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NO. 91989-5

E CRJ
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SENAI DENNIS HANKERSON,

Petitioner.

**ANSWER TO PETITION FOR REVIEW AND
CROSS-PETITION FOR REVIEW**

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A. IDENTITY OF RESPONDENT

Respondent, the State of Washington, asks this Court to deny review as to the issues raised in the Petition for Review, and to grant review as to the issues raised in this Answer.

B. COURT OF APPEALS DECISION

The Court of Appeals decision at issue is the unpublished opinion terminating review in State v. Senai Dennis Hankerson, No. 71161-0-I, entered on June 22, 2015 (attached to Petition for Review).

C. NEW ISSUES PRESENTED FOR REVIEW

1. Whether the court of appeals applied an improperly heightened standard of review in assessing the sufficiency of the evidence of the “in uniform” element of attempting to elude a pursuing police vehicle, essentially disregarding reasonable inferences from the evidence, and whether this Court should clarify that the proper standard does not require direct evidence of that element.

2. Whether, as a matter of first impression, a defendant who eludes police in a stolen vehicle and then flees the vehicle on foot before police arrive, leaving it parked and locked in a remote location, retains “possession” of the vehicle for purposes of

asserting automatic standing to challenge the subsequent seizure of the vehicle.

D. STATEMENT OF THE CASE

1. SEIZURE OF THE STOLEN RANGE ROVER.

On July 2, 2011, Seattle Police Department (SPD) Officer Brian Hanson spotted a Range Rover in a secluded parking lot. 3RP 29-31; 5RP 2; CP 181. It was unusual to see cars in this lot on a Saturday, although stolen cars were often dumped there. 3RP 29; 5RP 2. A black male, later identified as Hankerson, was in the driver's seat and another male was in the passenger's seat. 3RP 28, 31; 5RP 2; CP 181. The Range Rover was not properly parked in a parking space and was missing a front license plate. 3RP 30-31; 5RP 2; CP 181. Hankerson appeared nervous after seeing Hanson's marked patrol car. 3RP 32.

Hankerson exited the lot. 3RP 32. Hanson waited to see the Range Rover's back license plate, but it was missing. 3RP 32; 5RP 2; CP 181. No temporary license tag was visible due to the extremely tinted windows. 3RP 32; 5RP 2; CP 182. Hanson followed the Range Rover, which then drove the wrong way on a one-way street. 3RP 33; 5RP 3. Hanson activated his emergency lights and sounded his siren, but the Range Rover only

accelerated, exceeding the 30 mph speed limit while driving the wrong way down a one-way street for approximately three blocks. 3RP 33-35. As soon as it became obvious that Hankerson was not going to stop, Hanson turned off his lights and siren in accordance with SPD's pursuit policy, which does not allow pursuit merely to stop a vehicle for traffic offenses. 3RP 34. Based on the driver's actions, Hanson concluded that the Range Rover was likely stolen. 3RP 34.

Hanson followed the Range Rover onto Interstate 5, and had his communications unit alert the Washington State Patrol (WSP) so that they could stop the vehicle. 3RP 34-36; 5RP 3; CP 182. Hanson followed the Range Rover at varying speeds across the Ship Canal bridge, onto State Route 520, across Lake Washington, and then onto southbound Interstate 405. 3RP 37-38; 5RP 3; CP 182. The Range Rover changed lanes erratically, weaved in and out of occasionally heavy traffic, exceeded the speed limit at times, and appeared to be continuing to attempt to elude Hanson. 3RP 37-38, 41-43. Hanson continually updated dispatch so that they could update the WSP. 3RP 36; 5RP 3; CP 182.

