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Division II
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No. 51572-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES O'HAGAN,

Appellant.

Appeal from the Superior Court of Washington for Pacific County

Respondent's Brief

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I. ISSUES

- A. Did the trial court err when it refused to give O'Hagan's proposed jury instruction for good faith claim of title, thereby denying O'Hagan his constitutional right to present a defense?
- B. Did the trial court improperly impose discretionary legal financial obligations on an indigent defendant due to the retroactivity of the 2018 legislative amendments to the legal financial obligations statutes?

II. STATEMENT OF THE CASE

SUBSTANTIVE FACTS

Brian Couch met John O'Hagan¹ in 2012 in connection with a political campaign. RP 127. Mr. Couch owns Willapa Bay Research Services, which does business as Willapa Bay Lodge, LLC, a land clearing company. RP 117. O'Hagan had performed work for Mr. Couch mowing logging roads on a contract Mr. Couch had for Weyerhaeuser. RP 127. During the job O'Hagan performed repairs on some of the equipment. RP 128.

Mr. Couch was preparing to relocate and needed an airboat moved to storage. RP 123. O'Hagan asked what was wrong with the airboat and offered to store the boat and work on it. RP 123. The airboat was moved to O'Hagan's warehouse in April 2015 and Mr.

¹ The State will refer to John O'Hagan, the Appellant as O'Hagan. The State will refer to O'Hagan's brothers by their first names to avoid confusion, no disrespect intended.

Couch did not attempt to retrieve the boat until February 2016. RP 140.

Mr. Couch did not ask O'Hagan to perform repairs on the airboat. RP 124. O'Hagan volunteered to fix the airboat. RP 125. Mr. Couch has no knowledge of O'Hagan knowing how to do airboat repairs. RP 125. Mr. Couch was not expecting O'Hagan to do any major repairs to the airboat. RP 125-26. Mr. Couch was never presented with a bill for airboat repairs by O'Hagan. RP 125. According to Mr. Couch, the airboat engine was still frozen up when he retrieved the boat from O'Hagan's residence. RP 151. Mr. Couch's airboat is currently worth approximately \$20,000. RP 122.

O'Hagan was hired by Mr. Couch as a site supervisor in 2015 on a contract for a right-a-way clearing for the Olympic pipeline project. RP 118-19. O'Hagan did not complete the project. RP 119. According to Mr. Couch, O'Hagan quit the project and did not have a way to get home. RP 134-35. Therefore, Mr. Couch allowed O'Hagan to take Mr. Couch's Suburban and drive it back down to Grayland where Mr. Couch would retrieve it later. RP 135.

According to Mr. Couch he attempted to collect his property, the airboat and the Suburban in February 2012, but O'Hagan told Mr. Couch to get off O'Hagan's property. RP 136. Mr. Couch alleged he

attempted to collect his property prior to O'Hagan filing a civil suit against Mr. Couch surrounding failure to pay wages. RP 124, 278. Mr. Couch also asserted he attempted to get his property back twice from O'Hagan prior to contacting law enforcement. RP 124.

Pacific County Sheriff's Office Deputy Wiegardt received a complaint regarding vehicles being stored on a property that were not being released to the owner. RP 190. The complaint was relayed to Deputy Wiegardt from his supervisor. *Id.* Deputy Wiegardt spoke to Mr. Couch on May 13, 2016. RP 191. Deputy Wiegardt then contacted O'Hagan by phone on May 14, 2016. RP 191. O'Hagan admitted to being in possession of property owned by Mr. Couch. RP 192.

Deputy Wiegardt spoke to O'Hagan again on June 2, 2016 and informed O'Hagan if he did not give the property back to the property owner O'Hagan could face criminal charges. RP 192. O'Hagan admitted to still possessing the property. RP 193-94. Deputy Wiegardt spoke to O'Hagan again, in person, on June 10, 2016. RP 193. The Suburban was behind O'Hagan's residence and the airboat was located in the detached shop. RP 194. Deputy Wiegardt advised O'Hagan at least three times he needed to return the property to Mr. Couch. RP 196.

Mr. Couch did have a conversation with O'Hagan about settling the civil lawsuit. RP 154. Mr. Couch offered O'Hagan \$4,000 to settle the lawsuit. *Id.* According to Mr. Couch, the reason he offered \$4,000 is it was less expensive than paying an attorney to fight the lawsuit. RP 154.

