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NO. 51803-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS SCHUETTKE,

Appellant.

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

The Honorable Chris Lanese, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THERE WAS NO VALID REASON NOT TO OBJECT TO INADMISSIBLE EVIDENCE AND SCHUETTKE WAS PREJUDICED.	1
a. <u>Counsel was ineffective in not objecting to Clausen’s out-of-court statement on hearsay grounds.</u>	1
b. <u>Counsel was ineffective in failing to object to evidence admitted in violation of Washington’s Privacy Act.</u>	4
c. <u>The domestic violence designation attached to Schuettke’s prior offense was inadmissible, irrelevant, and prejudicial.</u>	6
2. THE INSTRUCTION DEFINING KNOWLEDGE UNCONSTITUTIONALLY PERMITTED THE JURY TO CONVICT WITHOUT FINDING SCHUETTKE ACTUALLY KNEW THE VAN WAS STOLEN.	8
3. THE COMMUNITY CUSTODY CONDITION PROHIBITING ASSOCIATION WITH LAWFUL USERS AND SELLERS OF CONTROLLED SUBSTANCES IS SO BROAD AS TO BE UNCONSTITUTIONALLY VAGUE. .	12
B. <u>CONCLUSION</u>	15

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Lewis v. Dep't of Licensing</u> 157 Wn.2d 446, 139 P.3d 1078 (2006).....	5
<u>State v. Bahl</u> 164 Wn.2d 739, 193 P.3d 678 (2008).....	12
<u>State v. Bell</u> 194 Wn. App. 1008, 2016 WL 2963481 rev. denied, 186 Wn.2d 1019 (2016)	5
<u>State v. Bourgeois</u> 133 Wn.2d 389, 945 P.2d 1120 (1997).....	3
<u>State v. Brettell</u> ___ Wn. App. 2d ___, 430 P.3d 677 (2018).....	12, 13
<u>State v. Brown</u> 147 Wn.2d 330, 58 P.3d 889 (2002).....	10
<u>State v. Coe</u> 101 Wn.2d 772, 684 P.2d 668 (1984).....	6
<u>State v. Copeland</u> 130 Wn.2d 244, 922 P.2d 1304 (1996).....	6
<u>State v. Froehlich</u> 96 Wn.2d 301, 635 P.2d 127 (1981).....	3
<u>State v. Hagler</u> 150 Wn. App. 196, 208 P.3d 32 (2009).....	6
<u>State v. Hakimi</u> 124 Wn. App. 15, 98 P.3d 809 (2004).....	3
<u>State v. Halstien</u> 122 Wn.2d 109, 857 P.2d 270 (1993).....	12

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Johnson</u> 119 Wn.2d 167, 829 P.2d 1082 (1992).....	10, 11
<u>State v. Kitchen</u> 110 Wn.2d 403, 756 P.2d 105 (1988).....	3
<u>State v. Lakotiy</u> 151 Wn. App. 699, 214 P.3d 181 (2009).....	12
<u>State v. Lamar</u> 180 Wn.2d 576, 327 P.3d 46 (2014).....	2
<u>State v. Leech</u> 114 Wn.2d 700, 790 P.2d 160 (1990).....	10, 11
<u>State v. O’Hara</u> 167 Wn.2d 91, 217 P.3d 756 (2009).....	9
<u>State v. Petrich</u> 101 Wn.2d 566, 683 P.2d 173 (1984).....	3
<u>State v. Scott</u> 110 Wn.2d 682, 757 P.2d 492 (1988).....	8
<u>State v. Shipp</u> 93 Wn.2d 510, 610 P.2d 1322 (1980).....	8, 9, 10

FEDERAL CASES

<u>Neder v. United States</u> 527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).....	10
--	----

RULES, STATUTES AND OTHER AUTHORITIES

Alan R. Hancock, <u>True Belief: an Analysis of the Definition of “Knowledge” in the Washington Criminal Code</u> , 91 Wash. L. Rev. 177 (2016).....	11
---	----

TABLE OF AUTHORITIES (CONT'D)

	Page
ER 609	6, 7
ER 801	3
GR 14.1	5
RCW 9.73.030	4
RCW 9.73.090	4, 5
RCW 10.99	6
RCW 69.50.101	13
RCW 69.50.205	13
RCW 69.50.206	13

