Supreme Court No. 1016883
Court of Appeals No. 38484-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff/Respondent

v.

MICHAEL DUANE ETUE
Defendant/Appellant

ANSWER TO PETITION FOR REVIEW

WILL M. FERGUSON
WSBA 40978
SPECIAL DEPUTY PROSECUTING ATTORNEY
STEVENS COUNTY
215 S. OAK STREET, ROOM 114
COLVILLE, WA 99114

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I. STATEMENT OF THE CASE

Prior to the close of the State's case-in-chief, Mr. Michael Duane Etue (hereinafter "Mr. Etue") was charged with one count of Possession of a Stolen Motor Vehicle, one count of Making or Possessing Motor Vehicle Theft Tools, two counts of Possessing Stolen Property in the Second Degree, four counts of Possessing Stolen Property in the Third Degree, and one count of Obstructing a Law Enforcement Officer. Clerk's Papers (hereinafter "CP") at 1-5.

At the close of the State's case-in-chief, the deputy prosecuting attorney moved to dismiss all but one count of Possession of a Stolen Motor Vehicle, one count of Making or Possessing Motor Vehicle Theft Tools, one count of Possessing Stolen Property in the Third Degree, and one count of Obstructing a Law Enforcement Officer. Report of Proceedings (hereinafter "RP") at page 384: lines 6-19; CP 34-37.

The count of Possession of a Stolen Motor Vehicle alleged in the charging Information that Mr. Etue, "…in the County of

Stevens, State of Washington, on or about February 12, 2020, did **knowingly** possess a stolen motor vehicle, to-wit: 2000 Audi A6, the property of Aasha D. Kissinger; Contrary to RCW 9A.56.068(1), and against the peace and dignity of the State of Washington." CP 1 (emphasis added).

The jury instructions defined circumstantial evidence as "…evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case." CP 15. The jury was instructed that direct and circumstantial evidence carry the same weight. CP 15.

The to-convict instruction on Possession of a Stolen Motor Vehicle informed the jury that the State had to prove that Mr. Etue "…knowingly possessed a stolen motor vehicle", and "[t]hat [Mr. Etue] acted with knowledge that the motor vehicle had been stolen…." CP 17. The jury was instructed that stolen, "…means obtained by theft." CP 24.

Most importantly, the jury was instructed on the following definition of knowledge:

> A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he or she is aware of that fact or circumstance. It is not necessary that the person know that the fact or circumstance 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.

CP 22. The jury returned verdicts of guilty on one count of Possession of a Stolen Motor Vehicle, one count of Making or Possessing Motor Vehicle Theft Tools, one count of Possessing Stolen Property in the Third Degree, and one count of Obstructing a Law Enforcement Officer. CP 34-38.

Mr. Etue appealed the jury's verdict. The Court of Appeals issued its unpublished opinion (hereinafter the "Court of Appeals' Decision" or "Decision") on January 10, 2023, affirming Mr. Etue's conviction. Mr. Etue's Petition to this Court followed.

II. ISSUE

1. Should this Court, under WA RAP 13.4(b), accept review of the Court of Appeals' Decision when the Decision does not warrant review under any of the four categories in WA RAP 13.4(b)?

III. ARGUMENT

1. <u>This Court Should Deny Review Because Mr. Etue Does Not Present Reviewable Issues Under WA RAP 13.4(b).</u>

Regurgitation of the issues presented to the Court of Appeals does not satisfy the applicable test. The issue for this Court to decide is not whether the Court of Appeals wrongly decided the case. The issue is whether or not Mr. Etue presents any reviewable issue under WA RAP 13.4(b).

WA RAP 13.4(b) contains the following four subsections, that set the qualifications for acceptance of review by this Court:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the

> United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

WA RAP 13.4(b). If a petitioner's case does not fit within one of the four above-listed categories, this Court will not accept review. WA RAP 13.4(b).

On Petition for Review, Mr. Etue argues three grounds. First, Mr. Etue argues that the Decision conflicts with this Court's decision in State v. Simon. Petition for Review at 15; WA RAP 13.4(b)(1). Second, Mr. Etue claims that the Court of Appeals Decision conflicts with two different appellate decisions. Petition for Review at 22; WA RAP 13.4(b)(2). Third, Mr. Etue claims that the substantial public interest prong permits review. Petition for Review at 24; WA RAP 13.4(b)(4). None of these three arguments should cause this Court to accept review.

Mr. Etue spends the lion's share of his first claim, seeking to re-hash his argument about the sufficiency of the charging information. What Mr. Etue should have done is found a decision from this Court with which his case actually conflicts.

