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AUG 20, 2012
Court of Appeals
Division III
State of Washington

NO. 30385-3

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICOLE M. LOPEZ ,

Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-iv
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
II. <u>STATEMENT OF THE CASE</u>	1
III. <u>ARGUMENT</u>	7
<u>RESPONSE TO ALLEGATION ONE</u>	7
<u>RESPONSE TO ALLEGATION TWO</u>	20
<u>RESPONSE TO ALLEGATION THREE</u>	24
<u>RESPONSE TO ALLEGATION FOUR</u>	30
<u>RESPONSE TO ALLEGATION FIVE</u>	35
<u>RESPONSE TO ALLEGATION SIX</u>	41
IV. <u>CONCLUSION</u>	42

TABLE OF AUTHORITIES

PAGE

Cases

Cox v. Spangler, 141 Wn.2d 431, 5 P.3d 1265 (2000)..... 16

Moreman v. Butcher, 126 Wn.2d 36, 891 P.2d 725 (1995)..... 16

State v. Bertrand, 165 Wn.App. 393, 267 P.3d 511 (2011)..... 38, 40

State v. Bobic, 94 Wn.App. 702, 972 P.2d 955 (1999),
reversed on other grounds, 140 Wn.2d 250, 996 P.2d 610 (2000) 28

State v. Brockob, 159 Wn.2d 311, 150 P.3d 59 (2006)..... 26

State v. Burden, 104 Wn.App. 507, 17 P.3d 1211 (2001) 9, 18

State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969)..... 29

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 26, 27, 34

State ex rel. Carrol v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971)..... 21

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002)..... 21

State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004)..... 21

State v. Finch, 137 Wn.2d 792, 975 P.2d 967,
cert. denied, 528 U.S. 922 (1999)..... 21

State v. Flores, 164 Wn.2d 1, 186 P.3d 1038, 1046-47 (2008)..... 29

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006) 21

State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985)..... 16

State v. Hudlow, 99 Wn.2d 1, 659 P.2d 514 (1983)..... 16

State v. Hughes, 154 Wn.2d 118, 110 P.3d 192 (2005)..... 26

TABLE OF AUTHORITIES (continued)

	PAGE
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988)	30, 31
<u>State v. Lakotiy</u> , 151 Wn.App. 699, 214 P.3d 181 (2009), review denied, 168 Wn.2d 1026, 228 P.3d 19 (2010)	27
<u>State v. Longuskie</u> , 59 Wn.App. 838, 801 P.2d 1004 (1990)	27
<u>State v. Maupin</u> , 128 Wn.2d 918, 913 P.2d 808 (1996)	15
<u>State v. Myers</u> , 133 Wn.2d 26, 941 P.2d 1102 (1997).....	26
<u>State v. O’Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (Wash. 2003).....	17
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	31
<u>State v. Powell</u> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	21, 24
<u>State v. Rempel</u> , 114 Wn.2d 77, 785 P.2d 1134 (1990)	26
<u>State av. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	26
<u>State v. Smith</u> , 130 Wn.2d 215, 922 P.2d 811 (1996)	30
<u>State v. Stowers</u> , 2 Wn.App. 868, 741 P.2d 115 (1970).....	27
<u>State v. Straka</u> , 116 Wn.2d 859, 810 P.2d 888 (1991).....	12
<u>State v. Summers</u> , 107 Wn.App. 373, 28 P.3d 780, 43 P.3d 526 (2001)	29
<u>State v. Tharp</u> , 96 Wn.2d 591, 637 P.2d 961 (1981)	16
<u>State v. Williams</u> , 136 Wn.App. 486, 150 P.3d 111 (2007)	31
<u>State v. Withers</u> , 8 Wn.App. 123, 504 P.2d 1151 (1972)	24
<u>State v. Wittenbarger</u> , 124 Wn.2d 467, 880 P.2d 517 (1994).....	8

TABLE OF AUTHORITIES (continued)

	PAGE
Federal Cases	
<u>Arizona v. Youngblood</u> , 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988).....	8-9
<u>California v. Trombetta</u> , 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984).....	8
<u>Taylor v. Illinois</u> , 484 U.S. 400, 108 S.Ct 646, 98 L.Ed2d 798 (1988).....	16
 Rules and Statutes	
ER 401	21
RCW 9A.46.068(1)	24, 26
RCW 46.20.285	41, 42
 Additional Authorities	
U.S. Const. amend VI; Wash.Const. art I, §22	15

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

- 1) The State's failure to preserve evidence violated Appellant's constitutional right to due process.
- 2) The trial court abused its discretion when it excluded certain evidence pertaining to Appellant's defense.
- 3) There was insufficient evidence presented that the vehicle possessed by Appellant was stolen.
- 4) The State failed to prove each alternative means presented to the jury.
- 5) The trial court did not make sufficient findings that Appellant had the present or future ability to pay her legal financial obligations.
- 6) The trial court erred when it found Appellant used the stolen car and therefore revoked her driver's license.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

- 1) There was no failure to preserve evidence; appellant had access to the vehicle in question.
- 2) The trial court did not abuse its discretion when it excluded evidence proffered by Appellant.
- 3) The State presented sufficient evidence to support the charge as filed in the information.
- 4) The State presented evidence supporting each alternative presented to the jury.
- 5) The trial court was apprised of sufficient information to address the appellant's ability to pay her legal financial obligations.
- 6) The State concedes this allegation without conceding the future applicability of this sanction to this statute.

II. STATEMENT OF THE CASE

Officer Changala was investigating a separate criminal act that had nothing to do with appellant Lopez. He went an address on this

nonrelated search for a stolen car and found a vehicle that was partially stripped and had one of the Vehicle Identification Numbers. (VIN's) on the dash board, removed the license plates had also been removed. (RP 154-55)

The VIN that was still found on that green vehicle, a 1998 Dodge Durango, on the door post and in the glove box was 1V4HS28ZXWF137932. The officer checked these numbers to determine if the vehicle was stolen and to determine if he could locate the owner. (RP 156) The VIN on this green Durango returned to a black and red Durango and listed the appellant as the registered owner of that vehicle at a specific address, 470 Lucy Lane. The officer did not seize the green Durango because it was not reported stolen and he had an enormous amount of other stolen items to deal with. (RP 157)

He later contacted appellant, at the Lucy Lane address, and she told him that she owned the vehicle but it was now a black and red and it is located at her boyfriend's home with a flat tire. She told him that she personally helped her boyfriend paint the vehicle. Officer Changala told Lopez that he has found the green vehicle and told her that the plates and the one VIN was missing. Appellant told the officer that she does not live at the Lucy Lane address but at the address on 180 East McDonald where

the now black and red Durango is located. This is the home of D. J. Zyph her boyfriend. (159-161)

Officer Changala went to that home and observes the vehicle through the lattice fence. When he asked the person at the home, Mr. Zyph's mother, for permission to look at the Durango she told him that he had to get a search warrant to look at the vehicle. Changala sat in his car and applied for and received a search warrant for that vehicle.