A. ARGUMENT IN REPLY

1. THERE WAS NO VALID REASON NOT TO OBJECT TO INADMISSIBLE EVIDENCE AND SCHUETTKE WAS PREJUDICED.

Schuettker argues his attorney was ineffective in failing to object to three types of testimony: 1) Clausen's testimony regarding his out-of-court statement to police, 2) the recording of Schuettker's interaction with police, and 3) the domestic-violence designation attached to Schuettker's prior conviction for witness tampering. In each case, the State claims there were valid reasons not to object and Schuettker was not prejudiced. These arguments should be rejected because the State's purported rationales for not objecting do not hold water, and the testimony bolstering the State's witness and making Schuettker appear to be a bad actor were likely to sway the jury's assessment of credibility which was the heart of this case.

- a. Counsel was ineffective in not objecting to Clausen's out-of-court statement on hearsay grounds.

The State concedes Clausen's statement to police was likely hearsay. Brief of Respondent (BoR) at 11. Yet the State claims counsel may have not wanted to object because he knew other witnesses would contradict Clausen's testimony. BoR at 11-12. This is irrational. The fact that other witnesses would contradict Clausen merely meant that the jury would be left with a credibility determination to make. There was no reason to permit the State to bolster Clausen's credibility with an inadmissible prior statement.

The State suggests an objection would have made the defense appear to be hiding something. BoR at 12. This rationale should be rejected because the jury knows that holding the State to the rules of evidence is defense counsel's role. The jury was instructed attorneys may have a duty to object to certain evidence and no conclusions should be drawn from the fact of an objection. CP 9. Jurors are presumed to follow such instructions. E.g., State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Given that presumption, it would make no sense for defense counsel to believe the jury would hold an objection against him, particularly if the objection were sustained, as this one likely would have been.

The State also suggests the jury would have heard that Clausen gave a statement to police and would likely have concluded the statement was consistent with his testimony even if the contents had not expressly been admitted. BoR at 12-13. This argument again relies on an assumption that the jury will consider evidence outside the record, contrary to the jury's explicit instructions. The law presumes the jury follows the instruction to base its decision on the admitted evidence and to disregard any argument not based on that evidence. CP 8-9; Lamar, 180 Wn.2d at 586. Counsel's failure to object is not reasonable in light of this presumption.

This Court should also reject the State's claim that Clausen's credibility would necessarily be under attack, and, therefore, its bolstering

was justified. BoR at 12-13 (discussing State v. Bourgeois, 133 Wn.2d 389, 945 P.2d 1120 (1997) and State v. Hakimi, 124 Wn. App. 15, 98 P.3d 809 (2004)). The admissibility of corroborating evidence is limited to “the facet of the witness’ character or testimony which has been challenged.” Bourgeois, 133 Wn.2d at 401 (quoting State v. Froehlich, 96 Wn.2d 301, 305, 635 P.2d 127 (1981)). When the witness’ character for truthfulness has not been attacked, evidence tending to show truthfulness is not admissible. State v. Petrich, 101 Wn.2d 566, 574, 683 P.2d 173 (1984), holding modified by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) (Evidence bolstering victim’s credibility not admissible when the opposing testimony was inconsistent with victim’s, but “did not attack her character for truthfulness.”).

Bolstering of Clausen’s truthfulness was impermissible here because the defense theory was merely that he was mistaken, not that he lacked the character for truthfulness. There was no charge of recent fabrication by Clausen that could justify admission of a prior consistent statement under ER 801(d)(ii). Clausen’s out-of-court statement was not admissible.

The State claims the admission of Clausen’s statement was not prejudicial to the defense because other witnesses at trial corroborated Clausen’s testimony. BoR at 13. This argument should be rejected. There was testimony both supporting and contradicting Clausen. RP 179, 215.

Prejudice occurred because, without the inadmissible hearsay, it was reasonably probable the jury would view the conflicting testimony as reasonable doubt.

- b. Counsel was ineffective in failing to object to evidence admitted in violation of Washington's Privacy Act.

Exhibit 22, the recording of Schuettke at his arrest was admitted in violation of the plain language of RCW 9.73.090(1)(b). The act generally prohibits recording any private conversation without consent; any such recording is inadmissible in court. RCW 9.73.030. An exception is made for "Video and/or sound recordings . . . of arrested persons by police officers responsible for making arrests or holding persons in custody before their first appearance in court." RCW 9.73.090(1)(b). However, certain requirements must be met before this exception can apply. RCW 9.73.090(1)(b). The State does not argue these requirements were met in this case. The recording was, therefore, not admissible under this provision.

