SUPREME COURT NO. 93770-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TYLER,

Petitioner.

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

The Honorable Thomas J. Wynne, Judge

SUPPLEMENTAL BREIF OF PETITIONER

JENNIFER L. DOBSON
DANA M. NELSON
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

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A. SUPPLEMENTAL ISSUES

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2. Was the evidence constitutionally insufficient to prove appellant "disposed of" a stolen vehicle?

3. Where the evidence was insufficient to prove the added "disposed of" element beyond a reasonable doubt, is the remedy dismissal?

B. SUPPLEMENTAL STATEMENT OF THE CASE

1. Substantive Facts

On January 10, 2014, at approximately 2:30 in the morning, Deputy Sheriff Scott Stitch was patrolling Forest Service Road 2070 near Darrington, Washington. RP 35-36.[1] He saw a Honda Accord on a jack and a Ford Ranger pick-up truck about twenty feet away. RP 37.

Upon reaching the scene, Stitch observed two men outside the truck and a man and woman inside the cab. RP 38-39. He later determined that petitioner Robert Tyler was in the driver seat

[1] The reference to report of proceedings refers to the trial transcript for March 30, 2015 to April 1, 2015.

of the pick-up truck. RP 40. Rebekah Nicholson was the woman inside the truck. RP 40, 57-58. Anthony Coleman and Tyson Whitt were outside the truck. RP 38, 40, 102.

Stitch never saw Tyler near the Honda or outside his truck. RP 60, 63. However, Stitch observed a few car parts that appeared to have been removed from the Honda inside Tyler's truck. RP 42, 43, 45, 54. Stitch suspected the Honda was being stripped of parts, so he arrested the individuals. RP 54, 58.

Eventually, police confirmed the Honda had been reported stole. RP 17, 52. Shortly after, Nicholson told police that Whitt, not Tyler, stole the vehicle. RP 58. Separately, Tyler told police he was doing a favor for Whitt's parents when he followed Whitt to the forest service road. RP 81. He admitted he had deduced from the circumstances that the car Whitt was driving was stolen. RP 82, 84.

On May 14, 2014, the Snohomish County prosecutor charged Tyler with one count of possession of a stolen motor vehicle under RCW 9A.56.068. CP 80-81. The jury was instructed that to convict Tyler the State had to prove the following elements beyond a reasonable doubt:

(1) That on or about the 10th day of January 2014,

> the defendant knowingly received, retained, possessed, concealed, disposed of a stolen motor vehicle;
>
> (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
>
> (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
>
> (4) That any of these acts occurred in the State of Washington.

CP 27. The State did not object. RP 134. A jury found Tyler guilty as charged. CP19.

2. Relevant Facts Pertaining to the Appeal

On appeal, Tyler challenged his conviction, asserting the State was required to prove he "disposed of" a stolen motor vehicle but had not done so. Tyler cited State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) for the proposition that once that element was included in the to-convict instruction, it became an essential element under the "law of the case" doctrine. Brief of Appellant (BOA) at 5-9 and Reply Brief of Appellant (RBOA) at 1-7.

Division One asked for supplemental briefing as to whether the U.S. Supreme Court's decision in Musacchio v. United States, __ U.S. __, 136 S. Ct. 709, 716, 193 L. Ed. 2d 639 (2016) was applicable. Musacchio holds that federal common law does not

require the government to prove as an essential element of a federal crime those elements not charged even when the jury is instructed on such elements. Id. at 716. Essentially, the question posed to Tyler was whether Musacchio superseded Hickman. Tyler answered that Musacchio was not applicable because it was predicated on federal common law, whereas Hickman was predicated upon Washington's "law of the case" doctrine (state common law). Supplemental Brief of Appellant (SBOA) at 1-5

Division One disagreed, reading Musacchio solely as a federal due process case and thereby concluding its holding abrogated Hickman and its progeny. State v. Tyler, 195 Wn. App. 385, 392-402, 382 P.3d 699 (2016). It also suggested in dicta that even if Musacchio were distinguishable on state common law grounds as Tyler urged, the only remedy available was a new trial (not reversal and dismissal as indicated under Hickman). Id. at 403-404. Ultimately, Division One held there was sufficient evidence to prove the necessary elements set forth in RCW 9A.56.068 (which does not expressly include the added "disposed of" element), and it affirmed Tyler's conviction. Id. at 402.

Tyler petitioned this Court for review raising the question of Hickman's continued viability after Musacchio. Petition for Review

at 7-12. His petition was stayed pending this Court's decision in State v. Johnson, 188 Wn.2d 742, 399 P.3d 507 (2017) – a case which raised the same legal question.

