

No. 42398-7-II

COURT OF APPEALS, DIVISION TWO,  
OF THE STATE OF WASHINGTON  
CLALLAM COUNTY No. 11-1-00110-4

---

STATE OF WASHINGTON,

*Respondent/Plaintiff,*

vs.

GUY RALPH,

*Appellant/Defendant.*

---

BRIEF OF RESPONDENT

---

Lewis M. Schrawyer, #12202  
Deputy Prosecuting Attorney  
Clallam County Prosecutor's Office  
223 East 4<sup>th</sup> Street, Suite 11  
Port Angeles, WA 98362  
(360) 417-2301  
FAX (360) 417-2422  
[lschrawyer@co.clallam.wa.us](mailto:lschrawyer@co.clallam.wa.us)

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES.....iii

COUNTERSTATEMENT OF ISSUES..... 1

STATEMENT OF FACTS.....2

ARGUMENT.....9

ISSUE ONE

U.S. Const., Amdt 5 and Wa.Const. art 1, section 9 are not implicated because Robbery has numerous elements not contained in Taking a Motor Vehicle Without Permission and Taking a Motor Vehicle Without Permission can be proved without proving an element of Robbery.....9

ISSUE TWO

“Attempting to induce a person to testify falsely” and “attempting to induce a person to withhold information from a law enforcement agency” are two halves of the same alternative. Case law shows that proof of the first half proves the second half, also..... 16

ISSUE THREE

Pursuant to *State v. Jackson*, the matter must Be remanded to Clallam County for further proceedings..... 19

ISSUE FOUR

There was no need for the Court to make a finding about Mr. Ralph's ability to pay LFOs because Mr. Ralph himself stated he

<u>usually worked as a logger or fisherman</u> .....	21
CONCLUSION.....	22
CERTIFICATE OF DELIVERY.....	23

## TABLE OF AUTHORITIES

### FEDERAL CASE LAW

<i>Blockburger v. United States</i> , 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932).....	9-10, 14
<i>Grady v. Corbin</i> , 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990).....	10
<i>United States v. Dixon</i> , 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993).....	9-11
<i>Grady v. Corbin</i> , 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990)	

### FEDERAL CONSTITUTION

U.S. Const., Amdt. 5.....	9
---------------------------	---

### WASHINGTON STATE CASE LAW

<i>In re the Personal Restraint of Orange</i> , 152 Wn.2d 795, 871 100 P.3d 291 (2004).....	14
<i>State v. Baldwin</i> , 63 Wn.App. 303, 818 P.2d 1116, 837 P.2d 646 (1991).....	21-2
<i>State v. Bankston</i> , 99 Wn.App. 266, 992 P.2d 1041 (2000).....	18
<i>State v. Bertrand</i> , 165 Wn.App. 353, 267 P.3d 511 (2011).....	21
<i>State v. Freeman</i> , 153 Wn.2d 765, 108 P.3d 753 (2005).....	11, 14
<i>State v. Jackson</i> , 129 Wn.App. 95, 117 P.3d 1182 (2005).....	20-21
<i>State v. Johnson</i> , 92 Wn.2d 671, 600 P.2d 1249 (1979).....	15
<i>State v. Lavery</i> , 154 Wn.2d 249, 111 P.3d 837 (2005).....	20-22
<i>State v. Lode</i> , 140 Wn.App. 487, 167 P.3d 627, 630 (2007).....	17-18
<i>State v. Lubers</i> , 81 Wn.App. 614, 915 P.2d 1157 (1996).....	19
<i>State v. Mandanas</i> , 163 Wn.App. 712, 262 P.3d 522 (2011).....	11
<i>State v. Morley</i> , 134 Wn.2d 588, 952 P.2d 167 (1998).....	20-21
<i>State v. Reiff</i> , 14 Wn. 664, 45 P. 318 (1896).....	11-14
<i>State v. Victoria</i> , 150 Wn.App. 63, 206 P.3d 694 (2009).....	18

