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NO. 36379-1-III

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

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STATE OF WASHINGTON,

Respondent,

v.

DERRICK LORRIGAN,

Appellant.

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

The Honorable John O. Cooney, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. 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.

2. Prosecutorial misconduct in closing argument denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. 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. Does the jury instruction violate due process by relieving the State of its burden to prove actual knowledge beyond a reasonable doubt?

2. In closing argument, the prosecutor asserted the jury was permitted to find the State had proved knowledge if a reasonable person "would have known" or "should have known" that the vehicle

at issue was stolen. However, clear case law establishes that, to convict, the jury must find the defendant has actual, subjective knowledge beyond a reasonable doubt. Do the prosecutor's repeated misstatements of the law constitute reversible misconduct?

B. STATEMENT OF THE CASE

John Sumner, a retired mechanic, buys vehicles at auction, repairs them, and sells them. RP 96-97. On June 21, 2018, Sumner purchased three vehicles from a Spokane tow yard, including a 2005 Chevy Impala. RP 98. The car was in "fair" condition, had some dents, and Sumner purchased it for his brother-in-law. RP 98, 101.

The Impala's ignition was intact, but there was no key, so Sumner had a locksmith come to the tow yard and make one. RP 99-100. After installing some new tires on the car, Sumner's brother-in-law parked it about a block from the tow yard, near Snoop's tavern, intending to come back later and retrieve it. RP 100-101, 112-113. This was sometime after 7:30 p.m., and the car was locked when left there. RP 102.

A few days later, Sumner drove by and noticed the Impala was no longer parked where they had left it. RP 102. After contacting his brother-in-law and confirming he had not moved the car, Sumner called police and reported it stolen. RP 102, 111-113.

On the evening of June 26, 2018, Spokane Police Officer Kelly Mongan was on duty and patrolling a residential area when he spotted Sumner's Impala, which he recognized from a "Hot Auto" list available to officers on their patrol vehicle computers. The license plate also matched the missing car. RP 132-135. Officer Mongan followed the Impala, which made a quick and seemingly unplanned turn onto another street and parked "hastily" on the side of the road. RP 134-136. Mongan activated his overhead lights and confirmed with dispatch the car was still reported stolen. RP 135.

There were two people in the car. RP 136. Officer Mongan, with body camera running and the assistance of other officers, conducted a high-risk stop. RP 137, 180-182, 188; exhibit 2 (clip 1). Lorrigan, who was driving the Impala, exited the vehicle, was cooperative, complied with all verbal commands, and was detained in handcuffs. RP 137-141, 159, 188-189. He indicated he had turned off the main road quickly because he feared he had outstanding driving warrants. RP 154, 164-167; exhibit 2 (clip 1). Officers checked and determined that Lorrigan had no active warrants. RP 154, 166.

The Impala was in worse condition than when Sumner had last seen it; it had new dents, the ignition was broken, and clothing was strewn about the seats. RP 104. Inside the car, officers found two key

rings containing a total of nine keys, some of which appeared “shaved” or tampered with. RP 143-149, 174, 190. Officer Mongan did not see a key in the ignition and he did not determine how the car had been started. RP 163. None of the recovered keys appeared to be for the Impala. RP 176, 179, 190, 194, 199.

Regarding the damaged ignition, the key slot had been pushed inside the steering column and would have required a screwdriver or other tool to start the vehicle. RP 190-192, 201. There was no evidence, however, of any such tool in the car. RP 197-198.

While those in possession of stolen vehicles tend to switch the license plates to avoid detection, the Impala still had its original and correct plates. RP 106, 168-169, 205. Other indicators a vehicle might be stolen – wires hanging down from the ignition, damage to the drive shaft, broken windows, scratched out vehicle identification numbers, and missing stereos – were not present here, either. RP 106-107, 167-168, 204-206.

Lorrigan agreed to speak with officers, who informed him the car was stolen. RP 142, 150, 196; exhibit 2. Lorrigan told Officer Chris Lesser that he had the Impala for four days and had borrowed it from Creston Aguilar. RP 151-152, 196; exhibit 2. Aguilar had indicated the car would be parked at the Wedgewood Apartments and Lorrigan

would find the keys on the floorboard. RP 153. Aguilar told Lorrigan to return the car to that location when he was finished with it. RP 155. When asked if he noticed the ignition has been “messed up” and “all punched in,” Lorrigan told Officer Lesser it appeared to have been “dented,” which was not uncommon for one of Aguilar’s cars. RP 202; exhibit 2 (clip 2). In hindsight, Lorrigan concurred with Officer Lesser’s assessment that the situation seemed suspicious and indicated that he now realized maybe he should not have driven the car. RP 203; exhibit 2 (clip 2).

Officer Lesser was “very familiar” with Creston Aguilar, who had been arrested multiple times driving stolen cars. RP 196, 207-208. The location where Lorrigan said he picked up the Impala from Aguilar was the same location where Aguilar was known to hang out. RP 197. Officers did not speak to Aguilar about the incident, however. RP 174-175, 196, 207. According to officers, Aguilar was “always moving around,” difficult to reach by phone, and their computer system did not have good contact information for him. RP 174, 196-197.

Lorrigan was charged with one count of Possession of a Stolen Vehicle for the Impala and one count of Making or Possessing a Motor Vehicle Theft Tool for the shaved keys found inside. CP 5-6.

To convict Lorrigan of possessing a stolen vehicle, the State had to prove beyond a reasonable doubt “[t]hat the defendant acted with knowledge that the motor vehicle had been stolen.” CP 19.

The trial court provided the following instruction to the jury regarding knowledge:

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

CP 20. The State proposed this instruction. RP 209.

