

67867-1

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NO. 67867-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JERAMIE D. OWENS,

Appellant.

2012 APR 23 PM 12:06
COURT OF APPEALS
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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I. ISSUES

1. A defendant test-drove a 1967 VW Beetle at a dealership. It was stolen within hours thereafter. By one means or another, the defendant acquired the same car within four days of its theft. At the same time, he applied for title for an entirely different car, a 1971 VW Beetle, on which registration had expired over 15 years earlier. The defendant then resold the 1967 Beetle, reworked as this entirely different car, to an innocent purchaser. At the time of sale, he told the purchaser he had "lost" the title. The car now bore a VIN plate for a 1971 Beetle that appeared to have been recently and inexpertly applied. The purchaser learned he bought the stolen 1967 VW Beetle when a mechanic, and then police, discovered the VIN plate riveted to the car's body did not match a hidden, confidential VIN engraved on the car's frame.

Was there sufficient evidence to convict the defendant of knowingly possessing a stolen vehicle, and knowingly trafficking in stolen property?

2. Was there sufficient evidence to convict of trafficking, when all alternate means were supported by substantial evidence?

3. Did the “to-convict” instruction for trafficking relieve the State of its burden to prove knowledge, when identical language has been upheld by this Court?

4. Did the prosecutor flagrantly and ill-intentionally misstate the law in closing argument, when he emphasized that a jury is permitted to infer knowledge if a reasonable person in the same circumstances would be aware of the relevant fact or circumstance, also argued actual subjective knowledge, and the comments were not objected to?

II. STATEMENT OF THE CASE

A. THE DEFENDANT’S POSSESSION OF A STOLEN VEHICLE AND TRAFFICKING IN STOLEN PROPERTY.

On July 28, 2010, Craig Sauvageau bought what he thought was a blue-and-white 1971 VW “Beetle” from the defendant, Jeramie Owens. The defendant had advertised it on Craigslist. Vol. 2, Verbatim Record of Trial Proceedings (hereafter “2 TRP”) 85-86, 95-100, 103-05, 108, 112-14, 117, 122, 144-45; Ex. 74. The defendant told Sauvageau he had not had the car long and he did not have title; instead, he furnished Sauvageau an affidavit saying title had been “lost.” 2 TRP 102, 114-16, 121; Ex. 5.

A few days later Sauvageau took the car into Conaway Motors in Everett for an inspection and to address some minor

problems. 1 TRP 41, 43, 59; 2 TRP 108. The mechanic there, Alberto Ruiz, had an expert's longtime working knowledge of VW Beetles. 1 TRP 42. As he worked on the vehicle, he discovered he could not get some parts to fit. He concluded that the Vehicle Identification Number ("VIN") on the car and the actual chassis did not match, and that car was a 1967, not a 1971 Beetle. He called Sauvageau and told him so. 1 TRP 43-44, 59; 2 TRP 109. Sauvageau, suspecting he had bought a stolen car, told Ruiz to stop further work, and called police. 2 TRP 109-11. Responding police discovered that the public VIN plate, riveted onto the body of the car, did not match the confidential VIN that they located elsewhere on the car, engraved on the frame. 1 TRP 44-54, 71; 2 TRP 132, 135, 138-40. Moreover, the public VIN plate was loosely riveted on, and looked shiny and new. 1 TRP 44-48, 54-56, 61; 2 TRP 137, 141, 189. One would expect oxidation and rust on a VIN plate and rivets that old. 2 TRP 138.

The actual, true VIN for the vehicle – the confidential VIN engraved on the frame – turned out to be to a 1967 VW Beetle that had been stolen one month earlier. 1 TRP 26; 2 TRP 133, 185-86, 202.

