

**FILED**

AUG 11, 2014

Court of Appeals  
Division III  
State of Washington

No. 32195-9-III

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

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

LUCIO CONTRERAS RODRIGUEZ,  
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT  
Honorable John D. Knodell, Judge

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BRIEF OF APPELLANT

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SUSAN MARIE GASCH  
WSBA No. 16485  
P. O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

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**A. ASSIGNMENTS OF ERROR**

1. The evidence is insufficient to support the conviction for possession of a stolen motor vehicle.

2. The evidence is insufficient to support Finding of Fact 2.15:

At the hospital, [the defendant] told Officer Bakke that he had not been driving the car and did not know who was driving. (CP 58)

3. The evidence is insufficient to support Finding of Fact 2.16:

The version of events [the defendant] told Officer Bakke, that he was not the driver of the car and he did not know who was driving was not plausible. This fact is based upon [the defendant's] location after the collision, Hernandez's location, their inability to walk without assistance due to their injuries, and that no other passengers were present. (CP 58–59)

4. The court erred in entering Conclusion of Law 3.3:

At the time [the defendant] possessed the vehicle he knew the vehicle was stolen. (CP 59)

5. The court erred in entering Conclusion of Law 3.4:

[The defendant] is guilty of the crime of Possession of a Stolen Vehicle. (CP 59)

6. The court exceeded its authority in imposing invalid conditions of community supervision.

a. The court erred in ordering that appellant “shall participate in counseling, outpatient substance abuse treatment programs, outpatient mental health programs, sex offender, and/or anger

management classes, as probation officer directs. [Appellant] shall cooperate fully.” CP 52, paragraph H.

b. The court erred in ordering that appellant “shall be evaluated for alcohol or other drug dependency at the direction of the probation counselor and shall comply with all treatment recommendations.” CP 52, paragraph I.

7. The Order of Disposition contains a scrivener’s error.

*Issues Pertaining to Assignments of Error*

1. Was the evidence insufficient to establish the elements of possession of a stolen motor vehicle, in violation of the defendant’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment?

2. Did the trial court exceed its statutory authority in imposing conditions of community supervision that were neither tailored to meet appellant’s specific needs nor related to his underlying offense?

3. The Order on Adjudication and Disposition states the range of disposition on “Count 1” shall be within the standard range. The evidence establishes that Rodriguez was found guilty of Count 2. Should this scrivener’s error be corrected?

## **B. STATEMENT OF THE CASE**

Sometime between the night before and 5:00 a.m. the following morning, someone took Jesus Comacho's 1993 Honda Civic without permission from the side of his house in Quincy, Washington. RP 20–21.<sup>1</sup> About 2:30 a.m., Quincy Police Officer Erik Bakke responded to a citizen's tip and arrived to find Comacho's car in the middle of a road, with flames and smoke coming from the engine. RP 23–27, 29–31. The defendant, 16-year-old<sup>2</sup> Lucio Contreras Rodriguez, and Alex Hernandez were lying on the ground and removed by police and bystanders to safety just before the car interior burst into flame. RP 31–32, 36–37. The crash took place at Tobin Electric, and sheared off posts and wiped out nearly 30 feet of a chain link, dragged racks of piping several feet and punched in the side of a large Conex box designed to sit on the back of a railroad flat car while sliding it several feet. The collision caused significant front end damage to the car and pushed the engine compartment almost a foot into the front interior of the car between the passenger and driver seats. RP 46–48, 58, 61; CP 58, paragraph 2.8.

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<sup>1</sup> The various hearings are contained in one volume and the pages are numbered sequentially. The citations to the record will be: "RP \_\_\_".

<sup>2</sup> Rodriguez' date of birth is January 5, 1997. The incident occurred on April 7, 2013. CP 14.

