IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. WENDY S. PETERSON, Appellant.	No. 41552-6-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Wendy Peterson appeals her conviction of theft of a motor vehicle, arguing that the trial court erred when it answered a jury question without first consulting the parties.[1] Holding that the error was harmless, we affirm.

FACTS

On December 13, 2009, Peterson and Charles Showalter went to the residence of Jack Sergojan on Sudderth Road in Hoquiam, near Humptulips. Sergojan used this residence as a vacation home. He did not visit the home during December 2009 and early January 2010, and had not given anyone permission to stay there or remove anything in his absence. When

[1] A commissioner of this court considered the matter pursuant to RAP 18.12 and 18.13 and referred it to a panel of judges.

Peterson and Showalter arrived, they found that their acquaintance, Don Erickson, had removed Sergojan's 1968 Camaro from the garage. Peterson and Showalter took the Camaro, placed it on a tow dolly, and transported it to their home. Peterson and Showalter sold the Camaro to Frank Hejna, Peterson's brother, on December 17 or 18.

On January 19, 2010, Deputy Sheriff Carl Lovgren was dispatched following a report of a burglary at Sergojan's home. It appeared to Deputy Lovgren that people had been living at Sergojan's residence without permission for an extended period. Sergojan's 1968 Chevy Camaro was also missing from the garage.

Grays Harbor County Sheriff's Office Sergeant Brad Johansson supervised the investigation of Sergojan's stolen Camaro. He contacted Peterson, who said that Erickson told Showalter about a Camaro he had found in an abandoned garage in Humptulips. In her statement to Deputy Johansson, Peterson said that she and Showalter decided to steal the Camaro and sell it to Hejna because they needed money to buy their children presents for Christmas. Peterson explained that she and Showalter borrowed a car dolly from Erickson, took their S-10 Blazer up to the Sudderth Road house, and, with Erickson's help, towed the Camaro to Hoquiam.

The State charged Peterson with theft of a motor vehicle. At trial, Peterson testified that, after picking up the tow dolly from Erickson's house, she went to the Sudderth Road house. She was told that Erickson's friend, Jimmy Simpson, and Simpson's female companion lived there. When Peterson arrived, the house looked as though Simpson had been living there because the power was on and the phone rang. Erickson asked Peterson and Showalter to tow the Camaro to their house, from where Erickson's brother would retrieve it, because Erickson could not keep the vehicle at his house. Peterson did not find this request to be out of the ordinary because

Showalter and Erickson often help each other with towing. Peterson believed the Camaro belonged to Erickson. After she did not hear from Erickson for about eight days about his brother picking up the vehicle, Peterson contacted her own brother about selling the car because they needed money to buy Christmas gifts.

The to-convict instruction read, in part,

> To convict Wendy Peterson of the crime of theft of a motor vehicle, each of the following three elements of the crime must be proved beyond a reasonable doubt:
> (1) That on or about the period beginning September 15, 2009 and ending January 18, 2010, Wendy Peterson wrongfully obtained a motor vehicle belonging to another;
> (2) That Ms. Peterson intended to deprive the owner Jack Sergojan of the motor vehicle; and
> (3) That this act occurred in the State of Washington.

Clerk's Papers (CP) at 20-21. The State asked that subsection (2) instruct the jury that Peterson intended to deprive simply "the owner" of the motor vehicle, rather than to specifically name Sergojan, because the identity of the owner is not an element of the crime of theft of a motor vehicle. The court denied that request because the name "Jack Sergojan" had been specified in the information.

During deliberations, the jury submitted a question to the court. The question, referring to subsection (2) of the to-convict instruction read, "Can the name 'Jack Sergojan' be interchanged with Don Erickson since she thought he was the owner." CP at 26. The court, without consulting counsel, responded, "You will be guided by the instructions given to you by the court." CP at 27.

The jury found Peterson guilty of theft of a motor vehicle.

ANALYSIS

Peterson argues that the trial court erred when it answered the jury's question without having solicited a response from the parties. She contends that because the question suggested that the jury believed Peterson's account of the facts, particularly her belief that she was stealing the car from Erickson rather than from Sergojan, the court's response prejudiced her.

A defendant has a constitutional right to be present at all stages of the proceedings, including a trial judge's consideration of jury questions. *State v. Ratliff*, 121 Wn. App. 642, 646, 90 P.3d 79 (2004). CrR 6.15(f)(1) further provides,

> The jury shall be instructed that any question it wishes to ask the court about the instructions or evidence should be signed, dated and submitted in writing to the bailiff. The court shall notify the parties of the contents of the questions and provide them an opportunity to comment upon an appropriate response. Written questions from the jury, the court's response and any objections thereto shall be made a part of the record. The court shall respond to all questions from a deliberating jury in open court or in writing. In its discretion, the court may grant a jury's request to rehear or replay evidence, but should do so in a way that is least likely to be seen as a comment on the evidence, in a way that is not unfairly prejudicial and in a way that minimizes the possibility that jurors will give undue weight to such evidence. Any additional instruction upon any point of law shall be given in writing.

Thus, a court is to "communicate with a deliberating jury only with all counsel and the trial judge present." *State v. Russell*, 25 Wn. App. 933, 948, 611 P.2d 1320 (1980). However, a court's error in answering jury questions in the defendant's absence may be harmless if the State can show the harmlessness beyond a reasonable doubt. *State v. Caliguri*, 99 Wn.2d 501, 509, 664 P.2d 466 (1983); *State v. Allen*, 50 Wn. App. 412, 419, 749 P.2d 702, *review denied*, 110 Wn.2d 1024 (1988). If the court's answer to a jury question is "'negative in nature and conveys no affirmative information,'" the defendant suffers no prejudice and the error is harmless. *Allen*, 50 Wn. App. at 419

(quoting *Russell*, 25 Wn. App. at 948).

In *State v. Langdon*, 42 Wn. App. 715, 713 P.2d 120, *review denied*, 105 Wn.2d 1013 (1986), the court instructed the jury on the elements of first and second degree robbery, accomplice liability, and theft. During deliberations, the jury sent a note to the judge reading, "Does 'committing' mean aid in escaping?" *Langdon*, 42 Wn. App. at 717. The judge, without consulting with counsel, responded, "You are bound by those instructions already given to you." *Langdon*, 42 Wn. App. at 717. Langdon argued that this communication violated CrR 6.15(f)(1) and his right to be present at all stages of the proceedings. The court disagreed and found any error was harmless because the communication was neutral and simply referred the jury back to the previous instructions. *Langdon*, 42 Wn. App. at 717-18.

As in *Langdon*, the trial court erred when it communicated with the jury in the absence of counsel. *Ratliff*, 121 Wn. App. at 646. But the note merely directed the jurors to refer to the instructions of the court. The to-convict instruction required the jury to conclude that Peterson had stolen the car from Sergojan in order for it to convict her of theft of a motor vehicle. It is presumed that a jury follows the court's instruction. *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994). Therefore, Peterson's contention that the court's reply to the jury's question caused the jury to convict her of a crime other than that defined in the to-convict instruction is meritless. Because the response was neutral in nature like that in *Langdon*, no prejudice resulted from the trial court's response. 42 Wn. App. at 717-18. Although the court erred in answering the question because Peterson and her counsel were not present during the court's response, the

error is harmless beyond a reasonable doubt. *Russell*, 25 Wn. App. at 948. 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 in accordance with RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

JOHANSON, J.