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**State of Washington**  
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**COURT OF APPEALS, DIVISION II**  
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DALE PAEPER, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Kitty-Ann van Doorninck

No. 18-1-03265-4

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**Brief of Respondent**

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A. INTRODUCTION

Dale Paeper was convicted of one count of unlawful possession of a stolen vehicle. Prior to trial, the State and Paeper proposed jury instructions defining knowledge based on the Washington Pattern Jury Instructions. The trial court instructed the jury on the definition of knowledge consistent with WPIC 10.02 and the parties' proposed instructions. The trial court's instructions were a proper statement of the law that has repeatedly been upheld as constitutional by Washington courts. Similarly, Paeper fails to show his counsel was ineffective for proposing a definition of knowledge that is a proper statement of the law that has been consistently upheld as constitutional. This Court should affirm Paeper's conviction.

B. RESTATEMENT OF THE ISSUES

1. Did the trial court properly instruct the jury using the definition of knowledge that has been repeatedly upheld as constitutional by Washington courts?
2. Has Paeper failed to show his counsel was ineffective for proposing a jury instruction defining knowledge that properly stated the law and that has been consistently upheld as constitutional by Washington courts?

C. STATEMENT OF THE CASE

1. PROCEDURE

On August 17, 2018, the Pierce County Prosecuting Attorney charged Dale Paeper with one count of unlawful possession of a stolen vehicle. CP 3.

At trial, the State filed proposed jury instructions, including the following instruction defining knowledge from the Washington Pattern Jury Instructions:

A person knows or acts knowingly with respect to a fact when he or she is aware of that fact. It is not necessary that the person know the fact is defined by law as being unlawful or an element of the crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 107; *see* WPIC 10.02.

Paeper proposed the following jury instruction defining knowledge:

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 42. This proposed instruction was also consistent with the Washington Pattern Jury Instructions. *See* WPIC 10.02.

The case proceeded to a jury trial. RP<sup>1</sup> 116. The State presented six witnesses: Jose Guadelio Laigo (the victim), Auburn Police Officer Jeffrey Nelson, Bonney Lake Police Officer Marcus Koehn, Bonney Lake Police Detective Kyle Torgerson, Bonney Lake Police Sergeant Kelly Maras, and Allan Tamajka. RP 115. Paeper did not testify or call any witnesses at trial. RP 206.

The court instructed the jury as to knowledge with an instruction nearly identical to the State's proposed instruction. CP 61; *see* CP 107. The jury found Paeper guilty of unlawful possession of a stolen vehicle. RP 234; CP 73. The court sentenced him to 40 months. 2RP 16; CP 78. Paeper subsequently appealed. CP 95.

## 2. FACTS

On the afternoon of August 15, 2018, Jose Guadelio Laigo's 1990 Honda Accord was stolen from the parking lot of the Muckleshoot Casino.

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<sup>1</sup> Citation to the Verbatim Report of Proceedings (RP) is as follows: RP refers to the trial held on December 11, 2018 through December 13, 2018 and 2RP refers to the sentencing that took place on December 21, 2018.

RP 136, 138. Laigo contacted police and filed a police report. RP 138. He testified that he never transferred the vehicle to another person. RP 137. Laigo had the sole key to his vehicle in his possession at all times while the vehicle was stolen. RP 138-39. There was no damage to the inside of the vehicle before it was stolen. RP 139.

The same day, on August 15, 2018, Auburn Police Officer Jeffrey Nelson was on patrol when he observed a black Geo Metro following a blue 1990 Honda Accord closely down an alley. RP 144, 146-47. He recognized the Honda as a commonly stolen vehicle. RP 147. Suspecting that the Honda was stolen and the vehicle following it had transported the driver to the location of the Honda, he ran a records check on the license plate. RP 146-47. Dispatch responded that the vehicle was not reported stolen at that time. RP 147. Nelson documented the vehicle's license plate in his report. RP 146. The license plate matched that of Laigo's Honda Accord. RP 137, 146.

