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STATE OF WASHINGTON
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NO. 93770-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE TYLER,

Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES

1. Does the law of the case doctrine apply when a definition of an element is included in a to-convict instruction?

2. What is the remedy in this case if the law of the case doctrine is applicable?.

II. STATEMENT OF THE CASE

The facts of the case are set out in the brief of respondent. A summary of the relevant facts are as follows:

On January 10, 2014 at about 2:30 a.m. Deputy Sheriff Stich was on patrol when he went up a remote forest service road about five miles out of Darrington. It was dark and raining heavily, and there were no lights in the area. The deputy used his high beams and a spotlight to see. About one-half mile up the road he came upon a Ford Ranger pickup truck facing toward the deputy. Just beyond the truck he saw a Honda that had been jacked up on its side facing the opposite direction. 3/30 RP 35-40.

The defendant, Robert Lee Tyler, was in the driver's seat of the pickup. Tyler Whitt was in the back of the pickup partially covered by a blue tarp. Whitt had stolen the Honda and asked Tyler to help him by coming to get him. Whitt was in the process of stripping the Honda when Deputy Stich arrived on scene. Whitt

hurriedly gave Tyler the stereo, speakers, catalytic converter, and work gear he had taken from the Honda. He put one of the Honda wheels in the bed of the pickup. 3/30 40-41; 3/31 RP 115-118.

Tyler and Whitt each gave Deputy Stich inconsistent stories about why they were there. Tyler could not explain how all of the stereo gear and work equipment got into his car. He claimed he was helping a "friend" but could not say the friend's name or where he was. Deputy Stich looked in the Honda and noticed that the stereo and speakers had been cut out of it and were missing. Deputy Stich ran the Honda and learned it had been reported stolen by Bruce Champagne. Deputy Stich called Mr. Champagne, who identified the items found in Tyler's truck as having come from his Honda. 3/30 RP 42-54; 3/31 RP 117-118.

Tyler continued to claim he was just helping out some unknown friend. He stuck to his story that he had no idea how the stereo equipment and other items got in his truck. Later, after Stich arrested him, Tyler agreed to talk to Detective Haldeman. Tyler admitted that he was helping out Whitt's parents by helping Whitt. Tyler explained that he had followed Whitt up the forest service road and was present when Whitt was stripping the Honda. Tyler admitted that he knew the Honda was stolen. 3/30 RP 54, 79-84.

Tyler was charged with Possession of a Stolen Vehicle. CP 80. The State argued Tyler was Witt's accomplice to the crime. 3/31 RP 139-140. Tyler was convicted as charged. CP 5, 19.

III. ARGUMENT

A. THE LAW OF THE CASE DOCTRINE DOES NOT APPLY WHEN TERMS DEFINING AN ELEMENT ARE INCLUDED IN THE TO-CONVICT INSTRUCTION.

Washington adheres to the law of the case doctrine in which jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 101, 954 P.2d 900 (1998), State v. Johnson, 188 Wn.2d 742, 399 P.3d 507 (2017). Where unnecessary elements are included in the to-convict instruction without objection the State assumes the burden of proving those extra elements. Hickman, 135 Wn.2d at 102.

In this possession of a stolen motor vehicle case the jury was instructed in part that to convict Tyler of the crime each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about the 10th day of January, 2014, the defendant knowingly received, retained, possessed, concealed, disposed of a motor vehicle;

1 CP 27.

Tyler argues that the foregoing instruction set out alternative means of committing possession of a stolen vehicle. He argues that

there was insufficient evidence to prove he disposed of a motor vehicle, and therefore he is entitled to have his conviction reversed.

Whether the terms constitute alternative means, or whether they are definitions of a single means is a threshold question. Where a defendant is charged with an alternative means crime the jury need not express unanimity as to which means if there is sufficient evidence to support each of the alternative means of committing the crime. State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014). If there is insufficient evidence as to one means then a particularized expression of unanimity is required. Id. If instead there is a single means of committing the crime then each definition of that means need not be supported by substantial evidence. State v. Linehan, 147 Wn.2d 638, 649-650, 56 P.3d 542 (2002). In that case the State has not taken on the burden of proving that term, and the law of the case doctrine does not apply.

RCW 9A.56.068(1) provides “a person is guilty of possession of a stolen vehicle if he or she possess a stolen motor vehicle.” Possession 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. RCW 9A.56.140(1). The WPIC committee believed the Legislature intended the definition of possession of stolen property applied to possession of stolen motor vehicle. WPIC 77.21 comments. It therefore included the definition as the first element in the standard instruction. Id.

