NO. 46093-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JASON HERNANDEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge Garold Johnson

No. 13-1-02943-1

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
BRENT J. HYER
Deputy Prosecuting Attorney
WSB # 33338

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

Table of Authorities

State Cases

Federal and Other Jurisdictions

Constitutional Provisions

Statutes

Rules and Regulations

Other Authorities

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant has failed to show that the Information was deficient when it included all of the essential elements of the crime.

2. Whether Officer Volk's remark about the defendant not wanting to talk to her constituted a prejudicial comment on the defendant's right to remain silent when the trial court struck the comment.

3. Whether the trial court properly denied the defendant's motion for a mistrial when the court believed a curative instruction was sufficient to cure any prejudice caused by the prosecutor's closing argument.

4. Whether the prosecutor's closing argument constituted prosecutorial error prejudicial to the defendant.

5. Whether the defendant has failed to show ineffective assistance of counsel where he has not demonstrated that his trial counsel's performance was deficient.

6. Where the defendant failed to object to the "to convict" jury instruction for unlawful possession of a stolen vehicle, has defendant failed to show that the alleged error is a manifest error of constitutional magnitude that can be raised for the first time on appeal?

7. Whether there was substantial evidence supporting all of the alternative means in the "to convict" jury instruction for unlawful possession of a stolen vehicle.

8. Where the defendant failed to object to the imposition of legal financial obligations, does the defendant show that he can raise this issue for the first time on appeal?

9. If the defendant did not waive the issue of legal financial obligations, is that issue ripe for review?

10. If the issue was not waived and is ripe, did the trial court properly impose legal financial obligations?

B. STATEMENT OF THE CASE.

1. Procedure

On July 25, 2013, Jason Hernandez, ("defendant"), was charged in Pierce County superior court cause number 13-1-02943-1 with unlawful possession of a stolen vehicle in count I, reckless driving in count II, and duty on striking unattended vehicle in Count III. CP 1-2.

The court called this case for trial on February 13, 2014. 1 RP 3. The trial court held a CrR 3.5 hearing on February 13, 2014. 1 RP 27. The defendant testified at the CrR 3.5 hearing, 1 RP - 55 - 67, but did not testify at trial. The trial court ruled that certain statements made by the defendant were admissible as spontaneous statements. 1 RP 73-74. The trial court entered Findings of Fact and Conclusion of Law regarding the CrR 3.5 hearing on February 18, 2014, CP 15 -22, 2 RP 83.

At trial the State called Arial Sloboden, 3 RP 118 - 130, Officer James Pincham 3 RP 130 - 134, Officer Matthew Watters, 3 RP 134 - 188, Britney Trujillo, 3 RP 188 199, Kirsti Sell, 3 RP 199 - 214, Officer Jeffrey Smith 3 RP 214 - 220, Officer Barry Paris, 3 RP 220 - 223, Officer Michel Volk, 3 RP 223 - 240, Officer Sylvester Weaver, 3 RP 240 - 249, Glenda Meza, 4 RP 294 - 304, Officer Tim Snyder, 4 RP 304 - 313, Officer Samuel Lopez Sanchez, 4 RP 313 - 322, Officer Erika Haberzettl, 4 RP 322 - 327, and Forensic Technician Shea Wiley, 4 RP 327 - 341, as witnesses. The jury convicted the defendant as charged. 5 RP 414 - 417. On March 14, 2014, the trial court sentenced the defendant to 50 months on count I, 360 days for count II, and 90 days for count III, all sentences to run concurrently. 6 RP 437. The trial court imposed the following legal financial obligations: $500.00 Crime Victim Assessment; $100.00 DNA Database Fee; $1,500.00 Court-Appointed Attorney Fees and Defense

Costs; $200.00 Criminal Filing Fee. CP 80. The trial court later ordered restitution in the amount of $29,336.41. CP 150-151 The defendant waived his right to be present for a restitution hearing and his trial attorney signed the order agreeing it its entry. CP 150-151.

2. Facts

On July 24, 2013, Officer Watters was on routine patrol in Tacoma, Washington. 3 RP 136. Officer Watters ran the plate of a car and it came back as stolen. 3 RP 136. Officer Watters identified the defendant as the driver of the stolen car. 3 RP 139. Officer Watters turned his car around to pursue the stolen vehicle. 3 RP 137. The defendant accelerated at a high rate of speed and was passing vehicles driving at normal speeds on the street. 3 RP 141. Officer Watters terminated pursuit due to the reckless driving of the defendant. 3 RP 141.