*State v. Vladovic*, 99 Wn.2d 413, 662 P.2d 853 (1983)..... 14-15

*State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007)..... 16

## WASHINGTON CONSTITUTION

Wa.Const. art 1, section 9..... 10,11

## WASHINGTON STATUTES

RCW 9.94A.589(1)(a)..... 15

RCW 9A.56.075..... 20

RCW 9A.56.210 (1)..... 15

RCW 9A.72.150..... 7, 17-19

## OTHER AUTHORITIES

Oregon statute 164.135..... 19-21

## COUNTER STATEMENT OF ISSUES

### ISSUE ONE

*Are Robbery and Taking a Motor Vehicle Without Permission sufficiently differentiated in law so they do not become "the same offence" for Double Jeopardy analysis?*

### ISSUE TWO

*Are attempting to "induce a person to testify falsely" and "withhold from a law enforcement agency information in any official proceeding" separate alternatives requiring the State to present evidence about both alternatives?*

### ISSUE THREE

*Are the Oregon statute about unauthorized use of vehicles and the Washington statute about taking a motor vehicle without permission sufficiently comparable to permit the State to introduce the prior conviction for sentencing purposes?*

### ISSUE FOUR

*Did the Trial Court err when it entered LFOs without making a finding that Mr. Ralph could pay them?*

## STATEMENT OF FACTS

On May 27, 2011, Mr. Guy Ralph, Jr. was charged by amended information with Robbery in the Second Degree (count I), Taking a Motor Vehicle Without Permission in the Second Degree (count II), Theft in the Third Degree (count III), and Tampering with a Witness (count IV) (CP 92-3). The probable cause for the first three counts was based on a report by Deputy Munger. It detailed that Leroy Hampton, owner of a pickup, gave a ride to a person he knew as "Guy," on February 27, 2011. The report continued that Mr. Ralph became upset with Mr. Hampton because he thought Mr. Hampton had stolen his knife. Mr. Ralph then struck Mr. Hampton hard enough that Mr. Hampton momentarily lost consciousness. Mr. Hampton escaped from his own vehicle. Mr. Ralph then drove off with Mr. Hampton's vehicle and personal possessions. When the vehicle was recovered, Mr. Hampton's wallet, GPS, cellular phone, DC power adaptor and cash were missing from his vehicle. Mr. Guy was charged with the first three counts listed above. (CP 106).

On May 18, 2011, the State filed a supplemental motion for determination of probable cause, seeking to add Witness Tampering (CP 95). A report filed by Detective Tom Reyes

indicated that Mr. Ralph had attempted to reach his sister, Cindy Smith, to contact Emily Beadle. The request was in a letter that Mr. Ralph had attempted to mail from the jail. It reads in pertinent part:

Anyway, hey could you do me a great big favor before my trial? Please. I need Emily [Beadle] (Welcome Inn #44) to write a statement that on the morning of the 27<sup>th</sup> of February, Leroy Hampton picked me & Denise up around 1 am and dropped us off around 4 am and he was fine. Also I need you to get ahold of Denise [last unknown]. Emily should know how and have her say the same thing only that Leroy her and I drove to the Lower Elwha[,] he unloaded his truck and we came back. If you guys can't get ahold of her just leave her out of it but have Emily write one please. And have her and Mike [last unknown] write that I stayed with them the rest of the day, unless you want to write one for me, and Kim and Mom. (CP 98-9).

Detective Reyes contacted Emily Beadle, who told him Denise had contacted her with the request but she refused to become involved (CP 96-7). The information was amended to add count IV, Tampering with a Witness (CP 93).

The matter proceeded to trial on July 19, 2011, before the Honorable Ken Williams (1RP-3).<sup>1</sup>

Mr. Hampton testified he owned a 1989 Nissan pickup that he did not allow others to drive (1RP 32). On the morning of February 27, 2011, he went to Emily's house. He left with Guy Ralph, a person he was hanging out the previous evening with

---

<sup>1</sup> "1RP" will reference trial proceedings on July 19, 2011 and sentencing on August 1, 2011. "2RP" will reference proceedings on July 20, 2011.

