71161-0

71161-0

No. 71161-0-I

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

APPELLANT'S REPLY BRIEF

WHITNEY RIVERA
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Rules and Statutes

A. SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. Following a suppression hearing pursuant to CrR 3.6, the court erred in entering Finding of Fact 22, which asserts that Officers contacted two individuals near the Lexus who reported that a black male and white female with blond hair had jumped out of the Lexus and gone into the garage. CP 182.

2. The court erred in entering Finding of Fact 23, which claims that a neighbor also reported that a black man and white female had recently left the Lexus and gone into the garage. CP 182.

B. ISSUE PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

In Mr. Hankerson's opening brief, he challenged the trial court's failure to enter written findings of fact and conclusions of law following a suppression hearing under CrR 3.6. Br. of Appellant at 13-15. After the opening brief was filed, the State secured the entry of these written findings and conclusions in the trial court. CP 181-84. Mr. Hankerson assigned error to the trial court's oral factual finding that a neighbor reported observing the suspects enter the garage. Br. of Appellant at 1 (Assignment of Error 3). Pursuant to RAP 10.3(g), Mr.

Hankerson now assigns error to these written findings of fact that were entered after the opening brief was filed.

C. ARGUMENT

1. There was no evidence from which a rational trier of fact could reasonably infer that Officer Clark was in uniform.

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. "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)).

In its response brief, the State argues that there was sufficient evidence for a rational trier of fact to conclude that Officer Clark was in uniform because Officer Brathwait testified that he wore his uniform when on patrol. Br. of Resp't at 18. The State contends that "[a] rational trier of fact could have reasonably concluded that Clark also wore her police uniform while on patrol given that she and Brathwait

both worked for Seattle police as patrol officers and each described the same general duties." *Id.*

Officer Brathwait's testimony does not lead to an inference that Officer Clark was in uniform. "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). 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). Officer Brathwait was part of the investigation involving the Lexus and was not part of Officer Clark's attempt to initiate a traffic stop on the Honda. The fact that he testified that he was in uniform does not lead to the inference that all other Seattle police officers, including Officer Clark, are wearing uniforms at all times. Any inference that Officer Clark was in uniform is based on arbitrary assumption and speculation.

The State also argues that "a rational juror could conclude that Clark wore her uniform because she testified that she maintained a visible presence in her district to deter crime." Br. of Resp't at 18-19. The State points to Officer Clark's testimony that she often parked her car and wrote reports near a grocery store that had shoplifting issues to

deter crime. *Id.* at 18. This evidence fails to support an inference that Officer Clark was wearing a uniform when she sat in her parked patrol vehicle, let alone whether she was wearing a uniform when she attempted to stop the Honda.

This Court found that there was insufficient evidence in *State v. Hudson*, where 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).

Similarly, the evidence pointed to by the State to argue that a rational trier of fact could reasonably infer that Officer Clark was in uniform are insufficient to establish this necessary element of the crime. 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 attempting to elude a pursuing police vehicle.

2. There was no evidence that police officers were susceptible to an "ambush" if they did not make a warrantless entry into the garage.

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 (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).

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)).

a. There was nothing to indicate that the police needed to swiftly act without a warrant because of concerns about an "ambush."

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).

In its response brief, the State repeatedly asserts that the police were in danger of an "ambush." Br. of Resp't at 25,[1] 26,[2] 27-28.[3] These concerns about "ambush" are entirely speculative and are not supported by any facts contained in the record. Moreover, in addressing the six factors that a court should consider in the totality of circumstances analysis to determine whether exigent circumstances justify a warrantless search, the State's response brief fails to address the second factor: whether the suspect is reasonably believed to be armed.

There was no testimony at the suppression hearing to indicate that law enforcement had any information that would lead them to the

---

[1] "Officers had particular concerns that the suspect may have been in the garage with a gun or other weapon, preparing to ambush them while they secured the Lexus."

[2] "All could have been at risk if the suspect in the garage decided to ambush officers."

[3] "The garage did not have another exit, so it was not likely that Hankerson could have escaped. This increased the danger to the officers and witnesses who were in front of the residence garage and at risk for an ambush by a suspect hidden inside."

reasonable belief that the suspect in the garage was armed. If this Court accepted the State's argument, law enforcement would be allowed to make a warrantless entry into any suspect's home, vehicle, or any other place wherein he may have a privacy interest based on the blanket assertion that law enforcement may be susceptible to "ambush."

The dashboard camera video admitted most markedly illustrates the lack of exigent circumstances. The fact that law enforcement waited approximately 20 minutes before opening and entering the garage demonstrates the absence of a true emergency or immediate major crisis. Ex. 16; 4/2/12 RP 66; 4/4/12 RP 7. The officers' casual behavior prior to entry into the garage, as depicted on this video, plainly establishes that there was no need for "swift action to prevent imminent danger to life, forestall the imminent escape of a suspect, or the destruction of evidence." *See Hinshaw*, 149 Wn. App. at 753.

b. The totality of circumstances does not establish a true emergency or an immediate major crisis justifying a warrantless entry into the garage.

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). 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.

The State acknowledges that these crimes are not violent offenses. Br. of Resp't at 27. The State, however, contends that taking a motor vehicle "presents a risk to the public and officers", citing to trial testimony as opposed to legal authority. *Id.* This Court should reject the argument that taking a motor vehicle is a violent or grave offense and thus this factor weighs against a finding of exigency.

