NO. 72727-3-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JESSE OSCAR MEJIA,
Appellant.

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

The Honorable David R. Needy, Judge
The Honorable Michael E. Rickert, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Jesse Mejia appeals from his conviction for four counts of possession of stolen motor vehicle for four vehicles found in various states of disassembly found in and by a barn. The property owner and renter of the property had given permission to law enforcement to go on the property and look in the barn. Mejia did not have permission to be in the barn. Mejia had been staying in a trailer on the property. Mejia lacks standing to contest the consent to enter the property given by the owner and to go into the barn where Mejia was the trespasser. There was also probable cause to search the trailer on the property next to where the vehicles were being worked on.

Mejia's contention that there was insufficient evidence the vehicles were being disposed or concealed of fail given the work being done on the vehicles and the concealment in the barn.

Mejia's claim the trial court improperly excluded two defense witnesses from testifying fails given the witnesses who were disclosed only after trial started, refused to speak to the State and were at best only impeachment witnesses on a collateral matter.

Finally, Mejia is entitled to a factual determination of criminal history and the case should be remanded to the trial court for resentencing after the history is determined.

II. ISSUES

1. Where a person is a guest and not present a the time of entry by law enforcement, can the owner and the tenant on a piece of property give permission for law enforcement to access common areas of the property?
2. Does a person who is trespassing in a building have standing to challenge the entry into the building?
3. Where there is evidence of an ongoing vehicle dismantling operation, with a wire leading from the location to an adjacent trailer is there probable cause to issue a search warrant to enter the trailer to identify participants in the operation?
4. Where a vehicle is hidden in a barn after being stolen, is there sufficient evidence it is being concealed?
5. Where four vehicles are being dismantled and worked on in a barn, is there sufficient evidence the vehicles are being disposed of?
6. Where witnesses are not disclosed until after the testimony has started, who are offered as impeachment witnesses on a collateral matter and the witnesses refuse to be interviewed prior to testimony, did the trial court abuse its discretion in denying the testimony?
7. Where the defense did not object to the criminal history asserted at sentencing, but the State failed to provide records of the defendant's

prior convictions for the purpose of criminal history should the case be remanded to the trial court for a hearing to determine criminal history?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On December 5, 2013, Jesse Oscar Mejia was charged with four counts of Possession of Stolen Motor Vehicle for four different vehicles. CP CP 50-1. After an individual reported Mejia was running a chop shop from a barn, officers found four vehicles in a garage after permission from the renter and owner of the property to look in a barn. CP 2-4. The owner had not rented the barn to anyone. CP 2. Mejia was arrested on December 3, 2013 in Mount Vernon municipal court and denied any knowledge of the stolen cars claiming he was out of the area. CP 4, 10/28/14 RP 183[1].

[1] The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

1/9/14 RP	Continuance in volume with 2/5, 2/6, 2/12, 3/12 & 8/20/14
1/29/14 RP	Temporary Release Hearing in volume with 3/5 & 4/10/14
2/5/14 RP	Release Hearing in volume with 1/9, 2/6, 2/12, 3/12 & 8/20/14
2/6/14 RP	Continuance in volume with 1/9, 2/5, 2/12, 3/12 & 8/20/14
2/12/14 RP	Counsel Status in volume with 1/9, 2/6, 2/5. 3/12 & 8/20/14
2/26/14 RP	Suppression Motion - Continued
3/5/14 RP	Motion to Suppress / Bail Hearing in volume with 1/29 & 3/5/14
3/12/14 RP	Drug Court Sought in volume with 1/9, 2/5, 2/6, 3/12 & 8/20/14
4/10/14 RP	Drug Court Setting in volume with 1/29 & 3/5/14
8/20/14 RP	Suppression Motion in volume with 1/9, 2/5, 2/6, 2/12 & 3/12/14
10/27/14 RP	Trial Day 1 in volume with 10/28/14
10/28/14 RP	Trial Day 2 in volume with 10/27/14
10/29/14 RP	Trial Day 3 in volume with 10/30/14 & 11/13/14

On February 19, 2014, Mejia moved to suppress evidence as a result of unlawful search. CP 71. On February 25, 2014, the State filed a response to motion to suppress and supplemental response. CP 78-86, 87-90.

On March 5, 2014, an Amended Information was filed adding a count of Identity Theft in the Second Degree. CP 5-6. The omnibus order was entered that day. 3/5/14 RP 18, 10/29/14 RP 12.

The next day, March 6, 2014, the State filed its witness list. 10/29/14 RP 12.

On March 14, 2015, a Second Amended Information was filed correcting the date of the identity theft to December 3, 2013. CP 7-8.

On August 20, 2014, the parties agreed that the Court would base decision upon the briefing and render a decision on the suppression motion. 8/20/14 RP 30-31. The Court considered a certified copy of the search warrant that was filed November 13, 2013. 8/20/14 RP 32.

On August 21, 2014, the Court denied the motion to suppress and entered written findings. CP 9-10. Among the findings was that Mejia was a trespasser on the property. CP 10. The trial court concluded Mejia lacked standing for the search of the barn. CP 10.

10/30/14 RP Trial Day 4 in volume with 10/29/14 & 11/13/14
11/13/14 RP Sentencing in volume with 10/29/14 & 10/30/14.

As of October 23, 2014, defense indicated there were no additional witnesses other than the defendant. 10/29/14 RP 9.

On October 27, 2014, the case proceeded to trial. 10/27/14 RP 2, 15. As of that date, defense again confirmed that only the defendant would testify. 10/29/14 RP 12.

