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Court of Appeals  
Division II  
State of Washington  
12/19/2019 12:02 PM

NO. 53911-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

JOSE LOPEZ-FLORES,  
Appellant.

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

The Honorable Michael E. Schwartz, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The state failed to prove beyond a reasonable doubt that appellant took a motor vehicle without permission.

Issue Presented on Appeal

Did the state failed to prove beyond a reasonable doubt that appellant took a motor vehicle without permission where he had previously been allowed to drive the car and the owner never expressly prohibited him from driving her car?

B. STATEMENT OF THE CASE

1. Procedural Facts

Mr. Lopez-Flores was charged by amended information with three counts of assault in the fourth degree, domestic violence, and taking a motor vehicle without permission ("TMVWP"). CP 7-8. A jury convicted him of two counts of assault in the fourth degree assault and TMVWP. CP 42-47, 69-80. The sentencing judge imposed a DNA fee for indigent Mr. Lopez-Flores despite the state having previously obtained his DNA. CP 69-80. This timely appeal follows. CP 94.

2. Substantive Facts

Mr. Flores-Lopez lived with his girlfriend Rebecca Herrera,

her foster parents, Carol and Dayton Johnston, his 5 year old daughter "N", other children, and Karen Collett who owned a functional car. RP 80-83. Mr. Flores-Lopez suspected, D. Johnston of sexually molesting the children, but had no proof until he saw his daughter on D. Johnston with his pants down and N on his lap in the evening of February 20, 2019. RP 160-62, 191, 194-95.

Mr. Flores-Lopez grabbed his daughter but said nothing while he formulated a plan to get himself, his daughter, his girlfriend and her daughter out of the house. RP 162-63. Mr. Flores-Lopez did not call the police because he was afraid of being deported. RP 170-71. The next morning after an argument, Mr. Flores-Lopez thought he heard a gunshot and feared that D. Johnston, who was ex-military had fired the shot. RP 188. Mr. Flores-Lopez also believed that everyone in the household was afraid of D. Johnston. RP191.

Mr. Flores-Lopez drove his daughter to California to stay with his mother in Fresno, the next morning on February 21, 2019. RP 162, 171. Before he left, he argued with Herrera as he told her to get her things to leave. RP 163-67, 170. Because his car was not working, he decided to drive Collett's car to California and to return

it after one night's rest in California. RP 169, 171.

Collett left her car with Herrera after Herrera drove Collette to the airport to visit her parents around February 15 or 16, 2019. RP 113. Collett did not return from California until the end of February. *Id.* According to Collett, she did not expressly give Mr. Lopez-Flores permission to drive her car, but he had driven her car before to take Collett to the hospital. RP 110, 112. Collett left the car for Rebecca to use to take the kids to school and for emergencies. RP 113. Collett admitted that she did not know that Mr. Flores-Lopez used her car to drive the children to school. RP 114. Collette never told Mr. Flores-Lopez that he could not drive her car. RP 112. Mr. Flores-Lopez returned the car after one night's rest in Fresno, while Collette was away. RP171.

C. ARGUMENT

THE STATE FAILED TO PROVE  
BEYOND A REASONABLE DOUBT  
THAT APPELLANT TOOK A MOTOR  
WITHOUT PERMISSION

The state failed to prove beyond a reasonable doubt that Mr. Lopez-Flores took a motor vehicle knowing he did not have permission. The state bears the burden of proving beyond a reasonable doubt all essential elements of the crime charged. *State*

*v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016) Evidence is sufficient to support a conviction if, viewed in the light most favorable to the trier of fact's decision, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 16 (2017). A claim of insufficiency admits the truth of the state's evidence and all reasonable inferences that a trier of fact can draw from the evidence. *Cardenas-Flores*, 189 Wn.2d at 265-66.

The crime of second degree taking a motor vehicle without permission is defined:

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 ... 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

(Emphasis added) RCW 9A.56.075.

To convict Mr. Lopez-Flores TMVWP, the state had to prove beyond a reasonable doubt that he took a motor vehicle knowing he did not have permission. RCW 9A.56.075.

In *State v. Johnson*, 119 Wn.2d 167, 173, 82 P.2d 1082

(1992) our Supreme Court addressed in some detail the distinction between knowledge and belief to ultimately hold the following under *State v. Scott*, 110 Wn.2d 682, 691-92, 757 P.2d 492 (1988), *State v. Leech*, 114 Wn.2d 700, 710, 790 P.2d 160 (1999), and *State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980). First, “the statutory definition of knowledge is the ordinary meaning of that term and does not create a different technical meaning.” *Scott*, 110 Wn.2d at 691-92.

Second, the legislature chose to define knowledge so that one may “know” something based upon a reasonable, subjective belief that a fact exists.” *Johnson*, 119 Wn.2d at 174. Third, the defendant's subjective belief, not the objective state of facts indicates culpability. *Shipp*, 93 Wn.2d at 517. “The jury is *permitted* to find actual subjective knowledge if there is sufficient information which would lead a reasonable person to believe that a fact exists. Therefore, a mistaken reasonable, subjective belief may constitute “knowledge” without violating *Shipp*.” *Johnson*, 119 Wn.2d at 174 (quoting *Shipp*, 93 Wn.2d at 517).

In *Johnson*, the Court held that regardless of the fact that the prostitutes and patrons were undercover police; the defendant's

subjective belief that his premises were being used for prostitution, with the objective reality satisfied the “knowledge” element of the crime promoting prostitution. Id

In the context of a civil insurance case the term “permission” is liberally construed to situations where the “honestly but mistakenly believes he is driving with the consent of the owner”. *State Farm Fire & Cas. V. Martin*, 73 Wn. App, 189, 191-92, 869 P.2d 79 (1994) (quoting *Robinson v. PEMCO Ins. Co*, 71 Wn. App. 746, 752, 862 P.2d 614 (1993)).

Here, Collett admitted that she had allowed Mr. Flores-Lopez to use the car to take her to the hospital; that she left the car with Herrera to transport the children to school and for emergencies; and she never told Mr. Flores-Lopez that he could not use her car. RP 110-14. Here, Mr. Lopez-Flores subjectively and honestly believed he had permission to use the car in an emergency, and further believed that he had no choice but to take the car to save his daughter. This subjective belief against a backdrop where Collett gave permission for her car to be used for emergencies and where she never told Mr. Lopez-Flores he could not use her car does not permit the state to establish by reasonable inference that

Mr. Lopez-Flores took the car knowing he did not have permission. Mr. Lopez-Flores immediately returned the car and Collett, has not told Mr. Flores- Lopez that his emergency.

Even in the light most favorable to the state, the state cannot establish that Mr. Flores-Lopez took the car knowing he did not have permission. The remedy for failure to prove beyond a reasonable doubt an essential element is dismissal with prejudice. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.3d 900 (1998). Accordingly, this Court must dismiss with prejudice the TMVWP charge.

D. CONCLUSION

Mr. Lopez-Flores respectfully requests this Court reverse his conviction for TMVWP and remand for dismissal with prejudice for failure to establish the essential element of knowledge.

DATED this 19<sup>th</sup> day of December 2019.

Respectfully submitted,



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LISE ELLNER, WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcecf@co.pierce.wa.us and Jose Lopez-Flores, 25409 50th Avenue E, Graham, WA 98338 a true copy of the document to which this certificate is affixed on December 19, 2019. Service was made by electronically to the prosecutor and Jose Lopez-Flores by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal flourish.

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Signature

**LAW OFFICES OF LISE ELLNER**

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**Transmittal Information**

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