others (1RP 34). "Guy" road with Mr. Hampton to Mr. Hampton's new address, helped unload items, and they headed back (1RP 35). Ralph asked to borrow Mr. Hampton's cell phone and to drive down to look at the Lower Elwha bridge (1RP 35). When Ralph asked Mr. Hampton to drive "below it" Mr. Hampton began to get "kind of a weird feeling like what's going on." (1RP 35). Mr. Hampton heard Ralph speaking to another person about "going through with certain jobs." (1RP 35). Ralph replied to the person on the telephone, "okay, I'll do it" and then asked Mr. Hampton to pull over (1RP 35-6). Mr. Hampton did not want to stop but was told by Ralph that Ralph would beat his face in if he did not stop (1RP 36). Ralph accused Mr. Hampton of stealing things from Emily's house (1rp 37). Mr. Hampton showed he had not stolen anything by emptying his pockets and showing Ralph what was in his coat (1RP 37). By then, they were standing near the driver's door (1RP 37). Ralph punched him in the face, knocking him unconscious and when he came to on the ground, Ralph came at him again (1RP 38). Mr. Hampton crawled under his truck and took off running (1 RP 38). Ralph did not follow; instead he left with Mr. Hampton's wallet, possessions in the truck, and his truck (RP 38). Mr. Hampton reiterated that Ralph did not have permission to

drive his truck (1RP 38). When his truck was recovered, his "Tom Tom" GPS, his wallet, some stereo equipment, and his cell phone were missing (1RP 40).

Deputy Eric Munger recovered Mr. Hampton's vehicle at the Fairmont gas station (2RP 7). The GPS unit, wallet and cell phone were not in the vehicle (2RP 10). Mr. Hampton told Deputy Munger the only name he knew for the assailant was "Guy." (2RP 11). Deputy Munger prepared a montage that included a photo of Guy Ralph (2RP 11). Mr. Hampton immediately recognized Guy Ralph in the montage (2RP 12).

Nathan Pence, a Clallam County jail employee (2RP 34), testified he screens inmate's mail before it is sent out (2RP 34). On May 5, 2011, he screened a letter that was being sent out by Guy Ralph (2RP 35). Mr. Pence read the pertinent portion of the letter into the record (2RP 38; CP 98-9, referenced earlier).

Mr. Ralph testified on his own behalf. (2RP 68). When being introduced by his attorney, Mr. Ralph was asked:

Q. What do you do for a living?

A. Um, I'm currently unemployed. I usually log or fish. I have been -- just got out of inpatient drug and alcohol treatment and I have been doing my outpatient.

Mr. Ralph also denied each of the four charges.

The jury was instructed as follows: Instruction 9 stated the definition of robbery:

A person commits the crime of ROBBERY IN THE SECOND DEGREE when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which case the degree of force is immaterial.

(CP 63).

Instruction 11 addressed Taking a Motor Vehicle Without Permission:

A person commits the crime of TAKING A MOTOR VEHICLE WITHOUT PERMISSION IN THE SECOND DEGREE when, without permission of the owner or person entitled to possession, he or she intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine that is the property of another.

(CP 65).

Instructions 15, 16, and 17 relate to Theft in the Third Degree (CP 69-71), for which Ralph was found "not guilty." (CP 48).

Instruction 19 defined Tampering with a Witness:

A person commits the crime of TAMPERING WITH A WITNESS when he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding, or a person whom he or she has reason to believe may have information relevant to a criminal investigation to testify falsely.

(CP 73).

The jury was not instructed on the alternative means of tampering with a witness, to withhold any testimony, or to absent himself or herself from any official proceedings.<sup>2</sup>

The jury found Ralph guilty of second degree robbery, taking a motor vehicle without permission and witness tampering (CP 50, 49, 47). Sentencing followed (1RP 2).

The State provided both all of Mr. Ralph's relevant Oregon convictions, which included an indictment for "unauthorized use of vehicle, ORS 164.135," charging him with "unlawfully and knowingly exercis[ing] control over a vehicle, to-wit: a car, without

---

<sup>2</sup> RCW 9A.72.150 provides three separate ways a person can tamper with a witness. The statute reads in pertinent part:

(1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:

- (a) Testify falsely or, without right or privilege to do so, to withhold any testimony; or
- (b) Absent himself or herself from such proceedings; or
- (c) Withhold from a law enforcement agency information which he or she has relevant to a criminal investigation or the abuse or neglect of a minor child to the agency.

consent of the owner[.]" (CP 26). Mr. Ralph pleaded guilty to "UUV" (CP 28). His last probation condition stated "Do not operate vehicle that you are not title owner of." (CP 31).

