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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ALEX JONES, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The evidence was insufficient to sustain a conviction for possession of a stolen motor vehicle.
2. The prosecutor's misconduct in closing argument deprived Mr. Jones of a fair trial.

II. ISSUES PRESENTED

1. Accepting the State's evidence and any rational inferences that may be taken from that evidence as true, did the State present sufficient evidence that someone other than Mr. Jones owned or was entitled to possession of the El Camino?
2. Did the State present sufficient evidence that Mr. Jones knew that he possessed a stolen vehicle?
3. Did the State engage in misconduct by arguing that knowledge that the vehicle was stolen could be imputed to the defendant if the facts were such that a reasonable person under the circumstances would have that knowledge?
4. If the prosecutor's argument constituted misconduct, does the absence of an objection waive a claim of error where that alleged misconduct was easily curable?

III. STATEMENT OF THE CASE

On January 24, 2019, the State filed an information in the Spokane County Superior Court, charging the defendant, Alex Jones, with one count of possession of a stolen motor vehicle. The matter proceeded to a jury trial and the defendant was convicted as charged.

Substantive facts.

During his retirement, Michael Troyer made extra money by working on "automotive projects"; he bought cars, repaired them, and sold

them for money. RP 107. In November 2018, Troyer purchased a 1981 Chevrolet El Camino from a friend, Lee Root, of Rosalia, Washington, who had obtained the vehicle from an estate sale. RP 108, 110, 120-21. When Troyer purchased the El Camino, it was not in running condition. RP 109. Because the El Camino did not run, Troyer intended to either fix it, if possible, or separately sell its parts. RP 109. Troyer paid \$1,500 for the El Camino and another vehicle, a GMC Caballero. RP 109-10.

Troyer took the vehicle to an automobile shop at 16th and Pines in Spokane Valley. RP 111. The car's transmission was in working order, but the motor, distributor, and wiring needed work. RP 112. The interior of the car was in good condition. RP 113. After investing time and money into the El Camino, Troyer decided he would attempt to sell it. RP 113.

Because the automobile shop was owned by an individual who ran a "park and sell" lot on the property, Troyer moved the El Camino to that lot in January 2019 to facilitate a sale. RP 114. At the time, the ignition was in working order and the vehicle had a set of matching keys. RP 115. The El Camino also had a license plate affixed to the rear, but it was not licensed. RP 115-16. Troyer placed a "for sale" sign in the window. RP 116.

Troyer was unable to recall the date upon which the El Camino disappeared, but recalled that its disappearance occurred between 9:30 at

night and 10 o'clock the following morning.¹ RP 118. After trying to locate the vehicle, Troyer called the police, who took his report but told him that since he had not transferred the vehicle into his name,² they would have to reach the original owner for a statement. RP 120.

Police recovered the vehicle the following day, and called Troyer, asking him to take and send a picture of the corresponding keys and title; he did so. RP 121. Troyer recalled that the title he had possessed showed the owner to be Frank Montgomery. RP 150.

Troyer was permitted to retrieve the vehicle two days later; at that time, the vehicle did not start, the shifting column was disconnected, there was damage to the ignition and the broken ignition components were still in the car, a headlight was broken, the license plate was removed from the vehicle and in the vehicle's interior, the exhaust pipe was flattened, and a different battery, in worse condition, was in the car. RP 122-23, 124. There were screwdrivers and a vice grip chain in the car. RP 125. Troyer had given no one, other than his friend, Bud Selby, permission to drive the El Camino. RP 123. By the time the case went to trial, Troyer no longer possessed the vehicle or its original title, having traded it. RP 145, 159.

¹ Troyer testified that the vehicle was recovered the following night, and he was able to retrieve it from impound two days later. RP 118.

² Troyer explained that he had not transferred the vehicle into his own name because he wanted to see if he could sell it first. RP 149.

Spokane County Sheriff's Deputy Garrett Spencer was on patrol on January 20, 2019, in Spokane Valley. RP 166. At approximately 1 a.m., he observed a white El Camino, which appeared to be travelling over the speed limit, driving with a broken or malfunctioning headlight; the vehicle turned into an industrial area where no businesses were likely open. RP 169-70. After Spencer caught up to it, he noted the El Camino made multiple turns down side streets in a rapid manner, cutting off the other lane of travel. RP 170. Spencer initiated a traffic stop by activating his lights and the El Camino was slow to respond; it pulled onto the shoulder as if it were going to stop, and then pulled back onto the roadway, continuing onto another street,³ failing to yield until the Deputy activated his siren. RP 171-72. Spencer observed there was no license plate on the vehicle. RP 171.

