71852-5

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No. 71852-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FRANK NELSON,

Appellant.

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

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Jurisdictions

Constitutional Provisions

Statutes

A. ASSIGNMENTS OF ERROR

1. Mr. Nelson was deprived of his right to a unanimous jury guaranteed by article I, section 21 of the Washington Constitution.

2. The trial court violated Mr. Nelson's rights under the Fifth Amendment by admitting statements he made during a custodial interrogation without having been advised pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether a new trial is required because the State failed to prove Mr. Nelson sold, transferred, distributed, dispensed, or otherwise disposed of stolen property, yet this alternative means of second-degree trafficking was presented to the jury and there was no special verdict form?

2. Whether the trial court erred in concluding that an investigating police officer's repeated questions about Mr. Nelson's name did not constitute an "interrogation" for purposes of the rule prohibiting custodial interrogations in the absence of *Miranda* warnings?

C. STATEMENT OF THE CASE

51-year-old Frank Nelson is an indigent, often-homeless man who attempted to sell a bicycle to make some money. RP (4/7/14) at 75, 82. Cam Ta saw the bike on Craigslist, advertised for sale by a man named "Jim," and called the police. RP (4/7/14) at 22-24. He told the police it

was his bicycle, which had been stolen from outside a Fred Meyer. RP (4/7/14) at 18-24, 44-46. Although the Fred Meyer had surveillance cameras aimed at the bike rack, police did not obtain the videos. RP (4/7/14) at 72-73. Instead, they asked Mr. Ta to arrange a meeting with the seller. RP (4/7/14) at 47-49.

Police officer Maryjane Hacker approached Mr. Nelson as he stood near the bike in front of a Texaco station, where Mr. Ta had agreed to meet the seller. RP (4/7/14) at 49-52. Mr. Nelson was on community custody at the time and believed there was probably a warrant for his arrest as he had missed a meeting with his community corrections officer. RP (4/7/14) at 76, 85. He started to move away and disclaimed knowledge or ownership of the bike when Officer Hacker asked if he was selling it. RP (4/7/14) at 53, 87.

Mr. Ta then drove into the parking lot, got out of his car, and shouted, "That's my bike! We got you! You're under arrest!" RP (4/7/14) at 53. Mr. Ta told the officers he had just been on the phone with Mr. Nelson. RP (4/7/14) at 54. As Mr. Nelson started removing the battery from his cell phone, Officer Hacker and her partner grabbed his arms and handcuffed him. RP (4/7/14) at 54. They gave the bicycle to Mr. Ta. RP (4/7/14) at 56.

After they placed Mr. Nelson in custody, they repeatedly asked him his name. RP (3/20/14) at 8. Mr. Nelson said his name was Joseph Thomas Higgins. CP 158; RP (4/7/14) at 59. The officers put the name in their database but it said "no record found." CP 158. Officer Hacker warned Mr. Nelson not to lie and said he was "committing a separate crime of making false or misleading statements to a public servant if he continued to try to deceive me about who he was." CP 158. Mr. Nelson said he understood and insisted he was not lying. He said the name he provided would be in a California database, but the officers discovered that the physical description associated with that name did not match Mr. Nelson's appearance. CP 158. Accordingly, they told him he was under arrest not only for trafficking in stolen property, but also for knowingly making a false statement to a public servant. CP 158; RP (4/7/14) at 58. Then they warned him of his right to remain silent pursuant to *Miranda*. CP 158; RP (3/20/14) at 9.

Prosecutors ultimately decided to charge Mr. Nelson only with second-degree trafficking in stolen property. CP 159. Officer Hacker, Mr. Ta, and Mr. Nelson all testified at trial. Mr. Nelson testified that the bike was not stolen, that he bought it from his friend Jim Day, and that he wanted to sell it because he needed money. He said he lied to police initially because he was worried about the potential warrant for his arrest.

RP (4/7/14) at 75-90. Mr. Ta testified that the bike Mr. Nelson had was definitely his bike, and that someone had cut off the lock outside the Fred Meyer. RP (4/7/14) at 18-21. Officer Hacker testified that she gave the bicycle to Mr. Ta at the Texaco instead of letting Mr. Nelson sell it because Mr. Ta had identified some of the bike's unique features to show that it was his. RP (4/7/14) at 56-57.

The State initially proposed a jury instruction describing trafficking as "to sell, transfer, distribute, dispense, or otherwise dispose of stolen property of another person." Supp. CP ___ (sub no.23) (State's Proposed Instruction 5). After it rested its case, however, it asked the court to add the second clause of the statute. RP (4/7/14) at 69. The court obliged, and instructed the jury that:

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

CP 118.

