

No. 94894-1
COA No. 76746-1-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF TUMWATER,

RESPONDENT,

v.

ALAN LEE LICHTI,
PETITIONER.

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

The Honorable Erik Price
Cause No. 15-1-00346-5
Thurston County District Court, No. P12-00111 ACT

ANSWER OF RESPONDENT
TO PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF RESPONDENT.

Respondent, City of Tumwater, was also the respondent in the Court of Appeals.

B. COURT OF APPEALS DECISION.

The petitioner is seeking review of State v. Lichtj, COA No. 76746-1-I, entered on July 31, 2017. The City of Tumwater incorporates herein by reference the briefs it filed in the Court of Appeals in this case.

C. ISSUES PRESENTED FOR REVIEW.

1. Whether the opinion of the Court of Appeals announced a new rule that is in conflict with other opinions of the Washington State Supreme Court and published opinions of the Court of Appeals.
2. Whether the opinion of the Court of Appeals announced a new standard of review for harmless error of constitutional magnitude which presents a significant question of law under the Constitutions of the United States and State of Washington.

D. ARGUMENT.

1. The Court of Appeals correctly followed the precedent set by the Washington State Supreme Court and did not create a new rule that conflicts with existing precedent.

The opinion of the Court of Appeals did not conflict with other opinions of Washington State Supreme Court and other published opinions of the Court of Appeals by finding that the facts of this case are controlled by the holding of State v. Linehan, 147 Wn.2d 638; 56 P.3d 542 (2002)(US Supreme Court certiorari denied by Linehan v. Washington, 538 U.S. 945, 155 L. Ed. 486 (2003)). In contrast, by following the holding of Linehan, the Court of Appeals correctly followed long standing precedent in the State of Washington.

Lichti argues that this court should accept review because the Court of Appeals should have applied the “uncontroverted evidence” standard. That standard is derived from the United States Supreme Court decision in Neder v. United States, 527 U.S. 1; 119 S.Ct. 1827 (1999). In Neder, the US Supreme Court considered whether the trial court’s instructions omitting an element of materiality in tax offenses was subject to harmless-error analysis. Id. at 7-8. After concluding that “the omission of an element is

subject to harmless-error analysis,” the Court indicated that the test for determining whether the error was harmless is “whether it appears “beyond a reasonable doubt, that the error complained of did not contribute to the verdict obtained.” Id. at 15. In applying the test to the facts of that case, the Court stated, “We believe that where an omitted element is supported by uncontroverted evidence, this approach reaches an appropriate balance between ‘societies interest in punishing the guilty and the method by which decisions of guilt are made.” Id. at 19.

This Court considered the decision in Neder in State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002). In Brown, the court considered harmless error in the context of an incorrect instruction regarding accomplice liability. Id. at 337-338. Discussing Neder, the court stated, “we must thoroughly examine the record before us as to each defendant [and] in order to hold the error harmless we must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.” Id. at 341. The court concluded, “to determine whether an erroneous instruction is harmless in a given case, an analysis must be completed as to each defendant and each count charged. From the record, it must

appear beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” Id. at 344.

Lichti cites to several other Washington State cases where instructional error was considered. In State v. Zimmerman, 130 Wn. App 170, 121 P.3d 1216 (2005), Division II of the Court of Appeals considered the erroneous inclusion of the victim’s date of birth in the to-convict instruction on a charge of child molestation. Id. at 174. After specifically noting that “no element was omitted from the jury’s to-convict instruction,” the court found “the instructional error was clearly harmless here, [victim]’s date of birth is undisputed...The record reflects beyond a reasonable doubt that but for the instructional error, the jury would have still found the J.C. was less than 12 years old at the time of the sexual contact.” Id. at 180.

In State v. Grimes, 165 Wn. App. 172 (2011), Division II of the Court of Appeals considered an erroneous instruction regarding unanimity in a special verdict form. Grimes, at 180. The court found that “Grimes has not attempted to challenge the uncontroverted evidence that the sale occurred less than 1,000 feet from a school route stop,” and held, “that the special verdict instructional error does not arise in an area entitled to constitutional

protection nor is it manifest, as grimes offered no evidence that it had practical and identifiable consequences in his trial.” Id. at 191. While the court discussed uncontroverted evidence, the court’s ultimate holding was that “any such error was harmless beyond a reasonable doubt in the context of Grime’s trial as it did not affect his rights at trial or the jury’s verdict.” Id.

In State v. Weaville, 162 Wn. App. 801, 256 P.3d 426 (2011), Division I of the Court of Appeals considered an erroneous instruction regarding the definition of penetration in a charge of Rape of in the Second Degree. Weaville, at 815. Noting that the victim had given conflicting accounts regarding penetration, the court stated, “we cannot say that the erroneous instruction was harmless as to Weaville’s conviction of rape in the second degree.” Id. at 816. The court went on to state however, that the error was harmless as applied to Weaville’s conviction for attempted rape in the second degree, specifically finding that “engaging in sexual intercourse is not an essential element of the crime of attempted second degree rape.” Id.