PROCEDURAL HISTORY

The State charged O'Hagan by information on October 31, 2016 with Count I: Possession of Stolen Vehicle and Count II: Possession of Stolen Property. CP 3-5. Count I was for the Suburban and Count II was for the airboat. *Id.* The State later filed a second amended information after O'Hagan failed to appear for a scheduled court date, adding a third count, Bail Jumping. RP 15-17.

O'Hagan asserted a good faith claim of title defense. RP 2. O'Hagan represented himself during the motion for reconsideration he filed regarding his defense and for the trial. See RP. O'Hagan did receive assistance from court appointed standby counsel. RP 4-20. The State objected to O'Hagan being allowed to assert the defense of good faith claim of title. RP 12-13. The trial court ruled O'Hagan was allowed to assert the defense for the airboat but not the Suburban. RP 18.

O'Hagan elected to have his case tried to a jury. RP 47. O'Hagan was ultimately convicted as charged. CP 98-100. O'Hagan was sentenced on March 23, 2018. CP 114-23. Counts I and II were found to encompass the same criminal conduct for scoring purposes. CP 114-15. O'Hagan was sentenced as First Time Offender to 21 days in jail, converted to 168 hours of community restitution (service) hours. CP 16. O'Hagan timely appeals his conviction and sentence. CP 124-25.

JURY TRIAL

The State's case was consistent with the facts outlined above in the Substantive Facts section. O'Hagan elected to testify on his own behalf. RP 259-351. O'Hagan explained he did not steal anything. RP 274. According to O'Hagan, Mr. Couch wanted to try to save the airboat. RP 274. O'Hagan told Mr. Couch he could possibly save the boat. RP 274. O'Hagan explained how he fixed the airboat and a number of other pieces of Mr. Couch's equipment. RP 274-75.

O'Hagan asserted Mr. Couch knew O'Hagan was going to leave the pipeline project early to pick his cranberries and O'Hagan only left the Olympic pipeline project a few days before the project ended. RP 275. O'Hagan explained the Suburban had bad breaks, Mr. Couch worried about letting just anyone drive it, and Mr. Couch

trusted O'Hagan. RP 275. O'Hagan also had his Chevy pickup and his motor home up at the Olympic pipeline project. RP 338. O'Hagan's nephew drove the Chevy truck back home and they left the motor home to pick up at a later time. RP 338.

O'Hagan explained the airboat and Suburban remained on O'Hagan's property for close to eight months before they were ever accused of being stolen. RP 339. O'Hagan asserted the property was only accused of being stolen after O'Hagan filed his civil action against Mr. Couch. RP 339. O'Hagan claimed he never intended to keep the property, he was holding onto the property in good faith until the civil litigation was resolved. RP 351. O'Hagan did admit the civil suit does not specifically mention the work and or repair done to the airboat. RP 346.

O'Hagan also repeatedly asserted during his testimony there was bias and maliciousness involved in the prosecution. RP 342-43. O'Hagan asserted Mr. Couch knew the animosity the Pacific County Prosecutor had against O'Hagan. RP 281. Further, according to O'Hagan, Mr. Couch knew from O'Hagan's background that Mr. Couch could use the imperfect judicial system to steal from O'Hagan. RP 295-96.

During a phone call O'Hagan had with Mr. Couch, two other individuals listened in on speaker phone, Robert Powers and David Dunham. RP 229, 247. During the phone call Mr. Couch offered O'Hagan \$4,000 to settle the civil suit. RP 230, 247. According to Mr. Powers and Mr. Dunham, Mr. Couch told O'Hagan if he did not settle Mr. Couch said he would use the courts to break O'Hagan. RP 229-30, 247.

Mr. Powers also stated O'Hagan had made a considerable amount of repairs to Mr. Couch's equipment both in the field and in O'Hagan's shop. RP 247. Mr. Powers was also aware of Mr. O'Hagan attending prebid meetings with Mr. Couch regarding the pipeline project and helping finance part of the pipeline project. RP 248-49.

O'Hagan also had his brothers, Daniel and Patrick O'Hagan testify. RP 360-70. Patrick stated he got paid for everything he was owed by Mr. Couch except the one receipt Patrick lost. RP 364-65. Patrick was with O'Hagan when O'Hagan did repairs on some of Mr. Couch's equipment. RP 364. Daniel worked for Mr. Couch, did repairs on equipment and was not reimbursed. RP 367-70. Mr. Couch's equipment sat on Daniel's property for approximately three

months and Daniel had trouble getting paid by Mr. Couch. RP 369-70.