On July 13, 2017, this Court published its decision in Johnson. It held Hickman was still good law. Id. at 757-762. It determined that Musacchio resolves only how federal courts determine the elements of federal crimes, and it does not govern how states determine the elements of state crimes. Id. It concluded Musacchio did not abrogate Washington's "law of the case" doctrine.

On November 8, 2017, this Court lifted the stay in Tyler's case, granted review and specifically asked the parties to address the question of remedy.[2]

C. SUPPLEMENTAL ARGUMENT

I. UNDER WASHINGTON'S "LAW OF THE CASE" DOCTRINE, THE STATE WAS REQUIRED TO PROVE BEYOND A REASONABLE DOUBT THAT TYLER "DISPOSED OF" A STOLEN VEHICLE.

The to-convict instruction provided to the jury added in Tyler's case the element that he "disposed of" a stolen vehicle. CP 27. The State did not object. RP 134. Consequently, that

[2] In Johnson, this Court did not have to directly address the question of remedy because Johnson could not show insufficient evidence in relation to the added element. Id. at 756, n. 9.

instruction became the law of the case, and the State had the burden of establishing beyond a reasonable doubt that Tyler "disposed of" the Honda.

Under Washington's "law of the case" doctrine, unless the State objects to the to-convict instruction, it defines the essential elements of a crime that the State must prove beyond a reasonable doubt to secure a conviction. Johnson, 188 Wn.2d at 760; Hickman, 135 Wn.2d at 102. This is so even though the added elements are not necessary under the relevant statute. For example, in State v. Hickman, the defendant was tried for insurance fraud under RCW 48.30.230. Id. at 99-100. Venue was not a necessary element under the statute. Id. However, that element was added to the to-convict instruction. Id. at 101. This Court held venue became an essential element under the law of that case, and the State was required to prove that element beyond a reasonable doubt. Id. at 105.

Hickman rested on this Court's determination that the "law of the case" doctrine benefits the justice system by encouraging trial counsel to carefully and methodically review to-convict instructions to ensure their propriety before they are submitted to and acted

upon by the jury.[3] Id. at 105. In Johnson, this Court affirmed Hickman's application of "the law of the case" doctrine, concluding it was neither harmful not incorrect and continues to be good law. 188 Wn.2d at 756-62.

Hickman applies here. By failing to object to the to-convict instruction, the State took on the burden of proving Tyler "knowingly received, retained, possessed, concealed, [and] disposed of a stolen motor vehicle" even though proof of all these acts is not statutorily necessary. CP 27.

While the instruction did not expressly include the coordinating conjunction "and" after the serial comma and instead listed the acts without any conjunction (CP 27), the default rule of construction for legal text is to interpret such a list as conjunctive rather than disjunctive. See, Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, 119 (2012) (explaining legal interpretation presumes "and" to be the final

[3] This Court has also cited Washington's constitution to support its law of the case doctrine. Pepperall v. City Park Transit Co., 15 Wash. 176, 183, 45 P. 743 (1896), overruled on other grounds by Thornton v. Dow, 60 Wash. 622, 111 P. 899 (1910). The Washington Constitution provides in pertinent part: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH CONST. art. IV § 16 (emphasis added).

coordinating conjunction where there is a list without any coordinating conjunction).[4]

Under such an interpretation of the to-convict instruction, there are no alternative means. The State had to prove all five means. Thus, the sufficiency analysis is straight forward. The Court simply looks to see whether there was sufficient evidence in the record proving each of the five acts.[5]

If this Court disagrees and reads the to-convict instruction as requiring proof Tyler knowingly received, retained, possessed, concealed, or disposed of a stolen vehicle, the sufficiency analysis takes a slight detour away from Hickman and ventures into the area of alternative means. E.g., State v. Hayes, 164 Wn. App. 459, 480, 262 P.3d 538 (2011). As explained below, however, regardless of the analytical path taken one still arrives at the same destination for sufficiency purposes.

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[4] Although not relevant to a Hickman analysis, it is worth noting that the information charged Tyler by using the coordinating conjunction "and," while the definitional instruction used the disjunctive "or." CP 26, 80.

[5] Admittedly, appellant's previous briefing did not engage in this type of textual analysis and, thus, unnecessarily waded through the alternative means case law. However, this does not change the fact that – under standard rules of construction for legal text – the list of criminal acts is to be construed as conjunctive rather than disjunctive. And it does not change the fact that Tyler has always maintained the State failed to sufficiently prove he "disposed of" the Honda.

