NO.

Supreme Court of the State of Washington

CITY OF TUMWATER, Respondent

v.

ALAN L. LICHTI, Petitioner

PETITION FOR DISCRETIONARY REVIEW

COURT OF APPEALS, DIVISION I NO. 76746-1-I
THURSTON COUNTY SUPERIOR COURT, NO. 15-1-00346-5
THURSTON COUNTY DISTRICT COURT, NO. P12-00111 ACT

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TABLE OF CASES, STATUTES, AND OTHER AUTHORITIES

Cases:

A) IDENTITY OF PETITIONER

Alan L. Lichti, defendant in the underlying action, seeks review of the decision described in Part B, below.

B) COURT OF APPEALS DECISION

Mr. Lichti requests this Court accept review of the Washington State Court of Appeals, Division I's July 31, 2017 unpublished opinion in *City of Tumwater v. Lichti.*, Case No. 76746-1-I, which affirmed the RALJ court's order affirming the judgment and sentence in *City of Tumwater v. Lichti*, Thurston County Superior Court Case No. 15-1-00346-5, which was an order in a direct appeal from *City of Tumwater v. Lichti*, Thurston County District Court Case No. P12-00111 ACT. Specifically, Mr. Lichti requests this Court reverse the holding of the Court of Appeals, reverse Mr. Lichti's conviction, and remand this case to the trial court for a new trial.

C) ISSUES PRESENTED FOR REVIEW

Should this Court grant review where an opinion of a Court of Appeals panel held "sufficiency of the evidence" is the proper standard of review for the harmlessness of a constitutional instructional error that relieved the government of proving each element of the crime beyond a reasonable doubt, which is in conflict with several Washington Supreme Court and Court of Appeals published opinions? RAP 13.4(b)(1), (2).

Should this Court grant review where an opinion of a Court of Appeals panel recognized a new standard of review for harmlessness of trial error of constitutional magnitude, which presents a significant question of law under the Constitutions of the United States and State of Washington? RAP 13.4(b)(3).

D) STATEMENT OF THE CASE

1. Procedural posture.

Alan L. Lichti, a defendant in a criminal jury trial, was accused of one count of Theft in the Third Degree. CP 9.

At trial, the District Court instructed the jury that to convict Mr. Lichti of theft, the jury would have to find the City of Tumwater "proved beyond a reasonable doubt...[t]hat...the defendant wrongfully obtained or exerted unauthorized control over property of another." CP 70. The District Court separately defined "exert unauthorized control" in the jury instructions as "having any property in one's possession, custody or control, to secrete, withhold, or appropriate the same to his own use or to the use of any other person other than the true owner or person entitled thereto." CP 71. The District Court also separately defined "wrongfully obtains" as "to take wrongfully the property or services of another." CP 72. The District Court did not provide the jury with any instructions explaining the law of accomplice liability. *See* CP 61-78.

The jury found Mr. Lichti guilty. CP 79. Mr. Lichti appealed that conviction. CP 5. The Superior Court, acting in its appellate capacity, affirmed the judgment of conviction. CP 399-401. Mr. Lichti sought and obtained discretionary review from the Court of Appeals. Appx. A at 1.

The Court of Appeals held the definition of "exert unauthorized control" given by the District Court was erroneous, that the definition of "wrongfully obtains" was proper, and that the two definitions "do not create...alternative means of theft." Appx. A at 4, 7-8. The Court of Appeals also held the erroneous definition of "exert unauthorized control" "relieved the [government] of its burden to prove each element of the offense," and thus was subject to a constitutional harmless error analysis. *See id.* at 3, 6-7.

The Court of Appeals then concluded the "erroneous instruction was harmless beyond a reasonable doubt." *Id.* at 7. In doing so, the Court of Appeals held this constitutional instructional error was "harmless beyond a reasonable doubt" because "*[s]ufficient evidence* support[ed] the jury's finding" of guilt under the proper "wrongfully obtains" definition. *Id.* at 8 (emphasis added). The Court of Appeals held "evidence is sufficient if after viewing the evidence in the light most favorable to the [government], any rational trier of fact could have found the essential

elements of the charged crime beyond a reasonable doubt." *Id.* (internal citation omitted).

Discretionary review is now sought under RAP 13.4(b)(1), (2), and (3).

2. Facts relevant to the issues presented.

At trial, the jury heard evidence that that Mr. Lichti purchased an Acer laptop computer with cash from Wal-Mart. CP 54, 169-70, 172, 191, 213. Mr. Lichti drove to Wal-Mart in his white Ford Focus. CP 58, 185-86, 213. The jury also heard Mr. Lichti testify he went home, placed the laptop in his bedroom, left the keys to the Focus on his computer desk, and then left his house driving a different vehicle. CP 213-15.

Later that same day, another individual—a man in a yellow shirt, identified by Mr. Lichti as his former roommate "William Lee"—approached Wal-Mart's return counter and presented a laptop box and receipt, seeking a cash refund. CP 55, 58, 171-72, 215-16. Wal-Mart accepted the return and provided the cash refund to the man in the yellow shirt. CP 170. Later, Wal-Mart discovered the laptop box contained an older, broken HP laptop, and did not contain a newly-purchased functioning Acer laptop. CP 167. Although neither the receipt nor the box were introduced into evidence, the jury heard testimony that the box and receipt matched Mr. Lichti's purchase earlier in the day. CP 169-70, 174.

Furthermore, although no CCTV video was introduced into evidence, still photographs from the video and testimony were presented that the video showed the man in the yellow shirt was associated with a white Ford Focus in the Wal-Mart parking lot, and that the Focus appeared to be the same vehicle earlier associated with Mr. Lichti, and that the Focus had a license plate that indicated it was registered to Mr. Lichti. CP 57, 168-69, 187.

The investigating officer also testified a man called him from a telephone number that had previously been described to him by a woman located at Mr. Lichti's address as Mr. Lichti's telephone number. CP 112-13, 204-05. The caller identified himself as Mr. Lichti and, unprompted, "admitted to swapping out the new computer for an old broken computer" and that he "had a friend," known by his street name "Tennessee," "return it for money." *Id*. Mr. Lichti testified he was not that caller. CP 216.

Mr. Lichti also testified that Mr. Lee, the man in the yellow shirt, as his roommate had access to his Focus, and had access to his bedroom where he put the Acer laptop. CP 215-16. Mr. Lichti also testified that when he returned home, the Acer laptop was missing, surmising that Mr. Lee had taken it. *Id.* No evidence was presented that Mr. Lichti retained the Acer laptop or received any money from the man in the yellow shirt.

E) ARGUMENT

1. This Court should grant review where an opinion of a Court of Appeals panel held "sufficiency of the evidence" is the proper standard of review for the harmlessness of a constitutional instructional error that relieved the government of proving each element of the crime beyond a reasonable doubt, which is in conflict with several Washington Supreme Court and Court of Appeals published opinions.

"A petition for review will be accepted by the Supreme Court...[i]f the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or...[i]f the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals." RAP 13.4(b)(1), (2).

Historically, "an instruction that relieves the [government] of its burden to prove an element of a crime [was] automatic reversible error." *State v. Jennings*, 111 Wn. App. 54, 62 (2002). However, eighteen years ago "[t]he United States Supreme Court held that a jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to a harmless error analysis." *Id.* (citing *Neder v. United States*, 527 U.S. 1 (1999). Because such an error sounds in the "federal constitution," Washington State courts "must follow" the United States Supreme Court's analysis. *Id.* at 63-64.

