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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

DERRICK LORRIGAN, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. ISSUES PRESENTED**

1. Can the defendant challenge the trial court's instruction defining "knowledge" for the first time on appeal, where he asserts error but did not object below, the allegations are not manifest on the record, and if there was error, it was invited?

2. Was the standard instruction defining knowledge, which has been approved by the Supreme Court, correct and sufficient?

3. Without objection and in the context of the entire closing argument, were the deputy prosecutor's references to "should have known" prejudicial?

## **II. STATEMENT OF THE CASE**

Derrick Lorrigan was charged and convicted by a jury of possession of a stolen motor vehicle and making or possessing a motor vehicle theft tool. CP 4-5, 26-27.

In June 2018, John Sumner purchased a 2005 Chevy Impala at an auction in Spokane. RP 98, 105. The vehicle's ignition was intact; however, Sumner had to have a key made for the vehicle after purchase. RP 99-100. New rims and tires were also placed on the vehicle. RP 101.

On June 21, 2018, Sumner parked the Impala in a Spokane neighborhood, locked it and left Spokane for an appointment in Seattle. RP 101-02. On June 22, 2018, Sumner returned to Spokane and discovered

his car had been stolen, which he reported to the police.<sup>1</sup> RP 102-03. No one had permission to possess the vehicle during Sumner's absence. RP 104-05, 111-12. Approximately one week later, the vehicle was located. RP 103. There were numerous dents on the rear of the vehicle, clothes were spread throughout the car, and it had a tampered ignition.<sup>2</sup> RP 104, 107, 190. Because of the tampering, a screwdriver or similar tool could start the car. RP 191-92.

On June 26, 2018, around 11:00 p.m., Spokane Police Department Officer Kelly Mongan was on patrol in North Spokane and observed Sumner's stolen Chevy Impala. RP 131, 133, 135, 143. The officer followed the vehicle as it made a furtive left hand turn. RP 135. The officer subsequently stopped the vehicle and contacted the driver. RP 140-41.

Lorrigan<sup>3</sup> told an officer that he had the Impala for four days. He alleged he had borrowed the car from "Creston."<sup>4</sup> RP 151-53, 164, 178. "Creston" previously told the defendant that the vehicle could be located at

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<sup>1</sup> That stolen vehicle information had been placed into a national law enforcement database for stolen vehicles. RP 114-15.

<sup>2</sup> "[T]he terminal where you stick your key in, the small slot for the key to go in, someone had jammed some sort of tool in there and punched it in the inside of the steering column." RP 201.

<sup>3</sup> The trial court had conducted a CrR 3.5 hearing and determined the defendant's statements would be admissible at trial. RP 42-79. There are no written findings of fact and conclusions of law in the record for that hearing.

<sup>4</sup> The defendant gave the name of "Creston" Alagard or Aguilar. RP 152.

the Wedgewood Apartments and the keys to the vehicle were on the floorboard. RP 153. There was a key ring containing several keys in the center console. RP 190. Most of the keys appeared shaved or tampered with. RP 190. No Chevy key was found in the Impala. RP 176, 179. That year of Impala could be started with a shaved key. RP 191.

### III. ARGUMENT

#### A. ANY ALLEGED ERROR CONCERNING THE “KNOWLEDGE” INSTRUCTION IS UNPRESERVED, NOT MANIFEST CONSTITUTIONAL ERROR, AND, IF ERROR, IT WAS INVITED. FURTHER, THE INSTRUCTION WAS A CORRECT STATEMENT OF THE LAW.

For the first time on appeal, Lorrigan asserts that the trial court’s instruction number 10, defining knowledge, was given in error. He alleges the instruction allowed the jury to convict him of the possession of a stolen motor vehicle if a “reasonable person” would have known the vehicle was stolen, rather than requiring the State to prove the defendant had actual knowledge the vehicle was stolen. Appellant’s Br. 10. This unpreserved claim has no merit.

##### 1. The alleged error is unpreserved.

Lorrigan’s trial counsel did not object or take exception to the trial court’s instructions. RP 231. CrR 6.15(c) requires timely and well-stated objections to jury instructions. *State v. Scott*, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988). The policy underlying the preservation rule is to

promote “efficient use of judicial resources”; therefore, “[an appellate court] will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.”<sup>5</sup> *Id.* at 685.

