

No. 42133-0-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

BEAU E. NUGENT, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber L. Finlay

No. 11-1-00010-9

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

TABLE OF CONTENTS

	Page
A. STATE’S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT’S ASSIGNMENT OF ERROR.....	1
B. FACTS.....	1
C. STANDARD OF REVIEW.....	5
D. ARGUMENT.....	7
1. The evidence at trial was sufficient to prove that Nugent possessed a stolen motor vehicle.....	7
2. The evidence at trial was sufficient to prove that Nugent knew that the stolen motor vehicle he possessed was a stolen motor vehicle.....	12
3. The evidence at trial was sufficient to prove that Nugent possessed motor vehicle theft tools.....	14
4. The evidence at trial was sufficient to prove that Nugent knew that the motor vehicle theft tools that he possessed were motor vehicle theft tools.....	16
E. CONCLUSION.....	18

TABLE OF AUTHORITIES

Page

Table of Cases

State Cases

State v. Bruton, 66 Wn.2d 111, 401 P.2d 340 (1965).....8, 13

State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969).....11, 12

State v. Cote, 123 Wn. App. 546, 96 P.3d 410 (2004).....9, 10

State v. Couet, 71 Wn.2d 773, 430 P.2d 974 (1967).....13, 14, 17

State v. Delmarier, 94 Wn.2d 634, 618 P.2d 99 (1980).....6, 14, 17

State v. Echeverria, 85 Wn. App. 777, 934 P.2d 1214 (1997).....7, 15

State v. Fiser, 99 Wn. App. 714, 995 P.2d 107,
review denied, 141 Wn.2d 1023, 10 P.3d 1074 (2000).....7

State v. George, 146 Wn. App. 906, 193 P.3d 693 (2008).....11, 12

State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975).....10, 11

State v. Hatch, 4 Wn. App. 691, 483 P.2d 864 (1971).....7, 8, 15

State v. Jeffrey, 77 Wn. App. 222, 889 P.2d 956 (1995).....12

State v. L.A., 82 Wn. App. 275, 918 P.2d 173 (1996).....13

State v. Mathews, 4 Wn. app. 653, 484 P.2d 942 (1971).....12

State v. McCaughey, 14 Wn. App. 326, 541 P.2d 998 (1975).....9, 13

State v. McPhee, 156 Wn. App. 44, 230 P.3d 284 (2010).....7, 15

State v. Portee, 25 Wn.2d 246, 170 P.2d 526 (1946).....13

State's Response Brief
Case No. 42133-0-11

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

<i>State v. Rockett</i> , 6 Wn. App. 399, 493 P.2d 321 (1972).....	13
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	6, 14, 18
<i>State v. Salzman</i> , 186 Wash. 44, 56 P.2d 1005 (1936).....	14, 17
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	6
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	6
<i>State v. Turner</i> , 103 Wn. App. 515, 13 P.3d 234 (2000).....	11, 12
<i>State v. Womble</i> , 93 Wn. App. 599, 969 P.2d 1097 (1999).....	8, 13

Statutes

RCW 9A.08.010(1)(b).....	14, 17
RCW 9A.56.063.....	14, 15, 17
RCW 9A.56.068.....	7

A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. The evidence at trial was sufficient to prove that Nugent possessed a stolen motor vehicle.
2. The evidence at trial was sufficient to prove that Nugent knew that the stolen motor vehicle he possessed was a stolen motor vehicle.
3. The evidence at trial was sufficient to prove that Nugent possessed motor vehicle theft tools.
4. The evidence at trial was sufficient to prove that Nugent knew that the motor vehicle theft tools that he possessed were motor vehicle theft tools.

B. FACTS

On December 31, 2010, Gregory Budd removed the keys from his blue, '94 Honda Accord and left it parked outside the Shelton Athletic Club in Shelton, Washington, while he was in the club swimming. RP 35-37. When he left the club about an hour and fifteen minutes later, he discovered that his car was missing. RP 37. He had not given Beau Nugent, or anyone else, permission to take his car. RP 37. Mr. Budd called the Shelton police and reported his car as stolen. RP 37-38.

Ten days later, at about 2:30 a.m. on January 10, 2011, Officer Dickinson of the Shelton Police Department was driving past a house at

State's Response Brief
Case No. 42133-0-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

621 California Street in Shelton when he saw a Honda Accord parked in the driveway. RP 48-49. He ran a registration check on the car, which revealed that the car was a stolen vehicle. RP 49.