The Durango is in fact a black vehicle with a red stripe. But there are two sets of VIN's on the vehicle. The one that is observable through the window was the same as the two that were still on the green Durango the officer had found previously. (RP 163-64) Officer Changala specifically looked to see if he could determine if this black and red Durango had the same VIN plates. The VIN on the dash was in the proper place but it had marks on it and it appeared to have been tampered with and glued into that location. The VIN on that plate on the dash of this black and red Durango had the same number as was found on the abandon green Durango. The VIN plate on the dash was the same type of plate and from the same location as the plate missing from the green Durango which was listed as being owned by Lopez. The officer was able to observe the VIN plates on the door post when this vehicle was opened. The number on the door post did not match that which was on the dash board. That

VIN was 1B4HS28N31F618028. (RP 164) When the VIN from the door post of the black and red Durango was run it returned to a 2001 Dodge Durango owned by Mr. Munoz that had been reported stolen. (RP 164-66) The officer testified that he looked at the interior of the vehicle and that the interior of the vehicle was grey. He also testified that the interior of the green Durango was brown. The officer testified that when he observed the interior of the green Durango there was no lighting and that he made the observation of the interior using a flashlight. (RP 167-9)

Officer Changala also testified that based on his twenty-seven years of experience and having recovered hundreds of stolen vehicles and observed the VIN stickers on the door post area of those cars as well as the green Durango and the black and red Durango that the VIN's located on the door posts of both of those vehicle appeared to be the original VIN's and that they did not appear to have been tampered with. (RP 189-94) The Officer also testified that the VIN plate on the black and red Durango was "glued onto the dash" and that this plate is put on with a "specific rivets that are used only for putting on VIN plates on these vehicles" and that those rivets were not holding the plate on in the black and red Durango. (RP 196-8)

Subsequently the black and red Durango, the one that had Mr. Munoz's VIN plates on it, that had been seized was eventually

inadvertently released. It was picked up by a friend of the appellant, Ms. Hawk. Later the green Durango was found in a canal and that too was released to this same friend of the appellant. She was able to retrieve both vehicles with the one title because they both had information on them that came back to her; Ms. Lopez had transferred the title to Hawk. (RP 44) Ms Hawk told Officer Changala that Mr. Zyph, Lopez's boyfriend had given her money to get the Durango out of the tow lot. (Hearings RP 47, 66) Hawk denied this but it was confirmed by the written report done by her brother and officer for the Yakama Nation Tribal Police. (Hearings RP 46-48, 66) When this friend, Mr. Hawk, was contacted by officers she claimed that she sold that the Durango to another person and denied ever picking up the green Durango. (RP 44- 47, 58-72)

By the time the case went to trial a "black and red" Durango was located. At that time the defense requested that they be allowed to run a test on the vehicle that would determine the true VIN of that specific vehicle. (RP 5, 33-34, 268-69) When that test was run it turned out that this was in fact the "green" Durango that was in the field stripped of the one VIN, license plates and several parts. Further tests and observations were made by State witnesses who also took paint chips.

The State believed that this Durango was in fact the original Durango that was purchased by Lopez. However the theory that was put

forward in hearings was that the appellant had taken this Durango and changed it to make it appear like the one that was stolen from Mr. Munoz so that it could be used in trial to support her theory that she had never had the Munoz Durango but had in fact always had this Durango, the green one and had painted it the same color, coincidentally, as the Munoz Durango. And this had been coincidentally done so within eight days of the Munoz Durango having been stolen. (RP 102-113) Ms Seward, a State's witness would have testified the VIN on the dash board of the repainted green Durango that had been "retrieved" by Lopez had in fact also been tampered with. It was the original VIN and tag but that had been tampered with. (RP 102) Mr. Munoz the owner of the stolen Black Durango was taken by Officer Changala to see the Durango that had been returned to impound, Munoz stated that that vehicle was not his. (RP 90-3)

The trial court ruled that there would be nothing that would come in after that date of the offense. The judge stated on the record that the test showing the VIN on the vehicle that was at that time back in the possession of the Police Department did not "prove possession" This ruling excluded any test done by both parties. (RP 112-13, 268-9)

THE COURT: Well, I'm a little mixed up. I don't think there's any -- the diagnostic doesn't address possession as of now or a month ago. It simply identifies

what the VIN number is for that vehicle; is that correct?

MR. GUZMAN: That's all.

THE COURT: It doesn't describe possession.

RP 64

...

THE COURT: Let me ask you this: The diagnostic has been run. What's the function of it, Mr. Krom? Does it reveal anything that's different? It seems to me it's just one way -- it's another VIN number location in the vehicle. Is it evidence of anything?

MR. KROM: Yeah. As I understand it, it's evidence of the identity of the vehicle.

THE COURT: Is it different from the other VIN numbers?

MR. KROM: It's different in that, again, as I understand it, once this information is entered into the computer, it cannot be changed. So if they're saying that other VIN location numbers may have been changed, in other words -- I'm trying to follow the argument. Again, I believe it's changed.

RP 74-5

...

THE COURT: The diagnostic test generates only a VIN number.

MR. KROM: It shows that she's still in possession.

THE COURT: No. The diagnostic doesn't show possession.

(RP 101)

The State shall refer additional sections of the record as needed.

III. ARGUMENT.

RESPONSE TO ALLEGATION ONE.

Appellant argues that the trial court was erred when it did not dismiss this case after the motion made by appellant's first attorney addressed the fact that the black Durango has been inadvertently released.

The problem with this allegation is a vehicle, purported to be this very same vehicle was later “found” and returned to the Yakima Police Department. This occurred prior to the start of the actual trial. Therefore Ms. Lopez can not demonstrate that there was any harm to her based on the claim the evidence was “lost or destroyed” as required. The vehicle she claimed she had possessed exclusively and throughout the initial investigation and all the work up to the trial was the actual Durango that was returned to impound.

