

42280-8-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington

v.

Scotty Eugene Collins

42280-8

On Appeal from the Superior Court of Cowlitz County

Cause No. 10-1-01133-9

The Honorable Michael H. Evans

REPLY BRIEF

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II. **RECAP OF CAUSE NO. 10-1-00623-8**

Cowlitz County Sheriff's Deputies Robinson and Stumph responded to a single-vehicle collision. They were told that Appellant, Scotty E. Collins might somehow be involved. They tracked down Mr. Collins to see if he could assist them. 4/14pm RP 32.¹

Deputy Robinson detained Collins and questioned him. 4/14pm RP 31. Robinson testified repeatedly that he had no reason to suspect Collins of wrong-doing but was merely interviewing a possible witness to a collision. 4/14pm RP 32; 35. He did not suspect that Collins was the driver. 4/19pm RP 20. Other witnesses did not see the driver but said Collins was somehow involved with the accident. 4/14pm RP 39-40.

At the suppression hearing, Robinson equivocated when asked the direct question whether Collins was free to leave during the initial contact. "Well, I needed — I'm trying to figure out if he was the driver of the car or not." 4/14pm RP 32-33. On cross examination, Robinson was again asked: Q: Was he free to leave, at that point? Robinson then answered plainly: "No." 4/14pm RP 37. In its bench ruling, the court acknowledged Robinson's testimony, but nevertheless ruled that Collins had been free to leave. 4/14 RP 32-33, 37, 48-49.

¹ Morning and afternoon hearings on April 14 and 19, 2011, are in separate, individually paginated volumes. The pertinent proceedings on both days took place in the afternoon.

While thus detained without a warrant as a potential witness, Collins told Robinson that someone else was driving the vehicle and that Collins himself was asleep until the crash woke him up. 4/14pm RP 21. Robinson claimed to have relied on this statement, which Collins later admitted was false. Robinson claimed it hindered the performance of his duty by delaying the investigation. 4/19 RP 22, 23, 26.

Meanwhile, Deputy Stumph was interviewing the 911 caller but was able to hear Collins say he was not driving. 4/14pm RP 33-34; 4/19pm RP 10. Stumph later told Robinson the 911 caller had told him that Collins was the sole occupant and driver. 4/14pm RP 34, 40.

Dispatch informed both officers that Collins's Washington driver's license expired in 2003. 4/14pm RP 34, 35, 40. Based on the expired license and the 911 report that Collins was driving, Stumph arrested Collins for No Valid Operator's License/Without Identification. 4/14pm RP 34, 35; 4/19pm RP 12. After his arrest, Collins admitted he was driving the crashed car. 4/19pm RP 27.

Robinson knew that an expired license was only an infraction. 4/14pm RP 40. And the prosecutor conceded that Collins had a valid Texas license that the Sheriff's Office had previously seized in an unrelated matter. 4/14pm RP 40, 42.

During CrR 3.5 proceedings, defense counsel argued that Collins's statements were unlawfully obtained. The prosecutor conceded that Collins was not free to leave from the moment Robinson contacted him but argued that the police could lawfully detain witnesses to an accident. 4/14pm RP 47. The State claimed that Collins was not formally arrested, so *Miranda*² was not in effect. 4/14pm RP 45. The court ruled the pre-arrest statements were admissible. 4/14pm RP 51. The court found that Collins was not in custody for *Miranda* purposes, in the erroneous belief that Robinson had testified that Collins was free to leave. 4/14pm RP 39. The court thought it significant that the initial detention was of short duration. 4/14pm RP 49-50.

Collins also argued that his statements were obtained pursuant to an unlawful arrest because the Sheriff's Office knew he had a valid Texas license. Collins argued that both the initial detention and his subsequent arrest were unlawful so that all subsequently-obtained evidence, including Collins's statements, must be suppressed. 4/19pm RP 28. The prosecutor disputed any connection between the Fourth Amendment and statements obtained in the course of an unlawful arrest. 4/14pm RP 43. The court agreed. "Does it really matter, as far as the 3.5? I mean, if he's in custody, whether it's a legal arrest or not — doesn't the same analysis

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

apply?” 4/14pm RP 42. Defense counsel backed down. 4/14pm RP 43.