In his Reply Brief to the Court of Appeals, Mr. Etue raised State v. Simon. Reply Brief of Appellant at 5-6. The Court of Appeals, noting the late addition, distinguished Simon in a footnote:

> [Mr.] Etue additionally argues that under *State v. Simon*, 120 Wn.2d 196, 840 P.2d 172 (1992), the mere fact that the word "knowingly" appeared in the charging information is insufficient. However, in *Simon*, the charging information alleged that the defendant "*did knowingly* advance and profit by compelling Bobbie J. Bartol by threat and force to engage in prostitution; and *did* advance and profit from the prostitution of Bobbie Bartol, a person who was less than 18 years old." *Id.* at 197-98 (emphasis added). As the court explained, by simple rules of sentence structure and punctuation, the "knowingly" cannot refer to the second means of committing the crime. *Id.* at 199. This is not the case here.

State v. Etue, No. 38484-5-III, 2023 WL 140283, at 3 (Div. III, 2023).

State v. Simon involved the charging information in an alternative means crime; Mr. Etue's case did not. In Simon, the State initially charged the defendant with first degree promotion of prostitution. State v. Simon, 120 Wash.2d 196, 197, 840 P.2d

172 (1992). The original information accused the defendant of profiting from the prostitution of a person who was less than 18 years of age. Id. The salient language of the original charging information: "did knowingly advance and profit from…a person who was less than 18 years old." Id. Prior to trial, the State amended the charging information to **add** an alternative means of committing the crime. Id. The alternative means was by "threat and force", also called forcible compulsion. Id. The amended information alleged that the defendant 1. "did knowingly advance and profit by compelling…by threat and force to engage in prostitution…." and 2. "did advance and profit…from a person who was less than 18 years old." Id. at 197-98.

This Court rightly held that failure to allege the *mens rea* element in each of both alternative means was fatal. Id. at 199. In reaching that holding, this Court noted,

> [t]he State concedes that knowledge that the prostitute was under 18 is a necessary element of the second means of committing first degree promotion

> of prostitution. The information, however, alleged that Simon "*did* knowingly advance and profit by compelling Bobbie J. Bartol by threat and force to engage in prostitution; and *did* advance and profit from the prostitution of Bobbie Bartol, a person who was less than 18 years old.' The Court of Appeals held that this language, even when liberally construed, does not allege knowledge of age as an element of the second means of committing the crime. We agree.

Id. at 198–99 (internal citations omitted) (emphasis in original). Each of the two means of committing the crime of promoting prostitution carried its own *mens rea* element. Thus, failure to allege the necessary element, as it applied to each of the two separate means, was fatal.

Just as the Court of Appeals held in Mr. Etue's case, Simon does not apply. Mr. Etue presents Simon as being on all fours with his case. But Mr. Etue's case isn't on all fours for the simple but significant reason that Simon applied to a crime in which the State alleged alternative means. Mr. Etue was charged with one means of committing the crime of possession of a stolen

motor vehicle; not two. The Court of Appeals' Decision in Mr. Etue's case does not conflict with Simon.

Mr. Etue's second argument is that this Court should accept review under WA RAP 13.4(b)(2) because the Decision conflicts with State v. Jones and State v. Tardiff. Petition for Review at 22. However, the Decision conflicts with neither case.

Turning to Jones, Mr. Etue's argument is misplaced because the facts of Jones do not provide support. "[The State's] attorney **repeatedly** encouraged the jury to convict Jones based on what he should have known without ever mentioning that the jury can convict only if Jones actually knew the car to be stolen." State v. Jones, 13 Wash.App.2d 386, 405, 463 P.3d 738, 747 (Div. III, 2020) (emphasis added). "The State's attorney thereby **repeatedly** misstated the law." Id. (emphasis added).

Here is what the Court of Appeals said in Mr. Etue's case:

> Although the prosecutor's statement on its own was a misstatement of the law, viewed in context of his total argument, it was not so flagrant and ill-intentioned that an instruction would not have cured it. The prosecutor was clearly trying to

> communicate to the jury that it could find actual knowledge from circumstantial evidence. This is demonstrated by the fact that the prosecutor, subsequent to the improper statement, read the instruction that clarified to the jury that it could, *but was not required to*, infer knowledge from such evidence. This misstatement was minor and would have been curable by an instruction had Etue objected.

State v. Etue, No. 38484-5-III, 2023 WL 140283, at 4 (Div. III, 2023) (emphasis in original). The Court of Appeals in Mr. Etue's case found neither multiple misstatements nor a misstatement that could not be and was not corrected by jury instructions. Id. at 1.

After dismissing Mr. Etue's claim that the prosecutor committed misconduct when he referred to unavailable witnesses, the Court of Appeals addressed Mr. Etue's allegations about the statements regarding constructive knowledge: "Although the prosecutor's statement on its own was a misstatement of the law, viewed in context of his total argument, it was not so flagrant and ill-intentioned that an instruction would not have cured it." Id. at 1, 4. "This is demonstrated by the fact

that the prosecutor, subsequent to the improper statement, read the instruction that clarified to the jury that it could, *but was not required to*, infer knowledge from such evidence. This misstatement was minor and would have been curable by an instruction had [Mr.] Etue objected." Id. at 4 (emphasis in original).

