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Court of Appeals
Division III
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No. 367959-III

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

STATE OF WASHINGTON, Respondent

v.

ALEX MICHAEL JONES, Appellant

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY
THE HONORABLE JUDGE JULIE McKAY

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The Evidence Was Insufficient To Sustain A Conviction For Possession Of A Stolen Motor Vehicle.
- B. The Prosecutor's Misconduct In Closing Argument Deprived Mr. Jones Of A Fair Trial.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. Did the State fail to prove someone other than Mr. Jones was a true owner or person entitled to the car?
- B. Did the State fail to prove the essential element of knowledge beyond a reasonable doubt?
- C. In closing argument, the prosecutor told the jury it could find the State had proven knowledge if Mr. Jones knew or "should have known" the vehicle was stolen. He also told the jury it did not have to find beyond a reasonable doubt that Mr. Jones had actual knowledge but could find him guilty if he "should have known" that a reasonable person in his situation would have known the car was stolen. Did the prosecutor's misstatements of the law constitute reversible misconduct?

II. STATEMENT OF FACTS

Spokane County prosecutors charged Alex Jones with possession of a stolen motor vehicle, based on events which occurred in the early morning of January 20, 2019. CP 6.

James Banks (“Banks”) worked as a tow truck driver, and on the side he sold cars and cars for scrap. RP 248-49. Banks learned about a 1981 El Camino through a friend of his from whom he had previously purchased a vehicle. RP 255. She told him it was her car and she wanted two hundred dollars for it. She told him it was an abandoned vehicle, did not run, and she did not have keys for it. RP 256-58.

Shortly after sunrise, he met her at a car lot in the Spokane Valley to see the car. RP 256. The car had a flat tire, garbage in the bed, and a broken headlight. RP 256-57,283. Banks said the car was junk. RP 260. With the intention of scrapping it, he towed the vehicle to his home driveway. RP 257-58. Banks stated that he regularly got cars for scrap and it was not unusual for them to not have keys. RP 288-89.

A few days later, on January 19, 2019, he and his friend, Mr. Jones, discussed the car. RP 258,273. He knew Mr. Jones had wanted an El Camino. RP 271. Banks used a slim jim to open the

car door. He put in spark wires and removed the ignition. RP 259-60. He left the ignition part on the seat, with the intention of getting a key made for it. He started the car with a socket extension and added starter fluid. RP 260, 262, 268. Because the battery would not hold a charge, he put in a different one. He saw that engine fluids were leaking, and he also changed the spark plugs. RP 262.

He and Mr. Jones cleaned the windshield and the dash where the VIN number was located. RP 265. They used an internet-based program, VINCheck, to ensure it was not a stolen car, and there were no liens on the vehicle. RP 264. The VINCheck website, maintained by the Insurance Crime Bureau, allows individuals to conduct a certain number of free VIN checks. RP 29. Banks and Mr. Jones both assumed if there was a problem with vehicle ownership it would show on VINCheck. RP 279.

The license plate tab on the car showed it had last been registered in 2000. RP 279. Banks told Mr. Jones he was confident it was not a stolen vehicle. RP 286-87. They removed the license plate and put a trip permit in the car window, because they believed they could not have a plate and a permit showing simultaneously. RP 266.

Banks testified that Mr. Jones wanted the paperwork for the car because he was trading his car for it. RP 281. Banks was supposed to acquire ownership paperwork from his friend shortly. RP 271. With that assurance, Mr. Jones took possession of the car after midnight on January 20, 2019. RP 271.

Spokane County Deputy Spencer was on patrol about 1 a.m. in the Spokane Valley. RP 168. He saw a white El Camino on the road with one of its headlights out and no license plate. RP 168,172. He reported the car was going faster than the speed limit but admitted he did not know the speed limit for the area. RP 169-170.

He conducted a stop and asked to see the trip permit. RP 176. Deputy Spencer testified the trip permit dates were correct, but the form had not been filled out correctly in its entirety. RP 176. He questioned Mr. Jones about the car and learned he had purchased it earlier that day from a friend, but there was not a bill of sale. RP 181. He believed the name on the trip permit, "Jhon Doe", was not a real person and the name John had been misspelled. RP 179-180. He arrested Mr. Jones for driving with a suspended license and the trip permit violation. RP 191.

Deputy Spencer testified he found “shaved keys” in the glove compartment. RP 184. He also searched Mr. Jones’s backpack for weapons. The deputy found two more trip permits inside the backpack. RP 186-87. Mr. Jones told him the trip permits were in the car when he purchased it. RP 186-87. One was properly filled out and the second was improperly filled out. RP 180.

Deputy Spencer called dispatch and learned there was not a department of licensing record for the vehicle; but, there was a report that Ed Troyer had tried to report the vehicle as stolen. RP 190. Mr. Troyer had not provided sufficient information to list the vehicle as stolen. RP 193,200.

