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COA No. 67867-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JERAMIE OWENS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF SNOHOMISH
COUNTY OF THE STATE OF WASHINGTON

The Honorable Richard t. Okrent
The Honorable Ronald Castleberry

APPELLANT'S OPENING BRIEF

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FILED
COURT OF APPEALS DIV. I
STATE OF WASHINGTON
2012 APR 30 PM 4:53

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A. SUMMARY OF APPEAL

Jeramie Owens told a detective investigating his sale of a Volkswagen that he purchased the vehicle off of Craigslist. Nevertheless he was charged with taking the car from a dealership, possessing it, and “trafficking” by selling it to another buyer. The jury acquitted him of taking the car, and the prosecutor had adduced inadequate else to show Mr. Owens knew the car was stolen when it came into his possession as an auto refurbisher. The jury instructions failed to require knowledge for trafficking, and further, not all the elements of the crime were proved by sufficient evidence, or to withstand unanimity challenge under the substantial evidence rule. The prosecutor committed misconduct in closing argument by misstating what was legally required to prove knowledge. The convictions should be reversed.

B. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to prove that the defendant Jeramie Owens knew the motor vehicle he possessed was stolen.
2. The evidence was insufficient to prove that Mr. Owens knowingly trafficked in stolen property, the vehicle.
3. Unanimity was violated by the general verdict on the trafficking charge.
4. The jury instructions relieved the State of its burden to prove every element of the offense of knowingly trafficking in stolen property, the

vehicle.

5. The prosecutor committed misconduct in closing argument by misstating the law regarding knowledge.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Mr. Owens was acquitted of taking the car in question from a dealership, and the prosecutor produced no other adequate proof that he knew the car was stolen when he later came into possession of it by purchasing it from a Craigslist advertisement. Was the evidence insufficient to prove that the defendant knew the motor vehicle he possessed was stolen?

2. Was the evidence insufficient to prove that Mr. Owens trafficked in the vehicle knowing it was stolen, or to prove any of the conduct required by the law of the case in the jury instructions for first degree trafficking?

3. The to-convict instruction includes eight alternative means of committing trafficking. Was unanimity violated by the general verdict on the trafficking charge, where there was not substantial evidence to prove all of the alternatives?

4. Did the jury instructions relieve the State of its burden to prove that Mr. Owens “knowingly” trafficked in stolen property?

5. Did the prosecutor commit misconduct in closing argument by misstating the law regarding “knowledge” so as to equate it with a recklessness, or even worse, with a mere criminal negligence standard?

D. STATEMENT OF THE CASE

Jeramie Owens makes his living by fixing Volkswagen vehicles and by purchasing and restoring them for resale, working from his home shop. 8/8/11RP at 21; 8/9/11RP at 174-78, 198. Mr. Owens, along with a friend, went to the Motor City car dealership in Mount Vernon, on July 2, 2010, where Owens kicked the tires on an old Volkswagen Beetle and took it for a test-drive, but did not purchase it. 8/8/11RP at 22; 8/9/11RP at 177.

According to the dealership, anywhere from 5, to as many as 10 other prospective buyers had also taken the car for test-drives during the previous several months the car had been for sale; in an employee's opinion, the car was not purchased because it was overpriced. 8/8/11RP at 28-30.

Unfortunately for Mr. Owens, the day after he looked at the Volkswagen, it went missing from the lot. 8/8/11RP at 22; 8/8/11RP at 62-68.

Subsequently, Mr. Owens purchased a Volkswagen Beetle from a Craigslist advertisement, in his normal course. 8/9/11RP at 174. As he later told Detective Paul Ryan, he refurbished the car, and later sold it to one Craig Savageau, helping him get it to his home in Marysville. 8/9/11RP at 174. Mr. Savageau testified that he had located the car for sale by finding Mr.

Owens' own publicly online Craigslist advertisement as seller of the motor vehicle. 8/9/11RP at 95-106.¹

A mechanic at Conway Motors in Everett, Alberto Ruiz, while working on the car for Mr. Savageau, discovered discrepancies in the several VIN number plates on the car, including a VIN plate that appeared to have been newly riveted. 8/8/11RP at 42, 45-48.

