

NO. 46929-4-II

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

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STATE OF WASHINGTON, Respondent

v.

DAVID PALAUKEKALA MAKEKAU, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.14-1-01770-7

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BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR.....	2
I.    The to-convict instruction for possession of a stolen motor vehicle did not create an alternative means crime requiring the State to prove each “alternative means” of possessing a stolen motor vehicle. ....	2
II.   The State concedes that Mr. Makekau’s judgment and sentence contains a scrivener’s error that requires correction. ....	2
STATEMENT OF THE CASE.....	2
A.    Procedural History .....	2
B.    Factual History .....	3
ARGUMENT .....	4
I.    The to-convict instruction for possession of a stolen motor vehicle did not create an alternative means crime requiring the State to prove each “alternative means” of possessing a stolen motor vehicle because listing definitional terms of a crime in a to-convict instruction does not create an alternative means crime, and the law of the case doctrine does not compel otherwise. ....	4
A.    The holding in <i>Lillard</i> that including definitional terms in a to-convict instruction creates an alternative means crime under the law of the case doctrine is <i>obiter dictum</i> . .	7
B.    The holdings at issue in <i>Lillard</i> and <i>Hayes</i> are incorrect extensions of <i>Hickman</i> .....	10
C.    The holdings at issue in <i>Lillard</i> and <i>Hayes</i> are in tension with the “alternative means” case law.....	11
D.    This court’s recent decision in <i>State v. Lindsey</i> and our Supreme Court’s decision in <i>State v. Owens</i> call <i>Lillard</i> and <i>Hayes</i> into doubt. ....	15
II.   Even if <i>Lillard</i> and <i>Hayes</i> are good law, the State elected the “means” of possession, the verdict was based on that “means,” and sufficient evidence supports it. ....	19

III. The State concedes that Mr. Makekau’s Judgment and Sentence contains a scrivener’s error that requires correction. ....	22
CONCLUSION.....	23

## TABLE OF AUTHORITIES

### Cases

<i>Dunn v. United States</i> , 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932)	22
<i>Hudson v. United Parcel Service, Inc.</i> , 163 Wn.App. 254, 258 P.3d 87 (2011)	7
<i>In re Domingo</i> , 155 Wn.2d 356, 119 P.3d 816 (2005)	7, 8
<i>In re Meyer</i> , 128 Wn.App. 694, 117 PP.3d 353 (2005)	23
<i>State v. Calvin</i> , 176 Wn.App. 1, 316 P.3d 496 (2013)	12
<i>State v. Calvin</i> , 183 Wn.2d 1013, 353 P.3d 640 (2015)	12
<i>State v. France</i> , 180 Wn.2d 809, 329 P.3d 864	4, 5, 10, 11
<i>State v. Goins</i> , 151 Wn.2d 728, 92 P.3d 181 (2004)	23
<i>State v. Hayes</i> , 164 Wn.App. 459, 262 P.3d 538 (2011)	<i>passim</i>
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998)	<i>passim</i>
<i>State v. Lillard</i> , 122 Wn.App. 422, 93 P.3d 969 (2004)	<i>passim</i>
<i>State v. Lindsey</i> , 177 Wn.App. 233, 311 P.3d 61 (2013)	<i>passim</i>
<i>State v. Linehan</i> , 147 Wn.2d 638, 56 P.3d 542 (2002)	12
<i>State v. McNeal</i> , 145 Wn.2d 352, 37 P.3d 280 (2002)	22
<i>State v. Ng</i> , 110 WN.2d 32, 750 P.2d 632 (1988)	22
<i>State v. Owens</i> , 180 Wn.2d 90, 323 P.3d 1030 (2014)	16, 17, 18, 19, 20
<i>State v. Peterson</i> , 168 Wn.2d 763, 230 P.3d 588 (2010)	4, 16
<i>State v. Potter</i> , 68 Wn.App. 134, 842 P.2d 481 (1992)	7
<i>State v. Rivas</i> , 97 Wn.App. 349, 984 P.2d 432 (1999)	18, 20
<i>State v. Satterthwaite</i> , 186 Wn.App. 359, 344 P.3d 738 (2015)	4
<i>State v. Smith</i> , 159 Wn.2d 778, 154 P.3d 873 (2007)	4, 11, 12, 13
<i>State v. Sony</i> , 184 Wn.App. 496, 337 P.3d 397 (2014)	14
<i>State v. Thorpe</i> , 51 Wn.App. 582, 754 P.2d 1050 (1988);	20

### Statutes

RCW 9A.52.025	13
RCW 9A.56.068	4, 13
RCW 9A.56.140	4, 10, 13
RCW 9A.82.050(1)	15, 16

### Other Authorities

WPIC 60.02.01	13
WPIC 77.20	13

### Rules

CrR 7.8	21
RAP 7.2(e)	21

## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The to-convict instruction for possession of a stolen motor vehicle did not create an alternative means crime requiring the State to prove each “alternative means” of possessing a stolen motor vehicle.**
- II. **The State concedes that Mr. Makekau’s judgment and sentence contains a scrivener’s error that requires correction.**

## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

David Palaukekala Makekau was charged by information with Possession of a Stolen Motor Vehicle and Attempting to Elude a Pursuing Police Vehicle for an incident occurring on or about August 22, 2014. CP 1-2. Each count also contained a special allegation that a motor vehicle was used in the commission of the crime. CP 1-2.

The case proceeded to a jury trial before The Honorable Suzan Clark, which commenced on October 13, 2014 and concluded that same day. RP 3-157. The jury returned a verdict the next day and found Mr. Makekau guilty of Possession of Stolen Motor Vehicle but acquitted him of Attempt to Elude a Pursuing Police Vehicle and of the special allegations. CP 3-6; RP 159-62. The trial court sentenced Mr. Makekau to

a standard range sentence of 50 months. CP 7-16; RP 167. Mr. Makekau filed a timely notice of appeal. CP 25.

B. FACTUAL HISTORY

The State adopts the Statement of the Case as set forth by Mr. Makekau in his brief at section C. Mr. Makekau's Statement of the Case recounts all the material testimony from the trial. Additionally, the State marshalled the trial testimony to argue in closing that there were only two real issues in the case as it pertained to the possession of stolen motor vehicle count: (1) identity—whether Mr. Makekau was the person riding on the stolen motorcycle when he was observed by two police officers and the victim and (2) whether Mr. Makekau knew the motorcycle was stolen. RP 143-144. Accordingly, the State focused on those two issues, arguing that if it proved identity that it proved possession since “if you're riding a motorcycle you've got it, it belongs to someone else and it's stolen, they don't have it” and “somebody riding a motorcycle obviously knows they have [(possess)] it.” RP 144.

Similarly, the State argued “[t]o prove possession of a stolen motor vehicle I have to prove that the -- the Defendant knowingly *possessed* a stolen motor vehicle.” RP 143 (emphasis added). Furthermore, the State in its rebuttal closing concluded that “Mr. Makekau was in *possession* of that

stolen motorcycle that day and he got away from the police.” RP 155 (emphasis added). In sum, when it came to the crime of possession of a stolen motor vehicle, the State argued that it had to prove possession and did not utilize the other definitional terms that define possession of stolen motor vehicle. RP 143-47, 153-55

## ARGUMENT

### **I. The to-convict instruction for possession of a stolen motor vehicle did not create an alternative means crime requiring the State to prove each “alternative means” of possessing a stolen motor vehicle because listing definitional terms of a crime in a to-convict instruction does not create an alternative means crime, and the law of the case doctrine does not compel otherwise.**

Makekau argues that when the definitional terms of a crime are included in the to-convict instruction they become the law of the case, are treated as alternative means of committing the crime, and that the State must prove each beyond a reasonable doubt. Br. of App. at 8-10.

#### Alternative Means

As a preliminary matter, “[a]n alternative means crime is one that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.” *State v. Lindsey*, 177 Wn.App. 233, 240, 311 P.3d 61 (2013) (second alteration in original) (quoting *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010)). Moreover, under our alternative means case law

it is well settled that definitional statutes do not create alternative means for committing a crime. *Id.* (citing *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007); *State v. France*, 180 Wn.2d 809, 818-819, 329 P.3d 864 (holding that “we have already rejected the notion that multiple definitions of statutory terms necessarily create either new elements or alternate means of committing a crime”).

Pursuant to RCW 9A.56.068 a “person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.” (alteration in original). Moreover, possessing a stolen vehicle is defined to mean “knowingly to receive, retain, possess, conceal, or dispose of 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.” RCW 9A.56.140(1); *State v. Satterthwaite*, 186 Wn.App. 359, 363-64, 344 P.3d 738 (2015) (holding that RCW 9A.56.068(1) implicitly incorporates RCW 9A.56.140(1)’s terms). Because RCW 9A.56.140(1) is definitional, it does not create alternative means of committing the crime of possession of a stolen motor vehicle. *State v. Hayes*, 164 Wn.App. 459, 477-78, 262 P.3d 538 (2011). Consequently, possession of a stolen motor vehicle is not an alternative means crime.

### Law of the Case

The law of the case doctrine in its most basic form provides that “jury instructions not objected to become the law of the case.” *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998). More specifically, in criminal cases, when the State adds “otherwise unnecessary *elements*” to the to-convict instruction, it assumes the burden of proving the “added *elements*.” *Id.* at 102 (emphasis added); *State v. France*, 180 Wn.2d at 815 (“Where an erroneous to-convict instruction creates a *new element* of the crime, the instruction will become the law of the case and the State will be required to prove that *element*.”) (emphasis added). Thus, for example, in *Hickman* the State agreed to a to-convict instruction that provided:

To convict the defendant of the crime of Insurance Fraud, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That the defendant, James Hickman, on or about the 1st day of July, 1992, to the 31st of August, 1992, did knowingly present or cause to be presented a false or fraudulent claim or any proof in support of such a claim, for the payment of a loss under a contract of insurance; and
- (2) That the false or fraudulent claim was made in the excess of One Thousand Five Hundred Dollars (\$1,500); and
- (3) *That the act occurred in Snohomish County, Washington.*

*State v. Hickman*, 135 Wn.2d at 101 (emphasis added). Thus, the State was required to prove venue, *i.e.*, that the crime occurred in Snohomish County, despite it not being a necessary element of the crime. *Id.* at 105.

*State v. Lillard* and *State v. Hayes*

Mr. Makekau relies on *State v. Lillard* and *State v. Hayes*, two Division I cases, for the proposition that the law of case doctrine transforms possession of a stolen motor vehicle from a crime without alternative means to an alternative means crime when the definitional terms are included in the to-convict instruction. Br. of App. at 9-12; *State v. Lillard*, 122 Wn.App. 422, 434-35, 93 P.3d 969 (2004); *State v. Hayes*, 164 Wn.App. at 480-81. In fact, *Hayes*, relying solely on *Lillard*, holds exactly that. *State v. Hayes*, 164 Wn.App. at 480-81. Nonetheless, this court should not follow *Lillard* and *Hayes* for the multiple reasons argued below.

- A. The holding in *Lillard* that including definitional terms in a to-convict instruction creates an alternative means crime under the law of the case doctrine is *obiter dictum*.

When an appellate court makes statements or holdings that are “unnecessary to decide the case,” those statements or holdings “constitute *obiter dictum*, and need not be followed.” *In re Domingo*, 155 Wn.2d 356, 366, 119 P.3d 816 (2005) (quoting *State v. Potter*, 68 Wn.App. 134, 149 n. 7, 842 P.2d 481 (1992)). In other words, subsequent appellate courts are not bound by holdings that are *obiter dictum* and may decide cases

contrary to those holdings. *Hudson v. United Parcel Service, Inc.*, 163 Wn.App. 254, 267 FN 6, 258 P.3d 87 (2011) (citations omitted).

In *Lillard*, a possession of stolen property case, the three main issues were whether the defendant validly waived his right to counsel, whether evidence of uncharged crimes was admissible, and whether the trial court was required to calculate defendant's exact offender score when it sentenced defendant. *State v. Lillard*, 122 Wn.App. at 424-33. After resolving those issues, the court discussed *ad seriatim* what it termed “Lillard’s additional pro se challenges.” *Id.* at 433. One of the challenges was that “by failing to specify which means of possession the jury was convicting him under, he was deprived of his right to a unanimous jury verdict.” *Id.* In response to this challenge *Lillard* stated the following:

The ‘to convict’ instruction required the State to prove beyond a reasonable doubt that *Lillard* ‘knowingly received, retained, possessed, concealed, or disposed of stolen property. Because the instruction specifically listed the alternative definitions of ‘possession’ as alternative means of the offense to be proved by the State, there must be sufficient evidence to support each alternative. . . . We conclude that substantial evidence supports each alternate means.

*Id.* at 434-35.

Because *Lillard* concluded that substantial evidence supported “each alternate means” its above holding—on a matter of first impression not briefed by either attorney—was “unnecessary to decide the case” and,

therefore, constitutes *obiter dictum*. *In re Domingo*, 155 Wn.2d at 366.

That is, the court did not have to decide whether including definitional terms in a to-convict instruction created alternative means requiring sufficient proof of each as a matter of law, since whether it did, or did not, was immaterial to the court's conclusion that the defendant's challenge failed.

*Hayes*, in turn, relying solely on *Lillard*,<sup>1</sup> expanded the *Lillard* holding to the crime of possession of a stolen motor vehicle explaining:

The State did not object to the inclusion of all five bracketed terms [(the definitional terms received, retained, possessed, concealed, or disposed of)] in the to-convict instruction. Hayes contends all five became alternative means for which the State assumed the burden of supplying substantial evidence, as in *Lillard*. The State does not argue otherwise. Accordingly, we limit our analysis to whether there was substantial evidence to support each alternative means that Hayes challenges.

*State v. Hayes*, 164 Wn.App. at 480-81. Therefore, the holding in *Hayes* rises and falls with the propriety of the holding in *Lillard*. Because the holding in *Lillard* is *obiter dictum*, this particular holding in *Hayes*—that the definitional terms of possession of a stolen motor vehicle become

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<sup>1</sup> *Hayes* does note that “brackets in the pattern instruction indicate, it is not necessary to use each of the” five definitional terms, but the WPICs and their commentary are not controlling authority and the ones referenced in *Hayes* do not provide substantive support for the *Lillard* holding.

alternative means when included in a to-convict—is not grounded in good law.

B. The holdings at issue in *Lillard* and *Hayes* are incorrect extensions of *Hickman*.

As most recently stated by our Supreme Court in *France*, the holding in *Hickman* is that “[w]here an erroneous to-convict instruction creates a *new element* of the crime, the instruction will become the law of the case and the State will be required to prove that *element*.” *State v. France*, 180 Wn.2d at 815 (emphasis added) (citing *Hickman*, 135 Wn.2d at 101). Thus, the focus of *Hickman* is the burden that the State undertakes when it adds elements to a to-convict instruction that are not part of the crime charged. There is no discussion in *Hickman* that the addition of terms—and especially definitional terms that accurately define the crime—to an element in the to-convict instruction is tantamount to creating new elements that the State must prove beyond a reasonable doubt or transforms a single means crime into an alternative means crime. *See State v. Hickman*, 135 Wn.2d 97. Consequently, *Lillard*’s unexplained extension of *Hickman* was unwarranted and incorrect.

Moreover, even *Hayes* recognized the lack of analysis of *Hickman* in *Lillard* noting that “*Lillard* summarily applied *Hickman* to hold, in response to an issue raised in a pro se supplemental brief, that the

definitional terms in RCW 9A.56.140(1) were transformed into alternative means when inadvertently included in a to-convict instruction.” *State v. Hayes*, 164 Wn.App. at 479 FN 5 (emphasis added). Because of that procedural posture it remarked that “[t]his is not a holding we are inclined to expand.” *Id.* But because *Lillard*’s holding was *obiter dictum* and unsupported by the case it cited (*Hickman*), *Hayes* is incorrect to the extent that it adopted *Lillard* at all to support its holding that including the definitional terms of possession of a stolen motor vehicle in the to-convict instruction transforms the crime into an alternative means crime.

- C. The holdings at issue in *Lillard* and *Hayes* are in tension with the “alternative means” case law.

As noted above, our courts have “rejected the notion that multiple definitions of statutory terms necessarily create either new elements or alternate means of committing a crime.” *France*, 180 Wn.2d at 818-819, 329 P.3d 864. This holds true even when those definitions are included in the jury instructions in a separate “definitional instruction” and become the “law of the case.” *Smith*, 159 Wn.2d at 785-790; *State v. Calvin*, 176 Wn.App. 1, 316 P.3d 496, 505-06 (2013) (reversed on other grounds by *State v. Calvin*, 183 Wn.2d 1013, 353 P.3d 640 (2015)). One reason that the definitions of a crime, when submitted in a jury instruction, do not

constitute alternative means of committing that crime “is that, properly understood, these definitions merely define an element of the crime charged. . . .” *Smith*, 159 Wn.2d at 787. Accordingly, there are no jury unanimity issues when a jury is instructed that there are multiple definitions applicable to an element of the crime charged. *Id.* at 790-92. Put another way, “[t]he jury need not be unanimous as to any of the definitions nor must substantial evidence support each definition.” *State v. Linehan*, 147 Wn.2d 638, 649-650, 56 P.3d 542 (2002).

*Lillard* and *Hayes* provide no analysis as to why when multiple definitional terms, which are properly included in the definitional jury instructions and do not create alternative means of committing a crime, are also included in the to-convict instruction they transform the crime into an alternative means crime. As *Smith* indicates, “these definitions merely define an element of the crime charged” and, as a result, it logically follows that the definitional terms do not create new elements. 159 Wn.2d at 787.

Moreover, there is no principled reason to distinguish between definitional terms that appear with a disjunctive in a to-convict instruction and other elements that appear in a to-convict with multiple disjunctives. Thus, it cannot be the case that only definitional terms that appear with a

disjunctive in a to-convict instruction transform the crime into one of alternative means and create jury unanimity issues, whereas the other elements that appear in a to-convict with multiple disjunctives do not. For example, in *Hickman* itself, where the defendant was charged with insurance fraud, the first element in the to-convict instruction was the following: “That the defendant . . . did knowingly present *or* cause to be presented a false *or* fraudulent claim *or* any proof in support of such a claim, for the payment of a loss under a contract of insurance.” 135 Wn.2d at 101 (emphasis added). Nonetheless, this instruction was not thought to transform insurance fraud into an alternative means crime or create jury unanimity issues as it was not complained about by the appellant nor addressed as problematic by the court despite the to-convict instruction and “law of the case” doctrine being the focal points of case. See *Id.*

Similarly, in *State v. Sony*, the to-convict instruction informed the jury that in order to find the defendant guilty of residential burglary, the State would have to prove the defendant entered or remained unlawfully in a dwelling “with intent to commit a crime against a person *or* property therein.” *State v. Sony*, 184 Wn.App. 496, 498-99, 337 P.3d 397 (2014) (emphasis added). There, the defendant raised jury unanimity issues and claimed that acting “with intent to commit a crime against a person” and “with intent to commit a crime against property” were alternative means

of committing residential burglary. See *Id.* But Sony rejected those claims holding that acting “with intent to commit a crime against a person” and “with intent to commit a crime against property” were not alternative means, despite appearing in the to-convict instruction, and therefore the defendant’s right to a unanimous verdict was not violated. *Id.* at 500-01.

There is no compelling legal reason, and *Lillard* and *Hayes* have not even provided *a* reason to treat to the to-convict instruction at issue here any differently from to-convict instructions like those at issue in *Hickman* and *Sony* where the definitional terms do not appear in the to-convict but the definition of the crimes themselves contain at least one disjunctive.<sup>2</sup> Nor do *Lillard* and *Hayes*<sup>3</sup> address the necessary interplay and conflict between their holdings and the “alternative means” case law.

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<sup>2</sup> The definition of residential burglary states that the crime is committed when a person “enters or remains unlawfully in a dwelling with intent to commit a crime against a person *or* property therein” just as possession of a stolen motor vehicle means “knowingly to receive, retain, possess, conceal, *or* dispose of 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.” RCW 9A.52.025(1), 9A.56.068(1), 9A.56.140; WPIC 60.02.01, WPIC 77.20.

<sup>3</sup> “In summary, we are treating concealment and disposal as alternative means, not because they necessarily are alternative means, but because they were listed in the to-convict instructions for the two counts of possession of a stolen vehicle and under *Lillard* the State was obligated to support them with substantial evidence.” 164 Wn.App. at 481.

D. This court's recent decision in *State v. Lindsey* and our Supreme Court's decision in *State v. Owens* call *Lillard* and *Hayes* into doubt.

In *State v. Lindsey*, a Division II case, the defendant was convicted of trafficking in stolen property in the first degree. *State v. Lindsey*, 177 Wn.App. 236, 239, 113 P.3d 61 (2013). The to-convict instruction stated that to convict the defendant of the crime the State had to prove:

(1) That on, about, or between July 8 and July 11, 2011, the defendant knowingly:

(a) *initiated, organized, planned, financed, directed, managed, and/or supervised the theft of property for sale to others; or*

(b) trafficked in stolen property with the knowledge that the property was stolen; and

(2) That this act occurred in the State of Washington.

*Id.* at 239 (emphasis added). Following his conviction, the defendant claimed that he was denied his constitutional right to a unanimous verdict because there was insufficient evidence to support a conviction on several of the alternative means that he alleged existed in the to-convict instruction. *Id.* at 236.

*Lindsey*, after noting that “[m]erely stating methods of committing a crime in the disjunctive does not mean that there are alternative means of committing a crime” and acknowledging that definitional statutes do not

create additional alternative means for a crime, analyzed whether RCW 9A.82.050(1)<sup>4</sup> creates eight alternative means for committing trafficking in stolen property in the first degree. *Id.* at 240 (citing *State v. Peterson*, 168 Wn.2d 763, 770, 230 P.3d 588 (2010)). The court concluded that the first seven terms (initiates, organizes, plans, finances, directs, manages, or supervises) constituted one alternative as the terms “relate to different aspects of a single category of criminal conduct—facilitating or participating in the theft of property so that it can be sold.” *Id.* at 241-42. Consequently, the terms were definitional. *Id.* at 242.

Next, *Lindsey* turned to whether the defendant’s right to a unanimous verdict was violated since he claimed “that there was no evidence that he organized, directed, managed, supervised, or financed the theft of property for sale to others” and the to-convict contained those terms. *Id.* at 247. But the defendant’s concession that there was sufficient evidence to support three of the definitional terms found in section (a), *supra*, of the to-convict instruction combined with the court’s previous holding that those definitional terms did not create alternative means of committing the crime led to the conclusion that sufficient evidence

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<sup>4</sup> A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.”

supported the first alternative<sup>5</sup> and that there was no unanimity problem.

*Id.* at 248.

*State v. Owens* reached the same conclusion in a similar case in which the defendant was convicted of trafficking in stolen property in the first degree. *See* 180 Wn.2d 90, 323 P.3d 1030 (2014). There the to-convict instruction read:

To convict the defendant of the crime of Trafficking in Stolen Property in the First Degree . . . each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) *That on or about the 28th day of July, 2010, the defendant did knowingly initiate, organize, plan, finance, direct, manage or supervise the theft of a motor vehicle for sale to others;*
- (2) That the defendant did knowingly traffic in stolen property; and,
- (3) That any of these acts occurred in Snohomish County.

*Id.* at 101 FN 6 (emphasis added). In concluding that the first clause of RCW 9A.82.050(1), which was contained in the first element of the to-convict instruction, only described one means of committing the crime the court remarked:

[I]t would be hard to imagine a single act of stealing whereby a person ‘organizes’ the theft but does not ‘plan’ it. Likewise, it would be difficult to imagine a situation

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<sup>5</sup>“(a) initiated, organized, planned, financed, directed, managed, and/or supervised the theft of property for sale to others; or.” *Id.* at 239.

whereby a person ‘directs’ the theft but does not ‘manage’ it. Any one act of stealing often involves more than one of these terms. Thus, these terms are merely different ways of committing one act, specifically stealing.

*Id.* at 96-99. Following that analysis, *Owens* concluded that there was sufficient evidence to support the means that the defendant knowingly initiated, organized, planned, financed, directed, managed, or supervised the theft of property for sale to others. *Id.* at 100-01.

Moreover, *Owens* noted that because the State put the second alternative means (“knowingly traffic”) in a separate element in the to-convict instruction that it had to prove that element pursuant to the law of the case doctrine. *Id.* at 101 FN 6 (citing *Hickman*, 135 Wn.2d at 102). Consequently, *Owens* did briefly touch on the law of the case doctrine as it applied to a to-convict instruction that contained an element with multiple definitional terms even if it did not directly address the claim at issue in this case. Simply put, *Lindsey* and *Owens* dealt with jury unanimity, alternative means, and evidentiary sufficiency challenges to to-convict instructions where an element contained multiple definitional terms and did not find error.

Given the reasoning of *Lindsey* and *Owens*, the issues at bar, and their recency, they call *Lillard* and *Hayes* into doubt.<sup>6</sup> Thus, this court should decline to follow *Lillard* and *Hayes*, especially given all their infirmities as noted above, and hold that to-convict instruction in this case did not create transform possession of a stolen motor vehicle into an alternative means crime. Accordingly, Mr. Makekau’s conviction should be affirmed.

**II. Even if *Lillard* and *Hayes* are good law, the State elected the “means” of possession, the verdict was based on that “means,” and sufficient evidence supports it.**

Where a jury is instructed on multiple alternative means to commit a crime, a verdict may stand where sufficient evidence does not support each means when the verdict is based only on one means and sufficient evidence supports it. *State v. Rivas*, 97 Wn.App. 349, 351-52, 354-55, 984 P.2d 432 (1999) (disapproved of on other grounds *Smith*, 159 Wn.2d at 778); *State v. Thorpe*, 51 Wn.App. 582, 586, 754 P.2d 1050 (1988); *Owens*, 180 Wn.2d at 99 FN 5 (“Some cases state that alternative means

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<sup>6</sup> To be clear the State readily acknowledges that neither *Lindsey* nor *Owens* met *Lillard* or *Hayes* head on and that, apparently, the appellants in those cases did not raise an issue based on *Lillard* or *Hayes*. While this situation prevents the State from arguing *Lillard* and *Hayes* have been overruled or explicitly disapproved of, that two recent cases where their holding would straightforwardly apply were bereft of any mention of them support the argument that the cases are outliers.

must be supported by ‘substantial evidence,’” but the correct test is “the sufficiency of the evidence standard.”).

Here, because it was undisputed that the subject motorcycle was stolen, the State argued that if it proved that Mr. Makekau was the person riding the motorcycle, it had proven he possessed it. RP 143.

Consequently, the focus of the State’s argument was on identity and whether Mr. Makekau knew the motorcycle was stolen. RP 143-47, 153-55. Regarding the definitional terms at issue, the State argued “[t]o prove possession of a stolen motor vehicle I have to prove that the -- the Defendant knowingly *possessed* a stolen motor vehicle.” RP 143 (emphasis added). The State in its rebuttal closing concluded that “Mr. Makekau was in *possession* of that stolen motorcycle that day and he got away from the police.” RP 155 (emphasis added). The State did not once mention the terms “received,” “concealed,” or “disposed of.” *See* RP. Instead, the State only mentioned the fact that the motorcycle had not been recovered and the potential that the motorcycle had been sold in order to show that Mr. Makekau knew the motorcycle he possessed was stolen. RP 146-47.

Moreover, the evidence presented established Mr. Makekau was the person on the motorcycle, and therefore, in possession of the

motorcycle when he drove it away from the police. Here, two police officers identified Mr. Makekau, a person they already knew, to be the driver of the motorcycle. RP 75-78, 82, 103-04. Furthermore, when Mr. Makekau was spotted almost a week afterwards by the police he was wearing what appeared to be the same red sleeveless t-shirt he had been wearing when riding the motorcycle. RP 82. When combined with the fact that Mr. Vilhauer, with whom Mr. Makekau had been staying, testified that he saw Mr. Makekau with a yellow Suzuki dual-sport motorcycle about a week earlier; the evidence that Mr. Makekau's conviction was based on the means of possession is overwhelming. RP 112-13.

That the jury rejected the special finding that a motor vehicle was used during the commission of the crime is of no matter despite Mr. Makekau's argument to the contrary. Br. of App. at 13; CP 4. While such a finding may appear inconsistent with a conviction for possession of a stolen motor vehicle "[t]he individual or collective thought processes leading to a verdict 'inhere in the verdict' and cannot be used to impeach" it. *State v. Ng*, 110 WN.2d 32, 43, 750 P.2d 632 (1988). In other words, "a criminal defendant convicted by a jury on one count of a criminal accusation cannot attack that conviction because it is inconsistent with the jury's verdict of acquittal on another count." *Id.* at 45 (citing *Dunn v. United States*, 284 U.S. 390, 52 S.Ct. 189, 76 L.Ed. 356 (1932)); *State v.*

*McNeal*, 145 Wn.2d 352, 359, 37 P.3d 280 (2002) (holding that the inconsistency between a special finding and a general verdict is to be treated the same as the inconsistency between two general verdicts). This holding is persuasive since juries “return inconsistent verdicts for various reasons, including mistake, compromise, and lenity.” *State v. Goins*, 151 Wn.2d 728, 733, 92 P.3d 181 (2004). Consequently, the jury’s rejection of the special finding shall have no impact on the analysis of the evidence, and its sufficiency, when considering Mr. Makekau’s conviction for possession of a stolen motor vehicle. Because the conviction could only rest on the means of “possession” and sufficient evidence supported that means, Mr. Makekau’s conviction should be affirmed.

**III. The State concedes that Mr. Makekau’s Judgment and Sentence contains a scrivener’s error that requires correction.**

As Mr. Makekau correctly notes the Judgment and Sentence incorrectly states that jury returned its verdict on October 13, 2014, when in actuality its verdict was returned on October 14, 2014. Br. of App. at 15; CP 3-5, 7; RP 157-59. The remedy for a scrivener’s error in a Judgment and Sentence is to remand to the trial court for correction of the error. *In re Meyer*, 128 Wn.App. 694, 701, 117 P.3d 353 (2005) (citing CrR 7.8); RAP 7.2(e).

**CONCLUSION**

For the reasons argued above, Mr. Makekau's conviction should be affirmed.

DATED this 3<sup>rd</sup> day of November 2015.

Respectfully submitted:

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**CLARK COUNTY PROSECUTOR**

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**Transmittal Letter**

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