The "*Neder* court" noted under a longstanding Federal rule, a "constitutional error is harmless" only when "it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *State v. Brown*, 147 Wn.2d 330, 341 (2002) (citing *Neder*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). "When applied to an element omitted from, or misstated in, a jury instruction, the error is harmless if that element is supported by uncontroverted evidence." *Id.* (citing *Neder*, 527 U.S. at 18). That is, for *any* constitutional error, the test is whether the government has proved "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Id.* (quoting *Neder*, 527 U.S. at 19). But for constitutional instructional error that consists of relieving the government of proving each element of the crime charged in particular, the government can only meet that burden of establishing harmlessness beyond a reasonable doubt by establishing the evidence "was uncontested and supported by overwhelming evidence." *Neder*, 527 U.S. at 17.

The "uncontroverted evidence" standard does not apply to other types of constitutional error. For example, where the constitutional error consists of adding an "unwanted affirmative defense," courts look at whether instructing on an unwanted defense "impacted jury deliberations by interfering with" the defendant's presentation of another defense by

"risk[ing] confusion" between defined terms, and whether the defendant had the opportunity to present evidence as to the unwanted defense. *State v. Corstine*, 177 Wn.2d 370, 381 (2013); *see also State v. Jones*, 99 Wn.2d 735, 748 (1983) (harmful error where "the jury was faced with two defense attorneys arguing conflicting defense theories" and where "much of the...evidence introduced at trial would have been inadmissible if [the unwanted] defense [had not been] raised"). Where constitutional error consists of admitting evidence in violation of the Confrontation Clause, courts have considered whether "the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *State v. Guloy*, 104 Wn.2d 412, 426 (1985); *see also State v. Lane*, 125 Wn.2d 825, 839-41 (1995) (applying "overwhelming untainted evidence" test to error consisting of improper judicial comments on the evidence); *see also State v. Thompson*, 151 Wn.2d 793, 808 (2004) (applying "overwhelming untainted evidence" test to error consisting of admission of evidence seized in violation of the Fourth Amendment).

But Washington courts *have* consistently applied an "uncontroverted evidence" test for constitutional error consisting of misstated or omitted elements since *Neder* was explicitly adopted by Washington courts in 2002. *See State v. Zimmerman*, 130 Wn. App. 170, 180 (2005) (the "instructional error was clearly harmless" because "J.C.'s

date of birth was undisputed"); *see also State v. Grimes*, 165 Wn. App. 172, 191 (2011) (where there was "no[] attempt[] to challenge the uncontroverted evidence that the sale occurred less than 1,000 feet from a school bus route stop...the procedure by which unanimity was achieved could not have affected the jury's special verdict on the sentence enhancement," even if that procedure was constitutional instructional error); *see also State v. Weaville*, 162 Wn. App. 801, 815 (2011) ("[C]onflicting evidence was presented regarding whether Weaville's penis had penetrated A.S.'s vagina.... [therefore] the erroneous jury instruction was [not] harmless as to Weaville's conviction of rape in the second degree"); *see also State v. Jones*, 117 Wn. App. 221, 231 (2003) (where "damning and uncontroverted evidence of [the omitted element of] knowledge" was presented at trial, court "conclude[d] beyond a reasonable doubt that the erroneous omission of the element of knowledge from the to-convict jury instruction had no effect on the verdict"); *see also Jennings*, 111 Wn. App. at 64-66; *see also Brown*, 147 Wn.2d at 341-43.

Even *Linehan*, which does not explicitly mention the "uncontroverted evidence" standard, is consistent with application of that standard. 147 Wn.2d 638 (2002). The *Linehan* court noted the evidence established "Linehan withdrew $105,000 from his Washington Mutual account" which had an "improper $116,999 balance," "and deposited the

sum...in his personal savings account at Continental Savings Bank," then "made 22 withdrawals from his Continental account." *Id.* at 642. Moreover, "[a]t trial, Linehan testified that his lawyer advised him that he could not keep the money" and that "Linehan was also aware that the money did not rightfully belong in his Washington Mutual account." *Id.* at 654. Finally, "Linehan refused to" provide a "promissory note for the outstanding sum...secure[d]...with collateral" at the request of Washington Mutual. *Id*. at 642. The *Linehan* court essentially found there was uncontroverted evidence as to what Mr. Linehan actually did, to wit: "took the property or services of another." *Id.* at 654. There is nothing in the *Linehan* opinion's references to "ample" and "sufficient" evidence that would suggest a new standard for harmless error review was being established; to the contrary, the court there reiterated "constitutional error [is] harmless only if [it was] convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error." *See id.* at 641, 654.