The Sherriff's Office subsequently determined that the car was the stolen Volkswagen from Motor City, was from a slightly different year, and was absent its original engine. 8/9/11RP at 127, 135-40. Based on this and on information that Mr. Owens had looked at the vehicle for sale some weeks earlier when it was at Motor City, law enforcement executed a search warrant at the home and shop of Mr. Owens, where he also stayed with his grandmother. 8/9/11RP at 127.

In the search, Detective Paul Ryan located a rivet gun (but no rivets), some paint, and a standard VW "California Bug" surfboard rack like the same type that had been clipped to the stolen car's roof. 8/9/11RP at 127, 135-40, 179, 186, 164-170, 174-78; 8/8/11RP at 32. The only paint found at the location was not spray paint, unlike the spray paint that the detective and

¹ Craig Savageau admitted in cross-examination that he had test-driven a Volkswagen Beetle at the Motor City lot sometime in July, a fact that he had previously failed to state when questioned by the prosecutor. 8/9/11RP at 124-25. He also admitted that he was a friend of the owner of the Motor City dealership. 8/9/11RP at 124-25.

the other witnesses agreed had been used on the vehicle after it was taken from Motor City. 8/9/11RP at 197; 8/8/11RP at 31. The paint at Owens' home actually appeared to have been acrylic, used to decorate chickens made out of wood. 8/9/11RP at 196-97.

At the time of the search, Mr. Owens immediately waived his Miranda rights, and told Detective Ryan about how he had purchased the car from a Craigslist advertisement. 8/9/11RP at 174. Mr. Owens also bore a Volkswagen tattoo, showing his enthusiasm for his long-time work with these types of vehicles. 8/9/11RP at 117, 147.

Mr. Owens was charged with taking the Volkswagen from the dealership. CP 110-11. The jury found him not guilty. CP 83. However, he was found guilty of possession of a stolen vehicle, and first degree trafficking in stolen property (the vehicle) for selling the Volkswagen. CP 84, CP 85.

At sentencing, following allocution,² Mr. Owens was given standard range terms. CP 48-58; 10/12/11RP at 4-15. He appeals. CP 38.

² At sentencing, Mr. Owens repeated his innocence and complained that his defense counsel had not introduced certain evidence, including the title to the Volkswagen which he had obtained after purchasing it lawfully and unknowingly. See 10/12/11RP at 9-12.

E. ARGUMENT

1. **MR. OWENS' CONVICTION FOR TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE MUST BE REVERSED FOR ABSENCE OF EVIDENCE TO PROVE THE CRIME AS DESCRIBED IN THE 'TO-CONVICT' INSTRUCTION.**
 - a. **Under the law of the case doctrine, the State was required to prove not only that Mr. Owens "knowingly traffic[ked]" in the Volkswagen when he sold it, but also that he had knowingly "initiated, organized, planned, financed, directed, managed, or supervised" the theft of the Volkswagen for sale to others.**

The State failed to prove the elements of the crime of first degree trafficking in stolen property as they were stated in the 'to-convict' instruction. By statute, RCW 9A.82.050, a person is guilty of first degree trafficking:

who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, **or** who knowingly traffics in stolen property.

(Emphasis added.) RCW 9A.82.050(1). However, the State proposed, and the court gave, a 'to-convict' instruction for trafficking which listed both clauses in the conjunctive. Supp. CP ____, Sub # 51 (plaintiff's proposed instruction 10); CP 99 (instruction 10³). There was no objection to this instruction. See 10/12/11RP at 2.

³ The "to-convict" instruction for trafficking read as follows in pertinent part:

The elements of first degree trafficking in stolen property for the purposes of this case therefore required proof not only that Jeramie Owens “trafficked” the Volkswagen by selling it to Mr. Savageau, but also that he originally “initiated . . . [etc.]” its theft with a plan of then selling it to another. See RCW 9A.82.050(1); State v. Hickman, 135 Wn.2d 97, 103-04, 954 P.2d 900 (1998) (jury instructions to which there is no objection become the law of the case).

b. The State failed to prove that Jeramie Owens knowingly “initiated, organized, planned, financed, directed, managed, or supervised” the theft of the Volkswagen for sale to others.

Cases in which first degree trafficking has been charged and upheld on appeal against sufficiency challenge have relied on the general trafficking language of the statute, and concordant proof of the defendant buying stolen property with intent to sell it, or selling stolen property. See RCW 9A.82.010(19) (definition of “traffic”⁴).