Under both the Washington Constitution and the United States Constitution, due process requires that the State preserve material exculpatory evidence. State v. Wittenbarger, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). For evidence to be materially exculpatory, two requirements must be met: the evidence's exculpatory value must have been apparent before it was destroyed, and the nature of the evidence leaves the defendant unable to obtain comparable evidence by other reasonable means. Wittenbarger, 124 Wn.2d at 475; California v. Trombetta, 467 U.S. 479, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984). If this test is not met and the evidence is only "potentially useful" to the defense, failure to preserve the evidence does not violate due process unless the defendant can show the State acted in bad faith. Wittenbarger, 124 Wn.2d at 477; Arizona v. Youngblood, 488 U.S. 51, 58, 109 S.Ct. 333, 102

L.Ed.2d 281 (1988). We review de novo a trial court's determination on whether missing evidence is materially exculpatory. State v. Burden, 104 Wn.App. 507, 512, 17 P.3d 1211 (2001).

Lopez argues the Durango that was released was materially exculpatory because it could have confirmed her version of the events and rebutted the testimony of Officer Changala. The problem with this allegation is it ignores that fact that throughout this case Lopez has consistently claimed that the vehicle that was seized by Officer Changala at Mr. Zyph's home (also the home of Lopez) was the Durango that she purchased at EZ Buy Auto (EZ) was also the vehicle that was inadvertently released, then later found by appellant and tested. The result of that test was to confirm that this vehicle was in fact the green Durango purchased legally by Lopez from EZ. Once again the theory/defense was that this was, and this was confirmed by the computer check, the same vehicle throughout and the officer was in error when he looked at the VIN plates on the "other" black and red Durango. That the officer's shoddy actions in not taking any photographs or seizing the green Durango was the cause of all of this confusion which resulted in the criminal charge against Lopez.

The allegation that the State failed to preserve the stolen vehicle Lopez was charged with possessing is not supported by the record. While

there is no dispute that the vehicle was released by the Yakima Police Department without consultation with the Prosecutors Office or the investigative officer, the fact remains that the basis for the crime arose from the observations and investigation done by Officer Changala who testified and was cross-examined extensively.

Further, according to the defense theory of the case the automobile that was in fact released was the one that was returned to the Sheriffs Office and which was subsequently tested and found to have the same VIN number as the vehicle that appellant purchased from EZ. She now argues in her brief that the vehicle that was released in violation of standard policy was not the same vehicle that was later returned. However that is not the theory that was set forth by trial counsel during argument in the trial court.

The theory at trial was that Lopez needed to be able to introduce the VIN evidence which was gathered at Mike Olson Dodge from the check of the computer in the, now, black and red Durango. This black and red Durango, so the theory went, was one in the same as the one that was seized and later released. They needed to get in this evidence to show bolster the claim that Officer Changala was just a lying sloppy police officer.

THE COURT: Didn't she -- didn't Ms. Hawk pick it up

from the tow yard?

MS. GRIJALVA: And indicated that she sold it, that it was not released to Mr. Zyph. And that's what her statement was to us, and we've been looking for it just as dearly as the State has been because --

THE COURT: But it -- well, okay. Go ahead, continue.

MS. GRIJALVA: Because that evidence, Judge, would be able to prove whether this vehicle was repainted, whether it was something that we can show that **Ms. Lopez did not have knowledge that a vehicle was stolen because it wasn't stolen**, and we can't prove that because we have nothing except for one deputy's testimony. (Emphasis mine.)

Hearings RP 74-75

The Durango was miraculously found again and this time it was the green Durango that was in fact the one that Lopez had purchased, with all of the proper VIN's as well as new black and red paint job. This was the paint that the State had analyzed. Appellant argued that she needed the test to show that all the time that this was going on the was just this one vehicle in effect arguing that there was never a time when the Durango of Mr. Munoz was in the possession of Ms Lopez, Mr. Zyph or for that matter anyone, to include the Yakima Police Department;

MS. Grijalva:...She's been accused of having a stolen motor vehicle that the Sheriff's Department had custody and control of for over a year, released, and then we had no way to prove our defense until it was tracked down and found. We have found that vehicle and are ready to proceed forward and show that this particular vehicle that she found was not stolen. That's the whole -- that's our whole defense, (Hearings RP 92)

MR. KROM:... We had a conversation before Mr. Guzman went on vacation. As I understood his position at that point in time, he was steadfastly maintaining that the vehicle that was in the possession of YSO, which was the vehicle we had tested yesterday, was not the vehicle that my client purchased from EZ Buy Auto.

My understanding is he said that the vehicle she had initially purchased from EZ Buy was somehow now in the possession of somebody else. I think he said Mike Hanson. And that the VIN numbers off that vehicle had somehow been placed on the stolen vehicle, and that stolen vehicle was now in the possession of the YSO.

That theory is all wrong. It's not correct. It's not factual in any of its components. We wanted to establish that the vehicle that's currently in possession of the YSO is the vehicle that my client purchased legally from EZ Buy Auto. **My understanding, at least, that's the only vehicle that she's ever knowingly possessed.**

When she was asked by the authorities to bring the vehicle back, she brought it back. The vehicle she brought back was this vehicle, which is in the possession of YSO, which is the vehicle that she purchased legally, and I think we're entitled to show all of that.

(RP 66)

Ms. Lopez did not at the trial level nor here on appeal demonstrate that this alleged "loss" met any of the tests. State v. Straka, 116 Wn.2d 859, 884, 810 P.2d 888 (1991);

Looking to the recent Court decisions then, in California v. Trombetta, 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984), the Court held that the Fourth Amendment's due process clause does not require law enforcement agencies to preserve breath samples in order to introduce breath test results at trial. The Court observed that in destroying defendant's breath samples after testing,

the officers acted "in good faith and in accord with their normal practice." Trombetta, at 488 (quoting Killian v. United States, 368 U.S. 231, 242, 7 L. Ed. 2d 256, 82 S. Ct. 302, reh'g denied, 368 U.S. 979, 7 L. Ed. 2d 441, 82 S. Ct. 476 (1961)). The Court then stated:

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, see United States v. Agurs, 427 U.S. [97,] 109-110, [49 L. Ed. 2d 342, 96 S. Ct. 2392 (1976)], evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

(Footnote omitted.) Trombetta, at 488-89.

The fact is that at the time this Durango was released it was not “exculpatory” in the eyes of the police or the prosecution. It was very inculpatory in that the State based its case on the fact that this was the black Durango belonging to the victim, Mr. Munoz. The State’s position was that this Durango, Mr. Munoz’s Durango, was later given a cursory paint job, the red stripe, in order to conceal the true identity of the vehicle from the true owner. This is supported by the testimony of this twenty-seven year veteran officer who had seized hundreds of stolen cars. He testified that the VIN plate in the window was obviously glued on and it did not match the sticker on the door post.

