

No. 48465-0-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JAMIL ALKITAB AL WALI MUTAZZ,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause No. 15-1-00820-1  
The Honorable Michael Schwartz, Judge

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OPENING BRIEF OF APPELLANT

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### **I. ASSIGNMENTS OF ERROR**

1. The state failed to prove beyond a reasonable doubt all the elements of the crime of possession of stolen property.
2. Any future request by the State for appellate costs should be denied.

### **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Did the State prove all the elements of possession of a stolen vehicle where the evidence did not support the conclusion that Jamil Mutazz knew the vehicle was stolen?  
(Assignment of Error 1)
2. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs because Jamil Mutazz does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 2)

### **III. STATEMENT OF THE CASE**

#### **A. PROCEDURAL HISTORY**

The State charged Jamil Mutazz with one count of first degree assault (RCW 9A.36.021), one count of unlawful possession of a stolen vehicle (RCW 9A.56.068, .140), one count

of attempting to elude a pursuing police vehicle (RCW 46.61.024) and one count of resisting arrest (RCW 9A.76.040). (CP 6-10) The State also alleged that the offenses were aggravated because: Mutazz committed the crimes shortly after being released from incarceration (“rapid recidivism”); multiple current offenses and a high offender score will result in some offenses going unpunished; and/or unscored misdemeanor history results in a presumptive sentence that is clearly too lenient. (CP 6-10)

The jury found Mutazz not guilty of first degree assault, but guilty on the remaining charges. (RP 477; CP 142-45) The trial court found that the rapid recidivism and multiple current offense aggravators were established and justified an exceptional sentence above the standard range. (RP 510-15; CP 100-01, 197-98) The trial court ordered Mutazz’s felony sentences to run consecutively, for a term of confinement totaling 100 months. (RP 514-15; CP 173) This appeal timely follows. (CP 185)

#### B. SUBSTANTIVE FACTS

Young Kim owns a dry cleaning store in downtown Seattle. (RP 119) Around 5:00 AM on February 28, 2015, he drove his Lexus sedan to the store, parked it in the driveway, and went inside the store to use the restroom. (RP 120-21) He left the keys in the

car with the engine running. (RP 121-22) Kim's employee, Juan Galvan-Garcia, saw a black male wearing a dark hooded sweatshirt walk past the Lexus. (RP 111-13) Then the man got into the car and sped away. (RP 108, 109, 111-13) Galvan-Garcia notified Kim, who called the police to report that the Lexus had been stolen. (RP 113-14, 123)

The Lexus was fitted with a device that allows its location to be tracked. (RP 123-24) If a vehicle with this device is reported stolen, police patrol units also fitted with the tracking system will receive an alert if the stolen vehicle is in the vicinity. (RP 153-54) Tacoma Police Officer Tim Fredericks received such an alert as he was on patrol in South Tacoma. (RP 216-17) He saw the Lexus at 8:48 AM, parked with the motor running on South 13th Street near South J Street. (RP 219-20) He saw the Lexus pull away from the curb and begin driving down the street, so he followed it while calling out the location to other nearby patrol units. (RP 220-21)

Pierce County Sheriff Deputy Ryan Olivarez also has the tracking system installed in his patrol car, and was alerted to the presence of the Lexus as he was driving eastbound on Highway 16 in Tacoma around 8:00 AM. (RP 152-54, 156) He began looking for the Lexus, and eventually came upon Officer Fredericks patrol

vehicle driving behind it. (RP 164-65)

Officer Fredericks then attempted to initiate a traffic stop by activating his overhead lights and siren. (RP 222-24) Deputy Olivarez also activated his overhead lights. (RP 166) But the Lexus did not pull over, and instead accelerated away from the officers. (RP 167, 223-24) The officers testified that the Lexus reached speeds of approximately 65 or 70 miles per hour while driving on city streets. (RP 168-69, 177, 225)

Tacoma Police Officer Brent Roberts decided to place spike strips on the street in hopes that it would deflate the Lexus' tires and end the chase. (RP 246-47, 252) As the Lexus passed Officer Roberts, it veered sharply in his direction and he had to jump out of the way to avoid being struck. (RP 262, 263-64) But at least one tire ran over the spike strip and was punctured. (RP 304-05)

The Lexus continued to speed away from the pursuing officers. (RP 173, 176-77) When Deputy Olivarez saw the Lexus narrowly miss a pedestrian crossing the street, he decided to terminate the pursuit. (RP 179-80, 182) But he came upon the Lexus again a short time later, as it had been slowed by the deflated tire. (RP 173, 185) The Lexus veered off the road onto a grassy area and came to a stop, then the driver got out and began

to run. (RP 185-86)