To convict the defendant of the crime of Trafficking in Stolen Property in the First Degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 28th day of July, 2010, the defendant did knowingly initiate, organize, plan, finance, direct, manage or supervise the theft of a motor vehicle for sale to others;
- (2) That the defendant did knowingly traffic in stolen property; and
- (3) That any of these acts occurred in Snohomish County.

CP 99 (instruction 10).

⁴ “Traffic” is defined by statute as

to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control

However, appeals involving the similar offense of leading organized crime shed light on the facts required for a trafficking conviction under the "initiates . . . [etc.]" clause. Under RCW 9A.82.060(1)(a), a person leads organized crime by intentionally organizing, managing, directing, supervising, or financing conduct of persons, with the intent to engage in a pattern of criminal profiteering activity. See, e.g., State v. Munson, 120 Wn. App. 103, 106, 83 P.3d 1057 (2004).

In the case of State v. Harris, ___ Wn. App. ___, ___, 272 P.3d 299 (Div. 2, March 20, 2012), there was sufficient evidence of managing, supervising, or financing the sale of drugs to others, where one witness testified that Harris supplied and coordinated both his and his associate's drugs for their dealing endeavors, and Harris directed still others in concealing and destroying drugs and money to hide the extent of the dealing business. State v. Harris, ___ Wn. App. at ___ (§ 70-71). In addition, the defendant made repeated inconsistent statements that showed his involvement in the enterprise, including denying guilt generically, but also directing his associates' destruction of items and evidence during a jail call. State v. Harris, ___ Wn. App. at 302-04.

of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

RCW 9A.82.010(19). The jury was not given the definition of trafficking.

In contrast, there is no evidence in this case that Mr. Owens directed someone to take the car. There was no proof that he managed or supervised its taking, which could have been committed by any number of persons. The jury concluded he did not take the car, and there was no accomplice liability instruction.

The case of State v. Strohm also provides guidance on the evidence required to prove the “initiates . . . [etc.]” element of trafficking. State v. Strohm, 75 Wn. App. 301, 879 P.2d 962 (1994). There, Strohm headed an organized auto theft ring where he supplied the car keys and paid drug addicts to steal new vehicles. Strohm, 75 Wn. App. at 303. In Strohm, conviction required proof of “organizing, managing, directing, supervising, or financing” persons with the intent to engage in criminal profiteering; on appeal, these were deemed alternatives, requiring sufficient evidence of each in order to affirm conviction on a general verdict. RCW 9A.82.060; Strohm, 75 Wn. App. at 305 (citing State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1998)).

This Court looked to the Webster’s Dictionary definitions and common understanding of these terms, concluding that

- “supervised” meant coordinating, directing and inspecting continuously and at first hand the accomplishment of a task, and was proved by sufficient evidence;
- “financed” was proved by sufficient evidence where Strohm promised to pay, then paid the car takers for the stolen

vehicles, while also promising to pay again for future stolen cars; and

- “organized” meant arranging or constituting into a coherent unity, and was proved by sufficient evidence where Strohm decided what cars were to be stolen, obtained the keys, and gave them to his selected thief.

Strohm, at 305-06 (citing Webster’s Third New International Dictionary 1596 and 2290 (1986)).

There was no evidence that Mr. Owens engaged in any of the above. There was no reasonable inference from the facts of Mr. Owens’ visit to the Motor City dealership in early July of 2010, or from any other trial testimony, that he somehow initiated theft of the vehicle for sale to others, or engaged in any of the other conduct (organized, planned, financed, directed, managed, or supervised the theft) that is listed in the first clause of the trafficking statute, and the ‘to-convict’ instruction. There was no proof that Mr. Owens or his friend were the ones who took the vehicle, resulting in the jury’s proper acquittal on that count. CP 83. There was certainly no evidence or proof Mr. Owens told or directed his friend to engage in any of the above conduct, as the law of the case required.

Further, the present case is not one like Harris, where the jury had conflicting or incredible claims by the defendant on which it could rely to conclude he was involved in the taking of the Volkswagen, such as giving conflicting accounts regarding how he came to possess the vehicle. See State

v. Allen, 57 Wn. App. 134, 143, 788 P.2d 1084 (1990) (false or inconsistent information given to the police is admissible evidence relevant to defendant's consciousness of guilt).