These are all indications that the evidence purported to have been lost was inculpatory not exculpatory as mandated by Trombetta, supra. Lopez must meet both parts of the test set forth in Trombetta she can not just state that it was “exculpatory” it had to be “apparent before the evidence was destroyed.” Trombetta, supra.

This also, once again, brings forth the problem with this allegation, according to the defense theory it was not destroyed. It was definitely out of the care custody and control of the Yakima Police Department but during that time it was self-admittedly at least initially in the possession of a friend of Ms. Lopez, Ms. Samantha Hawk. (Hearing RP 58-72) The evidence presented at the Motion to Dismiss also showed that the green Durango, the one everyone agrees Ms. Lopez legally purchased, was found in November of 2009. Officer Changala testified that another officer had found the green Durango in the “Marion Drain” and that the VIN matched the VIN of the green Durango. This was released to Ms. Hawk also because the release was based on the VIN in the vehicle which was the same as on the registration for the black Durango. So both Durango’s were released to Ms. Hawk who was obviously a close friend of Appellant. (Hearing RP 44-46) Ms Hawk denied she had ever picked up the green Durango. (Hearings RP 58-9)

Ms. Hawk claims that she was given the black Durango and later sold it to “a Mexican guy” for \$5,000.00 she claimed she did not know his name or could not recall his name. Her written statement indicated that D.J. had given her half of the money to get the Durango out of impound. On direct and cross examination she recanted that and stated that she had only said that because Officer Changala had pressured or threatened her. (Hearing RP 62, 66-68)

Appellant has not challenged the Findings of Fact and Conclusions of Law which specifically indicate that the Durango was released to Samantha Fox who then turned this vehicle over to Donald James Zyph and at the time this transfer took place Lopez lived with Mr. Zyph. Therefore Lopez had access to the Durango after its inadvertent release and there was no “spoliation” of that evidence. The court further found that because Lopez had access to the Durango after the release that release did not affect the defendant’s right to a fair trial. (CP 59-60)

Lopez argues that the trial court violated her right to present a complete defense by excluding certain evidence. The constitutional right to compulsory process is synonymous with a defendant's right to present a defense. U.S. Const. amend VI; Wash. Const. art. I, § 22; State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). But the right to

present testimony of witnesses is not absolute, and a defendant has no right to offer testimony inadmissible under applicable evidence rules. Taylor v. Illinois, 484 U.S. 400, 410, 108 S. Ct 646, 98 L. Ed. 2d 798 (1988); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). A trial court has broad discretion in ruling on evidentiary matters; this court will overturn its decision only for a manifest abuse of that discretion. Cox v. Spangler, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). An aggrieved party must clearly establish manifestly unreasonable or untenable grounds for the trial court's decision before we will find an abuse of discretion. Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995). If this court finds error, it will reverse only if the defendant can show within reasonable probabilities that the trial court's ruling materially affected the trial outcome and, thus, was prejudicial. State v. Tharp, 96 Wn.2d 591, 599, 637 P.2d 961 (1981). This court will presume that an error in excluding evidence that infringes on a defendant's constitutional right is prejudicial. Id. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). Accordingly, such error is subject to a harmless error analysis and we must reverse unless we are satisfied beyond a reasonable doubt the jury would have convicted the defendant absent the error. There has been no such showing in this case.

The only finding that was objected to at the trial court was number seven and the court altered that to meet that objection. The conclusions were objected to “the way they are worded.” These have not been challenged here. Those finding which where not and have not been challenged are therefor verities for the purpose of this appeal. Further those challenged at the trial court are binding if supported by the record which clearly this are. (Hearings RP 81-83) (CP 59-60) State v. O’Neill, 148 Wn.2d 564, 62 P.3d 489 (Wash. 2003):

The findings of fact entered following the suppression hearing are unchallenged. The rule in Washington is that challenged findings entered after a suppression hearing that are supported by substantial evidence are binding, and, where the findings are unchallenged, they are verities on appeal. See, e.g., State v. Hill, 123 Wash.2d 641, 647, 870 P.2d 313 (1994); State v. Horrace, 144 Wash.2d 386, 391-92, 28 P.3d 753 (2001); State v. Ross, 141 Wash.2d 304, 309, 4 P.3d 130 (2000); State v. Kinzy, 141 Wash.2d 373, 382 n. 19, 5 P.3d 668 (2000), cert. denied, 531 U.S. 1104, 121 S.Ct. 843, 148 L.Ed.2d 723 (2001); State v. Finch, 137 Wash.2d 792, 856, 975 P.2d 967 (1999); State v. Mendez, 137 Wash.2d 208, 214, 970 P.2d 722 (1999); State v. Armenta, 134 Wash.2d 1, 9, 948 P.2d 1280 (1997); State v. Broadway, 133 Wash.2d 118, 130, 942 P.2d 363 (1997). Decisions to the contrary are overruled insofar as they are inconsistent. E.g., State v. Thorn, 129 Wash.2d 347, 351, 917 P.2d 108 (1996); State v. Crane, 105 Wash.App. 301, 306, 19 P.3d 1100 (2001); State v. Knox, 86 Wash.App. 831, 838, 939 P.2d 710 (1997).

The proof that this evidence was inculpatory not exculpatory is supported as well by the testimony of the WSP officer who testified that the green Durango had not had the VIN's tampered with and yet the VIN of that vehicle was later found on the black and red Durango seized by Officer Changala

State v. Burden, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001).

Evidence is materially exculpatory only if it meets a two-fold test: (1) its exculpatory value must have been apparent before the evidence was destroyed, and (2) the nature of the evidence leaves the defendant unable to obtain comparable evidence by other reasonably available means. Wittenbarger, 124 Wn.2d at 475 (citing Trombetta, 467 U.S. at 489). If the evidence does not meet this test and is only "potentially useful" to the defense, failure to preserve the evidence does not constitute a denial of due process unless the criminal defendant can show bad faith on the part of the State. Wittenbarger, 124 Wn.2d at 477 (citing Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). (Emphasis mine.)

There is further support for the findings and conclusion elicited at a later hearing. On November 17, 2010 there was a hearing held to address several issues. One of those issues was that Lopez had found the missing green Durango. The one that she stated had legally purchased, that she and Mr. Zyph had painted black and red, the one that Lopez alleged was seized by Officer Changala and the one that was inadvertently released by Yakima Police Department. The fact that it was found and that it was to be brought forth for inspection is interwoven with other

matters involving trail counsel for Ms. Lopez. This once again demonstrates that this is not the theory now before this court that the Durango was lost and never recovered and therefore this appellant was not allowed to use it in this trial.

