SUPREME COURT NO. 98861-7

NO. 52956-4-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW SCHMIDT,

Petitioner.

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

The Honorable John Fairgrieve, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Matthew Schmidt asks this Court to review the decision of the court of appeals referred to in section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the court of appeals decision in State v. Schmidt, COA No. 52956-4-II, filed July 14, 2020, attached as an appendix to this petition.

C. ISSUE PRESENTED FOR REVIEW

Is review appropriate under RAP 13.4(b)(3) where this Court's decisions in State v. Shipp[1] and State v. Leech[2] are wrongly decided, harmful, and have produced the unconstitutional definition of "knowledge" found in WPIC 10.02?

D. STATEMENT OF THE CASE

1. Trial

Following a jury trial in Clark County Superior Court, Schmidt was convicted of possessing a stolen vehicle, a 1998 Jeep Cherokee. CP 1, 11, 27. The key issue at trial was whether Schmidt knew the Jeep was stolen. RP 198, 307.

[1] 93 Wn.2d 510, 610 P.2d 1322 (1980).

[2] 114 Wn.2d 700, 790 P.2d 160 (1990).

The jury instruction the court gave on knowledge allowed the jury to convict if it found a reasonable person in Schmidt's position would have known the car was stolen:

> A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance. It is not necessary that the person know that the fact or circumstance is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 24 (emphasis added); WPIC 10.02.

In closing argument, the prosecutor emphasized the underlined portion of the instruction several times, urging the jury it could convict if it found a reasonable person in Schmidt's position would have known the car was stolen. RP 304; see also RP 303 ("We're not mind readers. We don't have the ability to tell you what Mr. Schmidt was thinking"); RP 306 ("You are allowed to infer Mr. Schmidt knew"); RP 326 ("doesn't give him the right to ignore the blaring signs in his face that should have told any other person sitting in that car that that car was stolen").

At trial, Vancouver police officer Aaron Yoder testified that around 1:00 a.m. on December 17, 2019, he stopped a dark colored 1998 Jeep Cherokee because it had no rear license plate. RP 236. He approached the driver, Matthew Schmidt, who provided either his name and date or birth or his driver's license. RP 237-38. Yoder read the Jeep's vehicle identification number (VIN) over dispatch and learned it had been flagged as stolen. RP 240. The Jeep was registered to Delbert and Rhonda Dillman. RP 240.

Schmidt explained to Yoder he obtained the Jeep from his ex-girlfriend Jessica, who in turn, obtained the car from her uncle Randy. RP 241. Schmidt elaborated that Jessica received the car 2-3 days earlier but had since left for Texas. Schmidt further stated that Randy had demanded $500 from him, as still owing on the car. RP 242.

Yoder did not recollect anything in particular about the Jeep. RP 243. In his report, he did not write anything down about ignition damage, a paint job, nails coming out of its body, or that it was missing a bumper. RP 247. The VIN was not covered up or altered. RP 245.

Yoder decided to release the Jeep to the Dillmans. RP 243. Delbert and Rhonda had given the car to their son, Ryan. RP 208, 214, 243. Ryan reported it missing on December 12. RP 215.

Ryan testified that when he went to pick up the Jeep, it had been damaged. RP 218. A log bumper had been removed from its front. He claimed emblems and pin striping had been spray painted black. RP 218. The center console and ignition appeared to have been tampered with. RP 218. Ryan's father testified it appeared the Jeep had screws sticking out of it in various places. RP 212-213.

Ryan did to remember if he told Yoder about the bumper or the pin striping paint job. RP 221-22. Ryan claimed he did not notice the pin striping paint job until the next day when it was light out; it dried in a running pattern. RP 221, 226. Ryan acknowledged that despite these changes, the Jeep did not look out of place or obviously stolen; it just looked like an older car. RP 224-25.

The spare key Ryan brought to drive the Jeep home did not work. Schmidt offered Ryan's girlfriend the key he had been using, that he received from Jessica. RP 219, 223. The key looked "altered." RP 220.

Ryan testified he later sold the car on Craigslist. RP 221. No pictures of it – before or after it went missing – were offered by the state at trial.

