

89555-4

Supreme Court No. (to be set)
Court of Appeals No. 43219-6-II
**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,
Respondent,
vs.

Gary Lindsey
Appellant/Petitioner

FILED

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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

Cowlitz County Superior Court Cause No. 11-1-00721-6
The Honorable Judges Stephen Warning and Marilyn Haan

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Gary Lindsey, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Gary Lindsey seeks review of the Court of Appeals opinion entered on October 15, 2013. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

ISSUE 1: Does RCW 9A.82.050 set forth eight alternative means of committing first-degree trafficking in stolen property?

ISSUE 2: Did the trial court violate Mr. Lindsey's Fourteenth Amendment right to due process by instructing jurors on an uncharged alternative means?

ISSUE 3: Does the Court of Appeals' published opinion finding only two alternative means of committing first-degree trafficking in stolen property conflict with Division I's decisions in *Strohm* and *Hayes*, both of which found eight alternative means?

ISSUE 4: Where an appellant raises a constitutional error for the first time on review and the respondent agrees that RAP 2.5(a)(3) governs the scope of review, should the Court of Appeals analyze the constitutional error to determine whether

or not it is manifest, even if appellant does not specifically cite the rule or mention the “manifest error” standard?

ISSUE 5: Was Mr. Lindsey deprived of his state constitutional right to a unanimous jury because the evidence did not support three of the alternative means submitted to the jury?

ISSUE 6: Did the trial court violate Mr. Lindsey’s Sixth and Fourteenth Amendment right to counsel by refusing to appoint a new attorney?

ISSUE 7: Was Mr. Lindsey’s conviction entered in violation of his state and federal constitutional rights to notice because the Information was factually deficient?

IV. STATEMENT OF THE CASE

A. Charging document and request for new counsel.

The state charged Gary Lindsey with first-degree trafficking in stolen property. The Information alleged that he “did knowingly organize, plan, finance, direct, manage and/or supervise the theft of property, to wit: steel tank and/or cover, for sale to others, or did knowingly traffic in stolen property, to wit: steel tank and/or cover...” CP 1. The Information included no additional details, other than the offense date and the county in which it was alleged to have occurred. CP 1.

Prior to trial, a conflict arose between Mr. Lindsey and his attorney. The attorney brought the matter before the court, but announced

that Mr. Lindsey wanted to waive the conflict. RP 1-2. The nature of the conflict was not disclosed. RP 1-2.

The issue arose again several weeks later. Defense counsel told the court that Mr. Lindsey had “personal misgivings with me,” and didn’t “trust that I will adequately represent him.” RP 3. Mr. Lindsey told the court that he didn’t feel his attorney was trying to help him. RP 4, 6. The judge attempted to reassure him; however, he continued to express misgivings. RP 7, 8.

At the start of trial, counsel again told the court that Mr. Lindsey wanted a new attorney. RP 13. Mr. Lindsey had hung up on his attorney. Counsel expressed concern that Mr. Lindsey’s distrust might prevent him from listening to his attorney’s advice. RP 13, 17. Mr. Lindsey confirmed that he did not trust his attorney, and that they had argued heatedly. RP 14-15. The court denied his request for new counsel. Trial began that day. RP 18-24.

B. Evidence introduced at trial.

Mr. Lindsey’s trafficking charge involved a steel tank that sat next to a scrap dumpster outside a warehouse. RP 33-36. Prior to its theft, someone had attempted to move it. RP 54. No evidence connected Mr. Lindsey to this attempt. RP 33-93.

Mr. Lindsey and another man visited the scrap dumpster. RP 37-39. Mr. Lindsey received permission to take some discarded cables. He was told to ask before taking anything else from the dumpster. RP 39-41.

The tank was moved again. RP 42-43. A few days later, it was missing. RP 42-43.

Police arrested Mr. Lindsey when he tried to sell the tank and its cover for scrap. RP 62-65. He denied having taken it. He said he'd purchased it from a man named Jack Patching, Jr. RP 79. He acknowledged that he knew Patching was a thief, and that the tank was likely stolen. RP 81. Mr. Lindsey later said "[t]here is no sense in both of us going down for the same thing," and said he took it. RP 82, 91.

The court's "to convict" instruction for first-degree trafficking included the following language:

(1) That on, about, or between July 8 and July 11, 2011, the defendant knowingly (a) initiated, organized, planned, financed, directed, managed, and/or supervised the theft of property for sale to others; or (b) trafficked in stolen property with the knowledge that the property was stolen... CP 48.

The jury convicted Mr. Lindsey. The court sentenced him to 63 months in prison. CP 3, 51. He appealed. CP 18. On appeal he argued, *inter alia*, that he'd been tried for an uncharged alternative, in violation of his right to due process. Opening Brief, pp. 6-7. Appellate counsel did

not specifically mention RAP 2.5(a)(3) or the “manifest error” standard. Opening Brief, pp. 6-7.

Respondent correctly concluded that Mr. Lindsey intended the issue to be reviewed as a manifest error affecting a constitutional right. Brief of Respondent, pp. 11-12. The Court of Appeals also agreed that the scope of review was controlled by RAP 2.5(a)(3). Despite this, the Court of Appeals did not consider whether or not the constitutional error was “manifest,” and refused to reach the merits of the issue. Opinion, p. 12.

