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No. 71161-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SENAI HANKERSON,

Appellant.

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

BRIEF OF APPELLANT

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2. The trial court violated CrR 3.6 when it failed to enter written findings of fact and conclusions of law after conducting an evidentiary hearing on Mr. Hankerson's three separate motions to suppress evidence based on constitutional violations.

3. The trial court's oral finding one of the officers spoke to a neighbor who reported observing the suspects enter the garage was not supported by substantial evidence.

4. The warrantless search of the garage without exigent circumstances violated the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution.

5. The seizure of the Range Rover and the searches that followed were unreasonable and violated the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution.

6. The trial court's admission of a dashboard camera video showing Mr. Hankerson's arrest at gun point was manifestly unreasonable and prejudicial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. Evidence is insufficient if no rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. Was there insufficient evidence to prove the charge of attempting to elude a pursuing police vehicle where no evidence was introduced establishing that the police officer was in uniform? Was there insufficient evidence to prove that the vehicle was operated in a reckless manner where there were no other vehicles or people impacted by the manner in which the vehicle was driven?

2. If an evidentiary hearing is conducted pursuant to a CrR 3.6 motion to suppress evidence, the court shall enter written findings of fact and conclusions of law following the hearing. When a case comes before an appellate court without the required findings, there is a strong presumption that dismissal is the appropriate remedy. Was the trial court's oral opinion and record of hearing insufficiently clear and

comprehensive to permit appellate review, rending the error not harmless?

3. Police may search without a warrant when it is justified by exigent circumstances. The exigent circumstances exception applies when obtaining a warrant is not practical because of a true emergency or crisis that requires swift action to prevent imminent danger to life, the escape of a suspect, or the destruction of evidence. Was the exigent circumstances exception to the warrant requirement inapplicable where the suspected crime was non-violent, there was no reason to believe the suspect was armed, and law enforcement waited outside the garage for approximately 20 minutes before entering?

4. An impoundment of a vehicle is a seizure because it is a governmental taking. The Fourth Amendment and article 1, section 7 of the Washington Constitution require all seizures to be reasonable. Was the warrantless seizure of the Range Rover unreasonable because there was no probable cause to believe the vehicle had been stolen or used in a felony offense? Did the trial court err when it concluded that a locked and legally parked vehicle in a public place was abandoned such that any reasonable expectation of privacy in the vehicle was relinquished?

5. Evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Did the trial court abuse its discretion by admitting a dashboard camera video depicting Mr. Hankerson's arrest at gun point?

C. STATEMENT OF THE CASE

On July 2, 2011, Seattle Police Officer Brian Hanson entered a parking lot and noticed a vehicle without a front license plate. 4/5/12 RP 59, 66. Officer Hanson parked his vehicle 50 to 75 feet away and observed the vehicle, a newer gray Range Rover, for approximately 30 seconds. 4/5/12 RP 67, 79. The Range Rover exited the parking lot and Officer Hanson followed it. 4/5/12 RP 68. Officer Hanson activated his overhead lights after the Range Rover committed a traffic infraction. 4/5/12 RP 71. The Range Rover did not stop and Officer Hanson turned off his lights due to his department's pursuit policy, which does not allow him to continue pursuit merely for a traffic infraction. 4/5/12 RP 55-56, 75.

Officer Hanson continued following the Range Rover, which entered the southbound lanes of Interstate 5 (I-5). 4/5/12 RP 75. Traffic on I-5 was heavy and the Range Rover was not driving in an erratic or dangerous manner. 4/5/12 RP 76. Officer Hanson requested

assistance from the Washington State Patrol. 4/5/12 RP 75.

Washington State Patrol Trooper Brandon Villanti observed the Range Rover exit I-90. 4/5/12 RP 33. He attempted to effectuate a traffic stop by activating his lights and sirens, but the Range Rover did not respond. 4/5/12 RP 32-33. Trooper Villanti lost sight of the vehicle after it entered a park at the end of Lake Washington Boulevard. 4/5/12 RP 35-36.

Washington State Patrol Trooper David Bennett later located the Range Rover parked in a cul-de-sac on 120th Street. 4/5/12 RP 45. The vehicle was unoccupied, locked, and legally parked. 4/3/12 RP 10. Trooper Bennett was initially unable to obtain a vehicle identification number (VIN) for the vehicle. 4/5/12 RP 49. Trooper Bennett impounded the vehicle, conducted an inventory search, and located a VIN. 4/5/12 RP 49-50. There was no information that the vehicle was stolen. *See* 4/5/12 RP 50. The vehicle was not reported stolen until weeks later. 4/9/12 RP 99.

On July 10, 2011 at approximately 4:05 a.m., Seattle Police Officer Molly Clark observed a beige Honda that she began to follow. 4/5/12 RP 10. It was the only vehicle on the road at that time. *Id.* The vehicle made a turn without signaling and without stopping at the stop

sign. 4/5/12 RP 11. The beige Honda then made a U-turn on Aurora Avenue and Officer Clark did the same in an effort to catch up to the vehicle. 4/5/12 RP 12. Officer Clark did not attempt to effectuate a traffic stop at this time. 4/5/12 RP 13.