The court admitted Collins’s statements. RP 51.

The prosecutor conceded that arresting Collins for driving without a license was unlawful but claimed that probable cause existed to arrest Collins on the alternative ground of making a false statement to a public servant — but Robinson just did not know it. 4/19pm RP 32. The court agreed and admitted all the evidence. 4/19pm RP 33, 37.

Collins was tried by jury on charges of possessing a stolen vehicle and making a false statement to a public servant. 623-8 CP 1-2. He was convicted of all the charges in both causes. 083-9 CP 34; 623-8 CP 30, 31. He was sentenced on June 9, 2011 on all counts.

This Court consolidated the two causes on appeal.

III. **ARGUMENTS IN REPLY**

As a preliminary matter, the State’s facts are almost exclusively from trial testimony at 4/20 RP and 4/21 RP. Brief of Respondent (BR) 2-6. But facts supporting the suppression rulings must be found in the suppression record at 4/14 RP and 4/19 RP. The Court should disregard the facts as alleged by the Respondent.

1. **ROBINSON’S INITIAL SEIZURE OF COLLINS IS PROPERLY BEFORE THIS COURT.**

The State seeks to avoid review of Robinson’s initial seizure of Collins by claiming it was not raised below. BR 7-8.

But the initial stop was thoroughly aired, and that the record is sufficient to permit review.

The trial court acknowledged it was dealing with a “bifurcated” contact, including “one where the officer arrives on scene.” 4/14pm RP 48. The State argued that the legality of the initial detention was not relevant. 4/14pm RP 43. The prosecutor further argued that the initial stop was a lawful *Terry*³ stop of a material witness but that *Miranda*⁴ was not in effect because Collins was not formally arrested. 4/14pm RP 45.

The court agreed (a) that the initial stop was lawful and (b) that the legality of the stop was not relevant to the suppression analysis because the only relevant inquiry was whether Collins was in custody. 4/14pm RP 42. The court also ruled that the detention of Collins as a potential witness was of reasonable duration. 4/14pm RP 49-50. Then the court decided Collins was not seized at all and reverted to a Fifth Amendment analysis. “So, I think that those statements that were made post initial contact that led to the motor vehicle are admissible.” 4/14pm RP 50-51.⁵

It is these erroneous rulings that Collins is challenging.

The State relies here on the same argument that swayed the trial court: that the Fourth Amendment does not require suppression of

³ *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

⁵ The court’s suppression rulings are difficult to discern because the court did not enter any written findings or conclusions.

incriminating statements made in the course of an unlawful seizure unless the statements are made while in formal custody and without Miranda in violation of the Fifth Amendment. BR 9; 4/14pm RP 43.

The prosecutor conceded that Collins was seized but argued that Robinson lawfully detained him as a material witness. 4/14pm RP 47. The State successfully argued that an officer's subjective reason for seizing a person need not constitute probable cause so long as a plausible justification can later be devised. 4/19pm RP 28-29.⁶

When the trial court expressed the opinion that it did not really matter if Collins's seizure was legal or not, defense counsel backed down. 4/14pm RP 42-43. The issue was nevertheless squarely before the trial court. Moreover, in addressing the merits here, the State again concedes that the trial court "focused on the admissibility of Mr. Collins's pre- and post-arrest statements and the context in which they were made." BR 9.

Next, the State claims that an unlawful seizure that leads to an unlawful arrest and the unlawful admission of tainted pre- and post-arrest statements and physical evidence does not constitute manifest constitutional error. BR 10. The State offers no authority that unlawful seizures, arrests and searches are not manifest constitutional errors.

⁶ Both counsel submitted briefs, neither of which is in the record. 4/19pm RP at 3.

“Courts should not consider grounds to limit application of the exclusionary rule when the State offers no supporting facts or argument.”

State v. Ibarra-Cisneros, 172 Wn.2d 880, 885, 263 P.3d 591 (2011).

Rather, where no authority is cited, the Court presumes that counsel, “after diligent search, has found none.” *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000).