The circumstances of that theft were as follows: Motor City, a dealership in Mt. Vernon, had had on their lot a blue 1967 VW Beetle, with a roof rack, surfboard, high-performance 1835cc engine, and a tachometer. 1 TRP 20-21, 31-34, 69-70, 73-74. It had sat there for several months, likely because the dealership was asking \$8000 for it. 1 TRP 23, 29-30, 77. Once or twice a month people would come in and look at it. 1 TRP 29-30. On July 2, 2010, the defendant and another man had come to take a look at it. They took it out for a test drive. 1 TRP 20-22, 36-38, 64. Afterwards, they said they'd get back in touch, but they never did. 1 TRP 22. The defendant never gave his name. 1 TRP 21-22.

The next morning, Sat. July 3, 2010, salesman Michael Cassida came to work to find the back gate open and the padlock cut off. The 1967 Beetle, which had been parked at the edge of the lot by the highway, was gone. 1 TRP 23-24, 35, 76. One of the keys on the dealer's key ring was missing. 1 TRP 36. Cassida called police and his manager arrived to fill out a stolen car report. 1 TRP 24, 26-27, 65-66. They were able to give the correct VIN because they had a copy of the title. 1 TRP 67.

Having now discovered the stolen car at Conaway Motors, police contacted Motor City, which made arrangements to get their

car back. 1 TRP 35, 37, 69; 2 TRP 141. When they retrieved it they discovered it had been altered: among other things, the roof rack and surfboard were gone, as was a tachometer; the 1835cc engine had been replaced with an inferior engine; and the car was now painted blue and white, instead of just being blue. 1 TRP 33-35, 37, 40, 70, 74; 2 TRP 163.

Police confirmed the defendant, who had sold the stolen car to Sauvageau, was the same person who had test-driven the car a month earlier, the day before it was stolen. 1 TRP 38; 2 TRP 112-14, 117, 147, 150. An officer drove by the defendant's address in an unmarked car and saw a yellow "Baja"-style VW Beetle with a roof rack and a surfboard. 2 TRP 155, 158. A detective also scanned Craigslist to see what else the defendant might be selling, and found the defendant was advertising the yellow "Baja"-style VW. 2 TRP 152-58, Ex. 75. The ad indicated the car included a roof rack, an 1835cc engine, and a tachometer. Id.

A detective contacted the defendant, posing as a prospective purchaser, said he was interested in the yellow VW, and made an appointment. 2 TRP 152-158-59. Meanwhile, police swore out a search warrant. 2 TRP 158-59. The detective arrived for the appointment with backup and arrested the defendant. A

search of the premises yielded the stolen roof rack and surfboard, and a rivet gun. 2 TRP 163-69, 171-72.

Officers impounded the yellow VW and confirmed it had an 1835cc engine substantially similar to what had originally been in the stolen 1967 VW. 1 TRP 172, 209. But because they could not confirm a serial number, they could not be certain it had come from the 1967 car, and ultimately released the yellow VW and its engine back to the defendant. 2 TRP 172-74, 193-96, 206, 209-10.

As for the 1971 VIN, officers determined it was “valid” – that is, that it matched, or had matched, an actual car. 2 TRP 183-84. They pulled paperwork from the Department of Licensing for that VIN. 2 TRP 178-79. The registration for a VW with that VIN had expired over 15 years earlier, in 1993. Ex. 3. The color of that vehicle had been black. Ex. 3. The defendant re-registered a car under that VIN, and applied for title, on July 6, 2010, four days after the theft of the 1967 VW Beetle. 2 TRP 179-81, 202-03; Ex. 3.

For his part, the defendant admitted to police that he test-drove the 1967 at Motor City on July 2, 2010, but asserted he had bought the car he later sold to Sauvageau on Craigslist. He added that the roof rack and surfboard had come off the same car he had bought on Craigslist and then sold to Sauvageau. 2 TRP 174, 176-

78. Officers could find no corroborating earlier bill of sale when they reviewed DOL records for the 1971 VIN, and they were looking for it specifically. 2 TRP 188. (They did find the defendant's subsequent bill of sale to Sauvageau. 2 TRP 188.) The defendant provided no details about the supposed earlier Craigslist purchase, and had no explanation to officers how the fraudulent VIN plate for a 1971 vehicle got onto the vehicle he sold to Sauvageau. 2 TRP 178.