Deputy Olivarez chased the driver on foot and ordered him to stop. (RP 187) The driver initially continued to run away. (RP 187-88) But once Deputy Olivarez threatened to shoot him, the driver stopped and was taken into custody. (RP 189) Deputy Olivarez testified that the driver was identified as Jamil Mutazz. (RP 186-87) Mutazz was wearing a dark hooded sweatshirt. (RP 343; Exh. P70)

Mutazz acknowledged that he was driving the Lexus and that he did not pull over when the officers signaled him to stop. (RP 377-78) However, he came by the Lexus in Federal Way during a drug transaction with another man. (RP 375, 376-77) He initially fled because he thought the officers saw him using drugs when he was parked on the street in Tacoma, and he was on DOC supervision so he did not want to be caught with drugs. (RP 378-79, 389) Mutazz testified that he swerved to avoid the spike strips, and did not try to strike Officer Roberts with the Lexus. (RP 381)

#### **IV. ARGUMENT & AUTHORITIES**

A. THE STATE'S EVIDENCE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MUTAZZ KNEW THE LEXUS WAS STOLEN.

“Due process requires that the State provide sufficient

evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only 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 at 201.

To convict Mutazz of possessing a stolen vehicle, the State had to prove Mutazz knew the vehicle he possessed was stolen. RCW 9A.56.068, RCW 9A.56.140; State v. Michielli, 132 Wn.2d 229, 236, 937 P.2d 587 (1997); State v. Hatch, 4 Wn. App. 691, 693, 483 P.2d 864 (1971).

The “mere possession of stolen property does not create a presumption that the possession is larcenous[.]” Hatch, 4 Wn. App. at 694. Thus, possession of stolen property alone is not sufficient to prove the defendant knew the property was stolen. State v. Scoby, 117 Wn.2d 55, 61-62, 810 P.2d 1358, 815 P.2d 1362

(1991).

Although specific proof of actual knowledge is unnecessary, the State must show at least that Mutazz had “knowledge of facts sufficient to put him on notice that the [vehicle was ]stolen.” State v. Rockett, 6 Wn. App. 399, 402, 493 P.2d 321 (1972); RCW 9A.08.010(b). Possession of the item combined with “corroborative evidence of other inculpatory circumstances tending to show guilt” can be sufficient. State v. Ladely, 82 Wn.2d 172, 175, 509 P.2d 658 (1973).

In this case, the State proved nothing more than the fact that Mutazz possessed the Lexus. Neither Kim nor Galvan-Garcia saw the face of the man who stole the Lexus and did not identify Mutazz as the thief. (RP 115-16, 121) It was several hours later before Mutazz was seen driving the Lexus. (RP 109, 219) And there were no other facts shown at trial that would have reasonably led Mutazz to know that the Lexus was stolen, like a punched-out ignition or dangling wires, for example. Rather, the keys to the Lexus were inside the Lexus, which would indicate to a person that the car had been legally obtained. (RP 122) And Mutazz explained that he fled because he was doing drugs and was on DOC supervision. (RP 378-79, 389)

The fact that Mutazz possessed the Lexus, without more, is insufficient to support his conviction for possessing a stolen vehicle. The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996). Because the State failed to present sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that Mutazz knew the Lexus was stolen, this conviction should be reversed and dismissed.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.<sup>1</sup>

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal. RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

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<sup>1</sup> Recently, in State v. Sinclair, Division 1 concluded “that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief.” 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Mutazz is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1’s interpretation of RAP 14.2.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Mutazz’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Mutazz owns no property or assets, has no savings, and has no job and no income. (CP 187-89) Mutazz will be incarcerated for the next eight years,

and already owes over \$30,000.00 in previously ordered LFOs. (CP 172-73, 188) And, finding that Mutazz did not have the ability to pay LFOs now or in the future, the trial court declined to order any non-discretionary LFOs at sentencing in this case. (RP 515; CP 172) Thus, there was no evidence below, and no evidence on appeal, that Mutazz has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Mutazz is indigent and entitled to appellate review at public expense. (CP 191-92) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Mutazz's financial situation has improved or is likely to improve. Mutazz is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

## **V. CONCLUSION**

No rational finder of fact could have found, beyond a reasonable doubt, that Mutazz knew the Lexus was stolen. The State therefore failed to meet its burden of proving all of the elements of this crime beyond a reasonable doubt. Mutazz's conviction for possessing a stolen vehicle must be reversed and dismissed, and his case remanded for resentencing. This court should also decline any future request to impose appellate costs.

DATED: July 11, 2016

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Jamil A. Mutazz

**CERTIFICATE OF MAILING**

I certify that on 07/11/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jamil A. Mutazz, DOC# 916045, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.

*Stephanie Cunningham*

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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**July 11, 2016 - 2:36 PM**

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