71852-5

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NO. 71852-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK J. NELSON,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. Does the statutory definition of "traffic" create an alternative means of committing second degree trafficking in stolen property?

2. Were Miranda warnings required before police asked defendant routine questions regarding his identity?

II. STATEMENT OF THE CASE

A. FACTS OF THE CRIME.

On January 22, 2014, Cam Ta rode his bike to the Mill Creek Fred Myers. Ta locked the bike to the rack and entered the store. The bike was a blue/green and silver/white, Sedona Giant mountain bike, that Ta purchased for $350—$400. At the time of purchase Ta had a gear box, rack, seat shock absorber, and a mirror installed. Ta later removed the mirror, but a hole in the handle grip remained. He also shortened the kick stand. Ta took excellent care of the bike and although it was fifteen to sixteen years old it looked brand new. RP (4/7/14) 15-18, 35-39.

About twenty minutes after entering the store, Ta came out and discovered his bike was gone. He called the police to report the theft. A Fred Meyer employee found Ta's bike lock in the

garbage. The cable had been cut. RP (4/7/14) 18-19, 21-22, 36-39, 41-42.

Ta began checking Craig's List for his stolen bike. About a week later, he found a listing for a Sedona Giant mountain bike with a description that matched his bike. Ta called the police and reported what he had found. Ta contacted the person selling the bike on Craig's List and arranged to purchase the bike. The seller accepted Ta's offer of $120 and agreed to meet at the Texaco Gas Station on 128th in thirty minutes. Ta informed the police about the arrangement and they developed a plan. When Ta arrived at the Texaco he saw a man standing next to his bike talking on a cell phone. The police contacted the man standing next to the bike. CP 161-162; Exhibit 1; RP (4/7/14) 22-31, 43-52, 64-66; RP (3/20/14) 3-6, 11.

Officer Hacker contacted the man, later identified as Frank Joseph Nelson, defendant, and asked, "Is this your bike?" Defendant replied, "No." Officer Hacker asked, "Do you know whose bike this is?" Defendant replied, "I think it might be someone inside the store." Officer Hacker followed up by asking, "Are you sure this isn't your bike? Are you sure you're not here to sell it?" Defendant replied, "No, no, no, not me." Defendant

lowered his cell phone and started walking away from the bike. Officer Albright arrived at that time. Ta drove up, got out of his car and said, "That's my bike. That's my bike. We got you. You're under arrest." Defendant backed away saying, "No, no." Ta said that he was just on the phone with him. Defendant started trying to remove the battery from his cell phone. Officers Hacker and Albright grabbed defendant's hands, took the phone, placed defendant in handcuffs, and sat him on the patrol car bumper. Officer Hacker had Ta dial the sellers phone number. Defendant's phone rang and the number on the screen was Ta's. RP (4/7/14) 34-35, 51-55, 91-93; RP (3/20/14) 6-8, 11-13.

Prior to advising defendant of his Miranda rights, Officer Hacker asked defendant who he was. Defendant said his name was Joseph Thomas Higgins and gave a date of birth. When Officer Hacker was unable to verify the name was a true name, defendant was placed under arrest, read Miranda warnings and placed in the rear seat of the patrol car. Officer Hacker asked defendant about the bike. Defendant said he bought it about a week ago from someone named "Joe" for $100. Defendant would not provide a last name or phone number for Joe. Defendant said

he was selling the bike because he needed money. RP (4/7/14) 57-60, 94-96; RP (3/20/14) 8-10.

After completing the field investigation, Officer Hacker confirmed that the bike belonged to Ta and returned the bike to him. RP (4/7/14) 32-34, 55-57, 66-67.

At trial, defendant claimed that he bought the bike from his friend James "Jim" Day for $73 after confirming it was not stolen. A few days later he lost his wallet, needed money and decided to sell the bike. He posted an ad on Craig's List and agreed to sell the bike for $120 to a person who called. Because he had a warrant for his arrest, defendant panicked when the police showed up and asked him about the bike. He said he lied about the bike and lied about his name. RP (4/7/14) 77-78, 80-85, 87-90, 93-94, 98.

B. PROCEDURAL HISTORY.

Defendant was charged with second degree trafficking in stolen property. CP 159-160. A CrR 3.5 hearing was held prior to trial to determine admissibility of the defendant's statements. RP (3/20/14) 2-19. The facts were not disputed. Defendant's statements were made in three distinct factual circumstances. The first group of statements was made in response to Officer Hacker's initial questions about the bike and its ownership. The court ruled

that those questions were fairly casual and under the circumstances a reasonable person would not have felt his freedom to leave was curtailed. The court concluded those non-custodial statements were admissible. The second group of statements was made after defendant was taken into custody, but before he was advised of Miranda warnings. He was asked questions regarding his identification. The court found that the questions were asked to confirm his identity and not to elicit incriminating information. Defendant did not argue the identification information was incriminating. The court concluded that the statements regarding defendant's identity were admissible despite the absence of Miranda warnings. The third group of statements was made after defendant was told he was under arrest, advised of Miranda warnings, acknowledged that he understood and waived his rights. The court found any statements made after Miranda warnings were admissible. CP 140-142; RP (3/20/14) 17-19.

