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State of Washington  
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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,  
Respondent,

v.

THOMAS BRADSHAW,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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THE HONORABLE F. MARK MCCAULEY, JUDGE

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SUPPLEMENTAL BRIEF OF RESPONDENT

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**I. RESPONSE TO SUPPLEMENTAL ASSIGNMENT OF ERROR**

The Washington Pattern Jury Instruction on knowledge does not inherently violate due process when it conforms to the holding in *State v. Shipp* and both instructs the jury on actual knowledge and permits, but does not require, the jury to find actual knowledge based on circumstantial evidence.

The risk that the jury could misapply the jury instruction regarding knowledge and convict a defendant by finding that the defendant should have known his conduct was unlawful, rather than actually knowing his conduct was unlawful, is not present where there is no contextual evidence to infer what a reasonable person should have known.

A prosecutor's reference to what a defendant should have known did not mislead or influence the jury's verdict where the jury had no facts from which to consider the question of constructive knowledge; thus, the references did not result in prejudice and were unlikely to affect the jury's verdict.

**II. ARGUMENT**

The Appellant claims that the long-established and accepted jury instruction regarding knowledge known as Washington Pattern Jury Instruction (WPIC) 10.02, as well as the prosecutor's few remarks concerning what he should have known about a stolen car, deprived him of a fair trial. However, the general argument that the pattern instruction has the potential to allow a jury to convict a defendant who had no awareness of the fact he or she supposedly knows, is considerably flawed. The argument that the law must change, and that the *Shipp* Court did not go far enough, would have this Court undermine the legislature's role in

determining the requirements of criminal culpability, impose a new burden of proof on the State in that the State would need to persuade a jury that “the defendant is no less intelligent or attentive than an ordinary person and therefore did know.” (Supp. Brief of Appellant, 7).

The Court should review the jury instructions in this case, find that they adequately informed the jury on the issue of knowledge, and apply that law to the facts heard at trial. The Court must consider the prosecutor’s complained-of remarks in the context of the facts and the State’s theory of the case. On these facts, the jury could only have been faced with the question of whether the Defendant had an actual awareness that the vehicle he drove was stolen or not, not whether he should have known it was stolen. The concerns raised by the Appellant that he could have been convicted with a degree of culpability closer to negligence, or that the prosecutor misled the jury into making such a finding, simply do not exist in this case.

The Appellant’s argument relies only on two key decisions. In *Shipp*, the Washington State Supreme Court decisively addressed how a jury shall consider evidence of actual knowledge from circumstantial evidence. *State v. Shipp*, 93 Wn.2d 510, 610 P.2d 1322 (1980). In *Allen*, the Court continued to uphold *Shipp*, and made clear that the State must prove an accomplice had an awareness of a principal’s intent or actions to

be culpable; the State cannot convict an accomplice because they should have known they were assisting in a crime. *State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015).

The Appellant's reliance on these cases is misplaced. The errors in *Shipp* do not exist in the current pattern jury instructions, which have been upheld for 38 years since. The misconduct in *Allen* does not exist in the case at hand, or if so, cannot be said to have affected the verdict based on the facts before the jury.

The statutory definition of knowledge includes a permissive finding of actual knowledge from circumstantial evidence

The legislature has determined that a person has knowledge, or acts knowingly, when “(i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.” RCW 9A.08.010.

The Washington Supreme Court took up the issue of interpreting this statute in *State v. Shipp*, a consolidated case addressing the three ways that the second prong of the knowledge statute could be read by a jury. *Shipp*, 93 Wn.2d 510. The Court endorsed a reading of the statute whereby a juror “is permitted, but not required, to find such knowledge if he finds

that the defendant had information which would lead a reasonable man in the same situation to believe that (the relevant) facts exist.” *Id.*, at 514.

This interpretation took into account the possibility that, even if an ordinary person would have had knowledge under the circumstances, a given defendant may have been “less attentive or intelligent than the ordinary person,” and thus did not have actual knowledge. *Id.*, at 516.