The Rules of Appellate Procedure do not require appellants to defend the right to brief any assignment of error. Collins asserted his right to seek review of these issues by assigning error to them in his Appellant’s Brief. RAP 10.3(a). It was up to the respondent to argue that the errors were not reviewable. Rather than anticipating hypothetical objections, the RAP instructs the appellant to address the respondent’s arguments in a reply brief. RAP 10.3(b) and (c).

2. OMITTING WRITTEN FINDINGS AND CONCLUSIONS WAS NOT HARMLESS.

Omitting written suppression findings is harmless so long as the record is sufficient to permit appellate review of the assignments of error.

BR 10, citing *State v. Smith*, 67 Wn. App. 81, 897, 834 P.2d 26 (1992).

But the State wrongly claims that without written findings there are no limits to the grounds it can argue to uphold the court’s suppression rulings.

BR 11, citing *State v. Bobic*, 140 Wn.2d 250, 259, 996 P.2d 610 (2000).

First, the Sixth Amendment guarantees the right of criminal defendants to “be informed of the nature and cause of the accusation” and to be “confronted with the witnesses” against them. This means the State’s witnesses must testify to the State’s evidence, and the State must argue the implications of that evidence at the trial, not for the first time on appeal.

Second, Washington’s Rules of Appellate Procedure preclude any party from presenting “a ground for affirming a trial court decision which was not presented to the trial court” where, as here, the record was not “sufficiently developed to fairly consider the ground.” RAP 2.5(a).

Third, our courts do not permit parties to change theories of admissibility on appeal. *State v. Pavlik*, 165 Wn. App. 645, 651, 268 P.3d 986 (2011), citing *State v. Mak*, 105 Wn.2d 692, 718-719, 718 P.2d 407, *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 870 P.2d 313 (1994).

Fourth, the State is estopped from arguing both that the record is sufficient for review and also that it is not. The equitable doctrine of judicial estoppel precludes a party from asserting one position in a court proceeding and later taking a clearly inconsistent position. *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008). This preserves respect for the courts and avoids waste of time. *Id.* Specifically, a party

may not contend on appeal that the facts were other than as stipulated.

State v. Parra, 122 Wn.2d 590, 601, 859 P.2d 1231 (1993).

The State conceded below that Collins was seized and repeatedly argued that the initial seizure was a lawful *Terry* stop, because Robinson lawfully seized Collins as a witness to an accident. 4/14pm RP 31, 45, 47.

Moreover, the ink is barely dry on the State's argument to this Court that the record is not sufficiently developed to fairly consider the same issue when presented by Collins. BR 7-8.

Fifth, the burden is squarely upon the State in suppression proceedings to demonstrate that a challenged intrusion was lawful *Hill*, 123 Wn.2d at 644-45. This Court does not consider new grounds to limit application of the exclusionary rule when the State offered no supporting facts or argument at the hearing. *Ibarra-Cisneros*, 172 Wn.2d at 885.

Sixth, the court's conclusions of law on a motion to suppress must be supported by the findings of fact. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009); *State v. Garvin*, 166 Wn.2d 142, 249, 207 P.3d 1266 (2009). If the trial court does not enter a finding on a disputed fact, this Court "must indulge the presumption that the party with the burden of proof failed to sustain their burden on the issue." *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). By definition, an argument that was not presented to the trial court is not supported by the record.

Here, the court could not have concluded that Robinson described a social contact because, since the issue was not before it, the court made not a single finding from which such a conclusion could be derived.

Finally, the State's attempt to exploit the lack of definitive findings by presenting novel arguments on appeal defeats any claim that the court's failure to enter written findings was harmless. BR 11.

Bobic does not require a different result. The Court merely rejected the argument that the State needed to cross-appeal in order to assert alternative grounds to affirm. *Bobic*, 140 Wn.2d at 257-58. *Bobic* did not relieve the State of RAP 2.5(a)'s requirement that alternative supporting grounds for a trial court ruling must be found in the record. Not requiring a cross appeal is a far cry from not requiring support in the record. Rather, *Bobic* expressly limits the State's arguments on appeal to those supported by the record. *Bobic*, 140 Wn.2d at 258. (The State "was entitled to argue any grounds supported by the record to sustain the trial court's order.) Likewise, permitting the respondent to raise additional supporting grounds does not waive the doctrine of estoppel and permit a party to adopt a clearly inconsistent position.