None of the cases cited to by Lichti address the issue that existed in Linehan and exist in this case. As in this case, Linehan addressed the question of “whether an instructional error that omits

a required portion of a definition and is unsupported by the evidence can be harmless.” State v. Linehan, 147 Wn.2d at 643. Unlike the cases cited to by Lichti, an uncontroverted evidence test cannot be applied to this issue because the court is looking at an omitted portion of a definition that is not supported by the evidence.

Lichti misses the distinction in Linehan. The court specifically stated, “Linehan has misconstrued the theft statute by interpreting the general definition statute...as creating additional alternative means of committing theft.” Id. at 647-648. The court held that “the definitions provided in former RCW 9A.56.010 do not create alternative means of theft.” Id. at 649. The court went on to note, “the jury need not be unanimous as to any of the definitions nor must substantial evidence support each definition.” Id. at 649-650.

The Linehan court then found that the improper definition regarding the “embezzlement definition” was erroneous. Id. at 653. In engaging in a harmless-error analysis, the court stated, “we find constitutional error harmless only if convinced beyond a reasonable doubt that any jury would reach the same result absent the error.” Id. at 654. The court went on to note

“Having established that there is no unanimity requirement for definitions, nor is there an exclusive definitional relationship between “exerts unauthorized control” and former RCW 9A.56.010(7)(b), we can no address the effect of the instructional error discussed above. At trial, Linehan testified that his lawyer had advised him that he could not keep the money. Linehan was also aware of that the money did not rightfully belong in his Washington Mutual account. The jury was free to use any definition in subsection (7) to define the alternative means of wrongfully obtains and exerts unauthorized control. The omission of the statutory language required for former RCW 9A.56.010(7)(b) is harmless here because there was ample evidence to support a finding that Linehan “took the property or services of another,” thereby satisfying subsection (7)(a), one of the other definitions of “wrongfully obtains” and “exerts unauthorized control” provided in former RCW 9A.56.010(7). Thus, while it was error to give the instruction on subsection (7)(b), it is superfluous, and the error is harmless beyond a reasonable doubt.”

Id. at 654. State v. Linehan was decided on October 24, 2002, approximately one month after State v. Brown was decided on September 19, 2002. Linehan, 147 Wn.2d at 638; Brown, 147 Wn.2d at 330. It is clear that this court intended to make a distinction when dealing with unique statutes that allow for alternative definitions of the means of committing an offense.

In this case, the Court of Appeals considered the exact issue that was litigated in Linehan. As in Linehan, an “uncontroverted evidence” test would make no sense as the instructional error was

for a definition that was not supported by the evidence. That instruction, however, was superfluous, because ample evidence supported a finding that Lichti “took the property or services of another.” The Court of Appeals did not apply an incorrect standard or deviate from existing precedent. Instead the Court of Appeals followed the existing law. As such, this court should deny review.

2. The Court of Appeals did not announce a new rule which presents a significant question of law under the Constitutions of the United States or the State of Washington.

As stated above, Lichti missed the distinction in Linehan. This case and the Linehan case involve a narrow set of facts in situations that involve alternative definitions for means of committing an offense. The legal analysis applied is not a new rule crafted by the Court of Appeals. The Court of Appeals simply followed the analysis contained in Linehan and acknowledged both Linehan and this case are factually distinguishable from cases that have mentioned “uncontroverted evidence.”

In support of his request for review, Lichti argues, without application, that applying a different standard in this case than to the cases that he cited “almost certainly violates the Due Process and Equal Protection Clauses of the U.S. Constitution.” Petition for

Discretionary Review at 13. This argument is without merit and even unsupported by the law contained in Lichti's Petition. Lichti correctly notes that the "uncontroverted evidence" standard does not apply to other types of constitutional error. Id. at 7. Each case that Lichti uses to argue the "uncontroverted evidence" standard, ultimately looked at whether, but for the error, the court was convinced beyond a reasonable doubt that the verdict would have been the same.

Following the analysis set forth in State v. Linehan, the Court of Appeals used the same ultimate test noting, "a constitutional error is harmless only if this court is convinced beyond a reasonable doubt that the jury would have reached the same result in the absence of the error." State v. Lichti, COA No. 76746-1-I, Unpublished Opinion at 3. The Court of Appeals applied the specific holding of State v. Linehan that "any error in defining one alternative means of committing [theft] was harmless, as there was sufficient evidence for the jury to convict using other definitions for the alternative means." Linehan, 147 Wn.2d at 641; Lichti, No. 76746-1-I at 7.


Any significant question of law that applies to this case was long ago settled in State v. Linehan. As such, there is no basis under RAP 13.4(b)(3) for this court to accept review.

E. CONCLUSION.

The opinion of the Court of Appeals follows existing precedent in cases involving instructional error in defining one alternative means of committing an offense. The opinion does not contradict any opinions reached by this court of published opinions of the Court of Appeals. Any significant issue of law under the Constitutions of the United States and the State of Washington based on facts similar to this case were settled by this Court's decision in State v. Linehan. As such, this court should deny Lichti's Petition for Discretionary Review.

Respectfully submitted this 14 day of September, 2017.

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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

Dated this 14th day of September, 2017, at Olympia, Washington.



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