

No. 44287-6-II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

RYAN WESTBROOK, APPELLANT

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Appeal from the Superior Court of Mason County  
The Honorable Toni A. Sheldon, Judge

No. 12-1-00022-1

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**BRIEF OF RESPONDENT**

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A. INTRODUCTION

In this case the State charged the defendant, Ryan Westbrook, with one count of theft in the second degree and with three counts of trafficking stolen property in the first degree. The State also alleged that these crimes were facilitated by a special relationship or position of trust that Westbrook shared with the victims.

Westbrook and his girlfriend were apparently homeless; so, the victims offered to let them stay temporarily at the victims' home. While residing with the victims, Westbrook and his girlfriend stole personal possessions from the home, and Westbrook pawned them at pawnshops.

When presenting the charges of trafficking in stolen property to the jury, the to-convict jury instructions referred to "stolen property: to wit...", followed by a description of the property relevant to each separate count. At the conclusion of the case, the jury was presented with a single special verdict form and asked to answer whether Westbrook abused his position of trust to facilitate any on or all of the charged crimes.

B. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. When giving to-convict instructions in regard to each of three counts of trafficking stolen property, the court referred to the relevant property as stolen property and described the property with a to-wit description of the property. Did the court's instruction constitute a comment on the evidence, and if so, does the error require a new trial?
2. Was Westbrook's trial counsel ineffective because he proposed jury instructions similar to the ones used by the trial court?
3. After the jury returned a special verdict finding, as an aggravating circumstance, that Westbrook used a position of trust to facilitate the crime, but where the verdict form did not distinguish to which one or more of the four charged crimes that the finding should apply, did the trial court err by applying the aggravating circumstance to all four crimes for which the jury convicted Westbrook?

C. FACTS

For the purposes of consideration of the issues raised by Westbrook in this appeal, the State accepts Westbrook's statement of

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facts, but the State supplements with additional facts where needed to develop the State's arguments, below. RAP 10.3(b).

D. ARGUMENT

1. When giving to-convict instructions in regard to each of the three counts of trafficking stolen property, the court referred to the relevant property as "stolen property" and described the property with a to-wit description of the property. Did the court's instructions constitute a comment on the evidence, and if so, does the error require a new trial?

The elements instructions in regard to each of the three counts of trafficking in stolen property in the first degree (as charged in counts II, III, and IV of the instant case) each contained "to-wit" language to describe the property trafficked in each count, so as to distinguish that count from the other counts, as follows:

To convict the defendant of the crime of trafficking in stolen property in the first degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and/or between February 1, 2011 and March 19, 2011 the defendant knowingly trafficked in stolen property (to wit: a gold high school ring); and....

CP 101 (Jury Instruction No. 17).

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To convict the defendant of the crime of trafficking in stolen property in the first degree, as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and/or between February 1, 2011 and April 2, 2011 the defendant knowingly trafficked in stolen property (to wit: a ladies diamond set wedding ring); and....

CP 102 (Jury Instruction No. 18).

To convict the defendant of the crime of trafficking in stolen property in the first degree, as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and/or between March 25, 2011 and March 31, 2011 the defendant knowingly trafficked in stolen property (to wit: copper, and/or metal, and/or an anvil); and....

CP 103 (Jury Instruction No. 19).

Although he did not object to these instructions at the trial court, Westbrook now contends, for the first time on appeal, that these instructions prevented him from receiving a fair trial because the instructions each unconstitutionally commented on the evidence in violation of Washington Constitution article 4, section 16. Brief of Appellant 4-8. At trial, Westbrook proposed alternative instructions for counts II and III, but did not propose any instruction for count IV. CP 131 (count II), CP 134 (count III); RP 204-05.

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For count II, Westbrook proposed an element instruction similar to the trial court's instruction, except that Westbrook slightly altered the description of the property, and added a separate knowledge element, as follows:

- (1) That on or about a period between February 1, 2011 and March 19, 2011, the defendant knowingly trafficked in stolen property in the form of a gold high school class ring; and
- (2) That the defendant acted with knowledge that the property had been stolen; and....

CP 131 (Defendant's Proposed Instructions).

Westbrook made similar alterations to his proposed elements instruction for count III, as follows:

- 1) That on or about a period between February 1, 2011 and April 2, 2011, the defendant knowingly trafficked in stolen property in the form of a ladies diamond set wedding ring;
- 2) That the defendant acted with knowledge that the property had been stolen; and....

CP 134 (Defendant's Proposed Instructions).

The court and parties compared and discussed the State's and Westbrook's "to convict instructions" before the court decided which versions to use. RP 204-05. Westbrook expressed a preference for his proposed instructions because his included knowledge as a separate

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element, but there was no dispute or objection about the description of the trafficked property as it pertained to each count or instruction. RP 204-05, 221.