Officer Clark was unable to see driver's face and could not identify the driver's race. 4/5/12 RP 14, 22. She followed the Honda to Fifth Avenue and Broad Street, where the Honda proceeded through a red light. 4/5/12 RP 15. At that point, Officer Clark activated her overhead lights. 4/5/12 RP 16. The Honda accelerated and Officer Clark observed the vehicle travel past a stop sign without stopping. 4/5/12 RP 16. There was no one else in the area when this occurred. 4/5/12 RP 18. Officer Clark turned off her overhead lights after obtaining the license plate number and did not pursue the Honda any further. 4/5/12 RP 16, 19.

Later on July 10, 2011 at 5:56 p.m., Seattle police officers were alerted by a Lo Jack system[1] that a stolen Lexus was in the area. 4/5/12 RP 19. Officers arrived at a residence with a detached garage and

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[1] Lo Jack is a private company that installs transmitters on personal vehicles that are activated when the vehicle is reported stolen. 4/4/12 RP 16. If a police vehicle is equipped with a Lo Jack tracker box, it will begin to beep when in close proximity to the stolen vehicle. 4/4/12 RP 17. The Lo Jack indicator points in the direction of the vehicle and signals how close the vehicle is. 4/4/12 RP 19-20.

located the stolen Lexus parked in the driveway. 4/5/12 RP 21. Officers were at that location for approximately 20 minutes before opening the garage door and searching the garage. 4/4/12 RP 7. Officers removed Mr. Hankerson from the garage and placed him under arrest. 4/5/12 RP 23.

Mr. Hankerson was convicted of the following: (1) possession of a stolen motor vehicle for the July 2, 2011 incident involving the Range Rover; (2) possession of a stolen motor vehicle for the July 10, 2011 incident involving the Honda; (3) attempting to elude a pursuing police vehicle for the July 10, 2011 incident involving the Honda, and (4) taking a motor vehicle in the first degree for the July 10, 2011 incident involving the Lexus. CP 35-37, 93-96, 99. Pertinent facts are addressed in further detail in the argument sections below.

D. ARGUMENT

1. Mr. Hankerson's conviction for attempting to elude a pursuing police vehicle violates due process because there was insufficient evidence for any rational trier of fact to find all the elements beyond a reasonable doubt.

A conviction based on insufficient evidence contravenes the due process clause of the Fourteenth Amendment. *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). A reviewing court must reverse a conviction for insufficient evidence where no

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing all evidence in the light most favorable to the State. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). As discussed below, there was insufficient evidence to establish that Officer Clark was in uniform and that the Honda was operated in a reckless manner.

a. There was no evidence that Officer Clark was in uniform during the incident.

RCW 46.61.024(1) provides:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. *The officer giving such a signal shall be in uniform* and the vehicle shall be equipped with lights and sirens.

(emphasis added). Statutes should be construed as a whole and all language used should be given effect. *State v. Walter*, 66 Wn. App. 862, 870, 833 P.2d 440 (1992). Criminal statutes are strictly construed. *State v. Rinkes*, 49 Wn.2d 664, 667, 306 P.2d 205 (1957). The term "shall" in a statute is mandatory unless contrary legislative intent is apparent. *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994).

"The eluding statute clearly requires evidence that the officer giving the signal to stop shall be in uniform." *State v. Hudson*, 85 Wn. App. 401, 403, 932 P.2d 714 (1997) (citing *State v. Fussell*, 85 Wn. App. 126, 127-28, 925 P.2d 642 (1996)). The requirement that the police officer be in uniform is an express element of the crime. *Fussell*, 84 Wn. App. at 128 (citing *State v. Stayton*, 39 Wn. App. 46, 49, 691 P.2d 596 (1984)). The State never elicited testimony that Officer Clark was in uniform when she attempted to stop the Honda. *See* 4/5/13 RP 3-24.

Moreover, the testimony did not allow the inference that Officer Clark was in uniform. "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *Vasquez*, 178 Wn.2d at 16. Such inferences must be "logically derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption." *Bailey v. Alabama*, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911).

In *State v. Hudson*, two officers in a marked vehicle activated their emergency lights and siren to effectuate a traffic stop on a stolen vehicle. 85 Wn. App. at 404. The defendant admitted that after failing to stop, he heard an officer identify himself as police and order the defendant to stop. *Id.* However, no testimony was offered to establish

the police officers were in uniform. *Id.* "Evidence that the officers were in a marked vehicle and that Hudson probably knew that they were police officers, without more, is insufficient to permit a rational trier of fact to infer beyond a reasonable doubt that these officers were in uniform." *Id.* at 405 (citing *Fussell*, 84 Wn. App. at 128-29).

There was insufficient evidence to establish that Officer Clark was in uniform at the time she attempted to effectuate a traffic stop on the Honda. Because proof that the police officer was in uniform is mandatory under RCW 46.61.024(1), no rational trier of fact could find Mr. Hankerson guilty of the crime of attempting to elude a pursuing police vehicle.

b. There was insufficient evidence for any trier of fact to find that the Honda was driven in a reckless manner.

