IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 62657-4-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
JAMES PATRICK CORBETT,	)	UNPUBLISHED
	)	
Appellant.	)	FILED: December 21, 2009
	)	
	)	

Cox, J. — James Corbett appeals his conviction of second degree possession of stolen property. The jury instructions established the law of the case for this prosecution.[1] The trial judge essentially altered the "to convict" instruction after jury deliberations began. Specifically, the jury asked whether it had to find that Corbett had possession of stolen property for the entire four-year period stated in the instruction. The judge replied by stating, "Possession of stolen property during the entire time . . . need not be proven."[2] This was prejudicial error. We reverse and remand for a new trial.

On March 26, 2002, Corbett reported his motorcycle as stolen to Everett

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[1] State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998) (jury instructions not objected to become the law of the case).

[2] Clerk's Papers at 35.

police. He then filed a claim for the stolen motorcycle with his insurer, Progressive Insurance. Progressive investigated the claim and paid Corbett for the loss. Corbett signed over the motorcycle's title to Progressive on May 2, 2002.

Police recovered the stolen motorcycle from a residence in Snohomish County on May 5, 2006. At the time, Corbett's driver's license showed his address as that same residence.

In January 2008, the State charged Corbett with second degree possession of stolen property for a period "on or about the 1st day of May, 2002 to on or around the 5th day of May, 2006." Corbett moved to dismiss, arguing that the State did not file the charge within the statute of limitations. The trial court denied the motion, concluding that possession of stolen property is a continuing offense. A jury found him guilty as charged. The court imposed a standard range sentence and ordered restitution.

Corbett appeals.

LAW OF THE CASE

Corbett argues that there is insufficient evidence to support his conviction for second degree possession of stolen property based on the court's "to convict" instruction to the jury. Alternatively, he argues that he is entitled to a new trial based on the trial judge's response to a question from the jury during its deliberations. We agree with the second argument.

Under the law of the case doctrine, "jury instructions not objected to

become the law of the case."[3] "In criminal cases, the State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the 'to convict' instruction."[4] A defendant may then challenge the added elements on appeal as the law of the case.[5] The challenge may include a challenge to the sufficiency of the evidence to prove the added element.[6]

Alteration of a "to convict" instruction after the commencement of jury deliberations may be reversible error under appropriate circumstances.[7]

Our disposition of Corbett's challenge is controlled by State v. Hickman[8] and State v. Hobbs.[9] In Hickman, the State charged James Hickman with insurance fraud.[1] There was no statutory requirement that the State prove the venue of the crime. Nevertheless, the "to convict" instruction that Hickman proposed required the State to prove:

> (1) That the defendant, James Hickman, on or about the 1st day of July, 1992, to the 31st of August, 1992, did knowingly present or cause to be presented a false or fraudulent claim or any proof in support of such a claim, for the payment of a loss under a contract

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[3] Hickman, 135 Wn.2d at 102.

[4] Id. (citing State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995)).

[5] Id.

[6] Id.

[7] See State v. Hobbs, 71 Wn. App. 419, 422-23, 859 P.2d 73 (1993).

[8] 135 Wn.2d 97, 954 P.2d 900 (1998).

[9] 71 Wn. App. 419, 859 P.2d 73 (1993).

[1] Hickman, 135 Wn.2d at 99-100.

> of insurance; and
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> (2) That the false or fraudulent claim was made in the excess of One Thousand Five Hundred Dollars ($1,500); and
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> ***(3) That the act occurred in Snohomish County, Washington.***[11]

The State did not object to the proposed instruction.[12] A jury convicted Hickman as charged.

On appeal, he challenged the sufficiency of the evidence of venue.[13] Hickman had been in Hawaii when he reported the claim and the insurer with whom he filed the claim was located in King County.[14] There was no evidence at trial that any act of the charged crime "occurred in Snohomish County" as the instruction stated. On review, the supreme court held that the State assumed the burden of proving venue by virtue of the jury instruction to which it did not object.[15] Because there was no evidence that the crime occurred in Snohomish County, the supreme court reversed and dismissed.[16]

This court dealt with a similar situation in Hobbs. There, the State and Hobbs both submitted proposed "to convict" instructions that included as an element of the crime of assault that the act occurred in King County.[17] After the

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[11] Id. at 101.

[12] Id. at 100-01.

[13] Id. at 102-03.