At trial the defendant called no witnesses, and did not testify. 2 TRP 259-60, 263.

As the case was pending, the defendant failed to appear for a scheduled court date and was brought back to court in custody a month later, after he was arrested. 2 TRP 228-31, 257.

The defendant was charged with possession of a stolen vehicle (Count I), first-degree trafficking in stolen property (Count II), first degree taking a motor vehicle without permission (Count III), and bail jumping. (Count IV). 1 CP 110-11. A jury convicted on counts I, II, and IV, but acquitted on Count III, the taking motor vehicle charge. 1 CP 83-86. The defendant was sentenced within the standard range. 1 CP 48-58. This appeal followed. (The conviction for bail jumping is not challenged.)

B. RESPONSE TO DEFENDANT'S RECITATION OF FACTS.

On appeal the defendant states he told officers he bought the car in question and "refurbished" it for Sauvageau. BOA 3, citing 2 TRP 174. But the record does not support his having "refurbished" anything for Sauvageau. See 2 TRP 174, 176-78. Secondly, his assertion at BOA 4 that there were "several" VIN plates on the stolen 1967 Beetle is not supported by the record either; instead, there was the fraudulent 1971 *plate* riveted to the body, and the true 1967 VIN actually *engraved* onto the frame. See 1 TRP 44-54, 71; 2 TRP 132, 135, 138-40. Lastly, the defendant did assert his innocence in allocution at sentencing, adding he felt his lawyer had failed to introduce "important evidence." 10/12/11 Sent'g RP 9-12. But he never asserted, as he now claims at BOA 5 and 14, that this evidence included "paper title" or "the title to the Volkswagen which he had obtained after purchasing it lawfully and unknowingly." Compare 2 TRP 174, 176-78 (defendant could offer no details to police about this supposed earlier Craigslist purchase) and 2 TRP 188 (officers looked but were unable to find any corroborating earlier bill of sale in the DOL database). (Moreover, if he had had a "paper title" that counsel failed to introduce, see BOA 14, why would he have given Sauvageau an affidavit that title was

lost?) These three assertions are inaccurate and not borne out by the record below.

C. INSTRUCTIONS.

The State offered 18 instructions. 2 CP 129-151. All were pattern instructions except the two for trafficking, which do not have WPIC's. 2 CP 143-44 (tracking the statute at RCW 9A.82.050 and State v. Michielli, 132 Wn.2d 229, 234-37, 937 P.2d 587 (1997)). The trial court gave them all. 1 CP 87-109; compare 2 CP 129-151. In addition it gave the defendant's proposed pattern instruction that the defendant is not compelled to testify. 1 CP 106 (court's instruction no. 17), WPIC 6.51, 2 TRP 261-62. Neither side objected to or took exception with any of the instructions. 2 TRP 261-62; 8/10/11 Trial RP 2.¹

III. ARGUMENT

A. OVERVIEW.

While there were over seventy exhibits (primarily photographs), and the fact pattern a bit complicated, this remained a straightforward three-day trial with six witnesses. There were few

¹ The 8/10/11 verbatim report of proceedings is actually volume 3 of trial, comprising brief discussion of instructions followed by closing argument; but because it is separately paginated (going back to "1"), it is shown as "8/10/11 Trial RP."

objections, and these were over what the attorneys thought mattered, such as defense counsel's objecting to admission of the two Craigslist ads, 2 TRP 86-93, 155-56, or the prosecution's objection to defense counsel's arguing a fact not in evidence, 8/10/11 TRP 32. As indicated above, there was no argument over instructions. The defense theory of the case was simply that there was not enough to convict, focusing on other things that were also taken off the 1967 car – a stock radio, a vintage steering wheel with the VW Wolfsburg emblem, not to mention the 1967 car's own proper public VIN plate – that one would have expected to be found, but were not found, in the subsequent search. 1 TRP 33 (testimony about what else had been removed when Motor City got the car back); 8/10/11 TRP 27, 34 (defense closing argument). Counsel also wondered how one of the two dealer keys was stolen when there was no testimony that the dealership's building was broken into. 1 TRP 36 (testimony re missing key), 8/10/11 TRP 24-25 (defense closing). Counsel concluded that there was not enough evidence to prove the defendant knew the car was stolen. 8/10/11 TRP 39.