During its closing argument, the State indicated “[t]he only issue is whether Mr. Lorrigan knew that the vehicle was stolen.” RP 232. Concerning the element of knowledge, the prosecutor conceded, “You weren’t there, we don’t know. We do not know what Mr. Lorrigan knew. We can only look at the evidence and decide and infer what a reasonable person would know or should reasonably know under the circumstances.” RP 227 (emphasis added). The prosecutor then repeatedly asserted that the jury could find that Lorrigan knew the vehicle was stolen based either on what he knew or based on what a

reasonable person in his position should have known. See RP 229 (asks jurors if they should conclude Lorrigan “knew or reasonably should have known” vehicle stolen); RP 234 (“Is it reasonable to infer . . . that Mr. Lorrigan should have known or did know that he was in possession of a stolen motor vehicle?”); RP 235 (“The issue is whether he knew or reasonably should have known that that was a stolen vehicle.”); RP 237 (“reasonable inference is that Mr. Lorrigan knew or reasonably should have known.”) (emphases added).

During the defense closing arguments, counsel similarly focused on whether the knowledge element had been proved. RP 238. Counsel emphasized the absence of common indicators the car has been stolen (broken glass, missing stereo, etc.), criticized police for making assumptions and never following up with Creston Aguilar, and argued Lorrigan’s post-arrest realization he probably should not have driven the car was insufficient for the State to prove this element. RP 238-249.

Jurors convicted Lorrigan on both charges, and the court sentenced him to 50 months in prison. CP 26-27, 38; RP 255-258, 269-271. Lorrigan timely filed his Notice of Appeal. CP 47-67.

C. ARGUMENT

1. THE JURY INSTRUCTION DEFINING KNOWLEDGE VIOLATED LORRIGAN'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 crime of possessing 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), review denied, 168 Wn.2d 1026, 228 P.3d 19 (2010). In this case, the jury was instructed jurors may find the element of knowledge if the defendant has "information that would lead a reasonable person in the same situation" to have that knowledge. CP 20. This violates due process because it permitted the jury to find Lorrigan guilty without finding he had actual, subjective knowledge the car 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.

Judge Alan R. Hancock, True Belief: an Analysis of the Definition of “Knowledge” in the Washington Criminal Code, 91 WASH. L. REV. ONLINE 177 (2016).<sup>1</sup>

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). Knowledge may not be redefined as 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.

However, the State need not present direct evidence of knowledge. Knowledge may be proved by circumstantial evidence, including evidence that the defendant was in possession of knowledge which would lead a reasonable person to know the fact in question. Allen, 182 Wn.2d at 374.

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<sup>1</sup> Available at <https://digital.law.washington.edu/dspace-law/bitstream/handle/1773.1/1556/91WLRO177.pdf?sequence=1&isAllowed=y> (last visited April 30, 2019). This article is appended to this brief for ease of reference.

This is a “subtle” distinction but a “critical” one. Id. The Allen court recognized 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 than even criminal negligence. 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 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 20.

The instruction fails to preserve the critical distinction between actual knowledge (based on direct or circumstantial evidence) and

mere negligent ignorance. Cf. 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 where evidence of actual knowledge is absent. This violates due process.

The Shipp court deemed this problem solved because the jury was merely allowed, but not required, to find knowledge if the defendant had information that would lead a reasonable person to have knowledge. 93 Wn.2d at 516-17. So long as the inference was permissive, 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 is missing from the instruction. CP 20.

Allen illustrates the problem. There, the prosecutor in closing 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. 182 Wn.2d at 374-75. When the prosecutor expressly urged such a conclusion, the court had no difficulty viewing this as serious misconduct that required reversal of Allen's conviction. Id. at 375, 380.

While Allen was correct in recognizing the prosecutor's argument was reversible misconduct, it still did not get at the heart of the problem – the jury instruction on knowledge. In other words, whether or not a prosecutor commits misconduct by expressly urging conviction based solely on constructive knowledge, the jury instructions allow it. Compare Allen, 182 Wn.2d at 374-75 (quoting 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") with CP 20 ("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."). Jurors would naturally interpret the instruction as permitting a finding of guilt based solely on constructive knowledge even without a prosecutorial misstatement of the law—as noted, the

knowledge instruction explicitly permits the jury to find knowledge based solely on what a reasonable person would believe.

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, cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (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,” Shipp, 93 Wn.2d at 515, the pattern jury instruction does not.

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 (2009). Instructions that direct a particular verdict or relieve the prosecution of its burden constitute manifest constitutional errors under RAP 2.5(a)(3). State v. Scott, 110 Wn.2d 682, 688-89 & n.5, 757 P.2d 492 (1988). By permitting conviction based on constructive knowledge when the law requires actual knowledge, the jury instruction in Lorrigan's case violated due process.

When, as here, an erroneous jury instruction misstates an element the State must prove, it will be deemed harmless only if the reviewing court can conclude beyond a reasonable doubt that the element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1995)).

The State cannot make the necessary showing here. Whether the evidence established that Lorrigan knew the Impala was stolen was very much disputed at trial. Indeed, this was *the* disputed issue at trial,

and the prosecution conceded it was not clear what Lorrigan knew. See RP 227, 232. Moreover, as discussed below in conjunction with the prosecutorial misconduct argument, the State significantly relied on what a “reasonable person” should have known to establish knowledge and obtain a conviction. See RP 227, 229, 234-235. Because evidence of Lorrigan’s actual knowledge was controverted and in question, the erroneous instruction cannot be deemed harmless. Lorrigan’s conviction for possession of a stolen vehicle must be reversed.

2. PROSECUTORIAL MISCONDUCT FOR MISSTATING THE STATE’S BURDEN OF PROVING KNOWLEDGE ALSO REQUIRES REVERSAL.

The prosecutor repeatedly argued in closing that the jury could find the knowledge element met based on what a reasonable person should have known. This repeated misstatement of the law sought to relieve the State of its burden of proving Lorrigan’s actual knowledge, constituted flagrant and ill intentioned misconduct, and requires reversal.