After the *Shipp* decision, the pattern jury instruction was updated and now “follows the language of the statutory definition of knowledge as construed in *Shipp*.” *State v. Bryant*, 89 Wn. App. 857, 872, 950 P.2d 1004 (1998). Courts have upheld this pattern jury instruction many times since *Shipp*; no constitutional error is made when it is given. *State v. Leech*, 114 Wn.2d 700, 710, 790 P.2d 160 (1990). By the time the Washington State Supreme Court upheld the knowledge instruction 1990 with *Leech*, the language had been challenged and upheld so often in the Washington Court of Appeals, that the *Leech* court included five references to lower court cases between 1985 and 1897 upholding the revised language in a footnote. *Id.*, at 710 n.20. This is the pattern instruction provided to the jury at the Appellant’s trial. The Appellant’s challenge to the statute and pattern instruction offer no new arguments or grounds to reconsider *Shipp*, *Leech*, or the others upholding the language, other than the advocacy of a recent law review article.

State v. Allen is an outlier, and its misapplication of constructive knowledge does not apply, factually or legally, to the case at hand

The Appellant’s sole source of authority regarding the statements of the prosecutor, *State v. Allen*, neither factually nor legally fits the case at hand. In *Allen*, the State’s case was completely based on accomplice liability—Mr. Allen was not the principal. *Allen*, 182 Wn.2d 364. The court considered, therefore, a narrow question—“We must decide whether the prosecuting attorney committed prejudicial misconduct by misstating the standard upon which the jury may convict an *accomplice*.” *Allen*, 182 Wn.2d at 369 (italics added). The accomplice question was the heart of the misuse of the knowledge instruction in *Allen*, a situation not present here.

The jury instruction used in the *Allen* trial was correct, but the prosecutor’s simplification of the instruction to fit the State’s theory of the case constituted misconduct. *Id.*, at 371. “The prosecuting attorney stated that ‘[f]or shorthand we’re going to call that ‘should have known.’ The prosecuting attorney went on to repeatedly and improperly use the phrase ‘should have known’ when describing the definition of knowledge.” *Id.* (internal citations omitted) The prosecutor also used a slide show to feature the words “should have known” repeatedly. *Id.*, at 371–72. Most egregiously, the prosecuting attorney specifically told the jury that it did not need to find actual knowledge, saying “under the law, even if he

doesn't actually know, if a reasonable person would have known, he's guilty." *Id.*, 182 Wn.2d at 374-75.

"Should have known" clearly constituted the theme of the State's case in *Allen*, and indeed the prosecutor unapologetically sought to convict Mr. Allen because either he knew Mr. Clemons's plans, or he had some form of deliberate ignorance.<sup>1</sup> With the argument in *Allen*, the prosecutor sought to avoid having to prove actual knowledge at all. Given the facts before the *Allen* jury, and this level of advocacy by the prosecutor, the reviewing court reasonably lost faith that the jury convicted after finding Mr. Allen had actual knowledge of Mr. Clemons' intent and actions.

The Appellant's argument would be well taken in a case such as *Allen*. The facts in the case at hand, however, are nothing like those in *Allen*. The prosecutor's mentions of "should have known" were in passing and each time in conjunction with the question of Mr. Bradshaw's actual knowledge. They were nothing like those in *Allen*, even the few cited above, and Mr. Bradshaw's prosecutor did not make an argument at all like that in *Allen*. Finally, Mr. Allen was prosecuted as an accomplice,

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<sup>1</sup> A deliberate ignorance instruction, for example, "sensibly recognizes the reality that one who has enough knowledge of the law to consciously avoid learning the definite truth is at least aware of the high probability that his conduct is illegal and is simply attempting to maintain deniability." *United States v. Galimah*, 758 F.3d 928, 932 (8th Cir. 2014)

whereas Mr. Bradshaw had no accomplice. This distinction is important because, accomplice liability still requires the accomplice perform some act to be liable. RCW 9A.08.020. There, though, the knowledge aspect is passive. The facts in Mr. Bradshaw's case do not lend themselves to a "should have known" argument by the State, nor did they give the jury any basis to convict based on Mr. Bradshaw being somehow ignorant of the legal status of that car he drove.

The evidence at trial pertained only to what the Appellant actually knew about the stolen car; without suggesting how the Appellant obtained the car, there is no evidence to consider what he should have known

Trying to determine what Mr. Bradshaw, or any defendant, should have known at any given time requires context and information about what led up to that moment. In this case, that would involve evidence regarding how he came to possess the car, when he got it or from where, or what anyone said to him about the vehicle. Evidence that would suggest Mr. Bradshaw *should have known* he was driving a stolen care could have included any of the following:

- testimony that the sale price was far below market value, and thus a deal too good to be true;
- testimony that the car was traded or given to Mr. Bradshaw, and that the person who traded the car to Mr. Bradshaw was a known thief;

- testimony that Mr. Bradshaw found the car abandoned and decided to take possession of it;
- testimony that someone had told Mr. Bradshaw someone else owned it; or,
- testimony that when Mr. Bradshaw bought the car from a man, for example, and it was full of a woman's items.

Any of these pieces of evidence could provide strong circumstantial evidence that the Defendant should have known that the car was stolen without having to prove he actually knew it was stolen.

However, those facts are not present here. The jury heard no evidence regarding how Mr. Bradshaw came to possess the car or what he may have been told about it.

Instead, the jury heard the following evidence, all of which directly supports the conclusion that the Defendant *actually knew* the car was stolen:

- The vehicle was not registered to Mr. Bradshaw;
- Mr. Bradshaw avoided eye-contact with Officer Blodgett;
- Mr. Bradshaw ditched the car and ran off without taking the keys with him; and,
- Mr. Bradshaw hid from the police despite having done nothing else unlawful.

Asking why Mr. Bradshaw would act this way leads a fact-finder to the conclusion that he knew the car was stolen, not to the conclusion that he *should have known* it was stolen. A reasonable person could infer

that if Mr. Bradshaw were actually unaware the car was stolen, he would not have acted this way.

Given the facts of this case, the prosecutor's statements could neither have misled the jury, nor given the jury an opportunity to consider any knowledge other than the Appellant's actual knowledge

In order to prevail on a claim of prosecutorial misconduct, an appellant must show that in the context of the record and all of the circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *In re: Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The burden to establish prejudice requires an appellant prove a substantial likelihood the misconduct affected the jury's verdict. *State v. Thorgerson*, 172 Wn.2d 438, 442–43, 258 P.3d 43 (2011). Because Mr. Bradshaw failed to object at trial, he waived the errors unless he establishes that the misconduct was so flagrant and ill intentioned that the jury instructions would could not overcome the error. *Id.* Allegedly improper arguments should be reviewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” *State v. Russell*, 125 Wn.2d 24, 85–86, 882 P.2d 747, 785 (1994).

It is presumed that juries follow the instructions of the court. *State v. Cunningham*, 51 Wn.2d 502, 319 P.2d 847 (1958). It is also presumed that juries follow the court's instruction unless the prosecutorial

misconduct is so inherently prejudicial that it is likely to impress itself on the minds of the jurors. *State v. Escalona*, 49 Wn. App. 251, 742 P.2d 190 (1987). Here, the prosecutor's references to the idea that Mr. Bradshaw should have known the car was stolen did not encourage the jury to convict the Defendant on that basis for two reasons, and thus were not prejudicial.

First, given the arguments as a whole, the prosecutor's focused on Mr. Bradshaw's actual knowledge, mentioning "should have known" only the four times noted in the Appellant's brief. 2RP, 55, 58, 62–63. In each instance, the remark was an appositive following the question of what the Appellant actually knew at the moment he encountered Officer Blodgett.

Second, as discussed above, the facts are such that a jury could only have concluded that Mr. Bradshaw did or did not know the car he was driving was stolen; the evidence does not support the conclusion, let alone the question, that he believed the car was lawfully his but should have known better. If anything, the prosecutor's few references to what the Defendant should have known were merely inarticulate and confusing to the jury given the lack of facts on point. Certainly, given the record, there is not a substantial likelihood the remarks had an effect on the jury's verdict, as it did in *Allen*.

The Appellant seeks to overturn decades of case law upholding the definition of knowledge, depriving the legislature of its authority to determine the definitions of criminal culpability, and leading to untenable results

The Court should not accept the Appellant’s invitation to redefine knowledge and overturn decades of case law upholding the Washington State Legislature’s definition of knowledge. Doing so would undermine the legislature’s authority to determine criminal culpability, and lead to untenable outcomes. While the concept of constructive knowledge has the potential to be abused and misinterpreted, such as in *Allen*. Using circumstantial evidence to prove a person was aware of a fact or circumstance must still convince a jury beyond a reasonable doubt, the highest of standards.

The Appellant asks this court to disregard the previous holdings of the Washington Supreme Court, of which it is bound. Adherence to past decisions through the doctrine of *stare decisis* promotes clarity and stability in the law. *Matter of Arnold*, 198 Wn. App. 842, 396 P.3d 375 (2017). “A litigant seeking to upend a prior case faces an arduous task. Our Supreme Court does not lightly set aside a prior decision.” *Arnold*, 198 Wn. App. at 846–47. Because of the many benefits of adhering to precedent, an appellate court, specifically the Supreme Court, will only revisit prior decisions upon “a clear showing that an established rule is

incorrect and harmful.” *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016). Both prongs of this analysis are required. *Deggs v. Asbestos Corp. Ltd.*, 186 Wn.2d 716, 381 P.3d 32 (2016). When a party asks the court to reject precedent, it “is an invitation we [the Supreme Court justices] do not take lightly.” *Ottom*, 185 Wn.2d at 678, *citing State v. Barber*, 170 Wn.2d 854, 863, 248 P.3d 494 (2011).

Before considering reversing *Shipp*, as the Appellant encourages, the dissent in *Shipp* should be considered. Just as the *Shipp* majority found its decision “consistent with the accepted rule for proving knowledge in other jurisdictions” and “the standard in Washington as well under the previous statute defining knowledge,” the dissent found “the definition of constructive knowledge contained in this act is one well known to the law and one which has long enjoyed judicial approval.” *Shipp*, 93 Wn.2d at 517, 502 (J. Rosellini dissenting). It is important to note as well that the dissent highlights the separation of powers, which the Appellant seeks to set aside. “The legislature intended that persons who ought to have known what they were doing should be punished the same as persons who actually knew. It was for the legislature to decide whether the two groups are equally culpable, and not a judgment to be made by this court.” *Id.*, at 522.

Specific criminal intent may be inferred from circumstantial evidence or from a defendant's conduct, where the requisite intent is plainly indicated as a matter of logical probability. *State v. Bryant*, 89 Wn. App. 857, citing *State v. Billups*, 62 Wn. App. 122, 813 P.2d 149 (1991). This can be accomplished using direct evidence or circumstantial evidence, which is not to be considered any less reliable than direct evidence. *Id.*, at 871, citing *State v. Brown*, 68 Wn. App. 480, 843 P.2d 1098 (1993). “While the State must prove actual knowledge, it may do so through circumstantial evidence.” *Allen*, 182 Wn.2d at 374.

The Appellant seems to agree with these cases, stating that his argument does not mean the State must somehow present direct evidence of knowledge. However, it is difficult to conceive of a fact pattern where a Defendant’s actual knowledge is proved by circumstantial evidence without permitting a jury to make the inference allowed by the statute. Such evidence would only conceivably come in the form of a confession, or testimony that the Defendant previously said he or she knew a fact. Such evidence is unsurprisingly hard to come by and implicates all manner of evidentiary and due process issues. Even a statement from a witness that he or she advised the defendant that a certain car is stolen would require, to satisfy the Appellant’s position, proof that the Defendant actually heard the advisement and processed it mentally, all while being

no less intelligent or attentive than an ordinary person. Essentially, the appellant's position demands the jury hear of a confession, or hear from the Defendant. This result implicates numerous evidentiary and constitutional issue so as to be simply untenable.

### **III. CONCLUSION**

The pattern jury instruction on knowledge does not inherently violate due process, and decades of case law uphold the instruction as constitutional. The supposed risk argued by the Appellant simply does not exist in this case. All the evidence presented at trial pertained to the Appellant's reaction to law enforcement, and thus pertained directly to his actual knowledge of his unlawful activity. Given these facts, any misstatements by the prosecutor would not have any effect on the jury and therefore would not be prejudicial.

The State respectfully requests this court find no error in the Appellant's statement supplemental grounds, and uphold the conviction.

DATED this thirteenth day of March, 2019.

Respectfully Submitted,

By:   
Randy J. Trick  
Deputy Prosecuting Attorney  
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# GRAYS HARBOR PROSECUTING ATTORNEY

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