Generally, a defendant cannot challenge a jury instruction on appeal if he or she did not object to the instruction in the trial court. *State v. Salas*, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995). In the absence of an objection, an appellate court reviews jury instructions for only an error of constitutional magnitude.<sup>6</sup> RAP 2.5(a)(3); *State v. Hanna*, 123 Wn.2d 704, 709-10, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994); *see also State v. O’Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). “[T]he appellant must identify a constitutional error and show how the alleged error actually affected the [appellant]’s rights at trial.” *O’Hara*,

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<sup>5</sup> *See, e.g., State v. Burns*, --Wn.2d--, 438 P.3d 1183, 1192 (2019) (explicitly adopting “a requirement that a defendant raise an objection at trial or waive the right of confrontation. Requiring an objection brings this claim to align with what [the Court] employ[s] in other cases where we have held that some constitutional rights may be waived by a failure to object”).

<sup>6</sup> The Supreme Court has specified several instructional errors that are of constitutional magnitude, including instructions that direct a verdict, shift the burden of proof to the defendant, fail to define the “beyond a reasonable doubt” standard, fail to require a unanimous verdict, and omit an element of the crime charged. *O’Hara*, 167 Wn.2d at 100-01. These errors “affect a defendant’s constitutional rights by violating an explicit constitutional provision or denying the defendant a fair trial through a complete verdict.” *Id.* at 103. None of these instructional errors are present in this case.

167 Wn. 2d at 98. An error is “manifest” if it is “so obvious on the record that the error warrants appellate review.” *Id.* at 99-100. In addition, the appellant must also show “actual prejudice, there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* at 99 (alteration in original). An appellate court reviews the merits of the alleged error to determine whether the claim is likely to succeed. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).

In that regard, instructional errors are of constitutional magnitude only where the jury is not instructed on every element of the charged crime. *State v. Roggenkamp*, 153 Wn.2d 614, 620, 106 P.3d 196 (2005). For example, in *State v. Stearns*, the defendant was convicted of possessing a controlled substance with intent to manufacture. 119 Wn.2d 247, 830 P.2d 355 (1992). At trial, Stearns did not object to the trial court’s definition of “manufacture.” *Id.* at 249. On appeal, Stearns argued the trial court improperly instructed the jury as to the definition of “manufacture.” *Id.* at 248. The Supreme Court found no error holding: “[a]s long as the instructions properly inform the jury of the elements of the charged crime, any error in further defining terms used in the elements is not of constitutional magnitude.” *Id.* at 250. As important, “[e]ven an error in

defining technical terms does not rise to the level of constitutional error.”

*Id.*; see also *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011).

Likewise, our Supreme Court has held that an error of constitutional magnitude did not exist where the jury was not instructed as to the meaning of the technical terms “deliberate cruelty” and “particular vulnerability,” the statutory aggravating circumstances for imposing an exceptional sentence. *Gordon*, 172 Wn.2d at 677-80. In *Gordon*, the jury was presented with the alleged statutory aggravators and found that they applied; however, the jury was not instructed further as to the meaning of the aggravating circumstances. *Id.* at 674-77. The Supreme Court determined that further instruction would be merely definitional and, thus, the purportedly erroneous instruction could not be challenged on that basis for the first time on appeal: “Further elaboration in the instructions would have been in the vein of definitional terms, and the omission of such definitions is not an error of constitutional magnitude satisfying the RAP 2.5(a) standard.” *Id.* at 679-80. Similarly, in *Scott*, our high court held the constitution only requires the jury be instructed as to each element of the offense charged, and the failure of the trial court to further define “knowledge” was not within the confines of RAP 2.5(a)(3), and did not constitute manifest constitutional error. 110 Wn.2d at 689.

In the present case, the challenged instruction is a definitional instruction – it further defines “knowledge.” In that regard, the trial judge separately instructed the jury as to the elements of possession of a stolen motor vehicle. CP 19. Lorrigan fails to address the requirement that he establish a constitutional error which merits review for the first time on appeal and he fails to distinguish or discuss our high court’s rule announced in *Stearns* that an allegation of an error in a definitional instruction does not rise to the level of manifest constitutional error and cannot be raised for the first time on appeal. Moreover, Lorrigan fails to establish actual prejudice as to whether the alleged error is so obvious from the record that the error warrants appellate review. Indeed, the trial court’s definition of “knowledge” accurately stated the law and has been approved by the Supreme Court on several occasions.<sup>7</sup> Since the trial court instructed the jury as to each element of possession of a stolen motor vehicle, the alleged error regarding the definitional “knowledge” instruction does not rise to the level of manifest constitutional error and there has been no showing of actual prejudice. Lorrigan cannot show manifest error justifying review under RAP 2.5(a)(3) of the unpreserved objection to the knowledge instruction.

