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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

JAMES LAWRENCE BALLARD, Appellant, v. STATE OF WASHINGTON, Respondent.	)	No. 80702-1-I DIVISION ONE UNPUBLISHED OPINION

ANDRUS, A.C.J. — James Ballard appeals his conviction for possession of a stolen vehicle, arguing that erroneous jury instructions effectively reduced the State's burden of proof, that he received ineffective assistance of counsel, and that prosecutorial misconduct denied him a fair trial. We conclude the instructions were not erroneous and Ballard has not demonstrated either ineffective assistance of counsel or prosecutorial misconduct. We affirm.

FACTS

On February 10, 2019, Erin Carper parked her 1999 green Honda CR-V in the Northgate Mall parking lot. When she later realized her car was missing, Carper contacted mall security. Carper learned, from the mall's surveillance

videos, that someone wearing a red, long-sleeved jacket and a dark hat stole her car. Carper reported the theft to the Seattle Police Department.

Later that evening, Mill Creek Police Officer Marc Schuermeyer saw the green Honda CR-V driving in front of him, ran the license plate, and learned the vehicle had been reported stolen. Officer Schuermeyer called for back-up and followed the car until it pulled into a retirement home parking lot.

When the vehicle entered the parking lot, Officer Schuermeyer activated his emergency lights and the vehicle stopped. The officer ordered the occupants out of the car. Ballard exited the driver's seat carrying two cell phones and a set of keys, which he dropped when ordered to do so. The passenger, Lane Shaw, wearing a red jacket and a dark hat, then got out of the car.

Officer Schuermeyer informed Ballard that the vehicle had been reported stolen. Ballard "just kind of shrugged his shoulders, hung his head a little bit" and denied knowing the vehicle was stolen. Ballard said he got the car from a friend earlier that day but refused to identify the friend because he did not want to be a "snitch." Ballard said his passenger was a friend whom he was driving home to Shoreline.

While Officer Schuermeyer interviewed Ballard, Sergeant Fleming spoke with the vehicle's owner, Carper, who informed him she had the car's keys. Officer Schuermeyer looked at the keys Ballard had dropped and described five or six of them as "jiggler keys," or keys that had been smoothed out to help in the theft of vehicles. When Officer Schuermeyer asked Ballard about the keys, Ballard denied they were jiggler keys.

Carper was unable to retrieve her vehicle because of adverse weather conditions, so the officers tried to secure it using the jiggler keys. Officer Schuermeyer asked Ballard which key he had used on the car and Ballard pointed to one of the keys. Officer Eikenberry used that key to unlock the door and turn the ignition enough to turn the radio on. But he could not get the engine to turn over and was unable to roll up the windows or otherwise secure the vehicle. Office Eikenberry took the jiggler keys out of the ignition and placed them on the hood of Officer Schuermeyer's patrol car. Unaware the keys' location, Officer Schuermeyer drove Ballard and Shaw to the Snohomish County jail. When Officer Schuermeyer returned to the station, he and Officer Eikenberry discovered the keys were missing, returned to the parking lot to look for them, but were unable to recover the keys.

Ballard was charged with possession of a stolen motor vehicle in violation of RCW 9A.56.068 while on community custody. Ballard's defense at trial was that Shaw stole the car but Ballard did not know Shaw had done so and thus did not know he was driving a stolen car when the police pulled him over.

The trial court instructed the jury in Instruction No. 5:

> A person commits the crime of possessing a stolen motor vehicle when he or she possesses a stolen motor vehicle.
>
> Possessing a stolen motor vehicle means knowingly to retain or possess a stolen motor vehicle 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.[1]

Instruction No. 6 provided:

[1] Instruction No. 5 was based on Washington Pattern Jury Instruction, WPIC 77.20.