In *Bobic*, the prosecution fully developed facts establishing that the police viewed the contents of the defendant's storage unit through a peep-

hole with the legitimate cooperation of the storage facility manager, which justified application of the “open view” doctrine. *Bobic* at 255, 258-59.

Here, by contrast, Robinson did not testify that he merely wished to chat socially with Collins and that Collins was free to leave. The record contains nothing to support a novel argument that Collins was not seized after all but merely engaged in some sort of “social contact.” BR 11-12.

3. ROBINSON’S INITIAL CONTACT WITH COLLINS CONSTITUTED A SEIZURE.

The trial court’s suppression findings must be supported by substantial evidence which must actually appear in the record. *Hill*, 123 Wn.2d at 644-45. And the evidence must be sufficient to convince a reasonable person of its truth. *State v. Setterstrom*, 163 Wn.2d 621, 625, 183 P.3d 1075 (2008), citing *State v. Rankin*, 151 Wn.2d 689, 709, 92 P.3d 202 (2004).

On the issue of whether Collins was initially seized, Robinson said only that he was not in restraints and was not told he was under arrest. But when he was asked in terms that did not permit him to equivocate if Collins was free to leave, Robinson unequivocally answered that was not:

Q: Was he free to leave, at that point? A: No. 4/14pm RP 37.

The prosecutor even conceded that Collins was not free to leave from the moment Robinson approached him. 4/14pm RP 47. Collins was seized.

Moreover, Deputy Robinson conceded that he detained Collins as a potential witness to the accident. 4/14pm RP 31, 45, 47. The State now concedes that this was unlawful. BR 14, note 3. Const. art 1, § 7 prohibits the police from seizing a person merely because they think he might have useful information about a non-criminal incident. *State v. Carney*, 142 Wn. App. 197, 203, 174 P.3d 142 (2007).

Collins was unlawfully seized from the outset of this encounter, such that all subsequently obtained evidence is inadmissible fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). Reversal is required.

4. COLLINS WAS SUBJECTED TO A
WARRANTLESS ARREST WITHOUT
PROBABLE CAUSE.

The State next contends that Deputy Stumph had probable cause to arrest Collins (a) for making a false statement to Deputy Robinson and (b) for hit-and-run pursuant to RCW 45.52.010(2). BR 17-18. But Stumph did not arrest Collins for either of those things. Rather, Stumph arrested Collins for driving without a valid license. 4/19pm RP 14.

First, the fact that a 911 caller claimed to have seen Collins driving did not create probable cause to arrest him. As the State concedes at BR 17, a misdemeanor must be committed in the arresting officer's presence to justify a warrantless arrest. RCW 10.31.100. And the State concedes

that driving with a suspended or revoked license is at most a gross misdemeanor. RCW 46.20.342(1)(a). Moreover, the record shows that dispatch merely told the officers that Collins's Washington license was expired, not suspended. 4/14pm RP 45. Driving with an expired license is an infraction. RCW 46.20.342; 46.20.005.

Driving with an expired Washington license while licensed elsewhere is not even an infraction. RCW 46.20.005. Even driving with a revoked or suspended license is no more than a gross misdemeanor if the driver has a valid out-of-state license as Collins did. RCW 46.20.345.

Washington has a so-called "fellow officer" rule. *See, e.g., State v. White*, 76 Wn. App. 801, 805, 888 P.2d 169 (1995), *aff'd*, 129 Wn.2d 105, 915 P.2d 1099 (1996); *State v. Alvarado*, 56 Wn. App. 454, 457-58, 783 P.2d 1106 (1989). Under this rule, where police officers are acting together as a unit, the cumulative knowledge of all the officers is relevant in deciding whether there was probable cause to apprehend a suspect. *State v. Maesse*, 29 Wn. App. 642, 647, 629 P.2d 1349 (1981).

Here, the Sheriff's Office knew that Collins had a valid Texas license and actually had possession of the license. Stumph is charged with knowledge both of the law and of the facts known to his fellow officers.