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<sup>7</sup> Those decisions are discussed below.

Finally, if error, it was invited. Lorrigan should be precluded from raising this claimed error because he contributed to it at the time of trial. A party who sets up an error at trial cannot claim that very action as error on appeal and receive a new trial. *State v. Momah*, 167 Wn.2d 140, 153, 217 P.3d 321 (2009). In determining whether the invited error doctrine applies, our courts consider “whether the defendant affirmatively assented to the error, materially contributed to it, or benefited from it.” *In re Coggin*, 182 Wn.2d 115, 119, 340 P.3d 810 (2014). The doctrine requires “affirmative actions by the defendant.” *In re Thompson*, 141 Wn.2d 712, 724, 10 P.3d 380 (2000).

Under the “invited error” doctrine, a defendant may not make a tactical choice in pursuit of some real or hoped-for advantage and later urge his own action as a ground for reversal. *State v. Lewis*, 15 Wn. App. 172, 176, 548 P.2d 587 (1976), *overruled on other grounds by State v. Stephens*, 22 Wn. App. 548, 591 P.2d 827 (1979). Here, defense counsel proposed instructions, did not request an alternative “knowledge” instruction, and did not object or take exception to the court’s instructions (other than to the concluding instruction). CP 6-7 (defendant’s proposed instructions); RP 212-13. There was no error. If there was error, it was invited. This Court should decline to review the claimed error.

2. The definitional instruction for “knowledge” accurately stated the law.

*Standard of review.*

If this Court reviews the claimed error for the first time on appeal, challenged jury instructions are reviewed de novo, evaluating the challenged instruction within the context of the instructions as a whole. *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

A person is guilty of possessing a stolen vehicle if he or she possesses a stolen vehicle.<sup>8</sup> RCW 9A.56.068; CP 124, 130. RCW 9A.56.140(1) defines what it means to “possess” stolen property:

“Possessing stolen property” means 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.

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<sup>8</sup> While mere possession of stolen property is insufficient to justify a conviction, our high court in *State v. Couet*, noted, however, that “[w]hen a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his [or her] guilt will support a conviction.” 71 Wn.2d 773, 776, 430 P.2d 974 (1967). Examples of corroborative evidence may include a false or improbable explanation of possession, flight, or the presence of the accused near the scene of the crime. *State v. Q.D.*, 102 Wn.2d 19, 28, 685 P.2d 557 (1984); *State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999) (absence of a plausible explanation or an improbable explanation is a corroborating circumstance); *State v. Hudson*, 56 Wn. App. 490, 495, 784 P.2d 533 (1990) (flight from the police is a sufficient corroborating circumstance); *State v. Smyth*, 7 Wn. App. 50, 53, 499 P.2d 63 (1972) (buying the stolen property at an unreasonably low price may also be a corroborating circumstance); *State v. Hatch*, 4 Wn. App. 691, 694, 483 P.2d 864 (1971) (explanations of the stolen property that cannot be checked or rebutted may be corroborating circumstances).

Lorrigan was in actual possession of the Impala, as he was driving the vehicle when contacted by the police and exclaimed that he acquired the vehicle from another person. Lorrigan's possession of the Impala was not disputed at trial. In addition, the State had to prove that Lorrigan had actual knowledge that the Impala had been stolen. *See State v. Allen*, 182 Wn.2d 364, 341 P.3d 268 (2015).

Knowledge is defined in RCW 9A.08.010(1)(b):

b) KNOWLEDGE. 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; or

(ii) he or she has information which would lead a reasonable person<sup>9</sup> in the same situation to believe that facts exist which facts are described by a statute defining an offense.