The afternoon of the first day of testimony, defense provided the State with a witness list with three proposed defense witnesses: Adriana Partida (aka Teresa Simes), Cruz Mejia and Eva Ruiz. 10/28/14 RP 105. The Court ordered that the State have access to the three proposed defense witnesses after trial that afternoon or in the morning prior to starting up again, in a manner other than providing a phone number. 10/28/14 RP 106. The Court ordered that if that did not occur, that the witnesses would not be able to testify. 10/28/14 RP 106-107.

The State attempted to interview Adriana Partida in the jail, and she refused to meet with the State without a private attorney, even though her attorney said it was okay to talk to the State. 10/29/14 RP 7. The State also attempted to interview Cruz Mejia through Detective Sigman to discover his anticipated testimony and Cruz Mejia advised "you will find out when I get there." 10/29/14 RP 8. Detective Sigman was able to interview Eva Ruiz. 10/29/14 RP 12. Cruz Mejia and Adriana Partida were not allowed to testify. 10/29/14 RP 12. Evangeline Ruiz did testify. 10/29/14 RP 30-41.

Stipulation was entered and read to the jury regarding the owners of the vehicles found on the property. CP 76-77. This stipulation indicated that they were the registered owners of the vehicles in this case, that they had their vehicles stolen, and that Mejia did not have permission to possess their vehicles. CP 76-77.

The trial court dismissed the charge of Identity Theft in the Second Degree at the close of the State's case due to insufficient evidence. 10/29/14 RP 28-9.

The State provided proposed jury instructions and the defense did not provide any proposed instructions. 10/29/14 RP 73. The Court provided sixteen instructions which were not objected to by Mejia. 10/29/14 RP 76, CP 11-29.

The jury convicted Mejia on four counts of possession of stolen vehicles. 10/30/14 RP 135, CP 91-94.

At sentencing, the State provided the Court with a Statement of Defendant's Criminal History form, stating that Mejia's offender score as 15. 11/13/14 RP 137. The defendant did not object to this statement of his criminal history. 11/13/14 RP 136.

On November 13, 2014, Mejia was sentenced to 50 months of confinement. 11/13/14 RP 139, CP 42.

On November 17, 2014, Mejia timely filed a Notice of Appeal. CP 72.

2. Summary of Testimony at Trial

Douglas and Norma Rex own property at 17108 SR, Burlington, Washington. 10/28/14RP 20-22. The property was purchased a couple of years before 1987 and used to be a dairy farm. 10/28/14 RP 34. The property consists of land, a house, a barn and an area where old silage was stored. 10/28/14 RP 21. The barn is on the east side of the property and the house is on the west side of the property. 10/28/14 RP 27, 110. There is a driveway dividing the house and the barn on the property. 10/28/14 RP 29, 110. The Rexes rent the house to William Everett who has lived there for about 20 years. 10/28/14 RP 22, 31, 59. Everett only has use of the house and the yard, the rest of the land is rented to someone else for planting crops. 10/28/14 RP 22. Neither the party renting the land nor Everett had permission to use the barn on the property. 10/28/14 RP 24, 37-38. The farmer renting the land for crops also knows he does not have access/use of the barn. 10/28/14 RP 38. Everett pays all utilities, including electricity, except for water and is encouraged to use a dumpster provided by the Rexes for his garbage. 10/28/14 RP39, 73.

Everett has a trailer and a couple of cars that don't run that he intended on fixing up, on the property that Mr. and Mrs. Rex asked him to

remove many times as they clutter up the property. 10/28/14 RP 22, 31, 35, 61-64. A travel trailer was parked beside the barn. 10/28/14 RP 29-30, 110. The Rexes noticed that there were a lot of cars coming and going on the property. 10/28/14 RP 40. The Rexes always tell Everett when they learn of people moving in that he is to be the only person there and he cleans it up for a bit then it happens again. 10/28/14 RP 41.

William Everett let people stay in his trailer on the property to help them out, which snowballed on him. 10/28/14RP 60. Mejia asked Everett to stay on his property for three or four months to which Everett agreed. 10/28/14 RP 67. Everett allowed Mejia to live in the travel trailer on the property but did not charge him any rent. 10/28/14 RP 68. Everett told Mejia he could use the barn but not put stuff in there. 10/28/14 RP 69. Mejia's girlfriend, Eva Ruiz, also stayed in the trailer. 10/28/14RP 69. Eva Ruiz stayed in the trailer and had stuff in the trailer and in the house. 10/29/14 RP 31. Mejia ran an extension cord to the outside of Everett's house for electricity to the trailer. 10/18/14 RP 73. While Mejia was staying in the trailer, Everett's electricity bill went from $75/month to over $200/month. 10/28/14 RP 73. Everett did not store anything in the trailer that Mejia was staying in. 10/28/14 RP 73-74.

Everett noticed a lot of cars coming onto the property after he allowed Mejia to live there. 10/28/14 RP 70. Some of those cars were

dismantled, had no engines and some had parts missing. 10/28/14RP 71, 110.