2. Appeal

On appeal, Schmidt argued the knowledge instruction violated his right to due process because it permitted the jury to find appellant guilty of possessing a stolen vehicle without finding he had actual knowledge the vehicle was stolen. Brief of Appellant (BOA) at 5-13 (citing Alan R. Hancock, True Belief: an Analysiks of the Definition of "Knowledge" int eh Washington Criminal Code, 91 Wash. L. Rev. 177 (2016); State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015)). Schmidt argued this was automatic constitutional error that may be raised for the first time on appeal. BOA at 12 (citing State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009), as corrected (Jan. 21, 2010)).

Division Two declined to consider the issue on grounds it was not manifest constitutional error. Appendix at 3. Regardless, the court also held the knowledge instruction is a correct statement of the law. Appendix at 3 (citing State v. Leech, 114 Wn.2d 700, 710, 790 P.2d 160 (1990), abrogated on other grounds by In re Personal Restraint of Andress, 147 Wn.2d 364, 372, 341P.3d 268

(2015); see also State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980)).

Interestingly, this same due process issue was raised in State v. Derrick Lorrigan, COA No. 36379-1-III. In an unpublished opinion, Division Three likewise declined to reach the issue on grounds it did not amount to manifest constitutional error. State v. Lorrigan, noted at 12 Wn. App. 2d 1085 (2020), *3. In dissent, however, Judge Fearing found the issue was in fact constitutional:

> I first address whether Derrick Lorrigan may posit instructional error for the first time on appeal. An accused may assert instructional errors impacting constitutional rights for the first time on appeal. RAP 2.5(a)(3); State v. Bryant, 89 Wn. App. 857, 871, 950 P.2d 1004 (1998). Although Lorrigan failed to object to jury instruction 10 at trial, he now contends that the instruction violated his due process rights because the instruction relieved the State of the burden of proving actual knowledge, an element of the crime. Due process requires the State to prove all elements of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Therefore, convicting the accused of a crime demanding knowing misconduct on a theory of constructive knowledge is unconstitutional. *State v.* Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980). For this reason, I agree to address the merits of Lorrigan's assignment of error.

State v. Lorrigan, No. 36379-1-III, 2020 WL 1686392, at *9 (Wash. Ct. App. Apr. 7, 2020).

While Fearing also found Lorrigan's argument persuasive, he nevertheless felt constrained by stare decisis to reject Lorrigan's due process claim on the merits:

> Despite my disagreement with State v. Shipp, I follow the decision's holding. Once the Supreme Court decides an issue of state law, that interpretation is binding on all lower courts until it is overruled by the Supreme Court. State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). I thus find no instructional error.

State v. Lorrigan, No. 36379-1-III, 2020 WL 1686392, at *14 (Wash. Ct. App. Apr. 7, 2020). The dissent would have reversed based on prosecutorial misconduct. Lorrigan, at *19.

This Court is scheduled to consider Lorrigan's petition for review on September 8, 2010.

E. REASONS WHY REVIEW SHOULD BE ACCEPTED AND ARGUMENT

WPIC 10.02 VIOLATES DUE PROCESS – THIS COURT SHOULD OVERRULE SHIPP AND LEECH TO THE EXTENT THEY PRODUCED THIS INSTRUCTION.

As Judge Fearing explained in Lorrigan, the current pattern instruction defining knowledge, WPIC 10.02, is the product of this Court's opinions in Shipp and Leech. "Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change." In re Rights to Waters of Stranger Creek, 77 Wn.2d 649, 653, 466

P.2d 508 (1970). This Court will reject a prior holding upon "a clear showing that an established rule is incorrect and harmful." Id. This Court should find that Shipp and Leach have produced just such a rule.

As an initial matter, Schmidt properly raised his challenge to the pattern instruction for the first time on appeal. The purpose of an objection is to alert the trial court to error "so that any mistakes can be corrected in time to prevent the necessity of a second trial." State v. McDonald, 74 Wn.2d 141, 145, 443 P.2d 651 (1968). Where, however, an objection would have been a futile gesture, it is not required. See State v. Moen, 129 Wn.2d 535, 547-48, 919 P.2d 69 (1996) (where no corrective purpose can be served by an objection, the lack of an objection will not preclude appellate review); State v. Cantabrana, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996) (issue properly before appellate court where objection would have been "a useless endeavor"). In light of Shipp and Leech, a defense objection to the pattern knowledge instruction would have been a useless endeavor. Indeed, even Judge Fearing – recognizing these decisions are incorrect and harmful – ultimately found no error based on Shipp's binding precedence. See supra.

