Supreme Court No. 92073-7
(Court of Appeals No. 71852-5-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

FRANK NELSON,

Petitioner.

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# PETITION FOR REVIEW

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LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Petitioner Frank Nelson asks this Court to review the opinion of the Court of Appeals in *State v. Nelson*, No. 71852-5-I. A copy is attached as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Is second-degree trafficking in stolen property an alternative means crime, and, if so, is reversal required because there was no special verdict form and the State presented insufficient evidence to support one of the two alternative means?

2. Did an investigating police officer's repeated questions about Mr. Nelson's name constitute an "interrogation" for purposes of the rule prohibiting custodial interrogations in the absence of *Miranda* warnings?

3. Mr. Nelson also seeks review of the issues raised in his pro se Statement of Additional Grounds:

> a. Did the State present alternative means when it altered the "traffic" definition in Jury Instruction No. 6 from the original in RCW 9A.82.010(19)?
>
> b. Was the State's proposed jury instruction regarding the definition of "traffic" a recognition of alternative means?
>
> c. Did the state fail to prove that a transfer or possession of stolen property occurred on the date alleged in the information?

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." CP 171 (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. On appeal, he argued that the two clauses of the trafficking statute constitute alternative means of committing the crime, and that a new trial was required because there was no special verdict form and the State presented insufficient evidence to support the first means. He further argued that the trial court violated his Fifth Amendment rights by admitting the statements he made to law enforcement officers without the benefit of *Miranda* warnings.

The Court of Appeals rejected both arguments. It held that this Court impliedly rejected the first argument in *State v. Owens*, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014), even though a different issue was raised in that case. Slip Op. at 4-6. As to the second argument, the court held that when the officers in the field repeatedly asked Mr. Nelson his name they were not interrogating him but instead engaging in "routine booking

procedure." Slip Op. at 9. Accordingly, the court ruled, *Miranda* did not apply. Slip Op. at 10-11. Although Mr. Nelson had filed a Statement of Additional Grounds for review, the court stated that the pro se brief "does not raise any new issues and, as such, does not establish an entitlement to appellate relief." Slip Op. at 2 n.2.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

**1. This Court should grant review to address the question of whether second-degree trafficking is an alternative means crime.**

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.

This Court has never directly addressed the question at issue. The Court of Appeals ruled that this Court in *Owens* implicitly repudiated the argument. Slip Op. at 6. But in *Owens*, this Court had no occasion to consider the claim raised here. The defendant in *Owens* argued that the following clause in the first-degree trafficking statute created seven

different 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)). In addressing the question, this Court stated that it was appropriate to consider "how varied the actions are that could constitute the crime." *Id.* at 96-97. 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 the statute at issue here, it is clear that the separate *words* do 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. CP 171 (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,

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

and because there is no special verdict form showing the jury relied on the other alternative, a new trial should be granted. 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. This Court should grant review because the investigating officer's repeated demands that Mr. Nelson provide his name constituted an interrogation, not a routine booking procedure.**

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 Court of Appeals held it was not an interrogation because the questions fell within the "routine booking procedure exception." Slip Op. at 9. These conclusions are incorrect, as explained below.

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. The Court of Appeals improperly extended the "routine booking question exception" to *Miranda*, and this Court should grant review.

**3. This Court should grant review of the issues Mr. Nelson raised in his pro se Statement of Additional Grounds.**

As noted above, Mr. Nelson filed a pro se Statement of Additional Grounds pursuant to RAP 10.10, and raised the following issues:

> a. Did the State present alternative means when it altered the "traffic" definition in Jury Instruction No. 6 from the original in RCW 9A.82.010(19)?
>
> b. Was the State's proposed jury instruction regarding the definition of "traffic" a recognition of alternative means?
>
> c. Did the state fail to prove that a transfer or possession of stolen property occurred on the date alleged in the information?

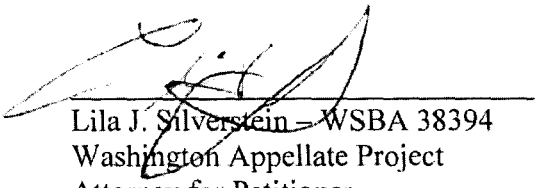
The Court of Appeals did not separately address these arguments, because they are related to the issues raised in the Brief of Appellant. Slip Op. at 2 n.2. But although the claims are related, the reasoning is not exactly the same, and Mr. Nelson would like this Court to address his arguments.