The Durango appellant now claims was lost or destroyed by the State was released Ms. Fox, it was in the possession of Mr. Zyph, appellant's boyfriend, it was then it was found by the defendant and was in the possession of the defendant through some period or periods of time after the inadvertent release. So to now claim that it was not available is simply not supported by the record. This vehicle left that Sheriffs Office lot sometime around March of 2010 the other Durango was found in the Marion Drain around November of 2009 and released to Ms. Fox thereafter. So the appellant had access to the green Durango from the time it was released to her friend Ms. Fox in 2009 until it was "found" and returned in November of 2010. It was this green Durango that was in fact checked by the computer test that appellant wanted to be introduced. Obviously it had been painted and altered in the time between Officer Changala finding it in the field missing its license plates and one VIN plate; the time it was found in the Marion Drain with at least enough VIN plates to make it traceable to Ms. Fox and the time it was "found" painted

black and red and ready to be introduced at trial. (Hearing RP 40, 45-46, 49, 89-91, 92-93, 101-3, 116-124)

RESPONSE TO ALLEGATION TWO.

The trial court made the following ruling with regard to the admission of information obtained from various tests done to the green Durango that had been repainted and recovered prior to the trial:

THE COURT: Part of my confusion has been things like Schneck (*This is the WSP laboratory forensic scientists name.*)

was going to come in and testify about the paint chips. That was something that occurred recently. I don't think that's relevant. I don't think what happened after January 16th to the subject vehicle that's listed in the information is relevant.

To that extent, at this juncture, events that occurred after January 16th with regard to the black and red Durango are not relevant and wouldn't come in. Does that make it clear? The diagnostic is not relevant either.

MR. KROM: I understand what the court is saying.

THE COURT: I think I understand clearly, more clearly now, what is being argued by both you, Mr. Krom, and you, Mr. Guzman. I don't think it's relevant.

(RP 112-13)

...

THE COURT: Well, I'm not going to change my ruling. I continue to believe that the events that occurred after January 16th with regard to the Durango and their testing are not relevant to establish the identity of the Durango as it existed on the 16th of January.

There may have been things that occurred to each of those vehicles that may have been an alteration to their appearance to make one or the other consistent with the numbering. In any event, I think it's inappropriate to allow that testimony.

(RP 268-9)

This court will review a trial court's evidentiary rulings for an abuse of discretion. State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). A court abuses its discretion when its evidentiary ruling is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State v. Downing, 151 Wn.2d 265, 272, 87 P.3d 1169 (2004) (quoting State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). This court may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds the record supports. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." State v. Gregory, 158 Wn.2d 759, 835, 147 P.3d 1201 (2006) (quoting ER 401). The threshold to admit relevant evidence is low and even minimally relevant evidence is admissible. Gregory, 158 Wn.2d at 835 (citing State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002)).

The problem with the argument is that the vehicle that they tested and all parties agree the test result indicated it was the vehicle purchased from EZ was out of the possession of the State and from what is in the

record, in the possession of Ms. Fox or Mr. Zyph and too which the appellant had access, for up to a year. (RP 60, 93, 100)

What the State was required to prove and what Ms. Lopez was to defend against was the condition of the Durango's at the time of the offense not their condition months or years later.

This vehicle, the black and red Durango, the one with two different VIN numbers on it one from the green Durango and the others from the Munoz Durango, left that Sheriff's Office lot sometime around March of 2010, the other Durango, the green one, was found in the Marion Drain around November of 2009 and released to Ms. Fox thereafter. Appellant had access to the green Durango from the time it was released to her friend, Ms. Fox, in 2009 until it was "found" and returned in November of 2010. It was this green Durango that was in fact checked by the computer test that appellant wanted to be introduced. Obviously it had been painted and altered in the time between Officer Changala finding it in the field missing its license plates and one VIN plate; the time it was found in the Marion Drain with at least enough VIN plates to make it traceable to Ms. Fox and the time it was "found" painted black and red and ready to be introduced at trial. (Hearing RP 40, 45-46, 49, 89-91, 92-93, 101-3, 116-124)

As the court pointed out the condition of any of the vehicles literally years later, was of no consequence to the charge that on January 16, 2009 Ms. Lopez was in possession of Mr. Munoz's vehicle.

The court was apprised of the observations of the States witnesses by way of what can only be characterized as an offer of proof. The State described to the court the condition of the Durango that had finally been taken to the Washington State Patrol in 2011 for inspection was in fact the green Durango. The State's witnesses where prepared to testify that this vehicle apparently the one that was legally purchased by Lopez had now in fact been painted black and red and that this paint job was an attempt to cover up the green and also to make the green Durango now match the story of Lopez that she all along had not been in possession of Mr. Munoz's Durango. This offer of proof also indicated that it appeared that the VIN on the dash board of the Durango that was inspected in 2011 had been tampered with and placed on the dash board with glue. The State had paint chip samples taken to demonstrate that the paint job on this car was not original. (RP 102-113)

Earlier Officer Changala had testified that the paint job on the black and red Durango that he had seize appeared to be a factory paint job with regard to the black paint but the red stripe appeared to have been added and was not of a factory nature. (Hearings RP 38)

There has been no showing that the court abused its discretion when it refused to allow the test of the green Durango that occurred in 2010 as well as the tests done by the State. This was a discretionary ruling and it is supported by the facts. This court should not set a discretionary act of a trial court on appeal unless the appellant has met the tests set out above. This court may uphold a trial court's evidentiary ruling on the grounds the trial court used or on other proper grounds the record supports. State v. Powell, 126 Wn.2d 244, 259, 893 P.2d 615 (1995).

RESPONSE TO ALLEGATION THREE.

State v. Withers, 8 Wn. App. 123, 128-9, 504 P.2d 1151 (1972).

Mere possession of stolen property is not sufficient, standing alone, to create a presumption of larceny. Possession is, however, a circumstance which may be considered with all other facts as bearing upon the guilt or innocence of the accused. State v. Hatch, 4 Wn. App. 691, 483 P.2d 864 (1971); State v. Tollett, 71 Wn.2d 806, 431 P.2d 168 (1967). And it is well established that when a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his guilt will support a conviction. State v. Portee, 25 Wn.2d 246, 170 P.2d 326 (1946); State v. Douglas, 71 Wn.2d 303, 428 P.2d 535 (1967); State v. Hatch, supra.

RCW 9A.56.068(1) provides, "A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle." A

rational jury could infer from the facts that Lopez knew the vehicle was stolen.

