FILED
FEBRUARY 29, 2016
Court of Appeals
Division III
State of Washington

NO. 33811-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Appellant,

v.

JOSHUA BARNES,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CHELAN COUNTY

The Honorable T.W. Small, Judge

BRIEF OF RESPONDENT

DAVID B. KOCH
Attorney for Respondent

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ISSUES IN RESPONSE

In 2007, the Washington Legislature passed legislation designed to halt and reverse the trend of increasing automobile thefts in Washington. In enacting this legislation, no mention was made of lawnmowers or any other lawn care equipment.

1. Given the legislature's target of automobile theft when enacting the statute for Theft of a Motor Vehicle, and the express language of the legislation, did the lower court correctly rule that the statute does not pertain to the theft of lawnmowers?

2. Assuming the statutory scheme is ambiguous on this point, does the rule of lenity require that the defendant receive the benefit of any doubt?

B. STATEMENT OF THE CASE

In June of 2015, the Chelan County Sheriff's Department established probable cause to arrest Joshua Barnes on charges of Theft in the Second Degree and Criminal Trespass in the Second Degree, and Barnes was booked into jail on both charges. CP 22.

The charges were based on the report of Judy Fraker, who witnessed Barnes – accompanied by a female – arrive at her property in a pickup truck, start her Sears lawnmower, and drive the riding mower up a ramp and into the back of the pickup truck. CP

21. When Fraker confronted Barnes, he said he was picking up the lawnmower at the request of "John." Fraker said she did not believe him and ordered him to put the mower back, which he did. CP 21. As Barnes drove away in the pickup, Fraker called 911, provided the truck's license plate number, and described Barnes and the female. CP 21. Deputies located Barnes two days later, and he admitted his attempt to steal the lawnmower. CP 21.

Although the only theft charge at booking was Theft in the Second Degree, the Chelan County Prosecutor's Office charged Barnes with that offense and Theft of a Motor Vehicle, both based on the thwarted effort to take Fraker's lawn care equipment. CP 1-2. Defense counsel filed a motion to dismiss the Theft of a Motor Vehicle charge under State Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), arguing the evidence was insufficient as a matter of law to prove the offense because a lawnmower does not qualify as a "motor vehicle" under the relevant criminal statutes. CP 5-17. The State opposed the motion. CP 24-26.

The Honorable T.W. Small heard argument from both parties on the issue. RP 2-22. Judge Small then granted the defense motion. RP 22-29. The State has appealed. CP 38-42.

C. ARGUMENT

THEFT OF A LAWNMOWER IS NOT THEFT OF A "MOTOR VEHICLE" UNDER RCW 9A.56.065.

This Court reviews a trial court's dismissal of a criminal charge under Knapstad de novo. State v. Montano, 169 Wn.2d 872, 876, 239 P.3d 360 (2010). Similarly, the de novo standard of review applies to issues of statutory interpretation. State v. J.P., 149 Wn.2d 444, 449, 69 P.3d 318 (2003). When interpreting statutes, this Court's "fundamental objective is to determine and give effect to the intent of the legislature." State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012).

"The surest indication of legislative intent is the language enacted by the legislature," and if the language is plain on its face, that language is given effect. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). "In determining the plain meaning of a provision, we look to the text of the statutory provision in question, as well as 'the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.'" Id. (quoting State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). Even the apparent plain meaning of a provision must give way, however, if "'some other section of the act expands or restricts

its meaning.'" State v. McDougal, 120 Wn.2d 334, 351, 841 P.2d 1232 (1992) (quoting 2A N. Singer, Statutory Construction § 46.01 (4th ed. 1984)). Moreover, "[w]e avoid a literal reading of a statute if it would result in unlikely, absurd, or strained consequences." State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). "'The spirit or purpose of an enactment should prevail over the express but inept wording.'" Id. (quoting State v. Day, 96 Wn.2d 646, 648, 638 P.2d 546 (1981)).

If, after the above analysis, a statute remains susceptible to more than one reasonable interpretation, it is ambiguous, and courts may look to the statute's legislative history and other circumstances behind its enactment to determine legislative intent. Ervin, 169 Wn.2d at 820. Under the rule of lenity, ambiguous criminal statutes must be construed in the accused's favor. Jacobs, 154 Wn.2d at 603; see also United States v. Lanier, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997) ("[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered.").