“While a defendant on appeal is ordinarily limited to specific objections raised before the trial court, he can, for the first time on appeal, argue that an instruction was an improper comment on the evidence.” *State v. Tili*, 139 Wn.2d 107, 127, 985 P.2d 365 (1999).

Article IV, section 16 of the Washington Constitution prohibits judges from instructing juries on questions of fact and from expressing or implying that a fact exists as a matter of law. *State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006). Whether a jury instruction is a comment on the evidence is reviewed de novo and is considered in light of the jury instructions as a whole. *Id.* If an instruction is a comment on the evidence, it is presumed to be prejudicial, and unless the record is clear that no prejudice could have resulted, the burden is on the State to show the absence of prejudice. *Id.*

The instructions in *State v. Levy*, 156 Wn.2d 709, 726-27, 132 P.3d 1076 (2006), were similar to the instructions in the instant case because the instructions “named the type of personal property allegedly stolen, the

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specific address where the offense allegedly occurred, the specific victims involved, and the two weapons allegedly used. *Id.* at 726. The Court in *Levy* reasoned that:

Even if we assumed that all of those facts were judicial comments, we do not believe that prejudice resulted. No one could realistically conclude that a revolver is *not* a deadly weapon, an apartment is *not* a building, a specifically named person is *not* someone other than the defendant, and jewelry is *not* personal property.

*Id.* at 726-27. Thus, the *Levy* Court's reasoning in upholding the instructions was that no prejudice occurred from the instructions because all guns are dangerous, and all jewelry is personal property, etc., and therefore a comment on the evidence that said so is not prejudicial. *Id.* In the instant case, however, the language that Westbrook challenges is the language describing certain property as stolen property. While it is mostly irrefutable that all jewelry is personal property, it is not always irrefutably true that all jewelry is stolen property.

The case of *State v. Becker*, 132 Wn.2d 54, 935 P.2d 1321 (1997), which is discussed by the Court in its opinion in *State v. Jackman*, 156 Wn.2d 736, 744, 132 P.3d 136 (2006), involved jury instructions where the underlying charge was that the defendant had sold illegal drugs within 1000 feet of a school. *Becker* at 57. The jury in *Becker* was asked to

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answer a special interrogatory that asked whether the defendants sold drugs “within 1000 feet of the perimeter of school grounds, to-wit: Youth Employment Education Program School at the time of the commission of the crime?” *Id.* at 64.

Discussing *Becker*, the Court in *Jackman* wrote that:

In *Becker*, the fundamental basis for the charge was the fact that drugs were being sold *near a school*. *Becker*, 132 Wash.2d at 58, 935 P.2d 1321. If the State could not prove that the youth program was a school, it had no case. *Id.* at 63, 935 P.2d 1321. We held that the explicit reference to the program as a school removed that fact from the jury's consideration. *Id.* at 66, 935 P.2d 1321.

*State v. Jackman*, 156 Wn.2d at 744.

Similarly, the defendant in *Jackman* was charged with several sex crimes that were committed against underage boys, and the fact that the boys were underage was an element of the crimes alleged by the State. *Jackman* at 740-41. At trial, the jury instructions identified the victims by their initials and dates of birth. *Id.* Although the dates of birth were not in dispute, the Court held that the “jury instructions in this case were judicial comments on the evidence because they allowed the jury to infer that the victims' birth dates had been proved by the State.” *Id.* at 744. Because the jury instructions took the factual question of the victim's ages from the jury and constituted a judicial comment on the evidence, the *Jackman*

Court held that the “record does not affirmatively show that no prejudice could have resulted.” *Id.* at 745. Therefore, the Court reversed the conviction and remanded for a new trial. *Id.*

Where the instructions as a whole correctly instruct the jury, however, an instruction that might otherwise appear to treat a fact as presumptively proved may nevertheless lead to a finding that no prejudice could have resulted. *See, State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006) (jury instructions to be considered as a whole). Where other instructions correctly define the terms described in the to-wit language of an elements instruction, the court may find that the record shows that no prejudice has occurred even if the to-wit instruction is technically a comment on the evidence. *State v. Levy*, 156 Wn. 2d 709, 727, 132 P.3d 1076 (2006) (discussing *State v. Akers*, 88 Wn. App. 891, 898, 946 P.2d 1222 (1997), *aff'd*, 136 Wn.2d 641, 965 P.2d 1078 (1998), wherein “a ‘to-wit’ reference to a knife in a deadly weapon instruction did not instruct the jury that a knife *is a deadly weapon* where the jury is properly instructed on the definition of a deadly weapon.”).

The jury instructions at issue in the instant case referred to certain property as “stolen property” even though the fact that the property was

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stolen was a fact that the state was required to prove beyond a reasonable doubt in order to prove the offense of trafficking in stolen property. CP 101-03; RCW 9A.82.050. Any remark that has the potential effect, even implicitly, of suggesting that the jury need not consider an element of an offense could qualify as judicial comment. *Levy* at 721.