On appeal the defendant repeats the insufficiency argument. But he also argues instructional error and issues that were never raised below.

B. THERE WAS SUFFICIENT EVIDENCE OF “KNOWLEDGE” TO SUPPORT THE CONVICTIONS FOR POSSESSING A STOLEN VEHICLE AND FIRST-DEGREE TRAFFICKING IN STOLEN PROPERTY.

Both possessing a stolen motor vehicle and first-degree trafficking in stolen property require the state prove knowledge – specifically, in the former, that the defendant knowingly possesses the vehicle, and acts with knowledge it is stolen, RCW 9A.56.068, WPIC 77.21; and, in the latter, that the defendant “knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or . . . knowingly traffics in stolen property,” RCW 9A.82.050. In the latter case, to knowingly sell stolen property is to traffic in stolen property. State v. Michielli, 132 Wn.2d at 234-37. As for knowledge generally,

“[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.”

WPIC 10.02; see RCW 9A.08.010; State v. Bryant, 89 Wn. App. 857, 871-72, 950 P.2d 1004 (1998) (pattern instruction at WPIC 10.02 repeatedly upheld). The jury here was instructed accordingly. 1 CP 95 (Instruction No. 6, knowledge); 1 CP 97 (Instruction No. 8, “to convict” for possessing stolen motor vehicle); 1 CP 99 (Instruction No. 10, “to convict” for trafficking); 1 CP 100 (Instruction No. 11, “Michielli instruction”).

Here, the defendant test drove a blue 1967 VW Beetle that had a roof rack and a surfboard. 1 TRP 20-22, 31-34, 36-38, 64, 69-70, 73-74. He did not give the dealership his name. 1 TRP 21-22. The car was stolen within hours. 1 TRP 23-24, 35, 76. Four days after the theft, the defendant filed a vehicle title application for a 1971 black VW Beetle. 2 TRP 179-81, 202-03, Ex. 3. The registration on this 1971 car had lapsed over 15 years earlier. Ex. 3. A month later the defendant sold a car to Craig Sauvageau. 2 TRP 85-86, 95-100, 103-05, 108, 112-14, 117, 122, 144-45. He stated he did not have title. Instead, he gave Sauvageau his affidavit that title has been “lost.” 2 TRP 102, 114-16, 121; Ex. 5. He represented what he sold as a 1971 VW Beetle. 2 TRP 85-86,

95-100, 102-05, 108, 112-17, 121-22, 144-45; Ex. 5. But in fact it was the stolen 1967 VW Beetle, now bearing a fraudulent VIN plate from the 1971 car. 1 TRP 26, 43-46, 59, 71; 2 TRP 109, 133-38, 141, 181-86, 189. The stolen surfboard and roof rack were found at the defendant's address, as was a rivet gun. 2 TRP 163-69, 171-72. The defendant stated he bought the car in question with a surfboard and roof rack, off Craigslist, within a few days after test-driving it. 2 TRP 174, 176-78. Yet no corroborating paperwork (such as a bill of sale) could be found. 2 TRP 188.

This car had sat at the dealership for months, given its \$8000 price tag. The notion that the defendant could quickly acquire it, almost simultaneously file a title application for another (1971) car that had not been registered for years, and then within a month sell the 1967 car, now stripped of several items and transformed into a 1971 Beetle, and asserting title is "lost," all without knowledge the car was stolen, begs credulity.

The jury was permitted to infer that a person had knowledge of a fact if he or she had information that would have led a reasonable person, in the same situation, to believe a fact exists. WPIC 10.02; Bryant, 89 Wn. App. at 871-72. Even if the defendant had bought the car from an unnamed someone else off Craigslist,

he stated he recognized it as the car he had test-driven just a few days earlier. 2 TRP 207. To acquire it under these circumstances would alert a reasonable person the car was stolen. And this is all the more true given that the defendant then immediately applied for title for an entirely different car., and then resold the car, under this different car's VIN, to Sauvageau. See Exs. 3, 5.

The defendant argues there was insufficient evidence to convict because the State's theory of the case was based entirely on the taking motor vehicle charge that the jury rejected. BOA 14-17. Since the State did not prove the he actually stole the car, the defendant reasons, it could not prove his knowledge the car was stolen, either. Id. The defendant essentially makes an inconsistent-verdicts argument – that acquittal on taking a motor vehicle automatically undermines the guilty verdicts for possessing a stolen vehicle and trafficking.

First of all, that is inaccurate. Both under these facts and in general, one can possess and traffic without committing an initial taking of property. As to Counts I and II, the State did not have to prove the defendant stole the car. RCW 9A.56.068 and WPIC 77.21 (as to possession of stolen vehicle); Michielli, 132 Wn.2d at 234-37 (as to trafficking). Secondly, even if the verdicts are

inconsistent – a point not conceded – such verdicts can be the result of several factors, including mistake, compromise, and lenity. Dunn v. United States, 284 U.S. 390, 393-94, 52 S. Ct. 189, 76 L. Ed. 356 (1932); State v. Goins, 151 Wn.2d 728, 733, 92 P.3d 181 (2004). Thus, even irreconcilable verdicts do not necessitate reversal, since one cannot be sure which was the verdict the jury “really meant.” Goins, 151 Wn.2d at 733; State v. Wai-Chiu Tony Ng, 110 Wn.2d 32, 48, 750 P.2d 632 (1988). As long as the guilty verdicts are supported by sufficient evidence, as these are, inconsistent or irreconcilable verdicts do not trigger reversal. United States v. Powell, 469 U.S. 57, 67-68, 105 S. Ct. 471, 83 L. Ed. 2d 461 (1984); Goins at 733. Thirdly, there was much more to the State’s case than is discussed in defendant’s argument, as the recitation of facts above shows.

Moreover, the standard of review is deferential. There will be sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the

evidence admits the truth of the States' evidence. Salinas, 119 Wn.2d at 201; State v. Porter, 58 Wn. App. 57, 791 P.2d 905 (1990). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas at 201; State v. Soderholm, 68 Wn. App. 363, 373, 842 P.2d 1039 (1993). And evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971); State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991).

And while this might be characterized as a circumstantial-evidence case, the rules apply equally, for circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007); State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991); see WPIC 5.01. Circumstantial evidence is sufficient to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978) (citing State v. Lewis, 69 Wn.2d 120, 123-24, 417 P.2d 618 (1966)).

The defendant's argument, that there is insufficient evidence to support his convictions on Counts I and II, fails.

C. THERE WAS SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF TRAFFICKING UNDER THE INSTRUCTIONS IN THIS CASE.

The defendant argues for the first time on appeal that under the “law of the case” doctrine, the State obligated itself to prove every alternative means of committing trafficking, and did not do so. BOA 6-12.

RCW 9A.82.050 specifies that “a person 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, is guilty of trafficking in stolen property in the first degree.” The second amended information mirrored this language, but charged in the conjunctive. 1 CP 110-111. But an act or conduct described in a penal statute in the disjunctive or alternative may be pleaded in the conjunctive. If the charge is in the conjunctive, the information is held to charge a single crime committed in any one or all of the ways charged. State v. Dixon, 78 Wn.2d 796, 802-03, 479 P.2d 931 (1971).

The “to convict” instruction read in relevant part as follows:

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.

Court's Instruction No. 10, 1 CP 99 (emphasis supplied). The defendant argues this instruction obligated the State to prove all means of committing the crime in clause (1).

In Hickman, the "to convict" instruction for insurance fraud needlessly added venue (Snohomish County) as an element. The court held that having not objected to its inclusion, the State was now required to prove this additional element, and had not done so. State v. Hickman, 135 Wn.2d 97, 101-06, 954 P.2d 900 (1998). (The court also held this could be raised for the first time on appeal, because it is a variant of an insufficiency argument. Hickman at 103, n.3.) The defendant says the same applies here.

He is wrong. Hickman addressed the consequence of affirmatively *adding* an additional element, not how one listed elements already in the statute.

Here, the "to convict" instruction listed as an element that "the defendant did knowingly initiate, organize, plan, finance, direct,

manage or supervise the theft of a motor vehicle for sale to others.”

It is hard to see how the rule in Hickman somehow obligated the State to prove *each one* of these various ways of committing the crime, especially given the use of the disjunctive “or.” His argument based on Hickman is meritless.

D. THE VERDICT BELOW DID NOT VIOLATE THE DEFENDANT’S RIGHT TO A UNANIMOUS VERDICT.

In a related argument, also raised for the first time on appeal, the defendant argues that the verdict below was not unanimous.

[W]here a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. If one of the alternative means upon which a charge is based fails and there is only a general verdict, the verdict cannot stand unless the reviewing court can determine that the verdict was founded upon one of the methods with regard to which substantial evidence was introduced.

State v. Strohm, 75 Wn. App. 301, 304-05, 879 P.2d 962 (1994)

(quotes and citations omitted).

In Strohm, a defendant was convicted of leading organized crime, first-degree trafficking in stolen property, and first-degree theft. He used drug addicts to steal cars, which he chopped and put on older frames, thereby retaining the older cars’ original valid

VIN, and enabling him to sell the cars so modified as apparently newer cars at a considerable profit. Strohm at 303.

In Strohm, the jury, as here, returned a general verdict. That being so, and looking at the statute, this court held that “[s]ince the jury returned a general verdict there must be substantial evidence that [the defendant] knowingly (1) initiated, (2) organized, (3) planned, (4) financed, (5) directed, (6) managed, (7) supervised the theft of property for sale to others, and (8) knowingly trafficked in stolen property.” Strohm, 75 Wn. App. at 309.

The evidence was that the defendant test-drove an overpriced 1967 Beetle; that it was stolen within hours; that, by one means or another, the defendant acquired the same car within four days or less of its theft; that he apparently even recognized it as the same car; that he contemporaneously applied for title for an entirely different car; that he resold the 1967 Beetle reworked as this entirely different car to an innocent purchaser; and that he told the purchaser he had “lost” the title. This all happened within a short period of time. And it occurred within the context of the defendant’s business of buying and selling cars on Craigslist. Viewed in the light most favorable to the State, this is initiating, organizing, planning, financing, directing, managing, or supervising the theft of

a motor vehicle for sale to others; and by knowingly selling the stolen car to Sauvageau, the defendant trafficked as well. The defendant disagrees, but he does so based on a truncated version of the facts.

Lastly, courts have held, under constitutional harmless-error analysis, that a reviewing court may nonetheless affirm a jury's verdict if it can be determined that the verdict was based on only one of several alternative means; substantial evidence supports that one means; and there is no danger the jury based its guilty verdict on the other alternatives which were unsupported by substantial evidence. State v. Johnson, 132 Wn. App. 400, 410, 132 P.3d 737 (2006); State v. Rivas, 97 Wn. App. 349, 351–52, 984 P.2d 432 (1999), review denied, 140 Wn.2d 1013.²

E. THE “TO CONVICT” INSTRUCTION DID NOT RELIEVE THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENT OF KNOWLEDGE.

Also for the first time on appeal, the defendant states the “to convict” instruction relieved the State of its burden to prove “knowledge” as to the trafficking charge. He argues he may do so

² Overruled on other grounds, State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007) (the three common-law definitions of assault are not even alternative means).

based on the “manifest constitutional error” standard under RAP 2.5(a)(3).

The “to-convict” instruction read as follows:

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.

Court’s Instruction No. 10, 1 CP 99. He argues that the language in clause (2) “appears to indicate that the defendant need only transfer property – and he is guilty if it was stolen property. BOA 19 (emphasis in original). But he overlooks that the jury was also given a separate instruction that “one who knowingly sells stolen property can be charged with trafficking stolen property[.]” 1 CP 100; see State v. Michielli, 132 Wn.2d at 234-37.

Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law.

State v. Gerdts, 136 Wn. App. 720, 727, 150 P.3d 627 (2007). The “to convict” instruction must contain all elements essential to the conviction and its adequacy is reviewed de novo. State v. Mills, 154 Wn.2d 1, 7, 109 P.3d 415 (2005). When reviewing a challenge to the adequacy of a jury instruction, the reviewing court reads it as an ordinary, reasonable juror would. State v. Noel, 51 Wn. App. 436, 440–41, 753 P.2d 1017 (1988); State v. Hanna, 123 Wn.2d 704, 719, 871 P.2d 135 (1994); State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Walden, 131 Wn.2d 469, 477, 932 P.2d 1237 (1997).

In Killingsworth, this Court recently weighed virtually identical language in a “to convict” instruction (“that . . . the defendant knowingly trafficked in stolen property”) against the same argument – that this relieved the State of its burden of proving the defendant knew the property was stolen. State v. Killingsworth, 166 Wn. App. 283, 288-89, 269 P.3d 1064, review denied, 174 Wn.2d 1007 (2012). This Court concluded:

The most natural reading of the adverb “knowingly,” as used in this instruction, is that it modifies the verb phrase “trafficked in stolen property.” . . . Read this way, “knowingly” modifies both “trafficked” and “stolen.” This reading is reinforced by the fact that the instruction tracks the language of the statute [at RCW 9A.82.050(1)]. The statute’s intent is plain: to

criminalize the trafficking of property known to be stolen. Indeed, to read “knowingly” as modifying only the word “trafficked” would lead to the absurd result that a person could be convicted for selling or disposing of property they did not know, or have reason to know, was stolen. No ordinary, reasonable juror would read the instruction this way.

Killingsworth, 166 Wn. App. at 289. The defendant presents an unpersuasive argument that Killingsworth, essentially, is, wrongly decided. BOA 21. But it is dispositive.³

F. THE PROSECUTOR DID NOT MISSTATE THE ELEMENT OF KNOWLEDGE IN CLOSING ARGUMENT.

The jury was given the pattern instruction on knowledge:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact circumstance or result. It is not necessary that the person know that the fact circumstance or result is defined by law as being unlawful or an element of a crime. *If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.*

1 CP 95 (Instruction No. 6) (emphasis added); WPIC 10.02; see RCW 9A.08.010. As long as the reasonable person inference is permissive rather than mandatory, no constitutional problems are posed. COMMENT to WPIC 10.02; State v. Bryant, 89 Wn. App. at 871-72, (pattern instruction at WPIC 10.02 repeatedly upheld); see

State v. Shipp, 93 Wn.2d 510, 610 P.2d 1322 (1980) (prior language not specifying inference was permissive violated due process, because could be construed as mandatory presumption).

The defendant contends that the prosecutor grievously misstated the law on knowledge in closing argument. To prevail on such a claim he must show the conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). A defendant is prejudiced if there is a substantial likelihood that the misconduct affected the jury's verdict. Stenson, 132 Wn.2d at 718-19. Failure to object, as here, waives the issue unless the conduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id. at 719; accord, State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996).