The Court has articulated three rules for assessing whether the Legislature meant to enact an alternative means crime. First the use of the word “or” in a list of terms does not necessarily create alternative means crime. State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010). Second, the doctrine does not apply to definitional instructions. Linehan, 147 Wn.2d at 646. Thus, a statutory definition does not create a means within a means. State v. Smith, 159 Wn.2d 778, 787, 154 P.3d 873 (2007). Third, the Court looks to see if the statute contemplates a single act described in various ways, or if it contemplates distinct criminal acts. Peterson, 168 Wn.2d at 770. To do so the Court considers the variations in the language of the statute.

The more varied the criminal conduct, the more likely the statute describes alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various “alternatives” are merely facets of the same criminal conduct.

State v. Sandholm, 184 Wn.2d 726, 734, 364 P.3d 87 (2015).

In Owens, this Court applied these rules to consider whether the trafficking in stolen property statute created eight or two alternative means of committing the crime. RCW 9A.82.050 provides

[a] person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics is stolen property is guilty of trafficking in stolen property in the first degree.

The Court concluded that the first seven terms described a single means of committing the crime. The Court agreed with the Court of Appeals in State v. Lindsey, 177 Wn. App. 233, 311 P.3d 61 (2013), review denied, 180 Wn.2d 1022 (2014). That Court reasoned that repetition of the word "knowingly" before the first seven terms and last term created two means of committing the crime. Otherwise it would be unnecessary to repeat the word knowingly. Also the first seven terms related to different aspects of a single category of criminal conduct, facilitating or participating in the theft of property so it could be sold. Id. at 241-242. This Court found support for the position that the first seven terms constituted a single means of committing the crime because they were closely related. A person organizing a theft would necessarily plan it. A

person directing a theft would also manage it. Owens 180 Wn.2d at 99.

The Court of Appeals has considered whether the definition of possession of stolen property creates an alternative means case in three prior cases. The Court rejected the argument that the definition of possession of stolen property in RCW 9A.56.140 created alternative means of committing possession of stolen property because it was a definition, not a separate means of committing the crime as set out in RCW 9A.56.160. State v. Hayes, 164 Wn. App. 459, 476-477, 262 P.3d 538 (2011).

The Court distinguished its earlier decision where it came to the opposite conclusion in State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004). Id. at 478-479. In Lillard the to-convict instruction included the definitional terms in the first element of the crime. The Court held that because those alternative definitions were included in the to-convict instruction they became alternative means of committing the crime. It held the State took on the burden of proving each of the alternative definitional "means" relying on Hickman. Lillard, 122 Wn. App. at 434-435. In Hayes, the court concluded that the definitional terms did not create alternative means because they were not included in the to-convict instruction,

but were set out in a separate instruction. Hayes, 164 Wn. App. at 478-479.

Since Owens, Peterson, and Sandholm were decided the Court of Appeals revisited the question whether the terms defining possession of stolen property become alternative means of committing the crime when those terms are included in the to-convict instruction. State v. Makekau, 194 Wn. App. 407, 378 P.3d 577 (2016). The Court rejected the notion that putting definitional terms in the to-convict instruction converted those terms into alternative means as Lillard and Hayes had concluded. First it noted that neither case provided any meaningful analysis as to why that result should occur. It also stated that the terms were definitional. "If these terms merely define different aspects of 'possession' and do not represent alternative means, it is unclear why including them in the to-convict instruction would transform them into alternative means." Id. at 419. The Court also noted that Owens and Lindsey make it clear that several terms can represent one means of committing a crime. The definitional terms "received, possessed, concealed, or disposed of" all relate to the same means, i.e. possession. Id. at 420. It therefore held that including

those terms in the to-convict instruction did not transform them into alternative means of committing the crime. Id.

The Court in Makekau is correct. There is no logical reason why a definition consisting of several terms becomes a separate element of the crime to be proved if that definition is included in the to-conviction instruction. The Legislature is responsible for defining the elements of a crime. State v. Ramos, 149 Wn. App. 266, 271, 202 P.3d 383 (2009). Non-statutory elements have been judicially added when necessary to render the statute consistent with other legal principles. The element of intent to steal was added to the crime of robbery by this Court because otherwise a person could be guilty of robbery for retrieving his own property from a thief who stole it from the person. State v. Steele, 150 Wash. 466, 473, 273 P. 742 (1929). No case, other than Lillard, had held that a trial court creates elements of a crime by including definitions in the to-convict instruction. Doing so does not conflict with any other legal principal that would justify treating definitional terms as alternative means when they are included in the to-convict instruction. There is no need to harmonize the statute by adding an element as this Court did in Steele.

Lillard cited Hickman for the proposition that once the definitional terms were included in the to-convict instruction the State took on the burden of proving sufficient evidence for each term. Lillard, 122 Wn. App. at 434-435, n. 26. Hickman does not support that conclusion because it did not deal with the question of whether definitional terms became alternative means when included in the to-convict instruction. The question there dealt with whether a distinct fact, venue, became an element the State was required to prove when it was unnecessarily included in the to-convict instruction without objection. Hickman, 135 Wn.2d at 105.

Finally, when looking at the various terms included in the definition set out in the to-convict instruction they all describe various aspects of the same thing, i.e. "possession of stolen property." One cannot "receive" or "retain" an item unless he also "possesses" it. Similarly one cannot conceal or dispose of an item unless he has actual or constructive possession of the item beforehand. The Court said it would be hard to imagine a situation where one receives, retains, conceals, or disposes of a stolen motor vehicle without also possessing it at some time. Makekau, 194 Wn. App. at 414.

This Court should adopt the reasoning in Makekau and hold that including the definition of possession of stolen property in the to-convict instruction does not create alternative means of committing the crime. Where a to-convict instruction includes those definitional terms, and each definitional term relates to a single means of committing the crime, the State does not take on the burden of establishing evidence to support each term as an alternative definition for possession of stolen property. Where several definitions are given for a single means of committing the crime the jury need not be unanimous as to which definitions was proved, nor must substantial evidence support each definition. Makekau, 194 Wn. App. at 412; Linehan, 147 Wn.2d at 649-650.

The challenged instruction in this case therefore did not create four alternative "means" of committing the crime when it included the interrelated terms in element 1 of the to-convict instruction. Those terms defined a single means of committing the crime; possessing a stolen motor vehicle. Since the definitions do not become new elements when included in the to-convict instruction, the State did not take on the burden of proving an otherwise unnecessary element of the crime. The law of the case doctrine does not apply in this case.

The conviction should be affirmed if there was evidence to prove possession of a stolen motor vehicle beyond a reasonable doubt under any of the terms defining that element. The defendant only challenges the sufficiency of the evidence as to one of those term, i.e. dispose. By implication he concedes that there is sufficient evidence to support his conviction as the element is defined under the other terms.

B. IF THE LAW OF THE CASE DOCTRINE APPLIES, THEN THERE WAS SUFFICIENT EVIDENCE TO SUPPORT EACH DEFINITIONAL TERM. ALTERNATIVELY, THE REMEDY SHOULD BE TO REMAND FOR NEW TRIAL.

If this Court concludes that including the definitional terms for possession of stolen motor vehicle in the to-convict instruction converts those terms into alternative means, and under the law of the case doctrine the State was obligated to produce sufficient evidence to support each means, then the State had carried tis burden of proof.

Evidence is sufficient to sustain a conviction if after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "A claim of insufficiency admits the truth of

the State's evidence and all inferences that reasonably can be drawn therefrom" State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences are drawn in favor of the verdict, and most strongly against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Credibility determinations are left to the trier of fact, and are not reviewed on appeal. State v. Mines, 163 Wn.2d 387, 391, 179 P.3d 835 (2008).

Dispose of is defined as "to get rid of; discard." <http://www.dictionary.com/browse/dispose--of?s=t>. The defendant here acted as an accomplice to Whitt who was in the process of stripping a stolen car. Whitt stated that his father told him to get rid of the car when Whitt brought it home. 3/31 RP 124. Whitt had called the defendant to come and help him. Whitt had loaded some of the things from the car into the defendant's truck when the deputy sheriff happened along. The car was not operable when the deputy arrived since Whitt had removed at least one of the wheels and put it in the defendant's truck. 3/30 RP 53. The rational inference from this evidence is that Whitt was in the process of getting rid of a stolen vehicle by taking everything of value that

could not be traced to him from the vehicle and leaving the rest in a remote forest where it was unlikely to be found for some time.