In any event, and for the reasons cited by Judge Fearing in the Lorrigan case, the issue is also properly raised as manifest constitutional error under RAP 2.5(a)(3). Indeed, in Shipp, one of the appellants was a man named Hinz. Shipp, 93 Wn.2d at 513. And his challenge to the permissive inference included in his jury instructions was raised for the first time on appeal. See State v. Hinz, 22 Wn. App. 906, 916, 594 P.2d 1350 (1979) ("No exception of any kind was taken to the giving of this instruction by the trial court, and it is raised for the first time on appeal."). There is no reason to treat Schmidt differently.

As to the merits, the crime of possessing a stolen vehicle requires proof that the person knew the car was stolen. State v. Lakotiy, 151 Wn. App. 699, 714, 214 P.3d 181 (2009), review denied, 168 Wn.2d 1026, 228 P.3d 19 (2010). In this case, the jury was instructed jurors may find the element of knowledge if the defendant has "information that would lead a reasonable person in the same situation" to have that knowledge. CP 20. This violates due process because it permitted the jury to find Schmidt guilty without finding he had actual, subjective knowledge the car was stolen.

> [I]t is no exaggeration to say that a criminal defendant can currently be found to have acted with knowledge, and therefore be found guilty of a crime, even though the defendant had no awareness of the fact he or she allegedly knew, and even though the "fact" he or she supposedly "knew" was not even true. This is untenable; the law must change.

Judge Alan R. Hancock, True Belief: an Analysis of the Definition of "Knowledge" in the Washington Criminal Code, 91 WASH. L. REV. ONLINE 177 (2016).[3]

For a defendant to have knowledge under the criminal code, he must be proved to have actual, subjective knowledge of the fact in question. Allen, 182 Wn.2d at 374; Shipp, 93 Wn.2d at 516. Knowledge may not be redefined as its opposite – mere negligent ignorance. Shipp, 93 Wn.2d at 516. The State need not present direct evidence of knowledge. Knowledge may be proved by circumstantial evidence, including evidence that the defendant was in possession of knowledge which would lead a reasonable person to know the fact in question. Allen, 182 Wn.2d at 374. This is a "subtle" distinction but a "critical" one. Id. In Allen, this Court recognized it would be unconstitutional to permit a finding of knowledge merely because the person should have known. Id. If, for example, the defendant is less intelligent or less attentive than

[3] This article is appended to Schmidt's Brief of Appellant.

an ordinary reasonable person, then the same information may not lead to the actual knowledge the law requires. Shipp, 93 Wn.2d at 516.

Yet, by permitting conviction when a reasonable person would have known the item was stolen, rather than when the defendant actually did know, the current pattern instruction, approved by this Court in Leech, essentially reduces the mens rea for the offense from knowledge to a state lower than even criminal negligence. A person is criminally negligent when (1) the person is "aware of a substantial risk that a wrongful act may occur" and (2) "his or her failure to be aware of such substantial risk constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation." RCW 9A.08.010(1)(d). The instruction defining knowledge permits conviction when a reasonable person would have been aware, without requiring any proof that the defendant's failure to be aware was a gross deviation from the standard of care. CP 20.

The instruction fails to preserve the critical distinction between actual knowledge (based on direct or circumstantial evidence) and mere negligent ignorance. Cf. Allen, 182 Wn.2d at 374. The instruction undermines and confuses the actual

knowledge requirement and permits the jury to misapply the law by finding knowledge even where evidence of actual knowledge is absent. This violates due process.

In Shipp, this Court deemed this problem solved because the jury was merely allowed, but not required, to find knowledge if the defendant had information that would lead a reasonable person to have knowledge. 93 Wn.2d at 516-17. So long as the inference was permissive, it allowed for the possibility that the jury could find the defendant was "less attentive or intelligent than an ordinary person." Shipp, 93 Wn.2d at 516. But Shipp did not go far enough. It is not enough to *permit* the jury to acquit if it does not find actual knowledge. The instructions must make clear that, without actual knowledge, acquittal is required.

A conviction must rest not just on the jury's finding that a reasonable person would have known, but also on the jury's conclusion that the defendant is no less intelligent or attentive than an ordinary person and therefore did know. This second requirement is missing from the instruction. CP 20.

Allen illustrates the problem. There, the prosecutor in closing urged the jury to convict Allen of being an accomplice because a reasonable person in the defendant's shoes should have

known, rather than because Allen actually did. 182 Wn.2d at 374-75. When the prosecutor expressly urged such a conclusion, this Court had no difficulty viewing this as serious misconduct that required reversal of Allen's conviction. Id. at 375, 380.

While Allen was correct in recognizing the prosecutor's argument was reversible misconduct, it still did not get at the heart of the problem – the jury instruction on knowledge. In other words, whether or not a prosecutor commits misconduct by expressly urging conviction based solely on constructive knowledge, the jury instructions allow it. Compare Allen, 182 Wn.2d at 374-75 (quoting prosecutor's closing argument that "under the law, even if he doesn't actually know, if a reasonable person would have known, he's guilty") with CP 24 ("If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact."). Jurors would naturally interpret the instruction as permitting a finding of guilt based solely on constructive knowledge even without a prosecutorial misstatement of the law -- as noted, the knowledge instruction explicitly permits the jury to find knowledge based solely on what a reasonable person would believe.

Jury instructions must not be misleading and must properly inform the trier of fact of the applicable law. Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). Jury instructions must convey "that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt." State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007).

By permitting a jury to find knowledge based on mere negligent ignorance, the jury instruction violates due process. It misleads the jury, fails to inform the jury of the requirement of actual knowledge, and relieves the State of its burden to prove actual knowledge. Although Washington case law makes clear that the jury "must still find subjective knowledge," Shipp, 93 Wn.2d at 515, the pattern jury instruction does not.

When a jury instruction permits conviction on evidence less than proof beyond a reasonable doubt of every element of the crime, the instruction violates due process. Allen, 101 Wn.2d at 358. By permitting conviction based on constructive knowledge when the law requires actual knowledge, the jury instruction in Schmidt's case violated due process.

When an erroneous jury instruction misstates an element the State must prove, it will be deemed harmless only if the reviewing court can conclude beyond a reasonable doubt that the element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1995)). The State cannot make the necessary showing here. Whether the evidence established that Schmidt knew the Jeep was stolen was very much disputed at trial. Indeed, this was *the* disputed issue at trial, and the prosecution conceded it was not clear what Schmidt knew. See RP 304 ('We're not mind readers. We don't have the ability to tell you what Mr. Schmidt was thinking"); RP 306 ("You are allowed to infer Mr. Schmidt knew"): RP 326 (doesn't give him the right to ignore the blaring signs in his face that should have told any other person sitting in that car that that car was stolen").

The constitutionality of an instruction like that used at Schmidt's trial, and the impact of such an instruction, presents a significant question of constitutional law this Court should decide under RAP 13.4(b)(3).

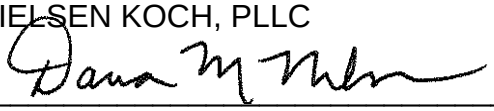
F. CONCLUSION

Petitioner asks this Court to accept review of this important constitutional issue. RAP 13.4(b)(3).

Dated this 6th day of August, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC



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APPENDIX

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July 14, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MATTHEW DAVID SCHMIDT, Appellant.	No. 52956-4-II UNPUBLISHED OPINION

MELNICK, J. — Matthew David Schmidt appeals his possession of a stolen motor vehicle conviction. He argues that the trial court incorrectly instructed the jury regarding the definition of knowledge. We affirm.

FACTS

On December 12, 2017, Ryan Dillman reported to police that his 1998 Jeep Cherokee had been stolen off the street just outside his residence. On December 17, Vancouver Police Officer Aaron Yoder stopped a 1998 Jeep Cherokee for not having license plates. Schmidt was driving the vehicle, which later was determined to be Dillman's stolen Jeep. Schmidt told Yoder that he got the vehicle from his ex-girlfriend and he did not know it was stolen.

The State charged Schmidt with possession of a stolen motor vehicle.

During trial, Dillman testified that after police located his vehicle, they asked him to come retrieve it. He testified that there was damage to the vehicle, and it appeared someone tried to change or alter its appearance. The front bumper had been removed, the logos had been removed, pin striping had been covered up with black spray paint, and the license plates had been removed.

Additionally, the ignition had been tampered with and the casing around the center console had been removed.

Dillman's key would not start the vehicle. Schmidt offered Dillman the key that he used to start the vehicle. The key was "filed on and altered." 2 Report of Proceedings at 220.

The court instructed the jury that to convict Schmidt it must find he knowingly possessed a stolen motor vehicle. In defining knowledge, the court instructed the jury:

> A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance. It is not necessary that the person know that the fact or circumstance is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.
>
> When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

Clerk's Papers at 24 (Instr. 10). The court took this instruction from 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL (WPIC) 10.02, at 222 (4th ed. 2016). Schmidt approved the instruction and did not offer any alternative instructions.

The jury found Schmidt guilty as charged. Schmidt appeals.

ANALYSIS

Schmidt argues for the first time on appeal that the trial court's instruction defining knowledge violated his right to due process because it permitted the jury to find him guilty based on constructive rather than actual knowledge that the car was stolen. We decline to reach this issue.

A defendant who does not object to an instruction in the trial court generally cannot challenge that instruction for the first time on appeal. *State v. Johnson*, 188 Wn.2d 742, 761, 399 P.3d 507 (2017). The exception is when an instructional error is of constitutional magnitude. RAP

2.5(a)(3); *State v. Ackerman*, 11 Wn. App. 2d 304, 309, 453 P.3d 749 (2019). Schmidt did not object to the "knowledge" instruction. Therefore, we must determine whether the purported error involves a manifest error affecting a constitutional right.

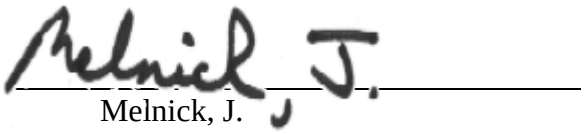
Instructional errors are of constitutional magnitude when the jury is not instructed on every element of the charged crime. *State v. Roggenkamp*, 153 Wn.2d 614, 620, 106 P.3d 196 (2005). As long as the instructions properly inform the jury of the elements of the charged crime, any error in defining the terms used in the elements is not of constitutional magnitude. *State v. Gordon*, 172 Wn.2d 671, 679-80, 260 P.3d 884 (2011). Even an error defining technical terms does not rise to the level of constitutional error. *Gordon*, 172 Wn.2d at 677.

Here, Schmidt does not argue that the trial court failed to instruct the jury on the elements of possession of a stolen motor vehicle. Rather, he argues the trial court erred in defining "knowledge." Because the claim of error does not involve a manifest error affecting a constitutional right, we decline to review it.

Nevertheless, we note that the knowledge instruction provided by the court, and approved by the parties, was a correct statement of the law. The knowledge instruction is identical to WPIC 10.02. In *State v. Leech*, 114 Wn.2d 700, 710, 790 P.2d 160 (1990), *abrogated on other grounds by In re Pers. Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), the Supreme Court expressly approved of WPIC 10.02 to instruct the jury on the meaning of "knowledge." And, more recently, in *State v. Allen*, 182 Wn.2d 364, 372, 341 P.3d 268 (2015), the Supreme Court held that the instruction given reflected the language of WPIC 10.02 and "correctly stated the law regarding 'knowledge.'" Once the Supreme Court decides an issue of state law, that interpretation is binding on all lower courts until it is overruled by the Supreme Court. *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

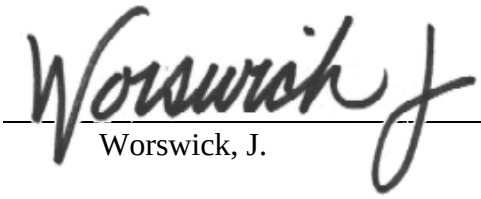
We affirm.

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.



Melnick, J.

We concur:



Worswick, J.

Sutton, A.C.J.

NIELSEN KOCH P.L.L.C.

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