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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ISIDRO LYNN APODACA, JR., APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Michael Schwartz, Judge

No. 18-1-00510-0

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**Brief of Respondent**

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MARY E. ROBNETT  
Prosecuting Attorney

By  
MARK von WAHLDE  
Deputy Prosecuting Attorney  
WSB # 18373

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court abuse its discretion by refusing to give an abandoned property instruction where there was no evidence of abandonment? (Appellant's Assignment of Error 1).
2. Was the abandoned property instruction relevant to the defendant's mental state where the instruction only addressed the mental state of the true owner of the car? (Appellant's Assignment of Error 1).
3. Was the defendant able to effectively argue his theory of the case without an abandoned property instruction where his closing was devoted to arguing the State did not prove he knew the car was stolen? (Appellant's Assignment of Error 1).
4. Should this Court remand defendant's Judgment and Sentence to strike a portion that allows for interest accrual where defendant was found indigent at sentencing? (Appellant's Assignment of Error 2).

B. STATEMENT OF THE CASE.

1. TRIAL

The State charged Isidro Apodaca, (the "defendant"), with one count of unlawful possession of a stolen vehicle under RCW 9A.56.068 and 9A.56.140. CP 2.

On February 1, 2018, William Marks woke up to go to work only to discover his green 1999 Honda was missing. 08/20/18 RP 172-73. He had

left it locked in his apartment parking lot and it had been in excellent condition. 08/20/18 RP 173-74.

The next day, Kelo Ceridon was working as an asset protection team lead at a Target store in Bonney Lake, Washington. 08/20/18 RP 187-88, 190. Ceridon was looking at surveillance cameras when he spotted a man and a woman in the parking lot with a stick object poking through the window of a green Honda civic. 08/20/18 RP 190-91. The man appeared to be trying to open the window of the car. 08/20/18 RP 192. The two individuals eventually got into the vehicle, started the car, and drove across the street to another parking lot. 08/20/18 RP 192, 194. Ceridon called 911. 08/20/18 RP 192.

Officer Brian Vansickle responded to the 911 call. 08/20/18 RP 205. He found the car in a parking lot across the street from Target. 08/20/18 RP 209. Officer Vansickle ran the license plate through dispatch and was informed the vehicle was stolen. 08/20/18 RP 210. As he drove around to the front of the car, Officer Vansickle saw a man, later identified as the defendant, walking away from the back of the car that matched the description of the male subject. 08/20/18 RP 210-11, 212. Officer Vansickle told him to stop and detained him. 08/20/18 RP 211-13. After Officer Vansickle patted the defendant down for weapons, the defendant said, "Just let her go. She didn't know the vehicle was stolen," referring to the woman

with him. 08/20/18 RP 213. Officer Vansickle placed the defendant under arrest and read him his Miranda rights. 08/20/18 RP 214. Unprompted, the defendant again stated, "Let her go. She did not know." 08/20/18 RP 214.

Officer Vansickle asked the defendant about the car. 08/20/18 RP 214. The defendant said he got the car in Kent, that he knew he shouldn't have taken the car, and he took it because he was cold. 08/20/18 RP 214-15. The defendant also mentioned someone else had already taken it and he had gotten it off the side of the road. 08/20/18 RP 215. Officer Vansickle patted the defendant down and found shaved keys and a file in his pockets. *Id.*

The police called Marks back to inform him that his car had been recovered. 08/20/18 RP 175. Marks had to retrieve the car with a tow truck because the ignition had been punched in and the car wouldn't start. *Id.* The car also had "considerable exterior damage. The interior had a lot of bizarre odors and [] items [that did not belong to Marks]." 08/20/18 RP 177. The plastic between the dash and the steering wheel had been removed, the entire column was twisted, and the ignition was separated from the column. 08/20/18 RP 178. Marks had not given anyone permission to drive his car. *Id.* Additionally, Marks had not left the car on the side of the street. *Id.*

## 2. JURY INSTRUCTIONS

After all the evidence was presented, the court addressed each party's proposed jury instructions. 08/20/18 RP 246. The defendant submitted an "abandoned property" instruction citing *State v. Kealey*, 80 Wn. App. 162, 171, 907 P.2d 319 (1995). CP 18. The State objected to giving this instruction. 08/20/18 RP 247. The court stated,

In this particular case, I do not believe [the instruction] factually or legally fits the facts within this case. It may become a case where that would be the particular issue, but I don't think that that has been appropriately fleshed out here, so the Court will decline to give that instruction.

08/20/18 RP 247. The defendant objected to the court's ruling. 08/20/18 RP 248. The court explained that there were insufficient facts before the jury to make an abandoned property argument. 08/20/18 RP 249. Specifically, the court explained:

There was testimony from the officer that [the defendant] claimed that he found the vehicle on the side of the road in Kent, or a version of that story. As I have indicted, the requirement here is that the instruction be a correct statement of the law, and not be misleading to the jury. And there is some affirmative or factual support for the instruction.

