with trafficking in stolen property in the first degree. CP at 53. The original information charged that Lindsey did knowingly initiate, organize, plan, finance, direct, manage, or supervise the theft of property for sale to others or did knowingly traffic in stolen property. CP at 53. On November 2, 2011, Lindsey waived any claim that his attorney had a conflict of interest in representing him. RP at 1-3. On November 30, 2011, Lindsey's attorney informed the court that Lindsey had "trust issues" with him, and now

wanted to new attorney. RP at 3. The court asked Lindsey what had changed since he had waived his conflict issue on November 2, 2011. RP at 4. Lindsey then complained about the charge against him and the amount of time he was facing. RP at 4. The court explained to Lindsey that his prior history was the reason for the amount of time he was facing, and that his attorney could not control the recommendation the prosecutor had made in the plea bargain offer. RP at 5. The court asked Lindsey what specific problem he had with his attorney. RP at 5. Lindsey complained that his attorney did not "stick up" for him and was not "representing him right." RP at 6, 7. Because Lindsey raised no specific problem with his attorney, the court did not appoint substitute counsel. RP at 6.

On the first day of trial, December 8, 2011, Lindsey again requested substitute counsel. RP at 13. However, when the court inquired of him, he again provided no specific reason that suggested his attorney was not competently representing him or had a conflict of interest. RP at 14. Lindsey's attorney informed the court he was prepared for trial and told the court there was nothing about his relationship with Lindsey that would cause him to be unable to fully and competently represent him. RP at 13, 16. Because no basis was given that would require appointing a

new attorney, the court denied Lindsey's request for substitute counsel. RP at 18. The case proceeded to trial.

On the first day of trial, the State moved to amend the information to adjust the dates. RP at 9. The amended information eliminated a second count of driving while suspended, adjusted the date ranges for trafficking, and dropped the word "initiate" from the description of how Lindsey trafficked in stolen property. CP at 1. Lindsey and his attorney reviewed the amended information, did not raise an objection, and entered a plea of not guilty. RP at 9. The State proposed jury instructions to the court. RP at 9. Prior to reading these instructions to the jury, the court went through the instructions with the attorneys. RP at 101. The "to convict" instruction stated that to find Lindsey guilty of the crime, it must be proved beyond a reasonable doubt that Lindsey had knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others or trafficked in stolen property with knowledge that the property was stolen. CP at 48. When this instruction was initially proposed, Lindsey's attorney reviewed it and said it was appropriate. RP at 25. Later, after the court went over the instruction with the parties, Lindsey neither objected nor took exception to it. RP at 102. After hearing the evidence the jury found Lindsey guilty of trafficking in stolen property in the first degree. At sentencing, despite frustration with

his circumstances, Lindsey expressed satisfaction with his attorney's performance. RP at 188.

IV. THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS' DECISION

Because Lindsey's petition fails to demonstrate that any of the grounds listed under RAP 13.4(b) apply, his petition should be denied. Under RAP 13.4(b) a petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

In his petition Lindsey does not claim that the holding in his case conflicts with a decision of the Supreme Court, thus RAP 13.4(1) does not apply. Lindsey does maintain that the Court of Appeals' decision creates a conflict with prior opinions of Division One of the Court of Appeals. However, he fails to address the Court of Appeals' reasoning that because

Division One was not reviewing the issue Lindsey raises, statements from these prior cases with regard to this issue were dicta. For the remainder of his arguments, Lindsey claims his case raises significant constitutional issues and substantial issues of public interest. Yet other than claiming that the decision in his case "implicates all prosecutions for trafficking in stolen property," Lindsey never explains how his case raises a significant constitutional issue or a substantial issue of public interest. Because Lindsey's petition fails to provide grounds for review under RAP 13.4(b), it should be denied.

A. Lindsey fails to demonstrate how the Court of Appeals' holding that trafficking in stolen property in the first degree contains two alternative means rather than eight conflicts with another decision of the Court of Appeals.