The jury in the instant case was not instructed in regard to the definition of the term “stolen property.” CP 82-115 (Court’s Instructions to Jury). Nor was the jury instructed in a separate instruction that it must independently determine whether the property alleged by the State to have been trafficked by Westbrook was, beyond a reasonable doubt, stolen property. *Id.* But the jury was instructed, by Instruction No. 3, that each element of each offense must be proved beyond a reasonable doubt. CP 87.

In regard to the crimes of conviction (trafficking in stolen property in the first degree), the jury was also instructed that in order to find Westbrook guilty of trafficking in stolen property it must find that he *knowingly* trafficked in *stolen* property. CP 98, 101-03 (Jury Instructions 14, 17, 18, and 19). Thus, to find Westbrook guilty, the jury had to independently find beyond a reasonable doubt that Westbrook *knew* that

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the property he trafficked was stolen. *Id.* The State asserts that this finding by the jury shows that the court's comment on the evidence was redundant and that the jury's finding, that Westbrook knew the property was stolen, shows that the court's comment on the evidence was not prejudicial. *See, e.g., State v. Killingsworth*, 166 Wn. App. 283, 289, 269 P.3d 1064 (2012) ("knowingly" modifies both "trafficked" and "stolen," so that jury's finding of guilty would indicate a finding that defendant knew the property was stolen).

By way of argument, the State asserts that Westbrook's jury could not have reasoned that when Westbrook trafficked the property he would have known that the property was stolen, merely because the court would later describe the property as stolen property at time of trial. It does not follow from the court's trial-time description of the property as stolen that such knowledge should be attributed to Westbrook. Thus, Westbrook's knowledge that the property was stolen on the date of the trafficking offenses could not have been derived from the court's later description of the property as stolen. And Westbrook cannot know that property is stolen unless it is, in fact, stolen. Therefore, the fact that the jury found that Westbrook knowingly trafficked in stolen property shows that the

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jury, irrespective of the court's later reference to the property as stolen property, independently found that the property was stolen and that Westbrook, at the time of the offense, was aware of the fact that it was stolen. It follows that the record shows that the court's reference to the property as stolen had no prejudicial effect on the jury's verdicts, and the convictions should, therefore, be sustained. *State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006).

2. Was Westbrook's trial counsel ineffective because he proposed jury instructions similar to the ones used by the trial court?

To prevail on his claim of ineffective assistance of counsel, Westbrook must show both that his counsel's performance fell below an objective standard of reasonableness in consideration of all the circumstances and that but for counsel's deficient representation the result of the trial would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Westbrook contends that his trial counsel was ineffective because he proposed jury instructions that were similar to the ones that Westbrook

argues were erroneous because they constituted a comment on the evidence. Brief of Appellant 8-10. These instructions were similar because counsel's instructions and the court's instructions both described the trafficked property as stolen. *Id.*

A review of the entire record on appeal shows that there was no credible or persuasive evidence or argument that the property at issue was not stolen property. The bigger issue was whether Westbrook knew the property was stolen. RP 244, 247. In consideration of all the circumstances, as derived from the record as a whole, counsel's conduct of including a description of the property in each of the to-convict jury instructions merely helped to distinguish each of the charges from the others in the same case. The jury was instructed that it had to find that Westbrook knew the property was stolen. CP 101-03. Thus, the instructions focused the jury's attention on the principle issue of the case, Westbrook's knowledge, and avoided a distraction away from the principle issue. If the jury were directed to answer a mostly undisputed question about whether the property was in fact stolen, it might have been distracted from the principle issue regarding Westbrook's knowledge, and the distraction might have diluted the strength of the real defense.

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Trial counsel's performance is presumed to be effective, and on appeal the defendant bears the burden of showing from the record that there was no legitimate strategic or tactical reason for counsel's conduct. *McFarland* at 336. Because Westbrook's defense was based upon his assertion that he did not steal the stolen property, that he innocently came into possession of the property, and that he did not know it was stolen when he pawned it, counsel was not ineffective for focusing the jury's attention on that defense and to thereby avoid the risk of damaging the credibility of the defense by challenging whether the property was stolen. To do so was a legitimate trial strategy in consideration of the circumstances of this case. *Id.*

Finally, Westbrook cannot show that, but for counsel's conduct of proposing jury instructions that were similar to the ones that the court ultimately provided to the jury, the result of the trial would have been different. Westbrook is required to make this showing before he can prevail on a claim of ineffective assistance of counsel. *Id.* at 334-35. In consideration of the whole circumstances as shown by the record of this case, the State contends that even if the trial court would have given jury instructions that did not potentially imply that the property at issue was, in

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fact, stolen property, the outcome of the trial would nevertheless not have been different. There was substantial evidence that the property was, in fact, stolen (RP 68-72, 98-104), and the principle defense was that Westbrook did not know it was stolen when he pawned it. RP 244, 247.