Lopez by her own statement helped to alter the green Durango, she says from green to black and red, the Munoz Durango was stolen on October 8th and Lopez changed the title on the green Durango to reflect the new color of black and red on October 16, 2008, she admitted that she was in possession of that vehicle, and that the title to that vehicle was in her name, six days earlier Officer Changala observed the green Durango with the proper VIN sitting partially stripped in a field in the midst of numerous other stolen items. The VIN that was on the dash board of the Durango which was in the self admitted possession of Lopez had been tampered with and was glued to the dash a condition that did not exist at the time the green Durango was inspected by the State, the officer with twenty-seven years of experience seizing hundreds of stolen vehicles testified that the other VIN's on that vehicle did not appear to have been tampered with and they reflected a VIN belonging to the black Durango stolen from Mr. Munoz. Mr. Munoz say his vehicle in the possession of Lopez and testified that there were numerous physical traits that he was able to observe that allowed him to be certain that the Durango was his. The inspector from the Washington State Patrol who had been the

inspector of the green Durango also testified that it was nearly impossible to tamper with the sticker VIN's on a vehicle.

Lopez argues that there was insufficient evidence to show that the car found by the police was the car stolen from Mr. Munoz. In determining the sufficiency of the evidence, this court's standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006) (citing State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005)); State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The facts set forth above clearly support the State's allegation. The circumstantial evidence presented is considered to be as reliable as direct evidence. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Credibility determinations are for the fact finder and are not reviewable on appeal. Brockob, 159 Wn.2d at 336 (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). RCW 9A.56.068(1) provides, "A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen

motor vehicle." A rational jury could infer from the facts that Lopez knew the vehicle was stolen.

In State v. Stowers, 2 Wn.App. 868, 872, 741 P.2d 115 (1970) the court found that evidence of the "color, year, model, date stolen and returned, punched ignition, etc., " was sufficient to establish that a car was stolen. Knowledge that the car was stolen can be actual or constructive. State v. Lakotiy, 151 Wn.App. 699, 714, 214 P.3d 181 (2009), review denied, 168 Wn.2d 1026, 228 P.3d 19 (2010). Here, Lopez did not take the stand. She only presented the testimony of the owner of EZ Automobile Sales. Therefore the only information presented regarding the VIN numbers and the possession of these two vehicles was through the States witnesses. Lopez places great emphasis on the fact that Officer Changala stated the interior of the green Durango that he found with VIN plates that came back registered to Lopez, had a brown interior. Lopez says this one statement is determinative; she then discounts all of the other testimony of this officer of twenty-seven years. Once again, credibility determinations are for the jury. Camarillo, 115 Wn.2d at 71. Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990).

At the end of the States case Lopez, moved to dismiss and challenged the sufficiency of the evidence. The trial court ruled as follows;

THE COURT: All right. Well, again, the standard was set forth. Taking the evidence that's been presented in a light most favorable to the state, I have to find that there is a sufficient amount of evidence that's been presented that it should go to the jury.

Deputy Changala recovered a vehicle. It comes back, following a VIN check, as stolen and previously owned or owned by Mr. Munoz. It was in the possession of Ms. Lopez. She admitted ownership of that vehicle, identified or described where it would be located, where she lived. It was, in fact, located at the place where she identified as her residence.

There are certain inconsistencies perhaps, but those are factual issues that should go to the jury and allow them to make the decision. There is sufficient information, I believe, to establish knowledge and possession. With that, the motion is denied.
(RP 259-60)

The court in State v. Bobic, 94 Wn. App. 702, 715, 972 P.2d 955 (1999), reversed on other grounds, 140 Wn.2d 250, 996 P.2d 610 (2000) upheld the conviction for possession of a stolen property, an automobile, even though the defendant was only in possession of parts of an the vehicle stating:

Stepchuk challenges the sufficiency of the evidence supporting his five convictions for possession of stolen property. He argues that evidence that he possessed a stolen car part is insufficient to support a conviction for possession of an entire stolen vehicle. He also contends that evidence proving his involvement in a conspiracy is insufficient to show that he is guilty of possession as an accomplice.

Stepchuk's contentions are correct. But viewing the evidence and reasonable inferences therefrom in the light most favorable to the State, evidence establishing that he possessed stolen vehicle parts, considered with evidence of an ongoing conspiracy, constitutes circumstantial evidence sufficient to support the jury's verdict. Accordingly, we affirm all five of the possession convictions.

"A person is guilty of possession of a stolen vehicle if he or she . . . [possesses] a stolen motor vehicle." RCW 9A.56.068

Possession may be actual, that is, in the physical custody of the person charged with possession, or constructive, meaning within the defendant's dominion and control. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Dominion and control need not be exclusive and is determined by considering the totality of the circumstances. State v. Summers, 107 Wn.App. 373, 384, 28 P.3d 780, 43 P.3d 526 (2001).

The evidence that was presented at trial was overwhelming. State v. Flores, 164 Wn.2d 1, 186 P.3d 1038, 1046-47 (2008):

In evaluating whether the error is harmless, this court applies the "overwhelming untainted evidence" test. State v. Davis, 154 Wash.2d 291, 305, 111 P.3d 844 (2005) (quoting State v. Smith, 148 Wash.2d 122, 139, 59 P.3d 74 (2002)), *aff'd on other grounds by* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). Under that test, when the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt, the error is harmless. *Id.* 2 Evidence that is merely cumulative of overwhelming untainted evidence is harmless. *State v.*

Nist, 77 Wash.2d 227, 236, 461 P.2d 322 (1969); *see also* Dennis J. Sweeney, *An Analysis of Harmless Error in Washington: A Principled Process*, 31 GONZ. L.REV. 277, 319 (1995) ("Regardless of the announced standard of review for harmless error, Washington has a long history of ruling error harmless if the evidence admitted or excluded was merely cumulative.").

See also , State v. Smith, 130 Wn.2d 215, 922 P.2d 811 (1996);

But based on this record, we are persuaded such error was harmless. An error is harmless if we are convinced beyond a reasonable doubt that any reasonable jury would have convicted Smith, despite the error. State v. Aumick, 126 Wn.2d 422, 430, 894 P.2d 1325 (1995); State v. Rice, 120 Wn.2d 549, 569, 844 P.2d 416 (1993).

RESPONSE TO ALLEGATION FOUR.

Jury instruction '13' sets forth the "to convict" instruction. In that instruction the jury was told in subsection (1);

That on or about January 16, 2009, the defendant knowingly received, retained, possessed, concealed or disposed of a stolen motor vehicle, a 2001 Black and Red Dodge Durango, Washington License No. 153 VEB, VIN #B14 HS28N37F618028

The evidence presented by the State clearly supports each and every part of this instruction. State v. Kitchen, 110 Wn.2d 403, 410-11, 756 P.2d 105 (1988);

In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means. State v.