Lindsey claims that the Court of Appeals erred by holding that trafficking in stolen property in the first degree contains two alternative means rather than eight, and that this creates a conflict between Division One and Division Two of the Court of Appeals. However, in its opinion, the Court of Appeals explained that in neither Division One case Lindsey cites was the court asked to decide the number of alternative means contained in the trafficking statute. Because the issue of whether or not the trafficking statute contains eight alternative means was not before Division One when it rendered its opinions, language in these opinions

indicating that the statute contains eight alternative means was merely dicta. In his petition for review, Lindsey makes no attempt to explain why the reasoning of the Court of Appeals is in error and therefore fails to demonstrate that the decision in his case conflicts with another decision of the Court of Appeals.

1. The Court of Appeals correctly held that the statute for trafficking in stolen property contains two alternative means rather than eight.

The Court of Appeals correctly found that the statute criminalizing trafficking in stolen property the first degree contains two alternative means. In its opinion the Court of Appeals stated: "We conclude that there are two means of committing first degree trafficking in stolen property: (1) facilitating the theft of property so that it can be sold and (2) facilitating the sale of property known to be stolen." Court of Appeals Opinion No. 43219-6-II at 8-9. Prior to reaching this conclusion, the Court of Appeals carefully examined the statute and applied principles gleaned from Washington cases analyzing the alternative means issue.

To understand the Court of Appeals' rationale it is important to read the text of the statute. RCW 9A.82.050(1) defines trafficking in stolen property in the first degree as follows:

> A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of

> property for sale to others, or who knowingly traffics in stolen property is guilty of trafficking in stolen property.

While a broad definition of how a person can facilitate the theft of property so that it can be sold to others is included in the text of the statute, the second concern of selling property one knows to be stolen is defined under a separate definitional statute.

> "Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

RCW 9A.82.010(19). After reading RCW 9A.82.050 and the accompanying definitional statute, it becomes readily apparent that the statute is concerned with prohibiting two types of activities: (1) facilitating the theft of property for sale to others and (2) facilitating the sale of property one knows to be stolen.

The Court of Appeals considered multiple factors in reaching the conclusion that RCW 9A.82.050 creates two alternative means for committing the crime of trafficking in stolen property in the first degree. First, by using the word "knowingly" twice—once before the first seven terms and then again before the final term, the statute indicates that the first seven terms are part of the same group and that this group of terms is separate from the final term, "traffics." Were the statute interpreted as

describing eight alternative means, as Lindsey maintains, then there would be no need to use the term "knowingly" again prior to "traffics." Second, the use of the word "who" as the subject twice—once before the first seven terms and then again before the final term—with a separate disjunctive creates two independent clauses. Were the statute describing eight alternative means there would be no need to use the term "who" a second time. Third, the first seven terms relate to different aspects of a single category of criminal conduct – facilitating the theft of property so that it can be sold. While the eighth term, "traffics," involves a separate category of conduct – transferring possession of property one knows to be stolen. Fourth, although the statute is not formally divided into separate subparagraphs (a) and (b), the structure of the paragraph "compels the conclusion that the statute describes only two means." Court of Appeals Opinion No. 43219-6-II at 7.

It is difficult to find fault with the Court of Appeals' logic. The plain reading of the statute strongly indicates two alternative means, and in his petition Lindsey makes no attempt to show error in this reasoning. RCW 9A.82.050(1) does not contain any separate subparts. This is significant because in *State v. Al-Hamdi*, 109 Wn.App. 599, 606-07, 36 P.3d 1103 (2001), the court found that the terms "physically helpless" and "mentally incapacitated" were not alternative means of committing rape in

the second degree, because they were not contained in different subparts. Had these two terms been contained in different subparts, then the court would have found them to be alternative means as it had in *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) ("The two subparts clearly create alternative means."). Thus, it appears that when terms are contained within the same subpart they would not ordinarily be considered alternative means.

