

FILED  
Court of Appeals  
Division III  
State of Washington  
4/4/2018 8:18 AM

**NO. 35585-3-III**

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

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STATE OF WASHINGTON,

Respondent,

v.

**DESTINY PEARL DURAN,**

Appellant.

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

The Honorable Ruth E. Reukauf, Judge

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**BRIEF OF APPELLANT**

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### **A. ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that poor maintenance, a missing stereo and other personal items, papers strewn about the car's interior, and a key stuck in the ignition put Miss Duran on notice that the car she borrowed from an acquaintance was a stolen car.

2. The trial court erred in finding that Miss Duran was driving in a manner to avoid detection by driving on designated streets to reach her destination after a police car passed her going in the opposite direction.

3. The trial court erred in finding it unusual that a person who did not know Miss Duran well would allow her to borrow a car he identified as his car.

4. The trial court erred in finding sufficient evidence that Destiny Duran was guilty of knowingly possessing a stolen car.

### **B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

Whether the evidence was insufficient to prove that Destiny Duran knew the car she drove was stolen when nothing about the poorly maintained car, including a key stuck in the ignition, would have made a reasonable person know the car was stolen?

### **C. STATEMENT OF THE CASE**

After shopping at the Union Gap Ross store, Teresa Arroyo-Valdez went to the parking lot only to find her car, a black Honda Accord, missing from where she had left it. RP 7-8. She called the police and made a stolen vehicle report. RP 8.

Shortly after 5:00 a.m. the next morning, Yakima Police Officer Thomas Tovar was driving on North 20<sup>th</sup> and saw a black Honda driving in the opposite direction. RP 61. He checked the Honda's license plate and discovered the Honda was reported as a stolen car. RP 61. After the cars passed each other, the Honda turned eastbound on Willow Street. RP 62, 74.

Once he learned the Honda was stolen, Officer Tovar attempted to catch up to the Honda. RP 61-62. He turned and was driving down the road when he noticed the Honda pulled off on a side road. RP 62-63. Officer Tovar backed up and contacted the Honda's driver who initially identified herself as 23-year-old Crystal Cerda. RP 22, 65. Other officers arrived as back up. RP 20, 63. After some investigation, the officers learned that "Cerda" was Crystal Cerda's younger sister, Destiny Duran. RP 65-66. Miss Duran gave a false name because she had an active arrest warrant from Benton County. RP 44; CP 22, Finding of Fact, No. 4.

Miss Duran was the only person in the Honda. RP 21, 63. Miss Duran explained to the police that she had needed a ride to 24<sup>th</sup> and Castlevale. RP 66. She talked to Thomas Harding's cousin, Chris, about borrowing a car. RP 66. Chris speculated about trusting her but agreed she could take his car. RP 103. In exchange, Miss Duran agreed to leave the car at 19<sup>th</sup> and Swan. RP 35. Chris told her there was a single key stuck in the ignition. RP 68.

Ms. Duran was pulling into the area of 19<sup>th</sup> and Swan when Officer Tovar pulled up behind her. RP 64.

Ms. Duran had no idea the Honda was a stolen car. RP 77-78.

After being advised of her *Miranda* rights, she made statements to the police. RP 24-25. Officers recorded many of her statements on their camera and audio recording equipment, COBAN.<sup>1</sup> RP 26. Included in her statements was a description where the police would find Thomas Harding's residence. RP 66. She knew where he lived but was not sure of the actual address. RP 66.

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<sup>1</sup> Several COBAN recordings were admitted into evidence at trial. None of the COBAN material was transcribed for appeal. There are instances in the record where the trial court and parties reference statements attributed to the COBAN recording. This counsel does not disagree with those attributions as they appear in the appellate record.

The police called Ms. Arroyo-Valdez to come and pick up her car. RP 8. When she arrived, she noticed it was not in the same condition it had been in when taken from the Ross parking lot. RP 8. The ignition had a key stuck in it. RP 8. The stereo was missing. RP 8. The contents of the glove box, mostly paperwork in her name, was strewn throughout the car's interior. RP 8. The car's hood was slanted and did not close properly. RP 8. And after driving it for a time, she realized the fuel line was cut and leaked gas. RP 9. Some clothing and money she had left in the car were also missing. RP 10-11.

