NO. 91577-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID EARL WOODLYN,

Petitioner.

ANSWER TO PETITION FOR REVIEW

DANIEL T. SATTERBERG
King County Prosecuting Attorney

AMY R. MECKLING
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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I. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to deny the petition for review.

II. COURT OF APPEALS OPINION

The Court of Appeals decision at issue is State v. Woodlyn, No. 71311-6-I, filed March 9, 2015 (unpublished).

III. STATEMENT OF THE CASE

Petitioner Woodlyn was convicted of second-degree theft with a vulnerable victim aggravating factor as a result of his actions involving 76-year-old Dora Kjellerson. The facts of his crime are succinctly outlined in the Court of Appeals' unpublished opinion attached to the Petition for Review.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

Below, Woodlyn cited to court of appeals cases that outline a "harmless error" standard for sufficiency problems in alternative means cases, and then argued the application of that standard required reversal in his case. In his petition however, Woodlyn reverses course and faults the Court of Appeals for applying the standard he cited. He now contends that reversal is automatic whenever there is insufficient evidence of one or more alternative means presented to the jury,

coupled with the absence of a particularized expression of unanimity. Because Woodlyn did not argue below the position he now asserts, the Court of Appeals had no occasion to consider it. As such, this Court should not use this case to consider the issue of a harmless error standard for sufficiency problems in alternative means cases.

Moreover, the unpublished opinion in this case does not conflict with any published decision of the Court of Appeals, nor does it conflict with this Court's precedent. Review should be denied.

A. STANDARD FOR REVIEW.

A petition for review will be accepted by the Supreme Court only:

> (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 another 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.

RAP 13.4(b). Woodlyn cites to both subsections (1) and (3) of the rule in support of his petition for review, but his argument appears to focus solely on the assertion that the Court of Appeals decision is in conflict with decisional law from this Court. Although he mentions subsection

(3) in passing, he presents no substantive argument as to why this issue is of substantial public interest.

B. THE UNPUBLISHED DECISION OF THE COURT OF APPEALS DOES NOT WARRANT REVIEW UNDER RAP 13.4.

1. Having Cited To A Harmless Error Standard In The Court Of Appeals, Woodlyn Cannot Challenge The Court's Application Of That Standard In His Petition For Review.

Woodlyn argued to the Court of Appeals that the evidence was insufficient to support one of the alternative means of committing theft presented to the jury. Arguing for reversal, Woodlyn cited to lower court decisions outlining a harmless error standard. Specifically, Woodlyn asserted that the relevant standard to apply was, "If the State presented evidence of only one means, then the reviewing court can conclude the jury must have relied only upon that [properly supported] means in reaching a unanimous verdict." Opening Brf. of Appellant at 12. Woodlyn then argued that the facts of his case failed to meet that standard.

Now, for the first time in his petition for review, Woodlyn asserts that this Court's decisions in State v. Owens,[1] and State v. Ortega-Martinez[2] required the Court of Appeals to automatically reverse his

[1] 180 Wn.2d 90, 323 P.2d 1030 (2014).

[2] 124 Wn.2d 702, 881 P.2d 231 (1994).

conviction once it determined that there was insufficient evidence to support one of the alternative means presented to the jury. But Woodlyn cannot fault the Court of Appeals for applying a standard that he proposed.[3] Because Woodlyn did not present the argument he now makes, the lower court had no occasion to consider it and its opinion does not address it.

This Court should decline to grant review of this new claim because it was not raised in the Court of Appeals. "An issue not raised or briefed in the Court of Appeals will not be considered by this court." State v. Halstien, 122 Wn.2d 109, 130, 857 P.2d 270 (1993); see also Plein v. Lacky, 149 Wn.2d 214, 222, 67 P.2d 1061 (2003) (generally, parties cannot raise a new issue in a petition for review); Fisher v. Allstate Ins. Co, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) ("This court does not generally consider issues raised for the first time in a petition for review."). Woodlyn does not acknowledge or explain why he made a different argument before the Court of Appeals. This Court should deny Woodlyn's petition and reject his attempt to raise a new argument for the first time in his petition for review.