The State relies on *State v. Huff*, 64 Wn. App. 641, 645, 826 P.2d 698 (1992), in arguing that an arrest that is not supported by probable

cause is made lawful if the arresting officer could subjectively have believed that the suspect had committed a different crime. BR 17.

That reliance is misplaced. *Huff* holds that an arrest that is supported by probable cause is not made unlawful by an officer's subjective belief that the suspect has committed a different crime. *Huff*, 64 Wn. App. at 645. The converse, however, is false. An arrest that is not supported by probable cause is not made lawful by the officer's erroneous subjective belief that the suspect has committed some crime or other. *State v. O'Neill*, 148 Wn.2d 564, 575, 62 P.3d 489 (2003) (the nature of an officer's subjective suspicion is generally irrelevant to whether or not a seizure has occurred, but once a seizure is found, the reasonableness of the officer's suspicion and the factual basis for it are relevant in deciding whether the seizure was lawful. *O'Neill*, 148 Wn.2d at 577.

The trial court here garbled the *O'Neill* analysis and concluded the officers' subjective belief was not relevant to whether Collins's arrest was valid, as distinct from whether a seizure occurred. 4/19pm RP 31-32.

Moreover, there is no evidence that either officer entertained a subjective belief that Collins could be arrested either for initially denying that he was driving or for hit-and-run. Contrary to the State's misconception, "subjective" means a false belief that is actually held by

the officer, not a hypothetical one that the officer might conceivably have held if only it had occurred to him. BR 19-20.

The prosecutor persuaded the trial court that, although arresting Collins for a driving infraction was clearly unlawful, Robinson nevertheless had probable cause to arrest him on the alternative ground of making a false statement to a public servant, even though Robinson did not know he had probable cause. 4/19pm RP 32, 33, 37. This was wrong.

In *State v. Vangen*, 72 Wn.2d 548, 552, 433 P.2d 691 (1967), a felony arrest for a non-felony was lawful because the police “had knowledge, at the time of the arrest” of felonies for which they could have arrested Vangen. *Vangen*, 72 Wn.2d at 553. Likewise, in *State v. Knighten*, 109 Wn.2d 896, 748 P.2d 1118, (1988), the arresting officer had knowledge of facts sufficient to create probable cause to arrest Knighten, he just mistakenly thought he did not. *Knighten*, 109 Wn.2d at 898.

Those cases are distinguishable. Here, while Deputy Robinson was unlawfully detaining Collins without a warrant as a possible material witness, Collins told Robinson that a fictitious person called Chad was driving the crashed car. But Robinson did not learn that this statement was false until after Stumph arrested Collins. This was too late to constitute probable cause. By his own testimony, and as the State concedes, it did not occur to Robinson that a person being questioned

about a hit-and-run accident might fabricate a story that someone else was driving. 4/19 RP 22, 23; BR 22.

The elements of probable cause to arrest are well settled. Probable cause requires that the facts and circumstances justifying the arrest must be within the arresting officer's knowledge. *State v. Gluck*, 83 Wn.2d 424, 426–27, 518 P.2d 703 (1974). That is, within the arresting officer's knowledge at the time of the arrest. *State v. Fricks*, 91 Wn.2d 391, 398–99, 588 P.2d 1328 (1979). That is not what happened here.

Until Collins confessed, all the officers had between them was conflicting statements by two witnesses. This no more established probable cause to arrest Collins than to arrest the 911 caller. The police may not arrest and search people merely because they tell inconsistent versions of events. *State v. Neth*, 165 Wn.2d 177, 184, 196 P.3d 658 (2008); *Setterstrom*, 163 Wn.2d at 627.

The police searched the crashed truck incident to this unlawful arrest and found keys of a type associated with car theft. 4/14pm RP 53-54. Because the officers lacked probable cause to arrest Collins, that evidence should have been suppressed.

5. THE EVIDENCE WAS INSUFFICIENT
TO CONVICT FOR FALSE STATEMENT.

The State next contends it established the essential elements of the crime of false statement. BR 20. But, even viewing the evidence in the

light most favorable to the State, no rational trier of fact could have found the elements beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007).