[14] Id. at 105-06.

[15] Id. at 105.

[16] Id. at 106.

jury had been instructed, and during closing argument, defense counsel argued that the State had failed to establish beyond a reasonable doubt that the assault occurred in King County.[18] After jury deliberations began, the State moved to amend the information and modify the "to convict" instruction to delete "King County" and insert "State of Washington" as the place where the act occurred.[19] Over a defense objection, the court allowed the amendment to the information and modified the jury instruction as requested by the State.[2]

On appeal, this court concluded that the State assumed the burden of proving that the crime occurred in King County because the State requested that the court include it as an element in the "to convict" instruction given to the jury.[21] Concluding that actual prejudice resulted from the belated modification to the instructions, this court reversed Hobbs' conviction and remanded for a new trial.[22]

Here, the "to convict" instruction, instruction number 6, stated:

> (1) That ***on or about the 1st day of May, 2002 to on or around the 5th day of May, 2006*** the defendant knowingly possessed stolen property;

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[17] Hobbs, 71 Wn. App. at 420.

[18] Id. at 421.

[19] Id.

[2] Id.

[21] Id. at 422-23.

[22] Id. at 422 n.2, 424-25. The court also relied on the principal that supplemental instructions should not go beyond matters that either had been, or could have been, argued to the jury.

> (2) That the defendant acted with knowledge that the property had been stolen;
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> (3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
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> (4) That the stolen property was a motor vehicle;
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> (5) That the acts occurred in the State of Washington.[23]

The State agreed to this instruction. During closing argument, defense counsel argued that the State had failed to establish beyond a reasonable doubt that Corbett was in possession of the stolen property for the entire four-year period. In its rebuttal, the State argued that it only needed to prove that Corbett possessed the stolen motorcycle at some point in time between the dates in the instruction. The court overruled Corbett's objection to this statement.

After beginning deliberations, the jury submitted the following question to the court:

> According to instruction #6 item #1 do we need to be convinced beyond a reasonable doubt that the defendant had possession of stolen property during the entire time of May 2002 to May 2006, or just part of the time?[24]

The court gave the parties an opportunity to argue before answering the jury's question. The State argued that the "on or about" language in the instruction did not require proof of possession of the stolen property for the entire period. Corbett argued that he had understood both the information and "to convict" instruction to "cover the whole period," not some part of it. He also argued that

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[23] Clerk's Papers at 81 (emphasis added).

[24] Clerk's Papers at 34; Report of Proceedings (Sept. 23, 2008) at 87.

he based his defense on the allegations in the information and that the State could have moved to amend the information before the close of its evidence but did not. Corbett also argued that the written instructions to which the State did not object had become the law of the case under Hickman.[25]

Rejecting Corbett's arguments and over his objection, the trial court answered the jury's question as follows: "Possession of stolen property during the entire time of May, 2002 to May 2006 need not be proven."

This response was incorrect. The word "to" is "used as a function word to indicate a position or a relation in time," synonymous with "till,"[26] "Up till,"[27] or "until,"[28] for example, "worked from nine to five."[29] The plain words of the "to convict" instruction here required the State to prove Corbett's possession of the motorcycle from "on or about the 1st day of May, 2002 ***to*** [until] on or around the 5th day of May, 2006."[3] The instruction is not ambiguous. There is no other reasonable interpretation of the word "to" in this context.

The trial court's incorrect response to the jury's question improperly relieved the State of its burden to prove Corbett's possession during the entire four-year period stated in the "to convict" instruction. Under Hickman, that

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[25] Clerk's Papers at 37.

[26] Webster's Third New Int'l Dictionary 2401 (1993).

[27] The American Heritage Dictionary 1882 (3d ed. 1992).

[28] Id.

[29] Id.

[3] (Emphasis added.)

instruction became the law of the case once the State did not object to it and the court instructed the jury.[31] The court effectively committed the same error as in Hobbs. Corbett's conviction should therefore be reversed and remanded for a new trial if actual prejudice resulted from the court's later modification of the "to convict" instruction.[32]

The information charged that Corbett possessed a stolen Suzuki GSXR motorcycle from May 1, 2002, to May 5, 2006. At trial, the State presented evidence that Corbett reported his Suzuki GSXR motorcycle as stolen on March 26, 2002, and filed a claim with Progressive shortly thereafter. Corbett signed over the motorcycle's title to Progressive on May 2, 2002, after Progressive paid Corbett $11,203.09 on the claim.