> To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 10th day of February, 2019, the defendant knowingly retained or possessed a stolen motor vehicle;
>
> (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
>
> (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
>
> (4) That any of these acts occurred in the State of Washington.[2]

During deliberations, the jury sent the court a question asking:

> Instruction 6(1) Knowingly: when in the process does James Ballard need to know/realize the car was stolen to be found guilty: when he got in the car? At some point during the drive? When the police pulled him over?

The State asked the trial court to direct the jury back to its instructions. Defense counsel agreed with this request but expressed concerns that the question indicated the jury was "disregarding the idea that he's got to be in possession of it when he knows" the car was stolen and suggested the jury be directed specifically to the "to convict" instruction, Instruction No. 6. The State indicated such a response would improperly highlight that instruction over all of the others or constitute a comment on the evidence. The trial court chose to respond: "You need to refer to your jury instructions as a whole." Neither the State nor defense counsel objected to the court's response.

[2] Instruction No. 6 was based on Washington Pattern Jury Instruction, WPIC 77.21.

The jury convicted Ballard and the court sentenced him to 50 months of incarceration. Ballard appeals.

ANALYSIS

Ballard argues the trial court's answer to the jury's question was an instructional error that reduced the State's burden of proof and resulted in a manifest violation of due process. Ballard further contends that he received ineffective assistance of counsel when his trial counsel failed to object to the court's "faulty" response to the jury's inquiry. Finally, in a statement of additional grounds, Ballard argues the State committed prosecutorial misconduct by using the phrase "shaved keys" to describe the jiggler keys, in violation of one of the court's pretrial rulings.

A. Instructional Error

Ballard first contends the trial court erred in failing to give the jury additional instructions in response to its question about the meaning of the word "knowingly" as used in Instruction No. 6. Because Ballard did not object to the jury instructions or the court's response to the jury question below, RAP 2.5(a) prevents him from raising the issue for the first time on appeal unless he can show that this was a "manifest error affecting a constitutional right." RAP 2.5(a). To meet RAP 2.5(a), the appellant must demonstrate that the error is both manifest and truly of constitutional dimension. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

We do not "assume the alleged error is of constitutional magnitude." State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2009). The appellant must identify a

constitutional error and show how that error affected their rights. State v. Gordon, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). In instances where the allegation is that the defendant's due process rights were violated because he was denied a fair trial, the court will look at the defendant's allegation of a constitutional violation, and the facts alleged by the defendant, to determine whether, if true, the defendant's constitutional right to a fair trial has been violated. O'Hara, 167 Wn.2d at 98-99.

Ballard argues the alleged instructional error was one of constitutional magnitude because it impermissibly lessened the State's burden of proof at trial. He contends the State had to establish Ballard knew the car was stolen before the police initiated the traffic stop. He argues the jury must have been confused about the temporal requirement and by failing to clarify it in response to the jury's question, he asserts, the court lessened the State's burden of proof on an essential element of the crime. We disagree.

Due process requires a criminal defendant be convicted only when every element of the charged crime is proved beyond a reasonable doubt. O'Hara, 167 Wn.2d at 105. To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case. Id. The instructions in this case met this constitutional test.

O'Hara is instructive here. In that case, the defendant, charged with second degree assault, claimed he struck the alleged victim because the victim had punched him in the forehead in a struggle for his car keys. O'Hara, 167 Wn.2d at

95. O'Hara requested and the court gave a self-defense instruction that informed the jury the defendant's use of force was lawful if used to prevent or attempt to prevent a malicious trespass or the malicious interference with his property. Id. at 96. The trial court defined "malice" as used in the self-defense instruction as "an evil intent, wish, or design to vex, annoy or injure another person." Id. at 96. O'Hara did not object to this instruction. On appeal, O'Hara argued the instruction provided an incomplete definition of "malice," and the trial court omitted a portion of the statutory definition in RCW 9A.04.110(12). Id. at 97.

This court held the omission in the jury instruction was a manifest error affecting a constitutional right that O'Hara could raise for the first time on appeal. Id. at 97. The Supreme Court disagreed. It established a clear test: to determine whether a jury instruction gives rise to an error of constitutional magnitude, "we must examine whether the instruction omitted an element so as to relieve the State of its burden or merely failed to further define one of those elements." Id. at 105. It held that failing to provide the full statutory definition of "malice" was not of constitutional magnitude because the State was not relieved of its burden of proving any elements of the crime or in disproving O'Hara acted in self-defense. Id. at 108. The court reasoned the incomplete "malice" definition was "at most, a failure to further define one of the elements." Id. at 105-06.

Here, like O'Hara, the trial court correctly instructed the jury on the law of possession of a stolen vehicle and did not relieve the State of the burden of proving every element of the crime. RCW 9A.56.068 provides:

> (1) a person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle.

Washington courts apply the definition of "possessing stolen property" found in RCW 9A.56.140(1) to the crime of possessing a stolen vehicle. State v. Lakotiy, 151 Wn. App. 699, 714, 214 P.3d 181 (2009). RCW 9A.56.140(1) defines "possessing stolen property" as:

> [K]nowingly 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. (Emphasis added).

Reading RCW 9A.56.068 and RCW 9A.56.140(1) together, the State must prove beyond a reasonable doubt that the defendant knew, at the time he possessed or retained the vehicle, that it was stolen.

Here, Instruction No. 6 properly instructed the jury that, to find Ballard guilty, the State had to prove that Ballard "knowingly retained or possessed a stolen motor vehicle" and "acted with knowledge that the motor vehicle had been stolen." Instruction No. 5 further provided the temporal requirement Ballard contends was missing in Instruction No. 6: "A person commits the crime . . . when he or she . . . knowingly [ ] retain[s] or possess[es] a stolen motor vehicle knowing that it has been stolen and [ ] withhold[s] or appropriate[s] [the vehicle] to the use of any person other than the true owner." The "when" clause in Instruction No. 5 communicated to the jury that, as Ballard argues, "the possession and the knowledge must coincide." Ballard concedes that Instruction No. 5 "made this standard manifestly apparent, defining the crime as 'knowingly to retain or possess a stolen motor vehicle knowing that it has been stolen.'"

Ballard argues that the jury question suggests some jurors may have believed Ballard realized the vehicle was stolen only after the police stopped him in the parking lot. If such were the case, he contends, Ballard could not have "knowingly" withheld or appropriated the car from its true owner because he was in police custody by the time he realized Shaw had stolen the car. Id. He maintains the trial court should have clarified that the State had to prove both that the defendant knowingly possessed a stolen vehicle and that he "knowingly withheld or appropriated the car" from the true owner.

For this argument, Ballard relies on State v. McKinsey, 116 Wn.2d 911, 810 P.2d 907 (1991). In that case, the Supreme Court evaluated whether possession of stolen property constituted a crime of dishonesty for purposes of determining its admissibility as a prior conviction under ER 609(a)(2). Id. at 912. After examining the statutory language in RCW 9A.56.140, the court concluded it was a crime of dishonesty because the word "dishonest" implied the act of telling a lie, cheating, deceiving or stealing. Id. at 913. It wrote:

> The property involved is stolen property, known by defendant to be stolen property, which defendant knowingly receives, retains, possesses, conceals or disposes of. Defendant, with this knowledge, withholds this property or appropriates it to the use of someone other than the person entitled to it.

Id. at 913 (emphasis added). Ballard argues this single sentence in McKinsey demonstrated the error in Instruction No. 6 because the "to convict" instruction did not clearly inform the jury that the State had to prove that Ballard withheld the vehicle from its owner after learning it had been stolen.

But McKinsey did not address the adequacy of the "to convict" instruction for possession of a stolen vehicle and the sentence on which Ballard relies was

penned in a completely different context. "In considering such statements made in the course of judicial reasoning, one must remember that general expressions in every opinion are to be confined to the facts then before the court and are to be limited in their relation to the case then decided and to the points actually involved." Peterson v. Hagan, 56 Wn.2d 48, 53, 351 P.2d 127 (1960).

Moreover, the instructions as a whole did inform the jury of the law, albeit not with the same language as the Supreme Court used in McKinsey. RCW 9A.56.140(1) does not define "to withhold" or "to appropriate." But when a term is not statutorily defined, we rely on the ordinary dictionary meaning of the term. State v. Edwards, 84 Wn. App. 5, 10, 924 P.2d 397 (1996). To "withhold" means to "keep in one's possession or control: keep back." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2627 (2002). To "appropriate" means "to claim or use as if by an exclusive or preeminent right." Id. at 106. Both verbs imply intentional conduct. This conclusion is bolstered by the requirement that the State also prove Ballard acted for the benefit of someone "other than the true owner or person entitled" to use the vehicle. The only reasonable reading of the withholding or appropriating element in Instruction No. 6 is that the State must prove Ballard acted with the knowledge the vehicle was stolen and with the intent to keep the stolen vehicle from its true owner.

Instruction No. 7 informed the jury that a person acts knowingly or with knowledge when that person acts intentionally. By finding Ballard guilty, the jury must have found, as required by the instructions, that Ballard both knew the car was stolen and intended to withhold that stolen car from its true owner.

The jury instructions as a whole were legally adequate, included all the elements of the charged offense, and did not lessen the State's burden of proof. Any failure to supplement the instructions to clarify that possession, knowledge, and intent to withhold from the true owner "must coincide" is not a question of constitutional magnitude when the instructions as a whole make this clear. See State v. Ng, 110 Wn.2d 32, 44, 750 P.2d 632 (1988) (as long as instructions, read as whole, correctly state the law, challenge to instructions on appeal not one of constitutional magnitude).

Even assuming there was an error of constitutional magnitude, Ballard has not demonstrated the error was manifest. An error is manifest only when it results in actual prejudice. O'Hara, 167 Wn.2d at 99. "To demonstrate actual prejudice, there must be a plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case." Id. (internal quotations omitted). "[T]o be manifest, the error must have practical and identifiable consequences apparent on the record that should have been reasonably obvious to the trial court." Id. at 108. Ballard has not met this standard.

Ng is instructive here. In that case, Ng challenged his conviction for robbery and assault, raising numerous purported instructional errors. 110 Wn.2d at 34. Ng had been charged with felony murder for shootings that occurred in the course of a robbery and first degree assault. At trial, the court instructed the jury that robbery is not unlawful if "done under duress." Id. at 35. It also instructed the jury it could find Ng guilty of first degree robbery as a lesser included offense to felony murder, and second degree assault as a lesser included offense to first degree

assault. Id. at 36. During deliberations, the jury sent a question to the court asking "Does the term duress apply to all lesser charges?" Id. at 36. The trial court advised the jury to refer to the instructions as given. Id.

On appeal, Ng contended the court's failure to include duress language in the "to convict" robbery instruction deprived him of a fair trial because the State's burden to disprove duress was unclear. Id. at 40-41. Ng argued the court created an ambiguity by referring to duress in the definition of robbery for felony murder purposes but not in the "to convict" robbery instruction. Id. at 43. Ng relied, in part, on the question from the jury to demonstrate this confusion. Id.

The Supreme Court rejected Ng's reliance on the jury's question and his claim it proved jury confusion. It held "the jury's question does not create an inference that the entire jury was confused, or that any confusion was not clarified before a final verdict was reached." 110 Wn.2d at 43. Because the jury's verdict "was clear and complete," it found no abuse of discretion in the court's decision to refer the jurors to the instructions as given. Id. at 44.

Here, like in Ng, the jury's question as to the meaning of the word "knowingly" does not establish jury confusion and certainly does not persuade us that the alleged instructional error was obvious to the trial court. We will not, as instructed by our Supreme Court, presume the jury was confused as to the law simply because the jury posed a question regarding the meaning of a particular word in an instruction. The jury's verdict was, as in Ng, "clear and complete." The failure to provide a supplemental definition of "knowingly" in response to the jury's question was not a manifest error.

Because the alleged error was neither of constitutional magnitude nor manifest, Ballard has failed to preserve the claim that the trial court erred in failing to supplement its instructions after the jury began its deliberations.

B. Ineffective Assistance of Counsel

Ballard alternatively contends he is entitled to relief because he received ineffective assistance of counsel for failing to object to the "faulty" jury instructions. Because Ballard has failed to demonstrate deficient performance, we also reject this argument.

A criminal defendant has the right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). To establish ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that deficient performance resulted in prejudice. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011); Strickland v. Wash., 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-45, 899 P.2d 1251 (1995).

Ballard contends his trial counsel should have requested a supplemental instruction based on McKinsey when it appeared the jury might convict Ballard based on "innocent (unknowing) withholding or appropriation." But because the jury instructions correctly set out the elements of the charged crime, there is no

basis for concluding that trial counsel's performance was deficient. We therefore reject his ineffective assistance of counsel claim.

C. Statement of Additional Grounds

Finally, in a statement of additional grounds, Ballard appears to argue that the State committed prosecutorial misconduct by referring to the keys he dropped on the ground as "shaved keys."

"'Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.'" State v. Lindsay, 180 Wn.2d 423, 430, 326 P.3d 125 (2014) (quoting State v. Brett, 126 Wn.2d 136, 174-75, 892 P.2d 29 (1995)). The defendant bears the burden of showing that the comments were improper and, if so, whether the improper comments caused prejudice. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

Ballard sought to exclude any evidence of possessing "shaved keys" or "jiggler keys" because the keys were lost by the police. During a pretrial hearing, the trial court denied the motion and permitted the State to present evidence regarding the keys being lost. But it also ruled that in general, the court does not allow witnesses to call something "shaved keys." "The officers can describe what the keys looked like, but having them say 'shaved keys,' I don't see that—[it] could be something along the lines of they appeared to be filed down, something along those lines, but I don't want them to use the . . . pejorative words 'shaved keys.'" The court confirmed that the State and witnesses could use the phrases "jiggler key," "filed key," or "altered keys," but could not use the phrase "shaved key."

During trial, the prosecutor used the term "shaved keys" twice: once during the State's opening statement, and once while questioning Officer Schuermeyer on redirect. Defense counsel did not object to the use of this phrase on either occasion.

When a defendant fails to object to portions of a prosecutor's argument or questions of a witness, he is deemed to have waived any error unless the prosecutor's misconduct is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. Emery, 174 Wn.2d at 760-61. We focus less on whether the prosecutor's statements were flagrant and more on whether the resulting prejudice could have been cured. Id. at 762. The defendant must show that (1) no curative instruction would have eliminated the prejudicial effect, and (2) the error resulted in prejudice that had a substantial likelihood of affecting the verdict. Id. at 761.

The record strongly suggests the State's reference to "shaved keys" was inadvertent, that a curative instruction would have eliminated any alleged prejudice, and the passing references by the State resulted in no prejudice to Ballard. In fact, defense counsel used the phrase during his cross-examination of Officer Schuermeyer when he asked "You've testified on direct that you confronted Mr. Ballard with the idea that those keys were shaved. Right?" Officer Schuermeyer corrected counsel, indicating he had testified that they were jiggler keys. Id. Defense counsel again referred to the phrase during closing arguments where he recounted how Ballard had denied the keys were shaved keys: "[Y]ou also heard the officer acknowledge with me [that] my client said, no, they're not

shaved keys, no, they're not jiggler keys, he denied it." That Ballard's own counsel used the phrase is a strong indication that the inadvertent use, despite the ruling in limine, had no impact on the outcome of this case. His prosecutorial misconduct claim fails.

We affirm.

Andrus, A.C.J.

WE CONCUR:

Leach, J.

Appelwick, J.