Deputy Wilhonen and Deputy Moses learned of a potential chop shop happening on the Rexes' property. 10/28/14 RP 42, 110. Prior to going to the property on November 12, 2013, Deputy Wilhonen contacted Douglas Rex, the property owner, and received permission to go onto the property. 10/28/14 RP 43. Upon arrival, Deputies Wilhonen and Moses walked around the property and went to the east side of the barn. 10/28/14 RP44. Deputies Wilhonen and Moses observed several cars parked on the cement east of the barn. 10/28/14 RP 44, 110. Of particular interest to the deputies was a red Acura that had been dismantled but they were able to obtain the VIN off of the firewall of the vehicle. 10/28/14RP 44, 110. Deputy Wilhonen ran the VIN of the red Acura through dispatch and discovered it was a stolen vehicle. 10/28/14 RP 44. Deputies observed a vehicle which was cut in half inside an opening in the barn and was able to obtain the VIN off of that vehicle as well. 10/28/14 RP 44, 110. Deputies also observed a GMC Safari van that was behind a makeshift gate in the barn as well. 10/28/14 RP 44, 167. Deputy Wilhonen was able to read the license plate on the van as 770XJU, which came back from dispatch as stolen. 10/28/14 RP 45. Deputy Wilhonen then went back to the property owner, Douglas Rex, and obtained written permission to enter the barn to search the vehicles. 10/28/14 RP 46,

113. Deputy Wilhonen and Deputy Moses then entered the barn and found another stolen vehicle, a Honda. 10/28/14 RP 46. There were a lot of other car parts and debris throughout various parts of the barn and the red car had an engine missing and the van had a battery missing. 10/28/14 RP 53-55, 58, 111, 113. There was a dog chained up to the trailer beside the barn. 10/28/14 RP 111. The trailer was locked up with a padlock on the outside and no one responded to deputies knocking. 10/28/14 RP 112. Deputies secured the scene and awaited day shift detectives to do further investigation on the stolen vehicles. 10/28/14RP 51.

In the morning of November 13, 2013, deputies again received permission both orally and written, to search the property and buildings by Douglas Rex. 10/28/14 RP 166. Deputies also received permission to search from Everett. 10/28/14 RP 166. Detective Walker applied for and received a search warrant for the property at 17108 SR 20 and large barn structure and a trailer on the property. 10/28/14 RP 86. The warrant was issued to search for evidence of stolen vehicles and any information that may lead to who was in control of those stolen vehicles. 10/28/14 RP 86. Detective Walker identified four stolen vehicles on the property. Trooper Giddings, certified in recovering and identifying stolen vehicles, noted there were ten vehicles on the property and four of them were stolen. 10/28/14 RP 99-101. The vehicles that were identified on the property as stolen vehicles are: 1) 1994 Blue,

GMC Safari, stolen on November 10th, 2013, Bellingham Police Department case No. 13-V46261 belonging to Angela Barnes; 2) 1992 dark blue Honda Accord, stolen August 29, 2013, Mount Vernon Police Department case 13-14221; 3). 1990 maroon Acura Integra reported stolen March 27th, 2013, Mount Vernon Police Department case 13-101873; and 4) 1990 black Honda Accord reported stolen 3/19/2013, Mount Vernon Police Department case number 13-04023. 10/28/14 RP 100-101. The 1990 black Honda Accord was cut in half and the roof section was removed. 10/28/14RP 101.

Inside of the trailer, deputies found items of personal belongings to the owners of the stolen vehicles as well as items of mail, driver's license, tax returns, and a credit card in a box, belonging to Everett. 10/28/14 RP 138-139. District court paperwork, clump of mail, casino players cards, and a prescription bottle belonging to Mejia were found inside the trailer, in a drawer. 10/28/14 RP 146, 170. Items belonging to Angelina Ruiz were also found in the trailer. 10/28/14 RP 146, 170, 190. Everett advised deputies that nothing in the barn was his or Mr. Rex's. 10/28/14 RP 159.

Deputy Moses had prior contact with Jesse Mejia wherein Mejia stated he was living in a trailer off of State Route 20 near Avon-Allen Road: 10/28/14 RP 114. Mejia acknowledged that it was Everett's place. 10/28/14 RP 114.

Angela Barnes is the owner of the stolen van recovered. 10/28/14 RP 119. She testified that it had been partially painted, the gas line had a hole in it and it appeared as if dogs had been living inside of it. 10/28/14RP 119, 123. There was damage to the dashboard and the third seat was missing from the van as well. 10/28/14 RP 124.

Mejia was arrested on December 3, 2013 in Mount Vernon municipal court. 10/28/14 RP 183.

During testimony Mejia claimed that he returned from North Dakota in November of 2013. 10/29/14 RP 42. Mejia claimed he only used the trailer for storage when he returned in November and that he noticed a lot of new cars and things lying around that were not his. 10/29/14 RP 43-44. Mejia denied activity involving the cars in the barn and living in the trailer. 10/29/14 RP 43-45, 60.

IV. ARGUMENT

1. Where the defendant was a trespasser in the barn and the property owner and renter gave permission to law enforcement to enter the property to look for stolen vehicles, the defendant lacked standing to challenge the viewing into the barn and the search warrant for the defendant's trailer was supported by probable cause.

A trial court's denial of a CrR 3.6 suppression motion is reviewed to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's

conclusions of law." *State v. Cole*, 122 Wn. App. 319, 322-23, 93 P.3d 209 (2004). Substantial evidence is evidence in sufficient quantity to persuade a fair-minded person of the truth of the finding. *State v. Barnes*, 158 Wn. App. 602, 609, 243 P.3d 165 (2010). The trier of fact is given differential on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

A trial court's conclusions of law at a suppression hearing are reviewed de novo. Challenged findings of fact are reviewed for substantial evidence, which is enough evidence to persuade a fair-minded, rational person of the truth of the finding. Unchallenged findings are treated as verities on appeal. *State v. Shuffelen*, 150 Wn. App. 244, 252, 208 P.3d 1167 (2009); *see also State v. Gentry*, 125 Wn.2d 570, 605, 888 P.2d 1105 (1995); *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). The findings must, in turn, support the conclusions of law. *State v. Shuffelen*, 150 Wn. App. at 252.

i. The factual determinations that officers had permission to enter the property from the owner and renter and that Mejial was trespassing in the barn were supported by the record before the trial court.