The State indicated that it would "concede that the likelihood is the robbery and the taking of motor vehicle would merge for purposes of sentencing since he was not found guilty of Theft third." (1RP 4). Mr. Ralph argued that all three convictions should merge, as the same course of conduct (1RP 5). Mr. Ralph argued the Oregon conviction for unlawful use of a motor vehicle "would be more like an attempt to taking and riding in motor vehicle" and "it does not have either taking or riding in the vehicle. It says exercise control." (1RP 10). The Court stated: "My impression would be that would be the same as taking a motor vehicle without owner's permission. I don't know if factually there would be a difference." (1RP 11). Mr. Ralph responded that it made a difference in scoring (1RP 12). In the end, the Court merged Count 1, robbery and Count 2, taking a motor vehicle for sentencing, but left Count 4, witness tampering, as a separate crime for sentencing (1RP 22, CP 9). The sentences were imposed concurrently (1RP 20) and Count 3, theft third, was dismissed (CP 10). Costs were imposed but Mr.

## COUNTER STATEMENT OF ISSUES

### ISSUE ONE

*Are Robbery and Taking a Motor Vehicle Without Permission sufficiently differentiated in law so they do not become "the same offence" for Double Jeopardy analysis?*

### ISSUE TWO

*Are attempting to "induce a person to testify falsely" and "withhold from a law enforcement agency information in any official proceeding" separate alternatives requiring the State to present evidence about both alternatives?*

### ISSUE THREE

*Are the Oregon statute about unauthorized use of vehicles and the Washington statute about taking a motor vehicle without permission sufficiently comparable to permit the State to introduce the prior conviction for sentencing purposes?*

### ISSUE FOUR

*Did the Trial Court err when it entered LFOs without making a finding that Mr. Ralph could pay them?*

Ralph was permitted to delay payments until January 2014 (1 RP 23). This appeal followed.

## ARGUMENT

### ISSUE ONE

*Are Robbery and Taking a Motor Vehicle Without Permission sufficiently differentiated in law so they do not become "the same offence" for Double Jeopardy analysis?*

RESPONSE: U.S. Const., Amdt 5 and Wa.Const. art 1, section 9 are not implicated because Robbery has numerous elements not contained in Taking a Motor Vehicle Without Permission and Taking a Motor Vehicle Without Permission can be proved without proving an element of Robbery.

The Double Jeopardy Clause provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., Amdt. 5. *United States v. Dixon*, 509 U.S. 688, 696, 113 S.Ct. 2849, 2854, 125 L.Ed.2d 556 (1993). In part II of Justice Scalia's opinion (with concurrence by four justices), the United States Supreme Court affirmed what is commonly known as the "*Blockburger test*," from *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932). The Court stated at 509 U.S. 696, 113 S.Ct. 2856:

The same-elements test, sometimes referred to as the "*Blockburger*" test, inquires whether each offense contains an element not contained in the other; if not, they are the "same offense" and double jeopardy bars additional punishment and successive prosecution.

In part IV of the opinion, a majority of the Court overruled *Grady v. Corbin*, 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), a recent United States Supreme Court pronouncement that added a “same conduct” analysis to the determination about whether Double Jeopardy had occurred. The *Grady* opinion had held at page 495 U.S., 510, 110 S.Ct. 2087 that double jeopardy was violated “if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted,” a second prosecution may not be had. *Dixon*, 509 U.S. at 697, 113 S.Ct. at 2856. Justice Scalia stated the definition of what constitutes “the same offence” has historically focused on “the same elements.” Adding a second definition to “the same offence” that includes “the same conduct” is not part of established double jeopardy analysis. Pursuant to United States Supreme Court interpretations of the United States Constitution, then, the *Blockburger* “same elements” test is controlling.

Article 1, section 9 of the Washington State Constitution reads “No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same

offense.” Both the state and federal constitution are interpreted in the same manner, relying, for the most part, on language from *Blockburger*. *State v. Freeman*, 153 Wn.2d 765, 108 P.3d 753 (2005) provides a textbook procedure to determine whether a double jeopardy violation has occurred. The four steps are summarized in *State v. Mandanas*, 163 Wn.App. 712, 718, 262 P.3d 522, 525 (2011): First, the court looks at each statute’s language to determine if separate punishments are specifically authorized. Here, neither statute contains any information about separate punishment; neither statute refers to the other.

Second, the court reviews whether the two crimes involve the “same evidence.” The federal test comes from *Blockburger*:

The same-elements test, sometime referred to as the “*Blockburger*” test, inquires whether each offense contains an element not contained in the other; if not, they are the “same offence” and double jeopardy bars additional punishment and successive prosecution.

