IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27007-6-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
STEVEN KELLY CODER,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Schultheis, C.J. — Steven Coder was convicted of possessing a stolen motor vehicle and attempting to elude a police vehicle. Mr. Coder defended the charges with evidence that he was merely a passenger in the car and did not know that it was stolen until a police chase ensued. On appeal, he contends that the court instructed the jury on an erroneous and uncharged means of possessing a stolen vehicle. We agree. We therefore reverse the conviction for possession of a stolen vehicle and remand for further proceedings. We affirm the attempting to elude conviction.

FACTS

On January 20, 2008, Blanca Garcia's car was stolen from the carport at her work. According to Ms. Garcia, she ran out of the building, screaming "wait, that's my car." Report of Proceedings at 31. The car stopped at the corner, Mr. Coder got into the passenger side, and the car sped off. Ms. Garcia called 911 to report the theft of her car. The police followed the tracks made by Ms. Garcia's car in the freshly fallen snow to where it was stopped on a narrow canal road. The car took off at a high speed. The officer pursued the car, having activated the patrol car's lights and siren.

Meanwhile, another officer had positioned himself at the intersection down the road to intercept the car. He got out of his cruiser with his rifle. When the officer saw the pursuit coming his way, he trained the scope of his rifle on the driver's side of the stolen car. As the car maneuvered around the officer, the driver lost control and veered up a snowy embankment and slid down, where the car came to rest on the driver's side with the passenger side up in the air.

The officers instructed the occupants to come out with their hands up. In response, the officers heard a female voice state that they could not get out. After it was determined that nobody needed emergency medical help, the occupants were told to stay still in the car until a tow truck could arrive and right the vehicle.

Mr. Coder was initially charged with possession of a stolen vehicle and reckless driving. The female in the car, Chavon Covel, Mr. Coder's fiancée, was charged with and

pleaded guilty to theft of a motor vehicle.

Mr. Coder stood trial on a two-count amended information that charged him, as a principal or accomplice, with (1) possession of a stolen vehicle or in the alternative theft of a motor vehicle and (2) attempting to elude a police vehicle or in the alternative reckless driving.

At trial, conflicting testimony was presented concerning the driver of the car. Ms. Covel testified that she was driving the car from the time she first took it at Ms. Garcia's work until she wrecked it. The State argued that Mr. Coder was the driver. When Ms. Covel attempted to tell the jury that she had told Mr. Coder she was borrowing the car, the court sustained the State's hearsay objection.[1] None of the officers could positively identify the driver.

The court instructed the jury that to convict Mr. Coder of possession of a stolen motor vehicle, it must find that he "possesses, carries, delivers, sells, or is in control of a

[1] We agree with Mr. Coder's contention that the trial court erroneously sustained the State's hearsay objection. The statement was not hearsay because Mr. Coder was not offering it for the truth of what was said—that Ms. Covel had borrowed the car. Instead, the statement was offered to prove the statement's effect on his own state of mind at the time of the offense alleged, i.e., lack of knowledge that the car was stolen. It is well established that statements can be admitted for this purpose. *State v. Mounsey*, 31 Wn. App. 511, 522 n.3, 643 P.2d 892 (1982); *State v. Marintorres*, 93 Wn. App. 442, 449, 969 P.2d 501 (1999); *State v. Roberts*, 80 Wn. App. 342, 352, 908 P.2d 892 (1996); *State v. Hamilton*, 58 Wn. App. 229, 231-32, 792 P.2d 176 (1990). Because we reverse this matter on the instructional issue, we mention this error only to prevent recurrence.

stolen motor vehicle." Clerk's Papers (CP) at 27; *see* CP at 28. No exceptions were taken to these instructions.

The jury found Mr. Coder guilty of possession of a stolen vehicle and eluding. Mr. Coder was sentenced to 50 months in prison. He appeals. A commissioner of this court denied the State's motion on the merits and referred resolution of the matter to us.

ANALYSIS

Mr. Coder contends the trial court erred by issuing a defective to-convict instruction to the jury, which included additional and erroneous uncharged means of committing the offense of possession of a stolen motor vehicle.

The State points out that Mr. Coder did not object to jury instruction 6 that he now contends was erroneous. Generally, an issue cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This involves a two-part test: (1) whether the alleged error is truly constitutional and (2) whether the alleged error is manifest. *State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007). "An error is manifest when it has practical and identifiable consequences in the trial of the case." *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001).

"The 'to convict' instruction carries with it a special weight because the jury treats the instruction as a 'yardstick' by which to measure a defendant's guilt or innocence." *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Such an instruction that relieves the

State of its burden to prove every element of the crime is an error of constitutional magnitude that we may review for the first time on appeal. *See Stein*, 144 Wn.2d at 241. Mr. Coder's constitutional right to due process is also potentially implicated by the alleged erroneous jury instructions and, assuming there was an error in the jury instructions, it could have had "practical and identifiable consequences in the trial." *Id.* at 240. Thus, the error was manifest and Mr. Coder's failure to object at trial does not preclude review.

The State agrees that a to-convict instruction that identifies flawed elements is a manifest error of constitutional magnitude that can be considered for the first time on appeal, but it argues that the instructions are not so flawed here.

According to statute, "A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." RCW 9A.56.068(1) (alteration in original). "Possessing stolen property" is defined as "knowingly to *receive, retain, possess, conceal, or dispose of* stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1) (emphasis added).

Here, instruction 6 read:[2]

---

[2] The same instruction is found in the definitional instruction. Instruction 5 states:

"A person commits the crime of possessing a stolen motor vehicle when he *possesses, carries, delivers, sells, or is in control of* a stolen motor vehicle.

"Possessing a stolen motor vehicle means knowingly to receive, retain, posses[s], conceal, or dispose of a stolen motor vehicle knowing that it has been stolen and to

> To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt[:]
>
> (1) That on or about January 20, 2008 the defendant *possessed, carried, delivered, sold or was in control 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 the acts occurred in the State of Washington.

CP at 28 (emphasis added).

Instructions 6 and 5 both include language found in the statute defining possession of a stolen *firearm*. RCW 9A.56.310(1) ("A person is guilty of possessing a stolen firearm if he or she *possesses, carries, delivers, sells, or is in control of* a stolen firearm."). While instruction 5 correctly defines "possessing stolen property," both instructions incorrectly state alternate means of the crime of possession of a stolen motor vehicle. A person commits this crime by possessing a stolen motor vehicle, not by carrying, delivering, selling, or controlling a stolen motor vehicle. *See* RCW 9A.56.068. Therefore, the to-convict instruction for possession of a stolen motor vehicle is defective as it misstates the law.

"Constitutional error is presumed to be prejudicial," but a "constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable

---

withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." CP at 27 (emphasis added).

jury would have reached the same result in the absence of the error." *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). The error is not harmless here. The jury could have determined that, as an accomplice, Mr. Coder either carried, delivered, sold, or was in control of the vehicle, which are not elements of possession of a stolen vehicle.

CONCLUSION

We conclude that the trial court erroneously instructed the jury on an erroneous alternate means of possessing stolen property and the error was not harmless. We therefore reverse Mr. Coder's conviction for possession of stolen property and remand for further proceedings. The attempting to elude conviction was not challenged or affected by the error, and it is affirmed.

Reversed in part, affirmed in part, and remanded.

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

_____
Schultheis, C.J.

WE CONCUR:

_____ _____
Sweeney, J. Korsmo, J.