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. RCW 9A.76.175. “Material statement” means a written or oral statement reasonably likely to be relied upon in the discharge of official duties. *Id.*

But where a citizen has no obligation to make any statement to police, his failure to do so does not create probable cause to arrest him. *State v. Moore*, 161 Wn.2d 880, 886, 169 P.3d 469 (2007). Likewise, making a statement that is not truthful, i.e., false, is not a crime if the person has no obligation to speak. *See, e.g., Setterstrom*, 163 Wn.2d at 627 (a suspect’s lying about his name was not grounds even for a frisk); *Neth*, 165 Wn.2d at 184 (it is unconstitutional to violate a person’s right to be left alone simply because they gave inconsistent accounts while being questioned by police.) An arrest violates a person’s right to be left alone.

Here, the evidence did not show that Collins had any obligation to talk to Robinson, or even to remain in his presence. Therefore, misleading Robinson was not criminal.

Moreover, the standard of reasonableness of an officer’s conduct takes into consideration the officer’s experience and expertise. By that

standard, Robinson's claim to have been deceived was not reasonable. *Fricks*, 91 Wn.2d at 399. And even if he believed the story, Robinson took no action based on it and did not delay any legitimate action.

As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993). The Court should reverse the conviction for making a false statement and dismiss the prosecution with prejudice.

6. THE COURT VIOLATED ER 404(b).

The court erroneously denied Collins's motion that the keys found in the truck served no evidentiary purpose other than to show a propensity to steal cars. 4/14pm RP 53.

ER 404(b) prohibits a trial court from admitting "[e]vidence of other crimes, wrongs, or acts ... to prove the character of a person in order to show action in conformity therewith." Before admitting evidence under an exception to ER 404(b), "the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect." *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996).

Before admitting evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance that the misconduct occurred, (2) identify the purpose for which the evidence is offered, (3) make sure that the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d at 648-49.

By omitting step (3), the court here effectively reduced ER 404(b) to a relevance analysis under ER 403.

The court first found the keys were relevant because they tended to prove knowledge that the vehicle was stolen. 4/14pm RP 56. But knowledge is not an element of possession of a stolen vehicle. “A person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle.” RCW 9A.56.068(1). The judge thought the propensity analysis consisted merely of balancing the potential for prejudice against the probative value. *Id.* BR 24.

The State now concedes that the key ring evidence was not necessary to prove the State’s case. BR 25. This further tips the scale against admissibility. *See, e.g., State v. Venegas*, 155 Wn. App. 507, 526, 228 P.3d 813 (2010).

This error was not harmless. The key ring evidence said nothing about the current alleged possession. It simply tipped off the jury that here was a person who steals cars.

The Court should reverse the conviction for possession of a stolen vehicle.

CAUSE NO. 10-1-01083-9

VI. RECAP OF THE CASE

Collins was convicted by jury on a single count of possessing methamphetamine after being pulled over for a seat belt violation. 4/19am RP 20, 48. Collins was wearing his seat belt, but it was under, instead of over, his arm. 4/19 am RP 55. When asked for identification, Collins removed a folded paper from his pocket. 4/19am RP 56-57. As he unfolded the paper, a chunk of crystal fell into his lap. 4/19am RP 60. The trooper ordered Collins out of the vehicle, losing sight of the chunk of material as Collins did so. The officer did not see anything fall. After Collins was out of the car, the officer found a chunk of crystal in the door jamb. 4/19am RP 61-62, 70. The crime lab identified it as methamphetamine. 4/19am RP 65-66, 79.

Collins told the trooper he knew the substance was meth and knew it was there, but that it was not his. 4/19am RP 10, 62, 65. The court admitted the statements admitting knowledge that the substance was

methamphetamine and that it was there, but excluded Collins's explanation that it was not his. 4/19am RP 13-15.

The court instructed the jury on actual possession but not on constructive possession.

Possession means having a substance in one's custody. Possession occurs when the item is in the actual physical custody of a person charged with possession.

083-9 CP 30. Both parties accepted this instruction. 4/19am RP 91.