The Court of Appeals affirmed Mr. Lindsey’s conviction in a published opinion dated October 15, 2013. Opinion, p. 15. Mr. Lindsey petitions for review of this decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that first-degree trafficking in stolen property may be committed by eight alternative means. The Court of Appeals’ published opinion conflicts with Division I’s decisions in *Strohm* and *Hayes*. In addition, this case raises significant questions of constitutional law that are of substantial public interest and should be determined by the Supreme Court. RAP 13.4 (b)(2)-(4).

1. Standard of Review

Constitutional errors are reviewed *de novo*. *State v. Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). Issues of statutory

interpretation are also reviewed *de novo*. *State v. Bao Dinh Dang*, 87726-2, 2013 WL 5857963 (Wash. Oct. 31, 2013).

2. The Court of Appeals' published opinion conflicts with Division I's decisions in *Strohm* and *Hayes*.

Division I of the Court of Appeals has twice indicated that first-degree trafficking may be committed "by eight alternative means."¹ *State v. Strohm*, 75 Wn. App. 301, 307, 879 P.2d 962 (1994); *State v. Hayes*, 164 Wn. App. 459, 476, 262 P. 3d 538 (2011). In this case, the Court of Appeals concluded that the trafficking statute creates only two alternative means. Opinion, p. 6.

The Supreme Court should accept review to resolve the conflict between Divisions I and II of the Court of Appeals. RAP 13.4(b)(2). Furthermore, this issue is of substantial public interest. It implicates all prosecutions for trafficking in stolen property. The Supreme Court should therefore accept review under RAP 13.4(b)(4).

3. Mr. Lindsey's trafficking conviction violated his right to due process because the trial court instructed on an uncharged alternative means.

¹ These eight alternative means are set forth in the first section of the statute: "'A person who knowingly [1] initiates, [2] organizes, [3] plans, [4] finances, [5] directs, [6] manages, or [7] supervises the theft of property for sale to others, or [8] who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.'" *Id.* at 307 (quoting RCW 9A.82.050(1)) (alterations in original).

A court must not instruct jurors on an uncharged alternative means of committing a crime. *In re Brockie*, 86241-9, 309 P.3d 498 (Wash. 2013). On direct appeal, the state bears the burden of proving harmlessness. *Id.*

First-degree trafficking may be committed by eight alternative means. *Strohm*, 75 Wn. App. at 307. The state charged Mr. Lindsey under only seven of them. CP 1. The prosecution did not allege that Mr. Lindsey committed first degree trafficking by “initiating” the theft of property for sale. CP 1. Despite this, the court instructed the jury on the “initiate” alternative. CP 48. Because the jury returned a general verdict, the error is presumed prejudicial. CP 51; *Brockie*, at ____.

The Court of Appeals declined to reach this issue. Opinion, p. 12. The court apparently agreed that the issue involved constitutional error, and thus could potentially be reviewed pursuant to RAP 2.5(a)(3). Opinion, p. 12. Respondent agreed as well: the state agreed that the issue was constitutional, but argued that any error was not manifest. *See* Brief of Respondent, pp. 11-12. The court’s decision not to reach the issue apparently rested on appellate counsel’s failure to explicitly cite RAP 2.5(a)(3) or mention the “manifest error” standard. Opinion, p. 12.

The Court of Appeals should have determined that the constitutional error was manifest, and should have reached the issue. First, there does not appear to be any dispute that RAP 2.5(a)(3) was the appropriate basis to analyze the scope of review. Opinion, p. 12; Brief of Respondent, pp. 11-12. Second, the appellate rules unequivocally favor decisions on the merits:

These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands...

RAP 1.2(a). The court of appeals should have considered whether or not the error was manifest, and should have addressed the merits of Mr. Lindsey's claim.

The Supreme Court should accept review and reverse Mr. Lindsey's conviction. The Court of Appeals' published opinion conflicts with *Strohm* and *Hayes*. Furthermore, this case raises significant constitutional issues that are of substantial public interest. RAP 13.4(b)(2)-(4).

4. Mr. Lindsey's trafficking conviction violated his right to a unanimous verdict because the evidence was insufficient to prove five of the alternative means submitted to the jury.

An accused person has a state constitutional right to a unanimous verdict.² Wash. Const. art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). This right includes unanimity as to the means of commission of the crime. *State v. Lobe*, 140 Wn. App. 897, 903-905, 167 P.3d 627 (2007). A particularized expression of unanimity is required unless sufficient evidence supports each alternative means submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994).

Insufficient evidence of one or more alternatives requires reversal. *Lobe*, 140 Wn. App. 897. Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

Here, the evidence was insufficient for conviction of five of the alternatives submitted to the jury. Even when taken in a light most favorable to the prosecution, there was little or no evidence that Mr. Lindsey organized, directed, managed, supervised, or financed the operation. The first four of these alternatives imply responsibility over the

² The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

actions of at least one other person. The state presented no evidence that Mr. Lindsey was in charge of the operation. Nor did it show that anyone else—including Patching—actually participated. CP 33-105.