Nevertheless, the State argues counsel was not ineffective in failing to object under the privacy act because it is unclear whether subsection (1)(c), with its less stringent requirements for admissibility, should apply instead. BoR at 14-16. The court should reject this argument because, as the State notes, Division One's unpublished decision in State v. Bell notes that, once a person is arrested, "arguably the recording from then on falls under

the plain language of subsection (b).” State v. Bell, 194 Wn. App. 1008, 2016 WL 2963481, rev. denied, 186 Wn.2d 1019 (2016).¹ Like Bell, Schuettke was also clearly being arrested. The recording in this case also falls under the plain language of subsection (b).

By contrast, subsection (1)(c) is referred to as the “traffic stop” provision, Lewis v. Dep’t of Licensing, 157 Wn.2d 446, 467, 139 P.3d 1078 (2006). It permits admission of “Sound recordings that correspond to video images recorded by video cameras mounted in law enforcement vehicles.” RCW 9.73.090(1)(c). A traffic stop, which occurs on a public street, is not considered a public communication. Lewis, 157 Wn.2d at 459. Schuettke’s interaction with police in this case was not a traffic stop. He was on private property. RP 102-03. His recorded interaction with police was part of a criminal investigation. RP 117, 130, 140. The interaction involved his arrest, which is specifically provided for under subsection (1)(b). Ex. 22; RCW 9.73.090(1)(b). There is no reason the traffic stop provision should apply. It is reasonably probable the court would have sustained a proper objection under the privacy act.

The State claims counsel made a strategic decision not to object to the video because, in it, the officer raises his voice, arguably supporting

¹ This unpublished decision, cited under GR 14.1, has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

Schuettke's testimony that the officer was rude to him. BoR at 19-20. This is not a valid strategy. Rudeness on the part of police is neither a defense to the charges Schuettke faced nor even a reasonable explanation for his failure to divulge the name of the person who had dropped him off at Clausen's property.

Schuettke was prejudiced by presentation of the untrue statement about "Jesse" and the unflattering, inculpatory portrayal of him in handcuffs. Like the other instances of ineffectiveness complained of in this brief, the admission of the arrest recording in Exhibit 22 was prejudicial because it negatively impacted his credibility.

- c. The domestic violence designation attached to Schuettke's prior offense was inadmissible, irrelevant, and prejudicial.

"A domestic violence designation under chapter 10.99 RCW is neither an element nor evidence relevant to an element." State v. Hagler, 150 Wn. App. 196, 202, 208 P.3d 32 (2009). Nevertheless, the court admitted the domestic violence designation attached to Schuettke's prior conviction for witness tampering under ER 609. Admissibility is limited to "the fact of the conviction, the type of crime, and the punishment." State v. Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996) (citing State v. Coe, 101 Wn.2d 772, 776, 684 P.2d 668 (1984)). The State claims the domestic violence

designation is part of the “type of the crime.” BoR at 23. This argument should be rejected.

Something that is “neither an element nor evidence relevant to an element” of the crime cannot be part of the “type of crime.” Moreover, the domestic violence designation is unrelated to reasons why the crime would be admissible under ER 609. The witness tampering conviction is admissible because it is an offense that “involved dishonesty or false statement.” ER 609(2). But the fact that the offense involved a member of the person’s own family is not related to the dishonesty involved in the crime. Thus, it is not relevant to the person’s credibility as a witness. It simply allows the State to paint for the jury the unsympathetic portrait of a domestic abuser. The prejudice of this image persists regardless of whether the current charge actually involves domestic violence or not.

Counsel’s deficient performance in failing to object to three instances of inadmissible and prejudicial evidence deprived Schuettke of a fair trial. He asks this Court to reverse his conviction due to the violation of his Sixth Amendment right to effective assistance of defense counsel.

2. THE INSTRUCTION DEFINING KNOWLEDGE UNCONSTITUTIONALLY PERMITTED THE JURY TO CONVICT WITHOUT FINDING SCHUETTKE ACTUALLY KNEW THE VAN WAS STOLEN.