The State was also required to prove beyond a reasonable doubt that in addition to failing to stop, the vehicle was driven in a "reckless manner." RCW 46.61.024(1). The term "reckless manner" means to operate a vehicle in a "rash or heedless manner, indifferent to the consequences." *State v. Roggenkamp*, 153 Wn.2d 614, 631, 106 P.3d 396 (2005). "Heedlessness" means "the quality of being thoughtless and inconsiderate; esp., conduct involving the disregard of others' rights or safety." Black's Law Dictionary (9th ed. 2009).

There was no evidence at trial that the operation of the Honda at any point evidenced a disregard for the safety of others or an indifference to the consequences that might occur because of the manner in which the Honda was being driven. Rather, Officer Clark testified repeatedly that the roads were nearly completely empty. 4/5/12 RP 10, 12, 13. The Honda's operation had no bearing on any other person's safety.

The Honda was the only vehicle on Aurora Avenue when Officer Clark first observed it. 4/5/12 RP 10. After the Honda made a U-turn, she noted that "there was no one out and [the Honda] just went straight down Aurora, so I tried to go catch up with it." 4/5/12 RP 12. When asked whether Aurora is a busy thoroughfare, Officer Clark agreed that it normally is busy, but at that time there was nothing else on the road other than the Honda. 4/5/12 RP 13.

As Officer Clark continued to follow the Honda, they traveled "a little bit" over the speed limit. 4/5/12 RP 14. At Fifth Avenue and Broad Street, the Honda went through the intersection against a red light. 4/5/12 RP 15. Officer Clark noted that there were two or three other vehicles at the light, but no pedestrians in the area. 4/5/12 RP 15-

16. When she activated her overhead lights, the vehicle accelerated and proceeded through a stop sign. 4/5/12 RP 16.

There was no testimony that the Honda's operation constituted anything but traffic infractions. There was no other vehicle affected by the manner in which the Honda was driven. Its operation does not evidence an indifference to the consequences. There was no evidence that the Honda was excessively speeding, driven in a manner unsafe due to road or whether conditions, or in any other way demonstrated that it was being driven in a rash or heedless manner. Thus, there was insufficient evidence that the vehicle was operated in a reckless manner as required by RCW 46.61.024.

c. The remedy is reversal and dismissal with prejudice.

A defendant whose conviction has been reversed due to insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982) (citing *Hudson v. Louisiana*, 450 U.S. 40, 44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981)). Consequently, this Court should reverse and dismiss the attempting to elude a pursuing police vehicle conviction with prejudice.

2. The trial court failed to enter written findings of fact and conclusions of law following the evidentiary hearing addressing the CrR 3.6 motions to suppress.

The trial court shall enter written findings of fact and conclusions of law following an evidentiary hearing on a motion to suppress physical, oral, or identification evidence. CrR 3.6. When a case comes before the appellate court without the required findings, there is a strong presumption that dismissal is the appropriate remedy. *State v. Smith*, 68 Wn. App. 201, 211, 842 P.2d 494 (1992). An appellate court may overlook the lack of findings and proceed to the merits only for compelling reasons. *Id.*

The consistent and firm enforcement of CrR 3.6 contributes to the "fair and expeditious handling of criminal appeals in the interest of both the defendant and the public." *Id.* at 209. The failure of prosecuting attorneys to perform this obligation results in an enormous waste of time and energy by the court addressing these issues. *Id.* at 210. The lack of written findings and conclusions on a material issue in which the State bears the burden cannot be harmless unless the oral opinion is so clear that written findings would be a mere formality. *Id.* at 208.

The trial court's opinion falls short of this standard and thus Mr. Hankerson's convictions cannot stand on the present record. When finding that law enforcement officers were permitted to open a garage door, enter, and arrest Mr. Hankerson, the trial court did not specify which exception to the warrant requirement justified this search and seizure. *See* 4/4/12 RP 6-9.

Moreover, the trial court's oral ruling failed to resolve disputed testimony concerning what witnesses told law enforcement. One officer testified that the two witnesses reported that the suspects associated with the Lexus had left the area. 4/3/12 RP 34. However, another officer testified that law enforcement learned from these same two witnesses that suspects went into the garage. 4/2/12 RP 62. The trial court then attributed this information to a neighbor in its oral ruling, a finding unsupported by the evidence. 4/4/12 RP 7; *see* 4/2/12 RP 61-62.

The trial court's oral ruling was not sufficiently clear and comprehensive to render its failure to enter written findings and conclusions harmless. There are no compelling reasons to justify this Court overlooking the lack of findings. The remedy is reversal and

dismissal in accordance with the strong presumption applicable when findings are absent.