WSP Troopers picked up the pursuit on southbound I-405. 4RP 5-6; CP 182. Trooper David Bennett coordinated the WSP

response and learned from dispatch the information that Hanson had relayed. 4RP 5-6; 5RP 3; CP 182. He learned that Trooper Osborne had caught up to the Range Rover and seen it exit I-405. 4RP 6. Osborne lost sight of it, but learned from witnesses that it had driven down a nearby bike path. 4RP 6; 5RP 4; CP 182. Bennett ordered his troopers not to pursue the Range Rover onto the busy bike path, but to search the surrounding area. 4RP 6-7. Bennett soon saw that one of the normally-closed gates that served as potential exits from the bike path was open near Coal Creek Parkway in Bellevue. 4RP 8-9.

Bennett located the Range Rover in a nearby residential area, parked and locked on a dead-end street. 4RP 9; 5RP 4; CP 182. No one was inside the vehicle or anywhere in the vicinity. 4RP 10, 12-13; CP 182. A neighbor did not recognize the car, nor had he seen anyone in it. 4RP 12-13; CP 182.

The Range Rover had no plates and Bennett could barely see the temporary license tag due to the darkly-tinted rear window. 4RP 10; 5RP 4; CP 182. Bennett ran the tag, but it returned to a 1990s Lincoln from Pacific. 4RP 11-12. The Range Rover had front-end damage, which had not been initially reported, but which appeared consistent with having been driven through the bike path

gates. 4RP 11; 5RP 4; CP 182. The vehicle identification number (VIN) was not visible from outside the car because a Starbucks coffee sleeve covered it on the front dash. 4RP 10; 5RP 4; CP 182.

Bennett called a tow truck to impound the Range Rover because officers could not locate the registered owner and the car had eluded Seattle police and WSP. 4RP 13-15. Bennett located the VIN when the tow truck arrived. 4RP 13. The VIN returned to an owner in Ohio who explained that he had returned the Range Rover to a company in New York. 4RP 13; 5RP 4. The Range Rover was seized and towed to a secure lot, so that Bennett could find the registered owner and obtain consent to search or obtain a search warrant. 4RP 14-16; 5RP 4.

On July 15, 2011, Craig Ludy, owner of the Auto Quest car dealership in the Georgetown neighborhood of Seattle, reported that the Range Rover had been stolen from his lot. 3RP 44, 47; 5RP 4; CP 182. He consented for the police to search the recovered Range Rover. 3RP 47; 5RP 4; CP 182. During the subsequent search, Hankerson's fingerprints were found in two locations inside the Range Rover. 4RP 53; 5RP 4; CP 182; 8RP 83-92.

The trial court denied Hankerson's motion to suppress the fingerprints, finding that the seizure of the Ranger Rover was lawful, and did not reach the argument raised by the State that Hankerson lacked standing to challenge the seizure. 5RP 5; CP 183. Hankerson was found guilty of possession of a stolen vehicle related to his possession of the Range Rover. CP 35, 93. The court of appeals affirmed his conviction, assuming without deciding that Hankerson had standing to challenge the seizure of the vehicle, but agreeing that the seizure of the Range Rover was lawful. Slip Op. at 17-18.

2. ATTEMPTING TO ELUDE OFFICER CLARK IN HONDA.

In the early hours of July 10, 2011, SPD Officer Molly Clark observed a man, later identified as Hankerson, driving a white Honda bearing Washington license plate ABB4793. 6RP 9-10, 19, 23; 7RP 115-16. After Hankerson appeared to notice Clark following him without her emergency lights on, he drove dangerously, running a stop sign, turning without signaling, and running a red light. 6RP 11-16.

When Clark activated her emergency lights to stop Hankerson, he reacted by accelerating. 6RP 16. Clark managed

to call out his license plate over the radio as he sped away.
6RP 16, 19. She saw Hankerson speed through a stop sign without even tapping his brakes. 6RP 16. After observing that Hankerson's erratic driving had only increased since she had signaled him to stop, Clark shut down her lights pursuant to SPD's pursuit policy. 6RP 6, 17-18.