Officer Watters began to patrol side streets and saw a huge cloud of dust that might be a crash. 3 RP 142. He located the crash site and noted it was the stolen car he had seen earlier, now wrecked and up on its side. 3 RP 143. The car appeared to have left the sidewalk, hit some trees and then hit a pickup truck. 3 RP 147. Officer Watters spoke to witnesses at the scene and learned that the people in the car had fled. 3 RP 149. Officer Watters radioed information to other officers arriving at the scene. 3 RP 149. Officer Watters later searched the car and located a backpack

with the defendant's credit card in it behind the driver's seat. 3 RP 156.

Officer Sanchez Lopez arrived at the scene. 4 RP 314. Based on witnesses' directions, he located two males and one female running through an alley a few blocks from the crash site. 4 RP 316. The defendant appeared to be extremely exhausted and injured. 4 RP 316. Officer Sanchez Lopez directed Officer Volk to take the defendant into custody. 4 RP 316. Officer Sanchez Lopez then located and detained the other male and female. 4 RP 318.

Officer Volk detained the defendant at the area of East 72nd Street and "G" Street in Tacoma, Washington. 3 RP 224. Officer Volk read the defendant his ***Miranda*** rights. 3 RP 227. Officer Volk drove the defendant to jail, but the defendant was rejected by the jail booking nurse because the defendant told the booking nurse, "We were going 100-plus when we crashed." 3 RP 233. The defendant was then taken to Tacoma General Hospital to be medically evaluated. 3 RP 234. In the patrol car, the defendant told Officer Volk, "We were going between 70 and 100 miles per hour when we crashed." 3 RP 234. The defendant was medically cleared and taken to jail. 3 RP 235.

Kristi Sell was driving on McKinley when a car passed her and came close to hitting her. 3 RP 200. The car was driving erratically and went through a red light. 3 RP 200. Ms. Sell continued on the road and

came across the crash site. 3 RP 201. Ms. Sell saw a person exit the vehicle and run. 3 RP 210. Ms. Sell indicated that this person was not the driver of the vehicle. 3 RP 211. She identified the defendant's booking photo as the person who looked like the driver. 3 RP 211.

C. ARGUMENT.

1. THE INFORMATION INCLUDED ALL OF THE ESSENTIAL ELEMENTS OF THE CRIME OF POSSESSION OF A STOLEN VEHICLE.[1]

All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him. ***State v. Kjorsvik***, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Charging documents which are not challenged until after the verdict will be more liberally construed in favor of validity than those challenged before or during trial. *Id.* at 102. Under this liberal construction rule, the Court will uphold the charging document if an apparently missing element may be "fairly implied" from the language within the document. *Id.* at 104. The test is: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he was nonetheless actually prejudiced by the inartful language which

[1] The State responds to this issue first because if the Court finds the Information insufficient, the remedy would be to vacate the defendant's conviction and dismiss the cause without prejudice. ***State v. Quismundo***, 164 Wn.2d 499, 192 P.3d 342 (2008).

caused a lack of notice?" *Id.* at 105–06. Words in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied. *Id.* at 109.

Defendant challenges the sufficiency of the Information for count I, which alleged that defendant committed the crime of possession of a stolen vehicle. In this case, the Information with regard to count I[2] contained the following language:

> I, MARK LINDQUIST, Prosecuting Attorney for Pierce County, in the name and by the authority of the State of Washington, do accuse JASON PAUL JOSEPH HERNANDEZ of the crime of UNLAWFUL POSSESSION OF A STOLEN VEHICLE, committed as follows:
>
> That JASON PAUL JOSEPH HERNANDEZ, in the State of Washington, on or about the 24th day of July, 2013, did unlawfully and feloniously knowingly possess a stolen motor vehicle, knowing that it had been stolen, contrary to RCW 9A.56.068 and 9A.56.140, and against the peace and dignity of the State of Washington.

CP 1. Pursuant to RCW 9A.56.068, a person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle. The Information in this case includes all of the essential elements of the crime.

The defendant argues that the Information does not include any description of the stolen vehicle he was alleged to have possessed. With regard to a charge of possession of stolen property, the Information does not need to give notice about the stolen property as it is not an element of

---

[2] The defendant makes no assignment of error related to counts II or III of the Information.

the crime. ***State v. Tresenriter***, 101 Wn. App. 486, 495, 4 P.3d 145 (2002). In addition, if the allegation is too general, the defendant's remedy is to request a bill of particulars. *Id.* The defendant does not argue that he ever requested a bill of particulars in this case.

The Declaration of Probable Cause in this case specifically lists the stolen vehicle as a 2009 Honda Civic. CP 147 - 149. The Declaration mentions only this 2009 Honda Civic throughout and there is no other mention of another stolen vehicle that could possibly be at issue in this case. CP 147 - 149. The defendant was provided with a description of the stolen vehicle he was alleged to have possessed.