Miss Duran did not testify and presented no defense witnesses. RP 95, 97.

The court found Miss Duran guilty as charged of possession of a stolen motor vehicle and making a false or misleading statement to a public servant.<sup>2</sup> RP 119; CP 11. In finding guilt on the stolen vehicle charge, the court focused on whether Miss Duran knew she had driven a stolen car. RP 97-107. In finding Miss Duran guilty, the court found the car's condition told Miss Duran it was stolen. RP 117-19.

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<sup>2</sup> The false statement was misidentifying herself as Crystal Cerda.

The trial court entered these findings of fact and conclusions of

law:

#### FINDINGS OF FACT

1. All of the events, acts, and omissions material to this matter occurred on or about July 15, 2017 through July 16, 2017 in the State of Washington, Yakima County.
2. Four witnesses testified on behalf of the prosecution: Teresa Valdez, Araceli Loera, and Yakima Police Officers Thomas Tovar and Lukas Hinton.
3. The parties stipulated to the admission of a Benton County warrant for the arrest of the respondent that was active at the time of her encounter with police in this matter.
4. Ms. Loera is the mother of the respondent.
5. Ms. Loera identified the respondent for the record as Destiny Duran, born November 3, 1999 - not to be mistaken for Ms. Loera's other daughter Crystal Cerda, September 16, 1994.
6. Ms. Valdez is the registered owner of a black Honda Accord sedan.
7. On the afternoon of July 15, 2017, Ms. Valdez drove her car to the Ross store in Union Gap, Washington.
8. After she finished her shopping, she exited the store and discovered that someone had stolen her car.
9. She immediately called police to report the theft.
10. At approximately 5:00 a.m. on July 16, 2017, police informed Ms. Valdez that her car had been recovered in Yakima, Washington.

11. At approximately 7:00 a.m. that morning, Ms. Valdez arrived at the location where the car had been found.
12. She observed that papers had been thrown everywhere inside the car, the stereo was gone, a key was stuck in the ignition, the hood would not close normally, wires were exposed, and as became evident during the drive home, there was a leak in the gas line.
13. Cash and clothing belonging to Ms. Valdez were missing from the car. The papers tossed around inside the car, which were normally kept in the glovebox, included bills and other documents addressed to Ms. Valdez.
14. Ms. Valdez's boyfriend was eventually able to remove the key from the ignition by using pliers.
15. Officer Tovar was on patrol in the city of Yakima on the morning of July 16, 2017.
16. He was in uniform and driving a marked patrol car.
17. As he was driving southbound on North 20<sup>th</sup> Avenue at approximately 5:00 a.m., he observed a black Honda driving in the opposite direction.
18. He noted the license plate as the car passed by him.
19. The license plate confirmed the car to be Ms. Valdez's stolen Honda.
20. Officer Tovar turned his patrol vehicle around and observed the Honda turn eastbound on Willow Street.
21. Officer Tovar activated his emergency lights, turned onto Willow Street, and did not immediately see the Honda.

22. As he drove along Willow Street crossing North 19<sup>th</sup> Avenue, he spotted the Honda pulled over on the side of North 19<sup>th</sup> Avenue.
23. Officer Tovar applied his brakes, put his car in reverse so that he could turn onto North 19<sup>th</sup> Avenue behind the Honda.
24. He could see the Honda's brake lights were still on.
25. Directly ahead of the Honda was a clearly visible street sign identifying the cross street as Swan Road.
26. The respondent, seated in the driver's seat, was the sole occupant of the Honda and had been the driver seen by Officer Tovar.
27. Officer Tovar called out on his radio that he located a stolen car and would need assistance to perform a high-risk felony stop.
28. Officer Hinton was less than two minutes from the Honda's location and arrived promptly to assist Officer Tovar.
29. The respondent complied with commands that she exit the Honda with her hands raised and that she walked backward towards the officers who placed her in handcuff and secured her in a patrol car.
30. Officer Hinton then properly gave the *Miranda* warnings to the respondent.
31. Officer Hinton did not read the juvenile warnings because the respondent had claimed to have been an adult.
32. The respondent freely agreed to speak with the officers.
33. The respondent identified herself as Crystal Cerda and claimed to have been born on September 16, 1994, which by her calculations made her 23 years old.