At the conclusion of the testimony there was a jury instruction conference. RP 383-408. The State once again argued O'Hagan should not be able to use the good faith title claim defense for possession of stolen property. RP 387-89. The State and O'Hagan were able to put forward their argument to the trial court. RP 387-98. The trial court ultimately ruled the good faith claim of title defense did not apply to possession of stolen property cases. RP 403-04.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE TRIAL COURT DID NOT DEPRIVE O'HAGAN OF HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE TO THE CRIMES CHARGED.

O'Hagan argues he was entitled to assert the statutory defense of good faith claim of title and the trial court's failure to instruct on his defense was prejudicial error that was not harmless. Brief of Appellant 16-24. O'Hagan further argues *State v. Hawkins*, 157 Wn. App. 739, 238 P.3d 1226 (2010), was wrongly decided. Division Three correctly decided *Hawkins* and O'Hagan is not entitled to raise the statutory defense for theft of good faith claim of

title for his Possession of Stolen Property and Possession of Stolen Vehicle charges. This Court should affirm O'Hagan's convictions.

1. Standard Of Review.

Jury instructions are reviewed de novo. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Bennett*, 161 Wn.2d at 307. Juries are presumed to follow the jury instructions provided to them by the trial court. *State v. Ervin*, 158 Wn.2d 746, 756, 147 P.3d 567 (2006).

Constitutional challenges are reviewed de novo. *Lummi Indian Nation v. State*, 170 Wn.2d 247, 257-58, 241 P.3d 1220 (2010). Questions of statutory interpretation are reviewed de novo. *State v. Sandholm*, 184 Wn.2d 726, 736, 364 P.3d 87 (2015) (citation omitted).

2. The Right Of A Criminal Defendant To Present A Defense Is Constitutionally Protected But Still Must Fall Within The Confines Of The Law.

O'Hagan asserts his right to present a complete defense was violated by the trial court's refusal to give O'Hagan's proposed jury instruction for good faith claim of title. O'Hagan fails to acknowledge a defendant's right to a defense is not completely unfettered. O'Hagan's defense must fall within the confines of the law.

The Fourteenth Amendment to the United States Constitution guaranties the State will not deprive a person of their liberty without due process of law. The Sixth Amendment guaranties a criminal defendant the right of confrontation, assistance of counsel, and the compulsory process to help ensure a fair trial. *State v. Coristine*, 177 Wn.2d 370, 375, 300 P.3d 400 (2013) (citations omitted). The Fourteenth Amendment guaranties that a person accused of a crime has the right to a fair trial. *State v. Statler*, 160 Wn. App. 622, 637, 248 P.3d 165 (2011), *review denied*, 172 Wn.2d 1002 (2011), *citing State v. Davis*, 141 Wn.2d 798, 824–25, 10 P.3d 977 (2000). “[T]he right to due process provides heightened protection against government interference with certain fundamental rights.” *Id.* (citations and quotations omitted). To satisfy the right to a fair trial, the trial court is not required to ensure the defendant has a perfect trial. *Id.*, *citing In re Elmore*, 162 Wn.2d 236, 267, 172 P.3d 335 (2007).

The due process right, in its essence, is the right for a criminal defendant to have a fair opportunity to defend him or herself against the State’s accusations. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010), *citing Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (quotations omitted). The

Sixth Amendment recognizes the defendant's right to control the presentation of their defense. *Coristine*, 177 Wn.2d at 376. A defendant does not, however, have an absolute right to present evidence. *Jones*, 168 Wn.2d at 720. Without adherence to the rules of evidence and other procedural limitations the adversary process would not function effectively because it is imperative that each party be given a fair opportunity, within the rules, "to assemble and submit evidence to contradict or explain the opponent's case." *Taylor v. Illinois*, 484 U.S. 400, 410-11, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).

3. The State And The Defendant Have A Right To Legally And Factually Sufficient Jury Instructions That Support Their Theory Of The Case.

O'Hagan asserts the trial court improperly denied his request for his proposed instruction on good faith claim of title. Brief of Appellant 16-24. O'Hagan argues the Court of Appeals wrongly decided *Hawkins*, which was the basis of the trial court's denial of the good faith of title claim. *Id.* at 18-24. The statutory defense of good faith of title was not available to O'Hagan, the trial court properly denied his requested instruction, and O'Hagan was not denied the ability to present a defense.

