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Court of Appeals
Division II
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NO. 52956-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW SCHMIDT,

Appellant.

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

The Honorable John Fairgrieve, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The jury instruction defining knowledge violated due process because it permitted the jury to find appellant guilty of possessing a stolen vehicle without finding he had actual knowledge the vehicle was stolen.

Issue Pertaining to Assignment of Error

A person cannot be convicted of possession of a stolen vehicle without proof beyond a reasonable doubt that the person actually knew the vehicle was stolen. The jury instruction defining knowledge permits the jury to convict if the defendant had information that would lead a reasonable person to know. The instruction does not clarify that, in order to convict, the jury must conclude beyond a reasonable doubt that the defendant actually knew, rather than merely that a reasonable person should have known. Does the jury instruction violate due process by relieving the State of its burden to prove actual knowledge beyond a reasonable doubt?

B. STATEMENT OF THE CASE

Following a jury trial in Clark County Superior Court, appellant Matthew Schmidt was convicted of possessing a stolen

vehicle, a 1998 Jeep Cherokee. CP 1, 11, 27. The key issue at trial was whether Schmidt knew the Jeep was stolen. RP 198, 307.

The jury instruction the court gave on knowledge allowed the jury to convict if it found a reasonable person in Schmidt's position would have known the car was stolen:

A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance. It is not necessary that the person know that the fact or circumstance 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.

CP 24 (emphasis added).

In closing argument, the prosecutor emphasized the underlined portion of the instruction several times, urging the jury it could convict if it found a reasonable person in Schmidt's position would have know the car was stolen. RP 304; see also RP 303 ("We're not mind readers. We don't have the ability to tell you what Mr. Schmidt was thinking"); RP 306 ("You are allowed to infer Mr. Schmidt knew"); RP 326 ("doesn't give him the right to ignore the

blaring signs in his face that should have told any other person sitting in that car that that car was stolen”).

At trial, Vancouver police officer Aaron Yoder testified that around 1:00 a.m. on December 17, 2019, he stopped a dark colored 1998 Jeep Cherokee because it had no rear license plate as required. RP 236. He approached the driver, Matthew Schmidt, who provided either his name and date of birth or his driver's license. RP 237-38. Yoder read the Jeep's vehicle identification number (VIN) over dispatch and learned it had been flagged as stolen. RP 240. The Jeep was registered to Delbert and Rhonda Dillman. RP 240.

After being advised of his constitutional rights, Schmidt explained he obtained the Jeep from his ex-girlfriend Jessica, who in turn, obtained the car from her uncle Randy. RP 241. Schmidt elaborated that Jessica received the car 2-3 days earlier but had since left for Texas. Schmidt further stated that Randy had demanded \$500 from him, as still owing on the car. RP 242.

Yoder did not recollect anything in particular about the Jeep. RP 243. In his report, he did not write anything down about ignition damage, a paint job, nails coming out of its body, or that it was

missing a bumper. RP 247. The VIN was not covered up or altered. RP 245.

Yoder decided to release the Jeep to the Dillmans. RP 243. Delbert and Rhonda had given the car to their son, Ryan. RP 208, 214, 243. Ryan reported it missing on December 12. RP 215.

Ryan testified that when he went to pick up the Jeep, it had been damaged. RP 218. A log bumper had been removed from its front. He claimed emblems and pin striping had been spray painted black. RP 218. The center console and ignition appeared to have been tampered with. RP 218. Ryan's father testified it appeared the Jeep had screws sticking out of it in various places. RP 212-213.

Ryan did not remember if he told Yoder about the bumper or pin striping paint job. RP 221-22. Ryan claimed he did not notice the pin striping paint job until the next day when it was light out; it dried in a running pattern. RP 221, 226. Ryan acknowledged that despite these changes, the Jeep did not look out of place or obviously stolen; it just looked like an older car. RP 224-25.

The spare key Ryan brought to drive the Jeep home did not work. Schmidt offered Ryan's girlfriend the key he had been using,

that he received from Jessica. RP 219, 223. The key looked “altered.” RP 220.

Ryan testified he later sold the car on Craigslist. RP 221. No pictures of it – before or after it went missing – were offered by the state at trial.