Officer Dickinson called for another officer's assistance. RP 49. Sergeant Pentz arrived to assist him. RP 49. While Sergeant Pentz covered the back door, Officer Dickinson went to the front door and knocked. RP 49-50.

Officer Dickinson knocked on the front door for about five minutes, but no one would answer the door. RP 50. Through the window, he could see someone who appeared to be sleeping on the couch, and he knocked persistently so he could find the owner of the Honda, but no one would answer the door. RP 50.

Finally, a female named Tracy Doyle came to the door. RP 51. Officer Dickinson knew that Ms. Doyle lived at that residence. RP 51. He asked her who had parked the Honda in her driveway, and Ms. Doyle said that she didn't know. RP 51. Officer Dickinson told Ms. Doyle that he needed to know who was the owner of the Honda. RP 51. Ms. Doyle went back into the house and shut the door. RP 51.

Then a man came to the door. RP 51. He was wearing a hood, and the area was not well lit, so the officer could not see the man very well.

RP 51. The man told Officer Dickinson that his name was "James Dixon."

RP 51. The man said he didn't have any identification and that he didn't know his own social security number. RP 52. Officer Dickinson asked the man why he was at the residence. RP 52. The man said that he'd been partying all night and fell asleep on the couch. RP 52. When asked how he got there, he said that a friend had dropped him off; later he changed his story and said that he'd walked there. RP 52. The man went back into the house. RP 52.

After that, the officers knocked on the door again and spoke to Ms. Doyle. RP 52. They told her what was going on. RP 52. She had the occupants of the house come outside. RP 52. Officer Dickinson recognized some of the people who came out of the house. RP 52. The officers asked the people from the house if they knew who "Mr. Dixon" was. RP 53. Everyone denied knowing who "Mr. Dixon" was and denied knowing how he got there. RP 53.

At that point, Officer Dickinson detained "Mr. Dixon" and put him in handcuffs. RP 53. The officer did a pat-down search of "Mr. Dixon" for weapons and found a screwdriver in his pocket. RP 53.

Officer Dickinson then placed "Mr. Dixon" into his patrol car while he continued his investigation. RP 54. Officer Dickinson then recognized "Mr. Dixon" and saw that he was actually Beau Nugent. Officer Dickinson knew Nugent from prior law enforcement contacts and also because he went to high school with him. RP 54-55.

Officer Dickinson contacted Gregory Budd, the owner of the vehicle, who then came to the scene. RP 38-39, 55. The car was loaded with things that did not belong to Mr. Budd. RP 39-40, 55, 57. Among these things there was a black briefcase or laptop computer case that contained two photographs of Nugent, Social Security paperwork pertaining to Nugent, and a prescription to Nugent. RP 58, 61-63.

The ignition of the Honda had been punched, meaning that someone had stuck "a screwdriver or a file of some type into the ignition to break the tumblers" and start the car without the key. RP 56. It is typical when stealing a car to punch the ignition and then start the car by using a screwdriver to turn the ignition. RP 82, 85-86.

State's Response Brief
Case No. 42133-0-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

When searching the car, Officer Dickinson also found "several miscellaneous keys to different types of vehicles," some of which were "shaved." RP 57. Shaved keys are used to steal cars. RP 57, 82. Also, in the back seat of the Honda, Officer Dickinson found a device known as a "slim jim," which is a tool that is commonly used to steal cars. RP 64, 82.

Based upon these facts, Nugent was ultimately charged by a three-count information with possession of a stolen motor vehicle, false statement to a public servant, and possession of motor vehicle theft tools. CP 61-62. Nugent was tried by a jury, and after hearing and seeing the evidence, the jury returned guilty verdicts on all three counts. CP 34-36. At sentencing, the court imposed a Drug Offender Sentencing Alternative sentence. RP 220-237; CP 7-20.

Nugent appeals the jury's guilty verdicts in regard to counts I and III, which are the jury's guilty verdicts to the crimes of possession of a stolen vehicle and possession of motor vehicle theft tools.

C. STANDARD OF REVIEW

Each of Nugent's four assignments of error and issues on review claim that there was insufficient evidence to sustain the conviction pertaining to the separate convictions specified by the individual.

State's Response Brief
Case No. 42133-0-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

assignments of error. Nugent asserts that the evidence was insufficient to prove beyond a reasonable doubt that he possessed a stolen motor vehicle, or if he did possess it, that the evidence was insufficient to prove that he knew it was stolen; and, he asserts that there was insufficient evidence to prove that he possessed motor vehicle theft tools, or if he did possess them, that the evidence is insufficient to prove that he knew they were motor vehicle theft tools.