At trial, Clark did not explicitly testify that she was in uniform when Hankerson attempted to elude her. However, she testified that she had just started her Seattle Police Department patrol shift when she observed Hankerson in the stolen Honda. 6RP 9-10. Her shift began as usual with the roll call meeting where she learned what had happened during the previous shift. 6RP 9-10. She then patrolled her district in a patrol car equipped with lights and sirens. 6RP 9, 16, 19. Her general duties on patrol were to respond to 911 calls and any issues she observed. 6RP 5. She also served a deterrent function by maintaining a visible presence. 6RP 5. For example, she often parked her car and wrote reports near a grocery store that had shoplifting issues to deter crime. 6RP 5.

Clark's fellow officer, Sydney Brathwait, testified that he was a patrol officer on duty on July 10, 2011, and that his shift began

with roll call where he learned information from the prior shift. 8RP 122-23. He then patrolled his assigned sector, responding to 911 calls and maintaining a presence to prevent crime. 8RP 122-23. When the prosecutor asked, "What do you normally [wear] when you are on patrol?" Brathwait responded, "I'm in my police uniform." 8RP 123.

Hankerson was found guilty of attempting to elude a pursuing police vehicle. CP 95. The court of appeals reversed Hankerson's conviction on the grounds that there was insufficient evidence for a rational trier of fact to infer beyond a reasonable doubt that Clark was in uniform during the pursuit. Slip Op. at 19-21.

3. THE STOLEN LEXUS AND WARRANTLESS ENTRY INTO THE GARAGE.

On July 10, 2011, SPD learned that a Lexus SUV had just been stolen from Auto Quest, the same dealership from which the Ranger Rover had been stolen. 3RP 44-45, 58; 5RP 6; CP 182. Officers located the stolen Lexus in a busy neighborhood in Beacon Hill, parked immediately in front of a garage, the door of which was slightly open. 3RP 59-62; 5RP 6-7; CP 182.

Bystanders reported that a black male and white female had just arrived in the Lexus and had gone into the garage. 3RP 61-62; 5RP 7; CP 182. A neighbor across the street, Antonio Guerrero, also reported that a black male and white female had just arrived in the Lexus. 3RP 61-62; 5RP 7; 9RP 13; CP 182.

Officers opened the garage door and entered the garage, where they found Hankerson and Michelle Antioquia lying on a mattress. 3RP 64-67; 5RP 7-8; CP 183. Officers removed them from the garage, arrested them, and then re-entered the garage and located the key to the Lexus under the mattress. 3RP 67-68; 5RP 7-8; CP 183.

Antioquia pled guilty to taking a motor vehicle without permission, and agreed to testify truthfully at Hankerson's trial in exchange for a lesser sentence. 7RP 111, 127, 142, 157. She testified that she had been in the passenger seat of the white Honda while Hankerson eluded Clark. 7RP 115-18. After Hankerson "shook the police," they hung out inside a garage until later in the morning. 7RP 119-20, 123, 127. Hankerson then drove them in the Honda to a car dealership, left the Honda for a few minutes, and then returned with the Lexus. 7RP 128-30. Hankerson switched the license plate from the back of the Honda

and put it on the Lexus, and then drove Antioquia back to the garage in the Lexus minutes before police arrived outside. 7RP 128-31.

Guerrero testified at trial that he had seen a black man and a white woman exit the Lexus and enter the garage shortly before police arrived, and testified without objection that they were the same people who were later removed from the garage by the police, and the same people he had seen leaving the area earlier in the day in an older model white Honda. 9RP 6, 11, 13-14.

Guerrero identified Hankerson in the courtroom as the man he had seen driving the Honda and Lexus. 9RP 5, 11, 14. An SPD in-car video was also admitted showing Hankerson and Antioquia being removed from the garage.¹ 6RP 112; 7RP 47-48.