The trial court here made findings after reviewing affidavit in search of the warrant and briefing from the parties. CP 71, 78-86, 87-90, Defendant and the State agreed that the court could decide on the pleadings. 8/20/14RP 31-32. Mejia did not object to the findings of fact that were entered by the trial court and does not assign error to any of the factual findings of the trial court on appeal.

The trial court specifically found: "There is no dispute that deputies received permission from William Everett, the renter, before entering the property." CP 9. This is consistent with the undisputed statements of the probable cause declaration in support of the search warrant. CP 84. The trial court also found that Mejia was a trespasser in the barn. CP 10. That finding is also supported by the facts in the search warrant declaration which indicated the owner of the property did not rent the barn to his renter and that no one should be in the barn and there should be no vehicles there. CP 84.

Mejia's failure to challenge these findings make them verities on appeal.

Article I, section 7 of the Washington Constitution forbids warrantless searches unless the search falls within one of the narrowly drawn

exceptions to the warrant requirement. *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007) (citing *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984)). The State bears the burden of establishing a warrantless search's validity. *Evans*, 159 Wn.2d at 407 (citing *State v. Hendrickson*, 129 Wn.2d 61, 71-72, 917 P.2d 563 (1996)). Consent to a search that police lawfully obtain from a person with authority to give such consent is one exception to the warrant requirement. *State v. Morse*, 156 Wn.3d 1, 8, 123 P.3d 832 (2005).

Consent to search a premises is valid, under the common authority rule, where (1) the consenting party has the legal authority to permit the search and (2) it is reasonable for a court to find that the defendant has assumed the risk that a cohabitant might permit a search. *Morse*, 156 Wn.2d at 10 (citing *State v. Mathe*, 102 Wn.2d 537, 543-44, 688 P.2d 859 (1984)). A person with a sufficient amount of control may have common authority over the premises. *See State v. Morse*, 156 Wn.2d at 10 (citing *State v. Leach*, 113 Wn.2d 735, 739, 782 P.2d 1035 (1989)). But if two cohabitants with equal authority over common areas are present, the police must obtain consent from each cohabitant. *State v. Morse*, 156 Wn.2d at 13.

The critical inquiry is whether the person with common authority has free access to the searched area and has the authority to invite others into that area. *Morse*, 156 Wn.2d at 10-11. "A person may have free access to some

areas of the premises but not all areas." *Morse*, 156 Wn.2d at 11. For example, a person may share control and access to the kitchen, the dining room, the living room, and the bathroom, but not other, private areas such as the person's bedroom. *Morse*, 156 Wn.2d at 11.

The appellant's opening brief ignores the trial court finding that the deputies investigating the property had obtained consent from both the renter and the owner of the property prior to entering the property. CP 9, 84. The trial court had information in the search warrant affidavit that the deputies had permission from both the property owner and the renter to search the premises. CP 84, 10/28/14 RP 43, 166. After observing in open view the stolen vehicles in the barn, deputies obtained not only permission from the owner to search the barn, but a search warrant that included the barn and all property to look for stolen vehicles, and identification of dominion and control. CP 84, 10/28/14RP 86, 166.

This case is analogous to *United States v. Hufford*, 539 F.2d 32, *cert. denied*, 429 U.S. 1002, 97 S. Ct. 533, 50 L. Ed. 2d 614 (1976). In that case, federal agents entered an adjacent rental garage with the renter's permission. *Hufford*, 539 F.2d at 33. Through a crack in the wall and a missing piece of sheetrock, the agents observed a variety of drug manufacturing paraphernalia and amphetamines. *Id.* The United States Court of Appeals for the Ninth Circuit held the agents' view was permissible because the agents did not

trespass on the property, they entered the stall with the renter's permission, and the contraband was in plain view. *See also State v. Bobic*, 140 Wn.2d 250, 260, 996 P.2d 610 (2000).

Here, the trial court properly determined that there was consent for the initial entry by the officers to view the property.

ii. As a trespasser in the barn, the trial court properly determined Mejia lacked standing to challenge the search of the barn.

"A defendant must have standing to challenge an unlawful search …" *State v. Picard*, 90 Wn. App. 890, 895-96, 954 P.2d 336 (1998), *State v. McKinney*, 49 Wn. App. 850, 854, 746 P.2d 835 (1987). A defendant has the preliminary burden to show that a privacy or possessory interest of his was invaded. *State v. Jackson*, 82 Wn. App. 594, 601-02, 918 P.2d 945 (1996) rev. denied, 131 Wn. 2d 1006 (1997). To establish standing based upon an expectation of privacy, Mejia must establish that he had an actual subjective expectation of privacy in the property searched and that this expectation was reasonable. *State v. Gocken*, 71 Wn. App. 267, 279, 857 P.2d 1074 (1993); *State v. Jones*, 68 Wn. App. 843, 847, 850-51, 845 P.2d 1385 (1993). Merely showing that he was legitimately on the property or a casual guest will not alone be sufficient to establish a reasonable expectation of privacy. *State v. Boot*, 81 Wn. App. 546, 551, 915 P.2d 592 (1996); *State v. Jones*, 68 Wn.

App. at 851. Temporary access to premises does not establish the necessary level of privacy interest. *Jones*, 68 Wn. App. at 849.

