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Court of Appeals  
Division III  
State of Washington  
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No. 353141-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL DUNBAR,

Appellant.

---

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

---

OPENING BRIEF OF APPELLANT

---

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## A. INTRODUCTION

Daniel Dunbar was convicted of possession of a stolen motor vehicle for possessing a stolen 1992 Dodge pickup truck that he said he bought from a friend. Statements Mr. Dunbar made during the course of Deputy Wang's custodial interrogation of him were admitted at trial even though Mr. Dunbar was not given *Miranda* warnings prior to making these statements.

Over defense objection, the court instructed the jury that it could convict Mr. Dunbar of possessing a stolen motor vehicle by either receiving, retaining, possessing, concealing, or disposing of the vehicle, even though the State failed to present sufficient evidence that Mr. Dunbar either concealed or disposed of the truck.

These errors entitle Mr. Dunbar to reversal of his conviction. Alternatively, this Court should remand Mr. Dunbar's sentence with an order to strike the payment schedule in which he is ordered to pay \$10 a month while incarcerated.

## B. ASSIGNMENTS OF ERROR

1. The trial court erred in finding that Mr. Dunbar was not in custody when questioned by Deputy Wang.

2. The court erred in admitting statements made while Mr. Dunbar was subject to custodial interrogation but not apprised of his *Miranda* rights.

3. The State failed to establish by sufficient evidence that Mr. Dunbar concealed or disposed of the stolen truck.

4. The court erred in requiring Mr. Dunbar to make monthly payments towards his fines while incarcerated.

#### C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The prosecution may not introduce statements that stem from custodial interrogation unless the person is notified of his right to counsel and right to remain silent. U.S. Const. Amend. V; Const. art. 1, § 9. A person is subject to custodial interrogation when law enforcement officers initiate questioning after the suspect is deprived of his freedom of action in any significant way. Did the trial court err in admitting Mr. Dunbar's statements made while Deputy Wang detained and interrogated him about the stolen vehicle?

2. The accused has a right to a unanimous jury verdict. Const. art. 1, § 21. The law of the case doctrine requires that when the jury instructions are not objected to, they come become the law of the case. If there is insufficient evidence to prove the added element, reversal is

required. Where the State proposed jury instructions that required it to prove that Mr. Dunbar knowingly received, retained, possessed, concealed, or disposed of a stolen motor vehicle, but failed to present sufficient evidence that Mr. Dunbar concealed or disposed of the stolen vehicle, is he entitled to reversal?

3. A trial court has discretion to order payment of legal financial obligations. Did the trial court abuse its discretion by failing to assess Mr. Dunbar's actual income-earning potential and mandatory statutory deductions when it ordered him to pay \$10 per month towards his legal financial obligations while serving a 57-month sentence?

#### D. STATEMENT OF THE CASE

1. The police investigation of the missing 1992 Dodge pickup truck.

Keith Quincy reported his 1992 Dodge pickup stolen from the parking lot of the bar where he worked. RP 3/14/17; 133, 142. About a week later, Gary Quincy, Keith Quincy's dad, thought he saw his son's pickup on his way home from work. RP 3/14/17; 94. Gary Quincy talked to the person in the truck, who he later identified as Mr. Dunbar. RP 3/14/17; 135. Mr. Dunbar told Gary Quincy he purchased the truck. RP 3/14/17; 135. Mr. Dunbar had driven away by the time Deputy Wang responded to Gary Quincy's call to police reporting the truck. RP

3/14/17; 135-136. Gary Quincy had taken pictures of the vehicle and the driver and showed them to Deputy Wang. RP 3/14/17; 136, 138. Deputy Wang ran the license plate on the vehicle. RP 3/14/17; 95. The license plate did not come back as stolen. RP 3/14/17; 95.

Deputy Wang then went to the address associated with the license plate. RP 3/14/17; 95. He noticed a truck matching the photograph parked across the street in a parking lot. RP 3/14/17; 96. He walked over to the truck and ran its VIN number through police dispatch. RP 3/14/17; 96. It came back as a stolen vehicle registered to Keith Quincy. RP 3/14/17; 96. Deputy Wang noticed that the passenger side window was broken out and the ignition was broken so it would turn without a key. RP 3/14/17; 96. Deputy Wang's next step was to take pictures of the vehicle, declare it stolen, and contact Keith Quincy to come and retrieve it. RP 3/14/17; 96.