In *State v. Shipp*, 93 Wn.2d 510, 513, 610 P.2d 1322 (1980), which involved a charge of knowingly promoting prostitution, the jury was instructed on the definition of knowledge "in the words of the statute." The Supreme Court found that instruction, as then written, was unconstitutional because it could have been interpreted by the jurors as creating a mandatory

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<sup>9</sup> The *Shipp* court stated that "[t]he comparison to the ordinary person has been imported into many legal definitions of knowledge to make it clear to the jury what level of circumstantial evidence is sufficient for it to conclude that the defendant had actual knowledge... But the comparison creates only an inference. The jury must still find subjective knowledge." 93 Wn.2d at 517 (citation omitted).

presumption or an objective standard for determining a defendant's knowledge (defining knowledge as the equivalent of negligent ignorance), rather than merely a permissive inference. *Id.* at 514-16. The court held that those two interpretations were unconstitutional and "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." *Id.* at 516.

In response to *Shipp*, the WPIC definition of "knowledge" was revised to correct the issue identified by the Supreme Court. *See State v. Leech*, 114 Wn.2d 700, 710, 790 P.2d 160 (1990); WPIC 10.02, Comment. In *Leech*, the defendant argued that the modified "knowledge" instruction<sup>10</sup> permitted a conviction based upon an objective standard (that which the

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<sup>10</sup> The trial court's instruction in *Leech* defining "knowledge" is the same used by the trial court in the present case and read as follows:

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 law as being a crime.

"If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge."

114 Wn.2d at 709 n. 17. The language of the current WPIC 10.02, used in this case, has been modified slightly since *Leech*. It has removed the reference to the facts in question being "described by law as being a crime," referring instead to knowledge of "a fact" and "that fact," which is not at issue in this case. *Compare Leech*, 114 Wn.2d at 709-10 & n.2 with WPIC 10.02; *see* WPIC 10.02 & Comment.

Court found unconstitutional in *Shipp*). 114 Wn.2d at 709-10. The Court disagreed and held:

Contrary to the defendant's contention, however, the definition of knowledge instruction given here was based not on the statutory language criticized in *Shipp* but on the revised version of WPIC 10.02, modified to correct the problem identified in *Shipp*. The revised pattern jury instruction states that a jury is permitted but not required to find that a person acted with knowledge if that person has information that would lead a reasonable person to believe that facts exist that constitute a crime. The constitutionality of this revised language has been upheld repeatedly. The definition of knowledge instruction (instruction 10) given by the trial court in this case is not the instruction condemned in *Shipp* and avoids the due process problem identified in *Shipp*; it was not unconstitutional.

*Id.* at 710 (footnote citations omitted).

In a later case, *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992), the defendant was convicted of permitting prostitution. That crime required the State to prove that the defendant permitted prostitution on a premises, and knew the premises were being used for prostitution. *Id.* at 172. On appeal, the defendant argued that one cannot be convicted of a crime requiring "knowledge" if he or she does not know a fact exists. *Id.* at 172. In affirming the conviction, the Supreme Court found the trier of fact is permitted to find actual, subjective knowledge if there is sufficient information that would lead a reasonable person to believe that a fact exists. *Id.* at 174.

The court in this case instructed the jury using the language of WPIC 10.02, as follows:

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.

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

CP 20.

The trial court's instruction was based on the pattern instruction and is a correct statement of the law. *See Johnson*, 119 Wn.2d at 174; *Leech*, 114 Wn.2d at 710 and n.20 (citing cases); *State v. McReynolds*, 104 Wn. App. 560, 581, 17 P.3d 608, 620 (2000), *as amended on denial of reconsideration* (Jan. 30, 2001); *State v. Bryant*, 89 Wn. App. 857, 872, 950 P.2d 1004 (1998).

The trial court did not instruct the jury that it must find the element of knowledge had been proven if it concluded that a reasonable person would have known the vehicle was stolen based on the facts available to Lorrigan. Nor did it instruct the jury that it was required to find that Lorrigan

had knowledge if it found that a reasonable person in the same situation would have had knowledge. The instructional pitfalls addressed in *Shipp* are not present in this case.

Lorrigan relies, in part, on the Supreme Court decision in *Allen*, to argue that the “knowledge” instruction, taken verbatim from WPIC 10.02, was given in error. In *Allen*, the State charged the defendant as an accomplice with aggravated murder in the first degree. 182 Wn.2d at 369-70. The State had the burden of proving accomplice liability and that the defendant had “actual knowledge” of the crime. *Id.* at 371. The trial court instructed the jury on knowledge using WPIC 10.02. *Id.* at 372. Contrary to the jury instruction that correctly defined the meaning of knowledge, in closing argument, the prosecutor “repeatedly and improperly” told the jury that the standard was whether the defendant “should have known.” *Id.* at 371-72. The misstatement of the law was aggravated by the prosecutor displaying a slide in closing that had the word “Know” crossed out and the words “Should Have Known” displayed prominently. *Id.* at 377.

