

COURT OF APPEALS
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No. 38330-6-II

STATE OF WASHINGTON
BY *VSC*

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

STATE OF WASHINGTON,

Respondent,

v.

TYRONE D. RUDOLPH,

Appellant.

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

The Honorable Christine Pomeroy, Judge
Cause No. 08-1-00745-0

BRIEF OF RESPONDENT

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08-1-1111

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Whether the evidence that was presented supported a jury instruction of the lesser included offense of trafficking in stolen property in the second degree.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case.

C. ARGUMENT.

The trial court did not err, because the second-prong of the Workman test was not satisfied, there was no evidence supporting an inference that the lesser offense was committed. The overwhelming evidence presented allowed for the jury to return a verdict of guilty.

The difference between the charges of trafficking in stolen property in the first degree¹, and trafficking in stolen property in the second degree², is the mental state required. For the first degree charge a mental state of knowledge is required, whereas for the second degree charge the lesser mental state of reckless is required.

¹ RCW 9A.82.050

(1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

(2) Trafficking in stolen property in the first degree is a class B felony.

² RCW 9A.82.055

(1) A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree.

(2) Trafficking in stolen property in the second degree is a class C felony.

In deciding whether a lesser included jury instruction is appropriate, a court applies the two-pronged test from State v. Workman, 90 Wn.2d 443, 447-448, 584 P.2d 382 (1978). The two requirements from Workman that need to be met when looking at a lesser included offense (RCW 10.61.006³) instruction are (1) each of the elements of the lesser offense must be a necessary element of the offense charged, and (2), the evidence in the case must support an inference that the lesser crime was committed. In the case at hand, the first-prong was satisfied, whereas the second-prong was not.

1. First-prong of the Workman test.

The first-prong is referred to as the legal prong. Each of the elements of the lesser offense must be a necessary element of the charged offense. This guarantees that the defendant has notice of the lesser included charge. Workman, *supra*, at 447-448.

Trafficking in stolen property in the first degree requires the defendant act with knowledge, whereas in trafficking in stolen property in the second degree, the lesser mental state of reckless is required. “[W]hen recklessness suffices to establish an element,

³ RCW 10.61.006

In all other cases the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.

such element also is established if a person acts intentionally or knowingly.” RCW 9A.08.010(2)⁴. Because the second degree charge has a lower standard, if the higher standard of knowing is found, then the element of reckless would also be satisfied.

Notice is another requirement that is incorporated in the first-prong of the Workman test. The test allows both parties to argue their theories of the case, and the lesser offense analysis must be applicable to the offense that was charged, consistent with the provision of Wash. Const. Art. 1, § 22, requiring that an accused person be clearly informed of the nature and cause of the charge against him or her. Notification is adequate so that the person may be found guilty, under this section of the uncharged crime as a lesser included offense, only when all of the elements of the included offense are necessary and essential elements of a single specific offense that was charged. State v. East, 3 Wn. App. 128, 474 P.2d 582 (1970), *review denied*, 78 Wn.2d 995 (1970).

⁴ RCW 9A.08.010(2)

Substitutes for Criminal Negligence, Recklessness, and Knowledge. When a statute provides that criminal negligence suffices to establish an element of an offense, such element also is established if a person acts intentionally, knowingly, or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts intentionally or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.

Because recklessness can be incorporated into knowledge, and because the lesser offense uses the same analysis as the charged offense, the first-prong of the Workman test was satisfied.

2. Second-prong of the Workman test.

The second-prong of the test is the factual prong, which “incorporates the rule that each side may have instructions embodying its theory of the case if there is evidence to support that theory.” State v. Berlin, 133 Wn.2d 541, 546, 947 P.2d 700, 702 (1997). In Berlin, the defendant was charged with second degree murder, and felony murder as a lesser included offense. Id. at 549-553. The court held that, “[i]t would be error to give an instruction not supported by the evidence.” Id. at 546. The court stated further that “some evidence must be presented which affirmatively establishes the defendant’s theory on the lesser included offense before an instruction will be given.” Id.

Other courts have considered the amount of evidence that must be submitted for a lesser included offense jury instruction. In State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000), the defendant, charged with first degree assault, sought a lesser included offense instruction for assault in the second degree. The court there held that “when *substantial* evidence in the record

supports a rational inference” then the second-prong is met and the instruction of a lesser included offense can be included. Id., at 461, (emphasis added). Because the defense in Fernandez-Medina presented an affirmative defense with substantial evidence, including the defendant’s testimony and the testimony of two forensic experts, the court found that there was substantial evidence presented to support the defense’s theory of the case, and allowed the lesser included offense instruction. Id. at 456.

In State v. Snider, 70 Wn.2d 326, 422 P.2d 816 (1967), the defendant was charged with robbery, and sought an instruction for the lesser included crime of larceny. The Court stated that a defendant must do more than make the request for the instruction; “[t]o justify such an instruction there must be some basis in the evidence produced at trial positively inferring that the lesser crime was committed and upon which the jury could make a finding as to the lesser included offense.” Id. In Snider, the defense did not affirmatively put forward a theory that would have allowed for the jury to find for a lesser included offense. The judgment was affirmed without the instruction. “[U]nder these facts, the defendant was either guilty of robbery or not guilty.” Id. at 327. Where there is no evidence presented at trial that supports a lesser included

offense, the trial court should disregard the proposed instruction. Id.