The State argues the knowledge instruction is correct because it directly reflects the plain language of the statute. BoR at 31. The fatal flaw in this argument is that this plain language interpretation of the statute has been held unconstitutional. State v. Shipp, 93 Wn.2d 510, 515-16, 610 P.2d 1322 (1980). The requirement that a person “know” is not satisfied merely because a reasonable person, under the circumstances, should have known. Id. To impose criminal liability, the finder of fact must go the additional step and find that, in fact, because of those circumstances, this person did, in fact, know. Id. Both the statute and the corresponding jury instruction elide the difference between proving actual knowledge via circumstantial evidence and merely proving negligence.

The State’s argument that knowledge need not be defined for the jury is beside the point. BoR at 28. The State is correct that the lack of an instruction defining knowledge is not manifest constitutional error. State v. Scott, 110 Wn.2d 682, 689-90, 757 P.2d 492 (1988). But this case is utterly unlike Scott. In fact, failing to define knowledge would have been preferable to the instruction that was given. Without a specific legal definition being provided, a reasonable lay juror would likely assume that knowledge means

actual knowledge. A reasonable lay juror would not assume that mere negligent ignorance (i.e. *not* knowing) could constitute knowledge.

But in this case, the jury instructions expressly told the jury that knowledge, in fact, includes negligent ignorance. CP 17. Because it does not, Shipp, 93 Wn.2d at 515-16, the instruction allowed the jury to convict without proof of an essential element of the crime, namely, actual knowledge. This was not the failure to define an element; this was an instruction that incorrectly defined the element to include its opposite. When the jury instructions permit the jury to convict without finding proof of every essential element of the offense, reversal is required, regardless of objection below. State v. O'Hara, 167 Wn.2d 91, 103, 217 P.3d 756, 763 (2009).

Incorrect jury instructions amount to manifest constitutional error when the instructions omit an element of the crime charged or shift the burden of proof to the defendant. O'Hara, 167 Wn.2d at 103. This instruction does both. By permitting the jury to find knowledge without finding actual knowledge, the instruction essentially omits that element. At best, the instruction suggests that, if there is evidence from which a reasonable person should have known, then the burden would shift to the defendant to prove that he did not. For both of these reasons, the jury instruction defining knowledge is manifest constitutional error that this court should address for the first time on appeal.

The State argues the error is not prejudicial because there was evidence from which the jury could have found actual knowledge. BoR at 29-30. But the sufficiency of the evidence to prove an element is immaterial when the jury was not required to find that element. A jury instruction omitting an element may be harmless if that element is supported by “uncontroverted” evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). But the evidence here was not uncontroverted. Schuettke testified he first saw the van about five minutes before the police arrived. RP 216-17. He heard the sound of a vehicle in the night but did not see how the van came to be on Clausen’s property. RP 238. These circumstances, if believed, are evidence he did not know the van was stolen. The omission of the element cannot be harmless in this case.

Finally, the State argues that, in State v. Leech, 114 Wn.2d 700, 710, 790 P.2d 160 (1990), and State v. Johnson, 119 Wn.2d 167, 174, 829 P.2d 1082 (1992), the Washington Supreme Court held that the problem identified in Shipp has been solved by the jury instruction permitting, rather than requiring, an inference of knowledge. BoR at 32. But as Judge Hancock points out in his article, the Leech court did not address the difference between proof of actual knowledge, via circumstantial evidence, and proof of only constructive knowledge. Alan R. Hancock, True Belief: an Analysis

of the Definition of “Knowledge” in the Washington Criminal Code, 91 Wash. L. Rev. 177, 185 (2016).² Schuettke respectfully submits that Leech was incorrectly decided to the extent it suggests that the instruction is correct because it only permits but does not require the jury to convict without finding actual knowledge.

Another way to view the problem is that the instruction conflates evidence of the element with the element itself. The fact that a reasonable person should have known, under the circumstances, may in fact be evidence from which a jury could reasonably, or even beyond a reasonable doubt, conclude that the defendant did, in fact, know. But the proposition to be proved, the element of the offense, is that the defendant actually knew, not merely that a reasonable person should have. The instruction incorrectly and unconstitutionally takes a description of one type of evidence that may be used to prove an element and suggests that that evidence is the element itself.