Rodriguez had been lying near the driver's side of the car and broke his right wrist and right ankle in the crash. RP 31, 45–46, 63. The other man had been lying near the passenger's side of the car and police saw portions of bone protruding from his upper left leg. RP 31, 34, 70–71. Rodriguez told police he could not feel his right leg and also said something about, "...lost control...". RP 44; CP 58, paragraphs 2.10, 2.11. Neither one could walk without assistance due to their injuries. Paramedics took them to the hospital. RP 37, 46, 62–63; CP 58, paragraph 2.13; 59, paragraph 2.16.

While Rodriguez was in the hospital bed, Officer Bakke asked him who was driving the car. Rodriguez said he didn't know. The officer testified he did not specifically ask Rodriguez if he had been driving the car. RP 50–52.

The State originally charged Rodriguez with four crimes<sup>3</sup> but dropped counts 1, 3 and 4 several months before trial because it "no longer believes it can prove these counts beyond a reasonable doubt". CP 1–3, 15.

Rodriguez proceeded to a bench trial on the remaining count two, which had been amended down from theft of a motor vehicle to possession

of a stolen motor vehicle. RP 9; CP 14. He did not testify. The trial court asked for briefing on the element of “knowledge that the property was stolen” and continued additional closing argument to a later date. RP 89–95.

At adjudication, the court determined the evidence reasonably supported the finding that Rodriguez—and not the other man or an unknown third party—was the driver. The court, concluding Rodriguez’ response in the hospital that he didn’t know who was driving showed the requisite guilty knowledge the car was stolen, reasoned as follows:

The statement that I thought was -- the -- one most favorable to the state is, -- the officers arrive and they ask ... who was driving the car and he says, “I don’t know.”

Difficult to understand ... that on the face of it seems pretty clearly to be a misrepresentation. ... [I]f we accept the proposition that Lucio was in the car – it’s pretty clear by saying – he must have known who was driving, he’d hiding something.

The difficulty here is that there are two alternative explanations for misrepresentation. The first is that he was driving the car and is trying to avoid responsibility for having – driv[en] a stolen car; the other is that he was covering for a friend.

But I think that if we accept the proposition that [] Lucio was driving, the friend was a passenger, it’s hard to understand how denying [] being the driver, denying who [] was the driver of the car would further the interests of the passenger [] under those circumstances.

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<sup>3</sup> Count I: vehicular assault-under the influence; Count 2: theft of a motor vehicle; Count 3: DUI; and Count 4: minor in a public place exhibiting effects of liquor. CP 1–3.

So, -- I think the statement [] “I don’t know who was driving the car” [] is a very clear indication of the guilty state of mind. While there may be other explanations I don’t find them reasonable.

RP 114–15.

The court found Rodriguez guilty of possession of a stolen vehicle.

RP 115; CP 48. The court entered written findings of fact and conclusions of law. CP 57–59.

At disposition, the prosecutor agreed with the Juvenile Department’s recommendation of local sanctions consisting of 5 days of detention, 20 hours of community service, 6 months of community supervision, and fees/costs. RP 120–21. Rodriguez’ attorney asked that no detention be imposed and agreed with the other recommended sanctions. RP 121–22. The court imposed the sentence recommended by the Department. RP 122–24.

Without discussion on the record, the court imposed conditions of supervision, including the following conditions:

Respondent shall participate in counseling, outpatient substance abuse treatment programs, outpatient mental health programs, sex offender [*sic*], and/or anger management classes, as probation officer directs. Respondent shall cooperate fully.

Respondent shall be **Evaluated for Alcohol or Other Drug Dependency** at the direction of the probation counselor and shall comply with all treatment recommendations. (Bolding in original).

CP 52, paragraphs H and I.

This appeal followed. CP 56.

## **C. ARGUMENT**

### **1. Mr. Rodriguez' right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the crime of possession of a stolen motor vehicle.**

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970); *State v. Crediford*, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found each element of the offense beyond a reasonable doubt. *State v. Salinas*, 119

Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” While circumstantial evidence is no less reliable than direct evidence, *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

“A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.” RCW 9A.56.068(1) (alteration in original). To convict Rodriguez of unlawful possession of a stolen vehicle, the State had to prove beyond a reasonable doubt that Rodriguez knowingly possessed a stolen vehicle and that he acted with knowledge the vehicle was stolen. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 77.21, at 177 (3d ed. 2008) (WPIC).

"Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the [property]." *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). In proving unlawful dominion and control over stolen property, the State must prove beyond a reasonable doubt the defendant knew that the property was stolen. *State v. Womble*, 93 Wn. App. 599,

604, 696 P.2d 1097 (1999). Knowledge that the property was wrongfully appropriated is an essential element of the crime of possession of stolen property. *State v. Hatch*, 4 Wn. App. 691, 693, 483 P.2d 864 (1971).

Knowledge may be inferred if “a reasonable person would have knowledge under similar circumstances.” *Womble*, 93 Wn. App. at 604.

Mere possession of recently stolen property is insufficient to establish the possessor knew the property was stolen. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). That fact plus slight corroborative evidence of other inculpatory circumstances tending to show guilt may support a conviction. *Id.* at 775–76.

In this case, police asked 16-year-old Rodriguez, “Who was driving the car”? The judge as fact-finder determined Rodriguez’ response “I don’t know” was a very clear indication he knew the car was stolen. RP 115. As a house-keeping matter, the written findings of fact incorrectly state Rodriguez additionally told police he had not been driving the car. CP 58, paragraphs 2.15, 2.16; Assignment of Error Nos. 2, 3.<sup>4</sup> This

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<sup>4</sup> After the evidentiary portion of bench trial, the court requested additional briefing on the element of knowledge and continued closing argument to a later date. In subsequent briefing the prosecutor represented this inaccuracy (Rodriguez “[i]ed] to police about driving the car”, “lied to police about driving”; “Officer Westby [*sic*] testified [] Rodriguez told him someone else was driving the car”). The prosecutor also argued additional facts not in evidence (Rodriguez “provid[ed] an unsubstantiated story for who was actually driving the car”, “provided an implausible explanation without substantiation). CP 41–43.

statement is not supported in the record. In fact, Officer Bakke testified he did not specifically ask Rodriguez if he was driving. RP 51–52. In its oral ruling, the court relied only upon the response, “I don’t know”. *See* RP 113–15.

In *Womble*, the court found sufficient evidence to support the defendant's conviction of taking a motor vehicle without permission where the defendant was arrested on the same night that the vehicle was “taken,” the defendant had an “implausible” explanation, the defendant fled when confronted by the vehicle's owner, and the defendant was identified by the vehicle's owner as one of the individuals who got out of her vehicle after it had been moved. 93 Wn. App. at 601, 605. In *Couet*, evidence was found sufficient to show knowledge where the defendant was in possession of the new car in a relatively short time after it was stolen, the defendant lied when he told arresting officers he hadn’t ridden in the car that night and the defendant’s explanation was “an improbable story that a fellow worker, identified only as ‘Bill’ let defendant have this practically new car while he, the fellow worker, was on vacation. The story is offered without any substantiation.” *Couet*, 71 Wn.2d at 776.

Here, the facts are distinguishable. Rodriguez was not seen stealing the car, he didn’t deny being in the car, and he wasn’t asked and didn’t

offer an implausible and/or unsubstantiated story about why he was in the car. Defense counsel argued Rodriguez was the passenger and not the driver. However, a passenger in a stolen motor vehicle with knowledge of the vehicle's status “ ‘shall be equally guilty with the person taking or driving said automobile.’ “ *State v. Phimmachak*, 93 Wn. App. 11, 13 n. 1, 968 P.2d 1 (1998) (quoting former RCW 9A.56.070(1) (1975)). Either as driver or passenger, the independent issue remained whether Rodriguez had “guilty knowledge” the car was stolen.

The court determined the evidence reasonably showed Rodriguez was the driver. It reasoned because Rodriguez “must have known who was driving”, his response “I don’t know who was driving” was therefore a misrepresentation and meant Rodriguez was hiding something. RP 115. The court considered only two possible explanations as reasonable: (1) the first is that Rodriguez was driving the car and was trying to avoid responsibility for driving a stolen car, and (2) the other is that Rodriguez was covering for his friend. RP 115. The court discounted explanation (2) and found Rodriguez had a guilty state of mind based on explanation (1).

