No. 72727-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE MEJIA,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. The trial court erred in denying Mr. Mejia's motion to suppress.

a. The trial court did not make factual determinations and did not deny Mr. Mejia's motion on the basis that the officers had consent to search the premises.

Mr. Mejia moved to suppress all the evidence as a result of the unlawful search by police in entering the property around the barn. CP 54-64, 71. The State contended that Mr. Mejia lacked standing and that he was not entitled to an evidentiary hearing on the issue. CP 78-80, 87-90. The court, without conducting a hearing, issued a short letter ruling denying Mr. Mejia's motion. CP 9-10. The State's argument notwithstanding, the basis for the denial was that Mr. Mejia lacked standing and that the warrant established probable cause to search the trailer. CP 10.

Contrary to State's representations, the trial court did make findings of fact in denying Mr. Mejia's motion to suppress. Br. of Resp't at 14. The court did not hear testimony. The court based its ruling on the affidavit in support of the search warrant along with the written arguments and documents submitted. CP 9-10; 8/20/14 RP 31-32. There was nothing for the court to "find." See State v. Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981) ("A finding of fact is the assertion that a phenomenon

has happened or is or will be happening independent of or anterior to any assertion as to its legal effect."). Hence, there are no findings of fact to assign error to.[1]

The State misrepresents the trial court's ruling and the record. Br. of Resp't at 16. Consistent with the affidavit, the trial court did not "find" that the officers obtained consent from the owner before entering the property. Rather, the court recounted that the officers obtained the consent of the renter of the house and only later obtained consent from the owner. CP 9-10. This is important because the renter did not have authority over the barn or the area around it. CP 58. In arguing that the police had consent from the owner before entering the property, the State improperly cites to testimony from trial, which (obviously) was not before the court when it made its ruling. Br. of Resp't at 16.

The State's analogy to Hufford,[2] a federal case, is based on the false premise that law enforcement were validly on the premises when

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[1] Even if the letter ruling were construed to be findings of fact and conclusions of law, the result would still be the same. A finding of fact which is really a conclusion of law is reviewed as such. State v. Gaines, 122 Wn.2d 502, 508, 859 P.2d 36 (1993). And whether a finding supports a trial court's legal conclusion is reviewed *de novo*. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). The "findings" that the State recounts, such as Mr. Mejia being a trespasser, Br. of Resp't at 14, are conclusions.

[2] United States v. Hufford, 539 F.2d 32, 35 (9th Cir. 1976), overruled on other grounds by on United States v. Jones, __ U.S. __, 132 S. Ct. 945, 947, 181 L. Ed. 2d 911 (2012).

they made their observations about the cars on the property. They were not. Because the renter did not have authority to grant consent to enter the area around the barn, this consent did not validate the search. State v. Eisfeldt, 163 Wn.2d 628, 639, 185 P.3d 580 (2008) (repairman did not have authority to let police into defendant's home).

This Court should reject the State's contention that the trial court denied Mr. Mejia's motion to suppress on the basis of consent, rather than lack of standing. In any event, a conclusion that the officers had valid consent would be erroneous.

b. The trial court erroneously concluded, as a matter of law, that Mr. Mejia lacked standing to bring his motion to suppress.

Standing is a legal issue reviewed *de novo*. State v. Magneson, 107 Wn. App. 221, 224, 26 P.3d 986 (2001). Here, in challenging the officers' search, Mr. Mejia is relying on the "automatic standing" doctrine, as established by article one, section seven, of the Washington Constitution. State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007).

A defendant has "automatic standing" if (1) the charged offense involves possession as an essential element; and (2) the defendant was in possession of the subject matter at the time of the contested search or seizure. State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002); State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). Possession is an

essential element of the offense of possession of a stolen vehicle. RCW 9A.56.068(1); State v. Zakel, 119 Wn.2d 563, 569, 834 P.2d 1046 (1992) (possession is an essential element of the offense of possession of stolen property). Hence, the State properly concedes that the first requirement is met. Br. of Resp't at 18-19.

The State, however, fails to concede that the second requirement is met. Br. of Resp't at 19-20. Law enforcement knew that Mr. Mejia was living on the property. CP 59. Further, the record established that Mr. Mejia was living in the trailer by the barn. CP 2-3. Hence, for purposes of standing, Mr. Mejia was in possession of the vehicles at the time of the search.

As argued, this Court's opinion in Bobic supports this conclusion. State v. Bobic, 94 Wn. App. 702, 972 P.2d 955 (1999), vacated on other grounds, 140 Wn.2d 250, 996 P.2d 610 (2000). There, police looked into a storage unit rented to a third person through an adjacent unit. Id. at 707. This Court held that requirements for automatic standing were met. Id. at 713. The Supreme Court did not disturb this holding. State v. Bobic, 140 Wn.2d 250, 258-59, 996 P.2d 610 (2000). Rather than address or attempt to distinguish Bobic, the State ignores it. Br. of Resp't at 18-20.

Moreover, the State's position that Mr. Mejia was not in possession of the vehicles because he was not there at the time of the

search is contradicted by its position at trial. There, the State argued that Mr. Mejia constructively possessed the vehicles because he was living in the trailer nearby. 10/30/15RP 99, 127-28. The State argued that Mr. Mejia had "dominion and control" of the vehicles because a person still has possession of their belongings when they leave their home temporarily. 10/30/15RP 127-28 ("Really, so when we leave our house, we don't have possession of it?"). The State's position that there was sufficient evidence to prove beyond a reasonable doubt that Mr. Mejia possessed the vehicles on or about November 12, 2013, but that he did not possess the vehicles at the time of the search (also November 12, 2013) is contradictory.

Finally, the State reasons that Mr. Mejia lacks standing because he was a "trespasser." Br. of Resp't at 17-18. While the trial court labeled Mr. Mejia as such, this determination was not supported by the affidavit and, as a conclusion of law, is entitled to no deference. See CP 59. In any event, even under a Fourth Amendment analysis, being a "trespasser" does not necessarily deprive that person of a "reasonable expectation of privacy" against the government. United States v. Sandoval, 200 F.3d 659, 660 (9th Cir. 2000) (rejecting argument that camper who was illegally camping on federal land lacked reasonable expectation of privacy in his tent). Hence, simply because an individual is engaged in illegal

activity does not mean that he or she forfeits an expectation of privacy. Id. at 660. Thus, even assuming that Mr. Mejia was a "trespasser," this did not deprive him of standing to challenge the search.

This Court should conclude that the trial court erroneously ruled that Mr. Mejia lacked standing to bring his motion to suppress.

c. The trial court erred in determining that there was probable cause to search the trailer.

"A search warrant may issue only upon a determination of probable cause." State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Review of whether the search warrant was properly issued is limited to the four corners of the affidavit offered to establish probable cause. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008). The trial court's determination of probable cause is a legal conclusion reviewed *de novo*. Id.

The trial court acknowledged that Mr. Mejia had standing to contest the search the trailer, but that this was irrelevant because a valid warrant authorized the search. CP 10. Because there was not probable cause to support the warrant's authorization to search the trailer, the court erred.

Here, the only facts in the affidavit connecting the trailer to the stolen vehicles was its mere proximity and that an electrical cord ran from

it to the barn. CP 59. As argued, this was inadequate. Br. of App. at 20-21; see State v. Kelley, 52 Wn. App. 581, 586, 762 P.2d 20 (1988) (probable cause to search outbuildings for marijuana did not establish probable cause to search residence); State v. Gebaroff, 87 Wn. App. 11, 17, 939 P.2d 706 (1997) ("if probable cause had existed for a search of the main residence, it did not exist for the search of [defendant's] separately occupied trailer."). The State does not discuss the cases cited by Mr. Mejia. Br. of Resp't at 20-22.

As for the State's argument that police were authorized to invade Mr. Mejia's trailer to determine who had "dominion and control" of the property and the vehicles, the State cites no authority in support of its argument. It is contrary to the precedent and would allow the State to invade a person's home simply because stolen property is found nearby.