Neither Leech nor Johnson addresses this aspect of the problem. Both cases assume the jury is required to find actual knowledge, without appreciating that the instruction suggests that negligent ignorance is an acceptable substitute. Schuettke’s conviction is unconstitutional unless the jury unanimously agreed beyond a reasonable doubt that he knew the van

² Available at <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1556/91WLRO177.pdf?sequence=1&isAllowed=y>; last visited 9/27/18. This article is attached as Appendix D to the Brief of Appellant.

was stolen. State v. Lakotiy, 151 Wn. App. 699, 714, 214 P.3d 181 (2009). But the current pattern instruction renders the element of knowledge a nullity by defining knowledge so as to include the lack of knowledge. This error requires reversal.

3. THE COMMUNITY CUSTODY CONDITION PROHIBITING ASSOCIATION WITH LAWFUL USERS AND SELLERS OF CONTROLLED SUBSTANCES IS SO BROAD AS TO BE UNCONSTITUTIONALLY VAGUE.

This Court should reject the State's argument that the government may, as a condition of community custody, prohibit Schuettke from associating with known users, manufacturers, or dealers of controlled substances. This condition is so broad and encompasses such a wide swath of lawful and innocent association that it fails to provide fair warning of prohibited conduct and encourages selective and arbitrary enforcement. Therefore, it should be stricken as unconstitutionally vague. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008); State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

The State correctly notes that this Court recently rejected a vagueness challenge to the phrase "known users or sellers of illegal drugs." BoR at 38 (discussing State v. Brettell, ___ Wn. App. 2d ___, 430 P.3d 677 (2018)). In Brettell, this court held that the term "known" was not vague because it would be understood to apply only to those known to the defendant (as

opposed to anyone else) to be currently (as opposed to at some prior or future date) using or dealing illegal drugs. ___ Wn. App. 2d at ___, 430 P.3d at 682. Schuettke respectfully argues the Brettell court is incorrect on this point. The plain language of the condition does not make those limitations clear enough to preclude selective and arbitrary enforcement. But even assuming the published precedent in Brettell sufficiently refines the understanding of the term “known,” it does not resolve the second part of Schuettke’s vagueness challenge involving the term “controlled substances.”

First, the term “controlled substances” is not more specific than the term “illegal drugs” discussed in Brettell. BoR at 39. On the contrary, it is far broader because it encompasses many substances that are commonly and legally used and sold. The term “controlled substances” includes not only illegal drugs but many drugs that are lawfully possessed both by pharmacies and by those with valid prescriptions. RCW 69.50.101(f); RCW 69.50.205; RCW 69.50.206. The condition is not limited to prohibit association only with those who illegally or unlawfully use or deal in controlled substances.

Contrary to the State’s claim, prohibiting Schuettke from associating with all dealers or users of controlled substances is not “reasonably necessary” to discourage further criminal conduct. See BoR at 40. The essential needs of public order are not served by sending Schuettke back to jail if he dares enter a Rite-Aid drug store to purchase a pack of chewing

gum or associates with a friend who is temporarily using a legally prescribed opioid due to dental issues or back pain.

The State claims that, when read together with the other conditions, this condition would not prohibit Schuettke from obtaining lawfully prescribed medication. BoR at 41. It is unclear how he could do so without violating the plain language of this condition by associating with a dealer in controlled substances.

This condition appears designed as a trap for the unwary. The scope is so unreasonably broad that a reasonable person might conclude that the condition does not really mean what it says. Schuettke might not think twice about entering a drug store or associating with a person who once had a lawful prescription for a controlled substance. Yet the plain language of the condition permits selective and arbitrary enforcement of this condition any time he does so. The condition should be stricken as unconstitutionally vague.

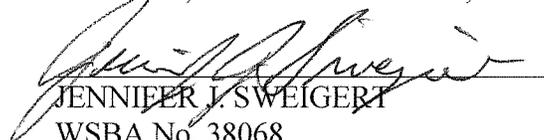
B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, the violation of Schuettke's right to effective assistance of counsel requires reversal of his convictions. Additionally, the conviction for possession of a stolen vehicle should be reversed because the jury instruction relieved the state of the burden to prove actual knowledge. Alternatively, this Court should strike the unconstitutional community custody condition and the improperly imposed legal financial obligations.

DATED this 11th day of January, 2018.

Respectfully submitted,

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