Whitney, 108 Wash.2d 506, 739 P.2d 1150 (1987); State v. Franco, supra; and State v. Arndt, 87 Wash.2d 374, 553 P.2d 1328 (1976). In reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt. Franco, 96 Wash.2d at 823, 639 P.2d 1320, citing State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980).

Alternative means statutes identify a single crime and provide more than one means of committing that crime. State v. Williams, 136 Wn.App. 486, 497, 150 P.3d 111 (2007). A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. Williams, 136 Wn.App. at 496 (citing State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). Generally, "[w]here a single offense may be committed by alternative means . . . , unanimity is required as to guilt for the single crime charged but not as to the means by which the crime was committed, so long as substantial evidence supports each alternative means." Williams, 136 Wn.App. at 497-98 (citing State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988)).

The State was required to produce substantial evidence that Lopez ***“knowingly received, retained, possessed, concealed or disposed”*** of the Durango.

Received, retained, possessed - The facts elicited at trial were that on the date of the search Officer Changala found the green Durango abandon in a field, partially stripped. The license plates as well as one VIN plate, the plate on the dash board were missing. When the officer ran this VIN it came back to a vehicle that was owned and was being operated by the appellant. Further, this vehicle was a Durango but it was now black and red not the green the officer had seen. The officer then located the now black and red Durango and confirmed that it had the license plates and one VIN plate from the green Durango, but it also had two VIN plates from the stolen Durango of Mr. Munoz.

When contacted in person Lopez she admitted to the officer that she was in fact the owner of the Durango that was now painted red and black and that this vehicle was located at the home she shared with her boyfriend.

This satisfies the first three sections of the charging language, Lopez obviously received the Durango, she admitted possession and claimed title to the vehicle that was determined to be stolen, she had it for a period of time, at least from the time Mr. Munoz saw her with it until the time it was seized and during that time she possessed it by her own statements.

Officer Changala testified with regard to the Munoz Durango having only one VIN changed the one on the dash board which is the most visible one.

For Lopez to have this vehicle and be able to put her VIN and her license plates, paint and drive this Durango she obviously had to have “received, retained and possessed it.” She clearly “knowingly received the Durango, she obviously retained that vehicle and by her own admissions she was in possession of that vehicle.

Concealment - Next Lopez stated that she and her boyfriend had painted that vehicle and made admissions that she in fact used the Durango but it was disabled at the time of the officer’s initial inquiry. The officer then went to the location of the vehicle and was able to eventually seize that Durango. When the doors were opened he was able to observe that the VIN number on the dash board did not match that on the door post. This Durango was seized from the home that Lopez shared with her boyfriend Mr. Zyph. This Durango had the Washington State license plates on it which were assigned to the green Durango registered in this State to Ms. Lopez. This vehicle also had glued to the dash board a VIN plate which had obviously been tampered with and was glued in place. This VIN plate had the VIN number from the green Durango, the one that had this very same VIN tag removed.

This information clearly demonstrated that Lopez had and was continuing to “conceal” the vehicle from the true owner. There was a red stripe on the Durango, the theory presented by the State and upon which the jury could base its findings was that this Durango was not the green Durango painted black and red but was in fact Mr. Munoz’s black Durango which had a stripe painted on it. This possession was supported by the testimony of the victim himself seeing and identifying this Durango prior to the seizure by Officer Changala. It is true that the officer involved in the contact testified that he ran the VIN and the plates and that it came back to Lopez, once again as cited above it is the jury’s job to evaluate the testimony of the witnesses. Camarillo, 115 Wn.2d at 71. Obviously the jury did not believe that the officer and did believe the owner Mr. Munoz.

Dispose - Mr. Munoz was at his home when his Durango was stolen by two individuals. The testified that when confronted one of them admitted they had taken the Durango. He subsequently found his Durango and confronted Ms. Lopez, whom he identified in court as the person in possession of his Durango; he testified “I told her, I think you might have a stolen vehicle.” (RP 142) After this the officer contacted Lopez and ran the plate and a VIN and testified that he determined that this Durango had not been stolen.

Subsequent to this contact Officer Changala did his investigation which led him to make contact with the registered owner of the green Durango, Ms. Lopez at the location that that vehicle was registered. Lopez stated that she did own a Durango but it was black and red and was at her boyfriends home and not being used. That is when Officer found the Durango behind the fence as a location not on the registration and was told by the property owner that he could not inspect that vehicle. Lopez claimed that she had the vehicle there because of a flat tire. It is the States position that she, Lopez, disposed of it there so that it would not be observed by either law enforcement or Mr. Munoz who had already seen her in this Durango, a Durango he was positive was his. By leaving the Durango inside of the fence unmoved she was able to “dispose’ of this obvious liability. Clearly from this contact Lopez knew that she and this stolen Durango were now at least under the scrutiny of Mr. Munoz and at least had been observed and contacted by law enforcement.

RESPONSE TO ALLEGATION FIVE

The trial court did not openly discuss with Lopez on the record her present or future ability to pay her legal financial obligations as required. Lopez through her attorney did present evidence of her economic status and even after having heard that the court imposed the costs.

She's unable to work because of this. She does get some food stamps and she does get some medical coupons for the family, as I understand it, but other than that she is not employed, she's not working, she doesn't have any funds of her own. (Hearing RP 170)

She further indicated to the court a financial ability to pay for electronic home monitoring. Apparently she was financially capable of paying for this service so that she would not have to serve time in the county jail but she was at the same time incapable of paying for the costs which the court assessed. (Hearing RP 171-2, 176) This would appear to indicate that she possessed at least some ability to pay costs associated with this conviction.

The sentencing court also noted that some the paper smelled of smoke and they contained information that she Lopez smoked, all this information was before the court when it imposed the financial obligations. Once again pointing out to the court the existence of disposable income.

Lopez was only assigned "indigent" counsel after her attorney was removed due to that attorneys own felony charges. Ms. Grijalva was retained counsel. It was less indigent than conflict counsel;

THE COURT: So let me come back to what I suggested before, you know, maybe you can have the best of both worlds here now that we know we're not going to start the trial today or tomorrow or whatever. I'm still willing to appoint another attorney for you.

Ms. Grijalva, as I understand it, was privately retained by you; is that correct?

MS. LOPEZ: Uh-huh. Yes.

THE COURT: All right. She can continue to work on the case and she could continue to consult with you and give you advice and you can get advice from the other attorney, but it would be the other attorney who would try the case, not Ms. Grijalva.