Jury instructions are considered inadequate if they prevent a party from arguing their theory of the case, misstate the applicable law, or mislead the jury. *Bell v. State*, 147 Wn.2d 166, 176, 52 P.3d 503 (2002). The State and the defendant have the right to have the trial court instruct the jury upon its theory of the case so long as there is sufficient evidence to support the theory. *State v. Griffin*, 100 Wn.2d 417, 420, 670 P.2d 265 (1983). A proposed instruction should be given by the trial court if it is not misleading, properly states the law, and allows the party to argue her or his theory of the case. *State v. Webb*, 162 Wn. App. 195, 208, 252 P.3d 424 (2011), *citing State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). “When considering whether a proposed jury instruction is supported by the evidence, the trial court must examine the evidence and draw all reasonable inferences in the light most favorable to the requesting party.” *Webb*, 162 Wn. App. at 208, *citing State v. Hanson*, 59 Wn. App. 651, 656–57, 800 P.2d 1124 (1990).

“A criminal defendant is entitled to have the jury fully instructed on the defense theory of the case.” *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994) (citation omitted). There is no entitlement to a requested instruction which lacks evidentiary support or inaccurately represents the law. *Staley*, 123 Wn.2d at 803.

a. O'Hagan was not entitled to statutory defense of good faith claim of title based upon the evidence presented.

O'Hagan requested the trial court give a good faith claim of title jury instruction. RP 384; CP 55. The good faith claim of title defense was not available to O'Hagan due to the lack of evidentiary support to assert the defense. The defense is a statutory one, available under the definition of theft. RCW 9A.56.020. It states, "In any prosecution for theft, it shall be a sufficient defense that: [t]he property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable[.]" RCW 9A.56.020(2)(a).

O'Hagan during his testimony never claimed ownership of the airboat or the Suburban. See RP 259-320, 338-52. O'Hagan testified,

I think I already said it again before. But I never intended to keep the property. But I was holding on to the property in good faith until there was a resolution in the civil action. And actually I studied fraudulent transfers. And a lot of cases where litigation pending or these type of lis pendes action arose, the it was determined the person held on to the property to avoid fraudulent transfers, so I was holding on to it in good faith to try to get a resolution in the civil action and resolve ...Mr. Couch could have went and got an order in the civil case. I would have turned the property over.

RP 351.

A defendant is only allowed to assert the defense of good faith claim of title “when a claim can be made to the specific property acquired.” *State v. Brown*, 36 Wn. App. 549, 559, 676 P.2d 525 (1984), *citing State v. Larson*, 23 Wn. App. 218, 219, 596 P.2d 1089 (1979). In *Brown*, three codefendants, Brown, Myles, and Washington, went to the victim, Morrow’s, apartment for various claimed reasons. *Brown*, 36 Wn. App. at 551. The defendants asserted the victim stole a gun and purse from Washington’s apartment earlier in the day. *Id.* The victim claimed Washington was angry with him regarding his failure to produce their son’s birth certificate. *Id.* Regardless, the defendants showed up at the victim’s apartment, Brown kicked in the door, and ultimately, Washington suggested they take the victim’s stereo to secure the return of the gun and purse stolen from her apartment. *Id.* at 552.

The Court of Appeals held the trial court did not err when it refused to give a good faith claim of title jury instruction. *Id.* at 559. The Court stated the record did not support giving the instruction, as Washington and Myles presented no evidence they had a claim of title to the stereo. *Id.* “Washington testified she took the stereo, not because it belonged to her, but because Morrow allegedly stole her

purse: ...I said tell Donald when he wants to give me my purse back he can have the stereo back because it means nothing to me..." *Id.*

Brown is analogous to O'Hagan's matter, absent the use of force. As Washington wanted to hold on to the stereo in hopes of return for her purse, O'Hagan held on to Mr. Couch's property because he wanted it to secure debt he alleged Mr. Couch owed O'Hagan. RP 351. This is not a good faith claim of title, it is at most some type of forced bailment, as there is no claim of title. Black's Law Dictionary, Tenth Ed. 169. A jury instruction with no evidentiary support should not be given by trial court. *Staley*, 123 Wn.2d at 803. The trial court did not err by failing to give O'Hagan's proposed instruction.

b. O'Hagan was not entitled to statutory defense of good faith claim of title based upon the charged offenses, Possession of a Stolen Vehicle and Possession of Stolen Property.