“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), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The appellate court is required to view the evidence in the light most favorable to the State and to grant deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75,

State's Response Brief
Case No. 42133-0-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

83 P.3d 970 (2004). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt but need only find that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, review denied, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

D. ARGUMENT

1. The evidence at trial was sufficient to prove that Nugent possessed a stolen motor vehicle.

In Count I of the information, Nugent was charged with possession of a stolen vehicle in violation of RCW 9A.56.068. CP 61-62. To prove the offense, the State was required to prove beyond a reasonable doubt that Nugent "knowingly possess[ed] a stolen motor vehicle." CP 61; RCW 9A.56.068; *State v. McPhee*, 156 Wn. App. 44, 230 P.3d 284 (2010); *State v. Hatch*, 4 Wn. App. 691, 483 P.2d 864 (1971).

"Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the [car] or over the premises where the [car] was found." *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

State's Response Brief
Case No. 42133-0-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Nugent was not in the stolen car when the police found it parked in the driveway in front of a house in Shelton, but when police knocked on the door and told the only occupant who would answer the door, Ms. Doyle, that they wanted to speak with the owner of the car, it was Nugent who then came to the door. RP 48-51. Nugent gave a false name, and he gave two different explanations about how he got to the house -- avoiding any connection to the car. RP 51-52, 54-55. Giving a false name and offering deceptive and inconsistent information is indicative of guilty knowledge, and guilty knowledge or evidence of consciousness of guilt is corroborative evidence. *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965); *State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999).

Nugent's connection to the stolen car was more than mere proximity. The stolen car's ignition was punched so that it could be started with a screwdriver. RP 82, 85-86. Nugent had a screwdriver in his pocket. RP 53. Items belonging to Nugent were found in the car. RP 58, 61-63. Here, these facts are further inculpatory circumstances, beyond mere proximity, that are corroborative of guilt. *State v. Hatch*, 4 Wn. App. 691, 483 P.2d 864 (1971).

State's Response Brief
Case No. 42133-0-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Nugent argues that *State v. McCaughey*, 14 Wn. App. 326, 541 P.2d 998 (1975), supports his contention that the evidence in this case is insufficient to establish his possession of the stolen car. But the facts of *McCaughey* involved establishing possession of items that were found in a car where the defendant was only one of two occupants who might have possessed the items. *McCaughey* at 327. Thus, the reasoning and holding of *McCaughey* are not easily applied to the instant case, because in *McCaughey* was whether the defendant possessed items found in the car, rather than the car itself, and there was "undisputed direct proof of exclusive possession in some other person." *McCaughey* at 329.

Nugent cites *State v. Cote*, 123 Wn. App. 546, 96 P.3d 410 (2004), for further support of his contention that the evidence in the instant case is insufficient to prove his possession of the stolen car, but the facts of *Cote* are not like the facts of the instant case. In *Cote*, the prosecution was seeking to prove that the defendant, who was a co-occupant of a car, was in constructive possession of an illegal drug that was found in a bottle that was found in the car. *Cote* at 549. The defendant's fingerprint was found on the bottle that contained the drug, but the *Cote* court reasoned that the mere fact that the defendant had been a passenger in the car and that his

fingerprint was found on a bottle in the car was insufficient evidence to prove that he possessed the drugs that were later found in the same jar. *Cote* at 550. The facts and legal analysis of *Cote* do not rebut the jury's verdict in the instant case because the evidence in *Cote* only established that at some prior point in time the defendant had handled the bottle, but, while possession of the drugs in the bottle was a crime, mere possession of the bottle was not a crime. In the instant case the evidence shows Nugent's actual and constructive possession of a stolen car, which is a crime, rather than his mere, prior possession of a container that would later be found to contain the car.

Nugent also cites *State v. Harris*, 14 Wn. App. 414, 542 P.2d 122 (1975), to further advance his contention that the evidence in the instant case is insufficient to prove his possession of the stolen car. But the facts and legal analysis of *Harris* are unlike the facts and issue of law in the instant case. In *Harris*, the defendant was a passenger in a car that was discovered to contain illegal drugs, and the prosecution was seeking to prove that the defendant was in possession of the drugs found in the car. *Harris* at 416. The evidence in *Harris* showed a link between the defendant and the car where the drugs were located, but the codefendant

State's Response Brief
Case No. 42133-0-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

also had a link to the car, and there was no other evidence to link the defendant to the drugs found in the car. *Harris* at 417-418. Contrary to *Harris*, in the instant case the question is about Nugent's possession of the car itself and his possession of items in the car rather than about the culpability of a codefendant in regard to contraband found in the car.

The totality of the evidence, direct and circumstantial, shows that Nugent was first in actual possession of the stolen car and that he was then in constructive possession of it.

Nugent was in actual possession of the car when he left his possessions in it and left it in the driveway. Actual possession occurs when property is in one's personal custody. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Dominion and control need not be exclusive. *State v. George*, 146 Wn. App. 906, 193 P.3d 693(2008), citing *State v. Turner*, 103 Wn. App. 515, 522, 13 P.3d 234 (2000). Nugent was not in the car when the police found the car in the driveway, but the evidence shows that he had been in actual possession when he left the car in the driveway and when he left his things inside the car.

And the evidence shows that Nugent was in constructive possession of the car when he was in the house while the car was in the

driveway outside. "Constructive possession cases are fact sensitive."

State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

Constructive possession is determined by looking at the totality of the circumstances. *State v. Jeffrey*, 77 Wn. App. 222, 227, 889 P.2d 956 (1995); *State v. Mathews*, 4 Wn. app. 653, 656, 484 P.2d 942 (1971).

Constructive possession occurred because Nugent exercised dominion and control over the car. *State v. Callahan*, 77 Wn.2d 27, 29-31, 459 P.2d 400 (1969). Because his possessions were still in the car, and the screwdriver to start the car was in his pocket, Nugent held dominion and control over the car. Again, dominion and control need not be exclusive. *State v. George*, 146 Wn. App. 906, 193 P.3d 693 (2008), citing *State v. Timmer*, 103 Wn. App. 515, 522, 13 P.3d 234 (2000). The totality of the circumstances includes the corroborative evidence provided by Nugent's act of providing a false name and other deception when contacted by officers.

2. The evidence at trial was sufficient to prove that Nugent knew that the stolen motor vehicle he possessed was a stolen motor vehicle.

The Honda was stolen only ten days before police found it. RP 35-

State's Response Brief
Case No. 42133-0-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

37, 48-49. Because the ignition was punched, it was apparent that the car was possibly or probably stolen. The fact that the ignition was punched supports a finding that Nugent knew it was stolen. *State v. L.A.*, 82 Wn. App. 275, 276, 918 P.2d 173 (1996); *State v. Rockett*, 6 Wn. App. 399, 403, 493 P.2d 321 (1972).

When a person is in possession of recently stolen property and there is other, even slightly, corroborative evidence of other inculpatory circumstances showing guilt, the evidence is sufficient to sustain a conviction. *State v. Portee*, 25 Wn.2d 246, 253-54, 170 P.2d 326 (1946). Nugent gave a false name when police contacted him about the stolen car, and he gave conflicting stories that disassociated himself from the car. RP 51-52, 54-55. But his personal possessions were found in the car. RP 58, 61-63. Deception is like flight, and flight indicates guilty knowledge and consciousness of guilt. *State v. Bruton*, 66 Wn.2d 111, 112, 401 P.2d 340 (1965); *State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999). Corroborative evidence can consist of false, improbable, or inconsistent explanations. *State v. Conet*, 71 Wn.2d 773, 775-776, 430 P.2d 974 (1967); *State v. McCaughey*, 14 Wn.App. 326, 329, 541 P.2d 998 (1975), citing *State v. Portee*, 25 Wn.2d 246, 254, 170 P.2d 326 (1946).

State's Response Brief
Case No. 42133-0-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
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The element of knowledge is a jury question. *State v. Couet*, 71 Wn.2d 773, 776, 430 P.2d 974, 976 (1967); *State v. Salzman*, 186 Wash. 44, 56 P.2d 1005 (1936). A person has knowledge when he is either directly aware of a fact or when he has information that would lead a reasonable person in the same situation to conclude that a fact exists. RCW 9A.08.010(1)(b). The jury in this case heard and saw the totality of the evidence described above and found the element of knowledge proved beyond a reasonable doubt. A jury may infer knowledge when the defendant's conduct makes it "logically probable" that he possessed the requisite knowledge. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Viewed in accordance with the applicable standard of review established by *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992), the jury's verdict should be sustained as a matter of law.

3. The evidence at trial was sufficient to prove that Nugent possessed motor vehicle theft tools.

In Count III of the information, Nugent was charged with possession of motor vehicle theft tools in violation of RCW 9A.56.063, CP 61-62. To prove the offense, the State was required to prove beyond a reasonable doubt that Nugent knowingly possessed...