Here, the Court of Appeals, purporting to rely upon *Linehan*, found constitutional instructional error to be harmless if "[s]ufficient evidence support[ed] the jury's finding that Lichti wrongfully took the property or services of another." Appx. A at 8. By adopting a "sufficiency of the evidence" standard, the Court of Appeals explicitly rejected the well-

established "uncontroverted evidence" standard for analyzing the harmlessness of constitutional instructional error. *Id.* at 11. This holding conflicts with the Supreme Court's holding in *Brown*, as well as the Court of Appeals' holdings in *Zimmerman*, *Grimes*, *Weaville*, and *Jennings*.

2. This Court should grant review where an opinion of a Court of Appeals panel recognized a new standard of review for harmlessness of trial error of constitutional magnitude, which presents a significant question of law under the Constitutions of the United States and State of Washington.

"A petition for review will be accepted by the Supreme Court...[i]f a significant question of law under the Constitution of the State of Washington or of the United States is involved." RAP 13.4(b)(3).

Even if "uncontroverted evidence" were not the proper test, a "sufficiency of the evidence" test has no historical precedent, and conflicts with basic constitutional jurisprudence on the general rule for harmlessness of error of constitutional magnitude. Specifically, the Court of Appeals test announced here fails to actually test whether the error "contributed to the verdict." *See Brown*, 147 Wn.2d at 344.

"Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could find the essential elements of the crime beyond a

reasonable doubt." *State v. Rose*, 175 Wn.2d 10, 14 (2012). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* The court reviewing for sufficiency "must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *State v. Thomas*, 150 Wn.2d 821, 874 (2004).

First, the new test applied here "view[s] the evidence in the light most favorable to the" government. Appx. A at 8. This relieves the government of its burden of proving harmlessness beyond a reasonable doubt. *See Coristine*, 177 Wn.2d at 380.

Second, the new test applied here "defer[red] to the jury on questions regarding conflicting evidence, witness credibility, and the persuasiveness of evidence." Appx. A at 10. Here, the Court of Appeals specifically found "[a]lthough Lichti provided the jury with an alternative version of events, the jury did not believe him." *Id.* But in assessing harmlessness, the reviewing court must "thoroughly examine the record" to determine if "the jury verdict would have been the same absent the error." *Brown*, 147 Wn.2d at 341. The reviewing court should not defer to the fact finder at all in assessing harmlessness. *See State v. Koslowski*, 166 Wn.2d 409, 431-32 (2009).

Third, the Court of Appeals recognized that generally the "uncontroverted evidence" test for harmlessness applies to "[a]n erroneous jury instruction that omits an element of the charged offense," but that here "the uncontroverted evidence test does not apply" because this case involves "theft statutes." Appx. A at 11-12. No court has ever before recognized that the standard for assessing harmlessness of error of constitutional magnitude is somehow dependent upon which statute defines the crime. Indeed, to find theft cases are subject to a relaxed standard when compared to non-theft cases almost certainly violates the Due Process and Equal Protection Clauses of the U.S. Constitution.