But before Deputy Wang took these steps, Mr. Dunbar came out of a house located across the street. RP 3/14/17; 96-97. Deputy Wang immediately recognized him as the person in the picture taken by Gary Quincy. RP 3/14/17; 96. Deputy Wang went to talk to Mr. Dunbar. RP 3/14/17; 96-97, 103.

2. Mr. Dunbar is detained and questioned about the truck without being given *Miranda* warnings.

Deputy Wang had Mr. Dunbar sit down on his front porch. RP 3/14/17; 103. Mr. Dunbar was not free to leave. RP 3/14/17; 104, 105. He was being detained by Deputy Wang. RP 3/14/17; 107. While Deputy Wang detained Mr. Dunbar, two additional officers and patrol cars were present. RP 3/14/17; 104.

Deputy Wang did not advise Mr. Dunbar of his *Miranda* rights. RP 3/14/17; 99. Nevertheless, the deputy questioned Mr. Dunbar about the broken ignition, the broken window, if he had driven it, and where he acquired the truck. RP 3/14/17; 97-98. Mr. Dunbar's statements made in response to Deputy Wang's interrogation were admitted against him at trial, including his admission that he drove the truck, he did not think the broken ignition was "suspicious," that he punched the truck's window out the night before because he was angry, and that the truck had license plates on it when he bought it, but he did not know where they were now. RP 3/14/17; 164-165.

Mr. Dunbar was convicted as charged and sentenced to the highest end of the standard range, 57 months. CP 50-55; RP 5/1/17; 111-112. The court ordered Mr. Dunbar to pay \$10 a month on the \$800 legal financial obligations, starting one year into his sentence,

based on the court's presumption he would make enough money in prison to afford payments. CP 58; RP 5/1/17; 112.

#### E. ARGUMENT

**1. Mr. Dunbar was subjected to custodial interrogation when Officer Wang had him sit down on the porch steps and questioned him about the vehicle he had already verified as stolen.**

*a. Police are required to give Miranda warnings prior to interrogating a detained suspect if those statements are to be introduced at trial.*

Statements made while the accused is subject to custodial interrogation are not admissible unless he is first advised of his constitutional right to counsel and his privilege against self-incrimination. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 1612, 16 L. Ed. 2d 694 (1966); *State v. Lavaris*, 99 Wn.2d 851, 857, 664 P.2d 1234 (1983); U.S. Const. Amend. V; Const. art. I, § 9.

Custodial interrogation occurs when law enforcement officers initiate questioning of a person who is deprived of his freedom of action in any significant way. *Miranda*, 384 U.S. at 444.

*b. Mr. Dunbar was in custody when, with three officers present, he was told to sit down on the steps to his residence while Deputy Wang interrogated him.*

The trial court ruled that Officer Wang's questions were an interrogation, finding that "It doesn't appear there was any question

that there was an interrogation.” RP 3/14/17; 112. Thus, the only question in determining whether Mr. Dunbar was entitled to *Miranda* warnings is whether Mr. Dunbar was in custody when Deputy Wang interrogated him. *Miranda*, 384 U.S. at 444.

A custody determination is a mixed question of law and fact, and is reviewed de novo. *State v. Solomon*, 114 Wn. App. 781, 787, 60 P.3d 1215 (2002) (citing *Thompson v. Keohane*, 516 U.S. 99, 112-113, 116 S.Ct. 457, 133 L.Ed.2d 383 (1995)). The factual inquiry determines “the circumstances surrounding the interrogation.” *Id.* at 787. The legal inquiry determines, given the factual circumstances, whether a reasonable person would feel he or she was not at liberty to terminate the interrogation and leave. *Id.* at 787-788 (citing *Thompson*, 516 U.S. at 112). This inquiry “calls for application of the controlling legal standard to the historical facts.” *Id.* at 788 (citing *Thompson*, 516 U.S. at 113). This is an objective test to resolve whether a person’s freedom of movement was restrained to the degree associated with a formal arrest. *Id.* (quoting *California v. Beheler*, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 77 L.Ed.2d 1275 (1983)).

The relevant question is whether a reasonable person in Mr. Dunbar’s position would believe his freedom of action was curtailed.

