

NO. 88905-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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BY RONALD R. CARPENTER
CLERK OF COURT
SUPERIOR COURT
COUNTY OF SNOHOMISH

STATE OF WASHINGTON,

Petitioner,

v.

JERAMIE D. OWENS,

Respondent.

SUPPLEMENTAL
BRIEF OF PETITIONER

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ORIGINAL

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I. ISSUE

The court granted review of the following issue: "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?"

II. STATEMENT OF THE CASE

The facts are correctly set out in the Court of Appeals opinion. Slip op. at 1-3. In resolving the issue on which review was granted, the essential facts are the following:

On Friday, July 2, 2010, the defendant (respondent), Jeramie Owens, inspected and test-drove a 1967 Volkswagen Beetle at Motor City, a used car dealership in Mt. Vernon. On arriving at work the following morning, the salesman discovered that this Beetle had been stolen. 1 RP 21-24.

On Tuesday, July 6 (the next business day), the defendant re-registered a 1971 Volkswagen Beetle whose registration had expired 15 years before. Ex. 3. On July 28, the defendant sold a supposed 1971 Beetle under that registration to Craig Savageau in Snohomish County. 2 RP 97-102.

On August 3, Mr. Savageau took his car to a mechanic for inspection. The mechanic discovered that 1971 Volkswagen parts

didn't fit on the car. The rivets holding the VIN plate looked brand new, when they should have been rusty or at least oxidized. The mechanic informed Mr. Savageau that the car may have been stolen. 1 RP 43-45.

Police inspected the car. They found a confidential VIN on the frame. This number matched the 1967 Beetle that had been stolen from Motor City. 2 RP 185-86, 202.

The defendant was charged with possession of a stolen vehicle, first degree trafficking in stolen property, first degree taking motor vehicle without permission, and bail jumping. 1 CP 110-11. The jury was instructed on the following elements of trafficking in stolen property:

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.

1 CP 99, inst. no. 10. (The full instruction is set out in the appendix.)

The jury found the defendant not guilty of taking a motor vehicle but guilty of the other charges. 1 CP 83-86. The court sentenced the defendant within the standard range. 1 CP 48-58.

The Court of Appeals held that there was not sufficient evidence to establish the alternative of “supervising.” “As a result, it is unclear based on the verdict alone which means the jury relied upon to support the conviction.” The court therefore reversed the conviction for trafficking in stolen property. Slip op. at 6-7. The other convictions were affirmed. This court granted the State’s petition for review.

III. ARGUMENT

A. A STATUTE THAT CONTAINS A LIST OF SIMILAR TERMS DOES NOT CREATE “ALTERNATIVE MEANS.”

The issue on which this court granted review can be broken down into two sub-issues. The first sub-issue is whether each of the statutory words establishes an “alternate means,” so as to render the lack of a unanimity instruction constitutional error. The second sub-issue is whether, assuming the instructions were erroneous, that error was harmless.

The basic rule is set out in State v. Arndt, 87 Wn.2d 374, 376, 553 P.2d 1328 (1995): “[W]hen alternative means of committing a single crime are charged and there is substantial evidence to support each of the alternative means, and the alternative means are not repugnant to one another, unanimity of the jury as to the mode of commission is not required.” In Arndt, there was no issue concerning sufficiency of evidence. The issue was whether the public assistance fraud statute (RCW 74.08.331) established “a single offense committed in more than one way or separate and distinct offenses.” Arndt, 87 Wn.2d at 377. The court treated this as an issue of legislative intent. After analyzing the language and history of the statute, the court determined that it defined only one offense. Consequently, jury unanimity between the alternate means was not required. Id. at 378-85.

This court applied the Arndt rule to a sufficiency of the evidence challenge in State v. Green, 91 Wn.2d 431, 558 P.2d 1370 (1980) (Green I), rev’d on reconsideration, 94 Wn.2d 216, 616 P.2d 628 (1982). That case involved a conviction for aggravated murder. The State alleged that the crime was committed in the course of rape or kidnapping. On initial review, this court determined that there was sufficient evidence of kidnapping.

Green I, 91 Wn.2d at 442-43. On re-hearing, however, the court held that the evidence of kidnapping was insufficient. Green II, 94 Wn.2d at 225-30. The court then held that the aggravated murder statute required unanimity as to the specific underlying crime. Because there was insufficient evidence as to one of those crimes, the defendant's right to jury unanimity was violated. Id. at 232-33.

This court later repudiated part of the holding in Green II, in State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987). Whitney held that jury unanimity as to an underlying crime is *not* required. This holding was, however, premised on the existence of sufficient evidence as to each alternative. "Because constitutionally sufficient evidence supports both charged alternatives, the lack of jury unanimity does not entail the danger present in Green II that any of the jury members may have based their finding of guilt on an invalid ground." Whitney, 108 Wn.2d at 511.

Subsequent cases have adhered to the analysis in Whitney. The court has, however, limited the concept of "alternative means." The court has rejected the idea that every way in which a crime might be committed constitutes an "alternative means." Consequently, a constitutional violation does not always arise from the inclusion in a jury instruction of words that are unsupported by

the evidence. Three cases reflect this analysis: State v. Linehan, 147 Wn.2d 638, 645-50, 56 P.3d 542 (2002); State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007); and State v. Peterson, 168 Wn.2d 763, 230 P.2d 588 (2010).

In Linehan, the defendant was charged with theft by “wrongfully obtaining” and “exerting unauthorized control.” The jury was instructed on both theft by taking and embezzlement. On appeal, this court held that there was no evidence of embezzlement. The court nonetheless held that theft by taking and embezzlement did not constitute “alternative means.” Linehan, 147 Wn.2d at 645-50.

In reaching this conclusion, the court examined the statutory definitions. Theft was defined in RCW 9A.56.020(1):

“Theft” means:

- (a) To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (b) By color or aid of deception to obtain control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services; or
- (c) To appropriate lost or misdelivered property or services of another, or the value thereof, with intent to deprive him or her of such property or services.

The terms used in this statute were defined in former RCW 9A.56.010(7) (now codified as RCW 9A.56.010(22)):

“Wrongfully obtains” or “exerts unauthorized control” means:

(a) To take the property or services of another;

(b) Having any property or services in one's possession, custody or control as bailee, factor, lessee, pledgee, renter, servant, attorney, agent, employee, trustee, executor, administrator, guardian, or officer of any person, estate, association, or corporation, or as a public officer, or person authorized by agreement or competent authority to take or hold such possession, custody, or control, to secrete, withhold, or appropriate the same to his or her own use or to the use of any person other than the true owner or person entitled thereto; or

(c) Having any property or services in one's possession, custody, or control as partner, to secrete, withhold, or appropriate the same to his or her use or to the use of any person other than the true owner or person entitled thereto, where the use is unauthorized by the partnership agreement.

This court viewed the “alternative means” of committing theft as those set out in the separate subdivision of RCW 9A.56.020(1). The alternatives set out in the subdivisions of former RCW 9A.56.010(7) were not alternative means. Rather, they were alternative definitions. Linehan, 147 Wn.2d at 646-48

Linehan considered this situation analogous to In re Jeffries, 110 Wn.2d 326, 339, 752 P.2d 1338 (1988). That case involved a

prosecution for aggravated murder. The statute set out as an aggravating circumstance “that the defendant committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime.” Former RCW 10.95.020(7) (now codified as RCW 10.95.020(9)). The court rejected an argument that this statute established alternative means of “concealing the commission of a crime,” “protecting the identity of a person committing a crime,” and “concealing the identity of any person committing a crime.” These possibilities are not “alternative means,” but rather “means within means.” Jeffries, 110 Wn.2d at 339-40; see Linehan, 147 Wn.2d at 646-47 (citing Jeffries).

Similarly in Linehan, the statutory references to “wrongfully obtains” and “exerts unauthorized control” did not establish alternative means. These terms established a single means, which could be committed in multiple ways. Id. at 647-48. So long as substantial evidence supported each *means*, the lack of evidence supporting one *definition* did not violate unanimity requirements. Id. at 649-50.

This court applied similar analysis in Smith. The defendant there was charged with second degree assault, based on an

assault with a deadly weapon. The trial court instructed the jury on three alternative definitions of assault. On appeal, the defendant argued that some of these definitions were not supported by the evidence. The court held that these alternative definitions did not constitute alternative means. “In the absence of legislative intent to the contrary, we limit the reach of the alternative means doctrine to those alternative means directly provided for by the assault statutes.” Smith, 159 Wn.2d at 789-90 (footnote omitted).

This court further elucidated the concept of an “alternative means” crime in Peterson. The defendant there was convicted of failing to register as a sex offender. The statute sets out numerous registration requirements that apply under different circumstances. Nonetheless, the court held that the statute does not create numerous means. “The mere use of a disjunctive in a statute does not an alternative means crime make.” Peterson, 168 Wn.2d at 770

¶ 13.

The legislature has not statutorily defined alternative means crimes, nor specified which crimes are alternative means crimes. This is left to judicial determination. There 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. An example of an alternative means crime is theft because it may be

committed by (1) wrongfully obtaining or exerting control over another's property or (2) obtaining control over another's property through color or aid of deception.

[The defendant] argues that failure to register is an alternative means crime because it can be accomplished in three different ways: (1) failing to register after becoming homeless, (2) failing to register after moving between fixed residences within a county, or (3) failing to register after moving from one county to another. This is too simplistic a depiction of an alternative means crime, as a comparison between theft and failure to register makes plain. The alternative means available to accomplish theft describe distinct acts that amount to the same crime. That is, one can accomplish theft by wrongfully exerting control over someone's property or by deceiving someone to give up their property. In each alternative, the offender takes something that does not belong to him, but his conduct varies significantly. In contrast, the failure to register statute contemplates a single act that amounts to failure to register: the offender moves without alerting the appropriate authority. His conduct is the same—he either moves without notice or he does not. The fact that different deadlines may apply, depending on the offender's residential status, does not change the nature of the criminal act: moving without registering.

Id. at 769-70 ¶¶11-12 (citations omitted).

Applying these standards to the present case, the relevant statute states:

A person [a] who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or [b] who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050(1).¹

Alternative [b] is defined by RCW 9A.82.010(19):

“Traffic” means to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

Viewed in light of this definition, RCW 9A.82.050 establishes at most two alternative means – [a] and [b]. Alternative [a] involves the original theft of the property. To be guilty under that alternative, the defendant must be directly involved in that theft, by initiating, organizing, planning, financing, directing, managing, or supervising it. Alternative [b] involves dealing with the stolen property *after* the theft. To be guilty, the defendant must sell the stolen property, or receive or possess it with intent to sell. Alternatives [a] and [b] address distinct acts.

In contrast, the words used within alternative [a] do not address distinct acts. Rather, they address different ways that a

¹ In the present case, the “to-convict” instruction required the State to prove *both* [a] and [b] as separate elements. 1 CP 99, inst. no. 10. Because there was no objection to this instruction, it became the law of the case. As a result, the State was required to prove both of these elements. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 190 (1998). This, however, does not affect the analysis of whether the words within alternative [a] constitute alternative means.

person can be involved with the same act of stealing the property. A single act will often involve more than one of the terms in the statutory list. It may be hard to distinguish between, for example, “organizing” and “planning,” or “directing” and “managing.” There is no reason to think that the legislature intended to have a person’s guilt depend on such subtle distinctions. Rather, the legislature intended that if a person is involved in any or all of these ways with stealing property for sale to others, that person is guilty of the crime of trafficking in stolen property.

In holding that the different words establish alternative means, the Court of Appeals relied on its own decision in State v. Strohm, 75 Wn. App. 301, 879 P.2d 962 (1994), review denied, 126 Wn.2d 1002 (1995). There, the court treated the alternative definitions of “trafficking” (i.e., the different ways of committing alternative [b]) as “definitional” rather than “alternative means.” Without explanation, however, the court treated the different statutory terms within alternative [a] as being alternative means. The court held that the verdict could stand only if each of the statutory terms was supported by substantial evidence. Because there was such evidence, the court upheld the conviction. Id. at 308-09.

The decision in Strohm preceded all of this court's clarifications of the "alternative means" rule. At the time, this court had not yet decided Linehan, Smith, or Peterson. In the present case, the Court of Appeals failed to re-examine Strohm in light of these subsequent decisions. As discussed above, those decisions indicate that the different terms used in alternative [a] are not "alternative means." As a result, the lack of evidence as to one of those terms does not establish constitutional error. Linehan, 147 Wn.2d at 649-50; Smith, 159 Wn.2d at 790 ¶ 20.

B. EVEN UNDER "ALTERNATIVE MEANS" ANALYSIS, INCLUSION OF AN UNSUPPORTED MEANS IS HARMLESS UNLESS THERE WAS A RATIONAL BASIS FOR A JUROR TO RELY ON THE UNSUPPORTED ALTERNATIVE WHILE REJECTING ALL SUPPORTED ALTERNATIVES.

If the terms in the statutory list do establish alternative means, then the absence of evidence as to one of the terms is constitutional error. This, however, does not resolve the case. The court must still determine whether any such error was harmless. An error in unanimity instructions does not require reversal if the appellate court can declare it harmless beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 50 (1990).

This court has not clearly articulated a harmless error test applicable to alternative means cases. This may be because error

in this regard has so seldom been found. Only Green reversed a conviction because of alternative means error – and the analysis of that case was partially repudiated in Whitney. Nonetheless, analysis of this court's decisions sheds light on the appropriate test.

On the surface, the “substantial evidence” aspect of the alternative means test seems peculiar. This requirement seems to have nothing to do with enduring jury unanimity. Consider a defendant who is charged under two alternatives – “X” and “Y.” Suppose that the evidence is sufficient but not overwhelming on each alternative. In this situation, six jurors may have relied on “X” and rejected “Y.” The other six jurors may have relied on “Y” and rejected “X.” There is thus no reason to believe that the jurors unanimously agreed on either “X” or “Y.” Yet under Arndt, this situation does *not* violate the right to jury unanimity.

Conversely, suppose that the evidence is insufficient to establish alternative “Y.” In this situation, no rational juror could have found the defendant guilty under that alternative. If we assume that the jury acted rationally, we must conclude that all 12 jurors agreed on alternative “X.” Yet under Arndt, this situation *does* violate the right to jury unanimity. What sense does this make? How can jury unanimity *not* be violated when a rational jury could

have been *non-unanimous*, but *be* violated when a rational jury *must* have been *unanimous*?

The answer to this seeming paradox is found in Green. There, the issue was whether there was sufficient evidence of the “alternative” of kidnapping. In the initial decision, the court held that there was sufficient evidence of kidnapping. Id. at 442-43. On re-hearing, however, the court held that there was insufficient evidence as to that “alternative.” Green II, 94 Wn.2d at 225-30. Including the kidnapping “alternative” in the jury instructions violated the right to jury unanimity:

As instructed, it was possible for the jury to have convicted Green with six jurors resting their belief of guilt upon kidnapping and the other six resting their belief upon rape. Thus, it is impossible to know whether the jury unanimously decided that the element of rape had been established beyond a reasonable doubt.

Id. at 233.

Under the facts of Green, this statement was correct. At the original hearing, a majority of this court had believed that there was sufficient evidence of kidnapping. On re-hearing, three members of the court still adhered to that belief. Id. at 241-43 (Rosellini, J., dissenting). A rational juror could have held the same belief. Since that belief was wrong as a matter of law, it was possible that a

rational juror could have convicted the defendant on an erroneous basis.

A contrasting situation occurred in Linehan. As discussed above, the court did not consider that to be an “alternative means” case. Nonetheless, the court held that it was error to instruct the jury on embezzlement, when there was no evidence to support that instruction. This error was, however, harmless:

The jury was free to use any definition in [former RCW 9A.56.010(7)] to define the alternative means of wrongfully obtains and exerts unauthorized control. The [error in the embezzlement instruction] is harmless here because there was ample evidence to support a finding that [the defendant] “took the property or services of another,” thereby satisfying subsection (7)(a), one of the other definitions of “wrongfully obtains” and “exerts unauthorized control” provided in former RCW 9A.56.010(7). Thus, while it was error to give the instruction on [embezzlement], it is superfluous, and the error is harmless beyond a reasonable doubt.

Linehan, 147 Wn.2d at 654.

These cases suggest an appropriate harmless standard. The dispositive question should be whether there were plausible grounds for a rational juror to accept the erroneous basis for conviction while rejecting all proper bases. If so, the error is prejudicial; if not it is harmless.

In Green, for example, the evidence of rape was sufficient but not overwhelming. See Green I, 91 Wn.2d at 433-34 (summarizing evidence). There were plausible grounds for believing that the murder was committed in the course of kidnapping. Consequently, there was no way for the court to be certain that the jury unanimously agreed on a proper basis for conviction.

In Linehan, on the other hand, there was ample evidence of a taking. There was no reason to believe that any juror rejected the “taking” theory and relied solely on the “embezzlement” theory. Consequently, the court could conclude that the error was harmless beyond a reasonable doubt.

This standard is similar to the one employed in “multiple act” cases. In such cases, “the jury must unanimously agree as to which incident constituted the crime charged.” Unless the State elects a specific act, absence of a unanimity instruction is constitutional error. State v. Bobenhouse, 166 Wn.2d 881, 893 ¶ 13, 214 P.3d 907 (2009). Such an error is harmless if “a rational trier of fact could find that each incident was proved beyond a reasonable doubt.” Camarillo, 115 Wn.2d at 65. This does not mean that the evidence must be overwhelming as to each act. Rather, the court considers

whether there is any basis on which the jury could rationally discriminate between the multiple acts. If the case presents the jury with an “all or nothing” choice, the error is harmless. Bobenhouse, 166 Wn.2d at 894-95 ¶¶19-20. The harmless error test thus turns on whether there is any reason to believe that a rational jury could have been non-unanimous.

In the present case, there was no such basis. The Court of Appeals held that the use of the term “supervise” in the jury instructions was erroneous because “there was no evidence that anyone other than Owens was involved in the theft or trafficking of the Beetle.” Slip op. at 6. For this same reason, there is no basis for believing that any rational juror relied on this theory. Nor was there any basis for a jury to conclude that the defendant “supervised” the theft, while at the same concluding that the defendant did *not* “initiate,” “organize,” “plan,” “finance,” “direct,” or “manage” it. The prosecutor did not even suggest that the defendant had “supervised.” He argued that the defendant “did in some form organize, initiate, finance, manage.” 8/10 RP 22. If the jurors are assumed to be rational, the court must conclude that they unanimously agreed on one or more of the alternatives other than “supervising.”

The Court of Appeals' analysis reflects an assumption of juror irrationality. It assumes that one or more jurors rejected all of the alternatives that were supported by the evidence, while seizing on the one alternative that was *not* supported. In other words, the analysis assumes that at least one juror carefully separated the wheat from the chaff, discarded all the wheat, and constructed a verdict solely from chaff. This kind of assumption has no place in harmless error analysis.

It would doubtless have been better practice to omit the word "supervise" from the jury instruction. All jury instructions should be supported by the evidence. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289 (1993). A careful judge should omit any paragraph, sentence, or even word that is unsupported. Not all errors, however, are prejudicial. An instruction that is unsupported by the evidence is harmless if "the record affirmatively establishes that the manner in which the instruction was worded could have no effect on the outcome of the case." State v. Crane, 116 Wn.2d 315, 331, 804 P.2d 10, cert. denied, 501 U.S. 1237 (1991). In performing this analysis, the court assumes a rational trier of fact. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Applying this assumption in the present case, there is no reason to believe that

any rational juror relied on the improper statutory term. Any error was harmless.

IV. CONCLUSION

The decision of the Court of Appeals should be reversed, and the trial court's judgment reinstated.

Respectfully submitted on December 9, 2013.

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APPENDIX

INSTRUCTION NO. 10

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.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.