Alternatively, if the court disagrees, and finds this evidence insufficient, then the remedy should be to remand for a new trial. Under Hickman this Court concluded that under the law of the case doctrine the State took on the burden of proving venue. Since the State bore the burden of proving every element beyond a reasonable doubt, and there was insufficient evidence supporting the venue element, the remedy was to reverse and dismiss the case. Hickman, 135 Wn.2d at 105-106.

Hickman did not involve a question of sufficiency of the evidence on alternate means. Rather it rested on instructing jurors on a completely separate element. Because alternate means cases involve several means of committing a crime, where there is sufficient evidence to convict on any of the means the jury had been instructed on, then the remedy should be to remand for a new trial on the means that are supported by the evidence.

Generally alternate means cases have concerned jury unanimity. Where there is sufficient evidence to support each of the means listed in the jury instruction no expression of unanimity is

required. Owens, 180 Wn.2d at 95. When there is insufficient evidence as to any one means, a conviction may not stand unless there is a particularized expression of jury unanimity as to means. Id. State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994). If there is sufficient evidence to support one means of committing the crime, but not another, and the jury renders a general verdict, the error is not harmless. State v. Woodlyn, 188 Wn.2d 157, 392, P.3d 1062 (2017).

In that case the remedy has been to remand for a new trial. In Green, the defendant was charged with First Degree Aggravated Murder. The aggravating factors included rape and kidnapping. This Court concluded that there was insufficient evidence to support the kidnapping alternative. The remedy was to remand for a new trial where the jury would consider only the rape aggravator. Green, 94 Wn.2d at 235.

The Court of Appeals followed the holding in Green when it dismissed one means of committing promoting prostitution on the basis that the Information did not contain all of the elements of the crime for that means in State v. Simon, 64 Wn. App. 948, 831 P.2d

139 (1991)¹. Because the jury had rendered a general verdict the court could not tell if it had unanimously agreed on the remaining properly charged means of committing the crime. It therefore reversed the conviction and remanded for a new trial. Id. at 962.

New trial is an appropriate remedy where there was sufficient evidence to support one alternative means, but the court concludes there was insufficient evidence to support a second means. Where the sufficiency of a single element is at issue, as in Hickman, the failure of proof on that element is obvious. The result is therefore dismissal. Hickman, 135 Wn.2d at 106. Where a jury has been instructed on multiple means, and the jury returns a general verdict, the failure of proof is not obvious. Green, 94 Wn.2d at 233. Since it is impossible to know if the jury's decision rested on the means supported by the evidence, or the means not supported by the evidence, or some combination of both, it is not clear that the defendant was convicted on a means not supported by the evidence.

¹ This Court affirmed the Court of Appeals in part and reversed in part. State v. Simon, 120 Wn.2d 196, 840 P.2d 172 (1992). While this Court agreed the Information was constitutionally defective as to one of the charged alternative means, outright dismissal by the appellate court was not the proper remedy. Rather the charge should have been dismissed without prejudice to the State to refile the Information. Id. at 199. In any event the State was not precluded from trying the defendant a second time.

Where there is sufficient evidence to support one or more means, and thus the jury could have convicted on that means, it cannot be said that the State failed to prove the case beyond a reasonable doubt. At best it can be said that there is an ambiguity as to that question. Consistent with this Court's decision in Green, the State should be given an opportunity to prove the charge by instructing the jury only on the means supported by the evidence.

IV. CONCLUSION

For the foregoing reasons the State asks the Court to find that in a possession of stolen vehicle case that incorporating the definitional terms in the to-convict instruction did not create an alternative means crime for which the State bore the burden of proving every means listed. Alternatively, if the law of the case doctrine applies, and the State bore the burden of proving the defendant "disposed" of the vehicle, the conviction should be affirmed. There was sufficient evidence to support the defendant's conviction as an accomplice to the crime of "disposing" a stolen vehicle. Finally, if the Court disagrees and reversed the conviction, the case should be remanded for a new trial.

Respectfully submitted on December 8, 2017.

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IN THE SUPREME COURT
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ROBERT LEE TYLER,

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The undersigned certifies that on the 8th day of December, 2017, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

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I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Eric Nielsen, Nielsen, Broman & Koch; Sloanej@nwattorney.net; nelsond@nwwattorney.net; dobsonlaw@comcast.net

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 8th day of December, 2017, at the Snohomish County Office.



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SNOHOMISH COUNTY PROSECUTOR'S OFFICE

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