Assuming arguendo that the Court finds the Information to be lacking necessary elements, the defendant cannot show actual prejudice as required by the second ***Kjorsvik*** prong. ***Kjorsvik*** at 106, 812 P.2d 86 (1991). The defendant was charged with being in possession of a stolen vehicle based on a specific fact pattern of him driving a stolen car, crashing that car and fleeing that car. His defense was that he was not the driver of the car, and he suffered no actual prejudice because there was no description of the stolen vehicle. The defendant makes no argument that he was unable to prepare an adequate defense because he did not know which vehicle he was alleged to have possessed.

Therefore, the defendant's Information included all essential elements and his conviction should be affirmed.

2. NEITHER OFFICER VOLK'S REMARK DURING THE TRIAL, WHICH WAS STRICKEN, NOR THE PROSECUTOR'S ARGUMENT IN CLOSING, COMMENTED ON THE DEFENDANT'S RIGHT TO A FAIR TRIAL.

The State may not comment on a defendant's exercise of his Fifth Amendment right to remain silent. ***State v. Gregory***, 158 Wn.2d 759, 839-40, 147 P.3d 1201, 1243-44 (2006), *overruled on other grounds by* ***State v. W.R., Jr.***, --- P.3d ---, 2014 WL 5490399 (2014). However, not all remarks amount to a comment on the exercise of that right. ***State v. Sweet***, 138 Wn.2d 466, 980 P.2d 1223 (1999). A comment on an accused's silence occurs when used to the State's advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt. ***State v. Lewis***, 130 Wn.2d 700, 706-07, 927 P.2d 235 (1996) (*citing* ***Tortolito v. State***, 901 P.2d 387, 390 (Wyo.1995)).

In determining the prejudicial effect of a comment on an accused's silence, the context in which the evidence is revealed must be examined to determine the extent to which it was called to the jury's attention, and the possibility that from that evidence the jury may have drawn an inference unfavorable to the defendant. ***State v. Johnson***, 42 Wn. App. 425, 431-32, 712 P.2d 301, 305-06 (1985). A police witness's mere reference to the defendant's silence will not result in constitutional error unless the State highlights or otherwise exploits the testimony, such as incorporating it in

closing arguments. ***State v. Romero***, 113 Wn. App. 779, 791-92, 54 P.3d 1255, 1261-62 (2002); ***State v Johnson*** 42 Wn. App. 425, 712 P.2d 301 (1985); ***State v. Rogers***, 70 Wn. App. 626, 855 P.2d 294 (1993). If there is no showing of prejudice, this is not a reversible, constitutional error. ***State v. Sweet***, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999); ***State v. Jackson***, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

a. Officer Volk's remark.

The defendant argues that Officer Volk directly commented on the defendant's post-Miranda right to remain silent; however, Officer Volk's remark about the defendant's silence was merely a reference in passing to a question that had nothing to do with questioning the defendant or his statements. The full exchange was:

> State's Question: After you spoke to Officer Watters - - tell me about the conversation with Officer Watters.
>
> Volk's Answer: It was very short. He told me we had probable cause to arrest the defendant for the list of the charges. I went back to the vehicle, advised the defendant that he was being under arrest (sic) for those charges, and then read him his Miranda rights again, which he state he -- I'd have to read my report if he waived them or not -- but he stated he didn't want to talk and that he was dizzy. So at that time I called the fire department over to check him out.

3 RP 226-227. This was followed by an immediate objection from defendant's trial counsel. 3 RP 227. The jury was excused and there was a discussion about Officer Volk's answer. 3 RP 227-230. The State

offered to have the answer stricken. 3 RP 228. The Court gave a curative instruction that the jury will disregard any testimony that the defendant said that he did not want to talk and any inferences therefrom. 3 RP 230.

The case at bar is similar to the issue that arose in ***State v. Johnson***, 42 Wn. App. 425, 432, 712 P.2d 301, 305-06 (1985), where the Court concluded that the defendant's post arrest silence "was not used unfairly by the prosecutor to deprive the defendant of his due process right to a fair trial." In ***Johnson***, the defendant's post-arrest silence was revealed during the course of direct examination aimed at laying the foundation for admitting into evidence the money taken from defendant's person after his arrest. ***Johnson***, 42 Wn. App. at 431. The trial court in ***Johnson*** believed the testimony was innocuous and offered to instruct the jury to disregard the evidence (although the defendant declined to not have a curative instruction given) . *Id.* at 433. The statement was not brought up during closing. *Id.* In the present case, Officer Volk's statement was made in a similar fashion where her answer was made in reference to a question about her conversation with another officer, the trial court offered a curative instruction and the jury was instructed to disregard the evidence, thereby curing any error. Because the statement was stricken, it was not referenced in closing arguments. There was no prejudice in this case.

