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STATE OF WASHINGTON  
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STATE OF WASHINGTON  
1/12/2018  
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NO. 93770-2

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE TYLER,

Appellant.

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SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

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## **I. ISSUES**

1. The “to convict” instruction in this case contains a list of words without a connecting term. In the corresponding definitional instruction, the same list of words is connected by an “or.” Should the missing term in the “to convict” instruction likewise be construed as an “or”?

2. If the “to convict” instruction is ambiguous, is dismissal the proper remedy?

## **II. STATEMENT OF THE CASE**

The trial court instructed the jury that the definition of 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...” 1 CP 26. It included the definition of possession of a stolen motor vehicle in the first element of the to-conviction instruction. The court left out the connector “or” in that element listing the terms defining the crime. In his Supplemental Brief, the defendant argues for the first time that the to-convict instruction should be read to include the connecting term “and” in the first element of the to-convict instruction. This Court has permitted the State to respond to that new argument.

### III. ARGUMENT

The defendant argues that where no connecting term is included in a list of terms, the default is to interpret the list in the conjunctive rather than the disjunctive. The sole authority for this proposition is the legal treatise by Antonin Scalia and Bryan A. Garner, Reading the Law: The Interpretation of Legal Texts. 119 (2012). There the authors stated that the technique of omitting connectors, known as asyndeton, is *generally* considered to convey the same meaning as syndetic or polysyndetic terms, i.e. that it is read as if “and” were inserted between the items listed. This Court should reject this interpretation of the jury instruction for several reasons.

The United States Supreme Court did not presume unconnected terms were conjunctive rather than disjunctive in Lamie v. United States Trustee, 450 U.S 526, 124 S.Ct. 103, 157 L.Ed. 1024 (2004). There the Court was interpreting a provision of the United States Bankruptcy Code regarding fees. 11 U.S.C. §330(a)(1) allowed compensation for “a trustee, an examiner, a professional person employed under section 327 or 1103...” The Court interpreted the list as disjunctive stating that “[u]nless the applicant for compensation is in one of the named classes of

person in the first part [of the statute] the kind of service rendered is irrelevant." Id. at 534. Justice Scalia, one of authors of the treatise the defendant relies on, was a signatory on that opinion.

The treatise related to the interpretation of statutes. See Reading the Law, Introduction p 1-2. The question presented here is the interpretation of jury instructions. In Reading the Law the authors noted that drafters usually avoid asyndeton because it could be read as disjunctive. Id. at 119. In other words the technique rendered a sentence ambiguous.

Under Washington law whether a statute is ambiguous is determined from looking at the plain meaning of the statute. Seattle v. Winebrenner, 167 Wn.2d 451, 456 219 P.3d 686 (2009). It is not ambiguous because more than one interpretation is conceivable. Id. the plain meaning of the statutory provision is derived from the language of the statute, as well as related provisions, and the statutory scheme as a whole. Id.

Similarly, when considering a challenge to a jury instruction, the court will examine the effect of a particular phrase in an instruction by considering the instructions as a whole, and reading the challenged portion if the instruction in the context of all other instructions. State v. Harris, 164 Wn. App. 377, 383, 263 P.3d 1276

(2011). The jury is presumed to read the courts instructions in light of other instructions and to presume that each instruction has meaning. State v. Hutchinson, 135 Wn.2d 863, 885, 959 P.2d 1061 (1998). Thus, where the trial court gave an ambiguous jury instruction on self-defense, reversal was not required where the court gave a clarifying instruction that when read together adequately conveyed the law of self-defense. Id. at 885.

Here when read with Instruction 3, there is no ambiguity in the to-convict instruction. Instruction 3 set out the same list of terms as the to-conviction instruction, including the disjunctive “or.” 1 CP 26. The to-convict instruction followed immediately after Instruction 3. When the two instructions are read together the first element in the to-convict instruction would naturally be interpreted as disjunctive. Thus any potential ambiguity is clarified by Instruction 3. Since the list of terms in the first element is disjunctive, then if there was evidence support any one of those terms the evidence was sufficient to support the conviction.<sup>1</sup>

Even where a jury instruction is ambiguous, the remedy in Washington is to remand for a new trial when that ambiguity

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<sup>1</sup> The State continues to maintain that there was sufficient evidence that the defendant was disposing of the vehicle when he was approached by the officer.

prejudices the defendant. State v. Irons, 101 Wn. App. 544, 4 P.3d 174 (2000). Since under the law of the case doctrine it is the State and not the defendant who is prejudiced by the ambiguity, the ambiguity does not justify either dismissal or remand for new trial.

Alternatively, should the Court find that Instruction 3 does not clarify the to-convict instruction, the remedy should be to remand for new trial. Under the circumstances dismissal would provide the defendant a windfall where he has not shown that he was prejudiced by the alleged error. In other circumstances the Court has refused to grant the defendant a windfall. State v. Ward, 125 Wn. App. 138, 146, 104 P.3d 61 (2005) (affirming sentencing on manslaughter after a conviction for felony murder was vacated in light of Andress.<sup>2</sup>); State v. Momah, 167 Wn.2d 140, 153, 217 P.3d 321 (2009) (recognizing the invited error doctrine was designed to prevent a party from receiving a windfall)).

#### **IV. CONCLUSION**

For the foregoing reasons and those set out in the State's earlier briefing the State asks the Court to affirm the conviction for possession of a stole motor vehicle.

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<sup>2</sup> In re Andress, 147 Wn.2d 602, 56 P.3d 891 (2002).

Respectfully submitted on January 10, 2018.

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

ROBERT LEE TYLER,

Petitioner.

No. 93770-2

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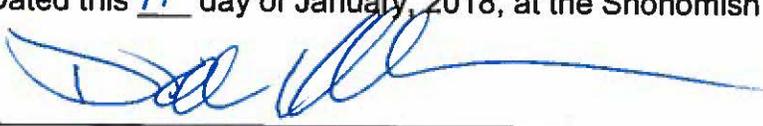
The undersigned certifies that on the 11<sup>th</sup> day of January, 2018, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

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I certify that I sent via e-mail a copy of the foregoing document to: The Supreme Court via Electronic Filing and Eric Broman, Nielsen, Broman & Koch; [Sloanej@nwattorney.net](mailto:Sloanej@nwattorney.net); [nelsond@nwwattorney.net](mailto:nelsond@nwwattorney.net); [dobsonlaw@comcast.net](mailto:dobsonlaw@comcast.net)

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11<sup>th</sup> day of January, 2018, at the Snohomish County Office.

  
\_\_\_\_\_  
Diane K. Kremenich  
Legal Assistant/Appeals Unit  
Snohomish County Prosecutor's Office

**SNOHOMISH COUNTY PROSECUTOR'S OFFICE**

**January 11, 2018 - 3:15 PM**

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