*United States v. Dixon, supra*, 509 U.S. at 696, 113 S.Ct. 2856.

The test in Washington State first arose in *State v. Reiff*, 14 Wn. 664, 667, 45 P. 318 (1896):

[Double jeopardy is violated when] “the evidence required to support a conviction [of one crime] would have been sufficient to warrant a conviction upon the other”.

Under either test, the analysis is the same: Look at the elements

of each offense and see whether the elements are such that proof of one is proof of the other.

The jury was instructed that robbery in the second degree contained the following pertinent elements:

(1) That on or about February 27, 2011, the Defendant unlawfully took personal property from the person or in the presence of another;

(2) That the Defendant intended to commit theft of the property;

(3) That the taking was against that person's will by the Defendant's use or threatened use of immediate force, violence, or fear of injury to that person; [and]

(4) That force or fear was used by the Defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking. CP64

The jury was instructed that taking a motor vehicle without permission contained the following pertinent elements:

(1) That on or about February 27, 2011, the Defendant took or drove away a motor vehicle without permission of the owner or person entitled to possession;

(2) That the Defendant was acting intentionally; [and]

(3) That the motor vehicle was the property of another. CP 66.

The elements of the two crimes are not the same. The same evidence would not lead to a conviction for both crimes. Robbery requires the defendant commit theft of personal property. Taking a motor vehicle only requires the defendant take or drive away a motor vehicle. That statute does not require proof that the intended to retain possession of the vehicle. Conversely, a person can be convicted of taking a motor vehicle without permission by merely intentionally moving it. The State need not show a person who took a motor vehicle intended to commit theft. Each crime has an element the other crime does not include.

The jury was also instructed about the legal definition of theft:

Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services. CP 70

Robbery requires the theft be by use or threatened use of immediate force, violence, or fear of injury to the victim. Taking a motor vehicle does not require force. The State need only show the taking was without permission.

Robbery requires the force or violence to a part of the theft. Taking a motor vehicle can be accomplished without force.

It appears the two statutes compare at only two points: A vehicle is property and both crimes must be intentional. Otherwise, there is no comparison. To meet the *Blockburger* test, each provision must require proof of a fact which the other does not. *In re the Personal Restraint of Orange*, 152 Wn.2d 795, 871 100 P.3d 291 (2004). To meet the *Reiff* test, the evidence required to support a conviction must be sufficient to support a conviction upon the other charge. Both tests are met; there are at least three elements in robbery that are not in taking a motor vehicle (theft, use of force, and force used to obtain property). Taking a motor vehicle does not require proof of theft; it can be proven by showing the defendant did not have permission to drive the victim's vehicle.

Third, there is no evidence the legislature intended the two statutes to merge:

Under the merger doctrine, when the degree of one offense is raised by conduct separately criminalized by the legislature, we presume the legislature intended to punish both offenses through a greater sentence for the greater crime.

*Freeman*, 153 Wn.2d 773, 108 P.3d 757, citing to *State v. Vladovic*, 99 Wn.2d 413, 419, 662 P.2d 853 (1983). *Vladovic* explained that merger occurs when the legislature enacts statutes that increase the punishment for a crime by using a second crime

as an element of the first crime. Citing to *State v. Johnson*, 92 Wn.2d 671, 600 P.2d 1249 (1979), *Vladovic* explained that the penalty for rape increased by degrees based upon an underlying offense; first degree rape required proof of conduct constituting at least one additional crime.

Merger is not applicable here. Robbery in the second degree is merely robbery.<sup>3</sup>

Mr. Ralph points out that the State admitted that robbery and taking a motor vehicle "merged." As *Vladovic* stated at 99 Wn.2d 419, fn. 3, the term "merger" is used in several different contexts. The State was discussing "same criminal conduct" for purposes of sentencing. See RCW 9.94A.589 (1)(a), where offenses count as one under the same criminal conduct rule if they require the same criminal intent, are committed at the same time, and involve the same victim. The "slang" for the term "same criminal conduct" is "merge." The tenor of the sentencing proceedings showed this meaning; both the defense counsel and the Judge used the term "merge" as the State had used it. Had the State meant "merge" in the sense the term was used in *Vladovic*, the Court would have

---

<sup>3</sup> RCW 9A.56.210 (1) A person is guilty of robbery in the second degree if he or she commits robbery.

followed the procedure outlined in *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007) (when conviction of more than one crime creates double jeopardy, the court must vacate the conflicting convictions).