When the vehicles arrived at a red light, Officer Nelson pulled up next to the Honda. RP 149. The driver's window of the Honda was rolled down. *Id.* Using a negotiation technique to gauge the driver's behavior, Officer Nelson said to the driver, "Man, I wish that car was stolen, you know, because then I could arrest ya." RP 151. The driver turned a full

ninety degrees and “looked right at” Officer Nelson. RP 150. The driver replied, “Oh, oh, oh, no, sir. It’s not stolen.” *Id.*

The next day, on August 16, 2018, Bonney Lake Police Officer Marcus Koehn and Sergeant Kelly Maras were dispatched to the parking lot of a Walmart store in Bonney Lake. RP 161, 196. When they arrived, they found Paeper standing at the opened trunk of a blue 1990 Honda Accord, working on the vehicle’s taillights. RP 196-97. When Officer Koehn ran the vehicle’s license plate, it came back as stolen. RP 197. The license plate matched that of Jose Laigo’s Honda Accord. RP 137, 188.

Minutes later, Allan Tamajka walked up and began talking to Paeper. RP 199. Sergeant Maras and Officer Koehn contacted the men. *Id.* Avoiding eye contact with the officers, Paeper began removing tools and other items from the Honda. *Id.* He placed the tools in a tool box and slid the toolbox toward a Ford Contour that was parked next to it. *Id.* Officer Koehn placed Paeper in custody. *Id.* Paeper claimed he knew nothing about the Honda and was only working on the Ford next to it. RP 200.

Sergeant Maras asked Paeper, if he knew nothing about the Honda, how he got into the trunk, why he was working on the taillights, and how he even knew the lights needed to be fixed. RP 201. He responded that “he just knew.” *Id.* Sergeant Maras observed that inside the Honda, the

ignition switch was “hollowed out or rounded out,” and the key was in the on position, although the vehicle was not running. RP 202.

Bonney Lake Police Detective Kyle Torgerson arrived at the scene and observed the damage to the ignition and removed two keys from the vehicle. RP 188, 190. One of the keys appeared to be a “valet key” and the other appeared to be a “shave key and/or jigglers key.” RP 193. Detective Torgerson testified that those types of keys are commonly used to operate stolen vehicles. RP 192. Detective Torgerson later contacted Officer Nelson, who viewed a picture of Paeper and immediately identified Paeper as the man he had encountered driving the Honda Accord one day earlier. RP 153-54.

D. ARGUMENT

1. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY USING THE DEFINITION OF KNOWLEDGE THAT HAS BEEN REPEATEDLY UPHELD AS CONSTITUTIONAL

The trial court properly instructed the jury on the element of knowledge using the definition from the Washington Pattern Jury Instructions that has been repeatedly upheld as constitutional by Washington courts. “Instructions must convey to the jury that the State bears the burden of proving every essential element of a criminal offense beyond a reasonable doubt.” *State v. Bennett*, 161 Wn.2d 303, 307, 165

P.3d 1241 (2007). Jury instructions are proper when 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. Willis*, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). Courts review an alleged error in law in jury instructions de novo. *Id.*

The Washington Pattern Jury Instructions define knowledge as follows:

A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It is not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

WPIC 10.02.

A definition of knowledge that permits the jury to find such knowledge if it finds that the defendant had "information which would lead a reasonable man in the same situation to believe that the relevant facts exist" is constitutional. *State v. Shipp*, 93 Wn.2d 510, 514-16, 610 P.2d 1322, 1325 (1980). In *Shipp*, the court held unconstitutional a jury instruction on knowledge which *directed* the jury to find that a person

knows of acts knowingly when “he has information which would lead a reasonable man in the same situation to believe that facts exists which facts are described by a statute defining an offense.” *Id.* at 514. The court concluded that this definition of knowledge improperly created a mandatory presumption that a defendant has knowledge without allowing a juror to consider the subjective intelligence or mental condition of the defendant. *Id.* However, the court held that language that *permits*, but does not *require* the jury to find such knowledge if it finds the defendant had “information which would lead a reasonable man in the same situation to believe that the relevant facts exist” is constitutional. A permissive standard allows the jury to conclude that a defendant is less attentive or intelligent than the ordinary person. *Id.* at 516.

In *State v. Leech*, the Washington Supreme Court approved a revised edition of WPIC 10.02, which states that a jury is permitted but not required to find that a person acted with knowledge if that person has information that would lead a reasonable person to believe that facts exist that constitute a crime. *State v. Leech*, 114 Wn.2d 700, 710, 790 P.2d 160 (1990); WPIC 10.02. The Court held that the revised language is constitutional and that it corrected the problem identified in *Shipp* because it contained the permissive inference that *Shipp* found constitutional. *Leech*, 114 Wn.2d at 710; *Shipp*, 93 Wn.2d at 514-16. The revised

language of WPIC 10.02 has consistently been held constitutional by Washington courts. *See e.g.* *State v. Barrington*, 52 Wn.App. 478, 485, 761 P.2d 632 (1988), *review denied*, 111 Wn.2d 1033 (1989). *State v. Johnson*, 61 Wn.App. 235, 240, 809 P.2d 764 (1991), *aff'd*, 119 Wn.2d 167, 829 P.2d 1082 (1992).