Mr. Troyer testified he purchased the El Camino in November 2018, from an individual who had purchased it from an estate. RP 108, 110. 124. The title was in the name of Frank Montgomery, the original owner. RP 150. The car was not registered when Troyer purchased it. He did not transfer ownership of the car to his own name. RP 115-16, 120,150. He did not produce a bill of sale and did not register the car in his own name. RP 149-151. He did not license the vehicle. RP 114.

He had it towed to a shop where he planned to repair it for sale or else scrap it for parts. In the front area of the shop was a car

lot. RP 111. Several months after purchasing the car he put it out on the park/sell lot with a sign. RP 116. One evening he left and the following morning the car was gone. RP 118.

The court provided the following jury instructions:

To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt: One, that on or about the 20th day of January 2019, the defendant knowingly possessed a stolen motor vehicle; two, that the defendant acted with knowledge that the motor vehicle had been stolen; three, that the defendant withheld or appropriate the motor vehicle to the use of someone other than the true owner or person entitled thereto; and four, that any of these acts occurred in the State of Washington.

CP 69

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime. If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 70.

During closing argument, the prosecutor told the jury:

The issue in this case is whether Mr. Jones knew the car was stolen, or significantly, if Mr. Jones ought to have known

that the car was stolen based on the information that was available to him...

RP 325.

And again:

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, you, the jury are permitted but not required to come to the conclusion beyond a reasonable doubt that the person actually had knowledge... if a person sees 15 different warnings in a small room that the temperature in the room is going to be turned up to a 100 degrees, you can't complain the temperature got turned up to 100 degrees because you didn't know. *Whether you read those signs or not, we're going to impute that knowledge to him. We're going to attribute him as knowing that knowledge, because anybody, who's a reasonable person, would be able to read those signs.*

CP 326.

And again:

I will argue to you in a moment that Mr. Jones actually knew, *but that's not what you have to find beyond a reasonable doubt. If you're satisfied that he should have known that a reasonable person in his situation would have known, then you can find for purposes of liability for this crime, he did know.*

RP 327.

The jury found Mr. Jones guilty of possession of a stolen vehicle. CP 74. He makes this timely appeal. CP 105-106.

III. ARGUMENT

A. The Evidence Was Insufficient To Sustain A Conviction For Possession Of A Stolen Motor Vehicle.

A criminal defendant is entitled to “ ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.’ ” *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L.Ed. 2d 435 (2000); *State v. France*, 180 Wn.2d 809, 814, 329 P.3d 864 (2014); U.S. Const. Amend. 6; Const. art.1§§ 21,22. More than a “mere scintilla of evidence” is needed to meet the beyond a reasonable doubt standard: “there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved.” *State v. Miller*, 60 Wn.App. 767, 772m 807 P.2d 893 (1991).

Thus, on review, the Court does not attempt to determine whether it believes the State met the burden of proof, but rather whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of possession of a stolen motor vehicle beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and "all reasonable inferences from that evidence must be drawn in favor of the State, and interpreted most strongly against the defendant." *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014); *State v. Salinas*, 119 Wn.2d 292, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable in determining the sufficiency of the evidence. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). However, inferences based on circumstantial evidence must be reasonable and cannot be based on speculation. *State v. Vasquez*, 178 Wn.2d 1,16, 309 P.3d 318 (2013).

Even viewed in a light most favorable to the State, the evidence was insufficient for any rational trier of fact to find that (1) Mr. Jones withheld and appropriated the vehicle to the use of another other than the true owner or person entitled thereto or (2) that he knew the vehicle he purchased was stolen. RCW 9A.56.068.

1. No Rational Trier Of Fact Could Find That Mr. Jones Withheld Or Appropriated The Car To The Use Of Another Other Than The True Owner Or Person Entitled Thereto.

The gravamen of possession of a stolen motor vehicle is the withholding or appropriating the vehicle to the use of someone other than the true owner or person who is entitled to it. RCW 9A.56.140(1); RCW 9A.56.068(1). An “owner” is “a person, other than the actor, who has *possession of* or any other *interest in the property* or services involved, and without whose consent the actor has no authority to exert control over the property or services.” RCW 9A.56.010(11).

When a person operates an automobile, he is effectively in possession of it, and can reasonably be presumed to be aware of its ownership. *Rhodes v. City of Roseburg*, 137 F.3d 1142, 1144 (9th Cir.) (1998). Because Mr. Jones had possession of the vehicle, in order for the jury to convict, there needed to be more than a scintilla of evidence that someone had a superior interest in in the car to Mr. Jones. *State v. Pike*, 118 Wn.2d 585, 590, 826 P.2d 152 (1992).