Furthermore, nothing in the record suggests that Mr. Lindsey financed the operation. The state presented no evidence that costs were incurred. Nor did it prove that Mr. Lindsey provided the funding to defray any such costs. CP 33-105.

Because the evidence was insufficient to establish five of the alternative means submitted to the jury, Mr. Lindsey was denied his constitutional right to a unanimous jury. *Lobe*, 140 Wn. App. 897. Since there was no special verdict, the conviction must be reversed and the case remanded for a new trial. *Id.* On retrial, the state may pursue only those charged alternatives for which it produced sufficient evidence.

The Supreme Court should accept review and reverse Mr. Lindsey's trafficking conviction. This case presents a significant question of constitutional law. It also raises an issue of substantial public interest. Review is appropriate under RAP 13.4(b)(3) and (4).

B. The Supreme Court should accept review and hold that the trial court infringed Mr. Lindsey's Sixth and Fourteenth Amendment right to counsel. This case raises a significant question of constitutional law that is of substantial public interest. RAP 13.4(b)(3) and (4).

1. Standard of Review.

Constitutional errors are reviewed *de novo*. *Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). A trial court's refusal to appoint new counsel is reviewed for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.3d 80 (2006). The reviewing court considers three factors: (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court's inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Id.*

A trial court abuses its discretion by failing to make an adequate inquiry into the conflict between attorney and client. *United States v. Lott*, 310 F.3d 1231, 1248-1250 (10th Cir, 2002); *see also State v. Lopez*, 79 Wn. App. 755, 767, 904 P.2d 1179 (1995), *overruled on other grounds by State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998).

2. The trial judge infringed Mr. Lindsey's right to counsel by refusing to appoint new counsel.

When the relationship between lawyer and client collapses, refusal to appoint new counsel violates the Sixth Amendment. *Cross*, 156 Wn.2d at 607. This is true even in the absence of prejudice. *Cross*, 156 Wn.2d at 607. When defendant and attorney become "embroiled in irreconcilable conflict," the accused person is deprived of effective assistance. *United States v. Williams*, 594 F.2d 1258, 1260 (9th Cir. 1979) (quoting *Brown v. Craven*, 424 F.2d 1166 (9th Cir. 1970)).

The trial court must inquire into the reason for any request for new counsel. *Cross*, 156 Wn.2d at 607-610; *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001). The court’s inquiry must include a full airing of concerns and a meaningful evaluation of the conflict. *Cross*, 156 Wn.2d at 610. Ordinarily, this requires the court to ask “specific and targeted questions.” *Adelzo-Gonzalez*, 268 F.3d at 777-778. The court should focus on the nature and extent of the conflict, not on whether counsel is minimally competent. *Id.*, at 778-779.

Here, the trial court abused its discretion.

First, the court failed to adequately inquire into the conflict.

Defense counsel told the court about the potential conflict of interest. RP 1-2. Mr. Lindsey repeatedly expressed his lack of trust and asked for new counsel. RP 3-8. He hung up on his lawyer during a phone call, and had heated arguments with him. Counsel expressed concern that Mr. Lindsey’s misgivings might prevent him from listening to advice. RP 13-18.

The record shows that the relationship had deteriorated to the point where the two could not work together. *Cross*, 156 Wn.2d at 607; *Williams*, 594 F.2d at 1260. Despite this, the trial court failed to adequately inquire. RP 1-18. None of the judges hearing the case asked specific and targeted questions. None of them encouraged Mr. Lindsey to

fully air his concerns. None of them developed an adequate basis for a meaningful evaluation of the problem and an informed decision. None of them conducted an inquiry sufficient to ease Mr. Lindsey's dissatisfaction, distrust, and concern. *Cross*, 156 Wn.2d at 610; *Adelzo-Gonzalez*, 268 F.3d at 776-779.

Second, the trial court should have appointed new counsel. The limited record establishes a complete breakdown in the attorney-client relationship. Under these circumstances it was unfair to force Mr. Lindsey to go to trial with an attorney in whom he had no trust. Mr. Lindsey's conviction must be reversed and the case remanded for a new trial.³ *Cross*, at 610.

The Supreme Court should accept review and hold that the trial court infringed Mr. Lindsey his Sixth and Fourteenth Amendment right to counsel. This case presents a significant question of constitutional law that is of substantial public interest. It should be reviewed pursuant to RAP 13.4(b)(3) and (4).

C. The Supreme Court should accept review and hold that Mr. Lindsey was deprived of his state and federal constitutional right to

³ In the alternative, the case must be remanded for a hearing to explore the nature and extent of the conflict, and for a new trial if the conflict was sufficient to require appointment of new counsel. *See, e.g., Lott*, 310 F.3d at 1249-1250 (failure to adequately inquire requires remand for a hearing to determine extent of the conflict).

notice. This case raises significant issues of constitutional law that are of substantial public interest. RAP 13.4(b)(3) and (4).

