

88905-8

COA No. 67867-1-I
SUPREME COURT No. _____

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

JERAMIE D. OWENS,

Respondent.

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STATE OF WASHINGTON
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PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The State of Washington, respondent below and petitioner here, seeks review of the Court of Appeals decision designated in Part II.

II. COURT OF APPEALS DECISION

The Court of Appeals affirmed the respondent's conviction for possession of a stolen vehicle but reversed a conviction for trafficking in stolen property. The opinion is unpublished. State v. Owens, COA 67867-1-I, Slip Opinion of 4/29/13. (The lower court's opinion and the text of the relevant statute are attached.)

III. ISSUE PRESENTED FOR REVIEW

The defendant (respondent here) was charged with trafficking in stolen property, defined in relevant part as to "knowingly initiate, organize, plan, finance, direct, manage or supervise the theft of property for sale to others." Evidence showed the defendant knowingly initiated, organized, planned, financed, directed, or managed the theft of property for sale to others. However, no evidence showed he also "supervised." The Court of Appeals assumed the jury convicted on the lone word for which there was no evidence, rather than on the six for which there was.

When a person is charged with a crime under a means that consists of alternate or a series of statutory words, is the failure to prove any one of the words reversible error?

IV. STATEMENT OF THE CASE

The detailed statement of facts from the attached Court of Appeals opinion is sufficient for this Court's review. In brief, the defendant went to a car dealership and expressed an interest in a particular car (a 1967 VW "Beetle"). Within hours, the car was stolen. Within days the defendant was in possession of the vehicle. After certain cosmetic changes and mechanical alterations were made to the vehicle (including changing the serial, or VIN number), the defendant offered it for sale on Craigslist. An innocent purchaser bought it. The purchaser's mechanic discovered the alterations and police were notified. A jury convicted the defendant of possession of a stolen vehicle and of trafficking in stolen property. The Court of Appeals affirmed the possession count but reversed the count of trafficking. See State v. Owens, Slip Opinion of 4/29/13 at 1-3.

V. ARGUMENT

A. IN WASHINGTON IF ALTERNATE MEANS OF A CRIME ARE CHARGED AND SET FORTH IN INSTRUCTIONS, EACH ALTERNATE MEANS MUST BE PROVED. THE COURT OF APPEALS OPINION ILLUSTRATES THE DIFFICULTY IN APPLYING THIS RULE. CLARIFYING WHEN THE LEGISLATURE HAS SET FORTH ALTERNATE MEANS OF COMMITTING A CRIME, AND WHEN IT HAS NOT, WOULD BENEFIT THE BENCH AND BAR.

In federal jurisprudence, where there are several acts or means for committing a crime upon which a jury could convict, a general instruction listing all of the possible acts or means under which the jury can convict is permissible, and does not require proof of all the acts or means listed. E.g., Griffin v. United States, 502 U.S. 46, 49-52, 112 S. Ct. 466, 116 L. Ed. 2d 371 (1991) (holding that the rule “that a general jury verdict was valid so long it was legally supportable on one of the submitted grounds ... [is] also applied to . . . a general jury verdict under a single count charging the commission of an offense by two or more means”); Turner v. United States, 396 U.S. 398, 420, 90 S. Ct. 642, 654, 24 L. Ed. 2d 610 (1970) (“[t]he general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive ... the verdict stands if the evidence is sufficient with respect to any one of the acts charged”); United States v. Durman, 30 F.3d 803, 809-10 (7th Cir.1994) (“Where the relevant statute lists alternative

means of violation, the general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive ... the verdict stands if the evidence is sufficient with respect to any of the acts charged”) (internal quotes omitted); cf. McKoy v. North Carolina, 494 U.S. 433, 449, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (Blackmun, J, concurring) (“different jurors may be persuaded by different pieces of evidence, even when they agree upon the bottom line.... [T]here is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict”).

“The constitutional requirement of a unanimous jury verdict applies only to the ultimate issue of the appellant's guilt or innocence of the crime charged, not the alternative means by which the crime was committed.” Gilson v. Sirmons, 520 F.3d 1196, 1209 (10th Cir. 2008). Due process does not require that a jury unanimously agree on one of several alternative statutory means of committing a charged offense. Schad v. Arizona, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991).

The federal rule reflects a presumption that a jury will act rationally. When two inferences are rationally possible based on the evidence, a reviewing court assumes that the jury made the

inference which, in light of the charge, supports the verdict. O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 357 (3d Cir. 1981). A reviewing court will not “indulge assumptions of irrational jury behavior,” Schneble v. Florida, 405 U.S. 426, 432, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972), as long as a rational explanation for the jury's verdict, consistent with both the judge's instructions and the evidence, is available. United States v. Dunham Concrete Products, Inc., 501 F.2d 80 (5th Cir. 1974).

This Court has rejected that approach. Washington jurisprudence comprises an exception to the federal rule. When a single offense may be committed in more than one way, a jury must unanimously agree on guilt, but not the means by which the crime was committed (as is the case under the federal rule), but only (and herein lies the difference) as long as there is sufficient evidence to support *each alternate means*. State v. Ortega-Martinez, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994); State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

Washington's exception renders critical being able to distinguish between definitions of a crime (which do not require separate proof) and alternative means of committing a crime (which do). Drawing this distinction is not without difficulty. “[T]here simply

is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits.” State v. Peterson, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (quoting the problematic case of Klimes, cited and discussed below). Compare, e.g., State v. Smith, 159 Wn.2d 778, 784, 154 P.3d 873 (2007) (the three common-law definitions of assault do not constitute alternate means of committing the crime) and Peterson, 168 Wn.2d at 769-770 (different deadlines for registering as sex offender based on residence are not alternate means) with State v. Nonog, 145 Wn. App. 802, 812, 187 P.3d 335 (2008) (preventing a domestic-violence victim or witness from calling 911, obtaining medical assistance, or making a report to law enforcement are three alternative means of committing crime of interfering with reporting of domestic violence) aff’d on other grounds, 169 Wn.2d 220, 237 P.3d 250 (2010).

An example of the difficulty in applying the Washington exception is afforded by Klimes. In that case, Division One of the Court of Appeals had held that “unlawfully entering” and “unlawfully remaining” were alternate means of committing the crime of second-degree burglary, and reversed when both alternate means

had not been proved. State v. Klimes, 117 Wn. App. 758, 765-69, 73 P.3d 416 (2003). But the same court rejected that reasoning and overruled Klimes two years later, holding that (“[i]n common factual situations . . . a jury instruction requiring the State to prove the defendant entered or remained unlawfully in a building raises no unanimity concerns, even if there is no evidence to support one of the alternative means.” State v. Allen, 127 Wn. App. 125, 127, 110 P.3d 849 (2005).

Courts have sought to give some guidance and place some limitation on the Washington exception. One method is by looking at whether the Legislature had broken out alternate means in subsections. State v. Barefield, 47 Wn. App. 444, 458–59, 735 P.2d 1339 (1987) (separate subsections within RCW 46.61.520 for driving under the influence, in a reckless manner, or with disregard for safety of others are alternative means to commit crime of vehicular homicide), aff’d on other grounds, 110 Wn.2d 728, 756 P.2d 731 (1988) and State v. Gillespie, 41 Wn. App. 640, 643, 705 P.2d 808 (1985) (separate subsections within RCW 9A.56.020 of theft by deception and theft by embezzlement provide alternative means by which to commit theft). “Typically, an alternative means statute will state a single offense, using subsections to set forth

more than one means by which the offense may be committed.” State v. Nonog, 145 Wn. App. at 812. Yet in Nonog the Court of Appeals then rejected that very approach, determining that there were in fact alternate means for committing the crime of interfering with domestic violence reporting within a subsection. Nonog, 145 Wn. App. at 812-13.

This Court has also rejected arguments that separate proof is required of “means within means” of committing an offense.

[W]here a disputed instruction involves alternatives that may be characterized as a “means within [a] means,” the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply.

Smith, 159 Wn.2d at 783, citing In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988). In Smith, this Court held the three different common-law definitions of assault are not alternative “means within means” that must be proved. Smith, 159 Wn.2d at 783-86. In Laico, the Court of Appeals rejected, as “means within means,” an assertion that the three alternative definitions of “great bodily harm” constituted alternative means of committing first-degree assault. State v. Laico, 97 Wn. App. 759, 762-63, 987 P.2d 638 (1999). And, lastly, this Court has cautioned against placing undue weight on the disjunctive “or:”

“[A] defendant may not simply point to an instruction or statute that is phrased in the disjunctive in order to trigger a substantial evidence review of her conviction.

Smith, 159 Wn.2d at 783, citing Jeffries, 110 Wn.2d at 339. The mere use of the disjunctive “or” does not break out additional alternate crimes or create alternative means of committing the crime. Smith, 159 Wn.2d at 783; Jeffries, 110 Wn.2d at 339; accord, State v. Laico, 97 Wn. App. at 762-63.

In Peterson, the defendant argued that failure to register as a sex offender was an alternative means crime because one can commit the crime by failing to register after becoming homeless, failing to register after moving between fixed residences within a county, or failing to register after moving from one county to another. Former RCW 9A.44.130. Different deadlines attached to each residential status. Id. Noting that its analysis differed from that of the Court of Appeals, this Court held that “the different deadlines in the statute, while presented in the disjunctive, do not implicate alternate criminal acts.” Peterson, 168 Wn.2d at 770.

In Jeffries, the defendant-petitioner was convicted of aggravated first-degree murder per the statutory aggravators of a murder committed to conceal the commission of the crime, or the

identity of the perpetrator; or there having been more than one victim slain in a common scheme or plan. On collateral attack, this Court rejected an “alternative means”/“means within means” argument that would have required separate proof and special verdicts for each subordinate clause, finding such an argument “raises the spectre of a myriad of instructions and verdict forms whenever a criminal statute contains several instances of use of the word “or”. Jeffries, 110 Wn.2d at 339.

Yet this is what the Court of Appeals in this case has done: substantively emphasize the disjunctive, and find “means within means.” See State v. Owens, Slip Opinion at 4-7.

The Legislature set forth the crime at issue as follows:

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.

RCW 9A.82.050. Applying the proper analysis from this Court, this crime has two alternate means: (1) to knowingly initiate, organize, plan, finance, direct, manage or supervise the theft of property for sale to others, or (2) to knowingly traffic in stolen property. Id. But the Court of Appeals further found “means within means,” by finding that each way to orchestrate or engineer the “theft of property for

sale to others” was a separate and distinct alternative means of committing the crime, so that there were eight alternate means (7 + 1) rather than two. State v. Owens, Slip Opinion at 4-7.

There was certainly evidence presented to support both of the two alternative means set forth by the Legislature. As reflected in the Court of Appeals’ own detailed statement of facts, the evidence was that the defendant test-drove an overpriced 1967 Beetle; that it was then stolen within hours; that, by one means or another, the defendant acquired the same car within four days or less of its theft; that he apparently even recognized it as the same car; that he contemporaneously applied for title for an entirely different car; that he resold the 1967 Beetle reworked as this entirely different car to an innocent purchaser; and that he told the purchaser he had “lost” the title. This all happened within a short period of time, within the context of the defendant’s business of buying and selling used cars on Craigslist. See State v. Owens, Slip Opinion of 4/29/13 at 1-3. This was initiating, organizing, planning, financing, directing, or managing the theft of a motor vehicle for sale to others; and, by knowingly selling the stolen car to an innocent buyer, the defendant trafficked as well.

Instead, the Court of Appeals found that “supervise” must be proved as well, as one of seven words of the first clause, and that there was no evidence that the defendant had “supervised” others in his illegal operation. It is true there was little or no evidence that the defendant supervised another in his illegal enterprise(s). But focusing on this lone word comprises a “means within means” analysis, which as discussed above has been rejected by this Court. Moreover, in reversing on this count, the Court of Appeals ascribed a rather startling ability of the jury to sort the wheat from the chaff, and convict only on the chaff. See Owens, Slip Opinion at 6-7.

Nor is this an isolated occurrence. Recently the Court of Appeals also examined the statutory language of first-degree animal cruelty. State v. Mary Peterson, ___ Wn. App. ___, ___ P.3d ___ (2013), Slip Opinion of May 20, 2013, 2013 WL 2156837. First-degree animal cruelty has three alternative means, broken out by subsections: the intentional infliction of pain or injury, or intentionally causing death by undue suffering (RCW 16.52.205(1)); negligently starving, dehydrating, or suffocating an animal, to cause substantial and unjustifiable pain leading to considerable suffering (RCW 16.52.205(2)); and knowingly engaging in sexual conduct or

sexual contact with an animal (RCW 16.52.205(3)). Yet the Court of Appeals held that starving, dehydrating, or suffocating an animal were separate alternative means within subsection (2). Mary Peterson, ___ Wn. App. at ___, ¶ 66, 69. As in the current case, this is “means within means” analysis,¹ an approach disfavored by this Court.

It is true that in the current case the Court of Appeals followed its own precedent in State v. Strohm, 75 Wn. App. 301, 304-05, 879 P.2d 962 (1994). But that any problems in applying the correct standard happen to be *ongoing* in fact *favours* review, rather than militating against it. And this Court is not bound by a decision of the Court of Appeals. Bunch v. King County Dep’t of Youth Services, 155 Wn.2d 165, 181, 116 P.3d 381 (2005).

If this to be the rule – that whenever a statute defines various ways of committing a crime set off in the disjunctive, even when within a subsection, and even when involving the same mental state, the Legislature always intends an alternative means crime – then it would be very helpful to the bench and bar for this Court to say so. The propriety of the Court of Appeals’ method of

¹ The Mary Peterson court did not reverse because it found sufficient evidence for each of the alternative means charged. Mary Peterson, ___ Wn. App. at ___, ¶ 71-78.

analysis warrants review by this Court. See RAP 13.4(b) (all four factors, in particular RAP 13.4(b)(1) (the decision conflicts with this Court's decision in Smith)). This is especially true when, as here and as in Mary Peterson, the issue was raised for the first time on appeal, depriving the trial court and the parties of any ability to correct or modify the charging document and instructions. Lastly, given the demonstrated difficulty, discussed above, in applying the Washington exception, by granting review this Court would also have the opportunity to consider whether to return instead to the federal constitutional standard, which has the advantage of simplicity, clarity, and decades of interpretive case law. See RAP 13.4(b)(4) (issue of substantial public interest).

VI. CONCLUSION

Review of the Court of Appeals decision should be *granted*.

Respectfully submitted on May 28, 2013.



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Title 9A. Washington Criminal Code
Chapter 9A.82. Criminal Profiteering Act

9A.82.050. Trafficking in stolen property in the first degree

(1) 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.

(2) Trafficking in stolen property in the first degree is a class B felony.

CREDIT(S)

[2003 c 53 § 86, eff. July 1, 2004; 2001 c 222 § 8. Prior: 1984 c 270 § 5.]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 v.)
)
 JERAMIE DAVID OWENS,)
)
 Appellant.)

No. 67867-1-I
DIVISION ONE
UNPUBLISHED OPINION
FILED: April 29, 2013

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

GROSSE, J. — Where the State charges an alternative means crime, the trial court instructs the jury on each means, and no way exists to determine which means served as the basis for the conviction, sufficient evidence must support each means. Because the State did not meet this burden, we reverse Jeramie Owens's conviction for first degree trafficking in stolen property. In all other respects, we affirm.

FACTS

On July 2, 2010, Michael Cassida was working as a salesman at Motor City, a used car dealership in Mount Vernon, Washington, when Owens and another man expressed interest in a solid blue 1967 Volkswagen Beetle with a high-performance engine and a surfboard attached to a roof rack. Owens closely examined the car's frame, engine compartment and interior and even crawled underneath the body. Cassida accompanied Owens on a short test drive of the car. Owens told Cassida that he restored Volkswagens for a living and even had a tattoo that said "Volkswagen" on his back. Owens and Cassida drove back to the dealership and Owens said he would get in touch.

The next morning, when Cassida was opening the dealership for business, he noticed that a lock on the fence had been cut and the 1967 Beetle, which had

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been parked at the edge of the lot, was missing. Cassida also noticed the ignition key for the Beetle was missing from his key ring.

On July 6, 2010, Owens filed an application with the Department of Licensing for title to a black 1971 Volkswagen.

On July 28, 2010, Owens posted a Craigslist advertisement for a "1971 Volkswagen Beetle." The "1971 Beetle" was painted blue and white and did not have a high-performance engine, a roof rack or a surfboard. Craig Sauvageau responded to the advertisement, went to Owens's address, and agreed to purchase the Beetle for \$2,800. Owens claimed he had lost the title to the Beetle but had completed an affidavit of lost title which Sauvageau could present to the Department of Licensing to obtain a new title.

On August 3, 2010, Sauvageau brought the Beetle to Conaway Motors, a repair shop specializing in European automobiles, for a tune-up. A mechanic, Alberto Ruiz, noticed that the rivets attaching the public VIN¹ plate were not fastened tightly and were shiny and new despite the fact that the Beetle was approximately 40 years old. Based on this fact, Ruiz believed that the original public VIN plate had been removed and another VIN plate put on. Ruiz also knew that the Beetle could not be from the 1971 model year because 1971 parts did not fit.

¹ "VIN" stands for "vehicle identification number," a number that uniquely identifies an automobile. Most cars have both a "public" VIN, which is stamped on a metal plate that is affixed to a visible location such as the dashboard, and a "confidential" VIN, which is stamped in a hidden location determined by the car's manufacturer.

Detective Paul Ryan of the Monroe Police Department and the Snohomish County Auto Theft Task Force was called to investigate. Detective Ryan located the Beetle's confidential VIN and determined that it did not match the public VIN, but that it did match the VIN for the 1967 Beetle stolen from Motor City. The public VIN matched the 1971 Volkswagen to which Owens obtained title on July 6, 2010.

Searching online using the phone number Owens gave Sauvageau, Detective Ryan discovered other Craigslist advertisements posted by Owens. One of the advertisements was for a yellow 1956 Beetle with a roof rack and the identical type of high-performance engine missing from Motor City's 1967 Beetle. On that basis, Detective Ryan obtained a search warrant for Owens's property. In Owens's garage, officers found a rivet gun, a paint sprayer, and the surfboard from the 1967 Beetle. Owens admitted that the 1967 Beetle he sold to Sauvageau was the same Beetle that he test-drove at Motor City on July 2. He claimed he bought the Beetle from a private seller on Craigslist, but could not provide any information about the purchase. The Department of Licensing had no bill of sale from Owens's purported purchase of the 1967 Beetle.

The State charged Owens with one count of possession of a stolen vehicle, one count of first degree trafficking in stolen property, and one count of first degree taking a motor vehicle without permission. The State later amended the information to include a charge of bail jumping after Owens failed to appear for a court hearing and a warrant was issued. A jury convicted Owens on the

possession, trafficking, and bail jumping charges but acquitted him of taking a motor vehicle. Owens timely appeals.

ANALYSIS

1. Sufficiency of the Evidence

Owens makes several challenges to the sufficiency of the evidence. To evaluate a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.² A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences must be drawn in favor of the State and interpreted against the defendant.³ We defer to the trier of fact to weigh the evidence, resolve conflicts in testimony, and evaluate witness credibility.⁴ Circumstantial evidence is no less reliable than direct evidence and is sufficient to prove any element of the crime.⁵

a. First Degree Trafficking in Stolen Property

Owens contends that the crime of first degree trafficking in stolen property is an alternative means crime and the State failed to present sufficient evidence to support each of the means. We agree.

² State v. Wentz, 149 Wn.2d 342, 347, 68 P.2d 282 (2003).

³ State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

⁴ State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007).

⁵ State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Criminal defendants have a right to an expressly unanimous jury verdict.⁶

A general verdict of guilty on a crime that can be committed by alternative means will be upheld only if sufficient evidence supports each means.⁷

RCW 9A.82.050 provides that a person is guilty of first degree trafficking in stolen property “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.” This definition identifies eight alternative means of committing the offense: knowingly (1) initiating, (2) organizing, (3) planning, (4) financing, (5) directing, (6) managing, or (7) supervising the theft of property for sale to others, or (8) knowingly trafficking in stolen property.⁸

Owens argues that the State failed to present substantial evidence supporting at least one of the alternative means of first degree trafficking in stolen property, specifically: that Owens “supervised” the theft of the 1967 Beetle. As this court relied upon in Strohm, the definition of “supervise” is “to coordinate, direct, and inspect continuously and at first hand the accomplishment of: oversee with the powers of direction and decision the implementation of one's own or another's intentions.”⁹ Inherent in the definition of “supervise” is the involvement of another

⁶ WASH. CONST. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994).

⁷ Ortega-Martinez, 124 Wn.2d at 708.

⁸ State v. Strohm, 75 Wn. App. 301, 307, 879 P.2d 962 (1994) (quoting RCW 9A.85.050(2)).

⁹ Strohm, 75 Wn. App. at 305 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2296 (1986)).

person. Although the State presented testimony that Owens was accompanied by a friend at Motor City, there was no evidence that anyone other than Owens was involved in the theft or trafficking of the Beetle.

If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if we can determine that the “verdict was based on only one of the alternative means and that substantial evidence supported that alternative means.”¹⁰ That is not possible here. The information charging Owens with first degree trafficking in stolen property listed the full statutory language and did not limit or specify a means. The trial court instructed the jury to consider all eight of the means.¹¹ The trial court did not instruct the jury that it must reach a unanimous agreement as to the alternative means, nor was there a special verdict form specifying the means relied upon. As a result, it is unclear based on the verdict alone which means the jury relied upon to support the

¹⁰ State v. Howard, 127 Wn. App. 862, 872, 113 P.3d 511 (2005) (quoting State v. Rivas, 97 Wn. App. 349, 351-52, 984 P.2d 432 (1999)).

¹¹ There is no pattern instruction for first degree trafficking in stolen property. The “to convict” instruction for first degree trafficking in stolen property proposed by the State and given by the trial court read:

To convict the defendant of the crime of Trafficking in Stolen Property in the First Degree, as charged in Count II, 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.

conviction. Owens's first degree trafficking in stolen property conviction must be reversed.

b. Possession of a Stolen Vehicle

To convict Owens of possession of a stolen vehicle, the State had to prove beyond a reasonable doubt that he knowingly possessed a stolen motor vehicle and that he knew the vehicle was stolen.¹² Owens contends that the State failed to present sufficient evidence of the "knowledge" element.¹³

Possession of stolen property alone does not create a presumption that the person knew the property was stolen, but that fact, together with "slight corroborative evidence of other inculpatory circumstances tending to show guilt" will support a conviction.¹⁴ Examples of such corroborative evidence include the absence of a plausible explanation and flight.¹⁵

¹² RCW 9A.56.068(1), .140(1). RCW 9A.56.068(1) states that "[a] person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.140(1) defines possession of stolen property in part as "knowingly" receiving, retaining, possessing, concealing, or disposing of stolen property "knowing that it has been stolen." The jury was instructed that "[p]ossessing 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."

¹³ Owens also claims there was insufficient evidence of the "knowledge" element to support his first degree trafficking in stolen property conviction. Because we reverse that conviction, we do not address this issue, nor do we address his claim that the "to convict" instruction for first degree trafficking in stolen property relieved the State of the burden to prove knowledge.

¹⁴ State v. Ford, 33 Wn. App. 788, 790, 658 P.2d 36 (1983).

¹⁵ See, e.g., State v. Hudson, 56 Wn. App. 490, 495, 784 P.2d 533 (1990) ("[t]he absence of any explanation for [the defendant's] use of what appears to have

Here, viewing the evidence in the light most favorable to the State and drawing all reasonable inferences therefrom, the evidence was sufficient to sustain the conviction. The Beetle was stolen less than 24 hours after Owens test-drove it. A few days after the theft, Owens registered the title to a 1971 Volkswagen. Roughly three weeks later, Owens sold the stolen 1967 Beetle to Sauvageau. Owens misrepresented to Sauvageau that the car was actually a 1971 Beetle, despite the fact that Owens worked on Volkswagens for a living, was extremely knowledgeable about Volkswagens, and even had a Volkswagen tattoo stretching across his back. Owens told Sauvageau he had "lost" the title. The Beetle Owens sold to Sauvageau had a fake VIN plate that corresponded to the 1971 Volkswagen to which Owens registered title. The surfboard attached to the 1967 Beetle at Motor City was found in Owens's garage, as were a rivet gun and painting supplies. Owens admitted the car was the same one that he had test-driven at Motor City immediately before it was stolen. He claimed he bought it from a private individual on Craigslist but there was no evidence to support this claim. Prior to trial, Owens jumped bail. A rational jury could infer from the facts that Owens knew the 1967 Beetle was stolen and that he knowingly possessed it.

2. Prosecutorial Misconduct

Owens contends that the deputy prosecutor committed misconduct by misstating the law regarding the element of knowledge. We review alleged

been a recently stolen automobile . . . and his flight provide ample evidence from which to infer guilty knowledge.").

misconduct in the context of the entire argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.¹⁶ To prevail on a claim of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect.¹⁷ If the defendant failed to object to the misconduct at trial, appellate review is only appropriate if the prosecutorial misconduct is so “flagrant and ill intentioned” that no curative instruction could have obviated the prejudice engendered by the misconduct.¹⁸

“A person knows or acts knowingly or with knowledge when: (i) he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense; or (ii) he or she has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense.”¹⁹ However, this definition “must be interpreted as only permitting, rather than directing, the jury to find that the defendant had knowledge if it finds that the ordinary person would have had knowledge under the circumstances.”²⁰ In accordance with this interpretation, the jury was given the pattern instruction on “knowledge”:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know

¹⁶ State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

¹⁷ State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

¹⁸ State v. Emery, 174 Wn.2d 741, 761-62, 278 P.3d 653 (2012).

¹⁹ RCW 9A.08.010(b)

²⁰ State v. Shipp, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980).

that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly is required to establish an element of a crime, the element is also established if a person acts intentionally.^[21]

Owens contends that the deputy prosecutor improperly instructed the jury that they were required to find that Owens knew the Beetle was stolen if a "reasonable person" would have done so.²² We disagree. The deputy prosecutor correctly quoted the law, informing the jury that they were allowed to presume Owens's knowledge based on a "reasonable person" standard, but were not required to do so. The jury was so instructed, and we presume jurors follow the instructions they are given.²³

Moreover, because Owens failed to object to the deputy prosecutor's statements, he must show that it was so "flagrant and ill intentioned" that no curative instruction could have obviated the prejudice. Owens does not show

²¹ 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 10.02 (3d ed. 2008).

²² Owens cites to the following portion of the State's closing argument:

Knowingly isn't a subjective standard. What that describes, if you look at the second paragraph on Instruction Number 6, "If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that she acted with knowledge."

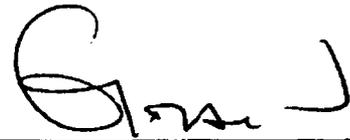
The reasonable person standard is this. It's a reasonable person. It's an objective standard. It means, what would a common, everyday person say, Hey, this clearly is suspicious. It's not what was that person thinking, what was that specific person thinking. It's the general knowledge, what an average person should know.

²³ State v. Grisby, 97 Wn.2d 493, 509, 647 P.2d 6 (1982).

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incurable prejudice. Even without the permissive inference, there was sufficient evidence from which the jury could find that Owens had actual, subjective knowledge that the Beetle was stolen. Owens attempted to resell the Beetle immediately after he claimed he purchased it; he misrepresented the model year to Sauvageau; and he could not explain how the Beetle came to possess a fraudulent VIN plate belonging to another Volkswagen he possessed. Accordingly, Owens fails to prove misconduct that undercuts the validity of the verdict.

We reverse and remand for resentencing, striking the first degree trafficking in stolen property conviction. We affirm Owens's remaining two convictions.



WE CONCUR:

