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Division II
State of Washington
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NO. 53509-2-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

I.M.C.

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

The Honorable Stanley J. Rumbaugh, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. In violation of the due process clauses of the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution, there was insufficient evidence to convict I.M.C. of taking a motor vehicle without permission in the second degree.

2 In concluding that I.M.C. was guilty of taking a motor vehicle without permission in the second degree, the juvenile court erred in entering Conclusions of Law II, V, and VI as fully set forth herein at pages 7-8. Clerk’s Papers (CP) 64-65.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the State fail to present sufficient evidence to find that I.M. C. committed the offense of taking a motor vehicle without permission in the second degree where there was no evidence that he was in the car or encouraged or aided in the planning or commission of the crime or that he facilitated the theft of the car by others? Assignment of Error 1.

2. Did the trial court err by adjudicating I.M.C. guilty of the offense? Assignment of Error 2.

C. STATEMENT OF THE CASE

I.M.C. was charged by information filed on January 16, 2019 in Pierce County Juvenile Court with one count of taking a motor vehicle without permission in the second degree, contrary to RCW 9A.56.075(1). Clerk’s Papers (CP) 3-4.

The case came on for fact-finding hearing on April 23 and April 24, 2019. Report of Proceedings¹ (RP) (4/23/19) at 5-100, 2RP (4/24/19) at 106-156. The State called four witnesses including Peter Ballatan and his son Andrew Ballatan, homeowner Shiloh Martindale, Tacoma police officer Rick Hutchinson, Pierce County Deputy Sheriff Michael Meyers, and Deputy Sheriff Arthur Centoni.

Peter Ballatan and his son Andrew were getting ready to leave for work at about 9:45 a.m. on January 15, 2019. RP at 17, 51. Andrew Ballatan went outside the house, located on at 3611 Portland Avenue in Tacoma, and started his father's 2001 Toyota Avalon. RP at 18, 51. The car was parked in the driveway behind a closed fence. RP at 51. He left the car running and went back inside the house. RP at 51.

About five minutes later, while still inside the house, Andrew Ballatan heard the fence rattling, and looking out a window, saw that the driveway gate had been opened and saw a female inside the fenced area. RP at 51. He knocked on the window and then ran outside the house and saw two males standing on the sidewalk in front of the house. RP at 52. One of them was wearing a white hoodie and the other had a black puffy jacket. RP at 52, 53. He also saw people inside the Toyota, and within five to ten seconds the car was quickly driven through the open gate and onto Portland

¹The record of proceedings consists of the following transcribed volumes: 1RP - April 23, 2019; 2RP - April 24, 2019; and 3RP - May 31, 2019 (disposition).

Avenue. RP at 53. The two males on the sidewalk ran in the same direction the car was travelling. RP at 52, 54. Andrew Ballatan stated that as he came out of the house the person with the white hoodie yelled “hey hey hey” as a warning to the people inside the car. RP at 54. He was able to see the driver, who was wearing a bright orange or red hoodie. RP at 53. In court Andrew Ballatan identified I.M.C. as the person wearing a black hoodie standing on the sidewalk in front of the house. RP at 52.

Peter Ballatan left the house through the back door and ran around the side the house to the driveway. RP at 19-20. He saw two people running south on Portland Avenue, one who was wearing all white and one wearing a black hoodie with white stripes and short pants. RP at 21. As he ran outside, he saw his car being driven away and saw the driver, who was wearing red clothing, and saw a female and another passenger wearing a black jacket. RP at 20.

The car turned left and drove southbound on Portland Avenue at a high rate of speed. RP at 21, 22. As the car left the driveway it drove over part of the gate, bending it in the process. RP at 21, 57. The back door of the car was open, and it scraped against the gate as the car left. RP at 22.

Peter Ballatan said that he had never seen the people in the car before. RP at 21. In court, Peter Ballatan identified the person he had seen wearing the black hoodie and white stripes on the pants as I.M.C. RP at 28-29.

Tacoma police officer Rick Hutchinson was dispatched to the Ballatan house at about 9:49 a.m. following a call about the stolen Toyota. RP at 65. Peter Ballatan, who has video surveillance company, had installed a video surveillance system with three cameras outside his house. RP at 22, 23. Two videos of the incident with a starting time of 9:53 a.m. were entered as Exhibit 2 and played to the court. RP at 24, 27. Officer Hutchinson viewed the surveillance video of the incident and obtained a description of the suspects. RP at 67.

After Officer Hutchinson left the Ballatan house he was told by distpacth at 10:30 a.m. that the Toyota had been found about four to five miles away in the 9900 block of Golden Given East. RP at 68. The car was located in front of a house belonging to Shiloh Martindale, about four and a half miles from the Ballatan house. RP at 33, 68.