State's Response Brief
Case No. 42133-0-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

any motor vehicle theft tool, that is adapted, designed, or commonly used for the commission of motor vehicle related theft, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of motor vehicle theft, or knowing that the same is intended to be so used....

RCW 9A.56.063(1). CP 62; RCW 9A.56.063; *State v. McPhee*, 156 Wn. App. 44, 230 P.3d 284 (2010); *State v. Hatch*, 4 Wn. App. 691, 483 P.2d 864 (1971). "[S]lim jim[s]" and "shaved key[s]" are statutorily defined as "motor vehicle theft tool[s]." RCW 9A.56.063(2).

"Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the [tools] or over the premises where the [tools were] found." *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

Nugent possessed a screwdriver in his pocket. RP 53. The screwdriver was an instrument that is commonly used to start the ignition of a stolen car after the ignition has been punched. RP 82, 85-86. The fact that the Honda's ignition had been punched is circumstantial evidence that Nugent possessed the screwdriver with the intent to commit motor vehicle theft. Additionally, a "slim jim," which is a tool that is commonly

used to steal cars, was found inside the car, along with a variety of shaved keys, which are also commonly used to steal cars. RP 57, 64, 82.

Nugent's personal belongings were found in the same stolen car that contained the additional motor vehicle theft tools. RP 58, 61-63.

The fact that Nugent gave officers a false name and attempted to disassociate himself from the stolen car by giving conflicting explanations about how he arrived at the house indicates his guilty knowledge. The fact that Nugent possessed the stolen Honda is circumstantial evidence of his intent to use the vehicle theft tools to commit motor vehicle theft. That Nugent possessed the stolen car where his personal items were found is further evidence that he exercised dominion and control over the motor vehicle theft tools that were found in the car.

The legal analysis applicable to possession of a stolen motor vehicle also applies to possession of motor vehicle tools. To avoid redundancy, the legal arguments from sections 1 and 2, above, are incorporated here by reference.

4. The evidence at trial was sufficient to prove that Nugent knew that the motor vehicle theft tools that he possessed were motor vehicle theft tools.

The ignition of the stolen car was punched so that it could be started with a screwdriver. RP 82, 85-86. Nugent's personal possessions were found in the stolen car, and he had a screwdriver in his pocket. RP 53. Also in the stolen car where Nugent's personal possessions were located were a slim jim and shaved keys. RP 57, 64, 82. These items are defined by statute as motor vehicle theft tools. RCW 9A.56.063(2).

As argued in relation to possession of a stolen motor vehicle in section 2, above, the element of knowledge is a jury question. *State v. Couet*, 71 Wn.2d 773, 776, 430 P.2d 974, 976 (1967); *State v. Salzman*, 186 Wash. 44, 56 P.2d 1005 (1936). A person has knowledge when he is either directly aware of a fact or when he has information that would lead a reasonable person in the same situation to conclude that a fact exists. RCW 9A.08.010(1)(b). The jury in this case heard and saw the totality of the evidence described above and found the element of knowledge proved beyond a reasonable doubt. A jury may infer knowledge when the defendant's conduct makes it "logically probable" that he possessed the requisite knowledge. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Viewed in the light of the applicable standard of review

established by *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992), the jury's verdict should be sustained as a matter of law.

E. CONCLUSION

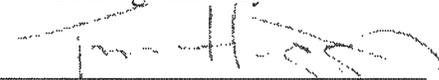
The evidence shows that Nugent possessed a stolen motor vehicle, that he knew the vehicle was stolen, that he also possessed motor vehicle theft tools, that he knew the tools were motor vehicle theft tools, and that he intended to use the tools to steal a motor vehicle.

After a fair trial, the jury found Nugent guilty on all counts.

Viewed in light of the legal analysis and standard of review discussed above, the jury's verdicts should be sustained.

DATED: February 10, 2012.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

State's Response Brief
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Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

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

STATE OF WASHINGTON,)	
)	No. 42133-0-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
BEAU E.NUGENT,)	
)	
Appellant,)	
_____)	

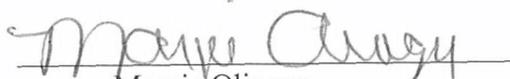
I, MARGIE OLINGER, declare and state as follows:

On February 10, 2012, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Lisa Ellner
P.O. Box 2711
Vashon, WA 98070

I, Margie Olinger, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 10th day of February, 2012, at Shelton, Washington.


Margie Olinger

Mason County Prosecutor's Office
521 N. Fourth Street, P.O. Box 639
Shelton, WA 98584
(360) 427-9670 ext. 417
(360) 427-7754 FAX

MASON COUNTY PROSECUTOR

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