1. Standard of Review.

Constitutional questions are reviewed *de novo*. *Lynch*, 87882-0, 2013 WL 5310164, --- Wn.2d --- (2013). A challenge to the constitutional sufficiency of a charging document may be raised at any time. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). Where the Information is challenged after verdict, the reviewing court construes the document liberally. *Id.*, at 105. The test is whether or not the necessary facts appear or can be found by fair construction in the charging document. *Id.*, at 105-106. If the Information is deficient, prejudice is presumed and reversal is required. *State v. Courneya*, 132 Wn. App. 347, 351 n. 2, 131 P.3d 343 (2006); *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

2. Mr. Lindsey was constitutionally entitled to notice that was factually adequate.

A criminal defendant has a constitutional right to be fully informed of the charge he or she is facing. This right stems from the Fifth, Sixth and Fourteenth Amendments to the federal constitution, as well as art. I, § 3 and art. I, § 22 of the Washington State Constitution. Courts must zealously guard the right to a constitutionally sufficient Information. *State v. Royse*, 66 Wn.2d 552, 557, 403 P.2d 838 (1965).

A charging document must notify the accused person of the underlying facts as well as the essential elements of an offense. The rule

requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged. This is not the same as a requirement to ‘state every *statutory element* of’ the crime charged.

State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (emphasis in original). The Information must provide “(1) the description (*elements*) of the crime charged; and (2) a description of the specific *conduct* of the defendant which allegedly constituted that crime.” *Auburn v. Brooke*, 119 Wn.2d 623, 629-630, 836 P.2d 212 (1992) (footnotes omitted, emphasis in original).

The Supreme Court imposed this rule to ensure that the defendant knows the facts underlying the charges. *Leach*, 113 Wn.2d at 699.

3. The Information did not include specific facts supporting each element of the offense.

Here, the Information alleged seven of the eight alternative means of committing first-degree trafficking. It did not provide any facts apprising Mr. Lindsey of the underlying conduct that formed the basis for the allegation. Instead, the charging document simply parroted the language of the statute. CP 1.

The Information did not provide “a description of the specific *conduct* of the defendant which allegedly constituted that crime.” *Brooke*, 119 Wn.2d at 629-630 (emphasis in original). Nor can the underlying facts be inferred from the language used in the Information. CP 1. Accordingly, Mr. Lindsey need not demonstrate prejudice. *Courneya*, 132 Wn. App at 351 n. 2; *McCarty*, 140 Wn.2d at 425. His conviction must be reversed, and the case dismissed without prejudice. *Id.*

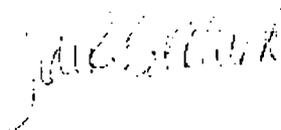
The Supreme Court should accept review and hold that the deficient Information deprived Mr. Lindsey of his constitutional right to adequate notice. This case raises significant questions of constitutional law that are of substantial public interest. Review is appropriate under RAP 13.4(b)(3) and (4).

VI. CONCLUSION

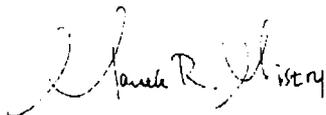
The Supreme Court should accept review and reverse Mr. Lindsey's conviction. The case must be dismissed without prejudice because of the deficient charging document. In the alternative, the case must be remanded to the trial court. If the case is retried, the state may not pursue a theory on which it presented insufficient evidence at the first trial.

Respectfully submitted November 13, 2013.

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review,
postage pre-paid, to:

Gary Lindsey, DOC #759941
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and I sent an electronic copy to

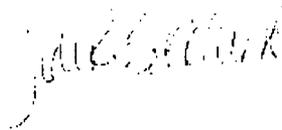
Cowlitz County Prosecuting Attorney
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through the Court's online filing system, with the permission of the
recipient(s).

In addition, I electronically filed the original with the Court of
Appeals.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE
LAWS OF THE STATE OF WASHINGTON THAT THE
FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 13, 2013.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

APPENDIX A:

FILED
COURT OF APPEALS
DIVISION II

2013 OCT 15 AM 8:55

STATE OF WASHINGTON

BY _____
DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

GARY LEE LINDSEY, JR.,
Appellant.

No. 43219-6-II

PUBLISHED OPINION

MAXA, J. – Gary Lee Lindsey, Jr., appeals his conviction for trafficking in stolen property under RCW 9A.82.050(1). He argues that this statute identifies eight alternative means of committing the crime, and based on this alternative means argument claims that (1) the charging document was factually deficient because it did not state facts supporting each alternative means, (2) he was denied a fair trial because the trial court instructed the jury on an uncharged alternative means of committing the offense, and (3) he was denied his constitutional right to an unanimous verdict because there was insufficient evidence to support conviction on several of the alternative means. Lindsey also argues that the trial court improperly refused to appoint new counsel when conflicts arose with his trial counsel, thereby violating his constitutional right to counsel.

We hold that RCW 9A.82.050(1) identifies only two alternative means, and on that basis reject Lindsey's arguments regarding the information and sufficiency of the evidence. We do not

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consider Lindsey's challenge to the jury instruction because he did not object below. We also hold that the trial court did not abuse its discretion in refusing to appoint new counsel. We affirm.

FACTS

Charged Crime

Earl Teel had possession of a large, 470-pound stainless steel tank that he hoped to sell on Craigslist. Teel placed the tank near a scrap bin where he deposited recyclable metals disposed of in his business.

On July 6, 2011, Teel observed a pickup truck drive onto his business property and then saw the driver – Lindsey – start looking through the scrap bin. Teel approached and asked Lindsey what he was doing, and Lindsey responded that he needed some cables to pull a log over an embankment for his firewood business. Teel told him to take the cables but not to return or take anything else without permission.