C. ARGUMENT

1. THE JURY INSTRUCTION DEFINING KNOWLEDGE VIOLATED SCHMIDT’S RIGHT TO DUE PROCESS BY PERMITTING THE JURY TO FIND HIM GUILTY BASED ON CONSTRUCTIVE, RATHER THAN ACTUAL KNOWLEDGE THAT THE VEHICLE WAS STOLEN.

The offense of possession of a stolen vehicle requires proof that the person knew the car was stolen. State v. Lakotiy, 151 Wn. App. 699, 714, 214 P.3d 181 (2009). In this case, the jury was instructed it may find knowledge if the defendant has “information that would lead a reasonable person in the same situation” to have that knowledge. CP 24. This instruction violates due process because it permitted the jury to find Schmidt guilty without finding he had actual, subjective knowledge the Jeep was stolen.

[I]t is no exaggeration to say that a criminal defendant can currently be found to have acted with knowledge, and therefore be found guilty of a crime, even though the defendant had no awareness of the fact he or she allegedly knew, and even though the “fact” he or she

supposedly “knew” was not even true. This is untenable; the law must change.

Alan R. Hancock, True Belief: an Analysis of the Definition of “Knowledge” in the Washington Criminal Code, 91 Wash. L. Rev. 177 (2016).¹

Washington law has long held that, for a defendant to have knowledge under the criminal code, he must be proved to have actual, subjective knowledge of the fact in question. State v. Allen, 182 Wn.2d 364, 374, 341 P.3d 268 (2015); State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980).² Knowledge may not be redefined to include its opposite, mere negligent ignorance. Shipp, 93 Wn.2d at 516. To do so would be unconstitutionally vague. Id. It would violate the constitutional requirement that criminal statutes provide fair warning of what is prohibited by stretching the meaning of knowledge far beyond what any reasonable person would understand it to mean. Id.

This does not mean, however, that the state must somehow present direct evidence of knowledge. Knowledge may be proved by circumstantial evidence, including evidence that the defendant

¹ <https://www.law.uw.edu/wlr/online-edition/hancock>; last accessed August 6, 2019,

was in possession of knowledge which would lead a reasonable person to know the fact in question. Allen, 182 Wn.2d at 374.

In Allen, the Court reiterated the “subtle” but “critical” distinction between proving actual knowledge via circumstantial evidence and finding knowledge merely because the defendant should have known. Id. The court acknowledged it would be unconstitutional to permit a finding of knowledge merely because the person should have known. Id. If, for example, the defendant is less intelligent or less attentive than an ordinary reasonable person, then the same information may not lead to the actual knowledge that the law requires. Shipp, 93 Wn.2d at 516.

By permitting conviction when a reasonable person would have known the item was stolen, rather than when the defendant actually did know, the instruction essentially reduces the mens rea for the offense from knowledge to a state lower, even, than criminal negligence. Washington law provides that a person is criminally negligent when (1) the person is “aware of a substantial risk that a wrongful act may occur” and (2) “his or her failure to be aware of such substantial risk constitutes a gross deviation from the

² But see State v. Jennings, 35 Wn. App. 216, 219, 666 P.2d 381 (1983) (possession of stolen property requires proof of actual or constructive knowledge that the property is stolen).

standard of care that a reasonable person would exercise in the same situation.” RCW 9A.08.010(1)(d). The instruction defining knowledge, however, permits conviction when a reasonable person would have been aware, without requiring any proof that the defendant’s failure to be aware was a gross deviation from the standard of care. CP 24.

The instruction fails to preserve the critical distinction between actual knowledge (shown based on circumstantial evidence) and mere negligent ignorance. See Allen, 182 Wn.2d at 374. The instruction undermines and confuses the actual knowledge requirement and permits the jury to misapply the law by finding knowledge even in the face of its absence.

The Shipp court deemed this problem solved because the jury was merely allowed, but not required, to find knowledge if the defendant had information which would lead a reasonable person to have knowledge. 93 Wn.2d at 516-17. So long as the inference was permissive, the Shipp court concluded, it allowed for the possibility that the jury could find the defendant was “less attentive or intelligent than an ordinary person.” Shipp, 93 Wn.2d at 516. But Shipp did not go far enough. It is not enough to *permit* the jury to

acquit if it does not find actual knowledge. The instructions must make clear that, without actual knowledge, acquittal is required.

A conviction must rest not just on the jury's finding that a reasonable person should have known, but also on the jury's conclusion that the defendant is no less intelligent or attentive than an ordinary person and therefore did know. This second requirement that is missing from the instruction. CP 24.

