

65438-1

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COURT OF APPEALS NO. 65438-1-1

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

STATE OF WASHINGTON

v.

F.F.,

Appellant.

REC'D

OCT 01 2010

King County Prosecutor  
Appellate Unit

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

The Honorable Julia Garratt, Commissioner

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to convict appellant of possessing a stolen vehicle.

Issue Pertaining to Assignment of Error

Where the state presented no corroborative evidence of other inculpatory circumstances to show appellant knew the car was stolen, was appellant's bare possession of it insufficient to support his conviction for possessing a stolen vehicle?

B. STATEMENT OF THE CASE

Following an adjudicatory hearing in King County Superior Court, F.F. was convicted of possessing a stolen vehicle, a Toyota Camry, on October 7, 2009. CP 1-2 (Information); CP 7 (Order on Fact Finding); CP 10-15 (Order of Disposition). F.F. was acquitted of possessing a stolen Nissan Sentra on October 7, 2009. CP 7. This appeal timely follows. CP 16.

1. Toyota

Kevin Linford woke up to go to work on the morning of October 7, 2009, but found his 1987 Toyota Camry (license no. 238 XPA) missing from the parking lot of his Kent apartment complex. RP 11. He reported it stolen. RP 11.

That same morning, Patricia Huerta-Solis (Huerta) called police after her son Jiro got into an older model Toyota Camry with F.F. RP 21, 23. Huerta testified she was concerned because it was her custom to drive Jiro to school, and because she disapproved of Jiro and F.F.'s friendship, as F.F. was older. Huerta testified she worried F.F. "might be taking [her] son to someplace [so she] called the police." RP 20-21. However, she reported Jiro as a runaway. RP 41.

Huerta testified she gave the police the license plate number of the car, although she could no longer remember it by the time of trial. RP 22. She testified it was accurate when given, as only one minute passed from the time she saw it and the time she called police. RP 22. Despite Huerta's concerns, Jiro made it safely to school. RP 22, 86.

Between 10:30 and 10:45 a.m., Officer John Crane found the Camry unoccupied and parked in the center turn lane of Meeker Street in Kent with its hazard lights on. RP 74. When Crane ran the plate, it came back as stolen. RP 75. Crane called the registered owner. RP 75.

The damage was not immediately apparent, but Linford discovered the exhaust had been smashed, after hearing a strange

noise when he drove the car. RP 16. The car was also out of gas. Linford also claimed that a radio speaker and amplifier were missing. Shoes and a soccer ball that did not belong to Linford were left in the car. RP 14. According to Linford, there were also radio faceplates left in the car. RP 15. However, there was no damage to the steering column or a key located in the car. RP 15.

While still at the car's location, Crane received information from dispatch that "there was a mother reporting her son who had run away again and she had seen him getting into a vehicle with the license plate number that belonged to the car I was with at that time." RP 76. Dispatch also relayed a description of the driver. Crane contacted Kent Meridian High School and school officials identified the individual Huerta described as F.F. RP 76.

The following day, on October 8, Mill Creek Middle School<sup>1</sup> security contacted Crane to ask if he would like them to detain F.F., who was on their campus at the time. RP 77. Crane indicated he did, but learned on route that F.F. had left and was heading northbound on Central Avenue. RP 78. Two officers on bicycles detained him until Crane arrived and took him into custody. RP 78.

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<sup>1</sup> Crane had spoken to Jiro at the school the day prior. RP 77.

2. Nissan

Huerta testified that on the same day Jiro left with F.F. in the Camry (October 7), Jiro came home with F.F. in the afternoon. She claimed she saw F.F. sitting in a “burnt red” Nissan, listening to music on headphones. RP 23, 28, 48. Three other boys were playing near the car. RP 49. Huerta told F.F. to leave and not come back. RP 23.

F.F. left on foot. RP 24, 27. Huerta did not see F.F. drive the car; it was parked when he was sitting in it. RP 39, 49.

Huerta commented on her observations to her social worker; Huerta was in transitional housing, reportedly as a victim of domestic violence. RP 24. On her social worker’s advice, Huerta called the police the next day and reported her observations about the Nissan. RP 24, 27.

As it turned out, the Nissan had been reported stolen. RP 59. Eliazer Angulo Cervantes reported it stolen on the evening of October 7, 2010, after his wife noticed it was no longer in the parking lot at their apartment. RP 69. The car belonged to Cervantes’ nephew, but he left it in Cervantes’ charge while he was away in Mexico. RP 68-69.

Cervantes testified the car was in the same condition upon its return, except a child seat was missing. RP 71. He also noticed “stereo things” in the back seat, which he described as “buttons, little things like that, that’s all.” RP 71.

### 3. Argument and Court’s Adjudication

The defense argued the state failed to prove F.F. had knowledge either one of the cars was stolen:

Usually those facts in cases like this are established through punched ignition columns. Not a fact in this case. Or items of dominion and control or some type of personal property related to the defendant or the respondent, the suspect. Nothing like that in this case. Or statements made by others or the suspect that there was knowledge that a car was stolen. Those facts are missing in this case.

RP 98.

The court disagreed with respect to the Camry, but agreed the evidence was insufficient to convict F.F. regarding the Nissan. RP 112. At counsel’s request, the court suspended the disposition pending appeal. RP 120.

### C. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO CONVICT F.F. OF POSSESSING A STOLEN VEHICLE.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime

beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 749, 927 P.2d 1129 (1996). A reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, when viewing the evidence in a light most favorable to the state, could have found the elements of the crime charged beyond a reasonable doubt. State v. Hundley, 126 Wn.2d 418, 421-22, 894 P.2d 403 (1995); State v. Wade, 98 Wn. App. 328, 338, 989 P.2d 576 (1999).