*State v. Ustimenko*, 137 Wn. App. 109, 116, 151 P.3d 256 (2007) (citing *State v. Short*, 113 Wn.2d 35, 41, 775 P.2d 458 (1989)). In *Ustimenko*, police already had probable cause to arrest Mr. Ustimenko for a hit and run collision when they located him in his driveway. *Ustimenko*, 137 Wn. App. at 116. As Mr. Ustimenko approached them, he smelled of alcohol, had slurred speech, was swaying, and had fresh injuries on his hands and head. The officers asked him to sit down. *Id.* at 113. This Court found that Mr. Ustimenko was not in custody. Even though the police officer knew he had probable cause to arrest Mr. Ustimenko when he told him to sit down, the police officer's subjective intent has no relevance to the determination of custody; thus it did not matter whether he was in fact already the focus of the police investigation when police told him to sit down. *Id.* at 115-116.

Mr. Dunbar's case is distinct, because here the officer's subjective intent—to detain Mr. Dunbar—was objectively communicated to Mr. Dunbar through the officer's conduct. Officer Wang contacted him after investigating the truck, and had him sit down. RP 3/14/17; 103. There was no evidence that Mr. Dunbar was being asked to sit down for any reason other than for investigation of a

crime, unlike was the case for Mr. Ustimenko, who was unsteady because of apparent intoxication. *Ustimenko*, 137 Wn. App. at 113.

In Mr. Dunbar's case, this command to sit down could only mean that he was the subject of the criminal investigation and not free to leave, which was indeed the case. RP 3/14/17; 107. Further there were three police officers on the scene, each with their own patrol car, which would objectively lead Mr. Dunbar to conclude he was not free to leave. RP 3/14/17; 104; *see State v. Young*, 167 Wn. App. 922, 930, 275 P.3d 1150 (2012) (examples of police showing authority include the threatening presence of several officers). Though *Young* involved detention for a *Terry* stop, Mr. Dunbar's detention far exceeded a *Terry* stop because "*Terry* stops are brief, and they occur in public, they are substantially less police dominated than the police interrogations contemplated by *Miranda*." *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004) (citing *Miranda*, 384 U.S. at 439-40) (internal quotations omitted)).

Here, Mr. Dunbar was detained, not in a public place, but on the steps of his dwelling, surrounded by three police officers. This was a police dominated interrogation in which he was objectively not free to

leave. The trial court erred in finding Mr. Dunbar's detention was not equivalent to custodial interrogation.

*c. The trial court's erroneous denial of Mr. Dunbar's motion to suppress requires reversal and remand for suppression of his statements because their admission was not harmless error.*

Because Mr. Dunbar was not warned of his right to remain silent before providing answers to Deputy Wang's interrogation, the entirety of these pre-*Miranda* statements should be suppressed on remand for a new trial.

Without *Miranda* warnings, the accused's statements during custodial interrogation are presumed involuntary and are inadmissible at trial. *Heritage*, 152 Wn.2d at 214; *Miranda*, 384 U.S. at 444. It is constitutional error to illegally admit highly prejudicial comments, and reversal is required unless the State proves beyond a reasonable doubt the error was harmless. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967).

Mr. Dunbar's erroneously admitted statements cannot be harmless error where they were admissions used to establish the facts of the crime—that Mr. Dunbar knowingly possessed a stolen vehicle. He admitted to driving the vehicle, and his comment about breaking out the window was contradicted by police observation of his uninjured

hand, which made the jury far more likely to infer he knowingly possessed a stolen vehicle. RP 3/14/17; 165. Furthermore, his statement that he purchased the vehicle from an unverified person also contributed greatly to the circumstantial evidence from which the jury would infer he knew the truck was stolen. RP 3/14/17; 165. Reversal for the erroneous admission of these statements is required.

**2. The prosecutor failed to present sufficient evidence that Mr. Dunbar concealed or disposed of a stolen motor vehicle.**

*a. Mr. Dunbar has a constitutional right to a unanimous jury verdict and the law of the case doctrine required the State to prove any unnecessary additions in the “to convict” instruction.*

The Due Process Clause of the Fourteenth Amendment requires the State to prove every element of the crime charged beyond a reasonable doubt. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

The State assumes the burden of proving otherwise unnecessary elements of the offense when such added elements are included without objection in the “to convict” instruction. *State v. Johnson*, 188 Wn.2d 742, 756, 399 P.3d 507 (2017) (citing *State v. Hickman*, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)). Even if courts have held the

different ways of committing the offense of possession of a stolen motor vehicle are “definitional,” rather than alternative means, these definitions become the law of the case if included in the “to convict” instruction. RCW 9A.56.068(1); *State v. Hayes*, 164 Wn. App. 459, 478-479, 262 P.3d 538 (2011); *State v. Lillard*, 122 Wn. App. 422, 434-435, 93 P.3d 969 (2004)).

