73564-1

NO. 73564-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TYLER,

Appellant.

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

The Honorable Thomas J. Wynne, Judge

REPLY BRIEF OF APPELLANT

JENNIFER L. DOBSON
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A. ARGUMENT IN REPLY

I. THE STATE ASSUMED THE BURDEN OF PROVING AS AN ELEMENT OF THE OFFENSE THAT APPELLANT "DISPOSED OF" THE STOLEN VEHICLE.

In his opening brief, appellant Robert Tyler asserts the State was required to prove appellant "disposed of" a stolen motor vehicle because that element became the law of the case after it was included in the to-convict instruction. Brief of Appellant (BOA) at 5-9. In response, the State claims it was not required to prove appellant "disposed of" the vehicle because this is not an alternative means of committing the offense but is, instead, a definitional element. BOR at 5-12. The State is incorrect.

The State assumed that burden when the disposal element was specifically included in the to-convict instruction. CP 27. To-convict jury instructions contain all the elements of the crime. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917 (1997). If the parties do not object to jury instructions, they become the law of the case. State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995). In a criminal case, if the State adds an unnecessary element in the to-convict instruction, the added element becomes the law of the case and the State assumes the burden of proving it. State v. Hickman,

135 Wn.2d 97, 102, 954 P.2d 900 (1998). A criminal defendant may challenge the sufficiency of the evidence to support such added elements. Hickman, 135 Wn.2d at 102.

When the State includes the definitional alternatives for possessing stolen property (including "dispose of") in the to-convict, the law of the case doctrine requires the State to prove each of these as if they were statutory elements. Compare, State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004) (holding the State was required to prove the defendant concealed property when that element was included in the to-convict); with, State v. Hayes, 164 Wn. App. 459, 478, 262 P.3d 538 (2011) (holding the State was not required to prove concealment when that element was not found in the to-convict instruction; however, it was required to prove disposal of property when that element was included). As explained in appellant's opening brief, the State failed to do so. BOA at 7-9.

In response, the State claims recent case law undermines this Court's holdings in Hayes and Lillard. BOR at 7-9. As shown below, this argument is not persuasive.

First, the State cites State v. Peterson, 168 Wn.2d 763, 230 P.3d 588 (2010). BOR at 7. However, this case is distinguishable.

There, the Supreme Court held "the failure to register statute contemplates a single act that amounts to failure to register," and thus there was no alternative means. Peterson, 168 Wn.2d at 770. In this case, there are five acts that amount to possession, not one.[1]

Second, the State cites State v. Sandholm, 184 Wn.2d 726, 364 P.3d 87 (2015) and State v. Owens, 180Wn.2d 90, 323 P.3d 1030 (2014) to support its claim that it did not have prove the additional element in the to-convict instruction. BOR at 7. However, both those cases merely stand for the proposition that when the Legislature uses of the disjunctive "or," this does not determine whether there are alternative means. Sandholm, 184 Wn.2d at 734; Owens, 180 Wn.2d at 96. Reviewing courts must instead focus on whether each alleged alternative describes "distinct acts that amount to the same crime." Id. The Supreme Court explained:

> The more varied the criminal conduct, the more likely the statute describes alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various "alternatives" are merely facets of the same criminal conduct.

[1] Furthermore, Peterson was filed one and half years before Hayes, so this Court was presumably aware of the Peterson holding when it reached its decision in Hayes.

Sandholm, 184 Wn.2d at 734.

In Lillard, this Court essentially undertook the same approach the Supreme Court suggested above. This Court did not focus on the disjunctive "or." Had it done so it would have five alternative means or elements. Instead, it essentially found that three of the means (possess, retain, and receive) were minor nuances of the same act. Lillard, 122 Wn. App. at 435. However, it found that "concealing" was a distinct act that amounted to the same crime. Id. Citing Lillard, this Court in Hayes recognized "disposed" of as another distinct act that became the law of the case when added to the to-convict instruction.

Finally, the cases the State cites involved a statutory analysis to determine whether the Legislature intended to create alternative means. This case involves a completely different issue – the law of case doctrine. Despite the line of cases pointed to by the State, the Washington Supreme Court has not shown any inclination to abandon the principles it set forth in Hickman, recently reiterating:

> If the jury is instructed (without objection) that to convict the defendant, it must be persuaded beyond a reasonable doubt of some element that is not contained in the definition of the crime, the State must present sufficient evidence to persuade a reasonable

> jury of that element regardless of the fact that the additional element is not otherwise an element of the crime.

State v. France, 180 Wn.2d 809, 814, 329 P.3d 864, 867 (2014).(citing Hickman, 135 Wn.2d at 102). Here, that added element was the "disposed of" element.