In *State v. Allen*, 182 Wn.2d 364, 371, 341 P.3d 268 (2015), the defendant was charged with aggravated first degree murder as an accomplice. The State was required to show Allen had actual knowledge that the principle would commit murder. *Id.* The Court reversed Allen's conviction because the prosecutor misstated the standard for knowledge, telling the jury several times that it could find the defendant acted with knowledge under a "should have known" standard. *Id.* at 387. The jury had been instructed "[i]f a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact." *Id.* at 372. The Court noted that was the "correct" definition of knowledge. *Id.* at 371-72. It was not that language, but rather the prosecutor's repeated use of the phrase "should have known," that the court held was improper and prejudicial. *Id.* at 371, 374.

Here, the jury was properly instructed on the definition of knowledge, using the language of revised WPIC 10.02, which has

consistently been held constitutional by Washington courts. The instruction given to the jury stated:

A person knows or acts knowingly with respect to a fact when he or she is aware of that fact. It is not necessary that the person know the fact is defined by law as being unlawful or an element of the crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 61; *see* WPIC 10.02. This Court should reject Paeper's claim that this jury instruction is unconstitutional. *See* Brief of Appellant at 7. The constitutionality of this language has been repeatedly upheld by Washington courts. *See e.g. Barrington*, 52 Wn.App. at 485; *Johnson*, 61 Wn.App. at 240.

Paeper incorrectly claims the instruction misstated the standard required for a jury to find knowledge, permitting the jury to convict based on an objective standard of knowledge. *See* Br. of Appellant at 7-8. But *Leech* rejected this argument. *Leech*, 114 Wn.2d at 710. In *Leech*, the Court held that the revised language of WPIC 10.02, which was used in Paeper's case, created a permissive inference of knowledge that is constitutional. *Id.* at 710. Relying on *Shipp*, the court held the instruction

was constitutional. *Id. Shipp* held that because a permissive inference allows the jury to consider that a defendant is less attentive or intelligent than the ordinary person, it nonetheless requires the jury to find subjective knowledge and thus is constitutional. *Shipp*, 93 Wn.2d at 514-16. Paeper concedes that such a consideration results in a jury finding of actual knowledge, as constitutionally required. Br. of Appellant at 9. Accordingly, Paeper's claim fails.

Paeper cites *Allen* to support his claim that the knowledge instruction in this case was unconstitutional. Br. of Appellant at 11 (citing *Allen*, 182 Wn.2d at 374-75). However, it was not the jury instruction in *Allen* that lead to reversal. *Allen*, 182 Wn.2d at 374-75. *Allen* reversed the defendant's conviction based on the prosecutor's repeated use of the "should have known" standard of knowledge. *Id.* In fact, *Allen* acknowledged that the language of WPIC 10.02, which was used in Paeper's case, is "the correct definition" of knowledge. *See id.* at 371. Thus, *Allen* does not support Paeper's argument.

Here, the court instructed the jury using the language of WPIC 10.02, which has specifically been approved by our Supreme Court. Washington courts have repeatedly rejected the defendant's claim that the instruction is unconstitutional. The language in the jury instruction is a proper statement of the law that did not relieve the State of its burden to

prove actual knowledge. Consistent with *Shipp*, the instruction allowed the jury to conclude that Paeper was “less attentive or intelligent than the ordinary person.” *See Shipp*, 93 Wn.2d at 516. The jury was instructed with the definition of knowledge that has consistently been upheld as constitutional by Washington courts. Accordingly, this Court should reject Paeper’s claim and affirm his conviction.

2. PAEPER HAS FAILED TO SHOW HIS COUNSEL WAS INEFFECTIVE FOR PROPOSING A JURY INSTRUCTION DEFINING KNOWLEDGE THAT PROPERLY STATED THE LAW AND THAT HAS BEEN CONSISTENTLY UPHELD AS CONSTITUTIONAL

Paeper has not met his burden to show that his counsel was ineffective for proposing a jury instruction defining knowledge that properly stated the law and that has consistently been upheld as constitutional by Washington courts. Claims of ineffective assistance of counsel require the defendant to meet the two-prong *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2050, 80 L.Ed.2d 674 (1984). The defendant must prove both that counsel’s performance was deficient and that the deficient performance prejudiced the defense. *Id.* at 687. The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s

conduct. *Strickland*, 466 U.S at 688; *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994).