Prosecutorial misconduct may deprive the defendant a fair trial under the federal and state constitutions. Miller v. Pate, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967); In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 286 P.3d 673 (2012). A fair trial is a fundamental

liberty secured by the Sixth and Fourteenth Amendments and article I, section 22. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922, 120 S. Ct. 285, 145 L. Ed. 2d 239 (1999).

Prosecutors are officers of the court and have a duty to ensure that the defendant receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). When prosecutorial misconduct affects the jury's verdict, it violates the accused's rights to a fair trial and an impartial jury. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

It is misconduct for the prosecutor to misstate the law. Allen, 182 Wn.2d at 374. "The prosecuting attorney misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

Prosecutorial misconduct is grounds for reversal if the prosecutor's conduct is both improper and prejudicial. Monday, 171 Wn.2d at 675. Prejudice is established where there is a substantial likelihood that the misconduct affected the jury's verdict. Glasmann,

175 Wn.2d at 704. Even if a defendant does not object, he does not waive his right to review of flagrant and ill intentioned misconduct by a prosecutor. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988); State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

During its closing argument, the State indicated “[t]he only issue is whether Mr. Lorrigan knew that the vehicle was stolen.” RP 232. Concerning the element of knowledge, the prosecutor conceded, “You weren’t there, we don’t know. We do not know what Mr. Lorrigan knew. We can only look at the evidence and decide and infer what a reasonable person would know or should reasonably know under the circumstances.” RP 227 (emphasis added). The prosecutor then repeatedly asserted that the jury could find the knowledge element satisfied based either on what Lorrigan knew or based on what a reasonable person in his position should have known. See RP 229 (asks jurors if they should conclude Lorrigan “knew or reasonably should have known” vehicle stolen); RP 234 (“Is it reasonable to infer . . . that Mr. Lorrigan should have known or did know that he was in possession of a stolen motor vehicle?”); RP 235 (“The issue is whether he knew or reasonably should have known that that was a stolen vehicle.”); RP 237 (“reasonable inference is that Mr. Lorrigan knew or reasonably should have known.”) (emphases added).

The prosecutor here engaged in the same misconduct that required reversal in Allen: he repeatedly indicated that what Lorrigan “should have known” could substitute for Lorrigan’s actual, subjective knowledge.

As in Allen, “the prosecuting attorney repeatedly misstated that the jury could convict [Lorrigan] if it found that he *should have known*” the vehicle was stolen. Allen, 182 Wn.2d at 374. The prosecutor even acknowledged that “[w]e do not know that Mr. Lorrigan knew” about the car being stolen, but then told jurors they could still decide what a reasonable person would know or should have known. Compare RP 227 with Allen, 182 Wn.2d at 374-75 (“under the law, even if he *doesn’t actually know*, if a reasonable person would have known, he’s guilty”). Although the prosecutor at Lorrigan’s trial repeatedly referenced what Lorrigan “knew,” these references were accompanied by additional references to what Lorrigan “should have known,” separated with the disjunctive “or” and therefore plainly indicating that the hypothetical knowledge of a reasonable person was all that was necessary to convict.<sup>2</sup> As in Allen, “the ‘should have known’ standard is incorrect;

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<sup>2</sup> In other words, a conviction cannot be based on what a reasonable person in the same position would have known *or* on what Lorrigan actually knew; rather, actual knowledge is always required, and the prosecutor’s argument dispensed with this requirement.

the jury must find that [Lorrigan] *actually knew* [the vehicle was stolen]. The remarks were improper.” 182 Wn.2d at 375.

As the Allen court noted, the “nuance” between actual knowledge and the State’s “should have known” argument was “critically important. In Shipp, we reversed the convictions of several defendants because it was ‘possible that the jury believed [that the accomplice lacked actual knowledge] and yet convicted him because it believed that an ordinary person would have known.’” Allen, 182 Wn.2d at 379 (alteration in original) (quoting Shipp, 93 Wn.2d at 517). Because the critically important nuance was similarly confounded by the prosecutor’s arguments here, the prosecutor’s arguments constitute misstatements of the law and therefore misconduct.

The prosecutor’s arguments prejudicially deprived Lorrigan of a fair trial because they went to the only disputed issue, knowledge. Lorrigan essentially conceded every other element of the crime of possessing a stolen vehicle, eliciting evidence and arguing only that he did not know the car was stolen. As in Allen, “the trial turned on whether the State produced sufficient circumstantial evidence to allow the jury to infer [Lorrigan] had actual knowledge.” Allen, 182 Wn.2d at 375. Therefore, a “misstatement that the jury could find [Lorrigan]

guilty if he should have known” the car was stolen “was particularly likely to affect the jury’s verdict.” Id.

Although Lorrigan’s attorney did not object to the State’s misconduct, an objection is not required where the misconduct is flagrant and ill intentioned. Where “case law and professional standards . . . were available to the prosecutor and clearly warned against the conduct,” the misconduct qualifies as flagrant and ill intentioned. Glasmann, 175 Wn.2d at 707; see also State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996) (holding prosecutorial arguments flagrant and ill intentioned where same arguments previously held to be improper in published opinion), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997).

Allen, a 2015 Washington Supreme Court case, was available to the prosecutor and it clearly warns against misstating this aspect of the culpability statute, noting that it can be easily misinterpreted by jurors. Furthermore, given the infirmity in the knowledge instruction itself, as discussed above, a curative instruction would not and could not have neutralized the prejudicial, misleading effect of the prosecutor’s misstatements of the law. The prosecutor’s misconduct during closing argument merits reversal and a new trial.