“To pass constitutional muster, the jury must find actual knowledge but may make such a finding with circumstantial evidence.” *Id.* at 374. The distinction between actual knowledge based on circumstantial evidence and “knowledge because the defendant ‘should have known’ is critical.” *Id.* at

374. The jury must find that the defendant actually knew, not that the defendant should have known. *Id.* at 374.

The Supreme Court held the prosecutor’s argument was improper and misleading because jurors could misinterpret the culpability statute and convict the defendant based on what the defendant should have known, rather than what he actually knew. *Id.* at 374, 380. The Court stated:

We have recognized that a juror could understandably misinterpret Washington’s culpability statute to allow a finding of knowledge “if an ordinary person in the defendant’s situation would have known” the fact in question, or in other words, if the defendant “should have known.”

*Id.* at 374 (quoting *Shipp*, 93 Wn.2d at 514).

Lorrigan contends that the instruction does not require a finding of actual knowledge, but his argument refers only to the second paragraph of the instruction, which describes the permissible inference. Lorrigan argues that:

While *Allen* was correct in recognizing the prosecutor’s argument was reversible misconduct, it still did not get to 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.

Appellant’s Br. at 12.

Lorrigan’s argument disregards the first paragraph of the instruction, which states in its first sentence, “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.” CP 20. The jury was necessarily required to find that Lorrigan had actual knowledge the vehicle was stolen per the first sentence of the “knowledge” instruction. A jury is presumed to follow the court’s instructions. *Matter of Phelps*, 190 Wn.2d 155, 167, 410 P.3d 1142 (2018).

Lorrigan further argues that “[b]y permitting a jury to find knowledge based on mere negligence, the 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.” Appellant’s Br. at 14. This claim was directly rejected by the court in *Leech* as discussed above. Likewise, in *Shipp*, the court concluded the jury may only be permitted, not directed, to find knowledge if the jury finds that the ordinary person would still have knowledge under the circumstances. 93 Wn.2d at 516. The Court noted that “[t]he jury must still be allowed to conclude that [the defendant] was less attentive or intelligent than the ordinary person.” *Id.*

Finally, the *Allen* court explicitly approved the “knowledge” instruction given in that case, stating the jury instructions “correctly stated

the law regarding ‘knowledge.’” 182 Wn.2d at 372. The instruction given in *Allen*, the same instruction given in this case, was quoted as:

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

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.

*Id.*

In the case at bar, the jury was properly instructed that it was “permitted but not required to find” that a person acted with knowledge if that person had “information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime.” CP 50. With this instruction, the jury was permitted, but not required, to find that Lorrigan subjectively knew that he possessed a stolen motor vehicle if there was sufficient evidence that would lead a reasonable person to have that knowledge. The “knowledge” instruction was a proper statement of the law and there was no error.

**B. THE DEFENDANT FAILS TO DEMONSTRATE THE DEPUTY PROSECUTOR COMMITTED MISCONDUCT DURING CLOSING ARGUMENT REGARDING COMMENTS MADE ABOUT THE “KNOWLEDGE” INSTRUCTION AND THAT ANY ERROR COULD NOT HAVE BEEN CURED BY A CURATIVE INSTRUCTION.**

For the first time on appeal, Lorrigan contends the deputy prosecutor committed misconduct by misstating the “knowledge” instruction during closing argument.

A prosecuting attorney commits misconduct by misstating the law. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008). To prevail on a claim of prosecutorial misconduct, the defendant must establish “that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011); *see also State v. Russell*, 125 Wn.2d 25, 85-86, 882 P.2d 747 (1994) (an appellate court reviews a prosecutor’s statements during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the closing argument, and the jury instructions).

However, if a defendant does not object, any error is waived “unless the prosecutor’s misconduct was so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice.” *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Our high court noted in

*Matter of Phelps*, that it has found prosecutorial misconduct to be flagrant and ill intentioned in only a narrow set of cases where the court was “concerned about the jury drawing improper inferences from the evidence, such as those comments alluding to race or a defendant’s membership in a particular group, or where the prosecutor otherwise comments on the evidence in an inflammatory manner.” 190 Wn.2d at 170.

“Under this heightened standard, the defendant must show that (1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *Emery*, 174 Wn.2d at 761 (quotations omitted). When evaluating whether misconduct is flagrant and ill intentioned, an appellate court “focus[es] less on whether the prosecutor’s misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured.” *Id.* at 762. Reversal is required only if “there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict.” *State v. Luvene*, 127 Wn.2d 690, 701, 903 P.2d 960 (1995).

During the State’s closing remarks in the present case, the deputy prosecutor stated:

So what we call the mental element in this particular circumstance, with respect to Count I, is knowledge, right. You’ve been provided a copy -- provided a – you will have

a copy of the Court's definition of what it means to act -- to know or act knowingly. And it's a difficult concept at best. How do we -- we all know about intent and inferring intent and how do you infer intent when you're not the actual witness to it. Well, you look at the circumstances surrounding exactly what we discussed during voir dire. Same thing is true with knowledge. Okay.

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.*

And what did Mr. Lorrigan admit? He admitted that, yeah, this probably wasn't a good idea. *He admitted knowing or should have known that, in fact, he admitted or indicated that he should have known better and that he made a stupid mistake.* The problem with that is when you're evaluating the evidence, the Court's instructions say, well, use your individual and collective common sense to evaluate the evidence and apply the law to that evidence.

RP 226-27 (emphasis added).

Is it reasonable for somebody to simply say, all right, you can have it, I don't care how long you have it, no parameters, restrictions, whatsoever on that vehicle. So guess what, something bad happens when they're driving that vehicle, who's going to come knocking on your door because you're the owner of the vehicle or you're the one that loaned it to them? That's when law enforcement is going to come knocking on your door and some lawyer is going to come and file a lawsuit against you because their client was injured because you let someone borrow the vehicle.

Does it make common sense? *It is reasonable under the circumstances, or should we reasonably infer or conclude that Mr. Lorrigan, on that date, knew or reasonably should have known the vehicle he picked up and possessed for four days was stolen?*

RP 229 (emphasis added).

Now, Mr. Lorrigan told the officers I've been in possession of this vehicle for four days, I borrowed it. You know, Mr. Alagard or Aguilar let me borrow it. No key. So any piece of metal that you could stick in there would start it.

How would a reasonable person, placed in that situation, view the fact that there's no key for the vehicle and you have to use a screwdriver to start it, or shaved key for that matter? Shouldn't that raise some suspicion on the part of the driver that every time he had to turn it over to go somewhere he had to use a screwdriver or a shiv or a shaved key in order to do so? Common sense. What's reasonable? What's reasonable to infer from that evidence?

So at this point it is uncontroverted on the 26th of June 2018 that Mr. Lorrigan was found in possession of a stolen motor vehicle. There's no question about that. There's no question about the fact that it occurred in the State of Washington on that date. *The only issue is whether Mr. Lorrigan knew that the vehicle was stolen.* That's it. That's it.

RP 231-32 (emphasis added).

So Mr. Lorrigan told you that he's known Creston for a while. And what do we know about Mr. Alagard? Mr. Alagard happens to engage in the type of activity that Mr. Lorrigan is well aware of, and that is the cars that are associated with Mr. Alagard typically don't have intact ignitions, that they can be started with screwdrivers or whatever, but yeah. So he admits that the person that loaned him the vehicle is known by Mr. Lorrigan to engage in possession or theft of motor vehicles.

*Is it reasonable to infer from that that Mr. Lorrigan should have known or did know that he was in possession of a stolen motor vehicle?*

RP 233-34 (emphasis added).

The issue isn't whether Mr. Lorrigan stole that vehicle. He's not accused of stealing the vehicle. *The issue is whether he*

*knew or reasonably should have known that that was a stolen motor vehicle. If it was, and he's -- and he was in possession of it for four days, by his own admission, then he's guilty of possession of a stolen motor vehicle.*

RP 235(emphasis added).

What happened here? Mr. Lorrigan admitted that he'd known Mr. Alagard or Creston for a year but couldn't provide the contact information, not even the phone number, for the officers to call to confirm that he had lawfully borrowed the vehicle or was in possession of the vehicle. *What does common sense tell you under those circumstances? Mr. Lorrigan knew that the vehicle was stolen.*

RP 236-37.

Lorrigan's trial counsel did not object to these remarks. Thereafter, during the defense closing statement, the defense attorney countered and properly informed the jury that it was required to find the defendant actually had "knowledge" the vehicle was stolen:

*The State has to prove, as part of the elements of the crime of possession of a stolen motor vehicle, that Mr. Lorrigan knew that the vehicle that he was driving was stolen at the time that he was stealing -- or at the time that he was driving the stolen vehicle.*

RP 238 (emphasis added).

The State, in this case, has not met its burden. It's a high burden. The State has to meet that high burden in order for you to convict Mr. Lorrigan in this case. *The State must prove beyond a reasonable doubt that he was in possession of a stolen motor vehicle, but also that he knew that it was stolen.* There was not enough talk about the keys. There was not enough talk about how that -- the key started. And there

was nothing but a few opinions from a couple of officers about those keys. So I won't say much more about those, but there wasn't – certainly wasn't enough for that charge either.

RP 248 (emphasis added).

The State did not readdress the “knowledge” requirement in its rebuttal closing argument. RP 249-53.

The deputy prosecutor's remarks, when discussing “knowledge,” were ill-phrased. The deputy prosecutor attempted to explain the permissive-inference contained within the instruction defining “knowledge” – that, “a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge of that fact.” CP 20. In effect, the deputy prosecutor argued that the jury could infer from the facts that Lorrigan actually knew the Impala was stolen.

The deputy prosecutor stated at least four times that the jury had to find Lorrigan actually knew the vehicle was stolen in order to convict him. The deputy prosecutor did not attempt to relieve the State of proving that the defendant had actual knowledge the vehicle was stolen; rather, the deputy prosecutor emphasized and identified the strong circumstantial evidence from which the jury could reasonably conclude that Lorrigan had

actual knowledge the vehicle was stolen, which neutralized the “should have known” comments.

The trial court provided the jury with a proper definition of knowledge in a jury instruction. Had Lorrigan’s counsel timely objected and requested a curative instruction,<sup>11</sup> the trial judge would have only needed to remind the jury to follow the instruction defining “knowledge” or instructed the jury that it needed to find the defendant had actual knowledge the vehicle was stolen. Such a curative instruction would have neutralized and obviated any possible prejudice from the deputy prosecutor’s ill-phrased remarks. Furthermore, the jury was instructed that the lawyer’s remarks were not evidence, the law was contained in the court’s instructions, and that it should disregard any argument by the lawyers not supported by the law in the court’s instructions. CP 10. The record contains no evidence the jury was confused. Additionally, the jury is presumed to follow the court’s instructions. *Matter of Phelps*, 190 Wn.2d at 172. All things considered, there is little likelihood the deputy prosecutor’s statements concerning the knowledge requirement impacted the jury’s verdict.

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<sup>11</sup> As opposed to the defendant in *Allen*, who lodged two objections against the improper argument and was overruled by the trial court. *Allen*, 182 Wn.2d at 378. Because there was an objection in *Allen*, the court determined it would review Allen’s claim under the less stringent standard of review requiring the defendant “show that the prosecutor’s misconduct resulted in prejudice that had a substantial likelihood of affecting the jury’s verdict.” *Id.* at 375.

Here, unlike in *Allen*, and taken in context, the deputy prosecutor did not attempt to relieve the State of proving that the defendant had actual knowledge the vehicle was stolen. The deputy prosecutor identified the circumstantial evidence from which the jury could make that finding.

Even without the permissive inference, there was sufficient evidence from which the jury could find Lorrigan had actual, subjective knowledge that the Impala was stolen. The defendant gave a dubious story on how he came into possession of the vehicle, there were numerous shaved keys in the vehicle, and the vehicle's ignition was altered so that it could be started with a screwdriver or other similar tool. Accordingly, Lorrigan fails to prove misconduct which undercuts the validity of the verdict. This claim fails.

#### IV. CONCLUSION

For the reasons stated herein, this Court should affirm the judgment and sentence.

Respectfully submitted this 20 day of June, 2019.

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK LORRIGAN,

Appellant.

NO. 36379-1-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 20, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

David B. Koch

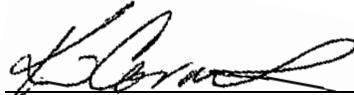
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**SPOKANE COUNTY PROSECUTOR**

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