While RCW 9A.82.050(1) does not contain any subparts, it quite obviously addresses two concerns. First, it prohibits actions designed to facilitate the theft of property so that it can be sold. Second, it prohibits actions facilitating the sale of property known to be stolen. The first seven words address this first concern and simply read as a list similar to the definition of "traffics" contained in RCW 9A.82.010(19). RCW 9A.82.050(1). However, rather than simply include traffics as the eighth alternative means of committing the crime, the statue sets it apart by stating "or who knowingly traffics in stolen property." RCW 9A.82.050(1). If the statute creates eight alternative means, then it is odd that the eighth alternative is set off in this manner. Additionally, unlike "traffics," the first seven words are not individually defined elsewhere in the statute. Thus, when the statute is considered in proper context, it appears to create two alternative means for committing the crime of

trafficking and simply defines the first of these alternatives in the definition of the crime and the second in a separate definitional statute. *See* RCW 9A.82.050(1); 9A.82.010(19).

2. Statements from prior decisions of Division One that the statute contained eight alternative means were merely dicta; therefore there is no conflict.

Because the issue of the number of alternative means contained in RCW 9A.82.050 was not before Division One in the cases Lindsey cites, statements in those opinions stating there were eight alternative means were merely dicta; accordingly the decision in Lindsey's case does not conflict with any other Court of Appeals' opinion. "Dicta are opinions made without argument or full consideration of the point, are not the professed deliberate determinations of the judge, and do not embody the resolution of the court." *State v. Schmidt*, 30 Wn.App. 887, 898, 639 P.2d 754 (1982). In two cases, Division One of the Court of Appeals stated that there were eight alternative means for committing trafficking in stolen property in the first degree. However, the latter case, *State v. Hayes*, 164 Wn.App. 459, 476, 262 P.3d 538 (2011), did not involve the crime of trafficking in stolen property in the first degree and simply discussed the holding from the prior case. Thus, only the former case, *State v. Strohm*,

75 Wn.App. 301, 879 P.2d 962 (1994), dealt with the crime of trafficking in stolen property in the first degree.

In *Strohm,* Division One stated that trafficking in stolen property could be committed by eight alternative means. *Id.* at 307. The court interpreted all eight terms listed in the trafficking in stolen property in the first degree statute as alternative means of committing the crime. *Id.* However, the issue before the court was not whether the statute itself contained eight alternative means, but rather did the separate definitional statute create "means within means." With regard to "traffics," Strohm argued for an even greater number of alternative means, claiming that each of the methods by which one traffics was an additional alternative means of committing the crime. *Id.* at 308. The *Strohm* Court rejected this "means within a means" argument holding that the definition of traffic was merely a definition and did not create additional alternative means for committing the crime. *Id.* at 308-09.

The *Strohm* Court made the common sense distinction that whether or not methods of committing a crime amount to alternative means depends on where they are placed in the statute. If a particular alternative means of committing a crime is elsewhere defined in a statute, then even if this definition would include multiple methods of committing the crime, it is still limited to a definition and does not create additional alternative

means. On the other hand, the court considered multiple methods described in the statute defining the crime itself to be alternative means. It should be noted, that the thrust of the *Strohm* Court's discussion was directed at explaining why the definition of traffic did not create additional alternative means. The court did not explain why it considered the first seven words to be alternative means. Because Strohm's conviction would have been upheld regardless of whether the first seven words were considered alternative means or not, the court's opinion as to this issue was not essential to its decision and may be properly characterized as dicta.

Division Two of the Court of Appeals recognized that the statement regarding eight alternative means was dicta, noting that when the *Strohm* Court said there were eight alternative means it did so "without analysis or comment." Court of Appeals Opinion No. 43219-6-II at 8. In Lindsey's case, Division Two correctly observed that "the issue of whether RCW 9A.82.050 identifies two or eight alternative means was not before the court in either *Strohm* or *Hayes*." Court of Appeals Opinion 43219-6-II at 8. Further, Division Two noted that neither *Strohm* nor *Hayes* actually discussed the alternative means issue with regard to RCW 9A.82.050. For these reasons Division Two declined to follow the dicta contained in *Strohm*. Because *Strohm* and *Hayes* merely stated that there

were eight alternative means in dicta, the Court of Appeals' holding that the statute contains two alternative means does not conflict with another Court of Appeals' decision.