Therefore, the defendant has failed to demonstrate constitutional error or prejudice. The defendant's convictions should be affirmed.

b. Alleged Prosecutorial Error[3] in closing

The defendant also frames the prosecutor's comments in closing as a comment on the defendant's right to remain silent. BOA 13 - 15. The defendant then goes on to argue that these comments constitute misconduct. This is a mischaracterization of the prosecutor's argument as the defendant made certain spontaneous and unsolicited statements that the trial court ruled were admissible because they were not the product of custodial interrogation. 1 RP 73 - 74, CP 17 - 18, 20 - 21.[4] The

---

[3] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." ***State v. Fisher***, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g.,* ***State v. Fauci***, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); ***State v. Leutschaft***, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); ***Commonwealth v. Tedford***, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State urges this Court to use the same phrase in its opinions.

[4] The defendant does not assign any error to this ruling or the accompanying finding of facts and conclusions of law entered by the trial court. As they were unchallenged, they are verities on appeal. ***State v. Broadway***, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

challenged argument is referencing the defendant's statements that were admitted at trial. The prosecutor argued:

> What we have in this case is a person who the moment he realized he was caught did everything he could to avoid taking accountability. And who even when he had a chance to say something about it, the only thing he said was a prideful boast about how fast he actually was going, because he was concerned not --

5 RP 373. At this point, defendant's trial counsel objected. 5 RP 373. The trial court correctly sustained an objection regarding the statements. 5 RP 373. The prosecutor then reframed his argument:

> The only thing he said was that I'm sorry, you don't know what you're talking about. We were driving -- we were going 70 to 100 miles per hour.

5 RP 373. The prosecutor then concluded his closing argument. 5 RP 373. The defendant's trial counsel did not object to the State's re-phrased argument.

After the end of the prosecutor's closing argument, the defendant made a motion for a mistrial. 5 RP 373 - 374. The trial court sustained an objection because the statement was overbroad:

> And the statement does go beyond -- it's so broad that -- is why I sustained the objection -- it's so broad that it does go to suggesting that when he had a chance to speak all he did was say how fast he was going. Actually, that's not the actual facts in this case in the first place. They were self-serving statements, so we did not admit them into evidence.

5 RP 376. The trial court denied the defendant's motion for a mistrial, but gave a curative instruction reminding the jury that the lawyers' statements are not evidence. 5 RP 377, 380. The trial court did not believe that it was intentional conduct on the part of the State, but was a slip. Thus, rather than this issue being analyzed as a comment on silence, it should be analyzed for whether the trial court abused his discretion in denying the motion for a mistrial.[5]

An appellate court applies the abuse of discretion standard in reviewing a trial court's denial of a motion for mistrial. ***State v. Mak***, 105 Wn.2d 692, 701, 719, 718 P.2d 407, *cert. denied*, ***Mak v. Washington***, 479 U.S. 995, 107 S. Ct. 599, 93 L. Ed. 2d 599 (1986); ***State v. Gilcrist***, 91 Wn.2d 603, 613, 590 P.2d 809 (1979). An appellate court finds abuse only "when no reasonable judge would have reached the same conclusion." ***Sofie v. Fibreboard Corp.***, 112 Wn.2d 636, 667, 771 P.2d 711 (1989).

The trial court should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the

---

[5] Alternatively, to establish prosecutorial error during closing argument, the defendant bears the burden of demonstrating that the prosecutor's remarks were improper and that they prejudiced the defense. ***Sate v. Gregory***, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006) *overruled on other grounds by* ***State v. W.R., Jr.***, --- P.3d ---, 2014 WL 5490399 (2014). When defense counsel objects, the Court must evaluate the trial court's ruling for abuse of discretion. *Id.* Under either argument, the standard remains abuse of discretion.

defendant will be tried fairly. ***Mak***, 105 Wn.2d at 701. Only errors affecting the outcome of the trial will be deemed prejudicial. *Id.* In determining the effect of an irregularity, we examine (1) its seriousness; (2) whether it involved cumulative evidence; and (3) whether the trial court properly instructed the jury to disregard it. *Id.* In this case, the trial court deemed the statement a slip and properly instructed the jury to disregard it. The trial court's decision to not grant a mistrial was not an abuse of discretion.

If the Court chooses to analyze the issue as a claim of alleged prosecutorial error, the defendant must show first that the prosecutor's statements were improper, and second that the statements were prejudicial. ***State v. Warren***, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); ***State v. Yates***, 161 Wn.2d 714, 774, 168 P.3 359, *cert. denied*, 554 U.S. 922, 128 S. Ct. 2964, 171 L.3d.2d 893 (2008). There must be a substantial likelihood that the statements affected the jury. ***State v. Anderson***, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). The prosecutor's statements are not looked at in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions to the jury. ***Warren***, 165 Wn.2d at 28. When a judge gives a curative instruction, the error is cured as the jury is presumed to follow the court's instructions. *Id.*

If the prosecutor's statement is not objected to, then the defendant must show that the comments were so flagrant and ill-intentioned as to cause an enduring and resulting prejudice that could not have been cleared

by a curative instruction to the jury. ***State v. McKenzie***, 157 Wn.2d 44, 57, 134 P.3d 221 (2006).