E. CONCLUSION

Frank Nelson respectfully requests that this Court grant review.

DATED this 7th day of August, 2015.

Respectfully submitted,



Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorney for Petitioner

# APPENDIX A

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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|---|---|---|
| STATE OF WASHINGTON, | ) | DIVISION ONE |
| | ) | |
| Respondent, | ) | No. 71852-5-I |
| | ) | |
| v. | ) | UNPUBLISHED OPINION |
| | ) | |
| FRANK JOSEPH NELSON, | ) | |
| | ) | |
| Appellant. | ) | FILED: July 20, 2015 |
| | ) | |



DWYER, J. — Frank Nelson appeals from the judgment entered on a jury's verdict finding him guilty of trafficking in stolen property in the second degree. Nelson contends that the statutory definition of "traffic" creates alternative means of committing the offense of trafficking in stolen property. Thus, he asserts, the State must adduce sufficient evidence on each of the alternative means in order to sustain the conviction. He further asserts that the State failed to do so. Nelson also contends that the trial court erred, violating his Fifth Amendment rights, by allowing into evidence his answers to certain pre-Miranda[1]-warning questions—posed by police officers—regarding his true identity. We reject Nelson's contentions, concluding both that the statutory definition of "traffic" does

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

not create alternative means of committing the offense at issue and that Nelson's Fifth Amendment rights were not violated. Consequently, we affirm.[2]

I

On January 22, 2014, Cam Ta reported that his blue-green and silver-white Sedona Giant mountain bike had been stolen from outside of a grocery store in Mill Creek. On January 31, Ta discovered a listing on Craigslist for a Sedona Giant mountain bike with a description matching that of his stolen bicycle. He informed the police. Everett Police Officer Maryjane Hacker instructed Ta to call the telephone number provided on the listing, agree to purchase the bicycle, and set up a buy. Ta called the provided telephone number using his cell phone and agreed to purchase the bicycle from the speaker—later identified as Nelson—for $120 at the Texaco gas station on 128th Street, just outside of Everett, approximately 30 minutes after their conversation. Ta arrived at the Texaco station in his vehicle, identified his bicycle, and called Officer Hacker to relay the information. Hacker then arrived and made contact with Nelson who was standing near the bicycle and talking on his cell phone. Hacker then initiated the following conversation with Nelson:

Hacker: Is this your bike?
Nelson: No.
Hacker: Do you know whose bike this is?
Nelson: I think it might be someone inside the store.
Hacker: Are you sure this isn't your bike? Are you sure you're not here to sell it?
Nelson: No, no, no, not me.

[2] Nelson also submits a pro se statement of additional grounds pursuant to RAP 10.10. He does not raise any new issues and, as such, does not establish an entitlement to appellate relief.

Nelson then started walking away from Hacker, at which point Officer Albright—one of the two officers Hacker had enlisted for back up—started to approach Hacker and Nelson. Ta then "came barreling into the parking lot, . . . got out of his car and shouted 'That's my bike. That's my bike. We got you. You're under arrest.'" Nelson responded by saying, "No, no," and backing further away. Ta stated "that he was just on the phone with him [Nelson]." Nelson then started to remove the battery from his cell phone. Officers Albright and Hacker grabbed Nelson's hands, took the cell phone, placed Nelson's hands in handcuffs, and sat him on Hacker's patrol car's bumper. Hacker had Ta dial the seller's telephone number. The cell phone that Hacker had just taken from Nelson rang, and it was Ta's telephone number on the screen. Hacker confirmed that the bicycle was the one that Ta had reported stolen, returned it to Ta, and arrested Nelson for trafficking in stolen property.

Prior to advising Nelson of his Miranda rights, Hacker asked Nelson who he was. Nelson said that his name was Joseph Thomas Higgins, and provided a date of birth. Hacker was unable to verify the provided name as authentic through a records check. Hacker then "cautioned [Nelson] about lying about who he was and told him that he would be committing a separate crime of making false or misleading statements to a public servant if he continued to try to deceive me [Hacker] about who he was." Nelson said that he understood, was not lying, and that his name would be in a California database. Hacker found a match for the name in California,

but the physical description associated with the name did not match Nelson's physical appearance and Nelson could not confirm the California address associated with the name.