Allen illustrates the problem. In that case, the prosecutor, in closing argument, urged the jury to convict Allen of being an accomplice because a reasonable person in the defendant's shoes should have known, rather than because Allen actually did. Allen, 182 Wn.2d at 374-75. When the prosecutor expressly urged such a conclusion, the court had no difficulty viewing this as a serious problem requiring reversal of Allen's conviction. Id. at 375, 380.

But the jury instruction, not misconduct by prosecutors, lies at the heart of the problem. Whether a prosecutor expressly urges conviction based solely on constructive knowledge or not, the jury instructions allow it. The prosecutor's argument in Allen is a reasonable interpretation of the language used to define knowledge in the pattern jury instruction. Compare Allen, 182 Wn.2d at 374-75 (quoting the prosecutor's closing argument that "under the law,

even if he doesn't actually know, if a reasonable person would have known, he's guilty); CP 24 ("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."). Many a juror might come up with that reasonable, but incorrect, interpretation even without a prosecutor misstating the law.

But here, the prosecutor emphasized that portion of the knowledge instruction and emphasized the state did not have to prove actual knowledge:

And the instructions on knowledge, No. 10, skip ahead to that one really fast. I mention that bells and whistles should be going off in someone's head because the instruction about knowledge says that if a person has information that would lead a reasonable person in the same situation to believe that the facts exist, the jury is permitted, but not required, to find that he or she acted with knowledge.

So, ladies and gentlemen, if you believe that a reasonable person is sitting in that car observing these paint drips, observing the obvious attempts to cover up the unique molding, observing the logos being pulled off, observing the ignition being tampered with, observing the damage to the center console, observing all of these things, and the person sitting in that car, looking at that car, should be hearing bells and whistles going off that this car is stolen, and a reasonable person would have known that that vehicle is stolen, and you are allowed to infer based on that that Mr. Schmidt knew the vehicle was stolen.

RP 304; see also RP 303 (“We’re not mind readers. We don’t have the ability to tell you what Mr. Schmidt was thinking”); RP 306 (“You are allowed to infer Mr. Schmidt knew”); RP 326 (“doesn’t give him the right to ignore the blaring signs in his face that should have told any other person sitting in that car that that car was stolen”).

Jury instructions must not be misleading and must properly inform the trier of fact of the applicable law. Bodin v. City of Stanwood, 130 Wn.2d 726, 732, 927 P.2d 240 (1996). Jury instructions must convey “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). It is reversible error when the instructions relieve the State of this burden. State v. Allen, 101 Wn.2d 355, 358, 678 P.2d 798 (1984) (“Failure to inform the jury that there is an intent element is thus a ‘fatal defect’ requiring reversal”); see also State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

By permitting a jury to find knowledge based on mere negligent ignorance, the jury instruction violates due process. It misleads the jury, fails to inform the jury of the requirement of actual knowledge, and relieves the State of its burden to prove

actual knowledge. Although Washington case law makes clear that the jury “must still find subjective knowledge,” the jury instruction does not. Shipp, 93 Wn.2d at 515; CP 24.

When a jury instruction permits conviction on evidence less than proof beyond a reasonable doubt of every element of the crime, the instruction violates due process. Allen, 101 Wn.2d at 358. Omitting an element of the crime from the jury instructions, so as to fail to require proof of that element, is automatic constitutional error that may be raised for the first time on appeal. State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756, 763 (2009), as corrected (Jan. 21, 2010). By permitting conviction based on constructive knowledge when the law requires actual knowledge, the jury instruction in this case violated due process and requires reversal of Schmidt’s conviction for possession of a stolen vehicle.

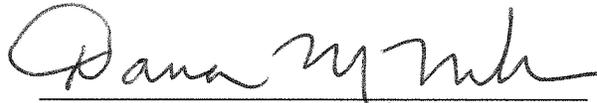
D. CONCLUSION

For the reasons stated above, this Court should reverse Schmidt's conviction.

Dated this 12th day of August, 2019.

Respectfully submitted

NIELSEN, BROMAN & KOCH

A handwritten signature in cursive script, appearing to read "Dana M. Nelson".

DANA M. NELSON, WSBA 28239

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ESSAY

TRUE BELIEF: AN ANALYSIS OF THE DEFINITION OF “KNOWLEDGE” IN THE WASHINGTON CRIMINAL CODE

MARCH 09, 2016 | 91 WASH. L. REV. ONLINE 177

Judge Alan R. Hancock

INTRODUCTION

In *State v. Allen*,¹ the Washington State Supreme Court reaffirmed *State v. Shipp*,² holding that in order for a defendant to have “knowledge” for purposes of the Washington Criminal Code, the defendant must have actual, subjective knowledge of the fact in issue.³ However, glaring problems still remain with the statutory definition of the term “knowledge.”

The Criminal Code defines “knowledge” in two alternative ways. The first prong states that a person knows or acts knowingly or with knowledge when “he or she is *aware* of a fact, facts, or circumstances or result described by a statute defining an offense.”⁴ The second prong of the definition states that a person knows or acts knowingly or with knowledge when “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.”⁵

Consider, for example, the crime of possessing stolen property.⁶ The term “possessing stolen property” is defined as “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.”⁷ Thus, one of the elements of the crime is that the defendant must “know” that the property has been stolen. Under the first prong of the definition of “knowledge,” the defendant could be found to have such “knowledge” only if he or she had actual *awareness* of the fact that the property was stolen. But under the second prong of the definition, the defendant could seemingly be found to have such “knowledge” if he or she had information that would lead a *reasonable person in the same situation* to believe that the property was stolen, even though he or she had no actual awareness that the property was stolen.

Read literally, the second prong of the statutory definition of “knowledge” in the Criminal Code is unconstitutional; it violates the Due Process Clause of the Fourteenth Amendment because it does not provide citizens with adequate notice of what the law requires.⁸ However, to avoid declaring the statute unconstitutional on its face, the Washington State Supreme Court interpreted this statute to mean that it permits, but does not direct, the finder of fact “to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances. The jury must still be allowed to conclude that he [or she] was less attentive or intelligent than the ordinary person.”⁹ In any case, the finder of fact “*must still find subjective knowledge.*”¹⁰ Despite the holdings in *Shipp* and *Allen*, other case law and the pattern jury instruction defining “knowledge” still literally permit the jury to find the defendant guilty based on constructive knowledge.

There is a related problem connected with the definition of “knowledge.” The Washington State Supreme Court has held that a defendant can be found to have “knowledge” even though the supposed “fact” that he or she “knew” was not even true.¹¹ This is directly contrary to the definition,¹² which requires awareness of a *fact*, which by definition is a proposition that is true.

Thus, it is no exaggeration to say that a criminal defendant can currently be found to have acted with knowledge, and therefore be found guilty of a crime, even though the defendant had no awareness of the fact he or she allegedly knew, and even though the “fact” he or she supposedly “knew” was not even true. This is untenable; the law must change.

The Legislature should amend the statute defining “knowledge” to eliminate the second prong of the definition. The second prong adds nothing useful to the first prong of the definition, and only causes confusion. The case law construing the statute has only added to the confusion. In addition, or in the alternative, the Washington Pattern Jury Instruction Committee should amend Criminal Washington Pattern Jury Instruction (WPIC) § 10.02 to eliminate the second prong of the definition.

1. 182 Wash. 2d 364, 341 P.3d 268 (2015).
2. 93 Wash. 2d 510, 610 P.2d 1322 (1980).
3. See *Allen*, 182 Wash. 2d at 374, 341 P.3d at 273.
4. WASH. REV. CODE § 9A.08.010(1)(b)(i) (2014 & Supp. 2015) (emphasis added).
5. *Id.* § 9A.08.010(1)(b)(ii) (emphasis added).
6. This crime may be committed in any of three different degrees. See *id.* §§ 9A.56.150–.170.
7. *Id.* § 9A.56.140(1).
8. See *Allen*, 182 Wash. 2d at 374, 341 P.3d at 273; *State v. Shipp*, 93 Wash. 2d 510, 513–16, 610 P.2d 1322, 1324–26 (1980).
9. *Shipp*, 93 Wash. 2d at 516, 610 P.2d at 1326.
0. *Id.* at 517, 610 P.2d at 1326 (emphasis added); see also *Allen*, 182 Wash. 2d at 374–75, 341 P.3d at 273.
1. *State v. Johnson*, 119 Wash. 2d 167, 829 P.2d 1082 (1992).
2. WASH. REV. CODE § 9A.08.010(1).

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