The property in question is owned by Douglas Rex. CP 84, 10/28/14 RP 20-22. William Everett was a renter of the residence at the time of the search warrant. CP 84, 10/28/14RP 22, 31, 59. No one had permission from Rex to be in the barn. Thus, Mejia was trespassing there. Mejia did not have a privacy or possessory interest that was invaded by the entry onto the property at 17108 SR 20, Burlington, WA to look into the barn. *See State v. Libero*, 168 Wn. App. 612, 616, 277 P.3d 708 (2012).

Mejia is also asserting that he has "automatic standing" as he is charged with Possession of Stolen Vehicle for the vehicles found near and inside the barn. To rely on the doctrine of automatic standing, Mejia must show that (1) the charged offense involved possession "as an 'essential' element of the offense;" and (2) he possessed "the contraband at the time of the contested search or seizure." *State v. Goucher*, 124 Wn.2d 778, 787, 881 P.2d 210 (1994) (citations omitted); *see also State v. Jones*, 104 Wn. App. 966, 973, 17 P.3d 1260, rev. denied 144 Wn.2d 1005, 29 P.3d 718 (2001). "Automatic standing is not a vehicle to collaterally attack every police search that results in a seizure of contraband or evidence of a crime." *State v. Williams*, 142 Wn. 2d 17, 23, 11 P.3d 714 (2000). Mejia does not have a privacy interest to be protected by the automatic standing rule. While the

crimes charged against Mejia are possessory in nature, he fails to meet the second prong of the automatic standing rule since he was not on the property and was trespassing in the barn.

Possession at the time of the search is necessary for automatic standing. *State v. Zakel*, 119 Wn.2d 563, 569, 834 P.2d 1046 (1992).

> 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.* at 29, 459 P.2d 400. Dominion and control means that the object may be reduced to actual possession immediately. *See State v. Simonson*, 91 Wn. App. 874, 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, 988 P.2d 1018 (1999) (ability to reduce object to actual possession is aspect of dominion and control establishing possession), *review denied*, 140 Wn.2d 1018, 5 P.3d 10 (2000). However, mere proximity is not enough to establish possession. *State v. Potts*, 93 Wn. App. 82, 88, 969 P.2d 494 (1998) (citing *State v. Robinson*, 79 Wn. App. 386, 391, 902 P.2d 652 (1995)).

State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

Furthermore, a guest has a greatly lessened privacy interest from a resident of the house. *State v. Gonzales*, 77 Wn. App. 479, 485, 891 P.2d 743 (1995); See also *State v. Jones*, 68 Wn. App. 843, 845 P.2d 1358 (1993) (person who was a guest in an apartment watching television did not have a privacy interest to contest search); *State v. McKinney*, 49 Wn. App. 850, 746 P.2d 835 (1987).

Mejia was not at the property when the deputies entered with the permission of the owner and renter to look into the barn. Mejia was not present and no one besides Mr. Rex had permission to be inside the barn. CP 84, 10/28/14RP24, 37-38. Mejia may not assert Mr. Rex's rights about presence in the area of the barn. *See State v. Williams*, 142 Wn. 2d at 23-24.

iii. Where there was evidence of stolen vehicles on the property, there was probable cause to search the trailer for evidence related to the stolen vehicles.

The search of the trailer occurred after the deputies had permission of the property owner and renter to look in the barn resulting in facts supporting the search warrant. The trailer was searched pursuant to the search warrant.

Mejia did not contend in the trial court that there was insufficient probable cause for the search of his trailer. His challenge was to the initial entry. However, the challenge to the search warrant raised for the first time on appeal would still fail in this case.

In reviewing a search warrant, great deference is given to the issuing magistrate. *State v. Vickers*, 148 Wn. 2d 91, 108, 59 P.3d 58 (2002). An affidavit establishes probable cause to search "if a reasonable prudent person would understand that the facts contained in the affidavit that a crime has been committed, and evidence of the crime can be found at the place to be searched." *State v. Garcia*, 63 Wn. App. 868, 871, 824 P. 2d 1220 (1992). A reviewing court must accord great deference to the magistrates determination

of probable cause, *State v. Coates*, 107 Wn. 2d 882, 888, 735 P.2d 64 (1987). And "[d]oubts should be resolved in favor of the warrants validity." *State v. Wilke*, 55 Wn. App. 470, 476, 778 P.2d 1054 rev. denied, 113 Wn. 2d 1032 (1989).

> Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *Cole*, 128 Wn.2d at 286; *State v. Dalton*, 73 Wn. App. 132, 136, 868 P.2d 873 (1994). Accordingly, "probable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citing WAYNE R. LaFAVE, SEARCH AND SEIZURE § 3.7(d), at 372 (3d ed. 1996)).

State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999).

Here, there was an adequate connection between the trailer on the property and the crimes under investigation.

The warrant authorized search for evidence of stolen vehicles and any information that may lead to who was in control of those stolen vehicles. 10/28/14 RP 86, CP 60. It was known that multiple stolen vehicles were on the property in varying states of disassembly. Thus, there was evidence of crimes on the property. The property owner had not given anyone permission to reside on the premises other than Everett. CP 84. Everett had also expressed previous concerns about a chop shop on the property and that

there should be no vehicles in the barn. CP 84. Thus, it was likely that Everett was not the individual involved. Everett indicated Mejia was coming and going from the property. CP 85. Mejia had reported to law enforcement that he was residing on the property. CP 85. Since Everett was residing in the house, which he was renting, a rational inference could be drawn that Mejia was residing at least from time to time in the trailer and was involved in the chop shop. It is reasonable that the warrant included search of the trailer to determine who had dominion and control of other areas of the property which were adjacent to the location of the vehicles. There was also an electrical cord from the trailer to the barn thus indicating that the person or persons who were using the trailer was entering the barn to where the stolen vehicles were observed in the state of disassembly. CP 85, 10/28/14 RP 112.