34. The officers attempted to verify the identifying information through a police database, and in so doing, they began to suspect the respondent was using a fake name.
35. Officer Tovar questioned the respondent about it - "You're Destiny, aren't you?"- but the respondent maintained her false name.
36. The officers found tattoo information on the police database that led them to erroneously accept the respondent's claim of being Crystal Cerda.
37. The respondent offered an explanation for how she came to be in possession of the car.
38. She said that she had been visiting a friend named Thomas Hardy who had a cousin Chris (last name unknown).
39. She said that while Thomas Hardy was sleeping, the respondent told Chris that she needed a ride to the area of North 24<sup>th</sup> Avenue and Castlevale Road.
40. She said that Chris, who she did not know well, asked if he could trust her and then told her she could borrow his car if she would drop it off at North 19<sup>th</sup> Avenue and Swan Road.
41. She said that Chris had described the key as being an aftermarket key with no keyring that was jammed in the ignition and could not be removed. She said that she did not know the address where she had received the car.
42. Findings of fact made on the record during the Court's oral ruling are incorporated by reference herein.

#### CONCLUSIONS OF LAW

1. The elements of possessing a stolen motor vehicle are listed at WPIC 77.21: knowingly possessing a stolen motor vehicle; acting with knowledge the car was stolen; withholding or

appropriating the car to the use of someone other than the true owner; in the State of Washington.

2. The elements of making a false statement are listed at WPIC 120.04: making a false or misleading statement to a public servant; the statement being material; knowing the statement was both material and false; in the State of Washington.
3. As stated at WPIC 10.02, if a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the finder of fact is permitted but not required to find that she acted with knowledge of the fact.
4. The respondent possessed a stolen motor vehicle with knowledge that it was stolen when she drove Ms. Valdez's car with a key stuck in the ignition, a missing stereo, papers addressed to the true owner tossed about in it, in a manner suggesting that she was attempting to avoid Officer Tovar's detection. The respondent made a material false statement to Officer Tovar when she lied about her name in hopes that she would not be arrested on the outstanding warrant.
5. Conclusions of law made on the record during the Court's oral ruling are incorporated by reference herein.

Therefore, the Court will find the respondent guilty of Assault in the Fourth Degree.<sup>3</sup>

CP 17-22.

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<sup>3</sup> The court finding Miss Duran guilty of assault in the fourth degree was error. Miss Duran was never charged with assault.

#### **D. ARGUMENT**

**The trial court lacked a factual basis for finding Miss Duran knowingly possessed a stolen car because the court based its finding on its belief that the car's poor condition would put a driver otherwise unfamiliar with the car on notice it was a stolen car.**

Miss Duran borrowed a car from a person she knew with that person's permission. The car was in poor condition. Its key was stuck in the ignition. It did not have a stereo. The car's interior was strewn with paperwork. The hood did not close properly and the fuel line leaked. Ms. Duran obeyed the traffic laws as she drove the car to where she was instructed to leave it. She did not try to run from the police. This record gave the court no legal basis to find Miss Duran knew she possessed a car. Her conviction for possessing a stolen vehicle should be reversed and remanded for dismissal with prejudice.

- a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.

In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. Amend. XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (1970); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of

insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of the evidence admits the truth of the State’s evidence and all reasonable inference that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence is to be considered equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). “Credibility determinations are for the trier of fact” and are not subject to review. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265–66, 401 P.3d 19 (2017).

b. The state failed to prove Miss Duran knew the Honda Accord was stolen.

“A person is guilty of possession of a stolen vehicle if he or she [possesses] a stolen motor vehicle. RCW 9A.56.068(1). And a person commits possession of stolen property in general under RCW 9A.56.150(1) when they “knowingly . . . receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or

appropriate the same to the use of any person other than the true owner or person entitled thereto.”