Additional testimony by officers established that when the Lexus was found, it had no front license plate, and bore the license plate ABB4793 loosely attached in the back, the same plate born by the white Honda Officer Clark had pursued hours earlier. 7RP 21-22. A white Honda was found abandoned near the dealership from which the Lexus was stolen. 5RP 30-31. It bore no front or

¹ Although Hankerson unsuccessfully objected to the video on the grounds that it was unfairly prejudicial because it showed officers entering the garage with their weapons drawn, he did not argue that it should be suppressed as the fruit of the warrantless entry into the garage. 4RP 58-67; 6RP 117.

rear license plate, and had been reported stolen. 5RP 33.

Hankerson's fingerprints were located on the interior driver's door handle of the Honda. 8RP 87, 113-18.

The trial court partially denied Hankerson's challenge to the officers' warrantless entry into the garage, finding that the initial entry to remove Hankerson was lawful, but the trial court found the subsequent entry unlawful and suppressed the key to the Lexus and evidence discovered inside the Lexus using the key. 5RP 8-10. The court of appeals affirmed Hankerson's conviction on different grounds, finding that the officers' initial entry into the garage was unlawful, but was harmless beyond a reasonable doubt in light of the overwhelming untainted evidence that Hankerson had possessed the Lexus. Slip Op. at 16.

E. ARGUMENT

1. THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS' DETERMINATION THAT THERE WAS INSUFFICIENT EVIDENCE THAT OFFICER CLARK WAS IN UNIFORM.

This Court may review a decision of the court of appeals that conflicts with another decision of the court of appeals or raises an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(2), (4). In holding that the evidence

in this case was insufficient for a rational fact finder to find beyond a reasonable doubt that Officer Clark was in uniform when Hankerson attempted to elude her, the court of appeals misapplied the prior decisions on which it relied, and did not faithfully apply the standard of review on a challenge to the sufficiency of the evidence. Slip Op. at 20-21. Moreover, the proper enforcement of laws criminalizing the dangerous behavior of attempting to elude a pursuing police vehicle is a matter of substantial public interest, and there are currently no decisions by this Court to guide lower courts on the quantum of evidence that may be sufficient to prove the uniform element of this crime in cases where there is no explicit testimony that the pursuing officer was in uniform.

The standard of review on a challenge to the sufficiency of the evidence is well known: it presumes the truth of the State's evidence and demands that all inferences be drawn in a light most favorable to the verdict. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Circumstantial evidence carries weight equal to that of direct evidence in this analysis. Id.

There are currently only two published appellate decisions in Washington addressing what amount of evidence short of explicit testimony is or is not sufficient to allow a jury to find beyond a

reasonable doubt that a pursuing officer was in uniform. State v. Hudson, 85 Wn. App. 401, 932 P.2d 714 (1997); State v. Fussell, 84 Wn. App. 126, 925 P.2d 642 (1996). These cases both hold that testimony that the pursuing officers were on duty in a marked patrol car and that the defendant probably knew they were officers, without more, is insufficient to permit a rational trier of fact to infer beyond a reasonable doubt that the officers were in uniform. Hudson, 85 Wn. App. at 405; Fussell, 84 Wn. App. at 128-29.

In this case, the court of appeals applied Hudson and Fussell in a way that essentially created a heightened standard of review as to the uniform element. The court of appeals mistakenly concluded that the amount of evidence in this case is analogous to the insufficient evidence in Hudson, when in fact there is significantly more evidence in this case than in Hudson—not only does this case contain the type of testimony seen in Hudson (that Clark was on patrol in a marked patrol car), but also testimony indicating that Clark was on an ordinary, routine patrol shift when she attempted to stop Hankerson, tasked with responding to 911 calls and dealing with problems that she observed, and testimony by another patrol officer that he wears his uniform on patrol,

creating the reasonable inference that all Seattle patrol officers wear their uniforms when on patrol.² 6RP 5-10, 16; 8RP 123.

By equating the evidence in this case with the evidence in Hudson, the court of appeals applied a heightened standard of review that would seem to require testimony that Clark herself habitually wore her uniform or was in fact in uniform on that night. This contradicts this Court's established precedent of a uniform standard of review for the sufficiency of the evidence across all elements and crimes. E.g., Goodman, 150 Wn.2d at 781. This Court should grant review on this issue to correct the outcome in this case and, more importantly, to clarify that there is no special, heightened standard of review when a challenge is raised to the sufficiency of the evidence that a pursuing officer was in uniform in a prosecution for attempting to elude a pursuing police vehicle.

² By characterizing the other officer's testimony as "testimony . . . that 'normally' when he is 'on patrol,' he is 'in [his] police uniform,' the court of appeals also failed to view the evidence in the light most favorable to the State. Slip Op. at 21. The word "normally" was merely part of the question, "What do you normally [wear] when you are on patrol?" 8RP 123. The officer's unequivocal answer, "I'm in my police uniform," could very reasonably have been interpreted by the jury as a statement that he is always in his uniform when on patrol. 8RP 123.

2. THIS COURT SHOULD GRANT REVIEW ON THE UNRESOLVED ISSUE OF HANKERSON'S STANDING TO CHALLENGE THE SEIZURE OF THE RANGE ROVER.

This Court may review a decision of the court of appeals that raises an issue of substantial public interest that should be decided by the Supreme Court. RAP 13.4(b)(4). Whether a defendant charged with theft of a motor vehicle or possession of a stolen vehicle may seek to escape conviction by challenging the search or seizure of the stolen vehicle by police is an issue of substantial public interest. This case presents such a question in a very common scenario: a defendant possesses a stolen vehicle, successfully flees from police officers who lawfully attempt to stop him, and then manages to park the vehicle and disappear before pursuing officers catch up. Although the issue of standing was litigated by the parties in both the trial court and the court of appeals, the trial court declined to reach the issue and the court of appeals assumed Hankerson had standing without deciding the issue. 4RP 67-69, 76; 5RP 5; Slip Op. at 17.

Under the Washington state constitution, a defendant has automatic standing to challenge a search or seizure if he is (1) charged with an offense that involves possession as an

essential element; and (2) in possession of the subject matter at the time of the search or seizure. State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). However, Washington appellate courts have never addressed whether a defendant remains in possession of a stolen vehicle for purposes of asserting automatic standing after he successfully eludes pursuing police vehicles and then flees from the vehicle before police catch up, leaving it parked and locked on a dead-end street to which the defendant has no known ties.

Prior cases that involved some but not all of the same facts appear to suggest different answers, depending on which facts are involved. E.g., State v. Zakel, 119 Wn.2d 563, 834 P.2d 1046 (1992) (defendant not in possession at time of search where vehicle was found unlocked, illegally parked, and unattended, in location to which defendant had no connection, and defendant disclaimed ownership prior to search, despite fact that defendant entered vehicle after the search and evidence found in search supported defendant's claim that he had been living in the vehicle); State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980) (plurality opinion) (defendant who parked and locked vehicle—later found to be stolen—outside his residence, and who had key with him when subsequently arrested on a warrant, retained possession of vehicle

for purposes of automatic standing); State v. Samalia, 186 Wn. App. 224, 230, 344 P.3d 722 (2015) (defendant who fled stolen vehicle on foot to evade police, leaving vehicle unlocked, abandoned the vehicle and its contents).

The mere fact that a defendant has parked and locked a stolen vehicle cannot mean that he necessarily continues to possess the vehicle in perpetuity despite other indications that he does not intend to return to the vehicle. However, current case law provides little guidance to trial courts regarding what facts are necessary to establish that a defendant no longer possesses a locked vehicle for purposes of asserting automatic standing. This Court should take the opportunity to provide such guidance by addressing whether Hankerson has standing to challenge the seizure of the Range Rover in this case. While the State asks the Court to address this issue regardless of whether it grants review of the issues raised in the Petition for Review, review is particularly appropriate if this Court also grants review of the court of appeals' substantive decision that the seizure was lawful.

3. REVIEW SHOULD NOT BE ACCEPTED ON THE HARMLESSNESS OF THE ENTRY INTO THE GARAGE WHEREIN HANKERSON WAS FOUND.

Hankerson seeks review of the Court of Appeals' conclusion that the trial court's error in approving of the warrantless entry into the garage was harmless. Review should be denied because this issue does not meet the standards governing acceptance of review set forth in RAP 13.4(b).

The Court of Appeals properly concluded that the error in denying Hankerson's motion to suppress the fruit of the warrantless entry was harmless. The granting of Hankerson's motion would have prevented the jury from hearing about Guerrero's identification of Hankerson at the scene, but the jury would still have heard Guerrero's in-court identification of Hankerson as the driver of the Lexus, as well as all the other evidence. See State v. Hastings, 119 Wn.2d 229, 236, 830 P.2d 658 (1992) (in-court identification admissible so long as it has a basis independent of illegal search at the scene). There was thus overwhelming untainted evidence that Hankerson possessed the Lexus, and the trial court's denial of Hankerson's challenge to the entry into the garage was therefore harmless beyond a reasonable doubt. See State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

The Court of Appeals' harmless error determination does not conflict with a decision of this Court, does not conflict with another decision of the Court of Appeals, does not present a significant constitutional question, and is not an issue of substantial public interest. This issue does not meet the standards governing acceptance of review set forth in RAP 13.4(b). For this reason, review should not be granted on this issue.

4. REVIEW SHOULD NOT BE GRANTED ON THE
LAWFULNESS OF THE SEIZURE OF THE RANGE
ROVER.

Hankerson seeks review of the Court of Appeals' conclusion that the seizure of the Range Rover was lawful. Review should be denied because this issue does not meet the standards governing acceptance of review set forth in RAP 13.4(b).

The Court of Appeals properly concluded that the officers had probable cause to seize and impound the Range Rover. A vehicle may be lawfully impounded if "the police have probable cause to believe the vehicle has been stolen or used in the commission of a felony offense." State v. Tyler, 177 Wn.2d 690, 698, 302 P.3d 165 (2013). The record contains substantial evidence to support the trial court's determination that the officers had probable cause to believe that the Range Rover had been

stolen or used in the commission of a felony based the presence of the wrong temporary plate on the vehicle and Hankerson's nervous behavior, eluding of officers, and abandonment of the vehicle.

The Court of Appeals' ruling does not conflict with a decision of this Court, does not conflict with another decision of the Court of Appeals, does not present a significant constitutional question, and is not an issue of substantial public interest. This issue does not meet the standards governing acceptance of review set forth in RAP 13.4(b). For this reason, review should not be granted on this issue.

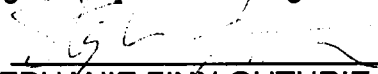
F. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to grant review of this case as to the new issues raised in this Answer, and to deny review as to the issues raised in the Petition for Review.

DATED this 21st day of August, 2015.

Respectfully submitted,

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Today I directed electronic mail addressed to Whitney Rivera, the attorney for the petitioner, at wrivera@snocopda.org, containing a copy of the ANSWER TO PETITION FOR REVIEW AND CROSS-PETITION FOR REVIEW, in State v. Senai Dennis Hankerson, Cause No. 91989-5, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of August, 2015.

W Brame

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Done in Seattle, Washington

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To: Brame, Wynne
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Please accept for filing the attached documents (Answer to Petition for Review and Cross-Petition for Review) in State of Washington v. Senai Dennis Hankerson, Supreme Court No. 91989-5.

Thank you.

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This e-mail has been sent by Wynne Brame, paralegal (phone: 206-477-9497), at Stephanie Guthrie's direction.

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