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A. ASSIGNMENTS OF ERROR

1. Mr. Campbell's conviction violated his Fourteenth Amendment right to due process.

2. The trial court provided an erroneous definition of knowledge.

3. The trial court erred by giving Instruction No. 9.

4. The trial court's instruction defining knowledge contained an improper mandatory presumption.

5. The court's instruction defining knowledge impermissibly relieved the State of its burden to establish each element by proof beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Trafficking in Stolen Property in the First Degree requires proof that the accused person acted knowingly. The trial court instructed the jury that knowledge "is established if a person acts intentionally," without limiting the intentional acts that could be used as proof of knowledge. Did the trial court's instruction misstate the law and relieve the State of its burden of proof?

2. A jury instruction creates a conclusive presumption whenever a reasonable juror might interpret the presumption as mandatory. The trial judge instructed the jury that "Acting knowingly or with knowledge...is

established if a person acts intentionally.” Did the court’s instruction defining knowledge create an unconstitutional mandatory presumption?

C. STATEMENT OF THE CASE

John Campbell was looking for a foreclosure property that he could buy cheap and fix up. 03/02/11 RP at 41. He thought the home at 37 Dekay Road might be the place. 03/02/11 RP at 41-42. The grass grew tall around it and it looked like no one was living there. 03/02/11 RP at 41.

One day, Campbell drove to the Dekay Road house hoping to get an address off the mailbox. 03/02/11 RP at 42. With the address, he hoped to track down the owner and see if the home was for sale or, maybe, available as a rental. 03/02/11 RP at 41-42. When Campbell arrived at 37 Dekay Road, he saw a man in the yard so he went to talk to him. 03/02/11 RP at 42. The man said his name was John Butts and that he did not know who owned the property. 03/02/11 RP at 43. Butts went on to say that a person named Tom Wells Jr. gave him permission to scrap the cars and that Wells owned the cars. 03/02/11 RP at 43.

Campbell helped Butts load part of a scrapped car onto Butts’ trailer. 03/02/11 RP at 43. In appreciation, Butts offered Campbell a junk

riding lawn mower, a junk freezer, and a junk water tank. 03/02/11 RP at 44. Butts helped Campbell load the items onto his truck. 03/02/11 RP at 44. Campbell drove to Butcher' Scrap Metal in Hoquiam to sell the items for scrap. 03/02/11 RP at 9, 44. Campbell is a regular customer at Butcher's. 03/02/11 RP at 22.

Before Campbell left Butcher's, Grays Harbor Deputy Sheriff Randy Gibson showed up there. 03/02/11 RP at 9. Deputy Gibson asked Campbell questions and Campbell answered the questions. 03/02/11 RP at 12-13. Campbell told Deputy Gibbons that he had Tom Wells Jr.'s permission to scrap the items. 03/02/11 RP at 12.

The true owner of the Dekay Road home and property was David Williams. 03/02/11 RP at 30. Williams did not know Campbell and never gave him permission to take anything from the Dekay Road property. 03/02/11 RP at 30-32. A person named Tom Wells Jr. who owned a log truck and had a horse rental business in Ocean Shores, did not know Campbell, David Williams, or John Butts. 03/02/11 RP at 36-37. Wells never gave anyone permission to act on his behalf at 37 Dekay Road. 03/02/11 RP at 36-37. Wells was never connected to that house in any way. 03/02/11 RP at 37.

Months later, Campbell was charged with Trafficking in Stolen Property in the First Degree. CP 1-2. During his testimony, he

acknowledged, only in hindsight, after listening to the other witnesses, that Butts did not own the Dekay Road house and had no permission to scrap cars owned by Tom Wells. 03/02/11 RP at 54. Campbell also acknowledged that Wells had no authority to speak for David Williams. 03/02/11 RP at 57. However, on the day he took the items offered by Butts, he believed that Butts had permission to scrap items from the Dekay Road property. 03/02/11 RP at 57.

At trial, the court instructed the jury that conviction required proof that Mr. Campbell “knowingly trafficked in stolen property.” Instruction No. 8; CP 6. The court defined the word “traffic” as “to sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person....” Instruction No. 5; CP 5. In another instruction, the court explained to the jury that “[a]cting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 9; CP 7.

Mr. Campbell was convicted and sentenced to 57 months in prison. CP 10, 13. He timely appealed. CP 19.

D. ARGUMENT

MR. CAMPBELL’S TRAFFICKING CONVICTION VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE COURT’S KNOWLEDGE INSTRUCTION CREATED A MANDATORY PRESUMPTION AND RELIEVED THE STATE OF ITS BURDEN TO PROVE THE ESSENTIAL ELEMENTS OF THE OFFENSE.

Under the Fourteenth Amendment's Due Process Clause, criminal defendants are presumed innocent, and the government must prove guilt beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). An omission or misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of an offense violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Jury instructions must be "manifestly clear," since juries lack the tools of statutory construction available to courts. *See, e.g., State v. Harris*, 122 Wn.App. 547, 554, 90 P.3d 1133 (2004).

Furthermore, due process prohibits the use of conclusive presumptions in jury instructions. Such presumptions conflict with the presumption of innocence and invade the fact-finding function of the jury. *State v. Savage*, 94 Wn.2d 569, 573, 618 P.2d 82 (1980) (citing *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979) and *Morrisette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952)). A conclusive presumption is one that requires the jury to find the existence of an elemental fact upon proof of the predicate fact(s). *Seattle v. Gellein*, 112 Wn.2d 58, 63, 768 P.2d 470 (1989). An instruction creates

a conclusive presumption whenever “a reasonable juror might interpret the presumption as mandatory.” *State v. Deal*, 128 Wn.2d 693, 701, 911 P.2d 996 (1996).

The Washington Supreme Court has “unequivocally rejected the [use of] any conclusive presumption to find an element of a crime,” because conclusive presumptions conflict with the presumption of innocence and invade the province of the jury. *State v. Mertens*, 148 Wn.2d 820, 834, 64 P.3d 633 (2003). Conclusive presumptions are unconstitutional, whether they are judicially created or derived from statute. *Id.*, at 834.

RCW 9A.08.010 (“General requirements of culpability”) defines the mental states used in the criminal code. Under certain circumstances, proof of one mental state can substitute for proof of a lesser mental state. Thus “[w]hen acting knowingly suffices to establish an element, such element also is established if a person acts intentionally.” RCW 9A.08.010(2).

Here, the prosecution was required to prove that Mr. Campbell knowingly trafficked in stolen property. Instruction No. 8; CP 6. “Traffic” was defined to mean “to sell, transfer, distribute, dispense or otherwise dispose of stolen property to another person...” Instruction No. 5; CP 6. Although this definition does not explicitly use the word

“intentionally,” each verb used to define “traffic” describes an intentional action. Thus conviction required proof of an intentional act (for example, a sale) performed with knowledge (that the property sold was stolen property).

The trial court’s instruction defining knowledge included the following language: “Acting knowingly or with knowledge also is established if a person acts intentionally.” Instruction No. 9; CP 7. The instruction did not place any limitation on the intentional acts that could establish the knowledge required. Thus the jury could have interpreted Instruction No. 9 to mean that any intentional act (including the intentional sale of property) conclusively established Mr. Campbell’s knowledge (that the property was stolen)—even if he were actually ignorant of the property’s status.

Identical language in an instruction defining “knowledge” has previously been found to require reversal under the same circumstances. *State v. Goble*, 131 Wn.App. 194, 126 P.3d 821 (2005). The Court of Appeals has recently reaffirmed its holding in *Goble*, in light of subsequent revisions to WPIC 10.02. *State v. Hayward*, 152 Wn.App. 632, 217 P.3d 354 (2009).

The flawed language first criticized in *Goble* requires reversal in this case. *Hayward*. A reasonable juror might interpret the language as

creating a mandatory presumption permitting conviction upon proof of any intentional act, even in the absence of actual knowledge. Since juries lack the tools of statutory construction, the trial court's failure to give an instruction that was manifestly clear requires reversal under the stringent test for constitutional error.

Constitutional error is presumed prejudicial. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000). To overcome the presumption, the State must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *Id.*, at 32. A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Instructions with conclusive presumptions require a more thorough harmless-error analysis than other unconstitutional instructions. The reviewing court must conclude that the error was "unimportant in relation

to everything else the jury considered on the issue in question...” *Yates v. Evatt*, 500 U.S. 391, 403, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), *overruled (in part) on other grounds by Estelle v. McGuire*, 502 U.S. 62, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). In other words,

A court must take two quite distinct steps. First, it must ask what evidence the jury actually considered in reaching its verdict...[I]t must then weigh the probative force of that evidence as against the probative force of the presumption standing alone...[I]t will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue...is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption.

Yates, at 403-405 (footnotes and citations omitted).

A court must examine the proof actually considered, and ask: [W]hether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict *resting on that evidence* would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said...that the presumption did not contribute to the verdict rendered.

Yates, at 403-405 (emphasis added). Thus, a reviewing court evaluating harmlessness cannot rely on evidence drawn from the entire record “because the terms of some presumptions so narrow the jury’s focus as to leave it questionable that a reasonable juror would look to anything but the

evidence establishing the predicate fact in order to infer the fact presumed.” *Yates*, at 405-406.¹

Here, the conclusive presumption required the jury to find Mr. Campbell acted with knowledge. Instruction No. 8; CP 7. The instruction provided no guidance as to what intentional acts could be considered a predicate for the presumed fact (that Mr. Campbell acted with knowledge). No limits were placed on what the jury could consider as predicate facts; under the instruction, jurors could presume knowledge from proof of *any* intentional act.

The absence of any limitation makes the conclusive presumption here worse than any of the instructions considered in the Supreme Court cases outlined above. *See, e.g., Sandstrom*, at 512 (“the law presumes that a person intends the ordinary consequences of his voluntary acts”); *Morissette*, *supra* (intent to steal presumed from the isolated act of taking); *Francis v. Franklin*, 471 U.S. 307, 309, 105 S. Ct. 1965, 85 L. Ed. 2d 344 (1985) (“[the] acts of a person of sound mind and discretion are presumed to be the product of the person’s will, but the presumption may be rebutted,” and “[a] person of sound mind and discretion is presumed to

¹ In *Deal*, *supra*, the court applied the standard test for constitutional harmless error, without reference to *Yates v. Evatt*. *Id.*, at 703. Presumably, this was because the defendant in *Deal* testified and acknowledged the facts that were the subject of the conclusive presumption. *Id.*, at 703.

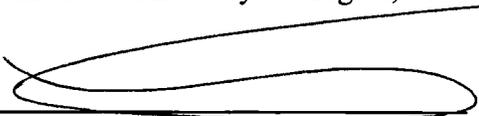
intend the natural and probable consequences of his acts but the presumption may be rebutted”); *Carella v. California*, 491 U.S. 263, 266, 109 S. Ct. 2419, 105 L. Ed. 2d 218 (1989) (“a person ‘shall be presumed to have embezzled’ a vehicle if it is not returned within 5 days of the expiration of the rental agreement,” and “‘intent to commit theft by fraud is presumed’ from failure to return rented property within 20 days of demand”); *Yates*, at 401 (“‘malice is implied or presumed’ from the ‘willful, deliberate, and intentional doing of an unlawful act’ and from the ‘use of a deadly weapon.’”).

The lack of any limitation makes it impossible to determine what portions of the record the jury considered in deciding that Mr. Campbell acted with knowledge. Jurors could have focused on evidence of *any* intentional act, and disregarded all other evidence bearing on Mr. Campbell’s mental state. Because it is impossible to make the determination required by *Id.*, *supra*, it cannot be said that the error was harmless beyond a reasonable doubt. Because of this, his conviction for Trafficking in the First Degree must be reversed and the case remanded for a new trial. *Hayward*, *supra*.

E. CONCLUSION

For the foregoing reasons, Mr. Campbell's conviction must be reversed, and his case remanded to the trial court for a new trial.

Respectfully submitted this 29th day of August, 2011.


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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Brief to:

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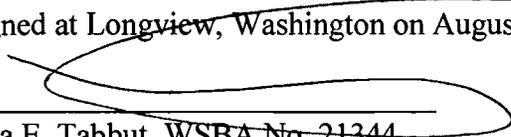
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 29, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Longview, Washington on August 29, 2011.


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