3. The warrantless entry into the garage without exigent circumstances violated the Fourth Amendment and article 1, section 7 of the Washington Constitution.[2]

Article I, section 7 provides broader protection against unreasonable search and seizure than the Fourth Amendment. *State v. Ladson*, 138 Wn.2d 343, 347-48, 979 P.2d 833 (1999). Warrantless searches are per se unreasonable under both the Fourth Amendment and article I, section 7 unless they fall within a few specifically established and well-delineated exceptions. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000) (citing *State v. Myers*, 117 Wn.2d 332, 337, 815 P.2d 761 (1991)). The burden is on the State to prove one of these exceptions applies. *Ladson*, 138 Wn.2d at 349-50.

Law enforcement used a Lo Jack system to find the stolen Lexus, which was parked outside a garage. 4/2/12 RP 58. Officers immediately detained two individuals located near the vehicle, Timothy Graham and Phillip Brewer. 4/3/12 RP 34. After law enforcement had been outside the garage for approximately 20 minutes, they opened the

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[2] In the event that this Court finds the failure to enter CrR 3.6 findings and conclusions harmless error, Mr. Hankerson challenges the trial court's denial of his motions to suppress evidence.

garage door with guns drawn and ordered two other individuals, later identified as Senai Hankerson and Michelle Antioquia, to exit. 4/2/12 RP 66; 4/4/12 RP 7. The police officers then conducted a "protective sweep" of the garage, where they located a key that was later used to access the interior of the Lexus. 4/2/12 RP 68.[3]

At the suppression hearing, the State argued that the law enforcement officers were "sitting ducks" outside the garage and that opening the door was necessary to ensure officer safety. 4/3/12 RP 71. The trial court, while acknowledging the lengthy period of time before police entered the garage, concluded that "the officers had a basis to remove the defendant because the[y] didn't know what, if anything, that person would do and they had a basis to believe the defendant was in the garage[.]" 4/4/12 RP 7, 9.

An appellate court reviews whether substantial evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006). Conclusions of law pertaining to a

[3] The trial court suppressed the key and evidence obtained during the subsequent search of the Lexus, concluding that the search of the garage went beyond a protective sweep. 4/4/12 RP 8-9.

suppression motion are reviewed de novo. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

a. The warrantless entry into the garage was not justified by "exigent circumstances."

Police may search without a warrant when "exigent circumstances" justify the search. *State v. Cardenas*, 146 Wn.2d 400, 405, 47 P.3d 127, 57 P.3d 1156 (2002). "'Exigent circumstances' involve a true emergency, i.e., 'an immediate major crisis,' requiring swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or the destruction of evidence." *State v. Hinshaw*, 149 Wn. App. 747, 753, 205 P.3d 178, 181 (2009) (citing *Michigan v. Tyler*, 436 U.S. 499, 509-10, 98 S. Ct. 1942, 56 L. Ed. 2d 486 (1978)).

"The idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a warrant." *State v. Bessette*, 105 Wn. App. 793, 798, 21 P.3d 318 (2001). Courts measure exigency by considering whether it was feasible for the police to guard the premises while seeking a warrant. *State v. Welker*, 37 Wn. App. 628, 633, 683 P.2d 1110 (1984).

The police bear the heavy burden of showing that exigent circumstances necessitated immediate police action. *Hinshaw*, 149 Wn. App. at 754; *Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 104 S. Ct. 2091,

80 L. Ed. 2d 732 (1984). The State must show why it was impractical or unsafe to take the time to get a warrant. *State v. Wolters*, 133 Wn. App. 297, 303, 135 P.3d 562 (2006). "When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequence if he postponed action to get a warrant." *McDonald v. United States*, 335 U.S. 451, 460, 69 S. Ct. 191, 93 L. Ed. 153 (1948).

Courts look at the totality of circumstances to determine whether exigent circumstances existed. *State v. Carter*, 151 Wn.2d 118, 128, 85 P.3d 887 (2004). The analysis is guided by six factors: (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) whether there is reasonably trustworthy information that the suspect is guilty; (4) whether there is strong reason to believe that the suspect is on the premises; (5) the likelihood that the suspect will escape if not swiftly apprehended; and (6) whether the entry can be made peaceably. *Cardenas,* 146 Wn.2d at 406 (citing *State v. Terrovona,* 105 Wn.2d 632, 644, 716 P.2d 295 (1986)). As discussed below, the totality of the circumstances demonstrates that there was no exigency to justify the warrantless entry.

i. Law enforcement was investigating a stolen motor vehicle, which is a non-violent offense.

The gravity of the underlying offense giving rise to the arrest is a key factor to be considered when determining whether any exigency exists. *Welsh,* 466 U.S. at 751-53. Exigency is not created simply because there is probable cause to believe that a serious crime has been committed. *Id.* at 753; *Payton v. New York*, 445 U.S. 573, 589, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980) (requiring exigent circumstances for warrantless home entry in a murder case).

Law enforcement was investigating crimes related to a stolen vehicle. Taking a motor vehicle, theft of a motor vehicle, and possession of a stolen vehicle are all non-violent property crimes. *See* RCW 9.94A.030(54); RCW 9.94A.411. Therefore, the non-violent nature of the offense, a key factor in an exigency analysis, weighs against any finding of exigency.

ii. Law enforcement did not have a strong reason to believe that the suspect was in the garage.