On July 10, Teel discovered that the tank was gone. Teel immediately called the police. The next morning Cowlitz County Deputy Sheriff Lorenzo Gladson went to GT Metals and Salvage and asked the owner to keep an eye out for anyone trying to scrap a stainless steel tank. One of GT Metals' employees later reported that someone was trying to scrap the lid to a stainless steel tank and would be returning with the rest of the tank. Gladson waited until Lindsey arrived with the tank and arrested him.

Gladson asked Lindsey how he got the tank. Lindsey responded that he had purchased it from someone known to him as a thief and that he knew the tank was stolen. Later, while sitting in the patrol car waiting for Teel to arrive, Lindsey remarked, " 'I might as well be honest with you. I took it.' " Report of Proceedings (RP) at 82. After matching the serial numbers on the

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tank with those Teel had given him earlier, Gladson showed Teel a photograph of Lindsey. Teel identified Lindsey as the same man who had been at his business going through his scrap bin.

The State charged Lindsey with first degree trafficking in stolen property.¹ The amended information charged the following:

TRAFFICKING IN STOLEN PROPERTY IN THE FIRST DEGREE

The defendant, in the County of Cowlitz, State of Washington, on, about or between July 08, 2011, and July 11, 2011, did knowingly organize, plan, finance, direct, manage and/or supervise the theft of property, to-wit: steel tank and/or cover, for sale to others, or did knowingly traffic in stolen property, to wit: steel tank and/or cover, contrary to RCW 9A.82.050(1) and against the peace and dignity of the State of Washington.

Clerk's Papers (CP) at 1. This amended information omitted the word "initiate" before "organize", which is contained in the statutory language.

Conflict with Counsel

At three separate hearings before trial, the issue arose as to whether Lindsey and his appointed counsel had a conflict entitling Lindsey to a change of attorney. The trial court held a hearing on November 2, 2011, because of Lindsey's concerns. At that hearing, Lindsey expressly waived counsel's conflict of interest.

On November 30, Lindsey asked for a new attorney, asserting that his counsel was not doing enough to get the charges reduced and that his counsel was not helping him. The trial court denied his request. On December 8, Lindsey again requested new counsel, explaining that poor communication and lack of trust undermined his attorney-client relationship. Defense counsel explained that they had engaged in heated arguments over getting a lesser charge from

¹ The amended information also charged Lindsey with third degree driving while license suspended or revoked but the trial court dismissed this charge before trial.

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the prosecutor, but that these arguments would not keep him from representing Lindsey fairly.

The trial court again denied the motion. The issue did not arise again.

Trial

At trial, the trial gave the following “to convict” instruction to the jury:

To convict the defendant of the crime of Trafficking in Stolen Property in the First Degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on, about, or between July 8 and July 11, 2011, the defendant knowingly:
 - (a) initiated, organized, planned, financed, directed, managed, and /or supervised the theft of property for sale to others;
 - or
 - (b) trafficked in stolen property with the knowledge that the property was stolen; and
- (2) That this act occurred in the State of Washington.

Suppl. CP at 48. The instruction included the word “initiated” that had been omitted from the amended information. Lindsey did not object to this instruction.

The jury returned a guilty verdict. At the sentencing hearing, Lindsey mentioned his counsel when responding to the trial court’s questions, saying, “He’s [defense counsel] doing good. Don’t get me wrong.” RP at 188.

ANALYSIS

A. ALTERNATIVE MEANS ARGUMENTS

Lindsey argues that RCW 9A.82.050(1) identifies eight alternative means of committing the crime of first degree trafficking in stolen property. Three of his assignments of error are based on this argument. We disagree with this interpretation of RCW 9A.82.050(1).

RCW 9A.82.050 defines first degree trafficking in stolen property:

- (1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly

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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.

Lindsey claims that this statute identifies eight alternative means for committing the crime:

knowingly (1) initiating, (2) organizing, (3) planning, (4) financing, (5) directing, (6) managing and (7) supervising the theft of property for sale to others, and (8) knowingly trafficking in stolen property. The State contends that there are two alternative means: (1) knowingly initiating, organizing, planning, financing, directing, managing or supervising the theft of property for sale to others; and (2) knowingly trafficking in stolen property.

“An ‘alternative means crime’ is one ‘that provide[s] that the proscribed criminal conduct may be proved in a variety of ways.’ ” *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) (alteration in original) (quoting *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007)). Because the legislature has not defined what constitutes an alternative means crime, whether a statute provides an alternate means for committing a particular crime is left to judicial determination. *Peterson*, 168 Wn.2d at 769. However, there is no bright-line rule for making this determination and each case must be evaluated on its own merits. *Peterson*, 168 Wn.2d at 769.

Washington cases suggest some guidelines for analyzing the alternative means issue. Merely stating methods of committing a crime in the disjunctive does not mean that there are alternative means of committing a crime. *Peterson*, 168 Wn.2d at 770. Definitional statutes do not create additional alternative means for a crime. *Smith*, 159 Wn.2d at 785. And a statute divided into subparts is more likely to be found to designate alternative means. *See State v. Al-Hamdani*, 109 Wn. App. 599, 607, 36 P.3d 1103 (2001) (distinguishing statutes for alternative means purposes because they separate means by subparts).