Rather, here, Mr. Owens consistently and repeatedly told law enforcement and anyone who would listen, that he had purchased the vehicle from a Craigslist advertisement. Mr. Owens' misfortune of having taken the car for a test drive at a local dealership was the very same conduct engaged in by most or all of the many multiple other prospective buyers who had looked at, but like Mr. Owens did not buy, the Volkswagen. 8/8/11RP at 28-30 (trial testimony of Motor City employee Michael Cassida). The Department of Licensing paperwork that Mr. Owens submitted for the car after purchasing it off of Craigslist, was the same sort submitted by any recent purchaser – including Mr. Savageau. 8/8/11RP at 119-22 (trial testimony of buyer Craig Savageau); 8/8/11RP at 202-05 (trial testimony of Detective Paul Ryan).

The evidence was insufficient. Pursuant to the Fourteenth Amendment's Due Process Clause, the prosecution must prove guilt on the charged offense beyond a reasonable doubt. U.S. Const. amend 14; In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). And in criminal cases, the State assumes the burden of proving elements of an offense as those elements are stated without objection in the jury instructions. Hickman, 135 Wn.2d at 104; State v. Lee, 128 Wn.2d 151, 159, 904 P.2d

1143 (1995). Here, the State was required to prove, but did not prove, trafficking as defined. See also State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) (if “no exception is taken to jury instructions, those instructions become the law of the case”).

This Court must therefore reverse the first degree trafficking conviction with prejudice.

Next, the terms “initiate, organize, plan, finance, direct, manage or supervise” as used in Court’s Instruction 10, taken from the first clause of the trafficking statute, established alternative means of first degree trafficking in themselves, and not all were proved by evidence sufficient to allow a trier of fact to find them proved beyond a reasonable doubt.

- c. **Additionally, unanimity was violated where not all of the alternative means of trafficking were supported by sufficient evidence that Owens “initiated, organized, planned, financed, directed, managed, and supervised” the theft of the Volkswagen for sale to others.**

RCW 9A.82.050 provides that a person is guilty of first degree trafficking:

who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property.

RCW 9A.82.050(1). As this Court stated in Strohm, this statute establishes “eight alternative means,” including general trafficking (the first clause of the

statute contains seven of the means). Strohm, 75 Wn. App. at 307; see also State v. Hayes, 164 Wn. App. 459, 476, 262 P.3d 538 (2011). Adequate evidence for a trier of fact to find each alternative is required, in order to affirm conviction on a general verdict without violating Mr. Owens' right to jury unanimity. State v. Kitchen, supra, 110 Wn.2d at 410-11 (when the crime charged can be committed by more than one means, only where substantial evidence supports a guilty verdict for each means, is it harmless to fail to instruct the jury that they must be unanimous as to the means the defendant actually used to commit the offense); Wash. Const. art. I, § 21. The present case included no unanimity instruction.

Certainly, not all were supported by substantial evidence. Choosing just a few of these, there was no substantial evidence that Mr. Owens initiated the theft of the Volkswagen for theft to others, or that he so "financed" or supervised it. See Strohm, at 305-06 (citing Webster's Third New International Dictionary as noted).

Therefore, in the face of a general verdict, the requirement that verdicts bear adequate assurances of unanimity was thoroughly violated, and Mr. Owens' first degree trafficking conviction must be reversed.

Next, Mr. Owens is also challenging the constitutional adequacy of the evidence of "knowingly trafficking" (the second clause of the statute)

based on lack of proof of knowledge the car was stolen. That matter goes to unanimity, and to the sufficiency of the evidence on the listed elements.

2. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT MR. OWENS POSSESSED OR SOLD THE VOLKSWAGEN “KNOWING” IT WAS STOLEN.

a. To convict on both possession of a stolen vehicle and trafficking, the State was required to prove that Mr. Owens knew the Volkswagen was stolen.

Count 1 (possession of a stolen motor vehicle) and Count 2 (trafficking) required proof that Mr. Owens possessed the Volkswagen knowing it was stolen, and that he knew the vehicle was stolen when he then transferred that possession by selling it to Mr. Savageau. RCW 9A.82.050; RCW 9A.56.068; RCW 9A.82.010; State v. Walker, 143 Wn. App. 880, 887, 181 P.3d 31 (2008); see Washington Pattern Jury Instructions, Criminal 77.02 (possession of stolen property).

b. The State failed to prove knowledge.