Officer Walter testified that he arrived at the location of the stolen Lexus with Officer Caille. 4/3/12 RP 32. Officer Walter and Officer Caille contacted two individuals, Timothy Graham and Phillip Brewer, who were in the car parked next to the Lexus. 4/3/13 RP 34.

Officer Walter testified that these witnesses reported seeing a black male and a white female exit the Lexus and leave the area. 4/3/12 RP 34. Officer Walter did not testify regarding any other witness information obtained by law enforcement before the entry into the garage. *See* 4/3/12 RP 34-35.

Officer Stone was the only other witness to testify at the CrR 3.6 hearing concerning the warrantless entry into the garage on July 10, 2011.[4] Officer Stone testified that two individuals were immediately detained upon arriving at the location. 4/2/12 RP 61. They reported to law enforcement that they observed a black male and white female exit the Lexus. 4/2/12 RP 61. Officer Stone attributed the information about the suspects entering the garage to Mr. Graham and Mr. Brewer. 4/2/12 RP 62. Officer Stone testified that Officer Caille talked to witnesses across the street who observed the Lexus pull into the driveway and a black man and white woman exit the vehicle. 4/2/12 RP 61-62.

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[4] Officer Hanson, Craig Lundy, and Trooper Bennett testified at the CrR 3.6 hearing with respect to the July 2, 2011 incident involving the Range Rover. *See* 4/2/11 RP 25, 44; 4/3/12 RP 5.

During oral argument, the prosecuting attorney made the following assertion regarding the evidence introduced at the CrR 3.6 hearing:

> Officer Stone testified that the other neighbor across the street – and I don't know if you remember, he mentioned his name, Mr. Guerreo said that he had seen the black male and the white female get out of the car and go into the garage. And so while Mr. Graham and Mr. Brewer said that they didn't know where they went the neighbor across the street did say that the people who had been in the Lexus had recently gone into the garage.

4/3/12 RP 72. However, Officer Stone neither mentioned Mr. Guerreo by name nor testified that he reported observing the suspects enter the garage. *See* 4/2/12 RP 62. Officer Stone testified that Officer Caille interviewed witnesses across the street who "could see the vehicle as it pulled up, and said a black man and white woman with blond hair jump[ed] out of the vehicle." 4/2/12 RP 62. He attributed the information about entry into the garage to Mr. Graham and Mr. Brewer, which directly contradicted Officer Walter's testimony. 4/2/12 RP 62; 4/3/12 RP 34.

The trial court adopted the prosecuting attorney's misstatement of the testimony in its oral findings:

> When they got there, one of the officers talked to a neighbor who said they saw a black male and a white woman go into the garage[.]

4/4/12 RP 7. There was not substantial evidence to support this finding.

Law enforcement did not have strong reason to believe that the suspects were in the premises. There was no testimony at the CrR 3.6 hearing that they could hear or see anyone in the garage before the unlawful entry.[5] At best, the evidence established that witnesses told Officer Walter the suspects left the area and told Officer Stone that they entered the garage. This contradictory information was insufficient to establish a strong reason to believe the suspects were in the garage. As such, this factor also weighs against a finding of exigent circumstances.

iii. The totality of the remaining circumstances demonstrate that there was no exigency.

Law enforcement had no information giving them reason to believe that the suspects were armed. *See Cardenas*, 146 Wn.2d at 406. There was also no likelihood that the suspects would escape if not swiftly apprehended. *See id.* The garage was concrete on all sides and the only way to enter or exit the garage was through the front vehicle door, which was surrounded by police officers. 4/2/12 RP 62. Law enforcement could have easily watched the garage while a warrant was obtained. *See City of Seattle v. Altschuler*, 53 Wn. App. 317, 322, 766

[5] Officer Stone later testified that they did not hear any noise or voices coming from inside the garage. 4/5/12 RP 107.

P.2d 518 (1989) (City's argument that defendant could flee at any time rejected because officers parked their vehicles in the driveway blocking the garage door).

The fact that law enforcement waited approximately 20 minutes before opening and entering the garage illustrates the absence of a true emergency or immediate major crisis. The totality of the circumstances analysis shows that the circumstances were not exigent. Because the State did not carry its "heavy burden" to show that the circumstances necessitated immediate police action, the warrantless entry and search of the garage was unconstitutional. *See Hinshaw*, 149 Wn. App. at 754.

b. This Court should reverse with instructions to suppress the evidence and all fruits obtained from the unlawful entry into the garage.

Evidence obtained pursuant to an unconstitutional search and fruits of an illegal search must be suppressed. *State v. Perrone*, 119 Wn.2d 538, 556, 834 P.2d 611 (1992); *Wong Sun v. United States*, 371 U.S. 471, 485, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The admission of evidence obtained in violation of the Fourth Amendment "is constitutional error and presumed prejudicial." *State v. McReynolds*, 117 Wn. App. 309, 326, 71 P.3d 663 (2003). The State bears the burden of demonstrating the error is harmless. *Id.* Constitutional error

is harmless only if the State shows beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *Id.*

The warrantless entry into the garage resulted in Mr. Guerreo's identification of Mr. Hankerson as the person he initially observed driving and exiting the Lexus. 4/11/12 RP 14-15. The State cannot demonstrate that this evidence is harmless beyond a reasonable doubt and therefore this Court should reverse and remand with instructions to suppress all evidence obtained from the warrantless search and its fruits.