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Reviewing RCW 9A.82.050(1) as a whole convinces us that the legislature intended two alternative means of committing the crime of trafficking in stolen property rather than eight. First, the placement and repetition of the word “knowingly” suggests that the legislature intended two means. The first “knowingly” clearly relates to all seven terms in the first part of the statute – “initiates, organizes, plans, finances, directs, manages, or supervises” – as a group. If each word was interpreted as standing on its own, the knowing requirement would apply only to “initiates”. Similarly, the phrase “the theft of property for sale to others” relates to the entire group. Treating these terms as a group indicates that they represent multiple facets of a single means of committing the crime. And use of the word “knowingly” a second time before the phrase “trafficking in stolen property” indicates that this is a separate means set apart from the other group. If the statute described eight means, there would be no need to use the word knowingly again.

Second and similarly, the statute repeats the word “who”. The statute thus contains two parts with each using “who” as a subject and separated with a disjunctive, making two independent clauses. Each clause describes distinct means of committing the offense. If the statute described eight means there would be no need to use the word “who” again.

Third, the first group of seven terms relate to different aspects of a single category of criminal conduct – facilitating or participating in the theft of property so that it can be sold. As a result, these terms appear to be definitional. They are examples of such facilitation or participation. As noted above, definitional statutes do not create multiple alternative means for a crime. *Smith*, 159 Wn.2d at 785. And trafficking in stolen property involves a second, separate category – transferring possession of property known to be stolen – defined separately in RCW 9A.82.010(19).

Finally, although RCW 9A.82.050(1) is not formally divided into subparts, the statutory language easily divides into two sections describing two different offenders: a person who knowingly facilitates or participates (“initiates, organizes, plans, finances, directs, manages, or supervises”) the theft of property for sale to others, and a person who knowingly transfers possession (“traffics”) of stolen property. If the legislature had designated the two sections of the statute as subparagraphs (a) and (b), there would be no question that it was describing only two alternative means. But even in the absence of such a designation, the paragraph structure compels the conclusion that the statute describes only two means.

Our holding is consistent with *Peterson*, where the court held that the failure to register as a sex offender statute proscribed a single act, not distinct acts, and therefore was not an alternative means crime. 168 Wn.2d 770. The court contrasted this with the theft statute, which proscribes distinct acts constituting theft. *Peterson*, 168 Wn.2d 770. Similarly, in *State v. Laico*, 97 Wn. App. 759, 762, 987 P.2d 638 (1999), the court held that the three definitions of “great bodily harm” for first degree assault did not create three alternative means for committing the offense. Accordingly, jury unanimity with regard to the existence of great bodily harm did not require unanimity as to the type of great bodily harm. *Laico*, 97 Wn. App. at 762.

Lindsey relies on *State v. Strohm*, 75 Wn. App. 301, 879 P.2d 962 (1994), where Division One of this court addressed alternative means in the context of former RCW 9A.82.050(2) (1984).² But the issue in that case was not the number of alternative means described in former RCW 9A.82.050(2). Instead, Strohm argued that former RCW 9A.82.010(10) (1994), which

² Former RCW 9A.82.050(2) was the statute in effect in 1994. The statute was recodified as RCW 9A.82.050(1) in 2003.

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defined “traffic”,³ listed several alternative means of trafficking in stolen property in addition to the means stated in former RCW 9A.82.050(2). *Strohm*, 75 Wn. App. at 307-08. Division One rejected this argument, reasoning that definitional statutes do not create alternative means of committing an offense. *Strohm*, 75 Wn. App. at 308-09. The court explained that this is because the legislature was defining an element of the offense, not creating alternate elements. *Strohm*, 75 Wn. App. at 308 (citing *State v. Garvin*, 28 Wn. App. 82, 85, 621 P.2d 215 (1980)).

At the beginning of its discussion, Division One stated without analysis or comment that former RCW 9A.82.050(2) had eight alternative means. *Strohm*, 75 Wn. App. at 307. After rejecting the *Strohm*’s argument that the definition of “traffic” contained additional alternative means, the court concluded that sufficient evidence supported a conviction on each of the eight means. *Strohm*, 75 Wn. App. at 309. Years later, Division One repeated without analysis its statement in *Strohm* that RCW 9A.82.050 identifies eight alternative means. *State v. Hayes*, 164 Wn. App. 459, 476, 262 P.3d 538 (2011). However, the issue of whether RCW 9A.82.050 identifies two or eight alternative means was not before the court in either *Strohm* or *Hayes*. And the court did not actually discuss in either case the alternative means issue with respect to RCW 9A.82.050.

Based on our analysis of the statutory language discussed above, we decline to follow the dicta in *Strohm*. We conclude that there are two means of committing first degree trafficking in

³ Former RCW 9A.82.010(10) (now codified at RCW 9A.82.010(19)) provided:

“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.

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stolen property: (1) facilitating the theft of property so that it can be sold and (2) facilitating the sale of property known to be stolen. We now turn to Lindsey's specific arguments.