[3] Woodlyn cited to Ortega-Martinez in the Court of Appeals, but he argued that it required reversal *only* when "it is possible that at least some jurors relied upon th[e] [unsupported] alternative in reaching their verdict." Opening Brf. of Appellant at 13.

2. The Decision Below Is Not In Conflict With A Decision Of This Court.

Woodlyn argues that this Court's decisions in Owens and Ortega-Martinez require automatic reversal in every case where there is insufficient evidence to support one or more alternative means presented to the jury and the jury does not render a particularized expression of unanimity as to a properly-supported means. He contends that the court's decision below is in direct contradiction to those cases because it affirmed his conviction even though it concluded that there was insufficient evidence to support one of the alternative means of theft.

However, neither Owens nor Ortega-Martinez held that reversal is automatic in such a situation. Indeed in both cases, the court did not reach the issue of harmless error because no error occurred, *i.e.*, sufficient evidence supported each alternative means. See Owens, 180 Wn.2d at 101 (specifically declining to reach the issue of harmless error because sufficient evidence supported each alternative); Ortega-Martinez, 124 Wn.2d at 717 (express unanimity as to means not required because sufficient evidence supported each alternative

submitted to jury). Therefore, Woodlyn's assertion that the Court of Appeals did not properly apply this Court's decisions in Owens and Ortega-Martinez is wrong.

Indeed, this Court has never adopted Woodlyn's new argument – that this particular type of error can never be harmless. To the contrary, in State v. Bonds, 98 Wn.2d 1, 17-18, 653 P.2d 1024 (1982), this Court determined that an instruction that permitted the jury to rely on an unsupported alternative means of committing first degree rape was harmless because, in order to reach a finding of guilt as to the first-degree murder charge, the jury must necessarily have unanimously agreed that a properly-supported theory of rape had been proven.

Although Woodlyn argues that the Court of Appeals erroneously characterized the error as an instructional error instead of a unanimity error, the lower court properly recognized that it is a hybrid of both. See Woodlyn, Slip. Op. at 7-8. Indeed, when there is sufficient evidence of each alternative means presented, a jury is properly instructed that unanimity as to means is *not* required. State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987); State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988); In re Pers. Restraint of

Jeffries, 110 Wn.2d 326, 338, 752 P.2d 1338 (1988); Ortega-Martinez, 124 Wn.2d at 707; State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007); Owens, 180 Wn.2d at 95. Because a trial court should not instruct the jury on an unsupported means, the pattern instruction is a proper statement of the law. See comment to WPIC 4.23 (3d ed. 2005). It is only in the absence of sufficient evidence that express unanimity as to means *is* required, and therefore use of the pattern instruction in such instance becomes error. Thus, because a unanimity error in this context is inexorably intertwined with instructional error, Woodlyn mistakenly criticizes the Court of Appeals for citing to cases involving harmless instructional errors. See Bonds, 98 Wn.2d at 17-18 (highlighting the interplay between unanimity error and instructional error in this context). The Court of Appeals' opinion does not conflict with a decision of this Court.

V. CONCLUSION

Because Woodlyn presents a new argument that the Court of Appeals had no occasion to address, and because he has not met the standard for review in RAP 13.4(b), this case is not an appropriate vehicle for this Court to consider the question of harmless error when the jury is presented with an alternative method of committing the

crime that is unsupported by sufficient evidence. This Court should deny the petition for review.

DATED this 14th day of March, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
AMY R. MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Maureen Cyr, at maureen@washapp.org containing a copy of the Answer to Petition for Review, in STATE v. DAVID EARL WOODLYN, Cause No. 91577-6, in the Supreme Court of the State of Washington.

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

Name

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Date

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Good afternoon,

Attached for filing in the above-captioned case, is Answer to Petition for Review.

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Thank you,

Bora Ly
Paralegal
Criminal Division, Appellate Unit
King County Prosecuting Attorney's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Phone: 206-477-9499
Fax: 206-205-0924
E-Mail: bora.ly@kingcounty.gov

For

Amy Meckling
Senior Deputy Prosecuting Attorney
Attorney for Respondent