In sum, Lillard and Hayes rest solidly on the principle that when the State includes unnecessary elements in the to convict instruction, it takes on the burden of proving those additional elements. Peterson, Owens, and Sandholm do not undermine the soundness of this Court's prior holdings. Consequently, this Court should reject the State's claim that it was not required to prove Tyler disposed of the vehicle.

II. THERE WAS INSUFFICIENT EVIDENCE TO PROVE TYLER DISPOSED OF THE VEHICLE.

Next, the State claims it presented sufficient evidence that Tyler – as an accomplice to Tyson Whitt – "disposed of" the stolen vehicle. BOR 10-12. The State appears to concede that if "disposed of" means to transfer into new hands or to the control of someone else (as it was defined in Hayes); it has not met its burden. Instead, however, the State suggests that the term "dispose of" as it pertains to this case means "to get rid of;

discard."[2] BOR at 11. Yet, even under the definition the State provides, the record establishes the State failed to meet its burden.

It is undisputed the arresting officer found Whitt and Tyler with the car. RP 37-42. There is no evidence the defendants were in the process of leaving the car behind. In fact, the State acknowledges that the arresting officer arrived "while Whitt was stripping [the car]." BOR at 2. This shows Whitt still had a use for the car and had indeed not gotten rid of it. Based on this record, there is no evidence Whitt had gotten rid of the car as useless, and it is pure speculation that he would have disposed of it in the future.

In sum, the State unnecessarily included an extra element in the to-convict – an element for which it had insufficient evidence to prove. On appeal, it attempts to stretch the facts to cover the additional element. However, under the State's definition of the term "disposed of," the record shows that the State did not – and could not – meet the burden of proving the disposal element beyond a reasonable doubt. For this reason and those stated in appellant's opening brief, this Court should reverse appellant's conviction.

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[2] Discard means "to get rid of especially as useless or unwanted." "Discard." *Merriam-Webster.com.* Merriam-Webster, n.d. Web. 18 Mar. 2016.

III. APPELLANT'S SUBSTANTIVE DUE PROCESS CHALLENGE IS REVIEWABLE UNDER RAP 2.5(a).

The State claims Tyler's substantive due process challenge is not reviewable under RAP 2.5(a)(3) because there was no objection during sentencing. BOR at 23-25. As explained below, this claim should be rejected.

Pursuant to RAP 2.5(a)(3), a manifest constitutional error may be raised for the first time on appeal. Review is appropriate where the appellant identifies a constitutional error and shows how the alleged error actually affected his rights at trial. State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009) (quoting State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007)). A constitutional error is manifest where there is a showing of actual prejudice. Actual prejudice is established by showing the asserted error had practical and identifiable consequences in the trial or, in this case, the sentencing. Id. at 99, 217 P.3d 756 (quoting Kirkman, 159 Wn.2d at 935).

Tyler has identified an error that is of true constitutional dimension. He asserts a substantive due process challenge to RCW 43.43.7541 and RCW 7.68.035 because they authorize sentencing courts to impose the DNA-collection fee and VPA

without any consideration of ability to pay. Hence, the scope of his challenge is undoubtedly constitutional.

Second, Tyler has established prejudice. On their face, the statutes do not require an ability-to-pay inquiry and mandate the trial court impose the DNA-collection fee and the VPA in every felony case. The consequence is Tyler now has a sentence that imposes these fees without the trial court first determining his has the ability to pay. Given these circumstances, Tyler has shown the error he complains of has had practical and identifiable consequences in his sentencing. As such, review is appropriate under RAP 2.5(a)(3).

Alternatively, this Court should exercise its own discretion under RAP 2.5(a) and decide the merits of this case because: (1) it raises a substantial constitutional issue regarding Washington's broken LFO system, (2) the parties have fully brief the issue, and (3) the constitutional error raised here impacts criminal sentencings that take place across the State on a daily basis. Hence, prompt appellate review of this issue is necessary, appropriate, and will ultimately save judicial resources since this issue will likely be repeatedly raised.

For the reasons stated above and in appellant's opening brief, this Court should find the issue reviewable under RAP 2.5(a).

B. CONCLUSION

For the reasons stated above and those set forth in appellant's opening brief, this Court should reverse Tyler's conviction. Alternatively, it should vacate the LFO order and remand for resentencing.

DATED this 28th day of March, 2016.

Respectfully submitted,

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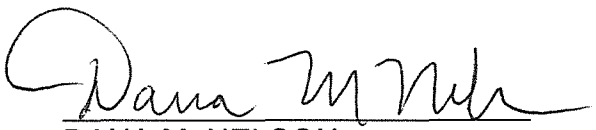

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ROBERT TYLER,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF MARCH, 2016, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ROBERT TYLER
2314 177TH AVENUE NE
SNOHOMISH, WA 98290

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF MARCH, 2016.

X Patrick Mayovsky