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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DANIEL H. DUNBAR, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT’S ASSIGNMENTS OF ERROR

1. The trial court erred in finding that Mr. Dunbar was not in custody when questioned by Deputy Wang.

2. The court erred in admitting statements made while Mr. Dunbar was subject to custodial interrogation but not apprised of his *Miranda* rights.

3. The State failed to establish by sufficient evidence that Mr. Dunbar concealed or disposed of the stolen truck.

4. The court erred in requiring Mr. Dunbar to make monthly payments toward his fines while incarcerated.

II. ISSUES PRESENTED

1. Was the defendant in custody for *Miranda* purposes where the defendant was not handcuffed, was never told he was not free to leave, and where the police officer was still investigating whether the defendant had committed a crime?

2. Where the terms “receive, retain, possess, conceal, or dispose of” are definitional and do not create alternative means of the crime of possession of a stolen vehicle, does the use of a disjunctive list of those terms in the to-convict instruction transform that single means crime into an alternative means crime, thus, requiring the State to satisfy all disjunctive terms?

3. Did the defendant waive any claim that the trial court erred by ordering an LFO payment schedule to commence while the defendant was in custody where the defendant did not object at sentencing?

4. Did the trial court err in setting an LFO payment schedule to commence while the defendant was in custody?

III. STATEMENT OF THE CASE

The defendant was charged in the Spokane County Superior Court with one count of possession of a stolen motor vehicle, occurring on or about June 10, 2016. CP 3. The case proceeded to trial.

CrR 3.5 Hearing.

Deputy James Wang responded on June 10, 2016, to a call from Gary Quincy, who reported that he saw his son's stolen two-tone pickup truck at the Centennial Trailhead. McMaster RP 94-95. Gary Quincy provided Deputy Wang with the license plate number that was on the truck – B93743V. McMaster RP 95. Mr. Quincy also showed Deputy Wang a photograph of the driver of the truck. McMaster RP 95. Deputy Wang ran the plate, but it did not return as having been reported stolen or as belonging to Mr. Quincy's son;¹ the deputy then drove to the residence associated with

¹ The plates were registered to Mr. Scott Branson. McMaster RP 95.

that license plate, and was advised by the resident there that the truck was parked at 10522 East 4th Avenue. McMaster RP 95.

Deputy Wang responded to that address, and attempted to contact the residents of that house, to no avail.² McMaster RP 96. As he was walking back to his patrol car, he noticed a truck matching the description of the stolen truck provided by Mr. Quincy in a parking lot across the street. McMaster RP 96. Deputy Wang observed that the truck did not have any license plates affixed to it. McMaster RP 96.

Deputy Wang ran the truck's VIN number through dispatch, and discovered that the truck *was* reported stolen, and was registered to Keith Quincy, Gary Quincy's son. McMaster RP 96. One of the vehicle's windows was broken, and the ignition was dismantled so it would turn without a key. McMaster RP 96.

As Deputy Wang prepared to take photographs of the truck, and contact Mr. Quincy to retrieve the truck, Mr. Dunbar emerged from the residence at 10522 East 4th Avenue.³ McMaster RP 96. Deputy Wang

² According to the CAD log, Deputy Wang arrived at this location at approximately 8:09 p.m. McMaster RP 101.

³ According to the CAD log, Deputy Wang made contact with Mr. Dunbar at 8:18 p.m. McMaster RP 101.

walked across the street to speak with him as he recognized Mr. Dunbar as the individual depicted in Mr. Quincy's photograph. McMaster RP 96.

Deputy Wang asked Mr. Dunbar to sit on the porch of the house.⁴ McMaster RP 97. He was not handcuffed and was not under arrest. McMaster RP 107. At that time, Deputy Wang was "still investigating trying to figure out what exactly was going on." McMaster RP 97. Mr. Dunbar gave Deputy Wang his name, which Deputy Wang confirmed through dispatch. McMaster RP 97. Deputy Wang asked Mr. Dunbar if he had been driving the vehicle; Mr. Dunbar voluntarily admitted that he had driven it earlier. McMaster RP 97. Deputy Wang asked where Mr. Dunbar had acquired the vehicle; Mr. Dunbar responded that he had bought it for \$1,000 from Alex Randu, and had also traded his old vehicle. McMaster RP 97.

Deputy Wang asked Mr. Dunbar how he started the pickup, and Mr. Dunbar stated that he started it by turning the ignition without a key. McMaster RP 98. The deputy asked Mr. Dunbar if this seemed suspicious to him; Mr. Dunbar stated, "a normal person would think so, but since he had been arrested for other stolen vehicles in the past, it did not seem weird to him at all." McMaster RP 98. Deputy Wang asked Mr. Dunbar whether

⁴ During this time, Deputy Covella was present with Deputy Wang. McMaster RP 104. Deputy Eaton arrived later. McMaster RP 104.

he thought it was odd that the truck had a broken window; Mr. Dunbar told him “no” because Mr. Dunbar had punched out the window in anger the day before.⁵ McMaster RP 98.