In *Lillard*, the court reasoned that because the jury instructions specifically listed the alternative definitions of possession of a stolen motor vehicle, the State was required to present sufficient evidence to support each alternative, unless the court was able to determine that the verdict was based on only one alternative means and that substantial evidence supports that means. *Lillard*, 122 Wn. App. at 434–35 (citing *Hickman*, 135 Wn.2d at 102). Likewise, in *Hayes*, because the “to-convict” instruction for possession of a stolen vehicle included all five alternative definitions, the court reversed for lack of proof that the defendant concealed or disposed of the vehicle. 164 Wn. App. at 480-81.

*State v. Makekau* disagreed with *Hayes* and *Lillard*, holding the inclusion of all five ways to commit the offense of possession of a stolen motor vehicle in the “to convict” instruction does not

“transform them into alternative means of the crime.” *State v. Makekau*, 194 Wn. App. 407, 420, 378 P.3d 577 (2016). As a result, Division II only requires the State to prove that the accused’s conduct satisfied one of the disjunctive terms. *Id.*

Since *Lillard*, *Hayes*, and *Makekau*, *State v. Johnson* affirmed the “law of the case” doctrine and the requirement that the State prove every element in the to-convict instruction. 188 Wn. 2d at 764. In *State v. Jussila*, the “law of the case” doctrine required the State to prove beyond a reasonable doubt the make, model, and serial number of the guns for the charges of theft and unlawful possession, because these descriptions were included in the jury instruction. 197 Wn. App. 908, 924, 392 P.3d 1108 (2017). Thus, *Jussila* supports *Hayes*’ and *Lillard*’s analysis that even if separate ways of committing the offense are definitional, their inclusion in the “to-convict” instruction turns them into elements the prosecutor must prove beyond a reasonable doubt.

Here, like in *Lillard*, *Hayes*, and *Jussila*, because the “to-convict” instruction listed all five the ways in which Mr. Dunbar was charged with committing the offense of possession of a stolen motor vehicle, these definitions became the “law of the case.” CP 37.

Accordingly, the State was required to prove beyond a reasonable doubt that Mr. Dunbar knowingly received, retained, possessed, concealed, or disposed of a stolen motor vehicle. *Lillard*, 122 Wn. App. at 434-435; *Hayes*, 164 Wn. App. at 480-81.

*b. Reversal is required where there was insufficient evidence that Mr. Dunbar concealed or disposed of the truck.*

Mr. Dunbar moved to dismiss the charge at the close of the prosecutor's case, because the prosecutor failed to prove beyond a reasonable doubt each of the ways that Mr. Dunbar was charged with possessing a stolen vehicle. CP 41; RP 3/15/17; 16<sup>1</sup>. The court overruled Mr. Dunbar's motion to dismiss, finding sufficient evidence supported each of the ways the State alleged Mr. Dunbar committed the offense. RP 3/15/17; 21-22. The jury was instructed they could convict Mr. Dunbar for possession of a stolen motor vehicle, if they found he, "knowingly received, retained, possessed, concealed, or disposed of a

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<sup>1</sup> Mr. Dunbar alleged that the State failed to prove all the elements charged in the conjunctive in the charging document, but the argument and court's ruling turned on whether the State proved each means of committing the offense beyond a reasonable doubt. Even if the specific legal grounds asserted on appeal were not raised below, a challenge to the sufficiency of the elements alleged in the "to convict" instruction may be raised for the first time on appeal. RAP 2.5(a); *Johnson*, 188 Wn.2d at 761 (citing *Hickman*, 135 Wn.2d at 102) (on appeal, a defendant may challenge the sufficiency of the added element).

stolen motor vehicle.” CP 37. No unanimity instruction was provided. CP 28-40.

The court specifically found, “[t]here’s evidence that it was moved across the street from where he was located showing that it was either trying to be concealed or disposed of after it went through the yard.” RP 3/15/17; 22.

But this was not sufficient evidence that Mr. Dunbar knowingly concealed or disposed of the vehicle. CP 43; RP 3/15/17; 16.