Unlike jury decisions which inhere in the verdict, the court in this case put its reasoning on the record – orally and in written findings. The court failed to consider other explanations that are equally reasonable,

saying instead, “While there may be other explanations I don’t find them reasonable.” RP 115.

Rodriguez may have denied knowing who the driver was because he was scared and afraid he’d get in trouble for involving the car in a collision or that he’d have to pay for the substantial damages. Given the circumstances of the impact of the collision and resulting injuries, quick response by police and paramedics and transport to the hospital, a reasonable explanation could also be that emotion or shock or medication or any combination thereof prevented Rodriguez from responding in any other way.

The court’s findings of fact similarly do not support a conclusion that Rodriguez knew the car was stolen. When revised to remove the portions not in evidence as discussed above, the findings are as follows:

At the hospital, [the defendant] told Officer Bakke that he ~~had not been driving the car and~~ did not know who was driving. (Finding of Fact 2.15, CP 58)

The version of events [the defendant] told Officer Bakke, that ~~he was not the driver of the car and~~ he did not know who was driving was not plausible. This fact is based upon [the defendant’s] location after the collision, Hernandez’s location, their inability to walk without assistance due to their injuries, and that no other passengers were present. (Finding of Fact 2.16, CP 58–59)

At best, the findings establish only that Rodriguez was the driver of the car and the court found implausible his response that he didn’t know who was

driving. The record establishes the court failed to consider at least two other reasonable explanations. And unlike in *Womble* and *Couet*, there was no further evidence that might corroborate guilty knowledge.

The evidence failed to establish sufficient evidence of Rodriguez' guilty knowledge beyond a reasonable doubt and the conviction should be reversed.

**2. The trial court exceeded its statutory authority and abused its discretion in imposing conditions of community supervision that were neither tailored to meet Rodriguez' specific needs nor related to his underlying offense.**

A trial court's sentencing authority is limited to that granted by statute. *State v. Moen*, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996) (citing *State v. Paine*, 69 Wn. App. 873, 850 P.2d 1369, rev. denied, 122 Wn.2d 1024 (1993)). If a trial court exceeds that authority, its order may be corrected at any time. *Paine*, 69 Wn. App. at 883.

When sentencing a juvenile to local sanctions under RCW 13.40.0357, the court has authority to impose 0 to 12 months of community supervision for offenses other than certain sex offenses. RCW 13.40.020(5). "Community supervision" means an "order of disposition by the court of an adjudicated youth not committed to the department or an

order granting a deferred disposition”. RCW 13.40.020(5). It is an “individualized program” which may include community-based sanctions; community-based rehabilitation; monitoring and reporting requirements; and/or posting of a probation bond. RCW 13.40.020(5)(a)–(d).

“Community-based rehabilitation” means one or more of the following:

Employment; attendance of information classes; literacy classes; counseling, outpatient substance abuse treatment programs, outpatient mental health programs, anger management classes, education or outpatient treatment programs to prevent animal cruelty, or other services; or attendance at school or other educational programs appropriate for the juvenile as determined by the school district. Placement in community-based rehabilitation programs is subject to available funds;

RCW 13.40.020(2).

Although the juvenile court has discretion to tailor the disposition to meet the needs of the juvenile and the rehabilitative and accountability goals of the juvenile code,<sup>5</sup> the community supervision should be individualized and therefore tailored to meet the juvenile’s specific needs. *State v. H.E.J.*, 102 Wn. App. 84, 87, 9 P.3d 835 (2000). The *H.E.J.* court suggests there should be a nexus between conditions of community supervision and the underlying offense. *Id. See also State v. D.H.*, 102 Wn.

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<sup>5</sup> *State v. J. H.*, 96 Wn. App. 167, 181, 978 P.2d 1121, *rev. denied*, 139 Wn.2d 1014, 994 P.2d 849 (1999).