Similarly, in State v. Pettus, 89 Wn. App. 688, 698, 951 P.2d 284 (1998), where the defendant, charged with first degree murder, sought a lesser included offense instruction for manslaughter, the court refused on the basis that the second-prong of Workman was not satisfied, “the evidence indicates either that Pettus intended to shoot Cady’s tires, not to kill him, or that Pettus committed a premeditated murder.” There was no evidence that supported the theory of manslaughter on the record. “The mere possibility that the jury might disbelieve the State’s evidence would not justify giving a manslaughter instruction.” Id. at 700.

Similar to Berlin and Fernandez-Medina, the defense in Rudolph’s case presented no evidence toward his theory of the case supporting a lesser included crime. The defendant is not required to put on any evidence. The only testimony to which he cites in support of his argument is that of Erica Greene, the driver of the car, who stated that her friend Kristen Eixenberger told Greene that Raul Espinosa (Eixenberger’s boyfriend), and Espinosa’s friend Rudolph, needed “a ride because their friends had given them some things, and they didn’t drive at the time, so they needed a

ride.” [RP 91]. The explanation that the items may have been given to Rudolph was not further explored in cross examination, nor did any other witnesses testify that the items were a gift to Rudolph and his friend. This third-layer hearsay is so tenuous as to carry no weight at all, and certainly not enough to justify a lesser included instruction for second degree trafficking.

LaDonna Gehlhaar, the neighbor to the victim, testified that she witnessed items that looked like a wall mount TV, speakers, and other items loaded into the trunk of Greene’s car. [RP 72] There was no theory presented by the defense that the defendant could have recklessly taken the items out of the greenbelt. Further, there wasn’t any theory of recklessness presented when Anita Bingham testified that the back door had been pried open and a wall mount TV, speakers, stereo, and DVD player were stolen from her house. [RP 30] Nor was there a theory presented about recklessness when Bryan Henry, the investigating officer, Paul Lower, another officer, Kevin Briley, the pawn store employee, or Eixenberger testified.

The court in Berlin, stated that “[i]t is not enough that the jury might simply disbelieve the State’s evidence. Instead, some evidence must be presented which affirmatively establishes the

defendant's theory on the lesser included offense before an instruction will be given." Berlin, *supra*, at 546. (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990)). Further, in Fernandez-Medina, the court made clear that "[o]ur case law is clear, however, that the evidence must affirmatively establish the defendant's theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt." Fernandez-Medina, *supra*, at 456. In this case there was no evidence presented which would lead to a theory dependant on a reckless act by Rudolph. While the defense may not be required to present any evidence, as stated in Berlin, the defense cannot expect a lesser included offense instruction simply because the jury may choose to disbelieve the evidence.

Greene made a single statement that they were picking up some of Rudolph's property; it was the only inconsistency among all of the other evidence. RP 91. This statement was later contradicted by Greene's friend, Eixenberger. [RP 134-35] There is no evidence in the record, nor does appellant point to any evidence, supporting the slightest inference that Rudolph acted recklessly.

There are only two possible choices for the jury in this case. First, is for the jury to find that Rudolph was retrieving items that were not his, but were the same items that were stolen from the Bingham's house, and that it was Rudolph, who pawned the wall mount TV, using his Washington driver's license, and social security number, which would result in trafficking in stolen goods in the first degree.

On the other hand, if the jury had chosen to believe the statement in Greene's testimony that the items being picked up were in fact Rudolph's property, then the items Rudolph retrieved from the woods would not have been stolen at all, but would have belonged to him. There would have been no possibility of committing the lesser charge of trafficking in stolen goods in the second degree, because the items would not have been stolen. The only possible alternative theory that could be established by Greene's testimony is that the items were not stolen at all, but belonged to Rudolph. Greene's testimony does not lead to the theory that Rudolph mistakenly took stolen goods. As stated in Berlin, "if it is possible to commit the greater offense without having committed the lesser offense the latter is not an included crime." Berlin, *supra*, at 546. Because the theory based on Greene's

statement makes it impossible to commit the lesser offense it would be improper to include a lesser included offense instruction in this case.

Similar to the situation in Snider, the only two options here were guilty or not guilty. Rudolph was either guilty of trafficking in stolen goods in the first degree, as the jury found, or he was not guilty at all. Because there is no possibility that Rudolph could have committed the lesser crime of trafficking in stolen goods in the second degree, the trial court would have erred to have included the lesser included offense instruction.

D. CONCLUSION.

There was no evidence presented at trial by either the defense or the State that this was a reckless act. It would have been error for the court to have instructed on the charge of trafficking in stolen property in the second degree. The second-prong of the Workman test fails. Therefore the trial court did not err, and the State respectfully asks this court to affirm Rudolph's conviction.

Respectfully submitted this 7th day of July, 2009 .



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 8 day of July, 2009, at Olympia, Washington.



CAROLINE M. JONES