O'Hagan asserts Possession of Stolen Property in the First Degree and Possession of a Stolen Vehicle constitute theft, therefore, the trial court erred by failing to give the statutory defense of good faith claim of title. Brief of Appellant 18-20. Following O'Hagan's argument, all prosecutions for possession of stolen property are also prosecutions for the underlying theft of the property,

as the State must show the property was stolen which means obtained by theft. *Id.*

The State concedes the definition of stolen pursuant to Chapter 9A.56 is “means obtained by theft, robbery, or extortion.” RCW 9A.56.020(16). The trial court gave the standard WPIC, 79.08, in O’Hagan’s case to define stolen, which stated, “[s]tolen means obtained by theft.” CP 86. Nothing in the statutory framework requires the State to prove a person who possess stolen property was the person who “wrongfully obtained or exert[ed] unauthorized control over the property...with the intent to deprive that person of such property.” RCW 9A.56.020(1)(a); RCW 9A.56.140(1).

O’Hagan also misses the mark on differences between the crimes of theft and possession of stolen property. Theft requires an intent to deprive the owner of their property. RCW 9A.56.020. Possession of stolen property merely requires the person “knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.” RCW 9A.56.140. While the property must be stolen, i.e. obtained by theft, the person who possesses the stolen property need not be the person who committed the theft. While the person

who possesses the stolen property may be the person who stole it, the State is not required to prove the defendant intended to deprive the victim of the property in a prosecution for possession of stolen property.

Under the statutory framework of Chapter 9A.56, the defense of good faith claim of title is not available to prosecutions other than theft. There are two statutory defenses to theft,

(2) In any prosecution for theft, it shall be a sufficient defense that:

(a) The property or service was appropriated openly and avowedly under a claim of title made in good faith, even though the claim be untenable; or

(b) The property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

RCW 9A.56.020(2). O'Hagan's argument is the definition applies to possession of stolen property because stolen incorporates the definition of theft. Yet, RCW 9A.56.140 leads to a different result, as possession of stolen property has its own defense section.

(1) "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

(2) The fact that the person who stole the property has not been convicted, apprehended, or identified is not a defense to a charge of possessing stolen property.

(3) When a person has in his or her possession, or under his or her control, stolen access devices issued in the names of two or more persons, or ten or more stolen merchandise pallets, or ten or more stolen beverage crates, or a combination of ten or more stolen merchandise pallets and beverage crates, as defined under RCW 9A.56.010, he or she is presumed to know that they are stolen.

(4) The presumption in subsection (3) of this section is rebuttable by evidence raising a reasonable inference that the possession of such stolen access devices, merchandise pallets, or beverage crates was without knowledge that they were stolen.

(5) In any prosecution for possessing stolen property, it is a sufficient defense that the property was merchandise pallets that were received by a pallet recycler or repairer in the ordinary course of its business.

RCW 9A.56.140. Subsection five (5) would be superfluous if the defenses found in RCW 9A.56.020 applied outside of prosecutions of theft, and in particular, to possession of stolen property.

The courts will not employ judicial interpretation if a statute is unambiguous. *State v. Steen*, 155 Wn. App. 243, 248, 228 P.3d 1285 (2010). “A statute is ambiguous when the language is susceptible to more than one interpretation. *Steen*, 155 Wn. App. at 248. When the reviewing court is interpreting a statute its “goal is to ascertain and give effect to the intent and purpose of the legislature in creating the statute.” *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660

(2005) (citation and quotations omitted). The court looks to the plain language in the statute, the context of the statute, and the entire statutory scheme to determine the legislative intent. *Steen*, 155 Wn. App. at 248; *Stratton*, 130 Wn. App. at 764 (citations omitted).

There can be no ambiguity when looking at the statutes. The legislature intended the defenses for theft, as contained under RCW 9A.56.020, to apply only to prosecution for theft and not for prosecutions for possession of stolen property. If the legislature intended the theft defenses to apply to possession of stolen property prosecutions, RCW 9A.56.020 would have stated, in any prosecution under Chapter 9A.56, rather than “[i]n any prosecution for theft, it shall be a sufficient defense that[.]” The legislature also would not have provided an identical statutory defense under RCW 9A.56.140, for merchandise pallets, as the one found in RCW 9A.56.020(2)(b), if the defenses for theft applied to possession of stolen property. To do such would be superfluous.²

² The State acknowledges when the modern statute was enacted in 1975 by Laws of 1975, 1st Ex. Sess., Ch. 260, Chapter 9A.56, the statutory defense regarding merchandise pallets did not exist for theft or for possession of stolen property. The amendment that added merchandise pallets was in Laws of 2004, ch. 122, § 1. This does not change the State’s analysis of the legislative intent.

c. Court of Appeals, Division Three, did not wrongly decide *Hawkins*.