The trial court properly denied the motion to suppress given Mejia's trespass in the barn, the consent of the owner and renter to view into the barn, Mejia's lack of standing to challenge the search of the barn and the facts supporting probable cause that evidence relating to the stolen vehicles and who would be involved would be located in the trailer on the property.

2. Given the rational inferences from the dismantling of the vehicles in the barn, there was sufficient evidence for a rational trier of fact to find they were disposed of and concealed.

i. Possession of Stolen Motor Vehicle is not an alternative means crime.

Possession of Stolen Motor Vehicle is codified in RCW 9A.56.068.

> (1) A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.
> (2) Possession of a stolen motor vehicle is a class B felony.

RCW 9A.56.068. "Stolen" means obtained by theft, robbery, or extortion. RCW 9A.56.010(14).

The jury was given the pattern instruction for possession of stolen motor vehicle.

> To convict the defendant of the crime charged in count [I, II, III, IV] of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about November 12, 2013, the defendant knowingly received, retained, possessed, concealed and/or disposed of a stolen motor vehicle, to wit; [vehicle description];
>
> (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
>
> (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;
>
> (4) That any of these acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 24-27, 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 77.21 (3d Ed).

All four counts used the same to convict instructions, just replacing the vehicles for each count.

This Court has held the reference to "receive, retain, possess, conceal, or dispose of stolen property" in RCW 9A.56.140(1) is definitional. *State v. Hayes*, 164 Wn. App. 459, 477, 262 P.3d 538 (2011), *see also State v. Lillard*, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004). It does not create alternative means of a crime. *State v. Hayes,* 164 Wn.App. at 477.

This Court has determined that if all five bracketed ways of committing possession of stolen property crime are included in the jury instructions, there must be sufficient evidence of all five alternatives to convict. *Id., see also State v. Lillard*, 122 Wn. App. 422, 434-35, 93 P.3d 969 (2004).

ii. A vehicle taken from the owner and stored on a property was stored in a barn was being concealed

A definition of conceal is:

> To prevent disclosure or recognition of: avoid revelation of: refrain from revealing: withhold knowledge of: draw attention from: treat so as to be unnoticed … to place out of sight: withdraw from being observed.

Webster's Third New International Dictionary (1993).

One of the deputies testified that after he got on the property that he observed the vehicles on the back side of the barn. 10/28/14 RP 110. However, the Honda Accords were identified as being located inside the barn. 10/28/14 RP 46, 167, CP 24 (Count I). By stipulation the vehicle was taken on August 29, 2013, in Skagit County. 10/29/14 RP 17. Thus the record supports that since it was taken from the owner and located in a barn and thereby was concealed.

Mejia's contention that the Honda Accord was "discovered outside of the barn in the open" is unsupported by any reference to the record. Appellant's Opening Brief at page 27. It is also contrary to the transcripts and exhibits.

iii. Vehicles in a state of disassembly and being stored on a property were being "disposed of."

Mejia argues specifically that the State failed to prove that he disposed of all four vehicles.

There was testimony that Everett allowed Mejia to live in the travel trailer on the property but did not charge him any rent. 10/28/14RP 68. Everett told Mejia he could use the barn but not put stuff in there. 10/28/14 RP 69. Mejia ran an extension cord to the outside of Everett's house for electricity to the trailer. 10/18/14RP 73. Everett noticed a lot of cars coming

onto the property after he allowed Mejia to live there. 10/28/14 RP 70. Some of those cars were dismantled, had no engines and some had parts missing. 10/28/14 RP 71, 110.

There was a stipulation as to the ownership of three of the vehicles. 10/29/14 RP 17, CP 76-77. The fourth vehicle, the Safari van was identified as stolen by the owner about three or four days before it was recovered. 10/28/14 RP 118

Upon recovery the owner testified it had been pretty much destroyed. 10/28/14 RP 119. It was starting to be painted, there was a hole in the gas line, and it was trashed inside, including dog droppings. 10/28/14 RP 119, CP 25 (Count III), Exhibits 27-34. Officers testified the van had been partially painted, the battery removed, damage to the dashboard, and missing a seat. 10/28/14RP 53-55, 111, 113, 124. The van was behind a makeshift gate in the barn. 10/28/14RP 44, 167.

The Acura had been dismantled. 10/28/14 RP 4 , CP 27 (Count IV), Exhibits 19-23 at trial. The engine was missing but they were able to obtain the VIN off of the firewall of the vehicle. 10/28/14 RP 44, 110.

One of the Honda Accords had been stripped to the point that all that was left was the firewall from which the VIN was recovered. 10/28/14 RP 44, 101, 110, CP 24-6 (Count II).

The other Honda which was in the barn had also had work done on it. 10/28/14 RP 46, CP 24 (Count I), Exhibits 61, 65.

There were a lot of other car parts and debris throughout various parts of the barn. 10/28/14 RP 53-55, 58, 111, 113. Everett advised deputies that nothing in the barn was his or Mr. Rex's. 10/28/14 RP 159. At no time was anyone to be using the barn, including Everett. 10/28/14 RP 24, 37-38)

Webster's Third New International Dictionary defines "dispose of" as:

> 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 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.