As I indicated in our off-the-record discussion, I think potentially abandonment could in some instances become a defense. However, there is not, to this Court's mind, sufficient facts before the trier of fact in order to make that particular argument. The fact that it was left by the side of the road would also imply that a person had left to go get a tow truck, or some other such thing. So while that may become an issue in another case, I don't believe that it's the fact of this

particular case. Therefore, the Court will decline to give the defense Instruction No. 7.

08/20/18 RP 249-50. The court also stated that the defendant could still argue to the jury that he did not have knowledge and the State did not prove beyond a reasonable doubt that the defendant had knowledge the vehicle was stolen. 08/20/18 RP 251. The defendant dedicated much of his closing to making this very argument. 08/20/18 RP 271-76. The jury found the defendant guilty. CP 48.

3. SENTENCING AND LEGAL FINANCIAL OBLIGATIONS

At sentencing, the court found the defendant indigent. CP 71-72. The defendant was sentenced to 57 months. CP 54-66. The court imposed a \$500 crime victim assessment fee. CP 54-66. The defendant's Judgment and Sentence included an interest provision, stating the financial obligations shall bear interest from the date of the judgment until payment in full. *Id.* The defendant filed a timely notice of appeal. CP 73-86.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DECLINING TO GIVE AN ABANDONED PROPERTY INSTRUCTION THAT WAS NOT SUPPORTED BY THE EVIDENCE.

An appellate court reviews a trial court's refusal to give jury instructions for an abuse of discretion. *State v. Ehrhardt*, 167 Wn. App.

934, 939, 276 P.3d 332 (2012). Jury instructions are proper if they permit the parties to argue their theories of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005). Here, the trial court properly declined to give an abandoned property instruction where the instruction addresses actual abandonment and there was no evidence of abandonment below.

A defendant is entitled to have his theory of the case submitted to the jury under appropriate instructions when substantial evidence in the record supports that theory. *State v. Harvill*, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010). When determining if the evidence at trial was sufficient to support the giving of an instruction, a reviewing court views the supporting evidence in the light most favorable to the party that requested the instruction. *State v. Fernandez-Medina*, 171 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). A trial court has no obligation to give misleading instructions. *State v. Crittenden*, 146 Wn. App. 361, 369, 189 P.3d 849 (2008).

The defendant proposed an abandoned property instruction that stated, “Abandoned property is not the property of another. Property is abandoned when the owner intentionally gives up possession of the property.” CP 11-18. The instruction cited *State v. Kealey*, 80 Wn. App. 162, 171, 907 P.2d 318 (1995), a Fourth Amendment case that discusses possessory interests in lost or abandoned property. Jury instructions must

be relevant to the evidence presented. *State v. Linehan*, 147 Wn.2d 638, 643, 56 P.3d 542 (2002). There was no evidence of actual abandonment in this case.

Here, Marks testified that he did not give anyone permission to use his car and did not leave it on the side of the road. 08/20/18 RP 178. He testified that he had parked his locked car in his apartment parking lot the night before the police located the defendant with his car. 08/20/18 RP 172-74. Although the defendant told the officer that he “found” the vehicle on the side of the road in Kent, “found” property is not “abandoned” property. *See Kealey*, 80 Wn. App. at 171. In *Kealey*, this Court stated, “Finders keepers, losers weepers’ is a time-worn old saying, but not true.” *Id.* at 172. Specifically, this Court explained, “Property is abandoned when the owner intentionally relinquishes possession and rights in the property.” *Id.* at 171.

The evidence presented in this case does not support the inference that Marks intentionally relinquished possession or any rights to his car. Thus, the abandoned property jury instruction was unnecessary. Construing the defendant’s statement in the light most favorable to him, the statement that the defendant found the property does not support the inference that the property was actually abandoned. As such, the court did not abuse its discretion by declining to give the abandoned property instruction where the evidence did not support it.

2. THE ABANDONED PROPERTY INSTRUCTION IS IRRELEVANT TO THE DEFENDANT'S MENTAL STATE.

The trial court properly declined to give an abandoned property instruction because it was irrelevant to the defendant's theory of the case and would have misled the jury. The proposed abandoned property instruction addresses actual ownership of the car and the *mens rea* of the true owner of the car. The defendant argues that this proposed instruction negated the knowledge element of possession of a stolen motor vehicle. Brief of Appellant, 9. The defendant's attempted recharacterization of the instruction as a mental state instruction is unfounded. The instruction does not instruct the jury on the defendant's knowledge of the status of ownership of the car. The instruction only addresses the subjective intent of the true owner, which is not at issue in this case. Accordingly, the defendant could not have reasonably advanced a defense about his mental state based on this instruction at trial. The trial court properly rejected the instruction.