O'Hagan also asserts Court of Appeals, Division Three, wrongly decided *Hawkins*, 157 Wn. App. 739. O'Hagan rests this argument on the lack of "any consideration of the legislative intent on rewording the 'good faith' defense statute in 1975." Brief of Appellant 21. Division Three's analysis of the differences between the former larceny statute, RCW 9.54.010 (1915), and the current theft and possession of stolen property statutes and the impact of the differences on the good faith claim of title defense was correct.

The former larceny statute, RCW 9.54.010 considered possession of stolen property a form of larceny,

(5) Every person who, knowing the same to have been so appropriated, shall bring into this state, or buy sell, receive or aid in concealing or withholding any property wrongly appropriated, whether within or outside of this state, in such a manner as to constitute larceny under the provisions of this chapter –
Steals such property and shall be guilty of larceny.

Hawkins, 157 Wn. App. at 749, *citing* former RCW 9.54.010 (1915).

Therefore, statutory defense to larceny applied to also to possession of stolen property. *Id.*, *citing State v. Smyth*, 7 Wn. App. 50, 55, 499 P.2d 63 (1972).

Division Three correctly notes larceny, i.e. theft, is no longer a component of possession of stolen property, as the two have been separated when the modern statute was enacted in 1975. *Hawkins*, 157 Wn. At 749, *citing* RCW 9A.56.140 through RCW 9A.56.170. Further, there is a catch all for larcenies found outside Chapter 9A.56 titled, “Theft and larceny equated.” RCW 9A.56.100. “All offenses defined as larcenies outside of this title shall be treated as thefts as provided in this title.” RCW 9A.56.100.

While, when enactment of the modern code, the legislature did not explicitly state it was rewording the good faith defense in the 1975 statute, the structure of the statutory scheme speaks for itself. Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.56; Legis. Rep. 44th Reg. & 1st Ex. Sess., RESSB 2092, at 243-44 (1975). The legislature broke apart the statutory sections for theft and possession of stolen property. Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.56. The legislature created a catch all for larcenies not contained within the new criminal code to be considered to fall within the definition of theft. Laws of 1975, 1st Ex. Sess., ch. 260, 9A.56.100. It is plain the legislative intent was only for theft to be equated with larceny.

Therefore, the previous defense for larceny, good faith claim of title, which was previously included in the larceny statute and now

only included in the definition of theft statute, is clearly only available for prosecutions of theft. This is obvious from the history of the statutory scheme, the transition from larceny to theft, and the plain language contained in the statute. See RCW 9A.56.020(2) (In any prosecution for theft, it shall be a sufficient defense that...). The Court of Appeals in *Hawkins* correctly decided the statutory defense contained in RCW 9A.56.020(2)(a), good faith claim of title does not apply to modern possession of stolen property charges.

4. The Trial Court's Refusal To Give O'Hagan's Proposed Instruction Was Not Error And Did Not Deny O'Hagan His Constitutional Right To Present A Defense.

The trial court did not err when it refused to give the proposed instruction for good faith claim of title. As argued above, O'Hagan did not present sufficient evidence to entitle him to assert the good faith claim of title defense. O'Hagan never claimed an ownership interest in the property, a fatal flaw in a claim of title defense. A defendant is not entitled to a jury instruction that has no evidentiary support. *Staley*, 123 Wn.2d at 803.

O'Hagan is also not entitled to the good faith claim of title instruction because such an instruction is not available to his charged crimes, Possession of a Stolen Vehicle and Possession of Stolen Property. A good faith claim of title defense is a statutory defense

only available to prosecutions of theft. RCW 9A.56.020(2)(a); *Hawkins*, 157 Wn. App. at 749. Therefore, the trial court's refusal to give an instruction that inaccurately states the law is not in error. *Staley*, 123 Wn.2d at 803.