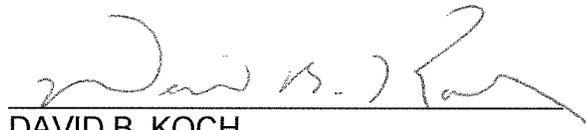
D. CONCLUSION

Lorrigan's possession of a stolen vehicle conviction should be reversed.

DATED this 3<sup>rd</sup> day of May, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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## APPENDIX

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

Alan R. Hancock\*

## INTRODUCTION

In *State v. Allen*,<sup>1</sup> the Washington State Supreme Court reaffirmed *State v. Shipp*,<sup>2</sup> 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.<sup>3</sup> 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.”<sup>4</sup> 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.”<sup>5</sup>

Consider, for example, the crime of possessing stolen property.<sup>6</sup> 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.”<sup>7</sup> Thus, one

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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).

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.<sup>8</sup> 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.”<sup>9</sup> In any case, the finder of fact “*must still find subjective knowledge.*”<sup>10</sup> 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.<sup>11</sup> This is directly contrary to the definition,<sup>12</sup> 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

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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.

10. *Id.* at 517, 610 P.2d at 1326 (emphasis added); see also *Allen*, 182 Wash. 2d at 374–75, 341 P.3d at 273.

11. *State v. Johnson*, 119 Wash. 2d 167, 829 P.2d 1082 (1992).

12. WASH. REV. CODE § 9A.08.010(1).

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.

#### I. THE SECOND PRONG OF WASHINGTON’S DEFINITION OF “KNOWLEDGE” SETS FORTH AN UNCONSTITUTIONAL NEGLIGENCE STANDARD

What is knowledge? In epistemological circles, knowledge is generally defined as justified true belief.<sup>13</sup> In other words, in order for a person to have knowledge of a given proposition, the proposition must be *true*, the person must *believe* it to be true, and the person must be *justified* in believing it to be true.<sup>14</sup>

The first prong of the definition of “knowledge” in the Criminal Code appears to define knowledge in terms of true belief, without any reference to what we might call justification for such true belief.<sup>15</sup> It states that “[a] person knows or acts knowingly or with knowledge when: (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense.”<sup>16</sup> This definition uses the term awareness rather than belief, and this is a reasonable synonym under the circumstances. Awareness connotes perception and consciousness, and certainly implies belief. The definition refers to awareness of a fact, facts, or circumstances. These terms necessarily

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13. See, e.g., RODERICK M. CHISHOLM, *THEORY OF KNOWLEDGE* 5–23 (1966). Chisholm formulates the elements of knowledge as follows: “*S* knows at *t* that *h* is true, provided: (1) *S* believes *h* at *t*; (2) *h* is true; and (3) *h* is evident at *t* for *S*.” *Id.* at 23. The term “evident” is a term of art in this context, which Chisholm explains in detail. It is roughly equivalent to the concept of being justified in one’s true belief.

14. In a famous paper, the philosopher Edmund L. Gettier III showed, by way of some ingenious counterexamples, that a person can have justified true belief of a proposition, and still not have knowledge of that proposition. Edmund L. Gettier, *Is Justified True Belief Knowledge?*, 23 *ANALYSIS* 121 (1963). Still, as a rule of thumb, justified true belief is a good working definition of knowledge. Chisholm adds a qualification to his definition of “knowledge” in order to account for Gettier’s point. CHISHOLM, *supra* note 13, at 23.

15. WASH. REV. CODE § 9A.08.010(1)(b)(i).

16. *Id.*

imply the truth of the proposition the person is aware of. A fact by definition is something that is true.<sup>17</sup>

When we turn to the second prong of the definition of “knowledge,” however, we encounter a definition that is not only contrary to an ordinary understanding of the concept of knowledge, but also contrary to well-established principles of criminal law. The second prong of the definition of “knowledge” is as follows:

A person knows or acts knowingly or with knowledge when:

...

(ii) 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.<sup>18</sup>

This reasonable person standard was part of the original Washington Criminal Code, Title 9A of the Revised Code of Washington, enacted in 1975, to become effective in 1976.<sup>19</sup> The Criminal Code was a combination of a revised criminal code prepared by the Judiciary Committee of the Washington Legislative Council, which drew on the Model Penal Code,<sup>20</sup> and a criminal code drafted by the Washington Association of Prosecuting Attorneys.<sup>21</sup>

The Model Penal Code defines the term “knowingly” as follows:

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his [or her] conduct or the attendant circumstances, he [or she] is aware that his [or her] conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his [or her] conduct, he [or she] is aware that it is practically certain that his [or her] conduct will cause such a result.<sup>22</sup>

Both parts of this definition are consistent with the ordinary understanding of the term “knowledge,” in that they both refer to the person’s *awareness* of the person’s conduct, the attendant circumstances,

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17. It was not unreasonable for the Legislature to exclude any consideration of justification for the actor’s awareness of facts in defining “knowledge.” After all, the focus of the criminal law is on the state of mind of the actor, as well as the acts of the actor.

18. WASH. REV. CODE § 9A.08.010(1)(b)(ii) (emphasis added).

19. An Act Relating to Crimes and Criminal Procedure, 1975 Wash. Sess. Laws 826.

20. See MODEL PENAL CODE (AM. LAW INST. 1962).

21. See *Recent Developments, Criminal Law—Affirmative Defenses in the Washington Criminal Code—The Impact of Mullaney v. Wilbur*, 421 U.S. 684 (1975), 51 WASH. L. REV. 953, 954–55 n.10 (1976).