B. Lindsey does not provide any basis to show the issues he raises create a significant question of constitutional law or substantial public interest.

Lindsey maintains that review of his remaining issues should be granted because they raise either a significant question of constitutional law or substantial public interest; however none of these claims appear to do so. First, Lindsey claims that he has preserved review of an errant jury instruction. However, he did not object to this instruction at trial and failed to cite the proper legal authority for raising this issue for the first time on appeal. Second, he claims that his verdict was not unanimous. However, he bases this claim on his failed argument that trafficking in stolen property contains eight alternative means. Third, he claims the trial court abused its discretion in refusing to appoint substitute counsel, yet fails to adequately support this claim with the record. Finally, he claims that the information was deficient, but fails to explain how the Court of Appeals erred by finding it was sufficient based on the liberal standard of review which exists for an information that is challenged for the first time on appeal. In addition to failing to demonstrate that the Court of Appeals

erred, Lindsey fails to explain how any of these issues raise significant questions of constitutional law or substantial public interest.

1. Because Lindsey did not object at trial to the jury instruction and failed to cite legal authority to support raising the issue for the first time on appeal, he failed to preserve this issue for review.

Because Lindsey did not raise an objection to the jury instructions given at trial, he waived the right to challenged them on appeal.[1] "[A]n issue, theory, or argument not presented at trial will not be considered on appeal." *State v. Jamison*, 25 Wn.App. 68, 75, 604 P.2d 1017 (1979) (quoting *Herberg v. Swartz*, 89 Wn.2d 916, 578 P.2d 17 (1978)). Under RAP 2.5(a), an appellate court "may refuse to review any claim of error which was not raised in the trial court." This rule requires parties to bring purported errors to the trial court's attention, thus allowing the trial court

[1] Often when cases involve a faulty jury instruction, the invited error doctrine will apply: "[E]ven where constitutional rights are involved, we are precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to its wording." *State v. Winings*, 126 Wn.App. 75, 89, 107 P.3d 141 (2005). Because Lindsey did not propose the jury instruction at issue, the invited error doctrine does not apply. *See State v. Corn*, 95 Wn.App. 41, 56, 975 P.2d 520 (1999). However, when the court addressed the jury instructions with the parties, Lindsey neither objected nor took exception to the instruction. By permitting the faulty jury instruction to go forward, Lindsey achieved exactly what the invited error doctrine is intended to prevent: He did not raise the issue when given the opportunity at trial, then after being convicted he raises the issue for the first time on appeal in an attempt to obtain a new trial, denying the trial court the opportunity to correct the error at the appropriate time. *See State v. Schaler*, 169 Wn.2d 274, 303, 236 P.3d 858 (2010) (J.M. Johnson, J., *dissenting*).

to correct them.[2] *See State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

Although an argument must be raised at trial to be preserved for review, in certain, limited circumstances appellate courts will consider arguments raised for the first time on appeal, but only where the legal standard for consideration had been satisfied. "The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a 'manifest error affecting a constitutional right.'" *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). Under RAP 2.5(a), an error may be raised for the first time on appeal only for (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. The parameters of a "manifest error affecting a constitutional right" are not unlimited: "RAP 2.5(a)(3) does not provide that all asserted constitutional claims may be raised for the first time on appeal. Criminal law is so largely constitutionalized that most claimed errors can be phrased in constitutional terms." *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992). Additionally, "permitting *every possible* constitutional error to be raised for the first time on appeal

[2] Requiring parties to raise their objections in the trial court also allows for the development of a complete record regarding the alleged error.

undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders, and courts." *Id.* at 344 (emphasis in original).