Before trial, throughout trial below, and later in sentencing statements complaining that his counsel did not introduce his paper title to the Volkswagen, Mr. Owens defended on the basis that he had purchased the car from a Craigslist advertisement and did not know it was stolen. 8/9/11RP at 174; 8/10/11RP at 39-4; 10/12/11RP at 9-12.

At trial, the State expected it would be able to prove Count 1, the charge that Mr. Owens took the Volkswagen from Motor City, which in

addition would prove Counts 2 and 3 – “knowing” possession and then sale of the stolen car (trafficking). The prosecutor relied in his very first sentences of closing argument on the taking or theft theory, immediately after thanking the jury:

As you know, this case started on July 2nd of last year. Mr. Owens, who admitted went [sic] to a test drive at Motor City in Mount Vernon. Test drove and subsequently stole a 1967 Volkswagen bug.

8/10/11RP at 3. The prosecution theory above (which the jury did not accept) was that Mr. Owens somehow schemed how to take the car for later resale when he test drove it, and then was also guilty of taking the motor vehicle at some time thereafter. This would support not only the taking charge against him, but more importantly, would supply the critical, missing proof of “knowledge” the car was stolen, required for the possession and trafficking counts.

But the jury found no evidence that Mr. Owens or his friend took the car. The trial evidence ultimately showed significant access by others at the dealership to the keys and any number of employees who could have planned a taking of the car. 8/8/11RP at 28-29. There was also no inference from the test drive by Mr. Owens that he or his friend saw or tried to see where the keys were kept, or were somehow ‘casing’ the joint for theft purposes, while they were on the lot. 8/8/11RP at 37. In fact the evidence affirmatively

demonstrated that Mr. Owens was not shown where the key was stored inside the business. 8/8/11RP at 37. There was also a large number of similar test-drives of the vehicle by multiple prospective buyers in the recent months. 8/8/11RP at 28-30.

Given the State's reliance at trial on proving Mr. Owens stole the car, there was unsurprisingly insufficient else adduced in the evidence phase to show knowledge the Volkswagen was stolen when the defendant later possessed it and sold it. In the remainder of closing argument, the State certainly offered no contentions, and cited no evidence from trial on the "initiates . . . [etc.]" aspect of trafficking, that would support proof even of management or supervision of a taking, and thus knowledge for the other two counts.

In a sufficiency challenge, the evidence and all reasonable inferences therefrom are taken in a light favorable to the State. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Conviction for possession and first degree trafficking in stolen property required proof that Mr. Owens knew the Volkswagen was stolen property. 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. RCW 9A.08.010.

Here, all that was established was that Mr. Owens came into possession of the Volkswagen, affirmatively telling Detective Ryan that he

had purchased it. It is not enough that Mr. Owens should have speculated that the car was stolen, which is a different crime. See RCW 9A.82.055(1) (“A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree”) (emphasis added).

There was no proof beyond a reasonable doubt that Mr. Owens knew the Volkswagen was stolen, for purposes of either Count 2 or 3. The possession and trafficking convictions must be reversed for insufficiency of the evidence.

Next, the jury instruction on “trafficking” did not even *require* proof of this essential element of knowledge.

3. THE JURY INSTRUCTIONS RELIEVED THE STATE OF ITS BURDEN TO PROVE TRAFFICKING WITH KNOWLEDGE THE VEHICLE WAS STOLEN, PARTICULARLY WHERE THE JURY WAS NOT GIVEN THE DEFINITION OF TRAFFICKING.

a. The matter constitutes manifest constitutional error under RAP 2.5(a)(3).

The State must prove guilt on the charged offense beyond a reasonable doubt. U.S. Const. amend 14; In re Winship, 397 U.S. at 362. The ‘to-convict’ instruction in the present case failed to include a requirement that Mr. Owens be proved to have known the car was stolen for purposes of trafficking. CP 99, infra. This relieved the State of its burden of proof on every element, State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995),

cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996), and where the evidence of knowledge was inadequate or non-existent, this was a “manifest” error affecting that constitutional right. RAP 2.5(a)(3); State v. Davis, 154 Wn.2d 291, 305-06, 111 P.3d 844 (2005); State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001); State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

Mr. Owens may seek relief for this error.

b. The jury instructions relieved the State of its burden to prove Mr. Owens sold the car to Mr. Savageau with knowledge it was stolen.

Where a defendant such as Mr. Owens is charged with the crime of trafficking in stolen property, the State must prove, as an essential element of the crime charged, that the defendant knew that the property he sold or transferred was “stolen” property. RCW 9A.82.050; RCW 9A.82.010; State v. Walker, *supra*, 143 Wn. App. at 887. Knowledge is an essential element of the offense.

The Washington pattern jury instructions make clear the legal intricacies of the critical “knowledge” element when it comes to the crime of “possession” of stolen property. See Washington Pattern Jury Instructions, Criminal 77.02 (requiring proof of the element that “the defendant [possessed the property] with knowledge that the property had been stolen”).

But there is no WPIC pattern instruction for “trafficking” in stolen property. Here, the “to-convict” instruction for trafficking read as follows in pertinent part:

To convict the defendant of the crime of Trafficking in Stolen Property in the First Degree, as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 28th day of July, 2010, the defendant did knowingly initiate, organize, plan, finance, direct, manage or supervise the theft of a motor vehicle for sale to others;
- (2) That the defendant did knowingly traffic in stolen property; and
- (3) That any of these acts occurred in Snohomish County.

CP 99 (instruction 10). The language above appears to indicate that the defendant need only transfer property – and he is guilty if it *was* stolen property. This is inadequate, particularly in the absence of a jury instruction setting out the statutory definition of “traffic,” which involves sale or transfer of “stolen” property. See RCW 9A.82.010(19).

Jury instructions, in respect to requiring proof of every element, must make the law “manifestly clear,” since juries lack the tools of statutory construction available to courts. See, e.g., State v. Harris, 122 Wn. App. 547, 554, 90 P.3d 1133 (2004).

In the recent case of State v. Killingsworth, 166 Wn. App. 283, 289-90, 269 P.3d 1064, 1067 (2012) (petition for review filed February 24, 2012),

this Court of Appeals stated that a “preferable” jury instruction for first degree trafficking should read as follows, and commented:

“That on or about _____, the defendant knowingly sold, transferred, distributed, dispensed, or disposed of property to another person, knowing that the property was stolen.”
Trial courts may well wish to consider the use of such language in future cases.

(Emphasis added.) Killingsworth, 166 Wn. App. at 289-90. However, the Court affirmed the appellant’s conviction over a challenge that the elements requirement, and the requirement that instructions be clear to a lay jury, were not met by the jury instruction in that case that was functionally identical to the present instruction. The Court reasoned that “knowingly” constituted a modifier, not only of the verb phrase that is stated immediately subsequent, but which also applies to the adjectival phrase “stolen.” Seeking to establish that a lay jury would understand the wording used in the challenged instruction, the Court stated that

the word “knowingly,” as used in this instruction . . . modifies the verb phrase^[5] “trafficked in stolen property.” [Citation omitted]. Read this way, “knowingly” modifies both “trafficked” and “stolen.”

Killingsworth, at 290 (citing State v. J.M., 144 Wn.2d 472, 480-81, 28 P.3d 720 (2001) (construing meaning of felony harassment *statute*)).

⁵ The terminology “verb phrase” is defined in The Oxford Dictionary of English Grammar (1998) as follows: “1. A phrase consisting either of a group of verb forms which functions in the same way as a single-word verb or of a single-word verb on its own. (In Systemic-Functional Grammar called a verbal group).”

However, the cited case of State v. J.M., of course, presented a question of statutory interpretation, *i.e.*, statutory “construction.” The J.M. Court specifically noted that the issue at hand there – the scope of the application of the word “knowingly” within the statutory language – was one of “judicial construction,” a matter for legal determination by lawyers and courts. State v. J.M., 144 Wn.2d at 480.

The present case involves a very different question than judicial construction of the meaning of a statute. Jury instructions are for lay jurors. Lay juries are not capable of such legalistic arguments of statutory construction as this Court in Killingsworth suggests they should engage in. State v. Harris, 122 Wn. App. at 554; State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Nor of course do we want jurors to have to try this hard to figure out during deliberations what the law “is” – that should be the easy aspect of the jury’s task.

The elements of the crime of trafficking were not correctly included in the “to-convict” instruction in Mr. Owens’ case, and even if the definition of trafficking had been included in the instructions (it was not), jurors are not to be required to search through other instructions, in order to deduce what the elements of the charge might be. State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953).

A criminal defendant did not have a fair trial “if the jury might assume [from the instructions] that an essential element need not be proved.” State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (citing State v. Johnson, 100 Wn.2d 607, 623, 674 P.2d 145 (1983)). Such was the case in Mr. Owens’ trial.

c. The error was not harmless beyond a reasonable doubt.

A jury instruction that omits an element is harmless error only when uncontroverted overwhelming evidence nonetheless supports the element. State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 9-10, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)). Thus, such error is reversible where merely weak or controverted evidence “supports” the missing element and the reviewing court therefore cannot conclude beyond a reasonable doubt that the verdict would have been the same absent the error. See State v. Borrero, 147 Wn.2d 353, 370, 58 P.3d 245 (2002).

In the present case, there was no proof that the defendant knew the Volkswagen was stolen. Certainly, if there was any such evidence, it was thoroughly controverted by Mr. Owens’ legal and factual defense, which he vigorously proffered from the commencement of the case to the end, that he did not know. This state of affairs precludes any conclusion of harmless error. Brown, at 341; Neder, at 19; Borrero, at 370.

4. THE PROSECUTOR COMMITTED MISCONDUCT BY MISSTATING THE LAW REGARDING “KNOWLEDGE” AND MISSTATING WHAT IS REQUIRED TO PROVE THAT ELEMENT.

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 95; RCW 9A.08.010.

However, misstatements in closing argument can render this simple rule confusing to any lay juror, or disguise it with complexities. At a minimum, those complexities ought to be legally correct. A prosecutor has a duty to seek justice and obtain a verdict that is the product of a fair trial. State v. Evans, 163 Wn. App. 635, 646, 260 P.3d 934 (2011). This presumably includes not effectively advocating for a first degree trafficking conviction when the defendant at best acted recklessly (second degree trafficking)⁶ or negligently, by misstating the critical element of knowledge.

⁶ The knowledge instruction used in this case stated:

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 the crime.

If a person has information that would lead a reasonable person in the same situation to believe a fact exists, the jury is permitted to find that he or she acted with knowledge of that fact.

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

CP 95 (instruction 6); RCW 9A.08.010. The second paragraph of the *statute* defining this mental state is wrong, having been deemed improperly worded by State v. Shipp, *infra*, for

That duty, and the likelihood of creating jury confusion on a critical aspect of the required proof, requires that the prosecutor not misstate the law on this central principle of criminal liability. See WPIC 10.0 et seq.

Here, the prosecutor began his closing argument discussion by advocating that knowledge does not depend on what the defendant actually knows. Although the prosecutor referred to the jury instruction's language regarding facts that amount to knowledge as a permissive inference, he did not discuss the matter as an available inference, but re-characterized the law as being entirely based simply on what a "reasonable person" should know:

the very reason that it erroneously tells the jury to find subjective knowledge of the fact at issue if there were lesser facts that a reasonable person would know of. RCW 9A.08.010 ("General requirements of culpability"), provides at subsection (1) as follows:

(1) Kinds of Culpability Defined.

(a) INTENT. A person acts with intent or intentionally when he or she acts with the objective or purpose to accomplish a result which constitutes a crime.

(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 in the same situation to believe that facts exist which facts are described by a statute defining an offense.

RCW 9A.08.010. This Court will note the similarity of the prosecutor's argument in closing in this case, to a standard of criminal negligence:

(d) CRIMINAL NEGLIGENCE. A person is criminally negligent or acts with criminal negligence when he or she fails to be aware of a substantial risk that a wrongful act may occur and 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.

Knowingly isn't a subjective standard. What that describes, if you look at the second paragraph on Instruction Number 6, "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 she acted with knowledge." The reasonable person standard is this. It's a reasonable person. It's an objective standard. It means, what would a common, everyday person say, Hey, this clearly is suspicious. It's not what was that person thinking, what was that specific person thinking. It's the general knowledge, what an average person should know.

(Emphasis added.) 8/10/11RP at 14-15. This was incorrect. Even if Mr.

Owens somehow "should have known" something was "suspicious" about the car (a contention he disputes and rejects), that is not knowledge.