Deputy Wang asked Mr. Dunbar why license plates belonging to Scott Branson had been seen on the truck; Mr. Dunbar stated those plates were affixed to the vehicle when he bought it. McMaster RP 98. The deputy then asked why the plates were no longer on the vehicle; Mr. Dunbar stated that he did not know – he had gone to a friend’s house, and when he left, the plates were missing. McMaster RP 99.

After speaking with Mr. Dunbar, Deputy Wang searched for information on Alex Randu to no avail. McMaster RP 99. Deputy Wang then spoke with other individuals living at the residence, and determined Mr. Dunbar’s statements did not “match” their statements. McMaster RP 99. It was at that point that Deputy Wang decided to place Mr. Dunbar under arrest for possession of a stolen vehicle. McMaster RP 99. Deputy Wang then handcuffed Mr. Dunbar, placed him in his patrol car, and advised him of his *Miranda*⁶ rights. McMaster RP 99.

⁵ Deputy Wang did not observe any injuries to Mr. Dunbar’s hand. McMaster RP 98.

⁶ *Miranda v. Arizona*, 383 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Mr. Dunbar acknowledged his rights. McMaster RP 99.

Deputy Wang then asked Mr. Dunbar what happened to Mr. Branson's license plates, and Mr. Dunbar admitted to taking them off the truck. McMaster RP 100.

After these facts were presented during the CrR 3.5 hearing, the trial court ruled:

Sounds like the facts are not in dispute here; that being that the Deputy had information that led him to the location, that while he was conducting an investigation Mr. Dunbar voluntarily came out to speak with him. He asked Mr. Dunbar to sit on the step or the porch, which he did and there was a discussion, there was questions asked and answered by Mr. Dunbar.

The question here is whether or not Mr. Dunbar was in custody. The first prong of the 3.5 analysis requires the Court to make the determination as to whether or not the defendant was in custody; second, whether there was an interrogation; and, third, whether they were advised of their constitutional rights and if there was a waiver of those rights.

I think I'll start with No. 2, that being the interrogation. It doesn't appear there was any question that there was an interrogation. Deputy Wang asked questions of Mr. Dunbar, Mr. Dunbar answered those questions at the time and at some point he was placed under arrest, he was provided his constitutional warnings, he waived his constitutional protections and answered one question and that one question was how did the -- he indicated he took the plates off the vehicle. So to work backwards, he was placed in handcuffs at some point, he was provided his constitutional warnings, he waived his constitutional rights, and answered one question, that being who took the plates off. Given that he was in custody, he was given his warnings, and he waived

those warnings and he voluntarily answered that question, that question or answer is admissible.

The more gray area is from the time of the contact until he was placed in formal custody. The question before the Court is was he in custody when he was being questioned by Deputy Wang. There's a number of tests that can be used to make a determination to determine whether or not a person is in custody. One is the circumstances surrounding the interrogation, one of the criteria that's looked at is where that interrogation occurs. If it occurs in a police station it's subject to more scrutiny. Here it occurred on a porch in the front of a house.

The second test would be given the location or circumstances would a reasonable person feel that they're not able to terminate the contact and leave. Here the Deputy had a subjective intent that Mr. Dunbar was not free to leave, that he was being detained for investigation. There's no testimony that he had ever conveyed to Mr. Dunbar that Mr. Dunbar was not free to leave, rather he just told him to sit down and asked him questions. So would a reasonable person in that position feel that they could terminate the contact and leave and the Court would answer that question as yes. The person availed themselves to law enforcement, came out and spoke to law enforcement, sat down at the direction of law enforcement, and was never told they were being detained. So a reasonable person in that situation may feel they could terminate contact and leave.

Ultimately, the question before the Court is the Court has to apply an objective test to resolve the ultimate question as to whether or not the restraint or freedom on the defendant was associated with a formal arrest, and here it wasn't. The restraint on the movement was directing him to sit down and not telling him anything beyond that. The test isn't the subjective intent of law enforcement it's rather the reasonable-person standard as to whether or not a reasonable person would feel they could terminate contact and also whether or not they're restrained and the freedom of movement was associated with a formal arrest.

So although it's somewhat close in this case, the Court does find that a reasonable person would feel they could terminate the contact although Deputy Wang probably wouldn't have let them do that it's the reasonable-person test. Secondly, there was no restraint of movement associated with a formal arrest rather the only direction was to sit down during the course of an investigation.

So that said, the Court will find that Mr. Dunbar was not in custody, therefore, Deputy Wang didn't have a duty to inform him of his constitutional rights prior to engaging in interrogation and the Court will deem the statements he provided to Deputy Wang admissible subject to an upcoming motion by Ms. Foley.

McMaster RP 111-114.

At trial, the facts presented to the jury were substantially similar to those elicited during the CrR 3.5 hearing. McMaster RP 132-185; Kerbs RP 1-14. During the jury instruction conference, the State requested the Court give WPIC 77.21, but the defense objected, claiming that the instruction should require the state to prove the defendant "knowingly received, retained, possessed, concealed, *and* disposed of a motor vehicle." Kerbs RP 28. The trial court disagreed, and instructed the jury by the use of the word "or" rather than "and."⁷ CP 37; Kerbs RP 37-38.