In the present case, the defendant objected to the prosecutor's first statement. The trial court sustained the objection. The prosecutor rephrased his argument and no objection was made. At the conclusion of the prosecutor's closing, the defendant made a motion for a mistrial, which the court denied. The court gave a curative instruction to the jury. In looking at the totality of the arguments, the evidence and the issues in the case, this case hinged on whether the jury believed the defendant was the driver of the stolen vehicle, or was merely in the car (as the evidence showed that he was at least a person who was in the car). Two witnesses identified him as the driver. 3 RP 139, 3 RP 211. The jury heard the defendant's statements of how fast the car was driving and in these statements, the defendant used the ambiguous word, "we" in his statement. The defendant pointed this out in closing argument. 5 RP 398. The prosecutor's statement, while objectionable, was not so prejudicial that it could not be cured by instruction and did not affect the jury's verdict given the witness's identification of the defendant being the driver of the car.

Therefore, there was no prejudice and the defendant's convictions should be affirmed.

3. DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO ADMIT THE DEFENDANT'S ENTIRE STATEMENT PURSUANT TO THE RULE OF COMPLETENESS.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in ***Strickland v. Washington***, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also* ***State v. Thomas***, 109 Wn.2d 222, 743 P.2d 816 (1987). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. ***State v. Carpenter***, 52 Wn. App. 680, 684, 763 P.2d 455 (1988). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." ***State v. McFarland***, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also* ***Strickland***, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. ***State v. Brett***, 126 Wn.2d

136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); ***Thomas***, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. ***McFarland***, 127 Wn.2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." ***Strickland***, 466 U.S. at 694. Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation.

Mickens v. Taylor, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489.

A defendant must demonstrate both prongs of the ***Strickland*** test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

a. Counsel's performance was not deficient.

The defendant alleges his trial counsel was deficient for failing to argue that the defendant's entire statement to the police, which included the statements that he was not the driver, that he was riding in the back seat of the car, that he did not know the driver, and that he had just been picked up, should have been presented to the jury under the doctrine of completeness and ER 106. These statements were presented by the State during motions in limine. 1 RP 10. Officer Volk also testified to them during the CrR 3.5 motion. 1 RP 40. Her report had a direct quote from the defendant, "With all due respect, Officer Volk, you don't know what your' talking about. We were going between 70 and 100 miles per hour when we crashed." 1 RP 40. Officer Volk also testified

> And then he went on to add -- this is not an exact quote. This was just conversation putting him in the car -- that he was not the driver of the vehicle; that he was the backseat passenger, and that he'd been picked up at the 7-Eleven located at 56th and McKinley in the above-listed stolen vehicle.
>
> He said he didn't know who the driver was, but he said there were only three people inside the vehicle. He declined to say who the other people were.

1 RP 40-41. The trial court excluded these statements pursuant to ER 801, ***State v. Finch***, 137 Wn.2d 792, 975 P.2d 967 (1999), and ***State v. Pavlik***, 165 Wn. App. 645, 268 P.3d 986 (2011).

First, the defendant's statement to police was not a formal written or recorded statement. ER 106 does not apply to testimony, it only applies to a written or recorded statement. ***State v. Perez***, 139, Wn. App. 522, 531, 161 P.3d 461 (2007). As this was testimony by Officer Volk at trial, not a written or recorded statement, ER 106 does not apply and the defendant's argument fails.

Second, the record indicates that the defendant's trial counsel believed the defendant's girlfriend, Brianna Cook, who was a passenger in the car, would testify that the defendant was not the driver. The defendant's trial counsel believed Cook would be called as a witness by either the State or defense. 1 RP 26. Cook was present at the trial as the State expressed concern that she was looking into the courtroom and possibly talking with courtroom spectators. 3 RP 115. Counsel believed Cook would testify at trial. 4 RP 263. In addition, defense believed that

Cook's friend/roommate, Jeannette Rensel, would testify that Cook was picked up by a man named Leonardo Martinez Ledesma, which would support Cook's testimony that the defendant was not the driver. 4 RP 262. The record is silent on why Cook or Rensel did not testify, but the record shows counsel had a legitimate trial strategy to admit testimony that the defendant was not the driver, which was his strategy for the case.