4. The seizure of the Range Rover violated the Fourth Amendment and article 1, section 7.

The Fourth Amendment and article 1, section 7 of the Washington Constitution require all seizures to be reasonable. *State v. Hill*, 68 Wn. App. 300, 304, 842 P.2d 996 (1993). An impoundment of a vehicle is a seizure because it is a governmental taking. *State v. Reynoso*, 41 Wn. App. 113, 116, 702 P.2d 1222 (1985). The State bears the burden of showing that a seizure falls within an exception to the warrant requirement. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980).

In denying Mr. Hankerson's motion to suppress evidence obtained as a result of the impoundment and subsequent search of the

Range Rover, the trial court determined that there was probable cause to believe the Range Rover was stolen because "there were no plates, they couldn't find the lawful owner, the car was essentially unoccupied." 4/4/12 RP 5. The trial court also concluded that the vehicle was abandoned. 4/4/12 RP 5. As previously discussed, conclusions of law pertaining to a suppression motion are reviewed de novo. *Armenta*, 134 Wn.2d at 9.

a. A vehicle may be lawfully impounded by law enforcement only if specific criteria are satisfied.

The police can impound a vehicle only under certain specific circumstances. *State v. Simpson*, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980).

> A vehicle may be lawfully impounded (1) as evidence of a crime, when the police have probable cause to believe the vehicle has been stolen or used in the commission of a felony offense; (2) under the 'community caretaking' function if (a) the vehicle must be moved because it has been abandoned, impedes traffic, or otherwise threatens public safety or if there is a threat to the vehicle itself and its contents of vandalism or theft *and* (b) the defendant, the defendant's spouse, or friends are not available to move the vehicle; and (3) in the course of enforcing traffic regulations if the driver committed a traffic offense for which the legislature has expressly authorized impoundment.

State v. Tyler, 177 Wn.2d 690, 698, 302 P.3d 165 (2013) (citing *State v. Williams*, 102 Wn.2d 733, 742-43, 689 P.2d 1065 (1984)). If there is no

probable cause to seize a vehicle and a reasonable alternative to impoundment exists, then it is unreasonable to impound a vehicle. *Houser*, 95 Wn.2d at 153. Absent one or more of these circumstances, the impoundment of a vehicle is unconstitutional.

i. There was no probable cause to believe that the Range Rover was stolen.

Probable cause exists where the facts and circumstances within an officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in the belief that an offense has been committed. *Terrovona*, 105 Wn.2d at 643. Facts obtained after the impoundment has occurred do not bear on whether the impoundment was reasonable. *Tyler*, 177 Wn.2d at 699. Law enforcement officers are not "free to impound just any vehicle parked on the street or any vehicle they stop for traffic infractions." *Id.* at 707-08.

Trooper Bennett located the Range Rover parked parallel to the curb on a small cul-de-sac. 4/3/12 RP 9. The door was locked and he could not see a VIN from outside the vehicle. 4/3/12 RP 10. There was a temporary tag on the vehicle, but it could not be read through the dark tinted windows. 4/3/12 RP 10. Based on this information, Trooper Bennett "called for a tow truck to try and get the vehicle open and off

the street[.]" 4/3/12 RP 13. When asked why the Range Rover was towed, Trooper Bennett testified:

> Well, for a start, we couldn't find out who did it, so I wanted to try and find who the registered owner was, maybe be [sic] they can get his consent to search the vehicle, you know, (inaudible) or to that jurisdiction, they might want to bring the vehicle up. Right now I didn't think we had much to go on at all. By the time the tow company got there, they managed to find the VIN number, ran an [sic] check through VIN, and if I remember right I think it was stating that it came back for an owner in Ohio. And they said they had given it back to the lease company in New York.

4/3/12 RP 13. The vehicle was not reported stolen at the time of the Range Rover's impound. 4/3/12 RP 23.

The trial court's reliance on the lack of license plates was insufficient to establish that the vehicle was stolen, especially in light of the testimony that a temporary tag was displayed in the rear window. Law enforcement was able to obtain the VIN prior to impounding the vehicle and a check provided no information that the vehicle may be stolen. 4/3/12 RP 13. Furthermore, the fact that the vehicle was unoccupied (i.e., legally parked on a public road) and that law enforcement were unable to reach the owner of the Range Rover does not establish probable cause that the vehicle was stolen. Therefore, this was not a basis upon which to justify impoundment.

ii. There was no probable cause to believe that the Range Rover was used in the commission of a felony.