Upon approaching the El Camino, Spencer observed a trip permit in the back window. RP 173. Alex Jones, the defendant, was the driver of the El Camino. RP 175. As Jones spoke, Spencer observed he had a flushed face and his voice caught in his throat; Spencer believed Jones to be nervous. RP 175. Spencer asked if he could inspect the trip permit and noticed the permit was not completed;⁴ although the front of the permit

³ Spencer testified there were "plenty" of safe places for the El Camino to pull over and no other traffic on the roadway. RP 172-73.

⁴ Under RCW 46.16A.320, certain requirements are necessary for a valid trip permit to be used. The permit must identify the vehicle for which it is used, be

appeared correct, the back side contained none of the pertinent vehicle information necessary, and contained the name “Jhon Doe” as the operator. RP 179. Jones stated the trip permit was in the car when he bought it from his friend. RP 187. Jones was asked to step from the vehicle; Jones told the officer he had purchased the El Camino from a friend “earlier that day,” “around the corner” but did not name the seller. RP 181, 183. Jones had no bill of sale, and no other documents evidencing ownership. RP 181. Spencer observed a socket extension replaced the ignition, which had been removed. RP 184.

Subsequently, after Jones had been placed under arrest, Spencer looked into the El Camino, seeing a license plate on the floor;⁵ he had dispatch check the status of the plate. RP 184. Although dispatch could provide no information from the Department of Licensing pertaining to that license plate, Spencer located a police report in which it had been reported stolen. RP 190.

Spencer noted the ignition, which had been removed, was on the seat, there was a set of multiple shaved keys in the glove box, and there

completed in its entirety, be signed by the operator before operation of the vehicle, not be altered or corrected, and be displayed on the vehicle for which it is used.

⁵ Spencer testified that license plates are one method by which law enforcement can determine if a vehicle is stolen. RP 191.

were a couple of screwdrivers on the floor.⁶ RP 184. A backpack in the El Camino, claimed by Jones, contained two other trip permits, one with the name “Jhon Doe,” which bore the same license number as the permit displayed in the window, leading Spencer to believe the permit was forged. RP 185-86, 187.

When attempting to ascertain the vehicle identification number (VIN), Spencer observed the VIN affixed to the vehicle door was too faded to read; the VIN affixed to the dash was corroded and the window fogged, but he could make out the last few digits.⁷ RP 197-98, 212. In an effort to verify whether the vehicle was stolen, Spencer contacted Troyer, who confirmed that the vehicle had been taken from him. RP 193. Troyer told Spencer he had last seen the car on January 18, 2019. RP 202.

James Banks testified on the defendant’s behalf. Banks was a tow truck driver, and sold and scrapped cars. RP 249. Mr. Banks claimed that a “friend” named “Alli”⁸ contacted him, stating she had a car that she “just got” and inquired whether he “might be interested in [scrapping] it or

⁶ In Deputy’s Spencer’s experience with stolen vehicle recovery, he has seen multiple instances where shaved keys or screwdrivers are used to start a stolen automobile; often a stolen vehicle will evidence tampering with the steering column or ignition switch as well. RP 165-66. Also in his experience, stolen vehicles may have their original parts, like car batteries, changed out. RP 189.

⁷ Spencer later ascertained the full VIN: 1GCCW80K0BD442204. RP 199.

⁸ Banks did not know “Alli’s” last name. RP 272.

sell[ing] it or whatever.” RP 255. She was “trying to get rid of it.” RP 255. Alli wanted a “couple hundred dollars” and “it didn’t run, it was abandoned.” RP 256. Banks claimed he went to “some car lot off Pines” in the early morning, just after sunrise to look at the car. RP 257. Banks claimed it looked abandoned and Alli “didn’t have keys for it. She got it without the keys and not running.” RP 257. Banks decided to purchase the abandoned, keyless El Camino that Alli had just purchased herself and was trying to “get rid of,” and towed it with his truck to his house. RP 258.