MS. LOPEZ: Uh-huh.

THE COURT: But you would then have two attorneys working for you at no extra cost to you. Do you think that might be a good idea?

There is nothing in the record other than the statement of Mr. Krom that she was found indigent. (Hearing RP 172) It would appear from the record that there was no such determination made. What occurred was the judge decided to ameliorate an apparently problem which arose due to Lopez's retain counsel being charged and later convicted of her own felony charges.

The language in the Judgment and Sentence merely states;

Financial Ability: The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The Court: finds that the defendant has the present ability or likely future ability to pay the financial obligations imposed herein. RCW 9.94A.753.

If this court determines that this record is insufficient the State strongly urges this allegation be remanded to the trial court to allow a determination to be made with regard to the ability to pay. If after a more

robust review it is determined that Lopez does not have the ability to pay these obligations now or in the future they should be stricken. If in fact the court is able to determine that Lopez has or will have in the future the ability to pay then there needs to be a record made of that ability and thereafter these costs and assessments may be left in the Judgment and Sentence.

Division II of this court in State v. Bertrand, 165 Wn.App. 393, 405-6, 267 P.3d 511 (2011) determined regarding this issue the following:

Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for us to review whether "the trial court judge took into account the financial resources of the defendant and the nature of the burden" imposed by LFOs under the clearly erroneous standard. Baldwin, 63 Wash.App. at 312, 818 P.2d 1116, 837 P.2d 646. The record here does not show that the trial court took into account Bertrand's financial resources and the nature of the burden of imposing LFOs on her. In fact, the record before us on appeal contains no evidence to support the trial court's finding number 2.5 that Bertrand has the present or future ability to pay LFOs. Therefore, we hold that the trial court's judgment and sentence finding number 2.5 was clearly erroneous.

We next address whether Bertrand's challenge to the imposition of LFOs is ripe for our review. Baldwin holds that "the meaningful time to examine the defendant's ability to pay is when the government seeks to collect the obligation." Baldwin, 63 Wash.App. at 310, 818 P.2d 1116, 837 P.2d 646 (citing State v. Curry, 62 Wash.App. 676, 680, 814 P.2d 1252 (1991)) (emphasis added). The Baldwin court further noted:

The defendant may petition the court at any time for remission or modification of the payments on [the basis of

manifest hardship]. Through this procedure the defendant is entitled to judicial scrutiny of his obligation and his present ability to pay at the relevant time. Baldwin, 63 Wash.App. at 310-11, 818 P.2d 1116, 837 P.2d 646 (emphasis added) (footnote omitted).

Although the trial court ordered Bertrand to begin paying her LFOs within 60 days of the judgment and sentence, our reversal of the trial court's judgment and sentence finding 2.5 forecloses the ability of the Department of Corrections to begin collecting LFOs from Bertrand until after a future determination of her ability to pay. Thus, because Bertrand can apply for remission of her LFOs when the State initiates collections, we do not further address her LFO challenge.

We affirm Bertrand's enhanced sentence and the trial court's imposition of LFOs. We reverse the trial court's finding that Bertrand has the present or future ability to pay LFOs and remand to the trial court to strike finding number 2.5 from the judgment and sentence. [16]

^[16] We further note that, after the trial court on remand strikes its finding that Bertrand has the present or future ability to pay her LFOs, before the State can collect LFOs from Bertrand, there must be a determination that she has the ability to pay these LFOs, taking into account her resources and the nature of the financial burden on her. See Baldwin, 63 Wash.App. at 312, 818 P.2d 1116, 837 P.2d 646; RCW 9.94A.753; former RCW 9.94A.760 (2008); former RCW 10.01.160 (2008); RCW 10.46.190. (Emphasis mine, some footnotes omitted.)

This court has on more than one occasion addressed similar issues.

On those occasions this court rather than merely striking the finding of future ability to pay and leaving it for another day, has remanded the matter to the trial court to allow the court to make the determination regarding ability to pay. If this court determines that the record made is

insufficient then remand with an order to address this issue is a better policy and practice than to leave this matter pending. (See footnote 16, Bertrand, supra, where Division II left this for later determination.)

If this court were to take no action other than striking the allegedly unsupported findings at some point in the future, the clerks office or the Department of Corrections, entities of the State, would attempt to enforce the assessed costs at which time there will be the need, the requirement, to hold some type of hearing to determine whether the defendant/appellant has the ability at that time and in the future to pay the costs. This would necessitate finding the appellant, requiring her to appear, probably the appointment of yet another attorney and the associated cost to the county and the court system.

Bertrand clearly allows the costs and assessments to remain in the Judgment and Sentence the only thing which was removed was the actual finding of the present of future ability to pay those obligations. To leave this determination to some future hearing which will have to be initiated by the State or the defendant and allow in the interim this question to float, a question which could easily be answered with a short hearing in the trial court would appear to be an enormous waste of scarce resources. If the decision from Division II is adopted the fact is there is a probability that appellant can and will try to appeal the future act of the trial court when

the determination is made regarding ability to pay. It should be noted that this also would allow interest to accrue while this defendant had no direction as to what she was required to pay and possibly would invalidate the Superior Clerk's Office from even receiving and disbursing the moneys.

The State would maintain that while there is not an extensive record with regard to this issue there is sufficient information in the record for this court to determine that the trial court did not abuse its discretion when it imposed these legal financial obligations.

RESPONSE TO ALLEGATION SIX

The State has reviewed RCW 46.20.285 and the brief of appellant. While there would appear to be an arguable basis to say that because the statute under which Ms. Lopez was charged is applicable only to "automobiles" that this would allow the trial court to apply this restriction. However based on the fact that the court did not specifically address this on the record and based on these very specific facts that there is a far better use of the scarce resources of this court than to address this allegation.

Therefore the State concedes this issue, without further argument. However the State does not concede that in some future case with facts

that differ from those very specific facts present in this case that RCW 46.20.285 could be applied to a conviction under this statute.

IV. CONCLUSION

Based on the forgoing facts and law Lopez's appeal should be denied as to allegations one through five and remanded to the trial court to have the section addressing the loss of her privilege to drive pursuant to RCW 46.20.285 stricken. Thereafter this appeal should be dismissed.

Dated this 20th day of August, 2012

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DECLARATION OF SERVICE

I, David B. Trefry state that on August 20, 2012, emailed as copy, by agreement of the parties, of the Respondent's Brief , to Marla Zink at ann@washapp.org and to Nicole Lopez, 2380 Maple Grove Rd, Sunnyside, WA 98944

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 20th day of August, 2012 at Spokane, Washington.

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