In the spring of 2006, two witnesses who testified at trial were at the house where the motorcycle was later recovered by police. When they arrived, they found Corbett working on a car in the garage and noticed "that there were two identical bikes in the garage." One witness noticed that one of the motorcycles did not have a license plate on it. When this witness asked Corbett about the two motorcycles, Corbett explained that he did not drive the one without a license plate and only used it for parts.

On May 5, 2006, police were dispatched to the residence where the witnesses had observed the two motorcycles. The dispatch was for "[a] report of

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[31] See Hickman, 135 Wn.2d at 105.

[32] See Hobbs, 71 Wn. App. at 422 n.2.

possible possession of stolen property." Police found a Suzuki GSXR 1000 with no license plate in the residence's garage. When the responding officer checked the motorcycle's vehicle identification number (VIN) over his radio through dispatch, he learned that the motorcycle had been reported as stolen and that Progressive owned it. Police also discovered that Progressive became the owner of the motorcycle after it paid Corbett on his claim. Department of Licensing records showed that Corbett's address since February 24, 2006, was the same as the location of the stolen motorcycle.

The defense theory of the case was that the State could not prove that Corbett possessed the stolen motorcycle during the entire period from May 2002 to May 2006. But it was undisputed from the evidence at trial that he possessed the property from sometime in the spring of 2006 until police recovered the property on May 5, 2006.

The court's response to the jury's question was both incorrect and prejudicial. It was incorrect because the only reasonable meaning of the word "to" in this context is to cover the entire four-year period between May 2002 and May 2006. It was prejudicial for two reasons. First, the information contained parallel language that "the defendant, on or about the 1st day of May, 2002 to on or around the 5th day of May, 2006, [possessed a stolen motorcycle]" and the defense theory at trial was that the State could not prove possession for the period between May 2002 and the spring of 2006. Second, once the law of the case was established by the "to convict" instruction, the court's response to the

jury question concerning proof relieved the State of its burden to prove what the written "to convict" instruction required.

Moreover, it was undisputed that Corbett had possession of the property during a portion of the time, specifically the spring of 2006. We cannot have confidence that the verdict was based on the proper legal standard: proof beyond a reasonable doubt that Corbett possessed the stolen property for the entire period stated in the "to convict" instruction. The court's error was not harmless, as it undoubtedly contributed to the jury's verdict.[33]

The State argues that Hickman does not apply because Hickman "tells us what happens *when* a superfluous element is added," but not "*if* a superfluous element has been added."[34] We are not persuaded by this argument.

Citing State v. Odell,[35] the State points out that the precise time at which a crime is committed is not a material element of a crime, provided it is before the filing of the information and within the statute of limitations.[36] The State's reliance on this case is misplaced.

Hickman makes clear that venue was an "otherwise unnecessary" element that the State assumed the burden of proving because the element was

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[33] See State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (instruction that misstates the State's burden is harmless only if it appears beyond a reasonable doubt that the error did not contribute to the jury's verdict).

[34] Brief of Respondent at 18.

[35] 188 Wash. 310, 62 P.2d 711 (1936).

[36] Brief of Respondent at 19 (citing Odell, 188 Wash. at 314-17).

included without objection in the "to convict" instruction.[37] Accordingly, even if time is not a material element under Odell, the State assumed the burden to prove beyond a reasonable doubt possession during the entire period of time stated in this "to convict" instruction. We also note that Odell is not persuasive here because it does not discuss the law of the case doctrine applicable to this case.

The State next cites to another pre-Hickman case, State v. Hayes.[38] Its reliance on this case is also misplaced. In Hayes, this court held that where time is not a material element of the crime charged, the language "on or about" is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi.[39] The court concluded that the language "on or about . . . the 31st day of May, 1992" was sufficiently broad to include an act that occurred about June 4, 1992.[4]

As with Odell, the law of the case doctrine was not at issue in Hayes. The more recent decision of the supreme court in Hickman controls. Hayes may support the proposition that the State's evidence need not precisely substantiate each end date of the time range that appears in the "to convict" instruction.[41] But

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[37] Hickman, 135 Wn.2d at 102 (citing Lee, 128 Wn.2d at 159).

[38] 81 Wn. App. 425, 914 P.2d 788 (1996).