Further, there is no evidence in the record that the defendant subjectively believed the property was abandoned. The defendant relies on his one statement to police that he found the car on the side of the road to support his proposed instruction. However, the defendant is improperly placing undue emphasis on one portion of his testimony. See *State v. Thomas*, 110 Wn.2d 859, 866, 757 P.2d 512 (1988) (undue emphasis on

one portion of testimony is improper). When the defendant's statement is viewed in the context of his full interaction with the police, his conduct indicates he did not actually believe the car was abandoned. Specifically, the defendant told the police, "Just let her go. She didn't know the vehicle was stolen."<sup>1</sup> 08/20/18 RP 213. After the defendant was read his *Miranda* rights, he again reiterated, "Let her go. She did not know." 08/20/18 RP 214. When asked about the car, the defendant told the officer the ignition had damage. *Id.* Then he explained that he got the vehicle in Kent, he knew he shouldn't have taken it, someone else had already taken it, and he found it on the side of the road. 08/20/18 RP 214-15. The defendant's statement, viewed alone or in the proper context, does not support the abandoned property instruction.

Accordingly, the trial court did not abuse its discretion by rejecting an instruction that was unsupported by the evidence, and this Court should affirm the instructions given.

3. THE JURY INSTRUCTIONS ALLOWED THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE.

Jury instructions are proper if they allow a party to argue his theory of the case, do not mislead the jury, and properly inform the jury of the applicable law. *State v. Barnes*, 153 Wn.2d at 382. Here, the jury

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<sup>1</sup> A woman was with the defendant when he was arrested. 08/20/18 RP 213.

instructions allowed the defendant to argue his theory of the case, which he repeatedly did in closing argument. *See* 08/20/18 RP 271-76.

In closing argument, the defendant's counsel argued that if the defendant "took possession of the vehicle on the side of the road, and he did not know that car was stolen, it's not a crime." 08/20/18 RP 273. Thus, the instructions that were given allowed him to argue his theory of the case — that he found the car on the side of the road and did not know it was stolen.

As discussed above, the proposed instruction is mutually exclusive from the defendant's knowledge, so it does not support the defendant's theory of the case as he now claims. The defendant does not articulate how the court's refusal to give the instruction denied him of the ability to argue his theory of this case. Thus, the trial court did not err in refusing to give this instruction because the defendant was able to thoroughly argue that the State did not prove beyond a reasonable doubt the defendant knew the car was stolen.

Further, the trial court did not abuse its discretion in declining to give an instruction that was not supported by the evidence. A trial court should deny a requested jury instruction that presents a theory of the defendant's case only where the theory is completely unsupported by the evidence. *State v. Barnes*, 153 Wn.2d at 382. Here, as argued above, the proposed instruction speaks only to actual ownership. That was not at issue

in this case. There was no evidence indicating that the car was actually abandoned. Marks testified that he left his car locked in his apartment parking lot and no one else had permission to possess it. The defendant's statement that he found the car on the side of the road does not necessarily negate the fact that the defendant knew that the car was stolen, specifically when he made that statement at the same time that he admitted to knowing the car was stolen. Accordingly, the court properly declined to give the instruction because the proposed instruction does not further the defendant's theory of the case as he claims, and he was able to argue his theory in closing.

- a. Even if this Court finds the trial court erred in refusing to give the proposed abandoned property instruction, any error was harmless.

Even if this Court determines that the trial court erred in refusing to give the abandoned property instruction, any error was harmless because the instruction would not have materially affected the jury's verdict.

The defendant claims that the trial court's refusal to give his proposed jury instruction violated his Sixth Amendment rights. Brief of Appellant, 4. The Sixth Amendment grants defendants the right to present testimony in one's defense, and the right to confront and cross-examine adverse witnesses. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 1925,

18 L. Ed. 2d 1019 (1967)). However, the trial court based its decision about the proposed instruction on factual reasons, and the ruling did not limit the evidence available to the defendant to make his arguments. Accordingly, a constitutional error analysis would be inappropriate.

In cases where jury instructions have been subject to a manifest constitutional error analysis, the instructions shifted the burden to the defendant, omitted an element of the crime, or failed to define the reasonable doubt standard. See *State v. Chacon*, 192 Wn.2d 545, 548, 431 P.3d 477 (2018). In contrast, failing to instruct on lesser included offenses and failing to define terms do not constitute manifest constitutional errors. *Id.* The issue in this case, refusing to give an instruction that defined abandoned property, is much more similar to the alleged instructional error on failing to define a term than burden shifting. Thus, the court's decision, if error, should be viewed under a nonconstitutional error standard.