Fourth, and most importantly, applying a new "sufficiency" test for harmless error turns the entire idea of a harmless error analysis on its head. "Constitutional error is presumed to be prejudicial." *Guloy*, 104 Wn.2d at 425. The harmless error analysis is supposed to be an exception to the general rule, "avoid[ing] reversal on merely technical or academic grounds while insuring that a conviction will be reversed where there is *any reasonable possibility*" that the error "was necessary to reach a guilty verdict." *Id.* at 426 (emphasis added). Applying "sufficiency" standard to the harmlessness of instructional error, on the other hand, essentially would presume harmlessness in almost every case, not just where the error is technical or academic, but also whenever there is any reasonable

possibility the jury could have convicted on the proper instructions it received. Essentially, a "sufficiency" test for harmlessness presumes the jury ignored the improper jury instructions, which is in conflict with Article IV, section 16 of the Washington State Constitution, as well as the instructions in this case. *See* CP 62.

F) CONCLUSION

The Court of Appeals' "sufficiency of the evidence" test for the harmlessness of constitutional instructional error is in conflict with Washington Supreme Court and Court of Appeals published opinions, and should be rejected. Furthermore, the Court of Appeals' "sufficiency of the evidence" test for harmlessness—because of its novelty, its burden shifting, its inappropriate deference to fact finders, its specific-to-theft nature, and its presumption-shifting—involves a significant constitutional question of law, and should be rejected. Under the proper "uncontroverted evidence" test for the harmlessness of constitutional instructional error, the

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City has failed to meet its burden of establishing harmlessness beyond a reasonable doubt. Reversal is required.

DATED this 23rd day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that a true copies of the foregoing PETITION FOR DISCRETIONARY REVIEW was mailed, postage prepaid, this 23rd day of August, 2017 to counsels for the Respondent as follows:

Thurston County Prosecuting Attorney's Office
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/s/ Christopher Taylor
Christopher Taylor

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF TUMWATER,	)	No. 76746-1-I
Respondent,	)	DIVISION ONE
v.	)	
ALAN L. LICHTI,	)	UNPUBLISHED
Appellant.	)	FILED: July 31, 2017

Cox, J. – Alan Lichti obtained discretionary review of the superior court's RALJ decision. That decision affirmed the district court's judgment of conviction for theft. Lichti argues that the district court's erroneous theft instruction prejudiced him. The superior court concluded that the erroneous instruction was harmless. Because the erroneous instruction was harmless beyond a reasonable doubt, we affirm.

Lichti drove to Walmart in his 2008 white Ford Focus. He purchased an Acer laptop computer, with cash, for $432.63. Lichti testified at trial that he drove home afterwards and placed the unopened laptop box in his bedroom, along with the keys to his Ford Focus. He lived with a few roommates at the time and had no lock on his bedroom door. Thereafter, he drove in another vehicle to a friend's house.

Approximately two hours after Lichti's purchase, someone went to Walmart and presented the Acer laptop box and receipt to customer service. He

received a cash refund of $432.63. He left the Walmart parking lot in a vehicle identified as Lichti's Ford Focus.

Walmart employees later opened the laptop box and discovered that it contained an old, broken HP brand laptop, not the new Acer. An employee tracked Lichti's purchase of the Acer laptop, obtained surveillance videos and photos, and called the Tumwater Police.

A police officer who investigated the incident testified at trial to calling Lichti's cell phone and speaking with him about the incident. The officer testified that Lichti admitted to the theft.

The City of Tumwater charged Lichti with one count of third degree theft of Walmart property. A jury found Lichti guilty as charged. The Thurston County district court entered its judgment and sentence on the jury's verdict.

Lichti appealed to the superior court, arguing that an erroneous theft instruction prejudiced him. The RALJ court affirmed his conviction, concluding that the erroneous instruction was harmless beyond a reasonable doubt.

Division II granted discretionary review of the RALJ court's decision.

JURY INSTRUCTION & HARMLESS ERROR

Lichti argues that the theft instruction was erroneous and prejudiced him. The State properly concedes that the instruction was erroneous. But it argues that the error was harmless beyond a reasonable doubt. We agree with the State.