3. After the jury returned a special verdict finding, as an aggravating circumstance, that Westbrook used a position of trust to facilitate the crime, but where the verdict form did not distinguish to which one or more of the four charged crimes the finding should apply, did the trial court err by applying the aggravating circumstance to all four crimes for which the jury convicted Westbrook?

The jury in this case was asked to answer a special interrogatory, which was worded as follows:

We, the jury, having found the defendant guilty of either Theft in the Second Degree, and/or Trafficking in Stolen Property in the First Degree, and or/or Trafficking in Stolen Property in the Second Degree, return a special verdict by answering the following question submitted by the court as follows:

Question: Did the Defendant use his position of trust or confidence to facilitate the commission of the crime?

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CP 71. The question posed to the jury assumes a position of trust and asks the jury to answer whether Westbrook abused it when he committed “the crime.” *Id.* But, as contended by Westbrook, the jury was asked to return verdicts in four separate counts, and the special interrogatory does not specify to which one or more of the four counts it should apply.

The jury returned guilty verdicts for three counts of trafficking in stolen property in the first degree and for one count of theft in the second degree. CP 73, 75, 77, 79. The jury answered the special interrogatory “yes.” CP 71. At sentencing, the trial court noted the finding of an abuse of trust and ordered an exceptional sentence with enhancements. CP 52-54. A sentencing enhancement of 31 months was ordered for each of the three convictions of trafficking in the first degree, and an enhancement of 12 months was ordered for the theft in the second degree conviction. CP 54.

The Washington Pattern Jury Instructions (WPIC) provide form instructions for “Exceptional Sentences -- Aggravating Circumstances” at chapter 300. A checklist is provided at WPIC 300.01. The checklist directs the use of specific jury instructions, to include WPIC 300.02, .07, and .50.

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In regard to WPIC 300.02, the checklist at WPIC 300.01 directs, “[r]epeat for each count.” The pattern instruction found at WPIC 300.02 also directs that a separate instruction be used for each count presented to the jury where the aggravating circumstance is alleged and directs that the separate crime be identified in regard to each instruction. The “Note on Use” section of WPIC 300.02 states as follows: “Use a separate instruction for each count on which the State has alleged the existence of an aggravating circumstance.”

Additionally, the pattern instruction found at WPIC 300.50 directs that a separate special verdict form be used for each count presented to the jury where the aggravating circumstance is alleged and that the separate crime to which it applies be identified in regard to each verdict form. The “Note on Use” section of WPIC 300.50 states as follows: “Use a separate special verdict form per count on which the state alleged the existence of an aggravating factor.”

These directives were not followed in the instant case, where there was only one instruction and one special verdict form that was meant to apply to all four counts for which the jury returned guilty verdicts. CP 71,

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113-15. Westbrook contends that there is no way of knowing from the jury's answer of "yes" to the special interrogatory whether they found that he abused his position of trust when he committed theft, or if he did so when he committed one or more of the three counts of trafficking in stolen property. Brief of Appellant at 12-13. This is because the jury was asked to answer whether Westbrook used his position of trust to facilitate *either* the crime of theft or the crime of trafficking. Brief of Appellant at 12-13; CP 71.

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536, 159 L. Ed. 2d 403 (2004) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). *See also, State v. Williams-Walker*, 167 Wn.2d 889, 895-902, 225 P.3d 913 (2010).

Thus, in regard to the special verdict jury instructions and special verdict form, the State must concede error in the instant case. The State contends that logically the jury's finding of the aggravating factor in this case should apply to the theft conviction, because it is most logical that

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Westbrook's special relationship with the victim would have facilitated the theft, but it is not clear how the special relationship would have facilitated the trafficking.

Nonetheless, one cannot discern from the special verdict form that the jury did in fact unanimously find beyond a reasonable doubt that the finding of the aggravating factor applies to the theft conviction rather than one of the trafficking convictions. And the special verdict by its own language does not indicate that the jury unanimously found beyond a reasonable doubt that the finding applies to all four of Westbrook's convictions in this case.

Therefore, the State concedes error and asks that the aggravating factor finding be applied to the theft conviction, or in the alternative, that the case be remanded for retrial of the aggravating circumstance.

E. CONCLUSION

For the reasons argued above, the State asks that this Court sustain Westbrook's convictions but to remand to the trial court to strike the

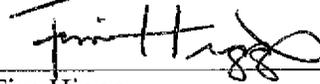
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enhanced sentence from the three counts of trafficking in stolen property,  
or in the alternative, for retrial of the aggravating circumstance.

DATED: September 30, 2013.

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