At the time of the purchase, Banks believed Alli would later provide him with documentation for the sale because “she didn’t have it at the time.” RP 263. Banks stated he had no reason not to trust Alli,⁹ having purchased from her before. RP 264. To be sure that the vehicle was not stolen, Banks had “them”¹⁰ check an app on a phone that purported to be capable of checking whether a vehicle was stolen. RP 264. Banks “had ‘them’ check before [he (Banks)] left with it.” RP 264.

Banks decided he was going to scrap or recycle the El Camino, but two days later, Mr. Jones “showed up” at his house expressing interest in it. RP 259. To make the car operable, Banks and Jones (not having keys to the

⁹ In advance of trial, Banks attempted to, and succeeded in contacting “Alli.” She did not “want” to testify on Jones’ behalf. RP 288.

¹⁰ It is unclear whether Mr. Banks was testifying that he bought the El Camino from more than one individual, or if the use of the word “them” was accidental.

car) “put a couple of spark wires on it and [took] the ignition out ... to turn it over to see if it started.” RP 259. They used a socket extension “to get under the ignition” to start the car. RP 262. They accessed the car by use of a Slim Jim. RP 259. Banks said the El Camino was “junk” and dirty, needing to be wiped down. RP 260-61.

On cross-examination, Banks clarified that he did not run the VINCheck on the El Camino until *after* he had already taken it to his property and Jones was present with him. RP 275. The last eight digits of the VIN searched by Banks and Jones were “BD412201.”¹¹ RP 279.

Jones traded Banks a Dodge Durango for the El Camino. RP 271. Banks said before leaving the property with the El Camino, Jones removed the license plate, claiming that the license plate and trip permits could not be displayed simultaneously. RP 266-67. Jones left Banks’ residence about midnight, after having worked on the vehicle for a “couple of hours.” RP 271. Banks did not provide any ownership paperwork to Jones or a bill

¹¹ During rebuttal closing argument, the State argued that Mr. Banks put the wrong VIN number into the website he claimed to use. This argument was objected to as “something not in evidence” and the objection was sustained. However, the deputy testified, as above, to the correct VIN number and Mr. Banks testified, to the last eight digits of the VIN he utilized for his alleged search. Both facts were testified to without objection, and the numbers did not match. Thus, this evidence may have been considered by the jury.

of sale. RP 271, 284. Jones “really wanted the car and wanted to leave in it that night,” so he made the trade and left without any paperwork. RP 282.

The jury found the defendant guilty as charged. CP 74. The defendant had an offender score of “20,” including two prior convictions for possession of stolen vehicle and two convictions for second degree taking a motor vehicle without permission. CP 86. The court sentenced him to the midpoint of the standard range, 50 months, but ran that sentence consecutively with two other unrelated cases. CP 88.

The defendant timely appealed.

IV. ARGUMENT

A. THE DEFENDANT’S SUFFICIENCY OF THE EVIDENCE CHALLENGE FAILS.

1. Standard of review for sufficiency of the evidence claims.

In reviewing a challenge to the sufficiency of the evidence, the test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be interpreted most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A

reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Circumstantial evidence carries the same weight, and is as reliable as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). “[I]nferences 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). “[A] verdict does not rest on speculation or conjecture when founded on reasonable inferences drawn from circumstantial facts.” *State v. Jameison*, 4 Wn. App. 2d 184, 197-98, 421 P.3d 463 (2018).

In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). In that regard, our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury,

upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981). Similarly expressed:

The fact that a trial or appellate court may conclude the evidence is not convincing, or may find the evidence hard to reconcile in some of its aspects, or may think some evidence appears to refute or negative guilt, or to cast doubt thereon, does not justify the court's setting aside the jury's verdict.

State v. Randecker, 79 Wn.2d 512, 517-18, 487 P.2d 1295 (1971).

2. Necessary elements of possession of a stolen motor vehicle.

The defendant was charged with one count of possession of a stolen motor vehicle. CP 6. A person is guilty of possessing a stolen vehicle if he or she possesses a stolen vehicle. RCW 9A.56.068. RCW 9A.56.140(1) defines what it means to "possess" stolen property:

"Possessing stolen property" means 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 or person entitled thereto.