A nonconstitutional error is harmless if it did not, within reasonable probability, materially affect the verdict. *State v. Walters*, 162 Wn. App. 74, 84, 255 P.3d 835 (2011). Here, there is no reasonable probability that the jury's verdict was materially affected by the absence of the abandoned property instruction.

The proposed instruction addressed only the third element of possession of a stolen motor vehicle, which states, "the defendant withheld

[...] the motor vehicle to the use of someone other than the true owner.” CP 29-47, Instruction 7. The true owner of the car explained to the jury that he did not relinquish control of the car or give anyone else permission to possess it. There was no evidence of actual abandonment. Thus, the evidence regarding ownership of the car was unequivocal, and the refusal to give an instruction that addressed only this element would not have materially affected the jury’s verdict. The trial court’s decision, if error, was harmless.

As discussed supra, the proposed instruction did not address defendant’s knowledge of the car being stolen, but even if it did, the jury’s verdict would not have been materially affected because the evidence firmly established the defendant knew the car was stolen. The evidence proved: (1) the defendant was seen breaking into the car with a stick-like object, (2) the inside of the car and the steering column were destroyed, (3) the defendant possessed shaved keys and a metal file on his person,<sup>2</sup> (4) when police stopped the defendant, he stated the car was stolen and his female friend did not know, and (5) the defendant stated he knew he should not have taken the car. Considering the evidence that proved the defendant knew the car

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<sup>2</sup> Shaved keys are keys with filed-down edges that can be “jiggle[d] to start vehicles.” 08/20/18 RP 216.

was stolen, a proposed abandoned property instruction would not have materially affected the jury's verdict.

In *State v. Walters*, 162 Wn. App. 74, the Court of Appeals held that the refusal to give a voluntary intoxication instruction was not harmless error to the defendant's theft conviction, but it was harmless to the defendant's other two convictions. *Id.* at 84-85. The distinguishing factor between the convictions was that the proposed instruction would have instructed the jury on how to apply the defendant's argument, that he failed to act intentionally, to the facts of the theft. *Id.* at 84. However, the instruction was harmless to the defendant's other convictions because there was direct evidence in the record that the defendant's mental state was not impaired when the other crimes were committed. *Id.*

In the present case, the defendant's proposed instruction was harmless because, like the instruction in *Walters* regarding that defendant's remaining convictions, the abandoned property instruction would not have helped the jury apply the defendant's argument to the facts of the case. The statement the defendant claims supports the instruction, that the defendant did not know the car was stolen because he found it on the side of the road, was presented to the jury in the context it was made. That context included the defendant stating the person he was with did not know the car was stolen, he knew he should not have taken the car, someone else had already

taken it, and that he “found it” on the side of the road in Kent. Accordingly, there was direct evidence in the record that the car was not abandoned, and the instruction would not have been helpful to the jury.

The defendant’s proposed instruction did not support his own statements and the instruction would not have been helpful to the jury. Thus, the trial court’s refusal to give an abandoned property instruction did not, within reasonable probabilities, materially affect the jury’s verdict.

4. THIS COURT SHOULD REMAND TO STRIKE  
THE INTEREST ACCRUAL PROVISION IN  
THE JUDGMENT AND SENTENCE.

The defendant was found indigent at sentencing; thus, the Judgment and Sentence should not have included an interest accrual provision. Accordingly, this court should remand to strike the provision.

Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) amended the legal financial obligation (LFO) system in Washington State. The bill is now codified as RCW 10.82.090. Particularly, the amendment eliminated interest accrual on the non-restitution portions of LFOs as of June 7, 2018. RCW 10.82.090.

The defendant’s Judgment and Sentence contains a portion that allows for interest accrual on unpaid legal financial obligations. CP 54-66. The only legal financial obligation the court imposed was a \$500 crime victim assessment fee. *Id.* Here, the defendant was found guilty after this

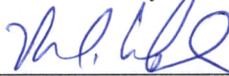
bill went into effect, so the Judgment and Sentence is subject to its provisions. Because the court found the defendant was indigent at sentencing, the interest accrual provision in the Judgment and Sentence is improper. The Judgment and Sentence should be remanded to strike that provision.

D. CONCLUSION.

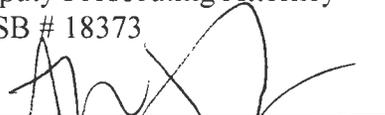
For the above stated reasons, the State respectfully requests this Court affirm the defendant's conviction and remand to the trial court to strike the interest accrual provision in the Judgment and Sentence.

DATED: April 15, 2019.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney



MARK von WAHLDE  
Deputy Prosecuting Attorney  
WSB # 18373



Angela Salyer  
Appellate Intern

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-15-19 Therese Ka

Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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