RCW 9A.56.140(1) defines the crime of possession of stolen property 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 or person entitled thereto.” And RCW 9A.56.068 provides, “A person is guilty of possession of a stolen vehicle if he or she [possesses] a stolen motor vehicle.”

It is well settled that bare possession of recently stolen property alone is not sufficient to justify a conviction. State v. Portee, 25 Wn.2d 246, 170 P.2d 326 (1946); State v. Tollett, 71 Wn.2d 806, 811, 431 P.2d 168 (1967). However, the rule is

otherwise when there is indicatory evidence on collateral points.  
Portee, 25 Wn.2d at 253; Tollett, 71 Wn.2d at 811.

In other words, when 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:

When the fact of possession of recently stolen property is supplemented by the giving of a false or improbable explanation of it, or a failure to explain when larceny is charged, or the possession of a forged bill of sale, or the giving of a fictitious name, a case is made for the jury.

State v. Beck, 4 Wn. App. 306, 310, 480 P.2d 803 (1971) (quotation omitted).

The court's decision in Beck is instructive. Beck and Lukenbill were charged with grand larceny for receiving and concealing copper and brass wire. The state's evidence showed that copper and brass wire in excess of \$75 was stolen from a supply company on November 26, 1968, and after its covering was burnt off, sold the same day to Pacific Hide and Fur. Co. in Spokane. Owens, a metal buyer for Pacific Hide, testified he purchased the wire from "these boys," referring to Beck and Lukenbill, who were in his place of business selling scrap. The wire

was transported by them in a Chevrolet bearing the license plate number of WAJ 203, which Owens recorded on an invoice. One of the boys signed the name "Ron Jacobson" and gave an address of "1923 South Freya." Owens testified Beck sold other scrap metal to him on prior occasions. Beck, 4 Wn. App. at 308.

Investigating officer Shepherd discovered the Chevrolet was registered to Lukenbill and that the address "1923 South Freya" was non-existent. Shepherd went to Lukenbill's residence and observed the Chevrolet described by Owens parked in the front yard. The remnants of a fairly new bonfire were in the back yard. Shepherd took samples of partially burned electric cable wire and plug-ins from the bonfire. These remnants were then compared to the stolen wire and found to be of the same type. Beck and Lukenbill were arrested, but denied any involvement in the theft or sale of the wire. Beck, 4 Wn. App. at 308-309.

Beck testified Lukenbill was a cousin; Lukenbill just got out of prison and was living by himself at 1923 East Bruce and was unemployed; he (Beck) was involved in junking out various items and selling the scrap to junk dealers, including Pacific Hide, using a 1950 Ford pickup for the purpose of hauling the junk. Beck denied he was with Lukenbill at Pacific Hide in a Chevrolet car with a load

of copper and brass wire. He also denied the signature 'Ron Jacobson' was in his handwriting. To the contrary, he testified that on November 26, 1968, he and Lukenbill went to Coulee City to visit an uncle, such date being the evening before or the evening of Thanksgiving Day. The trial court took judicial notice that Thanksgiving Day was November 28, 1968. Beck also testified he and Lukenbill were employed by Pacific Hide on November 24, 1968, and they later went back to pick up their pay-checks and were refused. Beck, 4 Wn. App. at 309.

On appeal, Beck argued there was no evidence linking him to the theft of the wire and that his mere presence with Lukenbill at the time of sale was insufficient to establish him as a possessor of stolen goods or that he aided in the concealment of stolen goods. Id.

Applying the corroborative evidence rule, the appellate court noted Beck's argument might have merit – *had he not testified*:

In the instant case, if Beck had elected to stand on his motion for dismissal at the close of the prosecution's evidence, his position might have merit. However, Beck did not do so. He took the stand, denied his presence with Lukenbill and claimed he and Lukenbill were in Coulee City with his uncle on November 26, 1968. To the contrary, cross-examination indicated they were there the evening before or evening of Thanksgiving Day-November 27

or 28, 1968. Beck also offered testimony that he and Lukenbill were at Pacific Hide subsequent to November 24, 1968 to pick up their paychecks. These offered explanations, coupled with a denial of his presence at Pacific Hide, in the face of other evidence of his presence, create sufficient indicatory points to justify submission of the question of Beck's guilt to the jury.

Beck, 4 Wn. App. at 310 (emphasis added).

In contrast to Beck, F.F. did not take the stand. Nor did he offer an explanation of a kind that could be checked or rebutted or one that could be regarded as improbable. RP 79; see Beck, 4 Wn. App. at 311. Regardless, the court suppressed his statements on grounds the state had not met its burden to prove admissibility. RP 91. And as defense counsel argued below, there was no evidence of a punched ignition, which would be corroborative of guilty knowledge, or evidence of "jiggler" keys, which would have enabled F.F. to enter the car feloniously. See e.g. State v. Lakotiy, 151 Wn. App. 699, 715, 214 P.3d 181 (2009). In short, the state's evidence boiled down to mere possession. As a result, this Court should reverse F.F.'s conviction.

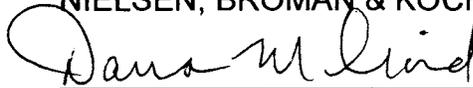
D. CONCLUSION

For the reasons stated above, this Court should reverse and dismiss F.F.'s possession of stolen property conviction.

Dated this 30<sup>th</sup> day of ~~April~~ <sup>September</sup>, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH



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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65438-1-1
	)	
F.F.-M.,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 1<sup>ST</sup> DAY OF OCTOBER, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] F.F.-M.  
24216 63<sup>RD</sup> WAY S.  
#5-202  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 1<sup>ST</sup> DAY OF OCTOBER, 2010.

x *Patrick Mayovsky*

*2010 OCT - 1 PM 4:53*  
FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON