

63144-6

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NO. 63144-6-I

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

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STATE OF WASHINGTON,  
Respondent,

v.

LOA LANKHAAR,  
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Charles R. Snyder

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. MS. LANKHAAR WAS CONVICTED OF A CRIME WITH WHICH SHE WAS NOT CHARGED.

Under CrR 2.1, the trial court must approve a proposed amendment of charges. In this case, the State filed an amended information without first making a motion to amend, and the trial court never approved an amendment. Since the original information did not charge Ms. Lankhaar with possession of stolen property, and the information was never properly amended, Ms. Lankhaar's conviction for possession of stolen property must be reversed.

The State first argues that Ms. Lankhaar has waived the issue by not bringing it up before or during trial, and by failing to pursue it post-trial. Brief of Respondent (BOR) at 11-12. In support of its argument, the State incorrectly asserts that Ms. Lankhaar's argument "relies solely upon an allegation of a violation of a court rule, as opposed to a constitutional issue." BOR at 12. A party cannot be convicted for an offense with which he or she was not charged. U.S. Const. amend. 6; Wash. Const. art. 1, § 22; State v. Irazarry, 111 Wn.2d 591, 592, 763 P.2d 432 (1988); State v. Pelkey, 109 Wn.2d 484, 487, 745 P.2d 854 (1987). Since Ms.

Lankhaar was convicted of possession of stolen property, a crime with which she was not properly charged, this presents a manifest error affecting a constitutional right that can be raised for the first time on appeal. RAP 2.5(a). Furthermore, the issue was raised in a motion for arrest of judgment, and contrary to the State's assertion that the defense "failed to obtain a ruling on this issue," the trial court clearly denied the motion on this basis.<sup>1</sup> CP 46-47; Corr. 5/13/08RP 12.<sup>2</sup>

The State also asserts that Ms. Lankhaar must show "prejudice from the amendment." BOR at 12. There was no amendment. To be valid, an amended information must be approved by the trial court. State v. Haner, 95 Wn.2d 858, 864, 631 P.2d 381(1981); State v. Alvarado, 73 Wn. App. 874, 876, 871 P.2d 663 (1994); CrR 2.1(d). In this case, the State never moved to amend the information, and the trial court never approved the amendment. Thus, there was no valid amendment.

The State finally argues that the trial court in this case gave "tacit approval" for the amended information, and that this was not

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<sup>1</sup> See BOR at 12.

<sup>2</sup> "Corr." refers to the corrected transcript from 5/13/08.

an abuse of discretion. BOR at 13. However, an abuse of discretion occurs when the trial court fails to exercise its discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Here, the trial court failed to exercise its discretion since it was never asked to rule on a motion to amend. The conviction must be reversed.

2. THE TRIAL COURT VIOLATED MS. LANKHAAR'S CONSTITUTIONAL RIGHT TO A PUBLIC TRIAL AS WELL AS THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL WHEN IT CLOSED THE COURTROOM DURING JURY VOIR DIRE.

When the trial court conducted a portion of jury selection in the judge's chambers without first performing the required analysis set out in State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), it violated Ms. Lankhaar's right to a public trial and the public's right to an open trial.

The State argues that Ms. Lankhaar may not raise this issue for the first time on appeal, citing to a 1957 case. BOR at 19. The Washington State Supreme Court has stated numerous times over the last several years that the right to a public trial is not waived by a failure to object, but may be raised for the first time on appeal. State v. Strode, 167 Wn.2d 222, 229, 217 P.3d 310 (2009); State v.

Easterling, 157 Wn.2d 167, 176 n.8, 137 P.3d 825 (2006); State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005).

Second, the State argues that the closure was for “obvious reasons.” BOR at 21. The State ignores the mandate that before closing the courtroom, the trial court perform the 5-part test set out in Bone-Club and enter specific findings justifying the closure order. Easterling, 157 Wn.2d at 175; Bone-Club, 128 Wn.2d at 258-59; State v. Paumier, 155 Wn. App. 673, 679, 230 P.3d 212 (2010) (a Bone-Club analysis must be performed even where only a limited portion of voir dire is held outside the courtroom).

The State cites to State v. Momah in support of its argument. 167 Wn.2d 140, 217 P.3d 321 (2009). However, in this case, unlike in Momah, the trial court never even mentioned the constitutional right to a public trial, and gave no reasons for closing the courtroom. Supp. 4/7/08RP 52-53. See also State v. Bowen, \_\_\_ Wn. App. \_\_\_, \_\_\_ P.3d \_\_\_, 2010 WL 2817197 at ¶ 11 (No. 39096-5-II, July 20, 2010) (citing to the recent case of Presley v. Georgia, \_\_\_ U.S. \_\_\_, 130 S.Ct. 721, 724-25, \_\_\_ L.Ed.2d \_\_\_ (2010), the court held that reversal is required where courtroom was closed without first identifying the overriding interest justifying closure or considering alternatives to closure).

Finally, the State argues that any violation here was de minimis. BOR at 21. The State is incorrect. The denial of the right to a public trial is not subject to harmless error analysis. Strode, 167 Wn.2d at 230-31; Bone-Club, 128 Wn.2d at 261-62. Reversal is required. Strode, 167 Wn.2d at 231; Paumier, 155 Wn. App. at 685.

3. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT IN CLOSING ARGUMENT, PREJUDICING MS. LANKHAAR AND REQUIRING REVERSAL OF HER CONVICTION.

It is improper for a prosecutor to misstate the law. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). The prosecutor misstated the law by arguing that one could be an accomplice for actions taken after the crime was completed.

In the rebuttal portion of closing argument, the prosecutor argued that Ms. Lankhaar was guilty as an accomplice for calling Ms. Hardy and asking her not to have Wayne arrested: "That's aiding in committing a crime. Helping the getaway." 4/9/08RP 246-47. By this time, the criminal activity had ended. 4/8/08RP 108-09, 114.

Prosecutorial misconduct requires both improper conduct and prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 672, 904

P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). The State argues that the prosecutor did not misstate the law of accomplice liability. BOR at 28-34. However, one cannot be an accomplice if the crime has already been completed. State v. Robinson, 73 Wn. App. 851, 857, 872 P.2d 43 (1994). The State cites to State v. McDaniel, 155 Wn. App. 829, 230 P.3d 245 (2010), for the proposition that a “getaway” driver can be an accomplice. However, the evidence in McDaniel showed that the defendant was also involved in the planning and carrying out of the crime. 230 P.3d at 264. The State also cites to State v. Galisia, 63 Wn. App. 833, 822 P.2d 303, rev. denied, 119 Wn.2d 1003 (1992), for the proposition that someone can be an accomplice for receiving payment after the crime is completed. However, the defendant in Galisia was present and involved throughout. Id. at 834, 840.

Finally, the State argues that if there was error, it was not prejudicial because the trial court redirected the jury to their instructions. BOR at 35. However, the court’s instructions did not explain that actions taken after a crime is completed cannot lead to accomplice liability. In addition, the court failed to sustain counsel’s objection, thereby lending an “aura of legitimacy” to the improper argument. Davenport, 100 Wn.2d at 764; 4/9/09RP 247. The jury

submitted questions showing that they were struggling with the question of accomplice liability for actions taken after a crime is committed. CP 61. Together, the failure of the trial court to sustain the objection, correct the misstatement, or clarify the law for the jury creates a substantial likelihood that the misconduct affected the verdict. Reversal is required.

**4. THE TRIAL COURT ERRED IN FAILING TO GIVE AN ADEQUATE SUPPLEMENTAL INSTRUCTION IN RESPONSE TO THE JURY'S QUESTIONS.**

The trial court abused its discretion in failing to answer the jury's questions, because it allowed them to convict on an improper basis. State v. LeFaber, 128 Wn.2d 896, 902, 913 P.2d 369 (1996); State v. Young, 48 Wn. App. 406, 415-17, 739 P.2d 1170 (1987). During deliberations, the jury submitted the following written questions to the court:

Is "knowingly received, retained, possessed [,] concealed or disposed of stolen property" the same as receiving/spending the money? Is receiving or spending the money "more than mere presence and knowledge"?

CP 61. Defense counsel argued that "[t]he answer is no, they're not the same thing." 4/9/09RP 251. While the State argues that Ms. Lankhaar did not properly preserve this issue for appeal, BOR at 36-37, the issue was preserved.

5. ABSENT AN ELECTION BY THE STATE AS TO THE ACT RELIED ON FOR CONVICTION OR A UNANIMITY INSTRUCTION ISSUED BY THE TRIAL COURT, MS. LANKHAAR'S RIGHT TO A UNANIMOUS VERDICT WAS VIOLATED.

Criminal defendants have a right under the constitutions of the United States and Washington to a unanimous jury verdict.

U.S. Const. amend. 6; Wash. Const, art I, § 21. Where evidence is presented of multiple distinct acts, any of which could be the basis of a criminal conviction, either (1) the State must elect which act it is relying on, or (2) the trial court must instruct the jury that they must unanimously agree that the same act has been proved beyond a reasonable doubt. State v. Camarillo, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990).

The State points out that a unanimity instruction is not required where there is a continuing course of conduct, as opposed to multiple distinct acts. BOR at 37. This may be so, but there was no evidence that Ms. Lankhaar was involved in a continuing course of conduct. Mr. Lankhaar accepted responsibility for the theft(s) and pled guilty to trafficking in stolen property. 4/8/08RP 180-81, 192-93. The only evidence of Ms. Lankhaar's involvement concerned two distinct events: Mr. Hardy's discovery on May 12, 2007, and the incident four to six weeks earlier when Ms. Lankhaar

accompanied her husband to the recycler. 4/8/08RP 108-114, 189, 200. Since some jurors may have found Ms. Lankhaar guilty for what happened on May 12<sup>th</sup>, and some may have convicted based on the earlier incident, the conviction must be reversed.

6. THE TRIAL COURT ABUSED ITS DISCRETION  
IN DENYING THE MOTION FOR ARREST OF  
JUDGMENT OR A NEW TRIAL BASED ON JURY  
MISCONDUCT.

A criminal defendant has a constitutional right to trial by an impartial jury. U.S. Const., amend. 6; Wash. Const. art. 1, § 22. He or she also has a constitutional right to a fair trial. U.S. Const. amend. 14; Wash. Const. art 1, § 3, 22. Where the jury considers material extrinsic evidence during the deliberations process, the jury commits misconduct and the defendant's constitutional right to trial by a fair and impartial jury is compromised. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004); see also CrR 7.5(a)(2) (juror misconduct is grounds for a new trial).

Extrinsic evidence is "information that is outside all the evidence admitted at trial." Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 270, 796 P.2d 737 (1990), rev. denied, 116 Wn.2d 1014 (1991). Here, the jurors committed misconduct by introducing into the jury deliberations their "own unsworn testimony

about matters that bear directly upon the material facts of the case at issue.” Ryan v. Westgard, 12 Wn. App. 500, 503-04, 530 P.2d 687 (1975).

The State argues that Ms. Lankhaar has abandoned this issue because the trial court gave her the opportunity to present additional evidence, which she failed to do. BOR at 44. However, the affidavits submitted by the jurors were sufficient to establish juror misconduct. CP 50, 52.

The State also argues that if the affidavits established that jurors considered extrinsic evidence, such evidence did not affect the verdict because “the issue was not what the value of the dairy equipment was as scrap metal, but what the value of the equipment was as dairy equipment.” BOR at 49-50. However, the State presented no evidence at trial as to what the value of the equipment was as dairy equipment. Mr. Hardy testified that someone was interested in buying the milk parlor intact, but did not state that an actual offer was ever made and never mentioned a possible selling price. 4/8/08RP 99. Given that Mr. Hardy quit operating the dairy farm in 2003 because it was no longer profitable to do so, it cannot be assumed that the equipment had a value other than its value as scrap. 4/8/08RP 90. Ms. Lankhaar told the

police that the metal was sold to the recycler for \$400. 4/8/08RP 141. Mr. Lankhaar testified that he received \$321 for the metal. 4/8/08RP 190. This evidence failed to prove value in excess of \$1500, as required for conviction. RCW 9A.56.150.

In the absence of proof beyond a reasonable doubt that the extrinsic evidence did not contribute to the verdict, a new trial must be granted. State v. Fry, 153 Wn. App. 235, 220 P.3d 1245, 1246 (2009).

7. THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.

The due process clauses of the federal and state constitutions require that the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art 1, § 3, 21, 22.

“Value” means the market value of the property at the time the crime was committed. 9A.56.010. The State argues that Mr. Hardy’s testimony proved that the value of the property was in excess of \$1500. BOR at 44. “Value” is not computed at the time the property was newly purchased, nor is it based on replacement

value. Rather, market value is based on an objective standard, and is defined as the “price which a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction.” State v. Kleist, 126 Wn.2d 432, 435, 895 P.2d 398 (1995); RCW 9A.56.010(18).

Mr. Hardy quit operating the dairy farm in 2003 because it was no longer profitable. 4/8/08RP 90. In the absence of proof regarding what a well-informed buyer would currently pay for it, the metal cannot be assumed to have more than scrap value. And since there was no evidence that the scrap value of the metal was more than a few hundred dollars, the State failed to prove beyond a reasonable doubt that the value of the property exceeded \$1500, an essential element of the crime of possessing stolen property in the first degree. RCW 9A.56.150.

The State also failed to prove Ms. Lankhaar “possessed” stolen property, as required under RCW 9A.56.140. Mr. Lankhaar pled guilty to trafficking in stolen property. 4/8/08RP 180-81. He testified that he was solely responsible for the wrongdoing, and that his wife did nothing to help him steal or sell any of the property. 4/8/08RP 192-93. The State fails to distinguish between the actions of Mr. and Ms. Lankhaar. There was no evidence that Ms.

Lankhaar ever had the stolen property in her personal custody. 4/8/08RP 83, 109, 114. Nor was there evidence that she had dominion and control over the property.<sup>3</sup> Finally, there was no proof that she acted as an accomplice to her husband's actions.<sup>4</sup>

The evidence was insufficient to prove all elements of the crime of possessing stolen property in the first degree. Reversal of the conviction is required, and double jeopardy prohibits retrial. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

B. CONCLUSION.

For the reasons set forth above, reversal of Ms. Lankhaar's conviction is required.

Respectfully submitted this 4<sup>th</sup> day of August, 2010.

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<sup>3</sup> Neither mere proximity to the stolen property nor mere presence at a place where the stolen property is seen establishes dominion and control. State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975), rev. denied, 86 Wn.2d 1010 (1976).

<sup>4</sup> Knowledge of the criminal activity and presence at the scene of the crime is insufficient to establish accomplice liability. In re Wilson, 91 Wn.2d 487, 490-92, 588 P.2d 1161 (1979).