In 2007, the Legislature enacted RCW 9A.56.065, which provides:

> (1) A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.
>
> (2) Theft of a motor vehicle is a class B felony.

See Laws of 2007 ch. 199, § 1, eff. July 22, 2007. This offense is narrowly tailored to a specific class of stolen objects, serious in its consequences, and removes automobile thefts from the general theft statutes. Id.; compare RCW 9A.56.030 - .050.

RCW 9A.56.065 employs the term "motor vehicle," a term already defined in RCW 46.04.320 well prior to 2007. That statute provides:

> "Motor Vehicle" means every vehicle that is self-propelled and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. "Motor Vehicle" includes a neighborhood electric vehicle as defined in RCW 46.04.357.[1] "Motor Vehicle" includes a medium-speed electric vehicle as defined in RCW 46.04.295.[2] An

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[1] RCW 46.04.357 provides, "'Neighborhood electric vehicle' means a self-propelled, electrically powered four-wheeled motor vehicle whose speed attainable in one mile is more than twenty miles per hour and not more than twenty-five miles per hour and conforms to federal regulations under Title 49 C.F.R. Part 571.500."

[2] RCW 46.04.295 provides, "'Medium-speed electric vehicle' means a self-propelled, electrically powered four-wheeled motor vehicle, equipped with a roll cage or crush-proof body design, whose speed attainable in one mile is more than twenty-five miles per hour but not more than thirty-five miles per hour and otherwise meets or exceeds the federal regulations set forth in 49 C.F.R. Sec. 571.500."

> electric personal assistive mobility device is not considered a motor vehicle.[3] A power wheelchair is not considered a motor vehicle. A golf cart is not considered a motor vehicle, except for the purposes of chapter 46.61 RCW.[4]

RCW 46.04.320.

The word "vehicle" also is defined by statute:

> "Vehicle" includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles. "Vehicle" does not include power wheelchairs or devices other than bicycles moved by human or animal power or used exclusively upon stationary rails or tracks. Mopeds are not considered vehicles or motor vehicles for the purposes of chapter 46.70 RCW. Bicycles are not considered vehicles for the purposes of chapter 46.12, 46.16A, or 46.70 RCW or RCW 82.12.045. Electric personal assistive mobility devices are not considered vehicles or motor vehicles for the purposes of chapter 46.12, 46.16A, 46.29, 46.37, or 46.70 RCW. A golf cart is not considered a vehicle, except for the purposes of chapter 46.61 RCW.

RCW 46.04.670.

These statutes make clear that the legislature did not intend the definition of "motor vehicle" to encompass every conceivable vehicle with a motor. Where questions have arisen regarding certain

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[3] An example of an "electric personal assistive mobility device" is a Segway personal transportation vehicle. See RCW 46.04.1695 (defining term); www.segway.com.

[4] Chapter 46.61, entitled "Rules of the Road," includes driving under the influence.

devices, the legislature has excluded them entirely or partially depending on the circumstances. These include mopeds, electrical personal assistive mobility devices, power wheelchairs, and golf carts.

As Judge Small recognized below, solely examining the language of RCW 46.04.320 and 46.04.670, a power lawnmower (whether a self-propelled walk-behind mower or a riding mower) arguably falls within the definition "motor vehicle" because it is self-propelled, capable of being moved upon a highway (albeit quite awkwardly), and may transport a person or property.[5] RP 25-28. The problem, however, with concluding that a lawnmower qualifies as a "motor vehicle" for purposes of RCW 9A.56.065 is – as Judge Small correctly recognized – that the statutory scheme as a whole indicates a contrary intent.[6] RP 25-27.

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[5] Indeed, myriad other items also could fall within this definition, including a remote-controlled toy cargo truck, a motorized skateboard, a child's push scooter with electric motor attachment, a motorized unicycle, and any motorized child's riding toy, including those plastic cars and trucks – intended for very small children to drive from a seated position – but incapable of going faster than about 2.5 mph.

[6] Judge Small also noted on the record that he had found a Georgia decision involving whether lawnmowers are motor vehicles, although the statutes at issue were somewhat different from our own. RP 2. He was likely referring to Harris v. State, 286 Ga. 245, 686 S.E.2d 777 (Ga. 2009) (a riding mower is not a "motor vehicle" under theft statutes despite having a motor and an ability to transport a person or cargo on public roads).

Even if one assumes that RCW 9A.56.065 is not ambiguous, it is still appropriate (indeed necessary) to interpret its plain language in the context of the entire legislation. Ervin, 169 Wn.2d at 820; McDougal, 120 Wn.2d at 351. As part of the legislature's 2007 enactment of RCW 9A.56.065, the legislature also enacted several express findings. These findings are found in subsection (1) of the legislation, and the language that became RCW 9A.56.065 is found in subsection (2). See Laws of 2007 ch. 199, §§ 1-2.

Subsection (1) reveals that the Washington Legislature enacted RCW 9A.56.065 in an effort to combat the growing number of automobile thefts on the west coast generally and Washington specifically:

> (1) The legislature finds that:
>
> (a) Automobiles are an essential part of our everyday lives. The west coast is the only region of the United States with an increase of over three percent in motor vehicle thefts over the last several years. The family car is a priority of most individuals and families. The family car is typically the second largest investment a person has next to the home, so when a car is stolen, it causes a significant loss and inconvenience to people, imposes financial hardship, and negatively impacts their work, school, and personal activities. Appropriate and meaningful penalties that are proportionate to the crime committed must be imposed on those who steal motor vehicles;
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> (b) In Washington, more than one car is stolen every

eleven minutes, one hundred thirty-eight cars are stolen every day, someone's car has a one in one hundred seventy-nine chance of being stolen, and more vehicles were stolen in 2005 than in any other previous year. Since 1994, auto theft has increased over fifty-five percent, while other property crimes like burglary are on the decline or holding steady. The national crime insurance bureau reports that Seattle and Tacoma ranked in the top ten places for the most auto thefts, ninth and tenth respectively, in 2004. In 2005, over fifty thousand auto thefts were reported costing Washington citizens more than three hundred twenty-five million dollars in higher insurance rates and lost vehicles. Nearly eighty percent of these crimes occurred in the central Puget Sound region consisting of the heavily populated areas of King, Pierce, and Snohomish counties;

(c) Law enforcement has determined that auto theft, along with all the grief it causes the immediate victims, is linked more and more to offenders engaged in other crimes. Many stolen vehicles are used by criminals involved in such crimes as robbery, burglary and assault. In addition, many people who are stopped in stolen vehicles are found to possess the personal identification of other persons, or to possess methamphetamine, precursors to methamphetamine, or equipment used to cook methamphetamine;

(d) Juveniles account for over half the reported auto thefts with many of these thefts being their first criminal offense. It is critical that they, along with first time adult offenders, are appropriately punished for their crimes. However, it is also important that first time offenders who qualify receive appropriate counseling treatment for associated problems that may have contributed to the commission of the crime, such as drugs, alcohol, and anger management; and

(e) A coordinated and concentrated enforcement mechanism is critical to an effective statewide

> offensive against motor vehicle theft. Such a system provides for better communications between and among law enforcement agencies, more efficient implementation of efforts to discover, track, and arrest auto thieves, quicker recovery, and the return of stolen vehicles, saving millions of dollars in potential loss to victims and their insurers.
>
> (2) It is the intent of this act to deter motor vehicle theft through a statewide cooperative effort by combating motor vehicle theft through tough laws, supporting law enforcement activities, improving enforcement and administration, effective prosecution, public awareness, and meaningful treatment for first time offenders where appropriate. It is also the intent of the legislature to ensure that adequate funding is provided to implement this act in order for real, observable reductions in the number of auto thefts in Washington state.

Laws of 2007 ch. 199 § 1. These findings address efforts to combat automobile theft and to establish appropriate consequences for those who steal automobiles. The legislature uses the terms "car," "auto," "automobile," "motor vehicle," and "vehicle" interchangeably throughout. Nowhere does the legislature refer to lawnmowers or any other type of lawn care equipment.

Subsection (1) of this legislation, although uncodified, is Washington law to the same extent as codified subsection (2). See State v. Hennings, 129 Wn.2d 512, 520-521, 919 P.2d 580 (1996) (relying on uncodified section of legislation to determine retroactive application of codified section). And this uncodified section confirms

that RCW 9A.56.065 is focused on, and intended to stop, automobile thieves.[7]

Unlike automobiles, lawnmowers are not "an essential part of our everyday lives," "a priority of most individuals and families," "typically the second largest investment a person has next to the home," or subsequently "used by criminals involved in such crimes as robbery, burglary and assault." Moreover, there is no evidence that "many people who are stopped in stolen [lawnmowers] are found to possess the personal identification of other persons, or to possess methamphetamine, precursors to methamphetamine, or equipment used to cook methamphetamine."

Thus, for RCW 9A.56.065, the definition of "motor vehicle" must be assessed in light of the statute's express enacted purpose – to combat automobile theft. That purpose is not achieved by convicting lawnmower thieves of a class B felony. Instead, the legislature intended that those who steal lawn and garden equipment be prosecuted under the general theft statutes based on the value of

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[7] This is not to say the crime is limited to theft of automobiles (i.e., cars, trucks, vans), since the legislature could have simply used the word "automobile" in RCW 9A.56.065 had that been the intent. Logically, in light of subsection (1) of the 2007 legislation, the statute also covers the theft of motor vehicles similar to automobiles in nature and use, including motorcycles, scooters, and mopeds. But the exclusion of such items as Segway personal transportation vehicles, power wheelchairs, and golf carts informs us that the Legislature did not intend to

the property stolen.

It seems particularly notable that golf carts are excluded from the definition of "motor vehicle" found in RCW 46.04.320 for purposes of RCW 9A.56.065. Since golf carts (which seem far more similar to automobiles than lawnmowers do) are not considered motor vehicles for purposes of theft, the legislature would not have intended that machines used to cut grass should be. Nor is it likely the legislature envisioned that anyone would ever argue otherwise, which explains why the Legislature could not have anticipated the need to expressly exclude lawnmowers.

As previously noted, statutes must be interpreted to avoid absurd results. State v. Alvarado, 164 Wn.2d 556, 562, 192 P.3d 345 (2008) (citing Tingey v. Haisch, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007)); McDougal, 120 Wn.2d at 351; Elgin, 118 Wn.2d at 555. Since RCW 9A.56.065 is aimed at the uniquely troubling problem of automobile theft, it is absurd to punish lawnmower thieves similarly. Moreover, if the legislature intended to treat all thefts of lawnmowers as class B felonies, they also intended to treat thefts of other objects falling within the general definition of "motor vehicle" similarly, including motorized skateboards and children's

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stray far from automobiles in establishing the statute's reach.

battery-powered toy vehicles. This also seems quite absurd.

The identical conclusion is reached if RCW 9A.56.065 is treated as ambiguous, which permits a review of the same legislative intent already properly reviewable (ambiguity or not) in the uncodified portion of RCW 9A.56.065. A statute is ambiguous if subject to more than one reasonable interpretation. State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993). Barnes has undoubtedly offered a reasonable interpretation. And, under the rule of lenity, he receives the benefit of the doubt as to whether RCW 9A.56.065 applies to lawnmower thefts. Therefore, as Judge Small correctly decided, he cannot be tried for Theft of a Motor Vehicle.

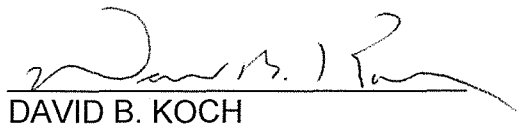
D. CONCLUSION

This Court should affirm dismissal of the Theft of a Motor Vehicle charge.

DATED this 29th day of February, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Respondent

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. NELSON
JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT

OF COUNSEL
K. CAROLYN RAMAMURTI

State v. Joshua Barnes

No. 33811-8-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 29th day of February, 2016, I caused a true and correct copy of the **Brief of Respondent** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Chelan County Prosecuting Attorney
Prosecuting.attorney@co.chelan.wa.us

Joshua Barnes
DOC No. 360979
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

Signed in Seattle, Washington this 29th day of February, 2016.

X Patrick Mayovsky