In closing argument, the State told the jury that it proved both that Mr. Nelson bought the bike with intent to sell it and that he actually sold it. Even though Mr. Nelson never transferred the bicycle to anyone, the prosecutor said Mr. Nelson "sold" the bike when he made the agreement on the telephone with Mr. Ta. RP (4/8/14) at 111. The prosecutor also

told the jury it should not believe Mr. Nelson's claim that he did not know the bike was stolen, because Mr. Nelson lied to the police when they questioned him. RP (4/8/14) at 106-10, 113.

The jury convicted Mr. Nelson as charged. CP 109. He timely appeals. CP 2-13.

D. ARGUMENT

1. Mr. Nelson's constitutional right to a unanimous jury was violated because there was no unanimity instruction, two alternative means of committing the crime were presented to the jury, and insufficient evidence supported one of the means.

a. The Washington Constitution guarantees the right to a unanimous jury verdict.

Article I, section 21 guarantees criminal defendants the right to a unanimous jury verdict. Const. art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). This right includes the right to unanimity on the means by which the defendant committed the crime. *State v. Green*, 94 Wn.2d 216, 232-33, 616 P.2d 628 (1980). Where an alternative means crime is alleged, the preferred practice is to provide a special verdict form and instruct the jury that it must unanimously agree as to which alternative means the State proved. *State v. Whitney*, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987). Absent such an instruction, a guilty verdict will be affirmed only if the evidence, viewed in the light most

favorable to the State, was sufficient as a matter of law to prove each alternative means presented to the jury beyond a reasonable doubt. *State v. Owens*, 180 Wn.2d 90, 99, 323 P.3d 1030 (2014); *Green*, 94 Wn.2d at 220-21.

b. This Court should hold that there are two alternative means of second-degree trafficking in stolen property.

The State charged Mr. Nelson with trafficking in stolen property in the second degree. CP 159. A person is guilty of this crime if he recklessly traffics in stolen property. RCW 9A.82.055(1). "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). In other words, a person can commit the crime either by disposing of stolen property, or by obtaining stolen property with intent to dispose of it. *Id.* This Court should hold that these are two alternative means of committing the crime. The question is one of statutory construction, which this Court reviews *de novo*. *See Owens*, 180 Wn.2d at 96; *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

It is true that 20 years ago this Court rejected a claim that RCW 9A.82.010 sets forth multiple alternative means of trafficking. *See State v.*

Strohm, 75 Wn. App. 301, 879 P.2d 962 (1994), *abrogated on other grounds by Owens*, 180 Wn.2d at 98. However, the defendant in *Strohm* did not argue that the statute's two clauses set forth two alternative means; he argued that each *word* of the statute was a separate alternative means. *See id.* at 307-08 (claiming, inter alia, that there was sufficient evidence that defendant "transferred" stolen parts but not that he "sold" them). Mr. Nelson does not ask this Court to reconsider that argument. But this Court should hold that the structure, grammar, and content of RCW 9A.82.010(19) indicate there are two alternative means of second-degree trafficking.

Although this Court in *Strohm* stated, "definition statutes do not create alternative means," 75 Wn. App. at 309, this is not a bright-line rule, but only a "guiding principle." *Owens,* 180 Wn.2d at 96. The Supreme Court recently clarified that "each case must be determined on its own merits." *Owens*, 180 Wn.2d at 96. The analysis focuses on "how varied the actions are that could constitute the crime." *Id.* at 96-97.

For example, in evaluating first-degree trafficking in stolen property, the Court held that the following phrase did not create separate alternative means: "[a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others ...." *Owens*, 180 Wn.2d at 96-99 (citing RCW 9A.82.050(1)). The

actions listed in this clause are not varied; indeed many are synonyms. The Court noted that terms like "organize" and "plan" are "closely related" terms, and therefore do not create alternative means of committing first-degree trafficking in stolen property. *Id.* at 99.

In applying the same analysis to RCW 9A.82.010(19), it is clear that *Strohm* correctly held that the separate *words* did not create alternative means. This is so because "sell," "transfer," "distribute," "dispense," and "dispose" are synonyms or closely related terms, as are "buy," "obtain," "receive," and "possess." However, the terms in the first clause are *not* synonyms or closely related terms of the words in the second clause. Indeed, they are antonyms, representing separate stages of a process. Thus, as with the statute construed in *Owens*, "an individual's conduct ... does not vary significantly between the [five] terms listed in the first clause, but does vary significantly between the two clauses." *Owens*, 180 Wn.2d at 99. As with the statute at issue in *Owens*, then, this Court should hold that RCW 9A.82.010(19) describes two alternative means of trafficking in stolen property. *See id.*

c. A new trial is required because both alternative means were presented to the jury, there was no unanimity instruction or special verdict form, and the State presented insufficient evidence to support the first alternative means.