Here, the evidence of a superior interest was based entirely on circumstantial evidence: that is, Mr. Troyer’s testimony. There was not a single piece of documentation to uphold Mr. Troyer’s claim of ownership over that of Mr. Jones. Troyer testified he purchased the car for 750 dollars but did not produce a bill of sale.

The individual who could have confirmed he sold the car to him did not testify.

There was no record or documentation of a chain of ownership to verify that Mr. Troyer owned the vehicle. Troyer admitted title to the car was not in his name. The car was not registered in his name. It was not registered with the Department of Licensing . The scant information provided by Mr. Troyer was so insufficient the police did not take a stolen car report. The entire proof that Mr. Troyer was the true owner rested solely on his testimony.

While circumstantial evidence is no less reliable than direct evidence, the 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).

Here, there is not that quantum of evidence necessary for a jury to reasonably infer that someone other than Mr. Jones owned the vehicle. The striking lack of documentation signifying any indicia of ownership militates against any reasonable inference that the essential element of withholding the vehicle from its true owner had been proven beyond a reasonable doubt.

2. The Evidence Was Insufficient For Any Rational Trier of Fact To Conclude Mr. Jones Knew The Vehicle He Had Purchased Was Stolen.

RCW 9A.56.068(1) provides “a person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle.” Possession of stolen property is defined as “knowingly to 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.” RCW 9A.56.140(1).

Knowledge that the item is stolen is an essential element of the offense. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). Mere possession of stolen property cannot justify a conviction for possession of stolen property. *State v. McPhee* 156 Wn.App. 44, 62, 230 P.3d 284 (rev. denied, 169 Wn.2d 1028 (2010)). Evidence that would tend to show guilt include providing an unlikely story or providing a story the police cannot investigate or rebut. *State v. Portee*, 25 Wn.2d 246, 253,254, 170 P.2d 326 (1946). Similarly, knowledge may be proven if there is information from which a reasonable person would conclude the fact at issue. (See jury instruction at CP 70).

When Mr. Jones purchased the car, he was assured it was not a stolen vehicle: he knew who sold it to him, they checked online for information about the car, such as liens, and had it been reported stolen. Mr. Banks repaired the car. Mr. Jones traded his Durango for the El Camino. Mr. Jones wanted the appropriate paperwork when he bought the car but agreed to wait until Allie supplied it to Mr. Banks. The explanation of the purchase was without contradiction.

The evidence used by the State to create the inference of knowledge: (1) Mr. Jones's gave a vague answer about where he purchased the vehicle and from whom; (2) the keys found in the glove compartment; (3) the use of the socket extension to start the vehicle; (4) the incorrectly filled out trip permits.

First, when the deputy asked Mr. Jones about the provenance of the car, Mr. Jones was apparently vague and then invoked his right to silence. A criminal defendant's assertion of his constitutionally protected due process rights is not evidence of guilt. *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). The State cannot invite a jury to infer that a defendant is more likely guilty because he invoked his constitutional rights. *State v. Nelson*, 72 Wn.2d 269, 285, 432 P.2d 857 (1967).

Second, the officer testified he arrested Mr. Jones for driving with a suspended license and having improperly filled out trip permits. He went in the glove compartment and found keys which had been possibly shaved. The State presented evidence there were no fingerprints on the keys. RP 203-204. Thus, a jury could not reasonably conclude that Mr. Jones touched the keys or knew of their existence.

Third, Mr. Banks told Mr. Jones the car had been abandoned and there was not a key. Mr. Banks testified he purposely placed the ignition on the passenger seat so they could have a key made for it. As Mr. Banks pointed out, it was not at all unusual for an older abandoned car, last registered in 2000, to be missing the key. Because the missing key was not unusual, it should not uphold an inference of knowledge the car was a stolen vehicle.

Last, the state relied on the two improperly filled out trip permits to help the jury infer knowledge the vehicle was stolen. There was no allegation that Mr. Jones filled out the permits. Further, Mr. Jones had a properly completed trip permit in his backpack but, had placed one not correctly filled out in the car window.

The deputy testified that three-day trip permits were used to drive when an individual drove an unlicensed car on the roadway, or if the car was not registered. RP 173. During the CrR 3.5 hearing, the deputy explained temporary permits were for three days and an individual was allowed to use up to three trip permits in a month. RP 56-57,73. Possessing more than one trip permit was not illegal and no rational trier of fact could infer having the temporary permits was evidence of knowledge the vehicle was stolen.

