

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.

RECEIVED
APPELLATE DIVISION
COURT OF APPEALS
STATE OF WASHINGTON
APR 11 12 47 PM '07

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

The Honorable Richard T. Okrent
The Honorable Ronald Castleberry

REPLY BRIEF

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A. REPLY ARGUMENT

1. MR. OWENS' CONVICTION FOR TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE MUST BE REVERSED FOR INSUFFICIENCY AND LACK OF ASSURANCES OF UNANIMITY.

The law of the case doctrine requires the State to prove the offense as stated in the to-convict instruction. *State v. Strohm* makes clear that where trafficking is listed in the instruction with the alternative means of committing the offense, the State must prove all of those means to avoid reversible unanimity error. *State v. Strohm*, 75 Wn. App. 301, 304-05, 879 P.2d 962 (1984).

Respondent cites *State v. Dixon*, 78 Wn.2d 796, 802-03, 479 P.2d 931 (1971), for the proposition that a charging document listing all of the means of violating the statute is effective to charge one or all of those means. Brief of Respondent, at p. 17. But Mr. Owens is addressing the jury instructions, not the information, and contending that the State was required to show sufficient evidence on every alternative of trafficking listed in the "to-convict." And that case in any event involved a vagueness challenge, during the course of which the Court simply noted the test for whether a statute establishes alternative means. *Dixon*, at 802-03 ("Where, under a penal statute, a single offense can be committed in different ways or by different means and the several ways or means charged in a single count are not

repugnant to each other, a conviction may rest on proof that the crime was committed by any one of the means charged") (citing State v. Parmenter, 74 Wn.2d 343, 444 P.2d 680 (1968)).

Here, there was insufficient evidence of, *inter alia*, at least one of the charged alternatives. There was no evidence that Mr. Owens "financed" the taking of the Volkswagen by paying or promising to pay the person who took it. Strohm, at 305-06. On this basis alone, the lack of a unanimity instruction for trafficking requires reversal, as it cannot be said that there was substantial evidence of that means.

**2. THE JURY'S REJECTION OF THE STATE'S
CENTRAL THEME AT TRIAL THAT MR. OWENS
STOLE THE VEHICLE FROM THE DEALER LEFT
INADEQUATE REMAINING EVIDENCE TO
PROVE THAT MR. OWENS POSSESSED OR SOLD
THE VOLKSWAGEN KNOWING IT WAS STOLEN.**

The parties agree that, 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. Although relying certainly on the jury's acquittal of Mr. Owens on the charge of taking the Volkswagen from the dealership, Mr. Owens has not raised an "inconsistent verdicts" argument. See Brief of Respondent, at p. 14. Mr. Owens has not argued, as the State contends he has, that since he was acquitted of taking the car, he "could not"

prove he possessed the car or sold it, knowing it was stolen. Brief of Respondent, at p. 14.

Rather, as detailed in the Opening Brief, in this case the State did not prove knowledge. The Respondent does not contest that, as appellant argued at length, the theory that Mr. Owens stole the car was central to the State's theory that he knew it was stolen – the prosecution rested its case of knowledge in great part on this claim, which failed in the jury's eyes.

In the Court's assessing of the sufficiency of the remainder of the evidence of knowledge, if any, Mr. Jeramie Owens vigorously disputes the Respondent's characterization of the facts in its Brief. See Brief of Respondent, at pp. 2-9, 12-14. Mr. Owens never told Mr. Savageau, the person to whom he sold the Volkswagen that he purchased, that he had "lost" the title to the car. Rather, Mr. Owens indicated that he had not received the title in the mail, and provided an affidavit in lieu of title, which was entered as Exhibit 5. 8/9/11RP at 115-15, 121; Supp. CP ____, Sub # 64 (Exhibit list, Exhibit 5). It was the State's attorney who characterized this affidavit as an assertion by Mr. Owens that he had lost the title, which is something that Mr. Savageau never testified to Mr. Owens saying. See 8/9/11RP at 115.

Further, Mr. Owens indeed did have a "bill of sale" for his lawful purchase of the Volkswagen. Supp. CP ____, Sub # 64 (Exhibit 9). The Respondent claims in its brief that police officers were unable to locate any

corroborating bill of sale for sale of the Volkswagen to Mr. Owens. However, State's exhibit 9 was offered and admitted, and discussed at trial, including by Detective Paul Ryan. 8/8/11RP at 16-18; 8/9/11RP at 185, 204; 8/10/11RP at 19. This exhibit is title to the Volkswagen, which also constitutes a bill of sale and shows the sale date of July 3, 2010.

Mr. Owens believes that defense counsel, as he stated at sentencing, mis-argued the case by telling the jury, in an apparent concession, that Mr. Owens did not have title to the car he purchased off of Craigslist. 8/10/11RP at 36. Additionally, the prosecutor leapt on this apparent concession, by telling the jury, contrary to the record the State had itself developed, that the defendant had made no response to the contention that he never had title to the Volkswagen he claimed he purchased. 8/10/11RP at 45-46.

3. THE PROSECUTOR COMMITTED MISCONDUCT BY MISSTATING THE LAW REGARDING "KNOWLEDGE" AND MISSTATING WHAT IS REQUIRED TO PROVE THAT ELEMENT.

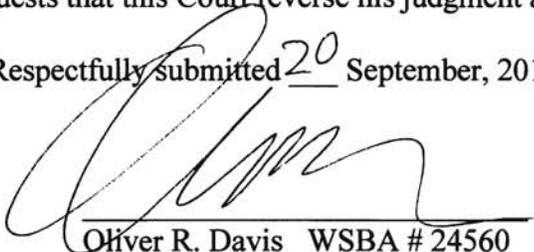
The Respondent contends that the prosecutor in closing argument made several statements that correctly described the crucial element of "knowledge" because the "reasonable person" standard bears on the question of whether the actor acted knowingly. Brief of Respondent, at pp. 25-26. However, by severely watering down that standard in argument, as the appellant argued in his Opening Brief, the prosecutor effectively advocated

that knowledge under the law does not depend, at all, on what the defendant actually knows. The Respondent concedes that this was a distortion of the importance of the reasonable person standard. Brief of Respondent, at p. 24, 26. Mr. Owens contends that the prosecutor's misstatements of the law were so inaccurate, and so central to the question of guilt in the present case, that he was prejudiced and that no curative instruction – which would merely have restated or referenced the language of the jury instructions which the prosecutor had already successfully distorted to the State's benefit to lower the standard of proof – could have cured the misstatement. The State's erroneous emphasis on a “reasonable person” standard was reinforced and again offered as the be all and end all of the law of knowledge. State v. Evans, 163 Wn. App. 635, 260 P.3d 934 (2011) (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).

B. CONCLUSION

Based on the foregoing and on his Opening Brief, Jeramie Owens respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted 20 September, 2012.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
)
 JERAMIE OWENS,)
)
 Appellant.)

NO. 67867-1-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **REPLY 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:

[X] CHARLES BLACKMAN, DPA (X) U.S. MAIL
SNOHOMISH COUNTY PROSECUTOR'S OFFICE () HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON, THIS 21ST DAY OF SEPTEMBER, 2012.

X _____


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