1. Sufficiency of the Information

Lindsey claims that the amended information did not properly apprise him of the factual basis for the charges, depriving him of his constitutional right to notice. Specifically, he argues that the information set out eight alternative means of committing first degree trafficking in stolen property and the information did not provide sufficient facts to ascertain what alleged conduct constituted the offense. We disagree.

Article I, section 22 of the Washington Constitution provides in part, "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him." The Sixth Amendment to the United States Constitution provides in part, "In all . . . prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." CrR 2.1(a)(1) provides in part that "the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Lindsey did not object to the sufficiency of the information or request a bill of particulars below. However, a challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991). We review challenges to the sufficiency of a charging document de novo. *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). But where the defendant challenges the sufficiency of an information for the first time on appeal, this court construes the document liberally in favor of validity. *State v. Brown*, 169 Wn.2d 195, 197, 234 P.3d 212 (2010). Under this liberal construction rule, we will uphold the charging document if an apparently missing element may be "fairly implied" from the language within the document. *Kjorsvik*, 117 Wn.2d at 104. The

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test is: “(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he was nonetheless actually prejudiced by the inartful language which caused a lack of notice?” *Kjorsvik*, 117 Wn.2d at 105-06.

Under the “essential elements” rule, a charging document must allege facts supporting every element of the offense in addition to adequately identifying the crime charged. *State v. Leach*, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). “It is sufficient to charge in the language of a statute if it defines the offense with certainty.” *State v. Elliott*, 114 Wn.2d 6, 13, 785 P.2d 440 (1990) (citing *Leach*, 113 Wn.2d at 686). The primary goal of the essential elements rule is to give notice to an accused of the nature of the crime that he must be prepared to defend against. *Kjorsvik*, 117 Wn.2d at 101 (citing 2 W. LAFAYE & J. ISRAEL, CRIMINAL PROCEDURE § 19.2, at 446 (1984); 1 C. WRIGHT, FEDERAL PRACTICE § 125, at 365 (2d ed. 1982)). All essential elements of the crime charged, including nonstatutory elements, must be included in the charging document so that a defense can be properly prepared. *Kjorsvik*, 117 Wn.2d at 101-02.

In *State v. Winings*, 126 Wn. App. 75, 84–85, 107 P.3d 141 (2005), the State charged Winings with second degree assault while armed with a deadly weapon but failed to identify the victim, the weapon used, or how Winings used the weapon. We held that the information, although vague, was constitutionally sufficient because it alleged assault of another with a deadly weapon in violation of RCW 9A.36.021 and it included the assault’s date and location. *Winings*, 126 Wn. App. at 86.

Here, the information alleged that Lindsey knowingly facilitated in the theft of property for sale to others and trafficked in stolen property in violation of RCW 9A.82.050(1), quotes the statute, identifies the stolen property, and alleges the applicable dates and county of the crime.

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Great specificity is not required, only sufficient facts for each element. *Winings*, 126 Wn. App. at 85. These details in the information, read liberally and in a common sense manner, were sufficient to give notice to Lindsey regarding the nature of the charges.

Lindsey seems to argue that because the statute provides eight alternative means for committing the crime, the information was required to provide specific facts supporting each of eight means. We disagree. As we have just held, RCW 9A.82.050(1) describes only two alternative means of committing trafficking in stolen property, and the information here provided Lindsey with sufficient detail for both means.

Ordinarily, we next would consider whether the defendant was, nonetheless, prejudiced by the “inartful language” of the information. *Kjorsvik*, 117 Wn.2d at 106. But Lindsey does not argue prejudice. Because he has the burden of raising and demonstrating prejudice, we decline to further consider the issue. *See generally Kjorsvik*, 117 Wn.2d at 106.

We hold that the information was constitutionally sufficient to provide Lindsey notice of the charge against him.

2. Instruction on Uncharged Alternative

The amended information did not include “initiated” as a means of committing trafficking in stolen property, but the “to convict” instruction did. Lindsey argues that instructing the jury on this uncharged alternative was error requiring reversal of his conviction. However, we need not address this argument because Lindsey failed to object to the instruction at trial.

The Sixth Amendment to the U.S. Constitution and article I, section 22 of the Washington Constitution require that an accused be informed of the charges he/she must face at trial. Accordingly, when an information alleges certain alternative means of committing an

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offense, it is error to instruct the jury on uncharged means allowable under the criminal statute. *State v. Brewczynski*, 173 Wn. App. 541, 549, 294 P.3d 825, review denied, 177 Wn.2d 1026 (2013). This is because “[o]ne cannot be tried for an uncharged offense.” *State v. Chino*, 117 Wn. App. 531, 540, 72 P.3d 256 (2003) (quoting *State v. Bray*, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988)). But the error can be harmless if other instructions define the crime in a manner that leaves only the charged alternative before the jury. *Brewczynski*, 173 Wn. App. at 549.

However, Lindsey did not object to the to-convict instruction at trial and raises this issue for the first time on appeal. RAP 2.5(a) states that “[t]he appellate court may refuse to review any claim of error which was not raised in the trial court.” The purpose behind this rule is to encourage the efficient use of judicial resources by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *State v. Robinson*, 171 Wn.2d 292, 304-05, 253 P.3d 84 (2011). RAP 2.5(a)(3) further states that a party may raise particular types of errors for the first time on appeal, including “manifest errors affecting a constitutional right”. But Lindsey fails to argue that any of the exceptions listed in RAP 2.5(a) apply. Therefore, we do not address his claim regarding inclusion of an uncharged alternative in the to-convict instruction.