Fourth, each statute has an independent purpose, although there is some overlap in purposes. Theft of a Motor Vehicle does not require either theft or violence. Its purpose is to criminalize driving off with another person's vehicle. Robbery is intended to criminalize theft by the use of force. The two statutes have an independent purpose. There is no double jeopardy problem. This Court should affirm both convictions.

## ISSUE TWO

*Are attempting to "induce a person to testify falsely" and "withhold from a law enforcement agency information in any official proceeding" separate alternatives requiring the State to present evidence about both alternatives?*

RESPONSE: "Attempting to induce a person to testify falsely" and "attempting to induce a person to withhold information from a law enforcement agency" are two halves of the same alternative. Case law shows that proof of the first half proves the second half, also.

Mr. Ralph contends the State erred because it proved he attempted to induce a person to testify falsely but failed to provide evidence he attempted to induce a person to withhold information from a law enforcement agency. There is no error.

The jury was instructed as follows:

A person commits the crime of TAMPERING WITH A WITNESS when he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding, or a person whom he or she has reason to believe may have information relevant to a criminal investigation to testify falsely. CP 73.

In the “to convict” instruction, however, the State included the second half of the first alternative:

(1) That during the period of time from on or about March 278, 2011, to on or about May 6, 2011, the Defendant attempted to induce a person to testify falsely *or withhold from a law enforcement agency information which he or she had relevant to a criminal investigation* [ ]. CP 74

*State v. Lode*, 140 Wn.App. 487, 902-3, 167 P.3d 627, 630

(2007) reads:

There are three alternative means of committing witness tampering—attempting to induce a person to (1) testify falsely or withhold testimony, (2) absent him- or her-self from an official proceeding, or (3) withhold information from a law enforcement agency.

According to Ralph, the State did not prove the second one-half of the first alternative because he sees “testifying falsely” as different from “withholding testimony.”

*Lode* does not support Mr. Ralph's argument. It holds there are three alternatives, not four. The first alternative is “testify falsely or withhold testimony.” It is not two alternatives but

opposite sides of the same coin. Thus, *Lode* stands for the proposition that each one-half of the first alternative are opposite sides of the same coin: to testify falsely is to withhold (truthful) information.

Other reported decisions support the State's argument. In *State v. Bankston*, 99 Wn.App. 266, 269-70, 992 P.2d 1041 (2000), albeit in dicta, the Court states:

Similar to intimidating a witness, witness tampering involves attempting to change or withhold a witness's testimony and thus interfering with the court's fact-finding process.

The gravamen of the first alternative, then, is to induce a witness to provide false information rather than true information.

*State v. Victoria*, 150 Wn.App. 63, 67-8, 206 P.3d 694 (2009), stated the issue in this manner:

A witness who does not have a right or privilege to refrain from testifying in a criminal proceeding has a legal obligation to do so truthfully and fully. This obligation can be a heavy burden. By making truthful testimony obligatory, the law removes the element of individual choice from the witness's testimony. Efforts to tamper with a witness, however, exert undue pressure on the witness that the obligatory nature of testimony otherwise eliminates.

The analysis here shows again that truth and falsity are the opposites postulated in the first alternative. A person who is obligated to testify must testify truthfully, not falsely.

*State v. Lubers*, 81 Wn.App. 614, 622, 915 P.2d 1157 (1996)

reads the same. The opinion reads:

The witness tampering statute requires that Lubers induce a "witness" or a a person "about to be called as a witness" to give false testimony or withhold testimony."

Again, the *Luber* court analyzes the two halves of the first alternatives as the same conduct, from opposite points of view. The actual language of the first alternative from RCW 9A.72.120 reads: "(a) Testify falsely or, without right or privilege to do so, to withhold any testimony[.]" As *Lubers* pointed out, withholding testimony is the same as testifying falsely. As *Victoria* made clear, a witness is expected to testify unless excused by right or privilege. A witness must testify truthfully. The first alternative does not contain two separate proof issues. The State proved the crime with which it charged Mr. Ralph. There is no error.