In closing, the State made an election that the substance Collins was accused of possessing was the crystal that fell out of the paper. 4/19am RP 107.

Collins was convicted and received the maximum 18 months on a standard range of 6+ to 18 months. 083-9 CP 39, 42.

VII. **ARGUMENT**

7. THE EVIDENCE WAS INSUFFICIENT TO PROVE POSSESSION.

In claiming the evidence was sufficient, the State misrepresents the record by characterizing the chunk of meth found in the door as "the methamphetamine," implying that there was only a single chunk. BR 30. But the conviction is based on something that fell from Collins's lap. The prosecutor did not attempt to show that this was the object found in the door. The State presented no evidence that the police searched the interior of Collins's vehicle for the first suspicious chunk. All the State

proved was that a trooper saw something in one place that might possibly have been methamphetamine and later retrieved something from another place that definitely was methamphetamine.

The missing link is fatal to the State's case, because there is no evidence that Collins ever had actual possession of the meth. Accepting the State's evidence and all reasonable inferences as true, the State simply did not prove that the controlled substance was ever in Collins's custody.

The State seizes on the fact that Collins cannot prove he never possessed the substance in the door jamb. BR 30. But he does not have to. Rather, the State was required to prove beyond a reasonable doubt that he did. This the State failed to do. The trooper admitted he lost track of whatever fell out of Collins's lap and that did not search the vehicle. The State argues that the jury rejected the defense argument on this point. BR 30. But the jury was instructed that counsel's remarks were not evidence. CP 22.

The State claims the only reasonable inference is that a single chunk fell from Collins's lap and landed in the door jamb. RP 30. This is false. An equally reasonable inference is that there were multiple chunks and the State charged Collins with possessing the wrong one. The jury was instructed that possession means custody. But, viewed in the light

most favorable to the State, the evidence established no more than constructive possession with regard to the substance in the door jamb.

The Court should reverse the conviction and dismiss with prejudice.

8. THE COURT ERRONEOUSLY EXCLUDED COLLINS'S DENIAL THAT THE METHAMPHETAMINE WAS HIS.

The court excluded as "self-serving hearsay" Collins's statement To the trooper that the meth was not his. 4/19am RP 7. This was error.

"Self-serving hearsay" merely denotes a statement does not fit into a recognized exception to the hearsay rule. *State v. King*, 71 Wn.2d 573, 577, 429 P.2d 914 (1967). There is no "self-serving hearsay" rule that bars admission of statements that would otherwise satisfy a hearsay rule exception. *State Pavlik*, 165 Wn. App. 645, 651, 268 P.3d 986 (2011).

Independently of the hearsay rule, moreover, the State effectively concedes that it opened the door to the second part of Collins's statement by introducing the first part. BR 33.

One party may not bring up a subject and then bar the other party from further inquiry. *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995). This Rule of Completeness and ER 106 required the court either to exclude the entire statement or admit all of it.

Where one party has introduced part of a conversation[,] the opposing party is entitled to introduce the balance

thereof in order to explain, modify or rebut the evidence already introduced insofar as it relates to the same subject matter and is relevant to the issue involved. This is true though the evidence might have been inadmissible in the first place.

State v. West, 70 Wn.2d 751, 754-55, 424 P.2d 1014 (1967).

Under the rule of completeness, the evidence the proponent seeks to admit must be relevant to the issues in the case. *State v. Larry*, 108 Wn. App. 894, 910, 34 P.3d 241 (2001). Here, the proponent of the explanatory part of the statement is Collins. Bizarrely, the State claims that the statement that the meth was not his is not relevant to the element of possession. BR 34.

The error prejudiced Collins by denying him the right to present a complete defense.

VIII. **CONCLUSION.** For the reasons stated, Scotty Collins asks the Court to reverse his convictions and grant him a new trial.

Respectfully submitted, this April 9, 2012.

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CERTIFICATE OF SERVICE

Jordan McCabe certifies that opposing counsel was served with this Reply Brief electronically via the Division II portal: Susan I. Baur, Cowlitz County Prosecutor, sasserm@co.cowlitz.wa.us.

A paper copy was deposited in the U.S. mail, first class postage prepaid, addressed to:

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