

**FILED**

**MAR 23 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
BY \_\_\_\_\_

NO. 29406-4-III  
COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**RODNEY SCOTT DUPRIE,**

Defendant/Appellant.

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**REPLY BRIEF**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES

|                          |    |
|--------------------------|----|
| TABLE OF CASES . . . . . | ii |
| ARGUMENT . . . . .       | 1  |

## TABLE OF AUTHORITIES

### CASES

|   |   |
|---|---|
| <i>State v. Jennings</i> , 35 Wn. App. 216, 666 P. 2d 381 (1983)..... | 2 |
| <i>State v. Morgan</i> , 123 Wn. App. 810, 99 P. 3d 411 (2004).....   | 1 |
| <i>State v. Summers</i> , 45 Wn. App. 761, 728 P. 2d 613 (1986).....  | 2 |

## ARGUMENT

The State contends that no instructional error occurred. Alternatively, the State asserts that even if instructional error occurred it does not arise to an error of constitutional magnitude.

The State's position is not supported by the record.

The Amended Information charges the offense of possession of a stolen motor vehicle in the conjunctive. This means that the State was required to prove each and every element of the offense as charged in the Amended Information.

The trial court instructed the jury that the State needed to prove only one alternative for possession of a stolen motor vehicle. The jury instruction was in the disjunctive instead of the conjunctive.

“The fact that the jury instruction's language differs slightly from the charging document does not violate due process...[if] the court requires the State to prove every element of the crime.” *State v. Morgan*, 123 Wn. App. 810, 820, 99 P. 3d 411 (2004).

Under the facts and circumstances of Mr. Duprie's case due process was violated. The Court did not require the State to prove all of the conjunctive elements set forth in the Amended Information. Rather, the jury was allowed to convict Mr. Duprie if it found that a single alternative had been established beyond a reasonable doubt.

In his original brief Mr. Duprie challenged whether or not the State established the “knowledge” element of possession of a stolen motor vehicle. The State concludes that his involvement in the vehicle proves supplies that element.

The vehicle proves do not establish the knowledge element as to the Ford Taurus. The Ford Taurus was stolen weeks earlier.

“...[T]he elements of possession of stolen property are: (1) actual or constructive possession of stolen property, and (2) **actual or constructive knowledge the property is stolen.**” *State v. Jennings*, 35 Wn. App. 216, 219, 666 P. 2d 381 (1983). (Emphasis supplied.)

The State’s evidence did not establish either actual or constructive knowledge by Mr. Duprie that the Ford Taurus had been stolen.

Moreover, as Mr. Duprie argued in his original brief, he did not have actual possession of the Ford Taurus. He was a passenger.

Dominion and control, and hence constructive possession, is determined by the “totality of the situation.”... *State v. Partin*, 88 Wn. 2d 899, 906, 567 P. 2d 1136 (1977). ...[M]ere proximity to stolen merchandise is not enough to establish dominion or control over it. [Citation omitted.]...[M]ere presence is insufficient to establish dominion and control over the premises where stolen property is found. [Citation omitted.]

*State v. Summers*, 45 Wn. App. 761, 763-64, 728 P. 2d 613 (1986).

Mr. Duprie was not in the Ford Taurus when the officer learned that it was a stolen vehicle. Mr. Duprie had been a passenger in that car.

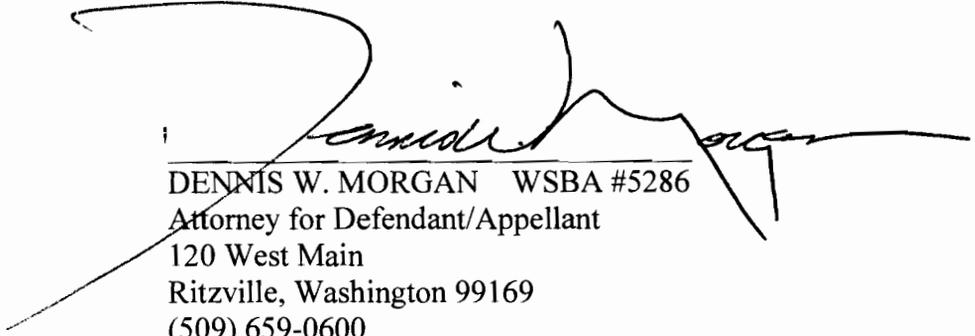
Mr. Duprie was not in the Ford Taurus when the officer learned that it was stolen. Mr. Duprie had been a passenger in that car. The driver had actual control over the car. The keys were in the driver's possession.

The State did not prove either actual or constructive possession by Mr. Duprie.

Mr. Duprie otherwise relies upon the argument contained in his original brief.

DATED this 22<sup>d</sup> day of March, 2011.

Respectfully submitted,



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