22. MODEL PENAL CODE § 2.02(b).

or the result of the person's conduct, as the case may be, which roughly equates to true belief.<sup>23</sup> The definition also avoids any concept of constructive knowledge.<sup>24</sup>

In stark contrast, the second prong of the definition of "knowledge" in the Washington Criminal Code essentially sets forth a negligence standard for determining whether a person has knowledge of a given fact. Civil Washington Pattern Jury Instruction § 10.01 sets forth the most common legal definition of negligence:

Negligence is the failure to exercise ordinary care. It is the doing of some act that a *reasonably careful person* would not do under the same or similar circumstances or the failure to do some act that a *reasonably careful person* would have done under the same or similar circumstances.<sup>25</sup>

There is a striking similarity between the definition of "negligence" and the second prong of the definition of "knowledge." Consider, for example, a situation in which a defendant is charged with possessing stolen property.<sup>26</sup> One of the elements of this crime is that the defendant "knew" that the property he or she possessed had been stolen.<sup>27</sup> Under the second prong of the definition of "knowledge," the defendant could be held 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 had been stolen.<sup>28</sup> Under these circumstances, the defendant has acted negligently, i.e., he or she has failed to become aware of the fact that the property had been stolen; a reasonably careful person would have become aware of this fact.

A. *The Washington Courts Have Held that "Knowledge" Requires Actual Knowledge; Constructive Knowledge Is Insufficient*

*Shipp* and *Allen* address the legal defect in the second prong of the definition of "knowledge." Three cases were consolidated for hearing

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23. As previously noted, it would not be necessary to include the concept of justification in a criminal code definition of "knowledge."

24. In the law, "constructive knowledge" is generally understood to be knowledge imputed to a person who should have been aware of a fact if the person had exercised reasonable care. *See, e.g., Constructive knowledge*, BLACK'S LAW DICTIONARY 950 (9th ed. 2009).

25. 6 WASH. PATTERN JURY INSTRUCTIONS: CIVIL § 10.01 (2014) (emphasis added).

26. This crime may be committed in any of three different degrees. *See* WASH. REV. CODE §§ 9A.56.150–.170 (2014 & Supp. 2015).

27. *Id.* § 9A.56.140(1) (2014 & Supp. 2015).

28. *Id.* § 9A.08.010(1)(b)(ii).

before the Supreme Court in *Shipp*.<sup>29</sup> In two of these cases, the issue was whether a jury instruction tracking the language of the second prong of the definition of “knowledge” was lawful and constitutional.<sup>30</sup> The Court held that such an instruction is not lawful and constitutional because it redefines the accepted meaning of the term “knowledge” to mean negligent ignorance: “[t]he ordinary person reading one of the criminal statutes would surely be misled if the statute defining knowledge were interpreted to effect such a drastic change in meaning.”<sup>31</sup> The Court’s citations indicate that it was basing this ruling on the Due Process Clause of the Fourteenth Amendment.<sup>32</sup> The Court remanded these two cases for new trials.<sup>33</sup> *Shipp* mandates that different jury instructions must be given.

As the Court pointed out in *Shipp*: “[k]nowledge is intended to be a more culpable mental state than recklessness, which is a subjective standard, rather than the equivalent of negligence, which is an objective standard.”<sup>34</sup> Thus, if the jury is permitted to find that the defendant acted knowingly if “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,”<sup>35</sup> the jury would, in effect, be permitted to find knowledge if it finds the defendant negligent in not being aware of the relevant fact or facts. This is unacceptable because acting with mere negligence is not sufficient to establish criminal liability.<sup>36</sup> Even the definition of “criminal negligence” provides that the actor’s failure to be aware of a substantial risk that a wrongful act may occur must constitute “a *gross deviation* from the standard of care that a reasonable person would exercise in the same situation.”<sup>37</sup>

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29. *State v. Shipp*, 93 Wash. 2d 510, 512, 610 P.2d 1332, 1324 (1980).

30. *Id.* at 512–13, 610 P.2d at 1324.

31. *Id.* at 516, 610 P.2d at 1326.

32. *Id.*

33. *Id.* at 517, 610 P.2d at 1326.

34. *Id.* at 515, 610 P.2d at 1325.

35. WASH. REV. CODE § 9A.08.010(1)(b)(ii) (2014 & Supp. 2015).

36. *Shipp*, 93 Wash. 2d at 515–16, 610 P.2d at 1325–26. Compare 6 WASH. PATTERN JURY INSTRUCTIONS: CIVIL § 10.01 (2014) (“Negligence is the failure to exercise ordinary care. It is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do some act that a reasonably careful person would have done under the same or similar circumstances.”), with 11 WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL § 10.04 (2014) (“A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that may occur and this failure constitutes a gross deviation from the standard of care that a reasonable person would exercise in the same situation.”).

37. WASH. REV. CODE § 9A.08.010(1)(d) (emphasis added).

In *Shipp*, the Court correctly recognized the aforementioned problems with the second prong of the definition of “knowledge.”<sup>38</sup> First, it rejected any interpretation of this definition that would *require* the jury to follow a mandatory presumption that knowledge exists where a reasonable person in the same situation would have knowledge.<sup>39</sup> Second, it rejected any interpretation that would *permit* the jury to find knowledge based on the reasonable person standard if the jury believed that the defendant “was so unperceptive or inattentive that [the defendant] did not have knowledge in the ordinary sense.”<sup>40</sup> The Court pointed out that this second interpretation “redefines knowledge with an objective standard which is the equivalent of negligent ignorance,” a redefinition that is “inconsistent with the statutory scheme which creates a hierarchy of mental states for crimes of increasing culpability.”<sup>41</sup>

However, the Court salvaged the legality of the second prong of the definition of “knowledge.” The Court held that

the statute must be interpreted as only permitting, rather than directing, the jury 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 [the defendant] was less attentive or intelligent than the ordinary person.<sup>42</sup>

The Court further pointed out that “[t]he jury *must* still find subjective knowledge.”<sup>43</sup>

*Allen* underscores the problematic language of the second prong of the “knowledge” definition.<sup>44</sup> In that case, the Court reaffirmed that “the State was required to prove that Allen *actually* knew that he was promoting or facilitating Clemmons [the principal in the murder of four Lakewood police officers] in the commission of first degree

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38. *Shipp*, 93 Wash. 2d at 515, 610 P.2d at 1325.