Thus, the State had to prove, among other things, that the defendant withheld or appropriated the El Camino to the use of any person other than the true owner or person entitled to the El Camino. In this regard, the State is required to prove only that the property belonged to someone other than the accused. *See e.g., State v. Lee*, 128 Wn.2d 151, 159, 904 P.2d 1143

(1995). “Ownership of personal property is a fact to which a witness may testify. On cross-examination, such witness can be required to state the particular facts on which the claim of ownership rests.” *Ft. Smith & W.R. Co. v. Winston*, 136 P. 1075, 1076 (Okla. 1913). An owner’s testimony regarding the value of personal property is given whatever weight deemed appropriate by the jury, *see Ingersol v. Seattle-First Nat. Bank*, 63 Wn.2d 354, 358, 387 P.2d 538 (1963); a witness’ testimony about the facts pertaining to a claim of ownership should be treated no differently under the law.¹²

In addition, the State had to prove that Jones acted with knowledge that the motor vehicle had been stolen. *State v. Porter*, 186 Wn.2d 85, 90, 375 P.3d 664 (2016). A person knows of a fact by being aware of it or having information that would lead a reasonable person to conclude the fact exists. RCW 9A.08.010(1)(b). Both circumstantial evidence and direct evidence are equally reliable to establish knowledge. *State v. Delmarter*,

¹² By way of example, in *State v. Neis*, 68 Wash. 599, 600, 123 P. 1022 (1912), our Supreme Court analyzed a larceny prosecution in which the complaining witness testified as to her ownership of a “certain nugget chain” that she described by “pointing out several marks and peculiarities.” Although the court reversed, because the trial court erred in its instructions to the jury on a separate issue, the court noted, “[The complaining witness] claimed the particular chain and the only question open for the jury was whether Exhibit A was her property.” There is no reason that proof of ownership of a vehicle need be established by any superior quantum of evidence than that found acceptable for other personal property, such as a gold chain.

94 Wn.2d 634, 638, 618 P.2d 99 (1980). An inference of guilty knowledge may be supported by evidence of either actual or constructive knowledge. *State v. Rockett*, 6 Wn. App. 399, 402, 493 P.2d 321 (1972). Knowledge may be determined by looking at the context surrounding the defendant's acquisition of the vehicle. *Id.* It may be proved by showing the defendant "had knowledge of facts sufficient to put him [or her] on notice that [the goods received] were stolen." *Id.* A jury may find actual knowledge when the defendant cannot explain his or her possession of a recently stolen vehicle, especially when an explanation given by the defendant is improbable or unverifiable. *Id.* at 403.

While mere possession of stolen property is insufficient to justify a conviction,¹³ our high court in *State v. Couet* noted, however, that "[w]hen a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his [or her] guilt will support a conviction." 71 Wn.2d 773, 776, 430 P.2d 974 (1967). Examples of corroborative evidence may include a false or improbable explanation of possession, flight, or the presence of the accused near the scene of the crime. *State v. Q.D.*, 102 Wn.2d 19, 28, 685 P.2d 557 (1984); *State v. Womble*, 93 Wn. App. 599, 604,

¹³ *Couet*, 71 Wn.2d at 775; *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284 (2010).

969 P.2d 1097 (1999) (absence of a plausible explanation or an improbable explanation is a corroborating circumstance); *State v. Hudson*, 56 Wn. App. 490, 495, 784 P.2d 533 (1990) (flight from the police is a sufficient corroborating circumstance); *State v. Smyth*, 7 Wn. App. 50, 53, 499 P.2d 63 (1972) (buying the stolen property at an unreasonably low price may also be a corroborating circumstance); *State v. Hatch*, 4 Wn. App. 691, 694, 483 P.2d 864 (1971) (explanations of the stolen property that cannot be checked or rebutted may be corroborating circumstances).

Jones asserts there is not sufficient evidence to support that someone, other than himself, owned or had superior possessory rights to the El Camino. He further asserts there was insufficient evidence that he knew the El Camino was stolen. The problem with both of these contentions is that he relies upon *his evidence*, necessarily rejected by the jury, rather than upon the evidence proffered by the State. In doing so, he fails to admit the truth of the State's evidence and the rational inferences that may be taken from that evidence, and, as a result, his analysis of the issues is flawed.

3. The State presented sufficient evidence that Mr. Troyer owned or was entitled to the El Camino.

The defendant claims that the lack of any licensing paperwork bearing Mr. Troyer's name left the State with only "circumstantial evidence" of ownership that was insufficient to meet its burden of proof. As

indicated above, circumstantial evidence is no less valuable than direct evidence.

Here, the jury had the opportunity to listen to Troyer, judge his credibility, and give whatever weight to that testimony it deemed appropriate. Troyer told the jury how he acquired the El Camino. The jury was able to hear Troyer detail the work he had put into the vehicle and his knowledge of its working components and nonworking components, both before and after it was taken. Troyer knew the name of the individual listed on the title of the vehicle – suggesting that, at one time, he had seen and/or possessed the title. Troyer presented a lengthy story about his purchase, transport, and subsequent work on the vehicle. He named multiple individuals (by both first and last name) who were involved in his acquisition of the El Camino and the work he put into it, and would have been able to confirm his testimony. Based upon the entirety of Troyer's testimony, the jury could believe or disbelieve him.

A legal title to a vehicle is not a prerequisite to a finding of ownership or rightful possession of a vehicle. As the trial court stated:

The fact that there is no record [of] ownership with the Department of Licensing does not negate the fact that Mr. Troyer is before this Court indicating he owns the vehicle. He indicated he purchased it, it wasn't running, he was either going to part it out or sell it. He got it running and determined, his testimony was that he was going to get it

licensed until he determined whether he could sell it or not.
It got stolen before he sold it.

RP 246. This evidence is sufficient evidence by which a rational trier of fact may find that the vehicle was withheld or appropriated “to the use of any person other than the true owner or person entitled thereto.” *See*, CP 68. This claim fails.

4. The State presented sufficient corroborative evidence that Mr. Jones knew that the vehicle was stolen.

As indicated above, mere possession of stolen property is insufficient to justify a conviction, but “[w]hen a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show his [or her] guilt will support a conviction.” *Couet*, 71 Wn.2d at 776. Here there was ample corroborative evidence that Jones knew the vehicle was stolen.

An operator of the vehicle, such as Jones, would be able to easily observe that the vehicle’s ignition was altered, bearing a socket extension, rather than an ignition switch that would accommodate a key. Ex. P-4. Strewn about the vehicle were the original ignition switch, screwdrivers, and shaved keys.¹⁴ The defendant was in possession of at least two trip

¹⁴ Defendant claims on appeal that the jury could not reasonably infer that Jones was aware of the presence of the shaved keys in his newly purchased vehicle. Br. at 13. The State disagrees. Contrary to the defendant’s assertion, it would be more than reasonable for the jury to infer that the items within the vehicle possessed by,

permits unlawfully bearing the same serial number, in the name of “Jhon Doe,” both in his backpack and affixed to the rear of the vehicle.¹⁵ The license plate, bearing tabs from the year 2000, and a means by which law enforcement might have easily detected whether the vehicle was stolen, had been removed, stashed in the passenger compartment, and replaced with one of two identical and highly suspect trip permits. When Deputy Spencer attempted to stop the El Camino, Jones, who was the driver, was slow to yield to the officer’s directive to do so. These facts, especially when taken as a whole, support the conclusion that Jones had actual knowledge the vehicle was stolen.

Thus, defendant’s claims, both at trial and on appeal, that he had no reason to believe the vehicle was stolen, having relied, in good faith, on an alleged cellphone VIN check application and the other circumstances presented by Banks, are ultimately irrelevant. That is not the standard by which this Court judges the sufficiency of the evidence. This Court does not reweigh the credibility of the witnesses or their testimony. The jury was in

and allegedly purchased by Jones either belonged to him, or were retained by him upon the purchase of the vehicle.

¹⁵ Defendant also claims the trip permits lack any evidentiary significance because there was no evidence that Jones filled them out. The State again disagrees. The trip permit in the window was identical to the one found in a backpack Jones asked to have transported with him upon his arrest. The jury could reasonably infer that both trip permits belonged to or were prepared by Jones.

the best position to see and hear defense witness Banks testify, and judge his credibility. It was free to disregard all or part of his testimony.