The matter proceeded to trial and the jury found defendant guilty as charged. CP 109; RP (4/8/14) 129-132.

III. ARGUMENT

A. THE DEFINITION OF "TRAFFIC" IN RCW 9A.82.010(19) DOES NOT CREATE AN ALTERNATIVE MEANS OF COMMITTING SECOND DEGREE TRAFFICKING IN STOLEN PROPERTY.

Defendant was charged with second degree trafficking in stolen property: "A person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree." RCW 9A.82.055(1). "Traffic" means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person. RCW 9A.82.010(19).[1] Defendant argues that definition of "traffic" in RCW 9A.82.010(19) sets out two alternative means of committing second degree trafficking in stolen property. Brief of Appellant 5-11.[2] Definition statutes do not create additional alternative means, "means within means," of committing an offense. State v. Strohm,

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[1] The court included the definition of "traffic" in its instructions to the jury. CP 118 (Instruction 6).

[2] Nothing in the record supports defendant's presumption that the State's proposed jury instruction regarding the definition of "traffic" was recognition of alternative means. CrR 6.15(a) contemplates that jury instructions can be submitted and discussed during the presentation of evidence or even during jury deliberations. State v. Mendes, 180 Wn.2d 188, 194, 322 P.3d 791 (2014).

75 Wn. App. 301, 309, 879 P.2d 962 (1994), review denied, 126 Wn.2d 1002 (1995).

To determine whether or not a statute proscribes a single offense that can be committed in more than one way, or multiple offenses, the court looks to the legislative intent. State v. Garvin, 28 Wn. App. 82, 85, 621 P.2d 215 (1980), review denied, 95 Wn.2d 1017 (1981). Washington courts have rejected the "means within a means" approach to alternative means cases: State v. Marko, 107 Wn. App. 215, 218-220, 27 P.3d 228 (2001) (the definition of "threat" did not create additional means of committing the crime of intimidating a witness); State v. Laico, 97 Wn. App. 759, 987 P.2d 638 (1999) (the definition of 'great bodily harm' does not add elements to the first degree assault statute, rather it is intended to provide understanding); Strohm, 75 Wn. App. at, 309 (definition of "traffic" does not create additional alternative means of committing trafficking in stolen property); Garvin, 28 Wn. App. at 85 (by defining 'threat' the legislature was merely defining an element of the crime, not creating alternative elements to the crime of second degree extortion). "The definition of 'traffic' in the definition section of the statute does not add to the criminal statute; its only purpose is to provide understanding." Strohm, 75 Wn. App. at 309.

Defendant's reliance on State v. Owens, 180 Wn.2d 90, 323 P.3d 1030 (2014), is misplaced. Owens addressed first degree trafficking in stolen property: "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." RCW 9A.52.050(1). Relying on Strohm, the Court of Appeals in Owens concluded that RCW 9A.82.050(1) described eight alternative means: "knowingly (1) initiating, (2) organizing, (3) planning, (4) financing, (5) directing, (6) managing, or (7) supervising the theft of property for sale to others, or (8) knowingly trafficking in stolen property." Owens, 180 Wn.2d at 97-98. The Supreme Court held that RCW 9A.82.050(1) describes only two alternative means of trafficking in stolen property. Owens, 180 Wn.2d at 98-99. The Court noted that the issue in Strohm "was not the number of alternative means described in former RCW 9A.82.050(2)" but whether former RCW 9A.82.020(10) defining "traffic" created alternative means of committing the crime. Owens, 180 Wn.2d at 98.

In the present case, defendant was charged with second degree trafficking in stolen property under RCW 9A.52.055(1): "A

person who recklessly traffics in stolen property is guilty of trafficking in stolen property in the second degree." Clearly, RCW 9A.52.055(1) describes only one means of committing second degree trafficking in stolen property. The definition of "traffic" does not create alternative means of committing the offense of second degree trafficking in stolen property. Strohm, 75 Wn. App. 309.

B. POLICE WERE NOT REQUIRED TO GIVE MIRANDA WARNINGS BEFORE ASKING DEFENDANT WHO HE WAS TO DETERMINE HIS IDENTITY.

Defendant argues the trial court's admission of his statements in response to questions regarding his identification violated his Fifth Amendment right against self-incrimination. Brief of Appellant 11-16. Miranda issues involve a mixed question of law and fact; unchallenged facts in the record are verities; legal conclusions are subject to de novo review. In re Cross, 180 Wn.2d 664, 681 n. 7, 327 P.3d 660, 698 (2014).