3. Right to Unanimous Verdict

Lindsey argues that the State failed to present evidence that he violated all eight charged means of committing his offense, which violated his right to a unanimous verdict in the absence of a special verdict. In particular, he argues that there was no evidence that he organized, directed, managed, supervised, or financed the theft of property for sale to others. Based on our holding above that there are only two alternative means for committing the crime of trafficking in stolen property, we reject Lindsey’s argument.

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Article I, section 21 of the Washington Constitution guarantees criminal defendants the right to a unanimous jury verdict. “In certain situations, the right to a unanimous jury trial also includes the right to express jury unanimity on the *means* by which the defendant is found to have committed the crime.” *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (emphasis in original) (citing *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980)). When sufficient evidence exists to support each alternative means submitted to the jury, a jury expression of unanimity is unnecessary because we infer that the jury was unanimous as to the means. *Ortega-Martinez*, 124 Wn.2d at 707-08 (citing *State v. Whitney*, 108 Wn.2d 506, 739 P.2d 1150 (1987)).

Although first degree trafficking in stolen property is an alternative means crime, it proscribes only two alternatives rather than eight. Lindsey concedes that there is evidence to support at least three of the definitions listed in the first part of RCW 9A.82.050(1), and we observe that substantial evidence supports the second part of the subsection. Accordingly, we hold that Lindsey’s argument regarding unanimity fails.

B. RIGHT TO CHANGE OF COUNSEL

Lindsey argues that the trial court abused its discretion in denying his repeated requests for new counsel, violating his Sixth and Fourteenth Amendment right to counsel. He argues that the trial court should have conducted a more thorough investigation, especially when it appeared that the attorney-client relationship had deteriorated to the point where the two could not work together. We disagree.

We review a trial court’s refusal to appoint new counsel for an abuse of discretion. *State v. Cross*, 156 Wn.2d 580, 607, 132 P.2d 80 (2006). “There is an abuse of discretion when the trial court’s decision is manifestly unreasonable or based upon untenable grounds or reasons.”

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State v. Brown, 132 Wn.2d 529, 572, 940 P.2d 546 (1997). “A decision is based ‘on untenable grounds’ or made ‘for untenable reasons’ if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal quotation marks omitted) (quoting *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). In assessing the trial court’s decision, we look at (1) the extent of the conflict between attorney and client, (2) the adequacy of the trial court’s inquiry into that conflict, and (3) the timeliness of the motion for appointment of new counsel. *Cross*, 156 Wn.2d at 607.

As noted above, on three separate occasions the trial court addressed Lindsey’s requests for new counsel. At the first hearing, Lindsey waived his claim that a conflict of interest existed. At the second hearing, Lindsey felt that his attorney was not doing enough to help him with his mental health issues and in getting the State to reduce the charges. And at the third hearing, one day before trial, Lindsey complained that the two had a communication problem, they had yelled at each other, and Lindsey had hung up the telephone on counsel. Defense counsel assured the trial court that he did not believe that these communication issues would prevent him from competently representing Lindsey or that they would cause him to compromise his representation.

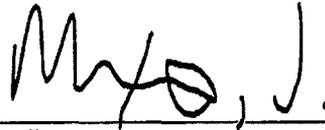
Under the *Cross* factors, Lindsey has failed to show that the trial court abused its discretion. First, although there appeared to be some friction between Lindsey and his counsel, the conflict did not appear too serious. At the first hearing, Lindsey waived his claim that a conflict of interest existed. At the second hearing, Lindsey felt that his attorney was not doing enough to help him but did not articulate a specific basis for withdrawal. And Lindsey’s reasons for wanting a change of counsel seemed to change as the time for trial neared, suggesting that

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they were fleeting requests not based on a tangible conflict. Second, the trial court held three hearings in which it inquired about the possible conflict. At the third hearing, the trial court expressly considered whether defense counsel was prepared for trial and the extent of the communications breakdown. Only when defense counsel provided assurance that he could provide competent representation did the trial court deny the motion. Finally, it is worth noting that Lindsey did not raise any concerns about a conflict with counsel during trial or after the jury returned a guilty verdict. In fact, at his sentencing he expressed satisfaction with counsel.

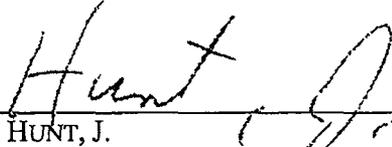
We hold that the trial court did not abuse its discretion in denying Lindsey's requests to appoint new trial counsel.

We affirm.

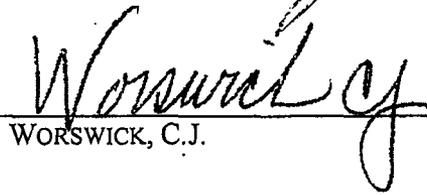


MAXA, J.

We concur:



HUNT, J.



WORSWICK, C.J.

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