IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAWNAJO HEIDENREICH, Appellant.	No. 39529-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Dawnajo Heidenreich guilty of first degree trafficking in stolen property. Heidenreich appeals, asserting that the trial court's jury instruction (1) misstated the law and relieved the State of its burden of proof on an element of the offense and (2) created an unconstitutional mandatory presumption. The trial court's instruction did not improperly conflate two mens rea elements to relieve the State's burden of proof or create a mandatory presumption. *State v. Gerdts*, 136 Wn. App. 720, 150 P.3d 627 (2007). Accordingly, we affirm.

Facts

Background Facts

Heidenreich lived in an apartment converted from a gas station with her boyfriend, Mike Peek. Peek died sometime in 2008.[1] While Peek was alive, he allowed his friend, Robert Pierce, to store automobile memorabilia in the gas station's shop and on the station's grounds. Pierce stored a nine-foot-tall antique gas pump outside the gas station's covered awning.[2]

A local automobile memorabilia collector, Michael Dudley, contacted Heidenreich in mid-July 2008 after spotting the gas pump from the road. Dudley returned over the course of a week to inquire about purchasing the pump. On his third visit, Dudley offered Heidenreich $500 for the pump.

The parties dispute the occurrences following Dudley's offer. Dudley contends that Heidenreich accepted immediately and he went to a local bank to withdraw the amount. Upon his return, Dudley contends that Heidenreich and her daughter, Jennifer Ross, helped Dudley load the pump into his truck. Dudley offloaded the gas pump into his garage. Soon after, he showed the pump to another local memorabilia collector, Bryce Moody.

Heidenreich asserts that she did not sell the gas pump, take Dudley's $500, or help him load the pump into his truck. Instead, she contends that when Dudley inquired about the pump, she gave him Pierce's phone number. Heidenreich's children, Jennifer and Jason Ross, agreed with Heidenreich's version of the events surrounding her conversation with Dudley. Jennifer Ross denied helping Dudley load the gas pump into his truck.

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[1] The record is unclear as to the exact cause or date of Peek's death.

[2] Pierce previously told police he purchased the gas pump but testified at trial that it was a gift from a motorcyclist for helping him while stranded roadside.

Pierce returned to the gas station sometime in late June or July of 2008 and noticed the gas pump was no longer under the gas station awning. Pierce received information from a common acquaintance that Dudley may have the pump. Based on the information, Pierce contacted the police. Hoquiam Police Officer Don Wertanen travelled to the Dudleys' home and asked if he could have Pierce identify the gas pump; Dudley's wife agreed. Pierce identified the gas pump in Dudley's garage as the one he had stored at Heidenreich's gas station; Pierce determined that the gas pump was his by matching a company brand name plate he had with him with the proper location on the pump. When questioned by Wertanen, Dudley identified Heidenreich as the seller of the pump from a photo array. The State charged Heidenreich with first degree trafficking in stolen property.

Procedural Facts

A jury trial commenced on June 23, 2009. The trial court's "to convict" jury instruction 5 stated,

> 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 or between July 23, 2008, and August 8, 2008, the defendant *knowingly* trafficked in stolen property;
> (2) That the acts occurred in Grays Harbor County, Washington.

Clerk's Papers (CP) at 16 (emphasis added).

The trial court provided a "knowledge" instruction in jury instruction 7:

> A person knows or acts knowingly or with knowledge when he or she is aware of a fact, facts or circumstances or result described by law as being a crime.
> If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.
> *Acting knowingly or with knowledge also is established if a person acts*

intentionally.

CP at 16 (emphasis added) (*see* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.02, at 206 (3rd ed. 2008)).

Heidenreich did not object to the trial court's instructions. CrR 6.15(c). The jury found Heidenreich guilty of first degree trafficking in stolen property. The trial court sentenced her to six months in jail. Heidenreich timely appeals her conviction.

Analysis

Heidenreich contends that the trial court's "knowledge" jury instruction (1) misstated the law and relieved the State of its burden of proof on an element of the offense and (2) created an unconstitutional mandatory presumption. In support of her contention, she cites *State v. Goble*, 131 Wn. App. 194, 203-04, 126 P.3d 821 (2005), where we reversed a conviction when a jury instruction improperly conflated two separate mens rea elements and relieved the State of its burden to prove the knowledge element. But the instruction at issue in *Goble* is distinguishable from the challenged instruction here. The trial court's "knowledge" jury instruction did not improperly conflate two mens rea elements to relieve the State's burden of proof or create a mandatory presumption. *See, e.g.*, *State v. Sibert*, 168 Wn.2d 306, 316-17, 230 P.3d 142 (2010) (knowledge instruction proper when offense has a single mens rea element).