The Fifth Amendment's protection against self-incrimination includes the right to be informed of one's rights before custodial interrogation may take place. Miranda v. Arizona, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); State v. Lavaris, 99 Wn.2d 851, 856–857, 664 P.2d 1234 (1983). However, not all custodial statements are a product of interrogation. Rhode Island

v. Innis, 446 U.S. 291, 299-300, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). For a statement to fall within Miranda, it must be made in response to interrogation. Innis, 446 U.S. at 300.

A police request for routine information necessary for basic identification is not interrogation that necessitates Miranda warnings, even if the information revealed is incriminating. State v. Walton, 64 Wn. App. 410, 414, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992), abrogated on other grounds, In re Cross, 180 Wn.2d at 681 n. 8; United States v. McLaughlin, 777 F.2d 388, 391–392 (8th Cir. 1985). In Pennsylvania v. Muniz, the U.S. Supreme Court explained that questions about name, address, height, weight, eye color, date of birth and current age were admissible despite the fact that the questions preceded Miranda warnings "because the questions fall within a 'routine booking question' exception which exempts from Miranda's coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.'" Pennsylvania v. Muniz, 496 U.S. 582, 601, 110 S.Ct. 2638, 110 L.Ed.2d 528 (1990).

Defendant argues that the routine booking question exception does not apply because the questions regarding his identification were not made during a true booking process. Brief of

Appellant 13-15. Washington has rejected this narrow view. Application of the routine booking procedure exception to Miranda does not depend upon the nature of the procedure during which the question is asked; it depends upon the nature of the question. State v. Sargent, 111 Wn.2d 641, 651, 762 P.2d 1127 (1988); Walton, 64 Wn. App. at 414. Only if the officer should have reasonably known the information sought was directly relevant to the offense, is the request subject to scrutiny. Walton, 64 Wn. App. at 414. Defendant's identity was not directly relevant to the offense of trafficking in stolen property. The police were not required to give defendant Miranda warnings before asking defendant who he was to determine his identity.

Here, the questions asked were routine questions necessary for identifying defendant. When defendant was asked who he was he gave a false name and date of birth and the officers were unable to determine his true identity at that time. RP (3/20/14) 8-9; RP (4/7/14) 57-59. "These are precisely the routine statements which are admissible, even though they ultimately prove to be incriminating." Walton, 64 Wn. App. at 414. The questions regarding defendant's identity were not interrogation because those questions fell within the routine booking procedure exception.

Sargent, 111 Wn.2d at 651; State v. Wheeler, 108 Wn.2d 230, 238, 737 P.2d 1005 (1987). The trial court correctly concluded that defendant's false statements about his identity were admissible at trial. CP 140-142; RP (3/20/14) 18.

Additionally, even if defendant's statements about his identity were the result of interrogation, defendant waived asserting any error. Invited error prohibits a party from "setting up error in the trial court and then complaining of it on appeal." State v. Wakefield, 130 Wn.2d 464, 475, 925 P.2d 183 (1996). Even where constitutional issues are involved, invited error precludes judicial review. State v. Henderson, 114 Wn.2d 867, 871, 792 P.2d 514 (1990). The invited error doctrine is a "strict rule" to be applied in every situation where the defendant's actions at least in part cause the error. State v. Summers, 107 Wn. App. 373, 381-382, 28 P.3d 780 (2001) review granted, case remanded, 145 Wn.2d 1015, 37 P.3d 289 (2002). At the CrR 3.5 hearing regarding the admission of his statements to the police, defendant did not argue that his identity might be incriminating evidence. Rather, defendant argued he was in custody the moment Officer Hacker contacted him and the statements he made regarding the bike should be suppressed. RP (3/20/14) 15-17. The defense theory was defendant lied to the

police about the bike and who he was, because he was in trouble with law enforcement before and he had a warrant out for his arrest. RP (4/8/14) 123. The invited error doctrine is particularly applicable when a defense counsel employs a tactical maneuver in what then appeared to be in the best interest of her client. State v. Lewis, 15 Wn. App. 172, 176, 548 P.2d 587, review denied, 87 Wn.2d 1005 (1976), receded from on other grounds, State v. Stevens, 22 Wn. App. 548, 591 P.2d 827 (1979). A potential error is deemed waived if the party asserting such error materially contributed to it. In re K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995).

IV. CONCLUSION

For the reasons stated above, defendant's conviction should be affirmed.

Respectfully submitted on January 30, 2015,

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