NO. 43219-6-II
Cowlitz Co. Cause NO. 11-1-00721-6

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GARY LEE LINDSEY, JR.,

Appellant.

BRIEF OF RESPONDENT

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Because Lindsey did not object to the jury instructions, he may not challenge them on direct appeal; Lindsey did not suffer a lack of notice to the essential elements of the crime; because the evidence was sufficient to support each of the alternative means contained in the trafficking statute, a particularized expression of unanimity was unnecessary; and the trial court did not err by refusing to appoint substitute counsel, when, after multiple inquiries, Lindsey could not provide a sufficient basis for a conflict.

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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 he 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. Approximately 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. RP at 79. 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. RP at 160.

IV. ARGUMENT

A. Because Lindsey did not challenge the jury instructions given at trial, he may not raise this issue for the first time on direct appeal.

Because Lindsey did not object 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 to correct them.[2] *See State v. Fagalde*, 85 Wn.2d 730, 731, 539 P.2d 86 (1975).

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[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*).

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

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.

In *State v. Lynn*, 67 Wn.App. 339, 342, 835 P.2d 251 (1992), the Court of Appeals explained that the parameters of a "manifest error affecting a constitutional right" are not unlimited stating:

> 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.

An appellate court must first satisfy itself that the alleged error is of constitutional magnitude before considering claims raised for the first time on appeal. *Id.* at 343. But this does not mean that any claim of

constitutional error is appropriate for review. For a reviewing court to consider such a claim, it must be "manifest," otherwise the word "manifest" could be removed from the rule. *Id.* The court explained: "[P]ermitting *every possible* constitutional error to be raised for the first time on appeal 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).

The court then provided the proper approach for analyzing whether an alleged constitutional error may be reviewed on appeal under RAP 2.5(a). *Id.* at 345. First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. *Id.* Second, the court must determine whether the alleged error is "manifest"; an essential part of this determination requires a plausible showing that the alleged error had practical and identifiable consequences in the trial. *Id.* The term "manifest" means "unmistakable, evident or indisputable as distinct from obscure, hidden or concealed." *Id.* An error that is abstract and theoretical, does meet this definition. *Id.* at 346. Third, if the court finds the alleged error is manifest, then the court must address the merits of the constitutional issue. *Id.* at 345. Fourth, if

the court determines an error was of constitutional import, it must then undertake a harmless error analysis. *Id.*

Here, when the four-part analysis is applied, it is difficult to conclude that manifest error affecting a constitutional right occurred. The State concedes that if the jury was instructed on an uncharged alternative means, this would suggest a constitutional error.[3] *See State v. Chino*, 117 Wn.App. 531, 538. 72 P.3d 256 (2003). However, this is only the first step in the analysis. Next the court must determine whether there is a plausible showing that the alleged error had practical and identifiable consequences in the trial. An abstract, theoretical error fails to meet this definition. Although it is theoretically possible that the jury could have found that Lindsey initiated the theft of the property, the evidence was much stronger with regard to other terms used in the trafficking statute. There was no eye witness to the theft of the 470-pound steel tank. Rather, Lindsey was seen near it prior to the theft. Then after it was stolen, he showed up with the tank in his truck and attempted to sell it. Upon arrest, Lindsey admitted to stealing the tank. During closing argument, the prosecutor explained that the evidence did not support all of the terms contained in the first part of the trafficking instruction, stating: "He could have financed it by paying a guy with a forklift to lift it up on his truck or

[3] For reasons stated in Part IV-C, the State does not concede that the statute creates eight alternative means. *See infra* Part IV-C.

whatever. But, we don't have evidence of that." RP at 128. On the other hand, there was overwhelming evidence that Lindsey possessed property he knew to be stolen with intent to sell it. Because there was no evidence or argument that Lindsey initiated the theft of property for sale to others, any constitutional error in the instruction is highly theoretical.

Moreover, even if this theoretical error is constitutional, its impact on the case obviously amounted to harmless error. "[E]rror is not prejudicial unless within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981) (citing *State v. Cunningham*, 93 Wn.2d 823, 613 P.2d 1139 (1980)). 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 possessed stolen property with intent to sell it. Thus, the error he now raises had no impact on the outcome of the trial, and was therefore harmless.

B. The amended information did not cause Lindsey to suffer a lack of notice to the essential elements of the crime.

The filing of the amended information on the morning of trial did not cause Lindsey to suffer a lack of notice to the essential elements of trafficking in stolen property. "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; because the term "initiate" was present in the charging document until the amendment occurred on the first day of trial, Lindsey did not suffer prejudice.