“Dispose,” means to “transfer into new hands or to the control of someone else.” *Hayes*, 164 Wn. App. at 481. There was no evidence that Mr. Dunbar ever transferred the truck to another person. Moving the truck to an open lot, contrary to the court’s reasoning, is not evidence of concealment or disposal. Deputy Wang immediately saw the truck parked in a lot, and walked over to it. RP 3/14/17; 96. Mr. Dunbar came out of the house across the street and associated himself openly with the truck. RP 3/14/17; 96-97.

If the reviewing court finds insufficient evidence to prove the added element, reversal is required. *Jussila*, 197 Wn. App. at 932. Retrial following reversal is barred, and dismissal is the remedy. *Id.* (citing *Hickman*, 135 Wn.2d at 103). This must be the result for Mr.

Dunbar's conviction for possession of a stolen motor vehicle, where the State presented insufficient evidence that Mr. Dunbar either concealed or disposed of the truck.

**3. The trial court abused its discretion in ordering Mr. Dunbar to begin paying his legal financial from prison on the mere speculation that he will have an ability to pay in the future, and there is a statute in place that already deducts payment for legal financial obligations from inmates.**

The court ordered Mr. Dunbar to pay \$10.00 a month, beginning about one year into his 57-month sentence. CP 58. The court abused its discretion in ordering this payment without assessing Mr. Dunbar's ability to pay while in prison, and accounting for the mandatory deductions from any earnings he is already subject to under RCW 72.09.480(1).

Appellate courts review a decision on whether to impose LFOs for abuse of discretion. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015). The trial court's factual determination concerning a defendant's resources and ability to pay is reviewed under the clearly erroneous standard. *Id.* (citing *State v. Bertrand*, 165 Wn. App. 393, 403–04, 267 P.3d 511 (2011)).

RCW 10.01.160(3) prohibits the trial court from ordering the defendant to pay costs unless he will be able to pay them. "In

determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” *Id.*

RCW 72.09.480(1) subjects any funds or wages earned by inmates to mandatory deductions of (1) five percent to the crime victims’ compensation account and (c) twenty percent for payment of legal financial obligations for all inmates who have legal financial obligations owing in any Washington state superior court.

When the court imposed \$10 a month payment from Mr. Dunbar while incarcerated, his employment opportunities while in prison were unknown. The court just guessed: “I assume you can make some money while in prison.” RP 5/1/17; 112. In fact, Mr. Dunbar’s earning potential while in prison is extremely limited. Inmates who are able to work earn anywhere between \$.70 to 2.70 per hour.<sup>2</sup> The court’s assumption about Mr. Dunbar’s earning income while in prison is thus contrary to RCW 10.01.160 (3)’s requirement that the court assess a person’s financial resources and the burden of the payment. Further, the

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<sup>2</sup> STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, DOC POLICY NUMBER 710.400: CORRECTIONAL INDUSTRIES CLASS II EMPLOYMENT (last revised 1/1/16), <http://www.doc.wa.gov/information/policies/default.aspx?show=700>.

court failed to account for the mandatory deductions, which makes the court's assumptions about Mr. Dunbar's ability to pay and the burden it will place on him an ill-informed assumption. Though the court noted Mr. Dunbar could contact the clerk if he is unable to pay while in prison, this does not undo the fact that the court's order for payment of \$10 a month was an abuse of discretion. RP 5/1/17; 112.

Remand to the trial court to strike this requirement from Mr. Dunbar's judgment and sentence is required. *Bertrand*, 165 Wn. App. at 405 (reversing and remanding for the court to strike the LFO requirement entered without sufficient factual basis in the record).

#### F. CONCLUSION

Mr. Dunbar's statements to Deputy Wang were inadmissible because they were made while subject to custodial interrogation before he was apprised of his *Miranda* rights, requiring reversal and remand of his conviction. The State's failure to prove that Mr. Dunbar knowingly concealed or disposed of the truck provides additional grounds for reversal.

Finally, the court erred in requiring Mr. Dunbar to pay \$10 a month while incarcerated, without taking into account his actual ability

to pay and the mandatory deductions for the payment of LFOs, and it should be stricken from his judgment and sentence.

DATED this 9th day of April 2018.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 35314-1-III
	)	
DANIEL DUNBAR,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF APRIL, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS - DIVISION THREE AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF APRIL, 2018.

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# WASHINGTON APPELLATE PROJECT

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## Transmittal Information

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**Appellate Court Case Number:** 35314-1  
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