Webster's Third New International Dictionary, 654 (1993).

Mejia disposed of the stolen vehicles by placing them in the barn, arranging them in a systematic way, including taking parts off of them, and apportioning them, as to particular purposes, as he saw fit.

The other language defining disposing of is also instructive in this case: Mejia treated the stolen vehicles by discarding parts and ultimately dispatching and destroying them.

> Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime

> beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

State v. McNeal, 98 Wn. App. 585, 592, 991 P.2d 649 (1999).

There was sufficient evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

3. The trial court property excluded witnesses who were not identified until after trial began, refused to be interviewed and were at most witnesses for impeachment on a collateral matter.

i. The trial court has discretion in deciding discovery violations.

A trial court's decision to exclude or admit evidence and testimony at trial is reviewed under an abuse of discretion standard. "[T]he trial court's decision will be reversed only if no reasonable person would have decided the matter as the trial court did." *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004). "A defendant in a criminal case has a constitutional right to present a defense consisting of relevant evidence that is not otherwise admissible." *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). But "the admission or refusal of evidence lies largely within the sound discretion of the trial court; its decision will not be reversed on appeal absent

an abuse of discretion." *Rehak*, 67 Wn. App. at 162. Even relevant evidence may be excluded when "its probative value is substantially outweighed by the danger of unfair prejudice[or] confusion of the issues." ER 403. And evidence is unfairly prejudicial if it is "likely to stimulate an emotional response rather than a rational decision." *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

"Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal." *Thomas*, 150 Wn.2d at 856. Evidentiary errors that do not prejudice the accused will not necessitate reversal of the conviction. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Such errors are "'not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *State v. Everybodytalksabout*, 145 Wn.2d 456, 469, 39 P.3d 294 (2002) (internal quotation marks omitted) (quoting *Bourgeois*, 133 Wn.2d at 403).

CrR 4.7(1)(b) requires that defense disclose witnesses no later than the Omnibus hearing together with any written or recorded statements and the substance of any oral statements of such witnesses.

ii. The defense witnesses who were offered for impeachment on a collateral matter were properly excluded.

The factors to be considered in deciding whether to exclude evidence as a sanction are: (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. *State v. Hutchinson*, 135 Wn.2d 863, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157, 119 S. Ct. 1065, 143 L. Ed. 2d 69 (1999). In *State v. Hutchinson*, the supreme court upheld the exclusion of a defense expert due to the defendant's failure to permit being examined by a State's expert. The Court noted that the remedy is an extraordinary remedy, but within the sound discretion of the trial court. *State v. Hutchinson*, 135 Wn.2d at 882.

In *State v. Kipp*, the Court of Appeals held that because defendant did not disclose a defense witness until six days before trial and did not disclose the substance of witness's testimony until the first day of trial, the testimony was duplicative, and the proceedings would need to be halted for half a day or more, the trial court did not abuse its discretion by excluding that witness's testimony under CrR 4.7(b)(1) and (h)(7). *State v. Kipp*, 171 Wn. App. 14, 286 P.3d 68 (2012) reversed on other grounds, *State v. Kipp*, 179 Wn.2d 718, 317 P.3d 1029 (2014).

Omnibus in this case was entered on March 5, 2014. 10/29/14 RP 12. The proposed witnesses were not disclosed to the State until the middle of October 28, 2014, the first day of trial in this case. 10/29/14 RP 7-12. The trial court required defense to give the State an opportunity to meet with the proposed witnesses after trial on October 28, 2014 and ordered it must be accomplished before 9:30 a.m. on October 29, 2014. 10/29/14 RP 13. The State attempted to reach Adriana Partida, aka Teresa Simes, on October 28, 2014, to determine what her testimony would be. She refused to talk to the State. 10/29/14 RP 7. Cruz Mejia told Detective Sigman that he would find out what he had to say when he got to court. 10/29/14 RP 8. Ms. Evangalina (Eva) Ruiz was the third witness and she did speak with Detective Sigman prior to 10/29/14. 10/29/14 RP 9-10.

Mejia contended they were impeachment witnesses, need not have been disclosed since they were unexpected and merely duplicative of what has already been presented. 10/29/14 RP 13. The Court did not abuse its discretion in deciding to exclude Adriana Partida and Cruz Mejia from testifying as they were not disclosed pursuant to CRR 4.7, since they had refused to be interviewed and their testimony would have been impeachment on a collateral matter,.

The fact that it was a collateral matter is shown from the record. During the testimony, the renter, Everett, mentioned he was driving a van

until it got stolen. 10/28/14 RP 66. On cross-examination, of the State's objection, defense elicited a further description that Everett contended a woman named Teresa Simes had stolen the van out of his yard. 10/28/14 RP 77. Defense went so far as to ask if Everett had asked Simes to marry him. 10/28/14 RP 80. That objection was sustained. 10/28/14 RP 81. The court went on to further examine the offer of proof on the issue about credibility about the collateral matter.

> But if he answers no to any of that, then it becomes issue of how are you going to prove the fact that his credibility is in jeopardy? You're going to have to do that by bringing in extensive evidence of all this collateral junk. And that is not quite relevant enough, I think, to get there, to overcome that.
>
> I think you would be limited to, you know -- I will allow you to ask the questions, those three or four questions that we just went through, whatever he answers, he answers. If he answers yes, then you got him. If he answers no -- but I think you're stuck there.
>
> I don't think we can -- I don't think, under relevance rulings, I don't think you can, and collateral evidence rulings, I don't think you can bring in extrinsic evidence to try and prove that kind of stuff, because it's just not that important and relevant to the case.