39. *Id.* at 514, 610 P.2d at 1325.

40. *Id.* The *Shipp* Court referred to what it called “subjective knowledge,” and clearly intended this to mean actual knowledge in the sense that the person with knowledge believed, or was aware of, the fact, facts, or circumstances or result in question. *Id.* at 513–17. Actual or subjective knowledge is to be distinguished from constructive knowledge, i.e., knowledge imputed to a person who should have been aware of a fact if the person had exercised reasonable care. *See supra* note 24. In this sense, the second prong of the statutory definition can be characterized as a definition of constructive knowledge, as the Court noted in *Allen*. *State v. Allen*, 182 Wash. 2d 364, 374, 341 P.3d 268, 273 (2015).

41. *Shipp*, 93 Wash. 2d at 515, 610 P.2d at 1325.

42. *Id.* at 516, 610 P.2d at 1326.

43. *Id.* at 517, 610 P.2d at 1326 (emphasis added).

44. *See* WASH. REV. CODE § 9A.08.010(1)(b)(ii) (2014 & Supp. 2015).

premeditated murder.”<sup>45</sup> The Court correctly cited *Shipp* for this proposition.<sup>46</sup> One of the issues in *Allen* was whether the prosecutor had engaged in prosecutorial misconduct in closing argument by misstating the “knowledge” standard upon which the jury could convict the defendant. The Court held that the prosecutor had done so by repeatedly arguing “that the jury could convict Allen if it found that he *should have known* Clemmons was going to murder the four police officers.”<sup>47</sup>

While the Court reached the correct result in *Allen*, it did not directly address the highly problematic language of the second prong of the definition of “knowledge.” And it added to the confusion by stating:

While the State must prove actual knowledge, it may do so through circumstantial evidence. Thus, Washington’s culpability statute provides that a person has actual knowledge when “he or she has information which would lead a reasonable person in the same situation to believe” that he was promoting or facilitating the crime eventually charged.<sup>48</sup>

Therein lies one of the problems addressed in this Article. This statute (the second prong of the definition of “knowledge”) states on its face that the jury can find actual knowledge based on constructive knowledge, and that is unconstitutional, as previously explained.

*B. The Criminal Washington Pattern Jury Instruction Does Not Remedy the Problem*

The WPIC does nothing to remedy this glaring problem. WPIC § 10.02 now states the second prong of the definition of “knowledge” as follows: “[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.”<sup>49</sup>

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45. *Allen*, 182 Wash. 2d at 374, 341 P.3d at 273 (emphasis in original).

46. *Id.* While correctly citing *Shipp*, the Court misstated the nature of the case in its parenthetical description of the case: “[a]ccomplice must have actual knowledge that principal was engaging in the crime eventually charged.” *Id.* (citing *Shipp*, 93 Wash. 2d at 517, 610 P.2d at 1322). *Shipp* did not involve accomplice liability. Rather, three cases were consolidated for hearing in *Shipp*. They involved convictions for (1) knowingly promoting prostitution in both the first and second degrees, (2) knowingly riding in a stolen car, and (3) attempted rape in the second degree and knowing assault with intent to commit rape (second-degree assault). *Shipp*, 93 Wash. 2d at 512–13, 610 P.2d at 1324.

47. *Allen*, 182 Wash. 2d at 374, 341 P.3d at 273 (emphasis in original).

48. *Id.* (quoting WASH. REV. CODE § 9A.08.010(1)(b)(ii)).

49. 11 WASH. PATTERN JURY INSTRUCTIONS: CRIMINAL § 10.02 (2014) (emphasis added).

This instruction essentially states that the jury *can find* that a person acted with knowledge of a fact if that person has information that would lead a reasonable person in the same situation to believe that that fact exists. But that is the very thing that *Shipp* and *Allen* hold to be impermissible, and therefore this instruction does not solve the problem addressed in those cases. Taken literally, the WPIC instruction does exactly what these cases, and any ordinary and commonsense understanding of the concept of knowledge, say cannot be done. The instruction allows the jury to find knowledge based on a constructive knowledge (reasonable person) standard even if the jury does not find that the defendant acted with actual or subjective knowledge. It does not say anything about the fact that the jury is required to find actual or subjective knowledge.

In *State v. Leech*,<sup>50</sup> the Washington State Supreme Court held that the WPIC instruction is consistent with *Shipp*.<sup>51</sup> Nevertheless, the holding of *Leech* is highly problematic. Neither *Leech* nor any of the other cases explains how its holding squares with *Shipp*, and it does not, in fact, square with *Shipp*. The *Leech* Court never addressed the fact that the State must prove that the defendant had actual, subjective knowledge of the fact in question in order to prove the element of knowledge.

This problem can be traced, in part, to a logical fallacy first introduced into this body of law in *State v. Davis*.<sup>52</sup> In that case, the court of appeals affirmed the use of WPIC § 10.02 as it describes the second prong of the definition of “knowledge.” The court held that WPIC § 10.02 complies with *Shipp*, and stated “[c]ontrary to defendant’s assertion, the instruction *allowed* the jury to consider the subjective intelligence or mental condition of the defendant.”<sup>53</sup> But the fact that the instruction *allows* the jury to consider the subjective intelligence or mental condition of the defendant is not the problem. The problem is that in order to find knowledge, the jury *must* find subjective knowledge. Regrettably, WPIC § 10.02 also *allows* the jury *not* to consider the subjective knowledge of the defendant, and this is clearly contrary to *Shipp* and *Allen*.

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50. 114 Wash. 2d 700, 790 P.2d 160 (1990).