Hacker then advised Nelson of his Miranda rights and proceeded to ask Nelson about the bicycle. Nelson responded that he had bought it a week ago from "Joe" for $100, but was now selling it because he needed money. Nelson, however, would not, or could not, provide a last name or a telephone number for "Joe."

Nelson was charged by information with trafficking in stolen property in the second degree. A jury returned a guilty verdict. Nelson was sentenced to 55 months of incarceration and ordered to pay various amounts of fines and assessments. He now appeals.

II

Nelson contends that insufficient evidence was adduced at trial to sustain a conviction for trafficking in stolen property in the second degree. This is so, he asserts, because the statutory definition of "traffic" creates two alternative means of committing the offense. Hence, he urges, given that the jury was not required to unanimously agree as to which means was proved, the State needed to adduce sufficient evidence to prove both alternative means, and it did not. We disagree.

In Washington, a criminal defendant is entitled to a unanimous jury verdict. WASH. CONST. art. I, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980) (citing State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963)).

> This right may also include the right to a unanimous jury determination as to the *means* by which the defendant committed the crime when the defendant is charged with (and the jury is instructed on) an alternative means crime. In reviewing this type of challenge, courts apply the rule that when there is sufficient evidence to support each of the alternative means of committing the crime, express jury unanimity as to which means is not required. If, however, there is insufficient evidence to support any means, a particularized expression of jury unanimity is required.

State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014);[3] accord State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994); In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 336-37, 752 P.2d 1338 (1988); State v. Whitney, 108 Wn.2d 506, 507, 739 P.2d 1150 (1987); State v. Arndt, 87 Wn.2d. 374, 377, 553 P.2d 1328 (1976).

However, as we have previously stated, "The Washington Supreme Court has rejected the application of this doctrine [sufficient evidence on each alternative means] to 'means within means.'" State v. Al-Hamdani, 109 Wn. App. 599, 604, 36 P.3d 1103 (2001) (citing Jeffries, 110 Wn.2d 326). "[T]he alternative means doctrine does not apply to mere definitional instructions; a statutory definition does not create a 'means within a means.'" Owens, 180 Wn.2d at 96 (citing State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007)); accord, State v. Linehan, 147 Wn.2d 638, 646, 56 P.3d 542 (2002).

Further, the court in Owens held that RCW 9A.82.050(1) sets forth two alternative means of trafficking in stolen property in the first degree:

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[3] Washington law differs from federal law in this regard. In federal prosecutions, "jury unanimity is not required as to the means by which a defendant commits a crime, regardless of whether there is sufficient evidence to support each of the alternative means." Owens, 180 Wn.2d at 95 n.2.

(a) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or
(b) who knowingly traffics in stolen property

See 180 Wn.2d at 99-100. By interpreting "traffics in stolen property" as setting forth a single alternative means, the court in Owens implicitly repudiated the notion that the definition of "traffic" creates yet additional alternative means.

The statute defining trafficking in stolen property in the second degree provides that: "A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree." RCW 9A.82.055. This provision sets forth only one means of committing the offense.

The due process clauses of the federal and state constitutions, U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3, require that the State prove each element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be . . . to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson, 443 U.S. at 319.

A claim of evidentiary insufficiency admits the truth of the State's evidence and all reasonable inferences from that evidence. State v. Kintz, 169 Wn.2d 537,

551, 238 P.3d 470 (2010); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence can be equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the jury on questions of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Killingsworth, 166 Wn. App. 283, 287, 269 P.3d 1064 (2012).

To authorize the jury's verdict the State needed to adduce sufficient evidence that Nelson "trafficked in stolen property." Jury Instruction 5. The jury was instructed that "[t]o '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." Jury Instruction 6.

Nelson had possession of Ta's stolen bike, and he intended to sell that bike, as evidenced through his Craigslist ad and subsequent planned sale to Ta. As to whether the bike was, in fact, stolen, the jury was convinced that it was and we defer to the jury on questions of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Killingsworth, 166 Wn. App. at 287. Viewed in the light most favorable to the State, sufficient evidence was adduced that Nelson "trafficked in stolen property."

III

Nelson contends that Officer Hacker's repeated questioning as to his real name violated his Fifth Amendment rights. This is so, he asserts, because the

questioning was not performed during the booking process but, rather, during a field investigation. Further, Hacker advised Nelson that, in addition to trafficking in stolen property, he could be arrested for making false statements. Thus, Nelson avers that Hacker should have known that questioning Nelson about his real name would have led to an incriminating answer. We disagree.