Initially, the State proposed a jury instruction setting forth only the first alternative means: to sell, transfer, distribute, dispense, or otherwise dispose of stolen property of another person. Supp. CP ___ (sub no.23) (State's Proposed Instruction 5). Presumably after realizing it did not have enough evidence of this means, the State then proposed an instruction including both this alternative and the second alternative: 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. RP (4/7/14) at 69. The prosecutor discussed both alternative means in closing argument. RP (4/8/14) at 111. However, the jury was not provided with a special verdict form and was not instructed that it had to be unanimous regarding which alternative the State proved. CP 108-25.

Because there was no express jury unanimity regarding the means by which the jury found Mr. Nelson committed the crime, the conviction may be affirmed only if the State presented sufficient evidence to support both means. *Ortega-Martinez*, 124 Wn.2d at 707-08. This it failed to do. The State presented sufficient evidence, viewed in the light most favorable to the prosecution, to prove the *second* alternative means: that Mr. Nelson

obtained the bike with intent to sell it. But it did not present evidence of the *first* alternative means. Mr. Nelson did not sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person. To the contrary, the police and complainant found Mr. Nelson with the bike, and the police took the bike and gave it to the complainant.

The prosecutor told the jury the bike was "sold" as soon as Mr. Nelson and Mr. Ta concluded their telephone conversation, but this is incorrect. RP (4/8/14) at 111. The primary definition of "sell" is "to transfer (goods) to or render (services) for another in exchange for money; dispose of to a purchaser for a price."[1] Furthermore, under the doctrine of *noscitur a sociis*, "sell" must mean something similar to "transfer," "distribute," "dispense," and "dispose of." *See State v. K.L.B.*, 180 Wn.. 2d 735, 747, 328 P.3d 886 (2014) ("Under noscitur a sociis, "a single word in a statute should not be read in isolation.... '[T]he meaning of words may be indicated or controlled by those with which they are associated.' ") (internal citations omitted). Mr. Nelson did not dispose of the bicycle; the police took it from him and gave it to Mr. Ta. Thus, the first alternative means should not have been presented to the jury. Because it was presented to the jury without sufficient evidentiary support, and because there is no special verdict form showing the jury relied on the

[1] http://dictionary.reference.com/browse/sell.

other alternative, reversal is required. On remand, only the second alternative may be presented to the jury. *State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997).

2. The trial court violated Mr. Nelson's Fifth Amendment rights by admitting the statements he made to law enforcement officers during a custodial interrogation without the benefit of *Miranda* warnings.

a. Police officers must provide *Miranda* warnings before subjecting a suspect to a custodial interrogation.

The Fifth Amendment provides, "No person ... shall be compelled in any criminal case to be a witness against himself...." U.S. Const. amend. V. A suspect must be advised of his Fifth Amendment rights before a custodial interrogation. *Miranda*, 384 U.S. at 444-45. Statements obtained in violation of this rule must be suppressed at trial. *Michigan v. Mosley*, 423 U.S. 96, 104, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975).

In this case, the State conceded and the trial court concluded that Mr. Nelson was "in custody" for purposes of *Miranda* once the officers grabbed his arms and handcuffed him. RP (3/20/14) at 14; CP 141-42. The State also conceded and the trial court found that the officers did not issue *Miranda* warnings prior to repeatedly asking Mr. Nelson to give them his real name. RP (3/20/14) at 14; CP 141-42. But the trial court adopted the State's argument that this questioning did not constitute an

interrogation because it was "not likely to lead to incriminating information." CP 141-42.

The trial court erred in issuing this ruling and admitting Mr. Nelson's false answers to these inquiries. This Court reviews *de novo* the trial court's legal conclusion that *Miranda* was not triggered on these undisputed facts. *See In re the Personal Restraint of Cross*, 180 Wn.2d 664, 681, 327 P.3d 660 (2014).

b. Police officers interrogated Mr. Nelson when they repeatedly asked him for his real name while threatening to arrest him for making a false statement to a public servant.