An erroneous jury instruction that omits an element of the charged offense is subject to the constitutional harmless error analysis.[1] Prejudice is presumed, and the City bears the burden of proving that the error was harmless beyond a reasonable doubt.[2] 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 absence of the error."[3]

"Circumstantial evidence and direct evidence can be equally reliable."[4] But "inferences based on circumstantial evidence must be reasonable and cannot be based on speculation."[5] Inferences are logical conclusions or deductions from an established fact.[6]

Theft is the crime at issue in this case. It is an alternative means crime.[7] Under RCW 9A.56.020(1)(a), theft means:

> To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services . . . .

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[1] State v. Thomas, 150 Wn.2d 821, 844-45, 83 P.3d 970 (2004).

[2] See State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

[3] State v. Fisher, 185 Wn.2d 836, 847, 374 P.3d 1185 (2016).

[4] State v. Rodriquez, 187 Wn. App. 922, 930, 352 P.3d 200, review denied, 184 Wn.2d 1011 (2015).

[5] State v. Vasquez, 178 Wn.2d 1, 16, 309 P.3d 318 (2013).

[6] Tokarz v. Ford Motor Co., 8 Wn. App. 645, 654, 508 P.2d 1370 (1973).

[7] State v. Linehan, 147 Wn.2d 638, 647, 56 P.3d 542 (2002).

The phrases "wrongfully obtain" and "exerts unauthorized control" are defined together under RCW 9A.56.010(22), which reads, in relevant part:

> "Wrongfully obtains" or "exerts unauthorized control" means:
>
> (a) To take the property or services of another;
> (b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto; or
> (c) Having any property or services in one's possession, custody, or control as partner, . . . where the use is unauthorized by the partnership agreement.

Subsection (b) of these definitions is commonly known as theft by embezzlement.[8] These three definitions do not create additional alternative means of theft.[9]

State v. Linehan[10] is instructive regarding these theft statutes. There, the State charged Timothy Linehan with one count of first degree theft of money from Washington Mutual.[11] Due to an encoding error, Linehan's Washington Mutual

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[8] Linehan, 147 Wn.2d at 645.

[9] Id. at 649.

[10] 147 Wn.2d 638, 56 P.3d 542 (2002).

[11] Id. at 642.

account had extra funds, which he did not return.[12] A jury found him guilty as charged, and he appealed.[13]

On appeal, Linehan argued that the trial court improperly instructed the jury by omitting a required portion of the "unauthorized control" instruction.[14] Specifically, the trial court purported to follow Washington Pattern Jury Instruction 79.02, which provides, in relevant part:

> [Wrongfully obtains means to take wrongfully the property or services of another.]
>
> [To exert ***unauthorized control*** means, having any property or services in one's possession, custody or control, as a _____, to secrete, withhold or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.][15]

According to the WPIC committee, the blank portion of this instruction "is to be filled in with 'the nature of the custodian of the property' from the list set forth in . . . RCW 9A.56.010(22)(b)," as listed above.[16] But the trial court in that case provided the following instruction:

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[12] Id. at 641-42.

[13] Id. at 642.

[14] Id. at 652-53.

[15] Id. at 652 (emphasis added); see also 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 79.02, at 200 (4th ed. 2016) (WPIC).

[16] Id. at 652 (quoting 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 79.02, at 110 (2d ed. 1994) (WPIC)); RCW 9A.56.010(7) is now RCW 9A.56.010(22). For consistency, this prehearing will refer to RCW 9A.56.010(22) instead of RCW 9A.56.010(7).

> Wrongfully obtains means to take wrongfully the property or services of another.
>
> To exert unauthorized control means, having any property or services in one's possession, custody or control, ***and*** to secrete, withhold or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto.[17]

This instruction omits text that should have been inserted at the word "***and***."

The supreme court concluded that the trial court should have required the State "to allege and prove the appropriate relationship or agreement between Linehan and Washington Mutual and instructed the jury accordingly. To do otherwise . . . relieve[d] the [S]tate of its burden to prove every element of the offense."[18] Thus, the instruction was erroneous.

But the supreme court ultimately determined that the error was harmless beyond a reasonable doubt.[19] The court analyzed RCW 9A.56.010(22), determining that "any one or all three definitions [in the subsections] can define" the "wrongfully obtain" or "exerts unauthorized control" phrases.[20]

The court also explained that "[t]he omission of the statutory relationship language required for . . . 9A.56.010(22)(b) [wa]s harmless . . . because there was ample evidence to support a finding that Linehan '[took] the property or

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[17] Id. (emphasis added).

[18] Id. at 653.

[19] Id. at 654.

[20] Id. at 651.

services of another,'" thereby satisfying subsection (22)(a).[21] As stated above, 9A.56.010(22)(a) provides one of the three definitions of "wrongfully obtains" or "exerts unauthorized control."[22] Thus, the court concluded: "while it was error to give the instruction on subsection (22)(b), it is superfluous, and the error is harmless beyond a reasonable doubt."[23] The court specifically held that any error was harmless "as there was sufficient evidence for the jury to convict [Linehan] using other definitions for the alternative means set forth in RCW 9A.56.020."[24]

The same principles control in this case. Specifically, under Linehan, we conclude that the erroneous instruction was harmless beyond a reasonable doubt.

Here, the trial court instructed the jury that "[t]heft means to wrongfully obtain or exert unauthorized control over the property of another, or the value thereof, with intent to deprive that person of such property."[25] The trial court instructed the jury that "[w]rongfully obtains means to take wrongfully the property or services of another."[26] As in Linehan, the trial court also gave the jury the

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[21] Id. at 654 (some alteration in original).

[22] Id.

[23] Id.

[24] Id. at 641.

[25] Clerk's Papers at 69.

[26] Id. at 72.

embezzlement instruction without including the nature of the custodian of the property from the list set forth in RCW 9A.56.010(22)(b).[27]

But the trial court's omission of the required custodian language is harmless beyond a reasonable doubt, as it was in Linehan. Sufficient evidence supports the jury's finding that Lichti "wrongfully [took] the property or services of another," thereby satisfying RCW 9A.56.010(22)(a).[28]

Sufficient evidence justifies a jury's finding of guilt beyond a reasonable doubt.[29] "[E]vidence is sufficient if 'after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.'"[30]

Here, it is undisputed that Lichti drove to Walmart in his Ford Focus. He purchased an Acer laptop, with cash, for $432.63. Lichti testified that he drove home afterwards and placed the unopened laptop box in his bedroom, along with the keys to his Ford Focus. He then drove in another vehicle to a friend's house, leaving the laptop and Ford Focus keys in his bedroom. He had a few roommates at the time and had no lock on his bedroom door.

Approximately two hours after Lichti's purchase, someone ("man in the yellow shirt") went to Walmart and presented the Acer laptop box and receipt to

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[27] See id. at 71.

[28] Id. at 72.

[29] State v. Armstrong, 188 Wn.2d 333, 394 P.3d 373, 377 (2017).

[30] Id. (quoting State v. Ortega-Martinez, 124 Wn.2d 702, 708, 881 P.2d 231 (1994)).

customer service. He received a cash refund of $432.63. The serial number on the purchase receipt matched the serial number on the box. The man in the yellow shirt signed the return slip and left the Walmart parking lot in a vehicle identified as Lichti's Ford Focus.

Amanda Johnson, a Walmart asset protection employee, testified about her role in the incident. She stated that the customer service department alerted her to a suspicious return of an Acer laptop. Walmart employees opened the laptop box and discovered that it contained an old, broken HP brand laptop, not the new Acer laptop. Johnson tracked Lichti's purchase of the Acer laptop, obtained surveillance videos and photos of the purchase and return, and called the Tumwater Police. Johnson testified that Lichti was not the man in the yellow shirt.

Officer Bryant Finch responded to the call and spoke with Johnson. He went to Lichti's residence the next day. A woman answered the door and identified herself as Lichti's girlfriend. She identified Lichti in a photograph and provided Officer Finch with Lichti's cell phone number. Officer Finch called the number and left a voice message.

Later that day, the police dispatch center notified Officer Finch of a call from the same phone number. He returned the call and asked the answerer to identify himself. The person identified himself as "Alan Lichti." Officer Finch explained his reason for the call but did not mention that the laptops had been switched. The answerer told Officer Finch what happened, stating that he switched the laptops and had a friend return the older laptop for a refund. The

answerer also stated that he still had the Acer laptop and was willing to meet Officer Finch at the police station. Officer Finch told the answerer to bring the laptop. No one did so.

At trial, Lichti testified that after he returned from Walmart, he drove a truck to a friend's house. He explained that he used his truck for work and went to work after visiting with friends. He also stated that he returned home and discovered that the Acer laptop was missing. He did not report it stolen because he "believe[d] in karma" and also believed that one of his roommates had taken it and would return it. He identified the man in the yellow shirt as his roommate "William Lee," who had borrowed his car in the past.

Lichti also stated that he did not receive a voice message from Officer Finch, did not call the officer, and did not receive any money from Lee.

Overall, the jury was presented with conflicting evidence surrounding the theft. Officer Finch testified that Lichti allegedly returned his call and admitted to the theft, while Lichti testified that he did not do so. Although Lichti provided the jury with an alternative version of events, the jury did not believe him. We defer to the jury on questions regarding conflicting evidence, witness credibility, and the persuasiveness of evidence.[31]

The City presented sufficient circumstantial evidence that allowed the jury to reasonably infer that Lichti "wrongfully [took] the property or services of another," thereby satisfying RCW 9A.56.010(22)(a). Thus, we hold that the

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[31] Rodriquez, 187 Wn. App. at 930.

erroneous instruction was harmless beyond a reasonable doubt "as there was sufficient evidence for the jury to convict [Lichti] using other definitions for the alternative means set forth in RCW 9A.56.020."[32]

Lichti argues that the jury could have acquitted him under the wrongfully obtained instruction and convicted him under the erroneous unauthorized control instruction. Thus, he argues that the erroneous unauthorized control instruction may have contributed to the jury's verdict. This argument is unpersuasive.

As we previously discussed, the City presented sufficient evidence to allow the jury to reasonably infer that Lichti "wrongfully [took] the property or services of another."

Lichti argues that the erroneous instruction was prejudicial under the uncontroverted evidence test. But that test does not apply here.

An erroneous jury instruction that omits an element of the charged offense is subject to the constitutional harmless error analysis.[33] This specific type of erroneous instruction "'is harmless if that element is supported by uncontroverted evidence.'"[34]

Here, the uncontroverted evidence test does not apply because Linehan controls. There, the supreme court did not apply the uncontroverted evidence test to determine whether the erroneous theft instruction was harmless beyond a

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[32] Linehan, 147 Wn.2d at 641.

[33] Thomas, 150 Wn.2d at 844-45.

[34] Id. at 845 (quoting State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002)).

reasonable doubt. Rather, the supreme court determined that the erroneous instruction was harmless because sufficient evidence supported the jury's finding that Linehan wrongfully obtained Washington Mutual's property.

Linehan controls because the supreme court specifically analyzed the theft statutes at issue in this case. The cases that Lichti cites to support his argument do not do so.

Lastly, Lichti argues that Linehan is consistent with the uncontroverted evidence test, even though the opinion does not mention it. But the supreme court's references to "sufficient evidence" and "ample evidence" in its harmless error analysis demonstrates otherwise.[35]

We affirm the RALJ court's order affirming the judgment of conviction.

Cox, J.

WE CONCUR:

[35] Linehan, 147 Wn.2d at 641, 654.

C.R.TAYLOR LAW PS

August 23, 2017 - 5:01 PM

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