The jury could easily have inferred that Banks, “Alli” (if she existed) and Jones were all involved in a vehicle theft ring – “Alli” wanted to “get rid of the vehicle,” Alli and Banks arranged a meeting at sunrise (when few people would likely witness the transaction) at a car lot to look at the “abandoned” vehicle she claimed to own, but for which she did not have keys or ownership paperwork, and Jones, himself, did not care if Banks provided him with a bill of sale – he “just wanted to leave” Banks’ house, with the El Camino, at midnight, having just traded that El Camino for a Durango, and having broken into the El Camino with Banks with a Slim Jim.

The jury could also have found Bank’s version of events inconsistent and, therefore, unreliable. Banks testified that he had the VIN checked before removing it from the car lot, but later testified he did not check the VIN until he was at his home with Jones; it would be illogical for anyone who has knowledge of such an app to purchase a vehicle without first using it to determine the status of the vehicle. Additionally, Banks testified he was confident that he had the correct VIN number from the El Camino’s dashboard, RP 280, and yet the VIN that he recalled searching, ending in BD412201, did not match the actual VIN of the vehicle. RP 199.

The jury was free to determine the significance of that mistake – whether it was innocent or purposeful.

The circumstances surrounding Jones’ acquisition and operation of the vehicle, and the vehicle’s objective physical condition and modifications amounted to more than the necessary quantum of “slight corroborative evidence” of the defendant’s knowledge the vehicle was stolen. This claim fails.

B. THE DEFENDANT’S PROSECUTORIAL MISCONDUCT CLAIM FAILS.

To establish prosecutorial misconduct, a defendant bears the burden of proving the prosecutor’s conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). If a defendant shows that the prosecutor’s conduct was improper, the court must determine whether the improper conduct prejudiced the defendant. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). A prosecutor’s improper conduct results in prejudice when ““there is a substantial likelihood [that] the instances of misconduct affected the jury’s verdict.”” *Thorgerson*, 172 Wn.2d at 443 (alteration in original) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

Where, as here, a defendant fails to object to alleged prosecutorial misconduct, the defendant is deemed to have waived any error unless he or she shows that the misconduct was so flagrant and ill-intentioned that an instruction from the trial court could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 760-61. To meet this heightened standard, the defendant must show that “(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.’” *Id.* at 761. Reviewing courts focus less on whether the conduct was flagrant and ill-intentioned, and more on whether the resulting prejudice could have been cured. *Id.* at 762.

This standard of review serves to give the court an opportunity to correct counsel and to caution jurors against being influenced by improper remarks. *Id.* at 761. Objections are required not only to prevent or remedy counsel’s improper remarks, but also to “prevent potential abuse of the appellate process”; otherwise, a party “could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict and then seek a new trial on appeal.” *Id.* (internal citations omitted).

Here, the defendant claims the prosecutor committed misconduct in closing argument by arguing that the jury could convict the defendant upon evidence merely demonstrating that a reasonable person would have known or should have known the vehicle was stolen. Br. at 16. The court instructed the jury:

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. The defendant does not claim that the jury was improperly instructed by the trial court.

In closing, and without objection, the prosecutor stated:

“If it walks like a duck, quacks like a duck, it’s a duck,” and in this case, the El Camino was the duck and Mr. Jones knew it was a duck. And certainly, if he didn’t know, which is highly doubtful, he should have known. He should have known he was driving a duck.

RP 319.

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. The prosecutor orally reiterated the court's proper definition of "knowledge" during his closing argument, emphasizing the second paragraph of that instruction:

"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 you're not required to come to the conclusion that the person actually had knowledge,*[" and you know, that makes sense. If a person sees 15 different warnings in a small room that the temperature is going to be turned up to 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.

And in this case, Mr. Jones had many, many signs that something was fishy with this car. 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, did he know.*

RP 326-27 (emphasis added).

After discussing the presence of the questionable trip permits in the El Camino, the removal of the license plate, the damage to the steering wheel, the lack of keys, the use of the socket extension to start the car, and the presence of shaved keys, the prosecutor reiterated that all of that

information could be “imputed to Mr. Jones” as “some of the things that we really know he must have known.” RP 328.

The prosecutor further argued evidence demonstrating the defendant’s actual knowledge the vehicle was stolen – his failure to yield to the police officer when directed to do so, the forged trip permit bearing an obviously fictitious name, and the presence of an identical permit in his own personal backpack, the fact that Jones had removed the license plate, and the story that he provided to law enforcement, about having just gotten the vehicle from a friend “around the corner.” RP 329-32.

Contrary to the defendant’s claims, the prosecutor did not improperly argue that the jury could find the defendant guilty solely upon its belief that under the circumstances a reasonable person would have known or should have known the vehicle was stolen. That was not the prosecutor’s argument at all, especially when reviewed as a whole. Courts review the comments of a prosecutor during closing argument in “the context of the prosecutor’s entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions.” *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

First, the prosecutor linked his argument to the actual instructions given by the jury; he read directly from the court’s instruction on “knowledge.” Second, he explained that if a reasonable person would have

or should have known under the circumstances, that knowledge could be imputed to Jones. The word “impute” means: “to credit to a person or a cause: attribute.” Merriam-Webster’s Dictionary and Thesaurus 411 (2007). The use of this word is consistent with the court’s instruction, CP 70, and the law requiring that the jury must find the defendant had knowledge of the facts or circumstances at issue. The prosecutor stated, at least twice,¹⁶ that the jury could infer the defendant’s knowledge from the facts and circumstances, but was not required to do so. When viewed as a whole, the prosecutor’s comments were consistent with the court’s instructions and the law. The State did not engage in misconduct in making these arguments.

Even if the comments strayed beyond the bounds of acceptable argument, those comments were not so flagrant and ill-intentioned as to be incurable by a curative instruction by the court. The focus in a review of prosecutorial misconduct allegations is not so much upon whether the conduct is flagrant and ill-intentioned, but whether it could be cured. *Emery*, 174 Wn.2d at 762. Here, the prosecutor’s statements, if a misstatement of the law, or misleading to the jury, would have easily been cured by an

¹⁶ “[Y]ou, the jury, *are permitted, but you’re not required to come to the conclusion* beyond a reasonable doubt that the person actually had knowledge.” RP 326 (emphasis added). “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 (emphasis added).

instruction from the court to disregard the remarks, and a reminder to follow the law as provided by the court.¹⁷ However, because the defendant failed to object below, apparently perceiving no misconduct or legal misstatement in the prosecutor's argument, no such instruction was requested or given by the court. The defendant should not now be permitted to benefit from his lack of objection below where the alleged misconduct was easily curable.

Lastly, if any comments were improper, they were not prejudicial to the defendant. There was ample evidence by which the jury could find the defendant had *actual* knowledge the El Camino was stolen – the defendant's possession of duplicate trip permits, his failure to yield to the police officer, the punched ignition, and the presence of shaved keys. Any error was harmless.

V. CONCLUSION

The defendant's argument that the evidence was insufficient to convict him for possession of a stolen vehicle fails as it ignores that the evidence must be viewed in the light most favorable to the State and that this Court does not engage in its own judgment of the credibility of the

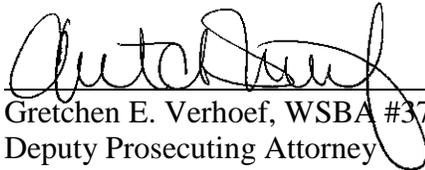
¹⁷ And, the jury was instructed to disregard any statement by counsel that was not supported by the evidence or the law provided in the court's instructions. CP 62. The jury is presumed to follow the court's instructions. *See e.g., State v. Foster*, 135 Wn.2d 441, 472, 957 P.2d 712 (1998).

witnesses. Sufficient evidence was presented establishing both that Troyer owned the vehicle and that Jones knew it to be stolen when he possessed it.

Further, the prosecutor did not engage in misconduct by arguing the jury could, but need not, impute knowledge to Jones in determining whether he had actual knowledge the vehicle was stolen. In any event, even if improper, the misstatements could have been cured by a timely objection and curative instruction. The State respectfully requests this Court affirm the jury's verdict and the defendant's judgment and sentence.

Dated this 26 day of November, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



A handwritten signature in black ink, appearing to read "Gretchen E. Verhoef", is written over a horizontal line.

Gretchen E. Verhoef, WSBA #37938
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

ALEX JONES,

Appellant.

NO. 36795-9-III

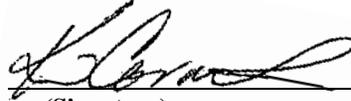
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I certify under penalty of perjury under the laws of the State of Washington, that on November 26, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Marie Trombley
marietrombley@comcast.net

11/26/2019
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

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