[39] Brief of Respondent at 19 (citing Hayes, 81 Wn. App. at 432-33).

[4] Hayes, 81 Wn. App. at 432.

[41] Id. at 431 n.9 ("To convict . . . [you must find] (1) That on or about the 1st day of July, 1990 through the 31st day of May, 1992, but ***an occasion*** separate and distinct from that charged in [the remaining counts], the defendant

it does not support the argument here that possession during the four-year period stated in the instruction need not be proven.

Alternatively, the State argues that under the deferential standard of review for sufficiency of evidence, there was proof beyond a reasonable doubt of Corbett's possession of stolen property for the entire period stated in the written instruction.[42] The State argues that in reviewing the sufficiency of evidence to support a criminal conviction, the reviewing court does not consider evidence and inferences favoring the defendant.[43] While the State correctly cites this principle, it does not control here. As discussed above, the trial court's response to the jury's question improperly relieved the State of the burden of proof the State assumed in the "to convict" instruction. The response misdirected the jury to consider only a portion of the stated time period.

Assuming, as we must, that the jury followed the judge's response to its question, we must also assume that the jury never considered whether there was proof beyond a reasonable doubt that Corbett had possession for the entire four-year period stated in the "to convict" instruction. Rather, the jury more likely applied the court's answer to the undisputed evidence that Corbett had possession during a portion of the time—during the spring of 2006. In short,

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had sexual intercourse with [K.].") (emphasis added).

[42] Brief of Respondent at 20.

[43] Brief of Respondent at 20 (citing State v. Randecker, 79 Wn.2d 512, 421, 487 P.2d 1295 (1971); State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991)).

application of the sufficiency of evidence review standard in this case is not appropriate.[44]

STATUTE OF LIMITATIONS

Corbett also contends the prosecution was barred by the statute of limitations. We disagree.

"[A] criminal statute of limitations is not merely a limitation upon the remedy, but is a 'limitation upon the power of the sovereign to act against the accused.'"[45] It is jurisdictional.[46] An information that "indicates that the offense is barred by the statute of limitation fails to state a public offense."[47] It is not subject to amendment and must be dismissed.[48]

RCW 9A.04.080(1) also prohibits the State from commencing a prosecution for a criminal offense after the applicable period of limitations as prescribed by that section has passed. Like many felonies, possession of stolen

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[44] For similar reasons, the proper remedy in this case is reversal and remand for a new trial, not dismissal. See Hickman 135 Wn.2d at 104 n.4 (commenting on the nature of the remedy in Hobbs, 71 Wn. App. at 425).

[45] State v. Glover, 25 Wn. App. 58, 61, 604 P.2d 1015 (1979) (quoting State v. Fogel, 16 Ariz. App. 246, 248, 492 P.2d 742 (1972)).

[46] Id.; see also State v. Hodgson, 108 Wn.2d 662, 667-68, 740 P.2d 848 (1987) (after statute has run it is an absolute and vested defense that cannot be taken away by legislative enactment); State v. Novotny, 76 Wn. App. 343, 345 n.1, 884 P.2d 1336 (1994) (criminal statute of limitations is jurisdictional and creates an absolute bar to prosecution and therefore may be raised for the first time on appeal).

[47] Glover, 25 Wn. App. at 61-62.

[48] Id. at 62.

property may not be prosecuted "more than three years after its commission."[49]

"Some offenses, for purposes of determining when they are committed, can be considered continuing offenses."[5] The doctrine of continuing offenses "should be employed sparingly, and only when the legislature expressly states the offense is a continuing offense, or when the nature of the offense leads to a reasonable conclusion that the legislature so intended."[51]

Our supreme court most recently considered the doctrine of continuing offenses in State v. Green.[52] In Green, the defendant sought to suppress evidence obtained in a search incident to her arrest for failure to transfer title to a vehicle.[53] The court held that a defendant committed the misdemeanor of failing to transfer title only when the purchaser had not applied for a title transfer 45 days after delivery.[54] Thus, the crime was not a continuing offense and was complete when 45 days had passed since the date of the vehicle's delivery.[55] Accordingly, the court held that Green did not commit a misdemeanor in the officers' presence and the trial court should have suppressed the evidence.[56]

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[49] RCW 9A.04.080(1)(h) ("No other felony may be prosecuted more than three years after its commission.").