O'Hagan is not entitled to present a defense not available under the law. *Taylor*, 484 U.S. at 410-11. A criminal defendant, while having the constitutional right to control their defense, still must adhere to the rules and procedural limitations. *Id.*; *Coristine*, 177 Wn.2d at 376. The trial court allowed O'Hagan to present evidence that he did not intend to keep the property, which could perhaps negate the claim the property was stolen. RP 279, 351. The trial court also gave O'Hagan a lot of latitude to present evidence regarding collateral issues, including a possible conspiracy and bias. RP 267-70, 281, 295-96, 343. The trial court did not prevent O'Hagan from presenting his defense, only from submitting jury instructions not available to O'Hagan due to lack of legal and evidentiary support.³ There was no error by the trial court and this Court should affirm O'Hagan's convictions.

³ It should be noted, O'Hagan submitted a number of jury instructions that were not given by the trial court, none of which are the subject of this appeal with exception of the good faith of title instruction. See CP 48-75.

B. THE RECORD DOES NOT SUPPORT O'HAGAN'S ASSERTION HE IS INDIGENT PER SE, BUT RATHER INDIGENT ONLY FOR OBTAINING COUNSEL, THEREFORE, THE LEGAL FINANCIAL OBLIGATIONS WERE PROPERLY IMPOSED.

O'Hagan asserts, without any documentation to substantiate his claim, he is indigent per se and therefore, the trial court incorrectly imposed the criminal filing fee. Brief of Appellant 24-27. The record presented throughout the trial would suggest, at best, O'Hagan was indigent pursuant to RCW 10.101.010(3)(d). Therefore, O'Hagan would be subject paying the \$200 filing fee.

The 2018 amendments apply to defendants whose appeals were pending — i.e., their cases were not yet final — when the amendment was enacted. *State v. Ramirez*, 191 Wn.2d 732, 747-49, 426 P.3d 714 (2018). Therefore, O'Hagan receives the benefit of the amendments that apply to him, which in O'Hagan's case it is unclear if any apply.

O'Hagan asserts he is indigent because he was indigent for counsel purposes, both at trial (standby counsel) and for appeal, he is entitled to have the remaining discretionary legal financial obligations stricken. Brief of Appellant 26-27. This is simply not true. Per the statutory amendments of 2018, the filing fee is no longer a nondiscretionary legal financial obligation if a defendant qualifies for

indigency under RCW 10.101.010(3)(a)-(c). RCW 36.18.020(h). Further, only if a defendant is indigent “per se” under RCW 10.101.010(3)(a)-(c) shall the sentencing court not order a defendant to pay costs. RCW 10.01.160(3).

(3) "Indigent" means a person who, at any stage of a court proceeding, is:

(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or

(b) Involuntarily committed to a public mental health facility; or

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level;

RCW 10.101.010(3)(a)-(c).

There is no evidence in the record O'Hagan meets this criteria of indigence. Simply having court appointed counsel only falls under RCW 10.101.010(3)(d), not the subsection that exempts a defendant from paying the filing fee or paying the cost of his court appointed counsel.

In actuality, the record supports the imposition of the fees on O'Hagan. During the trial O'Hagan discussed the work he had done

for Mr. Couch and the fact he left the job because he had to go harvest cranberries at his cranberry farm. RP 275. O'Hagan also discussed how he was an operating engineer, earning \$52 an hour, and the multiple companies he had worked for. RP 275-76. O'Hagan is not indigent under the per se definition in RCW 10.101.010(3)(a)-(c). Further, while O'Hagan may meet the definition of indigent pursuant to RCW 10.101.010(d), he clearly is able to pay discretionary legal financial obligations given his profession and substantial work history, including his ability to have multiple jobs and as the owner of a cranberry farm. This Court should reject O'Hagan's demand to strike the criminal filing fee.

IV. CONCLUSION

The trial court properly denied O'Hagan's proposed jury instruction for good faith claim of title. O'Hagan was not entitled to the jury instruction due to lack of evidentiary support and legal support. Court of Appeals, Division Three, properly concluded good faith claim of title is not a defense available for possession of stolen property crimes. Therefore, O'Hagan's constitutional right to present a defense was not violated. Finally, the record does not support a finding O'Hagan meets the criteria of indigent per se, therefore he is

not entitled to have the filing fee waived. This Court should affirm O'Hagan's convictions and sentence.

RESPECTFULLY submitted this 23rd day of January, 2019.

MARK MCCLAIN
Pacific County Prosecuting Attorney

A handwritten signature in blue ink, appearing to be 'SIB', written over a horizontal line.

by: _____
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LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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