10/28/14 RP 83.

Despite the trial court already ruling that the other stolen van was a collateral matter, these other witnesses were being offered on that issue.

The defense offered that Cruz Mejia would have testified that Everett had loaned a van to a woman and that she did not bring it back. 10/28/14 RP

106. He claimed Cruz Mejia would testify that the other van was stolen and he did not loan it to the woman. 10/28/14 RP 106.

The next day when the matter came back before the trial court, two witnesses refused to be interviewed about this collateral matter as explained by the prosecutor.

> I'm given, frankly, a very, very brief summary that they want to talk about some things that Mr. Everett may have said about a van, your Honor. And apparently there is some issue about a van. I had Detective Sigman find the paperwork about the stolen van, and the essence of what I hear these witnesses are going to say is that Mr. Everett may have asked a certain woman to marry him, that he -- they lived with him at a certain residence at a certain time period, and that he had later reported this vehicle stolen.

10/29/014 RP 9.

> It's also the state's position that the testimony I anticipated they would offer is after the date of the time, collateral impeachment issue, and that obviously would be my objection to Ms. Ruiz's testimony.

10/29/14 RP 11.

Despite acknowledging that the other witness who had agreed to be interviewed was collateral, the trial court permitted Ruiz to testify.

> Ms. Ruiz, I suspect what she's going to talk about is about as collateral as you can get, but I will allow her to testify.

10/29/14 RP 13. But, when Ms. Ruiz ended up testifying, she testified that this other person Adriana Partida (aka Teresa Simes) had only lived at the

property after the vehicles were recovered from the property. 10/29/14 RP 32-3.

Examining the four *Hutchinson* factors in light of this record shows the trial court did not abuse its discretion.

First, less severe sanctions were unavailable. The witnesses were unwilling to talk to the prosecution, so the State could not properly prepare to object. The State should not be required to risk waiting until after testimony to see what the witnesses would say.

Second, there was no impact from the preclusion of the witnesses because the issue of this van claimed by Mr. Everett to have been stolen by Simes, was a collateral matter. And Ms. Ruiz, who did testify contradicted the timing of the events.

Third, the State would be surprised and risks admission of prejudicial statements where the State has not been permitted to talk to the witness in advance.

Fourth, the State contends that the record shows a willful delayed disclosure. Defense was aware of this claimed other incident where Everett was accusing Simes of stealing the van since the questions posed to Everett showed they were aware of the claim. Thus, they held off on providing the information to the State and tried to surprise the State to seek admission to attack the credibility of Everett by impeachment on a collateral matter. They

were aware the claim existed, and since they wanted to discredit Everett, chose to wait until they questioned him before disclosing their witnesses on the claim.

For all these reasons, this Court should uphold the trial court's decision to exclude the two collateral impeachment witnesses who were not timely disclosed.

4. Remand for resentencing is the proper remedy when a defendant does not challenge the criminal history asserted at sentencing.

Present statutes provide that when offender score issues are raised on appeal, the case should be remanded for another hearing to determine criminal history. The trial court is not bound by the prior record.

> The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. Prior convictions that were not included in criminal history or in the offender score shall be included upon any resentencing to ensure imposition of an accurate sentence.

RCW 9.94A.525(22).

> On remand for resentencing following appeal or collateral attack, the parties shall have the opportunity to present and

> the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented.

RCW 9.94A.530 (2). This statute has been specifically approved by the Washington Supreme Court.

> Although sentencing courts retain the authority to reject the State's proof of a defendant's criminal history, in those cases where relief is ordered in an appellate proceeding and the case remanded, such as occurred here, under the statutory remand provision both parties have the opportunity to present any evidence relevant to ensure the accuracy of the criminal history. Because ensuring the accuracy of the criminal history does not implicate due process, the legislature acted consistent with its plenary authority over sentencing in enacting the statutory remand provision.
>
> We hold that the statutory remand provision in RCW 9.94A.530(2) controls the question whether the parties may present additional evidence on remand.

State v. Jones, 182 Wn.2d 1, 338 P.3d 278, 282-3 (2014) (holding statute superseded "no second chance" rule of *State v. Ford*, 137 Wn.2d 472, 973 P.2d 452 (1999)).

Here the prosecutor provided a statement of criminal history resulting in offender score of 15 and a range of 43 to 57 months of prison time. CP 75, 11/13/14 RP 137. Mejia did not contest or object to the offender score and argued for a sentence at the low end of the standard range. 11/13/14 RP 138.

Convictions for Possession of Stolen Motor Vehicle would triple score. RCW 9.94A.525(1), (20), RCW 9.94A.589. Thus, Mejia's offender

score on our counts of Possession of Stolen Motor Vehicle would still have been 9 and his range would be 43 to 57 months.

Despite this fact, prior case law indicates that when offender score is incorrect remand for resentencing is appropriate unless it is clear the trial court would have imposed the same sentence anyway. *State v. Rowland*, 160 Wn. App. 316, 332, 249 P.3d 635 (2011), citing, *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

Remand for resentencing for the State to prove criminal history is the appropriate remedy.

V. CONCLUSION

For the foregoing reasons, Jesse Mejia's four convictions for Possession of Stolen Motor Vehicle must be affirmed. However, the case should be remanded for a hearing to establish Mejia's criminal history and for resentencing after criminal history is determined.

DATED this 25th day of November, 2015.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: _____

ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [X]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Richard Lechich, addressed as Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 25th day of November, 2015.

Karen R Wallace

KAREN R. WALLACE, DECLARANT