[5] State v. Green, 150 Wn.2d 740, 742, 82 P.3d 239 (2004).

[51] Id. at 742-43 (citing Toussie v. United States, 397 U.S. 112, 115, 90 S. Ct. 858, 25 L. Ed. 2d 156 (1970)).

[52] 150 Wn.2d 740, 82 P.3d 239 (2004).

[53] Id. at 742.

[54] Id. at 743-44.

[55] Id. at 743.

Here, the State charged Corbett with one count of second degree possession of stolen property, occurring "on or about the 1st day of May, 2002 to on or around the 5th day of May, 2006" by information filed January 14, 2008. The State prosecuted Corbett under former RCW 9A.56.160(1)(d), which provided that a person is guilty of possessing stolen property in the second degree if "[h]e or she possesses a stolen motor vehicle of a value less than one thousand five hundred dollars."[57] Under RCW 9A.56.140, "[p]ossessing stolen property" means "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."[58]

The legislature has not expressly designated possession of stolen property as a continuing offense. But despite the absence of express language in the statute, the nature of the offense leads to a reasonable conclusion that the legislature intended that the offense be a continuing crime, at least under some circumstances. For example, where the defendant "retain[s]" or "possess[es]" the stolen property within three years of the State's commencing prosecution, the prosecution is timely. Unlike the failure to transfer title offense considered in Green, it would be unreasonable to conclude that the crime was complete as

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[56] Id. at 744.

[57] Former RCW 9A.56.160 (1995).

[58] RCW 9A.56.140(1) (emphasis added).

soon as a defendant either retains or comes into possession of stolen property. Instead, as long as a defendant either retains or continues to possess the stolen property, he or she continues to violate the statute.

Whether possession continues for purposes of the statute of limitations is a jury question.[59]

Here, it was undisputed that police seized the stolen motorcycle on May 5, 2006, while it was still in the possession of Corbett. The State commenced its prosecution against Corbett within three years of that date, by information filed January 14, 2008. The jury was asked to determine the question of timeliness and decided that the prosecution was timely. Corbett does not challenge the jury's determination.

Corbett argues that possession of stolen property is not a continuing offense under State v. Ladely.[6] We disagree.

In Ladely, the supreme court examined a portion of a former statute that defined the crime of larceny.[61] The statute provided, "Every person who, knowing the same to have been so appropriated, shall bring into this state, or buy, sell, receive or aid in concealing or withholding any property wrongfully appropriated . . . shall be guilty of larceny."[62] With little explanation, the court

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[59] State v. Mermis, 105 Wn. App. 738, 745-46, 20 P.3d 1044 (2001) ("Until the crime is complete, the statute of limitations does not begin to run. Whether a criminal impulse continues into the statute of limitations period is a question of fact for the jury." (citation omitted)).

[6] 82 Wn.2d 172, 509 P.2d 658 (1973).

[61] Id. at 174.

held "that the commission of the crime defined and prohibited in RCW 9.54.010(5) occurs at the time of coming into possession with guilty knowledge."[63]

Corbett argues that this court should apply Ladely to the statutes defining possession of stolen property because the statutes are "aimed at the same unlawful conduct" as larceny. But two important facts distinguish Ladely from this case. First, Ladely evaluated a substantively different statute than was applied here. The larceny statute did not expressly criminalize the "retaining" or "possessing" of stolen property, as do the current statutes.[64] Second, though the court used broad language to describe its holding in Ladely, the court characterized the issue as a "question of the statute of limitations as to ***receiving*** stolen property."[65] Accordingly, the court's holding could be said to apply only to the "receiving" means of committing larceny (or possession of stolen property), which is not at issue here.[66]

This prosecution was not barred by the statute of limitations.

Because of our resolution of the two issues we have discussed, we also vacate the restitution order.

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[62] Id. (quoting former RCW 9.54.010(5)).

[63] Id. at 177.

[64] Former RCW 9A.56.160(1)(d); RCW 9A.56.140.

[65] Ladely, 82 Wn.2d at 176 (emphasis added).

[66] See In re Estate of Burns, 131 Wn.2d 104, 113, 928 P.2d 1094 (1997) (General statements in opinions "are to be confined to the facts and issues of that particular case.").

We reverse the judgment and sentence and the order of restitution and remand for a new trial.

Cox, J.

WE CONCUR:

Schindler, CJ

Leach, J