⁷ WPIC 77.20 defines "possession" of a stolen motor vehicle by use of the word "or." The defendant did not object to the use of that instruction in its entirety. CP 36; Kerbs RP 28. However, WPIC 77.21, the to-convict instruction, does not include the word "and" or the word "or," as it simply includes, in separate brackets, each of the words used in WPIC 77.20 to define the word "possessing."

The defendant was convicted by a jury as charged, Kerbs RP 76; CP 40, and was sentenced to a standard range sentence of 57 months confinement, and mandatory legal financial obligations totaling \$800. CP 55-58. The sentencing court ordered the defendant to begin payment on those legal financial obligations on June 1, 2018, at a rate of \$10 per month. CP 58. The court stated, “That gives you a year to make your first payment. I assume you can make some money while in prison. If not, you can talk to the clerk’s office and see if they can postpone those until you are released from prison.” Kerbs RP 112. The defendant did not object to the imposition of the legal financial obligations or the first payment date. Kerbs RP 103-115. The defendant timely appealed.

IV. ARGUMENT

A. THE DEFENDANT WAS NOT IN CUSTODY AT THE TIME HE WAS ASKED QUESTIONS BY DEPUTY WANG; THE DEPUTY WAS STILL INVESTIGATING WHETHER A CRIME HAD OCCURRED; NO *MIRANDA* WARNINGS WERE NECESSARY.

1. Standard of review.

The standard of review “to be applied in confession cases is that findings of fact entered following a CrR 3.5 hearing will be verities on appeal if unchallenged; and, if challenged, they are verities if supported by substantial evidence in the record.” *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.

State v. Schultz, 170 Wn.2d 746, 753, 248 P.3d 484 (2011). An appellate court defers to the trier of fact on credibility issues. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Conclusions of law are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). “[T]his court must determine de novo whether the trial court ‘derived proper conclusions of law’ from its findings of fact.” *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215, 1220 (2002).

2. The defendant was not in custody for *Miranda* purposes when Deputy Wang asked him to sit on the porch without handcuffs and asked him questions as part of his investigation.

Under the Fifth Amendment of the United States Constitution, an individual has the right to be free from compelled self-incrimination while in police custody. U.C. Const. amend. V; U.S. Const. amend. XIV; *Miranda v. Arizona*, 383 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Sargent*, 111 Wn.2d 641, 647, 762 P.2d 1127 (1988). To protect this right, law enforcement is required to provide *Miranda* warnings to a person in custody before that person is subjected to interrogation. *Miranda*, 384 U.S. at 479. *Miranda* warnings are required only where the defendant is (1) in custody, (2) being interrogated, (3) by a state agent.⁸ *State v. Post*,

⁸ The State agrees that the defendant was “interrogated” by a “state agent;” thus, the only question on appeal, as in the trial court, is whether the defendant was “in custody” during questioning.

118 Wn.2d 596, 605, 826 P.2d 172, *as amended* 837 P.2d 599 (1992) (citing *Sargent*, 111 Wn.2d at 649-53). The absence of any one of the three conditions renders the giving of *Miranda* warnings unnecessary. *Post*, 118 Wn.2d 596.

“‘Custody’ for *Miranda* purposes is narrowly circumscribed and requires ‘formal arrest or restraint on freedom of movement of the degree associated with formal arrest.’” *State v. Heritage*, 152 Wn.2d 210, 217, 95 P.3d 345 (2004); *Post*, 118 Wn.2d at 606. In determining whether a suspect is in custody for purposes of *Miranda*, the court looks at the totality of the circumstances and determines whether a reasonable person in the suspect’s position would have felt that his or her freedom was curtailed to the degree associated with formal arrest. *Heritage*, 152 Wn.2d at 218. Thus, not every contact between a police officer and a subject that leads to a limitation of that subject’s freedom of movement constitutes a “custodial” situation mandating the giving of *Miranda* warnings.

Under *Miranda*, “custody” is equated with a formal arrest, and questioning that takes place in public or private environments outside of police control frequently is not considered “custodial.” For example, juveniles questioned in Spokane’s Riverfront Park were not “in custody.” *Heritage*, 152 Wn.2d 210. An adult questioned in the course of a search of her apartment was not in custody. *State v. Rosas–Miranda*,

176 Wn. App. 773, 309 P.3d 728 (2013). A juvenile rape suspect questioned in his own home in his mother’s presence was not found to be “in custody.” *State v. S.J.W.*, 149 Wn. App. 912, 206 P.3d 355 (2009).

Additionally, courts have specifically held that investigatory detentions (*Terry*⁹ stops) that result in a limitation on a person’s freedom of action short of arrest are not custodial for purposes of *Miranda*. *See, e.g., State v. Templeton*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) (citing *State v. Hilliard*, 89 Wn.2d 430, 573 P.2d 22 (1977)). As noted in *State v. Walton*, “[t]he fact that a suspect is not ‘free to leave’ during the course of a *Terry*-stop does not make the stop comparable to a formal arrest for purposes of *Miranda*.” 67 Wn. App. 127, 130, 834 P.2d 624 (1992) (citations omitted). A police officer who reasonably suspects an individual is violating the law is permitted to conduct a stop and ask a moderate number of questions “to try to obtain information confirming or dispelling the officer’s suspicions.” *Berkemer v. McCarty*, 468 U.S. 420, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). Our Supreme Court has adopted the *Berkemer* test. *Heritage*, 152 Wn.2d at 217.

Accordingly, police do not have to give *Miranda* warnings when the questioning is part of a routine, general investigation in which the defendant

⁹ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct 1868, 20 L.Ed.2d 889 (1968).

voluntarily cooperates, but is not yet charged. *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986). An investigative stop in public where a police officer asks questions to determine the identity and confirm or dispel the officer's suspicions does not constitute custodial interrogation. *Hilliard*, 89 Wn.2d at 436.

In *Hilliard*, police officers told an assault suspect that if the police could verify his story that he was only in the area to visit a certain person, he could leave. Our Supreme Court held that *Hilliard* was not in custody for *Miranda* purposes. The court found: "Mere suspicion, *before the facts are reasonably developed*, is not enough to turn the questioning into a custodial interrogation." *Id.* at 436 (emphasis added).

Similarly, in *Walton*, *supra*, an officer responded to investigate an underage party; he contacted the juvenile defendant at an apartment complex on the second story landing. 67 Wn. App. at 128. Although the officer did not advise the suspect of his *Miranda* warnings, he asked the juvenile how much he had to drink. *Id.* Even though the officer was "pretty sure" the suspect had violated the minor in possession/consumption law, the officer testified that, at the time he posed the question, he was still investigating whether an offense had occurred. *Id.* at 129. The court determined that the officer's question was asked during the course of a typical *Terry* stop, and, although the officer acknowledged his intent to

arrest the juvenile had he intended to leave, this intent was not communicated to the suspect. *Id.* at 129. The court stated, “This uncommunicated plan could not lead Walton, as a reasonable person, to believe that he was under arrest and in custody.” *Id.*; *see also Solomon*, 114 Wn. App. at 790 (a police officer’s unstated thoughts and plan are irrelevant to whether a person is in custody at the time of questioning).

Here, the facts do not demonstrate a formal arrest or restraint consistent with being “in custody.” Although Deputy Wang asked Mr. Dunbar to sit on the front porch of the residence, there was no evidence that he ever told Mr. Dunbar that he was not free to leave. Mr. Dunbar was not handcuffed. There was no restriction on the defendant’s movement that was indicative of formal custodial arrest or indicating Dunbar was not free to terminate the interview at any time.¹⁰ As in *Heritage*, *Rosas-Miranda*, and *S.J.W.*, questioning of the defendant on the front porch of a residence, after the defendant voluntarily exited the residence, bears none of the hallmarks of a formal arrest that could have turned this conversation into a custodial interrogation.

¹⁰ This Court has even concluded that advising a suspect that he was under arrest and placing him in a patrol car did not constitute an arrest because he was not deprived of his telephone. *See State v. Radka*, 120 Wn. App. 43, 83 P.3d 1038 (2004).

Furthermore, Deputy Wang was still investigating whether a crime had occurred at the time that he asked Mr. Dunbar un-*Mirandized* questions. After Deputy Wang asked Mr. Dunbar for his version of events, the deputy had conducted additional investigation, spoke to other witnesses in the residence and determined Mr. Dunbar's statements to be inconsistent with the other witnesses' statements, and attempted to confirm the defendant's story that he had purchased the vehicle for \$1,000.¹¹

The defendant claims that the presence of three officers on the scene bears heavily on whether Mr. Dunbar would have felt free to leave the scene. However, the defendant overstates the police presence during Deputy Wang's questioning of Mr. Dunbar. While Deputy Wang indicated that Deputy Covella was present at the inception of the interaction, the only testimony regarding the third officer was that that officer arrived sometime later. McMaster RP 104. There was no evidence that the third officer was

¹¹ Ultimately, however, it is irrelevant whether the officer had already developed probable cause to arrest the defendant, or intended to arrest the defendant at the time the questions were asked. *See e.g., State v. Lorenz*, 152 Wn.2d 22, 37, 93 P.3d 133 (2004) ("It is irrelevant whether the officer's unstated plan was to take Lorenz into custody or that Lorenz was the focus of the police investigation... It is irrelevant whether Lorenz was in a coercive environment at the time of the interview.... Thus it is, as the State contends, irrelevant whether the police had probable cause to arrest Lorenz (before or during the interview)." (internal citations omitted)).

present for the questioning of Mr. Dunbar.¹² And, there was no evidence, as now argued by the defendant, that the presence of the officers was “threatening” in any way. Br. at 9. There is no evidence, as defendant suggests, that the officer’s “subjective intent – to detain Mr. Dunbar – was communicated to Mr. Dunbar through the officer’s conduct,” Br. at 8, or that the officer somehow outwardly projected his subjective intent to arrest the defendant had the defendant attempted to leave the scene.

Here, the officers’ conduct was nothing more than an investigatory detention.¹³ It did not rise to the level of a formal arrest. Such a detention is permissible under *Terry*, and *Miranda* warnings are not required for questions asked during such an investigative detention. The trial court did not err in admitting the defendant’s pre-*Miranda* statements to law enforcement.¹⁴

¹² Even assuming that a third officer was present at the time of the questioning, that officer’s mere presence without more, is insufficient to demonstrate that a reasonable person would believe they were under arrest. *See, e.g., Rosas-Miranda*, 176 Wn. App. at 784 (“Here, the eight or nine officers entered Elvia’s apartment with her consent, and there is nothing in CrR 3.5 hearing record to suggest that the officers, if armed, unholstered their firearms in Elvia’s presence.”)

¹³ Defendant appears to concede that Deputy Wang was still investigating whether a crime had occurred. Br. at 8-9 (“There was no reason that Mr. Dunbar was being asked to sit down for any reason other than for *investigation* of a crime” (emphasis added)).

¹⁴ Thus, no harmless error analysis is necessary.

B. THE INCLUSION OF THE FIVE DISJUNCTIVE TERMS – RECEIVED, RETAINED, POSSESSED, CONCEALED, OR DISPOSED – IN THE TO-CONVICT INSTRUCTION FOR THE CRIME OF POSSESSION OF A STOLEN VEHICLE DID NOT TRANSFORM THESE TERMS INTO ALTERNATIVE MEANS OF THE CRIME, REQUIRING PROOF AS TO EACH TERM.

To begin, the State would note some established legal principles applicable to alternative means crimes. “An alternative means crime is one ‘that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.’” *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (quoting *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007)) (alteration in original). Additionally, our alternative means case law establishes that definitional statutes do not create alternative means for committing a crime. *State v. France*, 180 Wn.2d 809, 818-819, 329 P.3d 864 (2014) (holding that “we have already rejected the notion that multiple definitions of statutory terms necessarily create either new elements or alternate means of committing a crime”). In fact, “[t]he more varied the criminal conduct, the more likely the statute describes alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various ‘alternatives’ are merely facets of the same criminal conduct.” *State v. Sandholm*, 184 Wn.2d 726, 734, 364 P.3d 87 (2015).

The defendant claims that the inclusion of the five disjunctive terms – received, retained, possessed, concealed, or disposed – in the to-convict instruction for the crime of possession of a stolen vehicle, transformed these terms into alternative means of the crime, and therefore required proof as to each term.

Defendant claims that *State v. Lilliard*, 122 Wn. App. 422, 93 P.2d 969 (2004), and *State v. Hayes*, 164 Wn. App. 459, 262 P.3d 538 (2011), hold that the inclusion of the definitional terms “receive, retain, possess, conceal, or dispose” in the to-convict instruction create alternative means of the crime. This claim is superficially supported by these two cases. However, most recently, in *State v. Makekau*, 194 Wn. App. 407, 378 P.3d 577 (2016), Division II of this Court faced the precise issue presented here, holding:

[T]he terms “receive, retain, possess, conceal, or dispose of” *are definitional and do not create alternative means of the crime of possession of a stolen vehicle*, which involves a single means – possessing a stolen vehicle; and (2) including the disjunctive terms “received, possessed, concealed, or disposed of” in the to-convict instruction *did not transform them into alternative means of the crime* because the disjunctive terms together define the single means of possession. Therefore, the State was required to prove only that Makekau’s conduct satisfied one of the disjunctive

terms, and it is undisputed that the State presented sufficient evidence that Makekau “possessed” the stolen motorcycle.

Id. at 409-10 (emphasis added); *see also State v. Tyler*, 195 Wn. App. 385, 382 P.3d 699 (2016), *review granted in part by State v. Tyler*, 189 Wn.2d 1016, 404 P.3d 497 (Nov. 8, 2017);¹⁵ *State v. Gillam*, 2016 WL 4203487, 195 Wn. App. 1038 (2016) (unpublished opinion).¹⁶

Pursuant to RCW 9A.56.068 a “person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle” (alteration in original). Possessing a stolen vehicle is defined to mean “knowingly to receive, retain, possess, conceal, or dispose of a stolen motor vehicle 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.” RCW 9A.56.140(1); *State v. Satterthwaite*, 186 Wn. App. 359, 363-64, 344 P.3d 738 (2015) (holding that RCW 9A.56.068(1) implicitly incorporates RCW 9A.56.140(1)’s terms). Because RCW 9A.56.140(1) is definitional, it does not create alternative means of committing the crime of

¹⁵ Oral Argument was heard by the Supreme Court in *State v. Tyler* on March 13, 2018. Argument is available to view at <https://www.tvw.org/watch/?eventID=2018031094>.