Here, after failing to object to the proposed jury instruction at trial, Lindsey also failed to cite any legal authority as to why he could raise this issue for the first time on appeal. It should not be the responsibility of the reviewing court to discern what argument a party should have made when that party fails to do so in its brief. Because Lindsey did not argue for an exception under RAP 2.5(a), he failed to put the issue before the reviewing court. For this reason, the Court of Appeals did not err in refusing to consider this claim.[3]

2. Lindsey's verdict was unanimous because there was sufficient evidence of each of the alternative means for trafficking in stolen property.

Because RCW 9A.82.050 contains two alternative means by which a person may commit the crime of trafficking in stolen property in the first degree, and there was sufficient evidence to convict Lindsey under either

[3]Moreover, even if this theoretical error was constitutional, its impact on the case obviously amounted to harmless error. Constitutional error is harmless when the conviction is supported by overwhelming evidence. *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990). Because Lindsey was seen taking property beside the tank just before it was stolen, showed up with the tank after it was stolen and attempted to sell it, then confessed to stealing it, there was overwhelming evidence showing Lindsey knowingly stole property with the intent to sell it and possessed stolen property he knew to be stolen.

of these alternatives, a particularized expression of unanimity was unnecessary. "If the evidence is *sufficient* to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means." *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994) (emphasis in original). Here, Lindsey claims that he did not receive a unanimous verdict based on his faulty claim that RCW 9A.82.050 contains eight alternative means. However, for the reasons previously explained, the statute contains two alternative means of committing the crime. *See supra* Part A-1. Because there was sufficient evidence for the jury to find Lindsey guilty under each of these two alternative means, his claim necessarily fails.

3. The trial court did not abuse its discretion when it refused to appoint Lindsey substitute counsel.

Because Lindsey provided no basis that would have required the court to appoint him new counsel, the trial court did not abuse its discretion by refusing to do so. It is well-established that "[a] defendant does not have an absolute, Sixth Amendment right to choose any particular advocate." *State v. Varga*, 151 Wn.2d 179, 200, 86 P.3d 139

(2004) (quoting *State v. Stenson,* 132 Wn.2d 668, 733, 940 P.2d 1239 (1997) (citing *State v. DeWeese,* 117 Wn.2d 369, 375–76, 816 P.2d 1 (1991))). To justify appointment of new counsel, a defendant "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Id.* (quoting *Stenson*, 132 Wn.2d at 734). Generally, a defendant's loss of confidence or trust in his counsel is not sufficient reason to appoint new counsel. *Id.* (citing *Stenson*, 132 Wn.2d at 734 (citing *Johnston v. State,* 497 So.2d 863, 868 (Fla.1986))).

"The trial court's determination of whether a defendant's dissatisfaction with court-appointed counsel warrants appointment of substitute counsel is discretionary and will not be overturned on appeal absent an abuse of discretion." *Id.* (citing *Stark*, 48 Wn.App. at 252). "A trial court abuses its discretion when it bases its decision on untenable grounds or reasons." *State v. Depaz*, 165 Wn.2d 842, 852, 204 P.3d 217 (2009) (citing *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)). "An abuse of discretion occurs only 'when no reasonable judge would have reached the same conclusion.'" *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). When assessing a trial court's decision

regarding a conflict, a reviewing court looks to (1) the extent of the conflict between the attorney and the client, (2) the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion for appointment of new counsel. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.2d 80 (2006).

Here, on three separate occasions, the court inquired as to Lindsey's satisfaction with counsel. On the first occasion, Lindsey waived any claim of conflict. On the two subsequent occasions, despite being given numerous opportunities, Lindsey did not provide any substantive reason as to why new counsel was necessary. Further, his attorney stated he was prepared for trial and believed he could competently represent Lindsey. This appears to be what occurred, as Lindsey makes no claim of ineffective assistance of counsel. Further, at sentencing Lindsey expressed satisfaction with the representation his attorney had provided him. The Court of Appeals applied the *Cross* factors and determined that the trial court had not abused its discretion in refusing to appoint Lindsey substitute counsel. Lindsey fails to demonstrate any error in the Court of Appeals' application of the law to these circumstances.