Another factor in the exigent circumstances analysis is whether there is strong reason to believe that the suspect is on the premises. The State argues that "officers had strong reason to believe Hankerson was in the garage." Br. of Resp't at 26. However, the State does not address the conflicting reports that officers received from witnesses regarding whether the suspects were still in the area. Officer Walter testified that the two witnesses in the car parked next to the Lexus reported seeing a black male and a white female exit the Lexus and leave the area. 4/3/12 RP 34. Officer Stone, on the other hand, testified that these same two individuals reported that the suspects had entered the garage. 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] 4/2/12 RP 61-62.

There was no testimony at the suppression hearing that law enforcement could hear or see anyone in the garage before the unlawful entry. Officer Stone testified that they did not hear any noise or voices coming from inside the garage. 4/5/12 RP 107. This fact, coupled with the inconsistent testimony from law enforcement and the contradictory accounts of the witnesses does not lead to a *strong reason* to believe that the suspect was in the garage. This factor weighs against exigency under the totality of circumstances analysis.

The likelihood of the suspect escaping is also a factor in this analysis. The State acknowledges that there was a low likelihood of escape because police were outside the only door leading into or exiting from the garage. Br. of Resp't at 27.

The totality of circumstances analysis shows that the warrantless entry into the garage was not justified by exigency. Because the State

---

[4] At the suppression hearing, Officer Caille did *not* testify that he spoke to these witnesses. *See* 4/3/12 RP 34-35.

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.

3. Mr. Hankerson has standing to challenge the impound of the Range Rover.

A person may rely on the automatic standing doctrine if the challenged police action produced the evidence sought to be used against him. *State v. Williams*, 142 Wn.2d 17, 23, 11 P.3d 714 (2000). "To assert automatic standing a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be 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). "A defendant who has acquired automatic standing in effect stands in the shoes of an individual properly in possession of the property that was searched or seized." *State v. Libero*, 168 Wn. App. 612, 617, 277 P.3d 708 (2012) (quoting *State v. Simpson*, 95 Wn.2d 170, 182, 622 P.2d 1199 (1980)).

Because Mr. Hankerson was charged with possession of a stolen vehicle, the first requirement is satisfied because possession is an essential element of the crime charged. As to the second requirement,

possession may be actual or constructive to support a criminal charge. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item. *Id.* Dominion and control means that the object may be reduced to actual possession immediately. *See State v. Simonson*, 91 Wn. App. 874, 881, 960 P.2d 955 (1998) (defendant was in possession because dominion and control of the weapons could be immediately exercised); *State v. Murphy*, 98 Wn. App. 42, 46, 988 P.2d 1018 (1999) (ability to reduce object to actual possession is aspect of dominion and control establishing possession).

In *State v. Simpson*, the defendant was observed parking, exiting, and locking a truck before law enforcement arrested him on an outstanding warrant. 95 Wn.2d at 172. He was transported to the jail where his possessions, including the key to the truck, were inventoried and placed in a property box. *Id.* at 173. Law enforcement later used the key in police property to check the VIN and they discovered the truck was stolen. *Id.*

In concluding that the defendant could assert automatic standing, the Supreme Court concluded that the defendant had

possession of the truck at the time of the search. *Id.* at 181. At the time of the search, the truck was locked and parked where he had left it. *Id.* "Thus, [the defendant] had the requisite relationship to the seized property at the time when the contested search took place." *Id.* The defendant was therefore "entitled to the full protection of the automatic standing doctrine" and had the right to "invoke all the privacy interests that an individual properly in possession of the truck could assert." *Id.* at 182. Similarly, the Range Rover was locked and legally parked when law enforcement impounded the vehicle.

The State argues that *State v. Zakel*, 119 Wn.2d 563, 834 P.2d 1046 (1992), is analogous and controlling. Br. of Resp't at 32. In *Zakel*, officers found the vehicle unlocked with an open window. 119 Wn.2d at 569. It was unattended, illegally parked in a commercial ally, and the keys were still inside. *Id.* The defendant also walked by the vehicle and stated that he did not know who owned the car. *Id.* at 570. The court held that the combination of all these factors led to the conclusion that the defendant did not possess the vehicle at the time of the search and was not entitled to claim automatic standing. *Id.*

These facts are distinguishable from those in *Zakel*. The Range Rover was legally parked and locked. Law enforcement did not locate

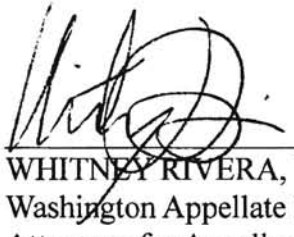
the keys and there was no disclaimer of ownership. The impoundment led to the subsequent discovery of Mr. Hankerson's fingerprint on the dashboard. This evidence was used against him at trial and thus he met the requirements to assert automatic standing.

D. CONCLUSION

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Hankerson respectfully requests this Court reverse his convictions.

DATED this 15th day of January, 2015.

Respectfully submitted,



WHITNEY RIVERA, WSBA No. 38139
Washington Appellate Project
Attorneys for Appellant

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 ANA ARRANZA RILEY, STATE THAT ON THE 16TH DAY OF JANUARY, 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:

[X] STEPHANIE KNIGHTLINGER, DPA [paoappellateunitmail@kingcounty.gov] KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL
[X] SENAI HANKERSON BA 214029532 KING COUNTY JAIL 500 5TH AVE SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 16TH DAY OF JANUARY, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710