Under the first prong, counsel's performance is only deficient where it falls below an objective standard of reasonableness. *Strickland*, 466 U.S at 688. There is a strong presumption that counsel's performance was effective and scrutiny thereof is highly deferential. *Id.* The defendant bears the burden of establishing the absence of any conceivable, legitimate strategy or tactic explaining counsel's performance to rebut this presumption. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011).

Counsel is not ineffective for proposing a pattern jury instruction that correctly states the law. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (counsel not ineffective for proposing a then-unquestioned pattern jury instruction); see *In the Matter of A.J.*, 196 Wn. App. 79, 84, 383 P.3d 536 (2016) (counsel not ineffective for failing to object when court gives a pattern jury instruction).

The second prong, prejudice, is only met when a defendant shows a reasonable probability that, but for counsel's errors, the outcome of the proceeding would have been different. *Strickland*, 466 U.S. at 669. A failure to show either prong is fatal to a claim of ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

Here, Paeper's counsel was not deficient for proposing a jury instruction defining knowledge that used the language contained in the pattern jury instruction. CP 42; *see Studd*, 137 Wn.2d at 551. Washington courts have consistently held that the language counsel proposed is a proper statement of the law and constitutional. *Shipp*, 93 Wn.2d at 514-16; *Leech*, 114 Wn.2d at 710; *Barrington*, 52 Wn.App. at 485; *Johnson*, 61 Wn. App. at 240. Accordingly, counsel was not deficient for proposing an instruction defining knowledge that is a pattern instruction, that properly states the law, and that has consistently been held constitutional. Because a failure to show either prong of the test is fatal to a claim of ineffective assistance, this Court need not even reach the second prong in this case. *Thomas*, 109 Wn.2d 225-26.

But even if the Court considers the second prong, Paeper cannot make the required showing of prejudice because there is no reasonable possibility that the outcome of the trial would have differed but for counsel's actions. *See Strickland*, 466 U.S. at 669. First, the State's proposed instruction contained similar language as Paeper's proposed instruction. CP 42, 107. Second, the instruction the court gave the jury was identical to WPIC 10.02, the pattern instruction. CP 61. Thus, even if Paeper had not proposed an instruction on knowledge, it is likely the court would have instructed the jury consistent with the pattern instructions.

Finally, the instruction proposed by counsel, which was nearly identical to the instruction given by the court, was a proper statement of the law. *See Leech*, 114 Wn.2d at 710. Accordingly, Paeper has not shown that the result of the trial would have been different.

Further, the invited error doctrine does not apply in this case because the instruction proposed by counsel was not error. *See Br. of Appellant* at 16-17. “Under the invited error doctrine, a defendant may not request that instructions be given to the jury and then complain upon appeal that the instructions are constitutionally infirm.” *State v. Aho*, 137 Wn.2d 736, 744–45, 975 P.2d 512 (1999). Review is not precluded where invited error is the result of ineffectiveness of counsel. *Id.* at 745. Here, Paeper’s counsel proposed a definition of knowledge that was a proper statement of the law. CP 42; *See, Shipp*, 93 Wn.2d at 514-16; *Leech*, 114 Wn.2d at 710. Thus, there was no error.

Paeper fails to overcome the strong presumption that his counsel’s representation was effective. Counsel was not deficient for proposing an instruction that is a pattern instruction, that properly states the law, and that has consistently been upheld as constitutional. Nor has Paeper shown a reasonable possibility that the outcome of the trial would have been different if counsel did not propose the instruction. A failure to show either required prong is fatal to a claim of ineffective assistance of

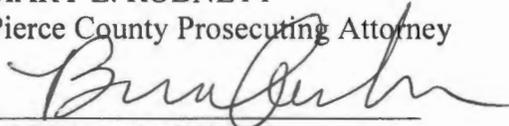
counsel. *Thomas*, 109 Wn.2d at 225-26. Accordingly, Paeper fails to meet his burden to show ineffective assistance of counsel, and this Court should affirm his conviction.

E. CONCLUSION

For the reasons stated above, the State respectfully requests that this Court affirm Paeper's conviction.

RESPECTFULLY SUBMITTED this 29th day of July, 2019.

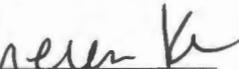
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This 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.

7-29-19   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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