The other Court of Appeals case with which Mr. Etue claims conflict is State v. Tardiff. At the outset, the fact that State v. Tardiff is an **unpublished** opinion Mr. Etue treats as sufficiently binding that it announced a standing rule with which Mr. Etue's case can conflict, should not be well-taken by this Court. Mr. Etue also glosses over the wording of WA RAP 13.4(b)(2) which requires there to be a conflict with a **published** opinion of the Court of Appeals. See WA RAP 13.4(b)(2).

Digging deeper, the facts of Mr. Etue's case demonstrate the significant differences that should lead this Court to conclude that Mr. Etue's case and Tardiff do not conflict. "In closing argument, the prosecutor lowered the State's burden to prove

Troyton Tardiff's knowledge by repeatedly asserting that the jury could find Tardiff guilty if the jury found he 'should have known' the vehicles were stolen. **Repetitive misconduct** can have a prejudicial 'cumulative effect.'" State v. Tardiff, 20 Wash.App.2d 1015 (Div. III, 2021) (unpublished opinion; see WA GR 14.1(a)) (emphasis added).

Jones and Tardiff dealt with **repeated** misstatements of the law, unlike in Mr. Etue's case. The unpublished nature of Tardiff aside, neither case cited Mr. Etue actually conflicts when the facts are compared. For there to be a conflict, as contemplated by WA RAP 13.4(b)(2), Jones and Tardiff would need similar facts; those facts simply aren't present in Mr. Etue's case.

Finally, to qualify for review, the issue presented by Mr. Etue must be of public interest and it must be substantial. First, the issue presented in Mr. Etue's case is not a substantial one. Second, the issue presented in Mr. Etue's case is not in the realm of public interest.

This Court has not announced a test for what does or does not qualify as a substantial public interest in the context of petitions for review. Though the term 'substantial public interest' has been used in the doctrine of mootness, the applicable test can be borrowed and applied here.

"To determine whether a case presents an issue of continuing and substantial public interest, we consider three factors: (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question." State v. Beaver, 184 Wash.2d 321, 330, 358 P.3d 385, 390 (2015) (internal quotation marks omitted). "As a fourth factor, the court may also consider the level of adversity between the parties." Id. at 331. "The continuing and substantial public interest exception has been used in cases dealing with constitutional interpretation, the validity of statutes or regulations, and matters that are

sufficiently important to the appellate court." Id. "This exception is not used in cases that are limited to their specific facts." Id.

The private nature of Mr. Etue's dilemma may be substantial to him, but the nature of his dilemma, to the public, is far less. Mr. Etue presents a case of limited applicability—allegations of a mistatement of the law in closing argument—thereby confining his situation to a very small segment of individuals. Next, unless or until Mr. Etue's issue presents itself again, the desirability of an authoritative decision is minimal, at best. There appears to be no general outcry of support before the Court of Appeals or this Court, for definitive guidance to public officials. Finally, Mr. Etue's issue is not likely to reoccur on the same facts.

This Court has routinely held that a substantial public interest must be something more than what Mr. Etue presents. For example, this Court has denied review of the patently erroneous decisions in Western Rivers Conservancy v. Stevens County, 198 Wash.2d 1023 (2021), which involved taxation of

timber land, Stevens County v. Stevens County Sheriff's Department, et. al., 1991 Wash.2d 1008 (2022), which involved the deprivation of fundamental rights under amendments to the Involuntary Treatment Act, and in Stevens County ex rel. Rasmussen v. Dashiell, et. al., 200 Wash.2d 1002 (2022), which involved appropriation of public funds.

Surely, if this Court has denied review in broadly applicable timber taxation issues in the Evergreen State, deprivation of fundamental rights to thousands of Washingtonians, and the alleged misallocation of our public funds, then Mr. Etue and the few other defendants impacted by the Court of Appeals' **unpublished** Decision do not qualify as presenting an issue of substantial public interest.

IV. CONCLUSION

This Court should deny review of Mr. Etue's Petition because the issues he presents do not qualify his Petition for review under WA RAP 13.4(b).

I, Will Ferguson, certify that the number of words in this Document, excluding this Certificate and the portions of this Document exempt from the word count, according to Microsoft Word, is 2,649 and is therefore within the word count permitted by WA RAP 18.17.

RESPECTFULLY SUBMITTED 28th day of February, 2023.

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Will Ferguson, WSBA 40978
Special Deputy Prosecuting Attorney
Office of the Stevens County Prosecuting Attorney
Attorney for Plaintiff/Respondent

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