Midway in his closing argument, the prosecutor addressed knowledge and cited to the instruction:

[Instructions] Numbers 5 and 6 are what we call essentially the mental state of the crime. There's different standards, there's intentionally, there's knowingly, recklessly, and there's some lesser ones as well. What you're concerned about four Counts I,

³ Killingsworth, decided after trial here, does suggest alternative language that could be employed. Killingsworth at 290.

II, and IV is knowingly. Knowingly isn't a subjective. 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 by not required to find that she acted with knowledge."

The reasonable person standard is this. It is 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 the specific person thinking. It's the general knowledge, what an average person should know. . . . So think of that, what would an average person do in that situation.

8/10/11 TRP 14-15. Later, in addressing the knowledge element of count I (possessing a stolen vehicle) the prosecutor cited the element "[t]hat on the 28th of July, 2010, defendant knowingly – again, remember, reasonable person . . . defendant acted with knowledge the motor vehicle had been stolen." Id. at 21. He also concluded with, "Use your common sense. It's a reasonable person standard for all these [counts]." Id. at 23.

The prosecutor was citing the "reasonable person" permissible inference that is an accurate statement of the law. See WPIC 10.02 and Bryant, 89 Wn. App. at 871-72. This is not even improper, much less prejudicial. But if the prosecutor improperly over-emphasized the permissive inference, his comments still must be viewed in the context of the entire argument and the instructions

given. State v. Coleman, 152 Wn. App. 552, 571, 216 P.3d 479 (2009); State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006). The jury was properly instructed on “knowledge.” 1 CP 95, WPIC 10.02. And elsewhere in his closing the prosecutor argued the actual, subjective knowledge of the defendant:

I would submit to you, based on the suspicious nature of the documents submitted by Mr. Owens, how quickly he wanted to sell this vehicle after it had been stolen, he acted knowing this vehicle was stolen.

Id. at 21.

Defendant knowingly did traffic in stolen property. Altering the vehicle. Removing the roof rack, the surf board, changing the date, replacing the VIN. Obviously those are all indicia of somebody knowingly trying to essentially traffic in stolen property.

Id. at 22. The defendant has left these latter comments out of his argument. In this context, any over-emphasis on the permissive “reasonable person” inference of knowledge, even if improper, could have been readily cured or neutralized by an admonition to the jury had an objection been raised. None having been, any error is waived.

It is helpful to look at cases that identify truly flagrant argument, where any objection would have been futile. In Belgrade, the defendant had testified to some affiliation with the

American Indian Movement (“AIM”). In closing the prosecutor characterized the AIM as “butchers” and a “deadly group of madmen.” State v. Belgrade, 110 Wn.2d 504, 506-08, 755 P.2d 174 (1988). In Wilson, the prosecutor remarked that to call the defendant “a beast would insult the entire animal kingdom.” State v. Wilson, 16 Wn. App. 348, 356-57, 555 P.2d 1375 (1976). In Rivers, the prosecutor described the defendant and his defense witnesses as “vicious rockers,” “predators,” “jackals,” and “nothing more than hyenas,” and referred to defendant’s jailhouse witnesses as the “pajama crowd.” State v. Rivers, 96 Wn. App. 672, 673-74, 981 P.2d 16 (1999). In Reed, the prosecutor mocked defense counsel, repeatedly called the defendant a liar, and derided defense experts as city doctors driving fancy cars. State v. Reed, 102 Wn.2d 140, 143-44, 684 P.2d 699 (1984). In Monday, the prosecutor injected racial prejudice into the trial by inferring in cross-examination that witnesses were uncooperative with police because of their ethnic background; by explicitly arguing the same (a race-based code of silence) in closing; and by asserting his personal belief in the defendant’s guilt. State v. Monday, 171 Wn.2d 667, 675-81, 257 P.3d 551 (2011). These statements were

truly flagrant and inflammatory, and likely incurable by admonition or supplemental instruction. The statements here were not.

IV. CONCLUSION

The judgment and sentence should be *affirmed*.

Respectfully submitted on August 22, 2012.

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