B. The Prosecutor's Closing Argument Prejudiced Mr. Jones's Right To A Fair Trial Requiring Reversal.

Every prosecutor is a quasi-judicial officer of the court and charged with the duty of insuring that a defendant receives a fair trial as guaranteed by the Sixth and Fourteenth Amendments, and Const. art. I,§22; *State v. Boehning*, 127 Wn.App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct may deprive a defendant of a fair trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 286 P.3d 673 (2012). Where the misconduct affects a jury's verdict, it violates the defendant's right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is

established where there is a substantial likelihood the misconduct affected a jury's verdict. *Id.* at 578.

A prosecuting attorney commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Where a defendant fails to object, he is deemed to have waived the error, unless the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012). Under this standard, the defendant must show (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) "the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011).

Here, the closing argument by the prosecutor misstated the law on the essential element of knowledge. The prosecutor argued that what Mr. Jones should have known or what a reasonable person would have known could substitute for actual, subjective knowledge¹. This argument was improper.

¹ The State used a PowerPoint presentation during closing argument. That presentation was not made a part of the trial record.

A jury may find a defendant had actual knowledge based on circumstantial evidence, but it is impermissible for the jury to find knowledge when a reasonable person in that situation would have known or the defendant “should have known.” *State v. Allen*, 182 Wn.2d at 374. The law allows the jury to consider what a reasonable person in the same situation would believe, not what he “should have known”. *Id.*

- 1) A curative instruction would not have obviated any prejudicial effect on the jury.

WPIC 10.02), which instructs the jury on the meaning of “knowledge” has been held to accurately state the law and has been approved by our Supreme Court. *State v. Leech*, 114 Wn.2d 700, 710, 790 P.2d 160 (1990). However, “knowledge” is a complicated concept: “if a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact.” The concept is difficult, and the prosecutor’s misstatement of the law made it very difficult for the court to give an effective curative instruction.

The court would have had to intervene and explain the standard proposed by the State was incorrect and explain it was

not that a reasonable person should have known the car was stolen based on the evidence: but what a reasonable person in the same situation would believe. *State v. Allen*, 182 Wn.2d at 374. At best these are foreign concepts to the average juror. The court would also have had to explain to the jury the standard was not what Mr. Jones should have known, but whether he had actual knowledge. As the *Allen* Court noted, “correctly stating the law once can hardly compensate for misstate the law multiple other times.” *State v. Allen*, 182 Wn.2d at 377.

In *Allen*, the defendant was prosecuted as an accomplice. The prosecutor there misstated the standard upon which the jury could find he had actual knowledge. *Id.* at 373. The Court pointed out “the distinction between finding actual knowledge through circumstantial evidence and finding knowledge because the defendant ‘should have known’ is critical.” *Id.* at 374. The Court reasoned that jurors could misinterpret the statute to allow a finding on the improper understanding, and “to pass constitutional muster, the jury must find actual knowledge, but may make such a finding with circumstantial evidence.” *Id.*

2) The Misstatement of Law Had a Prejudicial Effect.

Whether a prosecuting attorney commits prejudicial misconduct is “not a matter of whether there is sufficient evidence to justify upholding the verdicts”, but “whether there is a substantial likelihood that the instances of misconduct affected the jury’s verdict.” *Allen*, 182 Wn.2d at 376 (quoting *In re Pers. Restraint of Glasman*, 175 Wn.2d at 711).

Here, the prosecutor stated three times the jury could convict Mr. Jones: if they found he *ought to have known* the vehicle was stolen that was sufficient; whether he “read the signs” or not, a reasonable person would have, and knowledge would be imputed to him, and if the jury was satisfied he should have known the vehicle was stolen. “Repetitive misconduct has a cumulative effect.” *Id.* at 707.

Knowledge was the key issue for the jury to decide and the misstatements misled the jury on this critical issue. The State must convict on the merits, not by way of misstating the law. *State v. Fleming*, 83 Wn.App. 209, 216, 921 P.2d 1076 (1996).

“Where it is possible the jury believed the individual lacked actual knowledge and yet convicted him because it believed an ordinary person would have known” the conviction must be

reversed. *State v. Shipp*, 93 Wn.2d 510, 517, 610 P.2d 1322 (1980).

IV. CONCLUSION

The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and the charge. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Retrial of a case dismissed for insufficient evidence is barred by the Double Jeopardy Clause. Const.art.1, §9. Because the State failed to prove there was an owner whose interest superseded that of Mr. Jones and failed to prove he knew the vehicle was stolen, he respectfully asks this Court to reverse his conviction and dismiss the charge with prejudice. In the alternative, Mr. Jones asks the Court to reverse his convictions based on prosecutorial misconduct in misstating the law.

Respectfully submitted this 30th day of September 2019.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on September 30, 2019, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Spokane County Prosecuting Attorney at SCPAAppeals@spokanecounty.org and to Alex Jones/DOC#888323, Airway Heights Correction Center, PO Box 2049, Airway Heights, WA. 99001



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