Prosecutors commit misconduct when they misstate the applicable law in this manner. See State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996).

Proof of knowledge does require subjective awareness. Subjective knowledge of the conduct or facts is precisely what is required by knowledge. State v. R.H.S., 94 Wn. App. 844, 847, 974 P.2d 1253 (1999) (holding in accord with the permissive inference rule, that the trier of fact is permitted to find the required "actual subjective knowledge" if there is sufficient information that would lead a reasonable person to believe that a fact exists).

As the prosecutor continued on in argument, the erroneous emphasis on a "reasonable person" standard was reinforced and again offered as the be all and end all of the law of knowledge. In discussing all of the counts, including knowingly trafficking in stolen property, the prosecutor again

reduced knowledge to what Mr. Owens ought to have known: "Use your common sense. It's a reasonable person standard for all these." 8/10/12RP at 22, 23.

The prosecutor misstated the law regarding knowledge at length, by telling the jury repeatedly that knowledge is "not subjective" and is entirely dependent on what a reasonable person ought to know under the circumstances. See State v. J.M., 144 Wn.2d 472, 28 P.3d 720 (2001).

Whatever mental state that might be, it is not knowledge.

"Knowingly" is also a statutorily defined term. RCW 9A.08.010(1)(b)(i) states in relevant part that a person "acts knowingly . . . when . . . he [or she] is aware of a fact, facts, or circumstances or result described by a statute defining an offense," that is, has subjective knowledge. Alternatively, "knowingly" also means that a trier of fact may, but is not required to, infer actual knowledge if a reasonable person in the same circumstances would believe that facts exist which are described by statute as defining an offense. RCW 9A.08.010(1)(b)(ii) (as construed to meet constitutional standards regarding presumptions in State v. Shipp, 93 Wn.2d 510, 516–17, 610 P.2d 1322 (1980) (thus requiring that the jury still find subjective knowledge)).

(Emphasis added.) State v. J.M., 144 Wn.2d at 472.

Improperly describing the permissive inference and confusing it with the substance of the burden of proving knowledge was incorrect, and reversibly harmful, despite defense counsel's failure to object. In State v. Evans, 163 Wn. App. 635, 260 P.3d 934 (2011), the Court explained that misconduct to which there is no objection may nonetheless be flagrant and

incurable and require reversal on appeal, because the State deployed the misconduct to win a weak case. In Evans, after comparing other cases in which the evidence had been *strong*, stated of the case before the Court:

In light of such evidence, the Court [in those cases] could not conclude that the prosecutor's closing remarks caused prejudice, especially under the heightened standard following a failure to object.

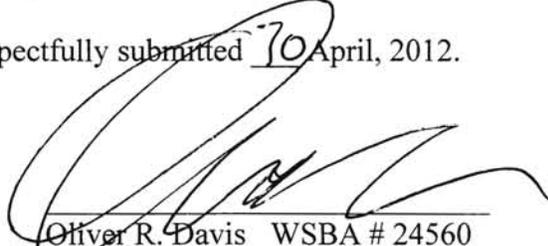
In contrast, the Venegas and Johnson convictions turned largely on witness credibility. In [State v. Venegas, 155 Wn. App. 507, 527, 228 P.3d 813, review denied, 170 Wn.2d 1003, 245 P.3d 226 (2010)], we held that the prosecutor's conduct was flagrant, and ultimately reversed because of cumulative errors. And in Johnson, where the jury was presented with conflicting evidence, we could not conclude that the prosecutor's comments did not affect the jury's verdict. [State v. Johnson, 158 Wn. App. 677, 686, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013 (2011)].

Evans, 163 Wn. App. at 646. It was critical at trial below that the legal differences between knowledge and recklessness (and negligence) not be blurred, particularly in closing argument to a lay jury which is likely to have even less of an ability than a lawyer to discern the subtle distinctions between these important mental states. This is particularly true where recklessness describes an entirely different degree of trafficking, that was not charged here. Considering additionally that the evidence of knowledge in this case was inadequate or at best extremely weak, reversal is required.

F. CONCLUSION

Based on the foregoing, Jeramie Owens respectfully requests that this Court reverse the judgment and sentence of the trial court as argued herein.

Respectfully submitted 70 April, 2012.



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67867-1-I
)	
JERAMIE OWENS,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF APRIL, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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() | U.S. MAIL
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