Third, this alleged instance of ineffective assistance of counsel is the only instance that the defendant's appellate brief singles out as being potential ineffective. The defendant's trial counsel appears to have made objections, made a motion for a mistrial, interviewed witnesses, filed a witness list, proposed jury instructions, etc. Even assuming this was a mistake by trial counsel, it is a singular mistake looked at in hindsight by the defendant. This single instance does not meet the ***Strickland*** test, especially as discussed in ***State v. Carpenter***, 52 Wn. App. 680, 763 P.2d 455 (1988), that counsel was inefficient to the point of the trial being an unfair adversarial process.

b. No prejudice can be presumed to result from the decision not to try to admit defendant's entire statement.

For a finding of ineffective assistance of counsel, the defendant must demonstrate prejudice. To demonstrate prejudice, the defendant must show that the outcome of the trial would probably have been different. ***State v. Brett***, 126 Wn.2d 136, 199, 892 P.2d 29 (1995). Two witnesses

testified that the defendant was the driver. 3 RP 139, 3 RP 211. Even had the court admitted the defendant's self-serving statements that he was not the driver, the outcome of the trial would probably not have been different.

Therefore, there was no prejudice, the defendant's trial counsel was not ineffective, and the defendant's convictions should be affirmed.

4. DEFENDANT WAIVED THE ISSUE REGARDING HIS "TO CONVICT" JURY INSTRUCTION BY FAILING TO OBJECT AT TRIAL AND FAILS TO DEMONSTRATE THAT THE ISSUE RISES TO MANIFEST ERROR OF CONSTITUTIONAL MAGNITUDE.

The defendant did not object to any of the jury instructions at trial. 5 RP 356. Pursuant to RAP 2.5(1), the defendant cannot raise an error for the first time on appeal unless the appellant demonstrates that the error is manifest and is truly of constitutional dimension. ***State v. Kirkman*** 159 Wn.2d 918, 926, 155 P.3d 125 (2007). To be manifest as required by RAP 2.5(a)(3), a showing of actual prejudice is required. *Id.* at 935. There must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences apparent on the record that should have been reasonably obvious to the trial court. *Id.* The Court will not assume the alleged error is of constitutional magnitude. ***State v. O'Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be

misleading, and permit the defendant to present his theory of the case. *Id.* at 105. Only if the defendant can demonstrate that the error is both constitutional and manifest, does the burden shift to the State to prove that the error was harmless. ***State v. Bertrand***, 165 Wn. App. 393, 401, 267 P.3d 511 (2011). The defendant fails to show that this error is constitutional or manifest and the Court should decline to address this issue.

If the Court does choose to address the issue, the defendant is still incorrect in his argument. The defendant argues that under the "to convict" jury instruction in this case (*see* Appendix A), he could be convicted of disposing of the vehicle without possessing it. This argument is illogical as he would necessarily have had to possess it, even if for a brief time, to dispose of it. This topic is briefed more fully below as this also relates to the alternative means of committing the crime of possession of a stolen vehicle.

The defendant does not demonstrate that the "to convict" instruction is erroneous, let alone an error rising to the level of constitutional magnitude. The instruction told the jury the applicable law, was not misleading and permitted the defendant to present his theory of the case, which was that he was not the driver. Appendix A; CP 38.

Even if the defendant could show that the error is constitutional and manifest, the error is harmless. Two witnesses identified the defendant as the driver of the stolen vehicle. 3 RP 139; 3 RP 211. The

record demonstrates that the defendant was in possession of the stolen vehicle, not merely that he disposed of it.

Therefore there was no error in the to-convict instruction and the defendant's conviction should be affirmed.

5. THERE WAS SUBSTANTIAL EVIDENCE SUPPORTING ALL OF THE ALTERNATIVE MEANS IN THE "TO CONVICT" JURY INSTRUCTION.

Criminal defendants have a right to a unanimous jury verdict. Const. art. 1, § 21; ***State v. Goldberg***, 149 Wn.2d 888, 892-93, 72 P.3d 1083 (2003). A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. ***State v. Stephens***, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means, ***State v. Arndt***, 87 Wn.2d 374, 553 P.2d 1328 (1976). "An alternative means crime is one 'that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.'" ***State v. Peterson***, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (*quoting* ***State v. Smith***, 159 Wn.2d 778, 784 P.3d 873 (2007)). Express unanimity as to an alternate means of committing a crime is unnecessary if sufficient evidence exists to support each of the alternate means presented to the jury. ***State v. Howard***, 127 Wn. App. 862, 872, 113 P.3d 511, 516 (2005).