### ISSUE THREE

*Are the Oregon statute about unauthorized use of vehicles and the Washington statute about taking a motor vehicle without permission sufficiently comparable to permit the State to introduce the prior conviction for sentencing purposes?*

RESPONSE: Pursuant to *State v. Jackson*, the matter must be remanded to Clallam County for further proceedings

Mr. Ralph is correct that the State bears the burden to show a foreign conviction is comparable to a Washington statute for

purposes of sentencing. Mr. Ralph is also correct that *State v. Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005) is controlling. *Lavery* cited to *State v. Morley*, 134 Wn.2d 588, 952 P.2d 167 (1998) to show there are two methods the State can follow to introduce a foreign conviction. First, the court compares the elements of the out-of-state crime with the comparable Washington crime. If the elements are comparable, the sentencing court counts the defendant's out-of-state conviction as an equivalent Washington conviction. *Lavery*, 154 Wn.2d at 254. If the elements of the out-of-state crime are different or broader, the sentencing court examines the defendant's conduct as evidenced by the undisputed facts in the record to determine whether the conduct violates the comparable Washington statute. *Morley*, 134 Wn.2d 606; *Lavery*, 154 Wn.2d at 255. The Court also held that a sentencing court can engage in limited fact finding to determine comparability, but cautioned that “[a]ny attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic.” *Lavery*, 154 Wn.2d at 258.

*State v. Jackson*, 129 Wn.App. 95, 117 P.3d 1182 (2005), held that the Oregon and Washington statutes were almost

comparable but that the Oregon statute covered “a broader range of activity than the Washington statute[.]” *Id.* at p. 107. *Jackson* further developed that “[w]here the disputed issues have been fully argued to the lower court at sentencing, the State is held to the existing record [ ] without allowing further evidence[.]” *Id.* at 105. In Mr. Ralph’s case, the only complaint he raised regarded the statutory language. He did not indicate he did not engage in conduct that would be a violation of the Washington statute. The State believes the evidence already points toward conduct that would be a violation of the Washington statute, but agrees remand is appropriate to address the second prong of *Morley*.

#### ISSUE FOUR

*Did the Trial Court err when it entered LFOs without making a finding that Mr. Ralph could pay them?*

RESPONSE: There was no need for the Court to make a finding because Mr. Ralph himself stated he usually worked as a logger or fisherman.

The State does not believe the standard established in *State v. Betrand*, 165 Wn.App. 353, 267 P.3d 511 (2011) requires remand to review his ability to pay fines and costs because the issue is his ability to pay the LFOs in January 2014. *State v. Baldwin*, 63 Wn.App. 303, 312, 818 P.2d 1116, 837 P.2d 646

(1991) requires only a record sufficient to review whether the Trial Court took into account the financial resources of the defendant and the nature of the burden when reviewing the facts before it. *Baldwin*, 63 Wn.App. at 312. Because the record here shows Mr. Ralph did indeed have a means of livelihood, the LFOs are not erroneous.

#### CONCLUSION

The convictions should stand but the State agrees the matter must be remanded for entry of a new offender score and sentence.

Respectfully submitted this <sup>11</sup>~~9~~th day of April, 2012.



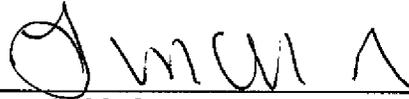
---

Lewis M. Schrawyer, #12202  
Clallam County Deputy Prosecutor

CERTIFICATE OF DELIVERY

LEWIS M. SCHRAWYER, under penalty of perjury under the laws of the State of Washington, does swear or affirm that a copy of this document was sent to Lila J. Silverstein by electronic copy at lil@washapp.org on <sup>April 11</sup> February \_\_\_\_, 2012 and by electronic delivery with the Court of Appeals.

Signed at Port Angeles, Washington on 4/11, 2012.



Lewis M. Schrawyer, #12202

# CLALLAM COUNTY PROSECUTOR

**April 11, 2012 - 10:42 AM**

## Transmittal Letter

Document Uploaded: 423987-Respondent's Brief.pdf

Case Name: State v. Ralph

Court of Appeals Case Number: 42398-7

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers                      Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: \_\_\_\_\_

Sender Name: Doreen K Hamrick - Email: **dhamrick@co.clallam.wa.us**

A copy of this document has been emailed to the following addresses:

lschrawyer@co.clallam.wa.us

lila@washapp.org