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COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL CARGILL, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT REGARDING
APPLICABILITY OF *WOLVELAERE*

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I. NATURE OF RESPONSE

By letter dated June 19, 2020, this Court lifted the stay of this matter and allowed additional briefing regarding the applicability of *State v. Wolvelaere*, -- Wn.2d --, 461 P.3d 1173 (2020).¹ The State incorporates its opening brief herein.

II. DISCUSSION OF THE APPLICABILITY OF *WOLVELAERE*

On April 30, 2020, our Supreme Court reached the question of whether a snowmobile is a motor vehicle for purposes of the theft of a motor vehicle statute, RCW 9A.56.065. *Id.* at 1174. The Court first looked at the theft of a motor vehicle statute, RCW 9A.56.065(1), and determined it did not define “motor vehicle.” *Id.* The Court then reviewed the definitions of a “motor vehicle” as contained with RCW 46.04.320(1) and RCW 46.04.670 and determined that a “motor vehicle” is “a self-propelled device (a description of its mechanics) that is capable of moving and transporting people or property on a public highway (a description of its function).” *Id.* at 1175 (parentheses in original). The Court found although a mechanical device’s function is considered by a court, its function does not have to be its main purpose. *Id.* Essentially, the Court set forth several

¹ *State v. Van Wolvelaere*, 8 Wn. App. 2d, 440 P.3d 1005 (2019), review granted sub nom. *State v. Tucker*, 194 Wn.2d 1008, 451 P.3d 343 (2019), and rev’d sub nom. *State v. Wolvelaere*, -- Wn.2d --, 461 P.3d 1173 (2020).

pragmatic steps to determine whether a particular mechanical device is a “motor vehicle” for purposes of the criminal code; namely, is it self-propelled and is it *capable* of moving and transporting individuals or property on a public highway? *Id.* Importantly, the Court found that whether a mechanical device is licensed through the Department of Licensing is immaterial to the analysis. *Id.* at 1175.

1. Is the Yamaha YZF 426 motorcycle, described as a dirt bike, a self-propelled motor vehicle as applied to RCW 9A.56.068, the possession of a stolen motor vehicle statute, considering the holding of *Wolvelaere*?

As observed by the *Wolvelaere* Court, RCW 9A.04.110(29) of the criminal code defines a vehicle as a “‘motor vehicle’ as defined in the vehicle and traffic laws.” 461 P.3d at 1175. The Court recognized that RCW 9A.04.110(29) requires a reviewing court to examine the vehicle and traffic laws under Title 46 for guidance to determine whether a mechanical device is a motor vehicle for purposes of the criminal code. *Id.* In part, the *Wolvelaere* Court found that since snowmobiles were not expressly excluded from the definition of what constitutes a motor vehicle under RCW 46.04.320(3), “snowmobiles are, by implication, included within” mechanical devices considered a motor vehicle. *Id.* at 1177.

As noted in the State’s opening brief, the legislature has defined a motorcycle, under the criminal and traffic laws of Title 46, as a “motor

vehicle” which can travel on not more than three wheels, which has a seat or saddle, and is designed to be steered with a handlebar or steering wheel. RCW 46.04.330.² In that regard, this Court has held that the State does not have to prove that a self-propelled vehicle is in working order at the time of the offense for it to be a motor vehicle. *State v. Acevedo*, 159 Wn. App. 221, 229, 248 P.3d 526 (2010).

Here, the defendant did not contest at the time of trial nor on appeal that the stolen Yamaha dirt bike is a self-propelled vehicle. At the time of trial, the admitted photographs and testimony showed the motorcycle had a motor, two wheels, a handle bar for steering, and it needed a key to start the motor; there was also testimony that the defendant tried to start the motor several times before his arrest. Exs. 1- 6; RP 79, 86, 107-08. Finally, the legislature has undoubtedly classified a motorcycle as a “motor vehicle.” The Yamaha dirt bike is a self-propelled motor vehicle.

2. Is the Yamaha motorcycle/dirt bike capable of moving and transporting people or property on a public highway?

The *Wolvelaere* court observed, “[s]ome self-propelled devices are unquestionably able to move and to transport people or property on a public

² The legislature exempted certain mechanical devices from the definition of a “motorcycle,” which are not at issue here. RCW 46.04.330.

highway: cars, trucks, vans, *motorcycles*. Some clearly are not: boats, Jet Skis. For others, it's a closer call." 461 P.3d at 1176 (emphasis added).

In the present case, it is immaterial whether the Yamaha motorcycle was designed for only off-road use, as a "dual sport" motorcycle intended to be used both on and off-road, or for use primarily on a highway because the Yamaha motorcycle was *solely* configured for the transport of one or more persons from one location to another³ and is *capable*⁴ of transporting persons or property onto a highway notwithstanding its intended use, purpose or whether such action is lawful. Moreover, the legislature did not distinguish nor exclude off-road or dual-purpose motorcycles when it defined "motorcycle" under the traffic code as a motor vehicle, RCW 46.04.330, or when defining the elements of possession of a stolen motor vehicle under RCW 9A.56.065, or when generally defining motor vehicles under RCW 46.04.320 and RCW 46.04.670.

³ As compared with and in contrast to the riding lawn mower at issue in *State v. Barnes*, 189 Wn.2d 492, 403 P.3d 72 (2017).

⁴ "Capable" is defined as "having ability, capacity or power to do something." MERRIAM-WEBSTER DICTIONARY 104 (7th ed. 2018).

Pursuant to the traffic code, the owner of an off-road motorcycle can apply to the State for on-road use. RCW 46.16A.435(1) and (2) state, in pertinent part:

(1) The department shall establish a declaration subject to the requirements of chapter 5.50 RCW, which must be submitted by an off-road motorcycle owner when applying for on-road registration of the off-road motorcycle. In order to be registered for on-road use, an off-road motorcycle must travel on two wheels with a seat designed to be straddled by the operator and with handlebar-type steering control.

(2) Registration for on-road use of an off-road motorcycle is prohibited for dune buggies, snowmobiles, trimobiles, mopeds, pocket bikes, motor vehicles registered by the department, side-by-sides, utility vehicles, grey-market vehicles, off-road three-wheeled vehicles, and, as determined by the department, any other vehicles that were not originally certified by the manufacturer for use on public roads.

As provided in RCW 46.16A.435, RCW 46.61.705(1) states:

(1) *A person may operate an off-road motorcycle upon a public road, street, or highway of this state if the person:*⁵

(a) Files a motorcycle highway use declaration, as provided under RCW 46.16A.435, with the department certifying conformance with all applicable federal motor vehicle safety standards and state standards;

(b) Obtains and has in full force and effect a current and proper ORV registration or temporary ORV use permit under chapter 46.09 RCW; and

(c) Obtains a valid driver's license and motorcycle endorsement issued to Washington residents in compliance with chapter 46.20 RCW for a motorcycle.

⁵ Emphasis added.

This statute further obligates the owner of an off-road motorcycle to have a headlight, rear light, reflectors, brake light, horn, and other similar safety features before operation upon a public highway. RCW 46.61.705(2)(a)-(k).

Even though no evidence was produced in this case that the Yamaha motorcycle was exclusively an off-road motorcycle as designated under RCW 46.04.363⁶ or that it was intended for that purpose, the legislature has authorized under the statutes cited above that an off-road motorcycle is *capable of and can* transport one or more persons on a highway given that certain safety measures are met. Whether a motorcyclist meets the legislature's safeguards to drive an off-road motorcycle on a public highway or whether such action is lawful has no bearing on the question of whether an off-road motorcycle is mechanically *capable* of being driven on a highway. By its very nature, as pointed out by the *Wolvelaere* Court, it is.

This Court reads the possession of a stolen vehicle statute in a manner that furthers its purpose and “avoids unlikely, absurd, or strained consequences.” *Acevedo*, 159 Wn. App. at 229. To decide that the Yamaha

⁶ RCW 46.04.363 states: “‘Off-road motorcycle’ means a motorcycle as defined in RCW 46.04.330 that is labeled by the manufacturer’s statement or certificate of origin as intended for ‘off-road use only’ or a similar message stamped into the frame of the motorcycle, contained in the owner’s manual, or affixed to any part of the motorcycle.”

motorcycle is not a motor vehicle for purposes of the possession of a stolen vehicle statute would lead to an absurd reading of the statutes defining “motor vehicle” and would be contrary to the analysis in the *Wolvelaere* opinion.

III. CONCLUSION

For the reasons stated herein and within the State’s opening brief, this Court should determine that the Yamaha motorcycle is a “motor vehicle” for purposes of the possession of a stolen vehicle statute as it is self-propelled and it is capable of being driven on a public highway. This Court should affirm the defendant’s judgment and sentence

Dated this 20 day of July, 2020.

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NO. 36140-3-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 20, 2020, I e-mailed a copy of the Supplemental Brief of Respondent Regarding Applicability of *Wolverlaere* in this matter, pursuant to the parties' agreement, to:

Skylar Brett
skylarbrettlawoffice@gmail.com

July 20, 2020
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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