To determine if police engaged in "interrogation" for Miranda purposes, "we defer to the trial court's findings of fact but review its legal conclusions from those findings de novo." In re Pers. Restraint of Cross, 180 Wn.2d 664, 681, 327 P.3d 660 (2014) (citing United States v. Poole, 794 F.2d 462, 465 (9th Cir.1986)).

The Fifth Amendment's protection against self-incrimination includes the right to be informed of one's rights before a custodial interrogation takes place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); State v. Lavaris, 99 Wn.2d 851, 856-57, 664 P.2d 1234 (1983). Statements obtained in response to a custodial interrogation are inadmissible if not preceded by proper warnings. Miranda, 384 U.S. at 444; Lavaris, 99 Wn.2d at 856-57. These warnings include the person's "right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." Miranda, 384 U.S. at 444. However, not all custodial statements are a product of interrogation. Rhode Island v. Innis, 446 U.S. 291, 299, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). For a statement to fall within Miranda's purview, it must be made in response to interrogation. Innis, 446 U.S. at 299. "'[I]nterrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the

police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Innis, 446 U.S. at 301. This exception for words or actions on the part of the police that are "normally attendant to arrest and custody," Innis, 466 U.S. at 301, is known as the routine booking procedure exception. United States v. Mata-Abundiz, 717 F.2d 1277, 1280 (9th Cir. 1983).

Application of the routine booking procedure exception to the Miranda rule does not depend upon the nature of the procedure during which the question is asked but, rather, it depends upon the nature of the question. State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988). A police request for "routine information necessary for basic identification purposes is not interrogation under Miranda, even if the information turns out to be incriminating." United States v. McLaughlin, 777 F.2d 388, 391 (8th Cir. 1985); accord State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533 (1992), abrogated on other grounds by In re Cross, 180 Wn.2d 664. "Only if the government agent should reasonably be aware that the information sought . . . is directly relevant to the substantive offense charged, will the questioning be subject to scrutiny." McLaughlin, 777 F.2d at 391-92.

The contested questioning herein concerned Nelson's true name, which is indisputably "routine information necessary for basic identification." McLaughlin, 777 F.2d at 391. Thus, it falls under the booking exception, as the nature of the question is one requesting routine information, despite the fact that the questioning was performed in the field. Further, the substantive offense charged

was trafficking in stolen property, to which Nelson's identity is not directly relevant. As such, the questioning about his name is not a ground for reversal.

Nelson relies on Timbers v. Commonwealth, 28 Va. App. 187, 199, 503 S.E.2d 233 (1998), to contend that because Hacker advised him that it was a crime to make false statements, and subsequently arrested him for making false statements,[4] Hacker's questions were necessarily part of a criminal investigation. Thus, Nelson maintains that the questions fell outside of the booking exception as they were designed to obtain incriminating information. However, the Virginia Court of Appeals clarified Timbers in its later decision in Watts v. Commonwealth, 38 Va. App. 206, 562 S.E.2d 699 (2002). In Watts, the Virginia Court of Appeals stated that "[the officer's] inquiries to Timbers [about her name] constituted [an] interrogation in violation of Miranda because the officer was clearly investigating a prior criminal act [the signing of an official document with a false name] and intended to elicit an incriminating response from Timbers." Watts, 38 Va. App. at 220.

Here, the prior criminal act being investigated was that of trafficking in stolen property. The warning of the potential for criminal charges for making false statements was contemporaneous with the false statements and tangential to the substantive offense of trafficking in stolen property. It is a stretch to imagine that when a law enforcement officer is investigating a separate crime, is

[4] In her police report, Officer Hacker states that she arrested Nelson for trafficking in stolen property and, later, arrested him again for making false statements to a police officer. Obviously, this is not correct. Nelson was arrested once. There was, as a factual matter, no "rearrest."

trying to obtain an individual's name, and advises the individual that it is a crime to make false statements, that the officer may no longer inquire into the person's name without first announcing the Miranda rights. Such is not the law.

Affirmed.

We concur:

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The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71852-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ respondent Andrew Alsford
[aalsdorf@snoco.org]
Snohomish County Prosecuting Attorney

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 10, 2015

# WASHINGTON APPELLATE PROJECT

## August 10, 2015 - 4:29 PM

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