The initial officer who attempted to effectuate a traffic stop on the Range Rover indicated that when he activated his lights, the car "took off." 4/2/12 RP 34. Because of the Seattle Police Department's pursuit policy, he did not continue pursuing the Range Rover. *Id.* "So as soon as, you know, that it was obvious the vehicle was not going to stop for me, I turned off my lights and siren." *Id.* These facts are insufficient to establish probable cause that the driver of the Range Rover willfully failed to bring the vehicle to a stop and drove in a reckless manner while attempting to elude a pursuing police vehicle. *See* RCW 46.61.024(1).

Trooper Bennett testified that based on the damage to the car and the damage to a gate on a bike trail, it "seemed a fair assumption that this pretty much matched – the vehicle damage seemed to match." 4/3/12 RP 14. Based on this evidence, the State argued that impounding the Range Rover was permissible because there was probable cause to believe the driver had committed the crimes of reckless driving and hit and run on unattended property. *See* 4/3/12 RP 69.

However, hit and run on unattended property is a simple misdemeanor and reckless driving is a gross misdemeanor. RCW 46.52.010; RCW 46.61.500. Because a vehicle may be impounded only if there is probable cause to believe it was used in the commission of a *felony*, hit and run or reckless driving did not justify impounding the Range Rover. *See Tyler*, 177 Wn.2d at 698. There was no probable cause to believe that the Range Rover was used in the commission of a felony and thus there was no legitimate basis to impound the vehicle.

iii. Impoundment of the vehicle was not authorized by law enforcement's community care taking functions.

An impoundment may be reasonable if the vehicle was impounded for community caretaking purposes. *Houser*, 95 Wn.2d at 150. Disabled or damaged vehicles located upon the highways or streets may be removed solely for caretaking and traffic control purposes. *Id.* at 151 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 368-69, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976)). Police may also impound vehicles that violate parking ordinances and jeopardize both the public safety and the efficient movement of vehicular traffic. *Id.* at 151-52. Abandoned and illegally parked vehicles can be impounded for the purpose of determining the owner. *Id.* at 152.

A community caretaking impoundment is not permitted absent a showing that the vehicle threatened public safety or convenience. *Id.* A vehicle cannot be impounded under the guise of the community caretaking function in order to effectuate an ongoing investigation. *Id.* The Range Rover was legally parked on a public street. 4/3/12 RP 9. There was no testimony that it was a threat to public safety or that it jeopardized the efficient movement of vehicular traffic. Therefore, the impoundment could not be justified as part of law enforcement's community caretaking functions.

b. The Range Rover was not abandoned when it was legally parked in a public place with the doors locked.

The trial court determined that even though the Range Rover was legally parked and locked, it was abandoned property and thus could be lawfully seized and searched without a warrant. 4/4/12 RP 5. Abandoned property is an exception to the warrant requirement. *State v. Evans*, 159 Wn.2d 402, 407-08, 150 P.3d 105 (2007). Property is voluntarily abandoned when the defendant engages in a willful action by throwing the property aside in an effort to keep the property from the police. *State v. Reynolds*, 144 Wn.2d 282, 286-88, 27 P.3d 200 (2001); *State v. Nettles*, 70 Wn. App. 706, 708-09, 855 P.2d 699 (1993); *State v. Whitaker*, 58 Wn. App. 851, 853, 795 P.2d 182 (1990).

"Whether a defendant voluntarily has abandoned property for purposes of the abandonment exception is based on a combination of act and intent." *State v. Hamilton*, 179 Wn. App. 870, 885, 320 P.3d 142 (2014) (citing *Evans*, 159 Wn.2d at 408). All relevant circumstances at the time of the alleged abandonment should be considered. *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001). Intent may be inferred from spoken words, acts, and other objective facts. *Evans*, 159 Wn.2d at 408.

The question is whether the defendant has relinquished his reasonable expectation of privacy in leaving the property so that the search and seizure is valid. *Id.* A defendant must show a reasonable expectation of privacy in the item seized and that he did not voluntarily abandon it. *See id.* at 408-09. The inquiry is twofold: (1) whether there is an actual expectation of privacy by seeking to preserve something as private; and (2) whether society recognizes that expectation as reasonable. *State v. Kealey*, 80 Wn. App. 162, 168, 907 P.2d 319 (1995).

In *State v. Evans*, the defendant easily satisfied the first prong of this test with regard to the search of a briefcase found in a vehicle because the item was closed and locked. 159 Wn.2d at 409. As such,

he demonstrated that he had an actual and subjective intent to keep the item private. *Id.* Similarly, the Range Rover was left legally parked and locked, evidencing a subjective intent to keep its contents private.

Mr. Hankerson satisfies the second prong of the test because society recognizes a general expectation of privacy in motor vehicles. A privacy interest in vehicles and their contents is recognized under article 1, section 7 of the Washington Constitution prohibiting the disturbance of private affairs without authority of law. *State v. Snapp*, 174 Wn.2d 177, 188, 275 P.3d 289 (2012). A person does not need to be the owner of a vehicle in order to have a legitimate expectation of privacy in it. *State v. Foulkes*, 63 Wn. App. 643, 648, 821 P.2d 77 (1991).