In the present case, the "to convict" instruction for the crime of possessing a stolen motor vehicle included the alternative means of "received, retained, possessed, or disposed of a stolen vehicle." Appendix A; CP 38.[6] As long as there is sufficient evidence to support each of these alternatives, then jury unanimity as to a particular means is unnecessary. The evidence is sufficient to show that the defendant received, retained and possessed the vehicle as the driver of the car. Officer Waters saw the defendant driving the vehicle. 3 RP 139. In addition, Kristi Sell indicated that the booking photo of the defendant was the person that looked like the driver. 3 RP 211. This is sufficient to support the means of possession. In order to be in possession of it, the defendant would have necessarily received and retained it. *See e.g.*, ***State v. Lillard***, 122 Wn. App. 422, 435, 93 P.3d 969 (2004) ("Lillard could not possess the stolen property without receiving it. ... [A] juror could not reasonably conclude that Lillard retained the property without possessing or receiving it.").

With regard to the defendant disposing of the car, it is clear that after he was seen as the driver, he crashed the car and then fled the scene of the accident. The term "dispose" was not defined by the court's instructions to the jury and is not defined by statute, so the common meaning applies. The Court may look to the plain meaning of the term as

---

[6] This instruction does not include the alternative means of "conceal" also at issue in ***State v. Hayes***, 164 Wn. App. 459, 480, 262 P.3d 538 (2011). In addition, the instructions in ***Hayes*** included a definition of "dispose," which is not present in this case.

reflected in a dictionary definition. ***In re Det. of Danforth***, 173 Wn.2d 59, 67, 264 P.3d 783 (2011). Webster's Third New International Dictionary defines "dispose of" as:

> 1 a: to place, distribute, or arrange esp. in an orderly or systematic way (as according to a pattern) ... b: to apportion or allot (as to particular purposes) freely or as one sees fit ... 2 a: to transfer into new hands or to the control of someone else (as by selling or bargaining away): relinquish, bestow ... b(1): **to get rid of: throw away: discard ... (2): to treat or handle (something) with the result of finishing or finishing with ...: COMPLETE, DISPATCH ... C: DESTROY**

Webster's Third New International Dictionary 654 (2002)(emphasis added.).

The defendant's crashing of and subsequent fleeing of the car constitutes sufficient evidence of him "disposing of" the car in this case. The defendant concedes this exact point in an earlier portion of his brief - "The jury could have found that Mr. Hernandez disposed of the vehicle by running from it after the accident even if did not possess it by driving it." BOA, 26.

The record supports this because Officer Lopez Sanchez saw the defendant and another male and female running northbound through an alley. 4 RP 316. Officer Lopez Sanchez noted the defendant appeared extremely exhausted and appeared injured. 4 RP 316. Officer Lopez Sanchez directed Officer Volk to detain the defendant. 3 RP 224.

Therefore the defendant's conviction should be affirmed.

6. THE DEFENDANT WAIVED THE ISSUE OF THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS BY FAILING TO RAISE THIS ISSUE IN THE COURT BELOW.

Arguments not raised in the trial court are generally not considered on appeal. ***State v. Blazina***, 174 Wn. App. 906, 301 P.3d 492 (2013); ***State v. Riley***, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). The State has previously briefed the standard for raising an issue on appeal in section three above. The defendant did not object to the imposition of any of the legal financial obligations (LFOs), at sentencing and makes no showing that the issue may be raised for the first time here. The defendant now challenges the $1,500.00[7] Court-Appointed Attorney Fees and Defense Costs. The Court should decline to allow the defendant to raise this issue for the first time on appeal. ***Blazina***, 174 Wn. App. at 906. In addition, because there is no record to support defendant's claimed inability to pay LFOs, the defendant has not shown prejudice and the claimed error cannot be manifest. *See* ***McFarland***, 127 Wn.2d at 333.

Therefore, Defendant may not raise this issue here, and the trial court's imposition of LFOs should be affirmed.

---

[7] The defendant mistakenly lists the amount as $1800.00, but the amount is $1,500.00 based on the total amount. There appears to be an initial that makes the 5 appear to be an 8. The defendant does not challenge any of the other amounts ordered by the trial court.

a. Assuming defendant did not waive the issue of the imposition of legal financial obligations, that issue is not ripe for review.

The time to challenge the imposition of LFOs is when the State seeks to collect the obligation. ***State v. Smits***, 152 Wn. App. 514, 523–524, 216 P.3d 1097 (2009). *See also* ***State v. Baldwin***, 63 Wn. App. 303, 310, 818 P.2d 1116 (1991) (holding that "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation.").

"The party presenting an issue for review has the burden of providing an adequate record to establish such error[.]" ***State v. Sisouvanh***, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); *See also* RAP 9.2(b). "If the appellant fails to meet this burden, the trial court[']s decision stands." ***State v. Tracy***, 128 Wn. App. 388, 394–395, 1215 P.3d 381 (2005).

Here, there is no evidence that the State has sought collection of defendant's LFOs. The issue is thus not ripe for review.

b. Assuming the issue of the imposition of legal financial obligations was not waived and is ripe, the trial court properly imposed legal financial obligations upon defendant after he was convicted.