As an initial matter, we note that Heidenreich did not object to the trial court's jury instructions. CrR 6.15(c). And, in general, we do not address alleged instructional errors raised for the first time on appeal unless the appellant demonstrates a "manifest error affecting a constitutional right." RAP 2.5(a)(3). Heidenreich's contention that the "knowledge" instruction relieved the State of its burden of proof, if true, concerns a manifest error of constitutional

magnitude. Accordingly, RAP 2.5(a) does not preclude our review. *Goble*, 131 Wn. App. at 203-04; *see State v. Deal*, 128 Wn.2d 693, 699, 911 P.2d 996 (1996) (mandatory presumptions that relieve State of proving an element of the offense violate due process).

The Fourteenth Amendment's due process clause provides that criminal defendants are innocent until proven guilty and that the government must prove guilt beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A misstatement of the law or a mandatory presumption in a jury instruction that relieves the State of its burden of proof on every element of an offense is a violation of due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004).

We review alleged errors of law in jury instructions de novo. *State v. Barnes*, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005); *see also State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). "'Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when as a whole properly inform the trier of fact of the applicable law.'" *Gerdts*, 136 Wn. App. at 727 (internal quotation marks omitted) (quoting *State v. Douglas*, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005)). When reviewing the effect of specific jury instruction phrasing, we consider the instruction as a whole and within the context of all the instructions given. *Pirtle*, 127 Wn.2d at 656. In a criminal case, the trial court must instruct the jury that the State has the burden to prove all essential elements of the charged offense beyond a reasonable doubt. *Pirtle*, 127 Wn.2d at 656. A jury instruction that relieves the State of its burden of proof is reversible error. *Pirtle*, 127 Wn.2d at 656.

Mandatory presumptions violate a defendant's due process right if they relieve the State of its obligation to prove all of the elements of the crime charged. *Deal*, 128 Wn.2d at 699 (citing

Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979)). A mandatory presumption requires a jury "to find a presumed fact from a proven fact." *Deal*, 128 Wn.2d at 699. To establish whether a jury instruction creates a mandatory presumption, the court examines whether a reasonable juror would interpret the presumption as mandatory. *Deal*, 128 Wn.2d at 701.

Heidenreich argues that the last sentence of the trial court's "knowledge" jury instruction which stated, "Acting knowingly or with knowledge also is established if a person acts intentionally," improperly created a mandatory presumption by allowing the jury to find knowledge from her taking *any* intentional act. CP at 76. We disagree.

In *Goble*, we determined that identical "knowledge" language contained in a third degree assault "to convict" jury instruction created an impermissible mandatory presumption. We held that the "knowledge" language was confusing because it potentially allowed the jury to find Goble guilty of third degree assault against a law enforcement officer performing his official duties if it found the defendant intentionally assaulted the victim. *Goble*, 131 Wn. App. at 203. This court agreed with Goble's argument that the challenged jury instruction allowed the jury to presume Goble knew the officer's status at the time of the incident if it found the assault was intentional. *Goble*, 131 Wn. App. at 203. Thus, its instructions conflated the intent and knowledge elements required under the "to convict" instruction into a single element and relieved the State of its burden of proving that Goble knew the officer's status if it found the assault was intentional. *Goble*, 131 Wn. App. at 203.

We reiterated this position in *State v. Hayward*, 152 Wn. App. 632, 645, 217 P.3d 354 (2009), where similar "knowledge" language was included in a second degree assault "to convict"

jury instruction. We held that the knowledge language in Hayward's "to convict" instructions improperly allowed the jury to combine the required intent element with the recklessness element necessary to convict for second degree assault and thus relieved the State of its burden of proof. *Hayward*, 152 Wn. App. at 645-46.

However, we distinguished *Goble* in *Gerdts*. The State charged Gerdts with second degree malicious mischief for scraping a parked van. That crime required the jury to find only one mens rea element to convict. *Gerdts*, 136 Wn. App. at 722-23. Gerdts argued that the jury instruction would allow the jury to find he acted with knowledge if it found he just intentionally walked past the van. *Gerdts*, 136 Wn. App. at 727-28. We held the trial court's jury instructions contained no second mens rea element to conflate and *Goble* was thus inapplicable. *Gerdts*, 136 Wn. App. at 728.

Our Supreme Court recently reiterated this distinction in *Sibert*, 168 Wn.2d at 316-17 (a "knowledge" jury instruction is appropriate for delivery of a controlled substance that has one mens rea element). Here, the State was required to prove only one mens rea; that Heidenreich knowingly trafficked in stolen property. *See* RCW 9A.82.050. Jury instruction 5 required the State to prove that Heidenreich *knew* she was trafficking in stolen property. *Gerdts* and *Sibert*, as opposed to *Goble* and *Hayward*, are dispositive. There is only one mens rea element essential to convict Heidenreich of knowingly trafficking in stolen property. As there is no second mens rea element, there is also no mandatory presumption here.

Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

ARMSTRONG, J.

WORSWICK, A.C.J.