The trial court's reasoning would result in any parked and locked vehicle being subject to the abandonment exception of the warrant requirement if the driver of the vehicle was not found in its immediately vicinity. The circumstances do not establish that the Range Rover was discarded. The trial court erred when it concluded that an individual loses their privacy interest by simply parking their locked vehicle legally in a public place.

c. The remedy is reversal and remand with instructions to suppress all evidence obtained from the unconstitutional impoundment.

As previously discussed, the admission of evidence obtained in violation of the Fourth Amendment is constitutional error and presumed prejudicial. *McReynolds*, 117 Wn. App. at 326. The State cannot demonstrate beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. Mr. Hankerson was not found in the vicinity of the Range Rover on July 2, 2011. 4/3/12 RP 12-13. The State relied on the fingerprint evidence obtained from the Range Rover after its impoundment to establish Mr. Hankerson's possession of the vehicle.[6] 4/10/12 RP 88. The State cannot prove beyond a reasonable doubt the result would have been the same without this evidence. Accordingly, this Court should reverse.

5. The trial court's admission of a dashboard camera video depicting Mr. Hankerson's arrest at gun point was manifestly unreasonable and prejudicial.

A trial court's decision to admit evidence is reviewed for abuse of discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990).

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[6] Law enforcement obtained consent from the lawful owner of the Range Rover prior to obtaining the fingerprints from inside the vehicle. 4/2/12 RP 46. Regardless, the Range Rover remained impounded from July 2, 2011 through July 21, 2011 when the fingerprints were obtained and thus the unlawful impoundment cannot be attenuated from the later search. 4/3/12 RP 18.

Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Failure to adhere to the requirements of an evidentiary rule can be an abuse of discretion. *State v. Foxhaven*, 161 Wn.2d 168, 174, 163 P.3d 786 (2007).

Over defense objection, the trial court admitted portions of a dashboard camera video that showed Mr. Hankerson being removed from the garage at gun point, arrested, and handcuffed. 4/8/12 RP 118; Ex. 16.[7]

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. In doubtful cases the scale should be tipped in favor of the defendant and exclusion of evidence. *State v. Smith*, 106 Wn.2d 772, 776, 725 P.2d 951 (2003) (citing *State v. Bennett*, 36 Wn. App. 176, 180, 672 P.2d 772 (1983)). Unfair prejudice is that which is more likely to arouse an emotional response than a rational decision and which creates

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[7] Exhibit 16 contains 3 different files: (1) 6967@20110710181724.mpg; (2) 6992@20110710175725.mpg; and (3) 7446@20110710180019.mpg. The file referred to during trial as "7446" was admitted as Exhibit 16. 4/5/12 RP 112. The video is 53 minutes, 17 seconds (53:17). Law enforcement can be seen drawing their firearms and opening the garage at 21:17. Mr. Hankerson is then searched and placed in handcuffs. Law enforcement officers walk him out of the view of the video at 24:30. The file referred to as "6967" was later offered by the defense and admitted into evidence. 4/9/12 RP 24.

an undue tendency to suggest a decision on an improper basis. *State v. Cronin*, 142 Wn.2d 568, 584, 14 P.3d 752 (2000).

The video shows multiple police officers gathering outside the garage and drawing their firearms. Ex. 16. Mr. Hankerson is shown being removed from the garage, searched by two different officers, and handcuffed. *Id.* Mr. Hankerson objected to the admission of this portion of the video as prejudicial and cumulative. 4/5/12 RP 117. These depictions, which had minimal if any relevance, were likely to arouse an emotional response from the jury, as well as speculation that law enforcement was aware that Mr. Hankerson was a particularly dangerous individual.

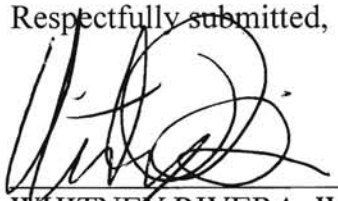
Error is prejudicial if there is a reasonable probability that the outcome of the trial would have been materially affected had the error not occurred. *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). The admission of this video created an undue tendency to suggest a verdict on an improper basis. Where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is required. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 673, 230 P.3d 583 (2010). The error is prejudicial and requires reversal.

E. CONCLUSION

This Court should reverse and dismiss the attempting to elude a pursuing police vehicle conviction because there was insufficient evidence of essential elements. Additionally, this Court should reverse Mr. Hankerson's conviction for possession of the stolen vehicle and remand with instructions to suppress all evidence and fruits obtained from the warrantless seizure of the Range Rover. This Court should also reverse Mr. Hankerson's conviction relating to the Lexus for taking a motor vehicle and remand with instructions to suppress all evidence and fruits obtained from the unlawful entry into the garage. Alternatively, this Court should reverse and remand for a new trial because of the prejudicial video of Mr. Hankerson's arrest.

DATED this 3rd day of September, 2014.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71161-0-I
v.	)	
	)	
SENAI HANKERSON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF SEPTEMBER, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] SENAI HANKERSON 11355 3RD AVE NE C-301 SEATTLE, WA 98125	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 3RD DAY OF SEPTEMBER, 2014.

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