4. The information was constitutionally sufficient to provide Lindsey with notice of the charge against him.

The filing of the amended information did not cause Lindsey to suffer a lack of notice to the essential elements of trafficking in stolen property in the first degree. "The primary goal of the 'essential elements' rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against." *State v. Kjorsvik*, 117 Wn.2d 93, 101, 812 P.2d 86 (1991). Because the definitions of the words describing how one may facilitate the theft of property with intent to sell necessarily overlap, the claimed missing element can be fairly implied.

"Generally, a charging document must contain '[a]ll essential elements of a crime' so as to give the defendant notice of the charges and allow the defendant to prepare a defense." *State v. Tresenriter*, 101 Wn.App. 486, 491, 4 P.3d 145 (2000) (quoting *State v. Kjorsvik*, 117 Wn.2d at 97). The standard of review depends on when the charging document is challenged. *Id.* When the defendant challenges the charging

document for the first time on appeal, a reviewing court will construe the document in favor of validity.[4] *State v. Winings*, 126 Wn.App. 75, 84, 107 P.3d 141 (2005) (citing *Tresenriter*, 101 Wn.App. at 491). "Under the liberal construction rule, if an apparently missing element may be fairly implied from the charging language within the charging document, we will uphold the charging document on appeal." *Id.* Under this rule, the courts apply the following two-part test: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused lack of notice?" *Kjorsvik*, 117 Wn.2d at 105-06.

Here, Lindsey argues that the information was deficient because it did not include all of the alternative means for committing the crime. However, this is based on Lindsey's claim that the statute contains eight alternative means rather than two. The Court of Appeals explained that this claim fails because the information provided sufficient detail for both alternative means of committing the crime. Court of Appeals Opinion No. 43219-6-II at 11. Under the liberal construction standard that applies when a defendant challenges the charging document for the first time on

[4] The courts apply this liberal construction rule to discourage "sandbagging" where the defendant recognizes a defect in the charging document but forgoes raising it before trial when a successful objection would usually result only in amending the information. *Kjorsvik*, 117 Wn.2d at 103.

appeal, all that is necessary is for the facts to appear in any form or be fairly construed from the words contained in the charging document. Here, this occurred. Further, as the Court of Appeals noted, Lindsey failed to provide any argument for prejudice. Because it was Lindsey's burden to demonstrate prejudice, the Court of Appeals did not err in finding the information was constitutionally sufficient.

V. CONCLUSION

Because Lindsey's petition does not meet any of the considerations governing acceptance of review under RAP 13.4(b), it should be denied.

Respectfully submitted this 11th day of February, 2014.

Susan I. Baur
Prosecuting Attorney
Cowlitz County, Washington

By: _____
Eric H. Bentson, WSBA #38471
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petition for Review was served electronically via e-mail to the following:

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backlundmistry@gmail.com

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

Signed at Kelso, Washington on February 11th, 2014.

Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle
Subject: RE: PAs Office Scanned Item Gary Lee Lindsey, Jr., 89555-4, Response to Petition for Review

Received.

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Sasser, Michelle [mailto:SasserM@co.cowlitz.wa.us]
Sent: Tuesday, February 11, 2014 1:37 PM
To: OFFICE RECEPTIONIST, CLERK; backlundmistry@gmail.com
Subject: FW: PAs Office Scanned Item Gary Lee Lindsey, Jr., 89555-4, Response to Petition for Review

Attached, please find the Response to Petition for Review regarding the above-named Petitioner with Certificate of Service.

If you have any questions, please contact this office.

Michelle Sasser, Paralegal
Cowlitz County Prosecuting Attorney's Office
312 S.W. 1st Ave.
Kelso, WA 98626

From: pacopier_donotreply@co.cowlitz.wa.us [mailto:pacopier_donotreply@co.cowlitz.wa.us]
Sent: Tuesday, February 11, 2014 2:35 PM
To: Sasser, Michelle
Subject: PAs Office Scanned Item