Courts may require defendants to pay court costs and other assessments associated with bringing the case to trial pursuant to RCW 10.01.160. However,

> (3) The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them...
>
> (4) A defendant who has been ordered to pay costs and who is not in contumacious default in the payment thereof may at any time petition the sentencing court for remission of the payment of costs...

RCW 10.01.160 (emphasis added). In light of such safeguards, the judiciary is not required to provide the added protection of formal findings to support the assessment of court costs. ***State v. Curry***, 62 Wn. App. 676, 680, 814 P.2d 1252, 1254 (1991). *See also* ***State v. Eisenman***, 62 Wn. App. 640, 810 P.2d 55 (1991); ***State v. Suttle***, 61 Wn. App. 703, 812 P.2d 119 (1991) (in both cases, financial obligations were upheld in the absence of formal findings of fact).

A defendant's poverty does not immunize him from punishment or the requirement to pay legal financial obligations. ***State v. Blank***, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (*quoting* ***State v. Curry***, 118 Wn.2d 911, 918, 829 P.2d 166 (1992)). While a court may not incarcerate an offender who truly cannot pay LFOs, every offender must make a good faith effort to satisfy these obligations by seeking employment, borrowing money, or otherwise legally acquiring resources to pay their court ordered financial obligations. ***State v. Woodward***, 116 Wn. App. 697, 703-704, P.3d 530 (2003). Furthermore, defendants who claim indigency must do more than plead poverty in general terms when seeking remission or modification of LFOs. *Id.* at 704.

The Court reviews a trial court's determination of a defendant's resources and ability to pay under the clearly erroneous standard. ***State v. Baldwin***, 63 Wn. App. 303, 312, 818 P.2d 1116, 1120 (1991) (reasoning that the erroneous standard applies because defendant's ability to pay and financial status are essentially factual findings); ***State v. Calvin,*** 316 P.3d 496, 500 (Wash. Ct. App. 2013), *as amended on reconsideration* (Oct. 22, 2013). "The inquiry is whether the court's determination is supported by the record." ***Baldwin***, 63 Wn. App at 312, fn 27.

In the present case, the defendant's trial counsel told the court that he was able to start working, has a good work ethic and enjoys work. 6[8] RP 428. Prior to his sentence, the defendant was working. 6 RP 429. The defendant's trial counsel also told the court that the defendant was employable and that he was a good worker. 6 RP 431. The record shows that the defendant will likely have the future ability to work and to pay off the LFOs.

Therefore, the court's order imposing LFOs was not clearly erroneous and should be affirmed.

D. CONCLUSION.

The defendant has not shown his trial was prejudiced by Officer Volk's remark. Nor has the defendant shown prejudice by the prosecutor's

[8] Verbatim Report of Proceedings Volume 6 is dated March 14, 2014.

statement in closing. The trial court properly gave curative instructions to cure any issues caused by these statements.

The defendant has not shown his trial counsel was ineffective by not moving to submit the defendant's entire statement to police under the doctrine of completeness as this was not a recorded or written statement, but merely testimony. Even if there was error, it was harmless error as two witness testified that the defendant was the driver of the stolen car in contradiction to his statement that he was not.

The defendant waived the issue regarding his jury instructions by failing to object at trial. He does not demonstrate that the issue rises to a manifest error of constitutional magnitude. Even if there was error, it was harmless error as two witness testified that the defendant was the driver of the stolen car in contradiction to his statement that he was not.

The State proved all of the alternative means of possession of a stolen vehicle by substantial evidence.

The information charging the defendant with possession of a stolen vehicle included all of the essential elements in it. A description of the stolen property is not an essential element.

The defendant failed to raise any issue with regard to legal financial obligations at trial. In addition, this issue is not ripe for review as the State has not attempted to collect on his legal financial obligations.

Lastly, the trial court properly set his legal financial obligations because the defendant was gainfully employed at the time of his sentencing.

The defendant's convictions should be affirmed.

DATED: November 24, 2014.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Brent Hyer by K. Proctor 14961
BRENT J. HYER
Deputy Prosecuting Attorney
WSB # 33338

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11-24-14 Theresa Kal
Date Signature

APPENDIX "A"

INSTRUCTION NO. 6

To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 24, 2013, the defendant knowingly received, retained, possessed, or disposed of a stolen motor vehicle;

(2) That the defendant acted with knowledge that the motor vehicle had been stolen;

(3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

PIERCE COUNTY PROSECUTOR

November 25, 2014 - 10:15 AM

Transmittal Letter

Document Uploaded: 460939-Respondent's Brief.pdf

Case Name: State v. Hernandez

Court of Appeals Case Number: 46093-9

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Therese M Kahn - Email: tnichol@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

backlundmistry@gmail.com