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Jul 12, 2016
Court of Appeals
Division I
State of Washington

NO. 73564-1-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

ROBERT LEE TYER,

Appellant

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. SUPPLEMENTAL ARGUMENT

The defendant assigned error to his conviction for possession of stolen property on the basis that there was insufficient evidence to support the charge. BOA at 1. He argued that because the court included the definition of possession of stolen property in the to-convict instruction there must be sufficient evidence to support each alternative definition. He relied on State v. Lillard, 122 Wn. App. 422, 93 P.3d 969 (2004), review denied, 154 Wn.2d 1002 (1995). In Lillard this court said that because the to-convict instruction included each alternative definition of possession of stolen property there must be sufficient evidence to support each alternative, citing State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). Lillard, 122 Wn. App. at 435, n. 26.

In Hickman the court held that a party may assign error to the sufficiency of the evidence of elements which were included in the to-convict instruction unnecessarily. Hickman, 135 Wn.2d at 102-103. While venue was not an element of the charged crime, when the court included it in the to-convict instruction the State was required to prove it beyond a reasonable doubt. Id. at 105. Since there was insufficient evidence to prove venue, the case was dismissed. Id. at 106.

Washington follows the federal standard for sufficiency of the evidence. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). That standard is based on the due process right to be convicted on no less than proof beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 313-14, 61 L.Ed.2d 560 (1979). That standard requires a court to look at the evidence and determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 221.

Recently the United States Supreme Court clarified that when a jury instruction sets forth all the elements of the charged crime, but incorrectly adds one more element, sufficiency of the evidence is assessed against the charged crime and not against the erroneously heightened jury instructions. Musacchio v. United States, __ U.S. __, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016). The United State Supreme Court's decision is the controlling authority on issues involving the interpretation of the United States Constitution. State v. Hess, 12 Wn. App. 787, 792, 532 P.2d 1173 (1975). Since the sufficiency of the evidence standard in Washington is based on an interpretation of federal constitutional

law Hickman no longer controls a challenge to the sufficiency of the evidence where additional elements are included in the to-convict instruction.

The elements of possession of a stolen motor vehicle are (1) actual or constructive possession of a stolen motor vehicle, (2) and actual or constructive knowledge that the motor vehicle was stolen. RCW 9A.56.068, State v. Pruitt, 145 Wn. App. 784, 790, 187 P.3d 326 (2008). Possession of stolen property is defined as to "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). The reference to "receive, retain, possess, conceal, or dispose of stolen property" are not alternative means of committing the crime. State v. Hayes, 164 Wn. App. 459, 477, 262 P.3d 538 (2011). If they become alternative means when placed in the to-convict instruction as the court held in Lillard, then they are erroneously added elements of the crime. In that case pursuant to Musacchio this court should determine whether the evidence was sufficient by comparing it to the charged crime.

Here the defendant was an accomplice to possession of a stolen motor vehicle. The evidence showed that Mr. Champagne's 1990 Honda Accord was taken without his permission. He did not know either Tyson Whitt or Robert Tyler, and had not given them permission to possess his motor vehicle. 3/30/15 RP 17-19.

Tyson Whitt has stolen the vehicle. He drove it to a remote area in the middle of the night and stripped equipment out of the vehicle. He also took one tire and the catalytic converter. Whitt had arranged for Tyler to come get him at that remote location. When Tyler arrived Whitt put all of the things he removed from Mr. Champagne's vehicle into Tyler's truck. Whitt had prepared to take other tires off the vehicle by jacking up the car and loosening the bolts when Deputy Stich interrupted him. Whitt then got in the bed of the truck and concealed himself with a tarp. Although Tyler initially claimed ignorance, he later admitted that he was helping Whitt, and that he knew the vehicle had been stolen. 3/30/15 RP 35-41, 42, 54, 79-84; 3/31/15 RP 114-118. This evidence is sufficient for a rational trier of fact to find each of the elements beyond a reasonable doubt.

II. CONCLUSION

When additional elements are erroneously included in a to-convict instruction the court assesses the sufficiency of the evidence against the elements of the charge, not against the erroneous instruction. If including the definition of possession of stolen property in the to-convict instruction converts that definition to alternative means, then that definition results in addition additional elements unnecessarily. Although as previously argued there is sufficient evidence to prove the charge when the evidence is measured against the erroneous instruction, there is also sufficient evidence when measured against the charge of possession of a stolen motor vehicle. For that reason the conviction should be affirmed.

Respectfully submitted on July 11, 2016.

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

THE STATE OF WASHINGTON, Respondent, v. ROBERT LEE TYLER, Appellant.	No. 73564-1-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 27th day of July, 2016, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

SUPPLEMENTAL BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Dana Nelson, Nielsen, Broman & Koch, nelsond@nwattorney.net; and Sloanej@nwattorney.net.

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

Dated this 27th day of July, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office