The U.S. Supreme Court has defined an "interrogation," for purposes of triggering the *Miranda* requirement, as either "express questioning" or any statements "that the police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). However, most courts have interpreted *Innis* to mean that even "express questions" do not necessarily constitute an interrogation unless they are reasonably likely to elicit an incriminating response. *See United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981); *State v. Sargent*, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988); *State v. Shuffelen*, 150 Wn. App. 244, 256-57, 208 P.3d 1167 (2009).

Thus, for example, asking a person for his name and address as part of a routine booking process generally falls outside the scope of *Miranda*. *State v. Denney*, 52 Wn. App. 665, 671, 218 P.3d 633 (2009), *overruled on other grounds by Cross*, 180 Wn.2d at 681. The reason such questions are not considered an "interrogation" is that they "rarely elicit an incriminating responses and do not involve the compelling pressures which undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely." *Denney*, 152 Wn. App. at 671 (internal citations omitted). Rather, "booking is essentially a clerical procedure, occurring soon after the suspect arrives at the police station." *United States v. Mata-Abundiz*, 717 F.2d 1277, 1280 (9th Cir. 1983).

Here, however, the questioning was not performed by a jail guard as part of the booking process; it was performed by officers in the field investigating a crime, where Mr. Nelson was subjected to compelling pressures to provide an incriminating response. The Craigslist advertisement stated that "Jim" was selling the bike, but the officers did not believe that was Mr. Nelson's name. Ex. 1. They asked him his name and he said "Joseph Thomas Higgins." RP (4/7/14) at 59. The officers "could not verify" the name through a records check, so they persisted in asking him "numerous questions" in "an attempt to verify [his] identity." RP (3/20/14) at 8. Officer Hacker warned Mr. Nelson not to lie and said

he was "committing a separate crime of making false or misleading statements to a public servant if he continued to try to deceive me about who he was." CP 158. Mr. Nelson said he understood and insisted he was not lying. He said the name he provided would be in a California database, but the officers discovered that the physical description associated with that name did not match Mr. Nelson's appearance. CP 158. Accordingly, they told him he was under arrest not only for trafficking in stolen property, but also for knowingly making a false statement to a public servant. CP 158; RP (4/7/14) at 58.

Thus, it is clear that the officers' questions constituted an interrogation as part of a criminal investigation, and were not part of a jail's routine booking procedure or other innocuous banter. *Cf. Timbers v. Commonwealth*, 28 Va.App. 187, 199, 503 S.E.2d 233 (Va. Ct. App. 1998) (officer's asking inmate her name was interrogation, not routine booking question, because he was investigating what he believed to be false information); *Pennsylvania v. Muniz*, 496 U.S. 582, 596, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990) (recognizing the Fifth Amendment reflects our "unwillingness to subject those suspected of a crime to the cruel trilemma of self-accusation, perjury or contempt"). The trial court erred in permitting the officers to testify that Mr. Nelson gave a false name in

response to the unwarned questions, and in allowing the State to urge the jury to infer guilty knowledge from these statements.

c. The erroneous admission of the unwarned statements prejudiced Mr. Nelson, requiring reversal.

Miranda is a constitutional requirement. *Dickerson v. United States*, 530 U.S. 428, 438, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). As such, the State bears the burden of proving that the admission of statements obtained in violation of *Miranda* was harmless beyond a reasonable doubt. *See Arizona v. Fulminante*, 499 U.S. 279, 292-97, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991); *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In other words, the State must show that the admission of the statements did not contribute to the conviction. *Fulminante*, 499 U.S. at 296 (citing *Chapman*, 386 U.S. at 26).

The State cannot meet this heavy burden here. Mr. Nelson's defense was that he did not know the bike was stolen. RP (4/8/14) at 119. There was no direct evidence of knowledge or recklessness; for instance, the State did not obtain the surveillance video from the Fred Meyer, which would have shown the theft of the bicycle. But the State told the jury that Mr. Nelson's lies to police, including his "concealing his identity," was circumstantial evidence of knowledge. RP (4/8/14) at 112. The State

cannot show beyond a reasonable doubt that the jury would have found this circumstantial evidence sufficient to prove the mens rea in the absence of Mr. Nelson's lies about his identity. For this reason, too, this Court should reverse and remand for a new trial.

E. CONCLUSION

For the reasons set forth above, Mr. Nelson asks this Court to reverse his conviction and remand for a new trial.

DATED this 17th day of November, 2014.

Respectfully submitted,

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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71852-5-I
	)	
	)	
FRANK NELSON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF NOVEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON, THIS 17TH DAY OF NOVEMBER, 2014.

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