Mr. Mejia's argument as to lack of probable cause is part and parcel of his motion to suppress. Additionally, the trial court ruled on the issue, making Mr. Mejia's assignment of error proper. Even if raised for the first time on appeal, the issue qualifies under the manifest constitutional error exception. RAP 2.5(a)(3); see State v. Martines, 182 Wn. App. 519, 523, 331 P.3d 105 (2014) (addressing new suppression argument for the first time on appeal), reversed on other grounds, 184

Wn.2d 83, 355 P.3d 1111 (2015). Thus, this issue is properly before this Court.

d. The errors require reversal.

As argued, the denial of Mr. Mejia's motion to suppress was prejudicial. The vehicles were the basis for the prosecution and the evidence from the trailer was used to tie Mr. Mejia to the vehicles. The State does not argue harmless error. Accordingly, this Court should reverse.

2. The evidence was insufficient to prove that Mr. Mejia "disposed of" any of the four vehicles and that he "concealed" one of these vehicles.

The "to-convict" instructions required the State to prove that Mr. Mejia "knowingly received, retained, possessed, concealed, and/or disposed of a stolen motor vehicle." CP 24-27. The State agrees that, under the law of the case doctrine, it bore the burden of proving all five of these methods by sufficient evidence. Br. of Resp't at 24; State v. Hayes, 164 Wn. App. 459, 480-81, 262 P.3d 538 (2011); State v. Lillard, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004). The State failed to prove that Mr. Mejia "disposed of" any of the vehicles and that he "concealed" one of these vehicles.

a. The Acura Integra, found outside in the open, was not concealed.

Concerning concealment, one of the stolen vehicles, a red Acura Integra, was found outside the barn in the open. 10/28/14 RP 44, 100-101, 167. Counsel correctly recounted this fact. Br. of App. at 6. In the section of the brief addressing insufficient evidence as to "concealment" of this vehicle, however, counsel mistakenly asserted that it was the 1992 Honda Accord found outside the barn. Br. of App. at 27. It was the red Acura Integra (Count IV), which was found outside. 10/28/14 RP 44, 100-101, 167; CP 6, 27.

The State acknowledges that the Acura was found outside the barn. Br. of Resp't at 9. Still, seizing on counsel's error, the State argues that the Accord was located in the barn and was thus concealed. Properly construed, Mr. Mejia's argument as to concealment is for the Acura. Counsel's error should be excused so as to decide the issue on the merits and to ensure that Mr. Mejia is not deprived of his right to effective assistance of counsel. RAP 1.2(a) (rules of appellate procedure may be waived or altered by this court and rules will be interpreted to promote justice and facilitate decision of cases on the merits); In re Pers. Restraint Petition of Dalluge, 152 Wn.2d 772, 787, 100 P.3d 279 (2004) (criminal defendants have a right to effective assistance of counsel on first appeal of

right). Because there was insufficient evidence that Mr. Mejia "concealed" the Acura, that conviction (Count IV) should be reversed.

b. None of the recovered vehicles had been "disposed of."

The State argues that evidence was sufficient to prove that Mr. Mejia "disposed of" the vehicles. In making this argument, the State relies on an alternative definition of "dispose of," one not used by this Court in Hayes. Hayes, 164 Wn. App. at 481. In analyzing this argument, this court should keep in mind that the purpose of using dictionaries is to fairly assess the "ordinary meaning" of a term, not every possible meaning. See State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009) ("'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue.").

The State cites the same dictionary definition of "dispose of," but includes portions of the first listed definition:

> 1 a : to place, distribute, or arrange esp. in an orderly or systematic way (as according to a pattern) . . . b : to apportion or allot (as to a particular purposes) freely or as one sees fit . . .
> 2 a : to transfer into new hands or to the control of someone else (as by selling or bargaining away) : relinquish, bestow . . . b (1) : to get rid of : throw away : discard . . . (2) : to treat or handle (something) with the result of finishing or finishing with . . . : complete, dispatch . . . c : destroy.

Br. of Resp't at 27, citing Webster's Third New International Dictionary, 654 (1993). Hence, this dictionary defines the verb phrase "dispose of" in two ways, one that denotes a permanent transfer and another a more temporary designation.

Our Supreme Court has interpreted the phrase "dispose of" to usually and ordinarily mean a permanent transfer to another person:

> What is the usual and ordinary meaning of the words "dispose of"? Webster's New International Dictionary (2d ed.) defines the words as "To get rid of; * * * part with; * * * bargain away."

Miller v. City of Pasco, 50 Wn.2d 229, 232, 310 P.2d 863 (1957). This Court should follow the Court's lead. Accord McClain v. Hardy, 184 Or. App. 448, 451-52, 56 P.3d 501 (2002) (applying Webster's Third New International Dictionary's definition of "dispose of," a disinheritance clause by itself did not "dispose of" property because property was not actually given to someone else). To apply the more temporary meaning would make the term indistinct from the term "retain." See State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) ("statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.") (internal citations omitted).

This reading is more consistent with the ordinary usage of the phrase to "dispose of." Absent some contrary context, if A tells B that he or she has "disposed of" a motor vehicle, it is unlikely that B, the listener, will think that the vehicle has been placed or arranged somewhere rather than gotten rid of. Even if a valet, whose job it is to park vehicles, says he or she was going to "dispose of" your car, you might not hand over your car keys absent additional clarification about what the valet meant.

A *corpus linguistics* analysis, which is simply the "study of language employing a body of language," confirms this conclusion. State v. Rasabout, 356 P.3d 1258, 1275 (Utah 2015) (Lee, A.C.J., concurring). As Associate Chief Justice Lee of the Utah Supreme Court explains,

> In this age of information, we have ready access to means for testing our resolution of linguistic ambiguity. Instead of just relying on the limited capacities of the dictionary or our memory, we can access large bodies of real-world language to see how particular words or phrases are actually used in written or spoken English. Linguists have a name for this kind of analysis; it is known as *corpus linguistics.*

Id. In Rasabout, the defendant fired twelve shots at a house and was convicted of twelve counts of unlawful discharge of a firearm. Id. at 1260. Using a dictionary, the court determined that each firing of a weapon is a separate discharge. Id. at 1263-64. Justice Lee confirmed that this conclusion was sound through a search of the Corpus of Contemporary

American English (COCA) database and a Google news search. Id. at 1279-1282 (Lee, A.C.J., concurring).

Similarly, a search of the COCA database, or even a simple Google news search, similarly confirms that the phrase "dispose of" is used in the second, more permanent, sense listed in Webster's dictionary. http://corpus.byu.edu/coca/ (last accessed December 23, 2015) (type in the phrase "dispose of"); (https://news.google.com) (last accessed December 23, 2015) (type in the phrase "dispose of").

Applying the common meaning of "dispose of," there is no evidence that Mr. Mejia transferred control of the vehicles to someone else or got rid of them. Accordingly, the evidence was insufficient to prove that Mr. Mejia "disposed of" the vehicles. Hayes, 164 Wn. App. at 481 (reversing because no evidence proved that defendant transferred control of vehicle to another).

Even applying the less ordinary meaning urged by the State, the evidence was still insufficient. There was no evidence that Mr. Mejia placed, arranged, or apportioned any of the vehicles.

The State appears to additionally argue that because the vehicles were in varying states of partial dismantlement, they were "discarded," "dispatched," and "destroyed. Br. of Resp't at 27. The vehicles, however, were only partly dismantled. The statute criminalizes the

possession or disposal of a whole motor vehicle, not parts of a motor vehicle. Moreover, there was no evidence proving Mr. Mejia himself had disassembled the vehicles. Thus, the evidence was insufficient to prove that Mr. Mejia "disposed of" the vehicles.

c. All four convictions should be reversed.

Because the evidence was insufficient to prove that Mr. Mejia "disposed of" any of the four vehicles, all four convictions for possession of a stolen motor vehicle should be reversed. Additionally, the conviction based on the Acura (Count IV) should be reversed because there was insufficient evidence that Mr. Mejia "concealed" that vehicle.