When alternative distinct criminal acts are added to the to-convict instruction and there is only a general verdict, the specter is raised that a defendant's constitutional right to a unanimous verdict has been violation. State v. Hayes, 164 Wn. App. 459, 480, 262 P.3d 538 (2011); State v. Lillard, 122 Wn. App. 422, 434, 93 P.3d 969, 975 (2004). To safeguard against such a violation, the State must show it presented evidence beyond a reasonable doubt as to each alternative means. Id.

The first step is to determine whether the alternative acts at issue represent distinct criminal conduct or are just nuances of a single criminal act. State v. Owens, 180 Wn.2d 90, n. 5, 323 P.3d 1030 (2014). Alternative means – whether set forth in a criminal statute or a to-convict instruction – are determined by looking at the variation among the different conduct. Id. at 96; Hayes, 164 Wn. App. at 481.

Here, the "disposed of" element represents criminal conduct that is distinct from the other conduct listed in the to-convict instruction. "Possess," "retain," and "receive" essentially mean to take hold of, or maintain physical or constructive control over, an

object.[6] "Conceal" means to prevent disclosure or recognition of an object.[7] It also suggests that one continues holding or maintaining control over a property. By contrast, "dispose of" means to transfer control to another or to get rid of an object.[8] It denotes the opposite of physically holding on to an object or maintaining control over it. Thus, this conduct is significantly varied from the other conduct listed.

The "disposed of" element is not merely a nuanced version of the other acts listed in the to-convict instruction.[9] Indeed, Tyler

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[6] See, "Possess." "Receive." and "Retain" *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 3 Dec. 2017.

[7] See, "Conceal." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 3 Dec. 2017.

[8] See, "Dispose." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 3 Dec. 2017.

[9] In response, the State may point to State v. Makekau, 194 Wn. App. 407, 414, 378 P.3d 577 (2016) in which Division Two concludes the "disposed of" element is not distinct criminal conduct. However, this conclusion is not based on a rigorous analysis of the meanings of the alternative terms provided in the to-convict instruction. Instead the sum of Division Two's reasoning is as follows: "It would be hard to imagine a situation where a person receives, retains, conceals, or disposes of a stolen vehicle without possessing it at some time." Id. However, it is not a crime to merely possess, retain, receive, conceal, or dispose of stolen property at some time. It is only a crime to engage in those actions with knowledge that the property is stolen. It is possible for a person to have possessed stolen property at some point without knowing it was stolen (not a criminal act) and then discarded that property upon learning that it was stolen (a criminal act supporting conviction). Hence, even the minimal reasoning offered in Makekau is not solid. As discussed above, when the meanings of the conduct at issue is considered and compared, the result undercuts Makekau's conclusion as it applies to the "disposed of" element. Consequently, this Court should decline to follow Makekau.

could have committed the other acts listed but still not have "disposed of" a stolen vehicle. As such, this element represents distinct criminal conduct. Thus, to insure Tyler his right to a unanimous verdict, the evidence must establish beyond a reasonable doubt that Tyler disposed of the Honda.

In the end, regardless of which analytical path this Court takes – a straight forward Hickman analysis or an alternative means analysis that looks at the added elements -- the relevant question is the same: Did the State produce proof beyond a reasonable doubt that Tyler (or an accomplice) "disposed of" a stolen vehicle? As shown below, the answer is no.

II. THERE WAS INSUFFICIENT EVIDENCE TO PROVE TYLER DISPOSED OF A STOLEN VEHICLE.

As explained above, disposing of something means to transfer control to someone else or to get rid of or discard.[10] In this case, there was no evidence that Tyler or Whitt handed over the Honda to someone else. Indeed, the record supports just the opposite conclusion. It established that Whitt stole the Honda, concealed it by driving out to a remote road, and continued to maintain control over it up until the time of arrest.

[10] See, "Dispose." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 3 Dec. 2017.

There was also not sufficient evidence establishing that either Tyler or Whitt discarded the Honda. While the jury could have inferred that Whitt had stripped the car of some its parts, the evidence established he had not abandoned or discarded the car. Instead, the evidence strongly suggests Whitt was holding on to the Honda to obtain more parts.

Indeed, even the State appears to implicitly concede this point in its response brief below, where it argued: "Here the facts and circumstances show that the defendant was 'disposing of' the Honda by getting rid of it or discarding it." Brief of Respondent (BOR) at 11 (emphasis added). By the State's own admission, the evidence – even when looked at in the light most favorable to the State – supports only the conclusion Whitt was in the process of discarding the car but had not done so. However, the State was not tasked with merely showing Tyler was disposing of the car. It was required to prove beyond a reasonable doubt he "disposed of" the car. The State did not carry this burden.

In sum, under the law of the case, the record must show sufficient evidence that either Tyler or Whitt "disposed of" the stolen Honda. Because Whitt retained the car and never discarded it or transferred control to another, the State could not carry its burden

of proving the added "disposed of" element beyond a reasonable doubt. Thus, reversal is required. Hickman, 135 Wn.2d at 103-04; Hayes, 164 Wn. App. at 481.

III. THE REMEDY AFTER REVERSAL IS DISMISSAL.

The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or reversal for lack of sufficient evidence. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969) overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989); State v. Hardesty, 129 Wn. 2d 303, 309, 915 P.2d 1080, 1083–84 (1996). A reversal for insufficient evidence is deemed equivalent to an acquittal, for double jeopardy purposes, because it means "no rational factfinder could have voted to convict" on the evidence presented. State v. Wright, 165 Wn. 2d 783, 792, 203 P.3d 1027, 1030 (2009).

Under the due process clauses of the federal constitution and our state constitution, evidence is insufficient to support a conviction unless the State proves all the elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. XIV; State

v. Rich, 184 Wn. 2d 897, 903, 365 P.3d 746, 749 (2016); Wash. Const. art. I, § 3. To determine whether a conviction is adequately supported with sufficient evidence, reviewing courts must consider the essential elements of the crime as defined by state law. Jackson v. Virginia, 443 U.S. 307, 324, n. 16, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Clark, 190 Wn App. 736, 761, 361 P.3d 168, 180 (2015), review denied, 186 Wn. 2d 1009, 380 P.3d 502 (2016).

Regardless of whether the elements defining the crime at issue are the product of Washington common law doctrines or statutory law, the question of whether the State met its burden is still governed by constitutional due process and double jeopardy principles. Jackson, 443 U.S. at 324, n. 16; Johnson, 188 Wn. 2d at 761. Hence, the remedy for insufficient evidence in a case where Washington's law the case doctrine has operated to incorporate added elements is not any different from the remedy in other cases where the State fails to meet its burden of proof.

This Court reached that conclusion in Hickman. There, this Court directly addressed the question of whether the remedy for the State's failure to sufficiently prove an added element found in the to-convict instruction required reversal and remand for a new trial or

outright dismissal. Hickman, 135 Wn.2d at 103-04. Recognizing that the added elements in the to-convict instruction operate the same as statutory elements, this Court saw no reasonable ground to depart from the standard remedy following reversal for insufficient evidence. It concluded: "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." Id. at 104 (citing Hardesty, 129 Wn.2d at 309).

Division One suggests that if Washington's "law of the case" doctrine is grounded in state common law, then Washington common law must dictate the remedy where there is insufficient evidence to prove nonstatutory added elements. Tyler, 195 Wn. App. at 403-04. It asserts the remedy "for a common law insufficiency of the evidence claim" is a new trial, not dismissal. Id. at 404 (citing State v. Pienick, 46 Wash. 522, 529, 90 P. 645 (1907) and State v. Payne, 6 Wash. 563, 574, 34 P. 317 (1893)). However, Hickman recognized, even when state common law is employed to define the elements of a state crime, constitutional principles still in shape the remedy. 135 Wn.2d 103.

In Johnson, 188 Wn.2d at 757, this Court confirmed Hickman was neither incorrect nor harmful. In so doing, it emphasized that the underlying goal of the law of case doctrine is

"to promote finality and efficiency in the judicial process." Id. (citing Roberson v. Perez, 156 Wn. 2d 33, 41, 123 P.3d 844, 849 (2005)). This goal is served best when the remedy is dismissal.

Dismissal rather than remanding for a new trial obviously promotes finality and judicial efficiency in the particular case. But this remedy also promotes systemic efficiency and finality by providing a stronger incentive for prosecutors and courts to ensure that the instructions they are submitting to juries are correct statements of the law. Weakening the remedy in these cases will only serve to undermine this incentive and will likely result in less instructional accuracy and more reversals.

In sum, dismissal is the constitutional remedy to be applied in any case where the State fails to meet its burden of proving the elements of a crime beyond a reasonable doubt. Hickman concluded that this constitutional remedy applies even when the essential elements of an offense are defined by operation of "the law of case" doctrine. Weakening this remedy will only undermine the concepts of finality and judicial efficiency which the "law of the case" doctrine seeks to promote. Hence, dismissal is the appropriate remedy here.

D. CONCLUSION

For the reasons stated above, this Court should reverse and dismiss petitioner's conviction.

DATED this ____ day of December, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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JENNIFER L. DOBSON, WSBA No. 30487
DANA NELSON, WSBA No. 28239
Office ID No. 91051

Attorneys for Petitioner