"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, the amended information vaguely asserts the essential elements of the crime because the words initiate, organize, plan, finance, direct, manage, supervise, and traffic have definitions that overlap with one another. It would be difficult—if it is even possible—to speculate to a factual scenario where a person could commit acts equivalent to initiating the theft of property without also having organized, planned, financed, directed, managed, or supervised the theft of that property. Under the liberal construction standard that applies when a defendant challenges the charging document for the first time on appeal all that is necessary is for

[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.

the facts to appear in any form or to be fairly construed from the words contained in the charging document. Because it can be fairly implied that facts supporting "initiate" appear in other forms in the information, and because these facts can be fairly construed by the synonymous words that do appear, the missing word can be fairly implied.

Under the second prong, there is absolutely no showing of prejudice. Considering the original information, filed on July 14, 2011, included the word "initiate," Lindsey does not suffer the harm that the essential elements rule is intended to prevent. He had five months to prepare a defense to the charge with notice of the word initiate, and only on the first day of trial did this word drop off the information. In light of the fact that at trial there was absolutely no discussion during testimony or closing argument of whether or not Lindsey initiated the theft, the lack of the inclusion of this word in the amended information was obviously not an issue. Further, as explained in Part IV-A, there is no realistic possibility that on the evidence presented in this case the jury found Lindsey guilty based on initiating the theft. *See supra* Part IV-A.

C. RCW 9A. 28.050(1) creates two alternative means for committing the crime of trafficking in stolen property; because there was sufficient evidence to convict Lindsey under each of these alternatives, thus his verdict was unanimous.

Because RCW 9A.28.050(1) contains two 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 of these alternatives, Lindsey did not fail to receive a unanimous verdict. "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). While the jury was not asked by special verdict form to identify under which alternative they found Lindsey guilty, there was sufficient evidence to convict him under both types of activities the statute prohibits—facilitating the theft of property so that it may be sold and facilitating the sale of property one knows to be stolen.

RCW 9A.28.050(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.

RCW 9A.82.010(19) defines "traffic" as follows:

> "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.

It is 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. However, 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 the definition of "traffic" by RCW 9A.82.010(19).

In *State v. Strohm*, 75 Wn.App. 301, 307, 879 P.2d 962 (1994), Division I of the Court of Appeals stated that trafficking in stolen property could be committed by eight alternative means. The court found that the first seven words were each alternative means of committing the crime and that an eighth alternative means exists when one traffics in stolen property. *Id.* 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.* a t 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 a 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*.

RCW 9A.28.050(1) does not separate the eight alternative means discussed in *Strohm* into different subparts. This is significant because in *State v. Al-Hamdi*, 109 Wn.App. 599, 606-07, 36 P.3d 1103 (2001), the same 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 *Ortega-Martinez*. *Id.* at 607 ("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.28.050(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.28.050(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.28.050(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.28.050(1); RCW 9A.82.010(19).

Here, there was sufficient evidence that Lindsey committed each of these two alternative means of trafficking. First, it was quite obvious that he had stolen the property with the intent to sell it. This act required some method of planning because the steel tank was too heavy for one person to pick up and carry. Because Lindsey himself admitted to stealing the tank, it could also be inferred that he organized and managed the theft. Second, Lindsey trafficked in stolen property when he possessed that property with the intent to sell it. Because there was sufficient evidence for a jury to convict him under either of these alternatives, a particularized expression of unanimity was unnecessary.

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

Lindsey provided no basis that would have required the court to appoint him new counsel. 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)). "Factors that a court must consider in determining whether to appoint substitute counsel are the reasons given for the defendant's dissatisfaction, together with the trial court's own evaluation of the competence of existing counsel and the effect of substitution upon the scheduled proceedings." *Rosborough*, 62 Wn.App. at 346 (quoting *State v. Stark*, 48 Wn.App. 245, 253, 738 P.2d 684, *review denied*, 109 Wn.2d 1003 (1987)).

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 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 him. This appears to be what occurred, as Lindsey makes no claim for ineffective assistance of counsel. Lindsey's lack of trust in his attorney was not a sufficient reason for the court to appoint new counsel, therefore the court

did not abuse its discretion when it refused to appoint new counsel for him.

V. CONCLUSION

For the above stated reasons, Lindsey's conviction for trafficking in stolen property in the first degree should be affirmed.

Respectfully submitted this 17th day of December, 2012.

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CERTIFICATE OF SERVICE

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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 December 18th, 2012.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

December 18, 2012 - 1:14 PM

Transmittal Letter

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