¹⁶ Pursuant to GR 14.1, a party may cite unpublished opinions filed on or after March 1, 2013; such opinions have no precedential value, are not binding on any court, and may be accorded such persuasive value as the court deems appropriate.

possession of a stolen motor vehicle. *Hayes*, 164 Wn. App. at 477-78. Consequently, possession of a stolen motor vehicle is not an alternative means crime.

The court in *Makekau*, *supra*, discussed the *Hayes* and *Lilliard* cases at some length, noting that neither case discussed “whether the five definitional terms together could be treated as defining a single means rather than as alternative means.” *Makekau*, 194 Wn. App. at 416. That court’s finding that neither *Hayes* nor *Lilliard* contained meaningful analysis on the issue presented here is supported by a review of those two cases.

In *Lillard*, a possession of stolen property case, the three main issues were whether the defendant validly waived his right to counsel, whether evidence of uncharged crimes was admissible, and whether the trial court was required to calculate defendant’s exact offender score when it sentenced defendant. 122 Wn. App. at 424-33. After resolving those issues, the court discussed the additional arguments raised by *Lilliard* pro se. *Id.* at 433. One of the challenges was that “by failing to specify which means of possession the jury was convicting him under, he was deprived of his right to a unanimous jury verdict.” *Id.* In response to this challenge *Lillard* stated the following:

The “to convict” instruction required the State to prove beyond a reasonable doubt that *Lillard* “knowingly received, retained, possessed, concealed, or disposed of stolen

property.” Because the instruction specifically listed the alternative definitions of “possession” as alternative means of the offense to be proved by the State, there must be sufficient evidence to support each alternative... We conclude that substantial evidence supports each alternate means.

Id. at 434-35 (footnote omitted).

Because *Lillard* concluded that substantial evidence supported each alternate means its above holding, on a matter of first impression that was apparently not briefed by either appellate attorney, that portion of the decision constitutes obiter dictum. *See Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 531, 79 P.3d 1154 (2003) (statements in a case that do not relate to an issue before the court and are unnecessary to decide the case constitute obiter dictum, and need not be followed). Because there was proof of all alternatives, whether the instruction actually created alternative means requiring sufficient proof of each as a matter of law was immaterial to the appellate court’s conclusion that the defendant’s challenge failed.

Hayes, in turn, relying solely on *Lillard*, seemingly expanded the *Lillard* dictum to the crime of possession of a stolen motor vehicle, adopting a view that was apparently – and significantly¹⁷ – left unchallenged and unbriefed by the State.

¹⁷ The *Makekau* Court found this concession probative: “Significantly, the State did not challenge this argument, and therefore the [*Hayes*] court accepted it.” *Makekau*, 194 Wn. App. at 417 (citation omitted).

The State did not object to the inclusion of all five bracketed terms in the to-convict instruction. Hayes contends all five became alternative means for which the State assumed the burden of supplying substantial evidence, as in *Lillard*. *The State does not argue otherwise. Accordingly, we limit our analysis to whether there was substantial evidence to support each alternative means that Hayes challenges.*

Hayes, 164 Wn. App. at 480-81 (emphasis added).

Therefore, the propriety of *Hayes*' uncontested reliance on *Lillard* is only as persuasive as the meaningful analysis of the issue contained in *Lillard*. Because the holding in *Lillard* is obiter dictum, *Hayes* reliance on it is not grounded in good law.¹⁸

¹⁸ [In *Hayes*, the Court] emphasized that [it was] treating the definitional terms as alternative means, “not because they necessarily are alternative means, but because they were listed in the to-convict instruction[.]” *Hayes*, 164 Wn. App. at 481, 262 P.3d 538. Finding that the State failed to meet its burden of proving that the defendant had “disposed of” the vehicle, [the court] reversed the conviction and dismissed the charge. *Hayes*, 164 Wash. App. at 481, 262 P.3d 538. As with *Hickman*, [the] analysis in *Hayes* no longer properly states the law.

Tyler, 195 Wn. App. at 399.

In *Tyler*, Division One of this court deviated from Washington's long-standing law of the case doctrine to follow the United States Supreme Court precedent in *Musacchio v. United States*, 577 U.S. —, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016). Our Supreme Court, in turn, rejected the analysis in *Musacchio*, as the proper analysis in Washington State when reviewing extraneous language in a to-convict instruction. *State v. Johnson*, 188 Wn.2d 742, 399 P.3d 507 (2017).

Makekau's holding, on the other hand, is grounded in logic and in well-reasoned analysis. The State requests that this Court find *Makekau*'s reasoning sound. Moreover, as discussed in *Makekau*, the more recent Supreme Court case of *State v. Owens*, 180 Wn.2d 90, 323 P.3d 1030 (2014), supports this conclusion. *Makekau*, 194 Wn. App. at 417-18. Indeed, because possession is the exercise of dominion and control, all of these five terms are simply aspects of a single means – possession. Therefore, the State was required to prove only that Dunbar's conduct satisfied one of the disjunctive terms, and it is undisputed that the State presented sufficient evidence that Dunbar "possessed" the stolen vehicle.

State v. Johnson, 188 Wn.2d 742, 399 P.3d 507 (2017), and *State v. Jussila*, 197 Wn. App. 908, 392 P.3d 1108 (2017), did not overrule the Supreme Court's ruling in *Owens*. In both *Johnson* and *Jussila*, the jury instructions included additional language that was not "definitional" in character.

In *Johnson*, the jury instruction included additional non-definitional facts that the State needed to prove at trial. The instruction at issue charged the jury that it must find "that the defendant *intended to deprive the other person of the access device.*" 188 Wn.2d at 749 (emphasis in original). This was not a definitional phrase, but rather, a particular fact demonstrating the defendant's specific intent to deprive another of the access device.

Likewise, in *Jussila*, the jury was charged in the to-convict instruction with finding that the defendant had appropriated specific firearms, identified by their make, model and serial numbers. Again, this language was not definitional in nature. It charged the jury with finding that the defendant took specifically identified firearms in order to make a determination of guilt. As a result, *Johnson* and *Jussila* are inapplicable.

Unlike its decisions in *Johnson* and *Jussila*, our Supreme Court has already decided that, where a jury is provided definitions of an element of a crime in a jury instruction separate from the to-convict instruction, no alternative means crime is created. *Smith*, 159 Wn.2d at 785. The *Makekau* court noted “if definitions in a separate instruction do not create alternative means, there is no reason that including the definitions in the to-convict instruction should change the result.” 194 Wn. App. at 419.

At trial, the defendant requested the trial court to instruct the jury that the State must prove the defendant “knowingly received, retained, possessed, concealed, *and* disposed of a stolen motor vehicle.” Kerbs RP 28 (emphasis added). The State opposed this request, arguing that each of those alternatives were not alternative means, but rather alternative “aspects of possession;” “We cannot charge Mr. Dunbar with six [sic] different versions of possession. It’s one count of possession based on proof

of those. But the statute, the RCW, actually is disjunctive, and so the elements of the instruction should reflect the statute.” Kerbs RP 29.

The Court agreed with the State, ruling:

I understand the State alleged ‘and’ when it charged received, retained, possessed, concealed or disposed of [in the information]. All of those elements are contained under possession. That’s the definition of possession. *So if the Court were to put ‘and’ [in the to-convict instruction] it would mean the State would be required to prove possession about five different times by different means.* So the court will note the objection and provide [WPIC] 77.21 as proposed by the State.

Kerbs RP 29 (emphasis added).

The use of the word “or” rather than the word “and” in the to-convict instruction charged the jury that it must find that only one of the alternative definitions of “possession” had been satisfied beyond a reasonable doubt. This did not create alternative means, nor did it alter the “law of the case” such that the State was required to prove all five definitions had been satisfied.¹⁹ *See Owens*, 180 Wn.2d at 98-99 (several definitional terms listed

¹⁹ Thus, it is unlikely that any decision in *Tyler* will adversely affect this case. The to-convict instruction in *Tyler* stated: “That on or about the 10th day of January, 2014, the defendant knowingly *received, retained, possessed, concealed, disposed of* a stolen motor vehicle.” 195 Wn. App. at 401 (emphasis added). There, the jury instruction did not explicitly inform the jury that only one of those elements need be met in order to support a conviction. The instruction did not use the disjunctive word “or” to separate the definitional terms in the to-convict instruction. Thus, even if the Supreme Court finds in *Tyler* that it was error to include each of these definitions in the to-convict instruction, the to-convict instruction given in

disjunctively together can define a single means, and if several terms represent one means, the State is required to prove only one term to sustain a conviction). No error occurred in this regard.

C. BECAUSE THE DEFENDANT DID NOT OBJECT TO THE PAYMENT DATE SET BY THE COURT, ANY ERROR IS UNPRESERVED; FURTHER, THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ORDERING THE DEFENDANT TO PAY LFOS WHILE STILL INCARCERATED.

1. Any error in setting the repayment date for the defendant's LFOS was unpreserved and should not be addressed for the first time on appeal.

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *Id.* at 749. This principle is embodied federally in Fed. R. Crim. P. 51 and 52, and in Washington under RAP 2.5. RAP 2.5 is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749 (quoting *New Meadows Holding Co. v. Wash. Water Power Co.*, 102 Wn.2d 495, 498, 687 P.2d 212 (1984)). This rule supports a basic sense

Mr. Dunbar's case clarified that only *one* definition of possession need be met.

of fairness, perhaps best expressed in *Strine*, where the Court noted the rule requiring objections helps prevent abuse of the appellate process:

[I]t serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further trials, facilitates appellate review by ensuring that a complete record of the issues will be available, ensures that attorneys will act in good faith by discouraging them from “riding the verdict” by purposefully refraining from objecting and saving the issue for appeal in the event of an adverse verdict, and prevents adversarial unfairness by ensuring that the prevailing party is not deprived of victory by claimed errors that he had no opportunity to address.

BENNETT L. GERSHMAN, TRIAL ERROR AND MISCONDUCT § 6–2(b), at 472–73 (2d ed. 2007) (footnotes omitted).

Strine, 176 Wn.2d at 749-50.

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right, our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Here, Mr. Dunbar provides no basis for review of this unpreserved issue on appeal. He does not allege manifest constitutional error, lack of trial court jurisdiction, or failure to establish facts upon which relief can be granted, as required under RAP 2.5(a)(1) and (2). Therefore, policy and

RAP 2.5 do not favor consideration of the belatedly-raised, non-constitutional legal financial obligations issue.

2. The trial court did not abuse its discretion in ordering the defendant to begin paying his legal financial obligations while in custody.

Trial courts must impose the victim's compensation penalty, the criminal case filing fee, and the DNA collection assessment regardless of a defendant's ability to pay. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Mandatory legal financial obligations are not "costs" under RCW 10.01.160(1) and (2). *State v. Shirts*, 195 Wn. App. 849, 858 n.7, 381 P.3d 1223 (2016). Thus, defendant's claim that the "court's assumption about Mr. Dunbar's earning income while in prison is thus contrary to RCW 10.01.160(3)'s requirement that the court assess a person's financial resources and the burden of the payment," Br. at 17, is inapt, because the court does not assess an individual's ability to pay mandatory obligations.

The legislature has directed sentencing courts to set a sum that a defendant is required to pay towards legal financial obligations. RCW 9.94A.760. The sentencing court may grant permission to the defendant to pay fines or costs in a specified period or in specified installments. RCW 10.01.170; RCW 9.92.070.

The legislature has deemed it appropriate that a portion of incoming funds received by an inmate during incarceration be applied to his or her

LFOs. RCW 72.09.480(2). Some deductions do not apply to funds an inmate receives as settlements or awards resulting from legal action. RCW 72.09.480(2)-(3), RCW 72.09.111(1)(a). The deductions do not apply to funds received for the Department of Correction's (DOC) education, vocation, or postsecondary education degree programs; for postage expenses; or for certain medical expenses. RCW 72.09.480(6)-(8).

There are, however, inmate work programs. RCW 72.09.100. Inmates participating in these programs are paid wages, and can contribute to the legal financial obligations imposed against them.²⁰ *Id.*, see also RCW 72.09.110; RCW 72.09.111. The legislature has deemed it appropriate that a portion of an inmate's wages be applied to his or her LFOs. RCW 72.09.111. These deductions from incoming funds and inmate wages have been held constitutional as long as they do not exceed the cost of incarceration. *Wright v. Riveland*, 219 F.3d 905, 918 (9th Cir. 2000); *In re Pers. Restraint of Metcalf*, 92 Wn. App. 165, 176, 963 P.2d 911 (1998).

In this case, the State asked the court to impose only mandatory legal financial obligations. There was no objection from the defendant. There

²⁰ Defendant states that inmates who are able to work earn between \$.70 and \$2.70 cents per hour. Assuming this to be true, that would require the defendant to work approximately 4 to 15 hours per month to satisfy repayment. While in prison, the defendant's basic needs (food, shelter, etc.) are provided at no cost to him.

was also no objection from the defendant when the court indicated its belief the defendant would be able to earn money through a work program while incarcerated. In setting the repayment schedule, the court would have been aware that DOC could recommend a change in the monthly payment schedule to reflect the defendant's circumstances. RCW 9.94A.760(7)(a). The trial court also allowed the defendant to contact the clerk of the court to modify his payment schedule if he was unable to make payments. Kerbs RP 112.

Additionally, because the legislature has recently overhauled Washington's legal financial obligations statutes, and effective June 7, 2018, the defendant is further protected against adverse consequences in the event that he is unable to pay his legal financial obligations. *See e.g.*, LAWS OF 2018, ch. 269, §§ 8, 13, 15. Assuming the defendant's continued indigency, upon either a show cause hearing initiated by the State, or a remission motion initiated by the defendant, the sentencing court shall modify his repayment obligations to reduce or waive all legal financial obligations, except for the crime victim penalty (or restitution, which was not ordered in this case); further, as of June 8, 2018, no interest will accrue on any of the defendant's non-restitution LFOs. LAWS OF 2018, ch. 269, §§ 1, 6, 8.

No error occurred by the court's order requiring repayment while the defendant is in custody, and even if error occurred, the defendant is insulated from any adverse consequences of that order; thus, any error is harmless.

V. CONCLUSION

For the reasons stated herein, the State respectfully requests that the court affirm the defendant's conviction and sentence. The trial court properly admitted the defendant's pre-*Miranda* statements; the to-convict instruction which included definitional terms did not create a alternative means crime; and the defendant failed to preserve any error with regard to the imposition of his LFOs, which, in any event, were properly imposed with an order to begin repayment while the defendant is still incarcerated.

Dated this 8 day of June, 2018.

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

NO. 35314-1-III

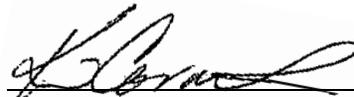
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 8, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Kate Benward
Wapofficemail@washapp.org

6/8/2018
(Date)

Spokane, WA
(Place)



(Signature)