51. *Id.* at 710, 790 P.2d at 165. In addition, the *Leech* Court cites numerous other cases upholding the WPIC instruction as constitutional. *Id.* at 710 n.20, 790 P.2d at 165 n.20. The *Leech* Court states, without any meaningful analysis, that the trial court’s definition of knowledge instruction in WPIC § 10.02 “avoids the due process problem identified in *Shipp*; it was not unconstitutional.” *Id.* at 710, 790 P.2d at 165.

52. 39 Wash. App. 916, 696 P.2d 627 (1985).

53. *Id.* at 919–20, 696 P.2d at 629 (emphasis added).

The fallacy in *Davis* is perpetuated in the other cases cited by the Washington State Supreme Court in footnote twenty of the *Leech* opinion,<sup>54</sup> and has become entrenched in the law. It is time to call a halt to any further use of this faulty reasoning. The defects in the second prong of the definition of “knowledge”<sup>55</sup> and WPIC § 10.02, as outlined in this Article, can lead to unjust and unconstitutional convictions. Jurors reading the instruction literally can reasonably conclude that they are permitted to find that the defendant acted knowingly if a reasonable person would have acted knowingly under the circumstances. In the absence of an improper closing argument by the prosecutor explicitly stating that the jury can find knowledge based on this objective standard, as happened in *Allen*, there is no remedy for a conviction based on such a result under current case law.

## II. ONE CANNOT KNOW A FALSE PROPOSITION EVEN IF ONE BELIEVES THE PROPOSITION TO BE TRUE

We have seen that the second prong of the definition of “knowledge” in the Criminal Code is defective on its face, and has led to erroneous legal reasoning. As outlined above, the Washington cases do not give proper attention to the requirement that a defendant have actual, subjective knowledge in order to be convicted of a crime in which “knowledge” is an element. It is not enough that a reasonable person in the same situation as the defendant would have had such actual knowledge. The WPIC on the definition of “knowledge” does not remedy this problem.

The second prong of the definition of “knowledge” has led to other problems as well. In *State v. Johnson*,<sup>56</sup> the State charged the defendant with the crime of promoting prostitution. The Washington Criminal Code defines this crime as follows: “[a] person is guilty of promoting prostitution if, having possession or control of premises which he or she *knows* are being used for prostitution purposes, he or she fails without lawful excuse to make reasonable effort to halt or abate such use.”<sup>57</sup> The Washington State Supreme Court upheld the defendant’s conviction for promoting prostitution, holding that the defendant knowingly allowed her premises to be used for prostitution purposes, even though the premises in question were not actually being used for prostitution

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54. *Leech*, 114 Wash. 2d at 710, 790 P.2d at 165.

55. WASH. REV. CODE § 9A.08.010(1)(b)(ii) (2014 & Supp. 2015).

56. 119 Wash. 2d 167, 829 P.2d 1082 (1992).

57. WASH. REV. CODE § 9A.88.090(1) (emphasis added).

purposes.<sup>58</sup> Rather, the defendant had been arrested pursuant to a sting operation in which undercover police officers posed as prostitute and patron.<sup>59</sup>

The *Johnson* Court cited the second prong of the definition of “knowledge,” and stated that “the Legislature has chosen to define knowledge so that one may ‘know’ something based upon a reasonable, subjective belief that a fact exists.”<sup>60</sup> In response to the defendant’s argument that one’s mistaken, reasonable, subjective belief is akin to an impermissible constructive knowledge standard invalidated in *Shipp*, the Court stated that “*Shipp* understood that actual knowledge included one’s subjective belief,”<sup>61</sup> and that the “fact that one’s subjective belief may be inaccurate is not equivalent to a presumption of knowledge.”<sup>62</sup> The Court concluded:

*Shipp* held that there cannot be a mandatory presumption of knowledge based upon one’s receipt of certain information because it would not allow a jury to take into account the subjective intelligence or mental condition of the defendant. *Shipp*, however, does permit a jury to find actual knowledge from a subjective belief based on circumstantial evidence. It is the defendant’s subjective belief that is important for culpability, not the objective state of facts. The jury is *permitted* to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists. Therefore, a mistaken reasonable, subjective belief may constitute “knowledge” without violating *Shipp*.<sup>63</sup>

The Court is correct in stating that a jury is permitted to find actual knowledge based on circumstantial evidence, and that it is the defendant’s subjective belief that is important for culpability, at least to the extent that the defendant must subjectively believe that the fact in question exists. But the remainder of the Court’s analysis is erroneous.<sup>64</sup> First, the Court misconstrues the holding in *Shipp*, as other courts have done, in stating that the jury is permitted to find actual subjective knowledge if there is sufficient information which would lead a

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58. *Johnson*, 119 Wash. 2d at 174, 829 P.2d at 1085.

59. *Id.* at 169, 829 P.2d at 1083.

60. *Id.* at 174, 829 P.2d at 1085.

61. *Id.* (citing *State v. Shipp*, 93 Wash. 2d 510, 517, 610 P.2d 1322, 1326 (1980)).

62. *Id.* at 174, 829 P.2d at 1085.

63. *Id.* at 174, 829 P.2d at 1805–86 (emphasis in original).

64. Only one member of the Washington State Supreme Court that decided *Johnson* remains on the Court today, Justice Charles W. Johnson. Justice Johnson correctly dissented in *Johnson*.

reasonable person to believe that a fact exists.<sup>65</sup> As previously explained, *Shipp* holds that the jury *must* find that the defendant had actual, subjective knowledge in order to find that he or she acted with knowledge.

Second, the Court introduces a new fallacy into the discussion by stating that a *mistaken* reasonable subjective belief can result in culpability.<sup>66</sup> On the contrary, the definition of “knowledge” requires awareness of a “*fact, facts, or circumstances or result* described by a statute defining an offense.”<sup>67</sup> One cannot have knowledge for purposes of the Criminal Code unless one is aware of a *fact*. If a person has a *mistaken* belief concerning a supposed fact, then by definition, the person does not have knowledge. This is also consistent with the ordinary meaning of the term “knowledge” as (justified) *true* belief.<sup>68</sup>

The Court in *Johnson* waxed philosophical in its reasoning, citing an example in which a person can reasonably believe that by flicking a light switch, the light will come on. Yet, if there is a fault in the wiring, the light will not come on.<sup>69</sup> The Court stated that under these circumstances, “we believe or subjectively ‘know’ the switch will turn the lights on even though it is objectively impossible, until we obtain information that the wiring is faulty, i.e., by flicking the switch and the lights remain off.”<sup>70</sup> The Court’s quotation marks around the word “know” are telling. We do not, in fact, *know* something just because we reasonably believe it to be the case. In order to have knowledge, the fact we purport to know must be *true*. More to the point of this Article, the definition of “knowledge” in the Criminal Code requires awareness of a *fact*, not what someone believes to be a fact. The *Johnson* case is yet another instance in which the second prong of the definition of “knowledge” has led to erroneous reasoning and, in that case at least, a

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65. See, e.g., *Johnson*, 119 Wash. 2d at 174, 829 P.2d at 1085–86.

66. See *id.* at 174, 829 P.2d at 1086.

67. WASH. REV. CODE § 9A.08.010(1)(b)(i) (2014 & Supp. 2015) (emphasis added).

68. To be charitable, perhaps one interpretation of the court’s reasoning is that under the second prong of the definition of “knowledge,” a reasonable person could believe that the relevant facts exist, even though they did not exist and the person’s belief was mistaken, and still have knowledge. Any such interpretation would be erroneous, however. The first prong of the definition of “knowledge” clearly requires awareness of an actual fact, and the two parts of the statute must be considered as a whole, with all its provisions considered in relation to one another. See *State v. Bunker*, 169 Wash. 2d 571, 578, 238 P.3d 487, 491 (2010). Moreover, even assuming, for the sake of argument, that the statute is ambiguous in this regard, any such interpretation would violate the rule of lenity. See, e.g., *State v. McGee*, 122 Wash. 2d 783, 787, 864 P.2d 912, 913–14 (1993).

69. *Johnson*, 119 Wash. 2d at 173, 829 P.2d at 1086.

70. *Id.*

wrongful conviction.<sup>71</sup>

### III. THE LEGISLATURE SHOULD REPEAL THE SECOND PRONG OF “KNOWLEDGE,” AND THE JURY INSTRUCTIONS COMMITTEE SHOULD AMEND THE JURY INSTRUCTION

Voltaire once said that the “the Holy Roman Empire was neither holy, nor Roman, nor an empire.”<sup>72</sup> By the same token, the longstanding definition of “knowledge” is (justified) true belief. But under current Washington case law and the pattern jury instruction defining the second prong of “knowledge,” a defendant can be held to have knowledge of a given fact (1) even though he or she did not believe the fact to be true,<sup>73</sup> and (2) even though the supposed “fact” was not even true!<sup>74</sup> This flies in the face of the first prong of the definition of “knowledge” set forth in the Washington Criminal Code,<sup>75</sup> fundamental constitutional principles under the Due Process Clause of the Fourteenth Amendment as they relate to the second prong of the definition of “knowledge,”<sup>76</sup> and the common understanding of the concept of “knowledge” generally. It is not too much to ask that the law, and particularly the criminal law where liberty is at stake, be logical and reasonable.

The Legislature should remedy these problems by eliminating the second prong of the definition of “knowledge” in the Criminal Code altogether. After all, what is wrong with defining “knowledge” in accordance with the first prong of the definition? As is constitutionally required, this definition simply requires that the defendant have awareness of the fact in question (true belief) in order to have knowledge. There is nothing to be gained by adding a second definition that talks about what a reasonable person might believe about a fact in question. In order for any such second definition to be constitutional, it would have to make reference in some manner to the fact that the

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71. Even though the defendant could not properly have been convicted of promoting prostitution under the facts in *Johnson*, she could have been charged with and convicted of *attempted* promoting prostitution. See WASH. REV. CODE § 9A.28.020(2) (“If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.”).

72. OXFORD DICTIONARY OF QUOTATIONS 716 (Angela Partington ed., 4th ed. 1992).

73. See *supra* Section I.A.

74. See *supra* Part II.

75. WASH. REV. CODE § 9A.08.010(1)(b)(i).

76. *Id.* § 9A.08.010(1)(b)(ii).

defendant must still have actual, subjective knowledge, which is required in the first definition anyway.

Even if the Legislature does not repeal the second prong of the definition of “knowledge,” the Washington Supreme Court Committee on Jury Instructions should amend WPIC § 10.02 to eliminate the second paragraph thereof, which makes reference to the unconstitutional reasonable person standard in defining “knowledge,” or else amend it to include a requirement that the defendant must in any event act with actual, subjective knowledge. The Washington State Supreme Court should also reexamine, in an appropriate case, *State v. Leech*, *State v. Johnson*, and other problematic cases to rectify these problems.

## CONCLUSION

The second prong of the definition of “knowledge” in Washington’s Criminal Code sets forth an unconstitutional negligence standard. WPIC § 10.02 further complicates the problem. The Legislature should repeal the second prong of the definition of “knowledge” in the Criminal Code. Absent such a repeal, the jury instructions committee should amend WPIC § 10.02 to eliminate the potential for juries to find “knowledge” based on constructive knowledge. Until this happens, there is a substantial risk that juries will wrongly find defendants guilty of crimes based on constructive knowledge, rather than based on their *true belief*, as constitutionally required.

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