The evidence did not prove Miss Duran knew the Honda was stolen. The key stuck in the ignition proved nothing. The Honda was an older Accord that could easily have several mechanical issues. Not everyone who possesses an older car would invest the money, or would have the money to invest, in fixing an ignition. A key stuck in the ignition is just that, not per se evidence a car is stolen.

The key stuck in the ignition followed the condition of the rest of the car. The hood did not close properly, there were exposed wires, and the car may have smelled of gas as there was a leak in the gas line. But none of that seemed to affect the operability of the car and Miss Duran’s limited use of the car to get to the one place she needed to go. Nothing in the record suggested that cars in poor condition are more likely to be stolen and people should be on notice when borrowing a car in disrepair because it is likely stolen.

As a one-time driver of the Honda, Miss Duran had no reason to know that the car once had a stereo and would not think one was missing. There is no correlation between a missing car stereo and a stolen car.

Similarly, Miss Duran would not know anything about clothing removed from the car before she drove it.

Frequently people do not keep their cars' interiors in pristine condition. Finding a borrowed car messy with paperwork does not mean the car is stolen. It just means the car is messy. In borrowing the car as she did, Miss Duran had no reason to concern herself with who the car's owner might be. She needed to borrow a car, and one was given to her to use by a person with whom she had an acquaintance. It would not be her business to know who the "true owner" of the car would be when she was borrowing it for a short time from a person who represented it was his car to lend.

Also, contrary to the court's finding, Miss Duran did not drive in a manner to avoid detection. She was driving on the same roadway as a police officer. She had a place to go, and she turned in that direction about the same time as the officer saw the Honda. RP 62. She was not trying to avoid detection; rather, she was driving to her destination and a police officer was driving in the same area. Nothing about Miss Duran's driving proves otherwise.

The court took issue with Miss Duran not knowing the literal address from where she picked up the car. RP 115. But she described the

general location where she got the car. RP 66. No one testified to that having been an inaccurate description. The court expressed annoyance with the officers for failing to conduct a more thorough investigation by, for example, taking a picture of the car's interior and exterior condition. RP 109-10. It was annoying, too, that the police failed to investigate the address by having cooperative Miss Duran show the officers where she got the car and having the officers write the address in their report.

The court found Miss Duran misidentified herself to police as her sister, Crystal Cerda, but only because she had an active warrant and for no other reason. CP 22, Conclusion of Law 4.

Driving a beat up loaner car with a key stuck in the ignition does not prove beyond a reasonable doubt that the car is stolen or the car's driver should be on notice that she drove a stolen car.

c. This Court must reverse and remand with instruction to dismiss the conviction.

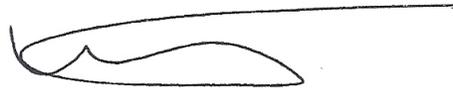
Since the State failed to prove Miss Duran knowingly possessed a stolen vehicle, there was insufficient evidence to support the conviction. This Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 761, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United

States Constitution “forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding.”), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

**E. CONCLUSION**

Miss Duran’s conviction for knowingly possessing a stolen motor vehicle must be reversed and remanded for dismissal.

Respectfully submitted April 4, 2018.



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LISA E. TABBUT/WSBA 21344  
Attorney for Destiny Duran

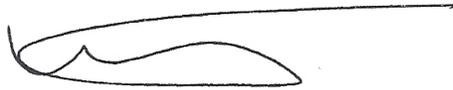
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares:

On today's date, I filed the Brief of Appellant to (1) Yakima County Prosecutor's Office, at [appeals@co.yakima.wa.us](mailto:appeals@co.yakima.wa.us) and [tamara.hanlon@co.yakima.wa.us](mailto:tamara.hanlon@co.yakima.wa.us); and [joseph.brusic@co.yakima.wa.us](mailto:joseph.brusic@co.yakima.wa.us); (2) the Court of Appeals, Division III; and (3) I am maintaining a copy in my file for Destiny Duran and will provide it to her when I have a valid address. This Court can send me Miss Djuran's RAP 10.10 notice.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed April 4, 2018, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344  
Attorney for Destiny Duran, Appellant

**LAW OFFICE OF LISA E TABBUT**

**April 04, 2018 - 8:18 AM**

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