Shortly before 10:30 a.m. Ms. Martindale heard a noise outside her house and saw a car with a blown-out tire containing either five or six people stop near the front of her house. RP at 71, 72. When she looked again, she saw two males looking at the tire, one wearing a black puffy coat. RP at 71. She looked several minutes later and saw a group of five or six people cross the street and go toward an apartment complex. RP at 73. She saw five people either African American or mixed race, including a female dressed in black, a male dressed in white, a male with a black puffy jacket, and male with an orange or red jacket. RP at 73, 74.

Deputy Michael Meyers arrived at her house, and while talking with him, Ms. Martindale saw the individuals she had seen earlier walking back down the street. RP at 75. When she pointed them out to Deputy Meyers, “they turned and ran back up the street.” RP at 75.

Ms. Martindale informed Deputy Meyers that she surveillance had cameras at the front of her houses, and he viewed video of the car. RP at 75. Ms. Martindale testified that the video showed the people crossing the street in front of her house, and a second camera showed them running through the apartment complex across the street. RP at 76.

Deputy Meyers stated that the video showed the car stop and an African American male wearing white got out of the left rear seat and walked across Golden Given Road, then returned to the car and get back in, at which time the car pulled forward out of camera view. RP at 83, 84. A few minutes later he saw five individuals walking away from the Toyota. RP at 83. He stated that the video showed an African American male wearing red clothing, an African American male wearing white clothing, an African American female wearing a black jacket, a white male wearing dark clothing, and an African American male wearing a dark jacket and dark pants. RP at 84-85.

Deputy Meyers did not make a copy of the video. RP at 77, 82.

Deputy Meyers testified that the Toyota was located at 10:30 a.m. in the 9900 block of Golden Given Road East. RP at 80, 87. Deputy

Meyers transported Peter Ballatan to the location of the Toyota on Golden Given. RP at 31, 32. The car had a blown front right tire and had been driven on the wheel rim, and the housing for the passenger mirror was broken from hitting the gate when the car was taken from the driveway. RP at 32, 35, 37

At about 10:50 a.m. police detained five individuals matching the description of the youths about five blocks from Ms. Martindale's house. RP at 85. Deputy Meyers transported Peter Ballatan to the location where officers were holding the five individuals. RP at 42, 43, 85, 86, 87, 98.

The deputies brought each of the detained people for Peter Ballatan to view one at a time. RP at 43. Peter Ballatan stated that one of the detained juveniles was wearing a white hoodie, one had a red hoodie, and one was wearing a black jacket with a hoodie with white stripes and short pants. RP at 43. He identified the male with the black hoodie and short pants with white stripes as the person he saw on the sidewalk in front of his house and who ran down Portland Avenue earlier that morning. RP at 43, 44.

Deputy Sheriff Arthur Centoni stated that I.M.C. was wearing all black clothing when he was detained. RP at 111, 112.

The defense rested without calling witnesses. RP at 127.

The juvenile court found that I.M.C. committed the offense as charged. RP at 154. The court stated: "its implausible entirely that the 4

to 5-mile distance between the place of the theft and the place of the abandonment of the car would have allowed [I.M.C.] to locate and somehow walk there on his own.” RP at 154.

The court imposed 30 days in detention with credit for 14 days serves and credit for 16 days on electronic home monitoring and ten months of community supervision. RP at 166.

A disposition order was entered May 31, 2019 and findings of fact and conclusions of law were entered July 19, 2019. CP 36-45, 57-66.

The court entered the following conclusions of law:

II. That [I.M.C.] is guilty beyond a reasonable doubt of the crime of TAKING A MOTOR VEHICLE WITHOUT PERMISSION IN THE SECOND DEGREE in that in Pierce County, Washington, on January 15, 2019 he did unlawfully and feloniously, without permission of the owner or person entitled to possession, intentionally take or drive away an automobile or motor vehicle that is the property of another or did voluntarily ride in or upon the automobile or motor vehicle with knowledge of the fact that it was unlawfully taken, contrary to RCW 9A.56.075(1).

...

V. The respondent was a passenger in the stolen vehicle because he was identified at the scene where the Avalon was abandoned approximately 4.5 miles from the Ballatan residence no more than 45 minutes after it was stolen. The respondent reasonably could not have walked from the Ballatan residence to the location where the Avalon was abandoned in 45 minutes. There was no evidence submitted that the respondent obtained a car ride to the location where the Avalon was abandoned.

VI. The respondent was a passenger in the stolen vehicle because he was identified with a group of juvenile suspects who were arrested approximately five blocks away from the location where the Avalon was parked on Golden Given Road East approximately 20 minutes

after the car was abandoned by the group.

CP 64-65.

Timely notice of appeal was filed June 27, 2019. CP 47. This appeal follows.

D. ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT ADJUDICATION FOR TAKING A MOTOR VEHICLE WITHOUT PERMISSION IN THE SECOND DEGREE

- a. ***The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt***

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); *State v. Cronin*, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I, section 3 of the Washington Constitution and the 14th Amendment of the federal constitution. *Sandstrom v. Montana*, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could

have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence is to be considered equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). “Credibility determinations are for the trier of fact” and are not subject to review. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265-66, 401 P.3d 19 (2017).

b. There was no evidence that I.M.C. took or rode in the Toyota or assisted others taking the car

The prosecution charged I.M.C. with second degree taking a motor vehicle without permission under RCW 9A.56.075(1). The statute provides:

A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.

The statute has alternative prongs. ‘Under the ‘taking’ prong, the elements are: (1) taking or driving away without the owner's permission (2)

a motor vehicle (3) intentionally. Under the 'riding' prong, the elements are: (1) voluntarily riding in a motor vehicle (2) with knowledge that it was unlawfully taken.' *State v. Walker*, 75 Wn.App. 101, 106, 879 P.2d 957 (1994). Here, the evidence did not prove I.M.C. took the Toyota nor rode in the car after it was taken from the Ballatan residence.

I.M.C. was identified as being at the Ballatan house at 9:50 a.m., and he was in the group of juveniles detained at 10:50 a.m. on 103rd Street East, about 4.5 miles away. Finding of Fact V, IXX. RP at 28-29, 53. Police located the car near the front of Ms. Martindale's house at 10:30 a.m., shortly after she saw the individuals walking across the street to the apartments. RP at 74, 93.

Peter Ballatan identified I.M.C. as the person wearing a black hoodie with a white stripe on the pants on the sidewalk. RP at 28-29. Andrew Ballatan identified the youth on the sidewalk wearing a "black hoodie, puffy jacket" with black sweatpants with white trim as I.M.C. RP at 53. Both witnesses testified the youth on the sidewalk did not get into the car, but ran south on Portland Avenue in the same direction as the car. RP at 54.

No testimony was presented that conclusively linked I.M.C. to the youths who got into the car other than his proximity and similar manner of attire. Peter Ballatan did not identify I.M.C. as the person who shouted or

warned the car thieves that someone was coming out of the Ballatan's house. RP at 54.

Ms. Martindale saw an African American male wearing a black puffy coat, but did not identify any person she saw in front of her house as I.M.C. RP at 71. Moreover, although she saw a male wearing a black coat in the proximity of the car but did see him get out of the car itself. RP at 71, 72. Ms. Martindale did not consistently watch the car, but looked away at least one time. RP at 72. The youths were not in constant view of the surveillance camera in front of Mr. Martindale's house, and were seen going in the direction of an apartment complex across the street. RP at 72.

Taken in a light most favorable to the State, the evidence shows that I.M.C. was on the sidewalk in front of the Ballatan residence when the car was taken, and that he was in the group of youths taken into custody on 103rd Street East. No witness saw him inside the Toyota. No witness saw him inside the gate at the Ballatans' house or otherwise assisting the car theft. It is equally plausible that he was at the location of the initial car theft, and later joined the group of youths when they abandoned the car on Golden Given about 10:30 a.m., or when they were at the apartment complex, or when the group was detained at 10:50 a.m., several blocks from Golden Given. RP at 79, 93.

The State elicited testimony that it would take an hour and a half to two hours to walk from the Ballatan house to Golden Givens. RP at 68. The State did not submit testimony, however, on how long it would take to *run* or *jog* that distance. Contrary to the juvenile court's statement that it was implausible for I.M.C. to walk the distance from the Ballatan house to the Martindale house and locate the people who took the car, it was entirely conceivable that he could have run that distance and joined the group out of view of Ms. Martindale's surveillance video either at Ms. Martindale's house after they abandoned the car, or when they entered the area of the apartment complex across from her house, and that he could have learned their location by cell phone, text, Instagram, Facetime, Facebook, or other form of communication through social media.

- Running or jogging at a nine minute per mile pace, it would take 40 minutes to run 4.5 miles, enough time to go from the Ballatan house to Golden Givens.
- No witness saw I.M.C. get into or get out of the Toyota.
- No witness testified that I.M.C. was in the Toyota.
- No witness saw or heard him give warning or otherwise assist the people who took the car or give indication that he knew that the vehicle was going to be taken.

- It is not unreasonable to run 4.5 miles in 40 minutes at a nine minute per mile pace.
- No evidence supports the court's conclusion that he must have ridden in the car in order for him to be present on Golden Given Road at 10:30 a.m.

c. This Court must reverse and remand with instruction to dismiss the conviction

In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt I.M.C. committed the offense for which he was adjudicated, the judgment may not stand. *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990).

Since the State failed to prove I.M.C. took a motor vehicle without permission, there was insufficient evidence to support the adjudication. This Court must reverse with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 761, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), quoting *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

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E. CONCLUSION

For the reasons stated, I.M.C. respectfully asks the Court to reverse his conviction and remanded for dismissal.

DATED: January 31, 2020.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on January 31, 2020, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Elizabeth Vincent Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on January 31, 2020.



PETER B. TILLER

THE TILLER LAW FIRM

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