App. 620, 629, 9 P.3d 253 (2000), *rev. denied* 142 Wn.2d 1025 (2001) (juvenile court has considerable discretion to fashion individualized rehabilitative disposition including a broad range of community supervision).

Thus, juvenile courts may design a specialized program for juvenile offenders based on their individual needs.<sup>6</sup> They have broad discretion to tailor dispositions to meet the needs of juveniles and the rehabilitative and accountability goals of the juvenile code.<sup>7</sup> While juvenile offenders' sentences need not be limited to crime-related conditions, the court may not order community supervision conditions without any basis in the record.

In this case, the court exceeded its authority by imposing alcohol and substance abuse evaluation and program conditions because they are not supported on the record. There was no testimony by witnesses or the Juvenile Department that alcohol or drugs were involved and the record does not disclose the nature of Rodriguez' social history or limited criminal history. The court did not make any findings or indicate on the record it considered these conditions necessary to Rodriguez'

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<sup>6</sup> See *State v. J.H.*, 96 Wn. App. 167, 181, 978 P.2d 1121, *review denied*, 139 Wn.2d 1014, 994 P.2d 849 (1999), *cert. denied, sub nom. Anderegg v. Wash.*, 529 U.S. 1130, 120 S.Ct. 2005, 146 L.Ed.2d 956 (2000).

<sup>7</sup> *H.E.J.*, 102 Wn. App. at 87 (quoting *J.H.*, 96 Wn. App. at 181).

rehabilitation. There is no showing the challenged conditions were tailored to meet Rodriguez' specific needs and they should be stricken.

The court further exceeded its authority by ordering anger management and sex offender treatment because nothing in the record indicates Rodriguez needs either.<sup>8</sup> While a juvenile court may order treatment including anger management and sex offender treatment for juvenile offenders whether or not they had been previously convicted of similar crimes,<sup>9</sup> it exceeds its authority when it imposes conditions without a rational basis.<sup>10</sup>

The portions of the court's order requiring substance abuse evaluation/treatment and sex offender and anger management treatment must be stricken.

**3. The Order on Adjudication and Disposition contains a scrivener's error that should be corrected.**

The Order on Adjudication and Disposition states the range of disposition on "Count 1" shall be within the standard range. CP 50, paragraph 4.2. The evidence establishes that Rodriguez was found guilty

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<sup>8</sup> The Grant County Juvenile Court uses a form for its juvenile adjudication orders that lists a number of discretionary conditions of supervision grouped in boxes F through S to be chosen by the court at the time of sentencing. Here, the court checked Boxes H and I, which are set forth in the text *infra*. The form appears to have exacerbated the problem in this case because it appears to limit the court to an "all or nothing" choice. It does not lend itself to designing an individualized program.

of Count 2. CP 48. Therefore, this court should remand the case for correction of the Order on Adjudication and Disposition to accurately reflect Count 2 as the operative conviction for purposes of disposition. *See, e.g., State v. Nallieux*, 158 Wn. App. 630, 647, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence); *State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed).

#### **D. CONCLUSION**

For the reasons stated, the matter should be remanded to dismiss the conviction for possession of a stolen vehicle or, alternatively, to strike the portions of the court's order requiring substance abuse evaluation/treatment and sex offender and anger management treatment and to correct the scrivener's error.

Respectfully submitted on August 11, 2014.

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s/Susan Marie Gasch, WSBA #16485  
Gasch Law Office P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149, FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

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<sup>9</sup> *See H.E.J.*, 102 Wn. App. at 87.

<sup>10</sup> *See H.E.J.*, 102 Wn. App. at 87.

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on August 11, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Lucio Contreras Rodriguez  
213 "K" Street SW  
Quincy WA 98848

**E-mail:** [kburns@co.grant.wa.us](mailto:kburns@co.grant.wa.us)  
D. Angus Lee  
Grant County Prosecutor's Office  
P. O. Box 37  
Ephrata WA 98823-0037

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s/Susan Marie Gasch, WSBA #16485