3. The trial court improperly excluded two of Mr. Mejia's witnesses, requiring reversal.

Exclusion of defense evidence is an extraordinary remedy, which should be applied only in narrowest of circumstances. State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1998). Four factors guide whether exclusion is proper:

> (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case; (3) the extent to which the prosecution will be surprised or prejudiced by the witness's testimony; and (4) whether the violation was willful or in bad faith.

Id. at 882-83. The ordinary remedy is a continuance, not exclusion. Id. at 881.

Here, Mr. Mejia sought to call two witnesses to impeach Mr. Everett, the renter of house. 10/28/14RP 81-82, 106; 10/29/14RP 11. Mr. Everett was a witness called by the State, who testified that Mr. Mejia was at the property about every night. 10/28/14RP 68. In contrast, Mr. Mejia maintained he had not been living at the property when police found the stolen vehicles. 10/29/14 RP 45. Hence, Mr. Everett's credibility was key to the State's theory of the case. In excluding the witnesses, the court inexplicably refused to hear Mr. Mejia's offer of proof. 10/29/14 RP 14.

The State argues exclusion was proper because the witnesses would have only testified about collateral matters. Br. of Resp't at 31. The State's argument is speculative and conclusory in light of the trial court's refusal to hear Mr. Mejia's offer of proof. Br. of Resp't at 31-33.

The State's analysis of the Hutchinson factors is similarly unpersuasive. First, the State argues that a continuance would have been inadequate because the two witnesses had been uncooperative in a previous attempt to fully interview them. Br. of Resp't at 34. But Mr. Mejia's counsel stated that he was going to direct them to cooperate. 10/29/14 RP 11. Second, the State argues there was no impact from exclusion. This is speculative because the court denied Mr. Mejia's offer of proof on what the witnesses would testify to. Third, the State asserts that, absent exclusion, it would have been surprised and been faced with

an unfair risk of prejudicial statements. Again, if there had been an offer of proof, there would have been no surprise or unfair risk. Finally, the State argues the record shows that the delay was willful and that Mr. Mejia was trying to surprise the State. Br. of Resp't at 34-35. This characterization is not supported by the record and is speculative.

These were not extraordinary circumstances which justified exclusion of Mr. Mejia's impeachment witnesses. See Hutchinson, 135 Wn.2d at 881-82 (allowing exclusion of expert witness where the defendant repeatedly refused to submit for an evaluation). A short continuance would have sufficed. The impact was significant because it hindered the ability of Mr. Mejia to attack the credibility of a key State witness. And there was no showing of bad faith on the part of the defense. Thus, the Court abused its discretion. Cf. State v. Venegas, 155 Wn. App. 507, 522-23, 228 P.3d 813 (2010) (where all but the third Hutchinson factors favored the defendant, trial court abused its discretion).

The State does not argue that the error is harmless beyond a reasonable doubt. Br. of Resp't at 35. Accordingly, this Court should reverse. Br. of App. at 34-35.

4. The State properly concedes that it did not prove Mr. Mejia's offender score. This Court should accept the concession and remand.

As argued, the State failed to meet its burden to prove Mr. Mejia's criminal history. Br. of App. at 35-36. The State properly concedes that remand for resentencing is the required. Br. of Resp't at 35-36. The Court should accept the concession and remand for a new sentencing hearing.

F. CONCLUSION

The court erred in denying Mr. Mejia's motion to suppress for lack of standing and in determining that probable cause supported the warrant's authorization to search the trailer. Sufficient evidence does not support the conclusions that Mr. Mejia "disposed of" the vehicles or that he "concealed" the Acura. And the trial court improperly excluded two of Mr. Mejia's witnesses. For these reasons, the convictions should be reversed.

DATED this 28th day of December, 2015.

Respectfully submitted,

/s/ Richard W. Lechich
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Attorney for Appellant

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DIVISION ONE

STATE OF WASHINGTON,	)	
	)	
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	)	NO. 72727-3-I
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	)	
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF DECEMBER, 2015, I CAUSED THE ORIGINAL **REPLY 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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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF DECEMBER, 2015.

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