

FILED

JAN 07 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29406-4-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

RODNEY SCOTT DUPRIE,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
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Ritzville, Washington 99169
(509) 659-0600

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ASSIGNMENTS OF ERROR

1. The State failed to prove, beyond a reasonable doubt, each and every element of the offense of possession of a stolen vehicle.

2. Instruction 11, the to-convict instruction on possession of a stolen vehicle, does not comport with the charging language contained in the Amended Information. (CP 9; CP 27; Appendix "A").

3. Rodney Scott Duprie was sentenced on Count IV contrary to the jury verdict. (CP 48; CP 50).

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the State establish, beyond a reasonable doubt, that Mr. Duprie knew that the car in which he was a passenger had been stolen and/or that he possessed the car?

2. Is Mr. Duprie entitled to have his conviction for possession of a stolen vehicle reversed due to violation of the essential elements rule? *See*: Const. art. I § 22; Sixth Amendment to the United States Constitution.

3. Does the Judgment and Sentence need to be corrected due to the fact that Mr. Duprie was found guilty of Count V; but sentenced on Count IV?

STATEMENT OF CASE

Employees at the Franz Bakery noticed a car parked on the sidewalk in front of the Auto Credit car lot at 2:00 a.m. on February 22, 2010. (RP 4, ll. 2-15; RP 5, ll. 2-21; CP 88, ll. 2-4; CP 85; CP 86; CP 169).

One of the employees, Aaron Tiffany, observed a flashlight going back and forth in the car lot. He also saw somebody inside the car parked on the sidewalk. (CP 88, ll. 18-22; CP 169).

Deputies Karnitz and Walter of the Spokane County Sheriff's Office responded to the 911 call. They contacted two people after their arrival. (RP 7; ll. 2-4; RP 24, ll. 22-24; RP 52, l. 1; CP 88; CP 105; CP 133).

The car parked on the sidewalk was a white Ford Taurus, license no. 768-UCC. Deputy Walter cited the driver for driving while license suspended third degree (DWS 3rd). The driver was then released. (RP 28, ll. 7-8; RP 42, ll. 16-20; RP 57, ll. 405; ll. 17-25; CP 109; CP 123; CP 138).

When Deputy Walter ran a computer check on the license plate it returned with VIN# 1FAFP55U6YG105505. It was later determined that the correct VIN for the Taurus is 1FAHP56U95A264797. A Ford Taurus with that VIN# was stolen from First Choice Auto Sales during early February. (RP 19, ll. 9-18; RP 20, l. 23; RP 21, l. 4; RP 56, ll. 2-10; CP 99; CP 100; CP 101; CP 102; CP 137).

Mr. Duprie advised the deputies that the Taurus had been borrowed from a friend. The driver confirmed that fact. Victoria Stony tried

to claim the car after it was impounded. (RP 54, ll. 4-7; RP 58, ll. 3-6; CP 135; CP 137; CP 139).

Deputy Karnitz had contacted Mr. Duprie on the eastside of the building at the car lot. Mr. Duprie stood up next to a car with his hands in his pockets. The deputy did a patdown for officer safety. He found a screwdriver and shaved keys in Mr. Duprie's pocket. Mr. Duprie was placed under arrest. A subsequent patdown search revealed a flashlight, more keys, wire cutters and a pair of pliers. (RP 29, ll. 13-17; RP 30, ll. 9-20; RP 31, ll. 1-3; ll. 11-14; CP 110; CP 111; CP 112).

Deputy Karnitz noted that cars on the lot had their dome lights on and trunks open. The cars included a 1998 Chevy Malibu, 1998 Ford Ranger, 1990 Mitsubishi Diamante and a 1994 Ford Windstar. (RP 28, ll. 22-24; RP 36, ll. 14-19; RP 37, ll. 2-6; ll. 19-21; RP 38, ll. 5-7, ll. 16-18; RP 39, l. 25 to RP 40, l. 1; RP 40, ll. 14-18; RP 41, ll. 14-18; CP 109; CP 117; CP 118; CP 119; CP 120; CP 121; CP 122).

An Information was filed on March 30, 2010 charging Mr. Duprie with taking a motor vehicle without the owner's permission in the first degree. (CP 10).

An Amended Information was filed on July 29, 2010. Count I now included alternatives of possession of a stolen motor vehicle and taking a motor vehicle without the owner's permission second degree. Four (4) counts of second degree vehicle prowling and 1 count of possession of motor vehicle theft tools were also added.

A jury convicted Mr. Duprie of possession of a stolen motor vehicle under Count I, second degree vehicle prowling under counts II, III and V, and possession of motor vehicle theft tools under Count VI. (CP 45; CP 46; CP 47; CP 48; CP 49).

Judgment and Sentence was entered on September 17, 2010. Instead of Count V, the Judgment and Sentence reflects that Mr. Duprie was found guilty on Count IV. (CP 50).

Mr. Duprie filed his Notice of Appeal on October 4, 2010. (CP 65).

SUMMARY OF ARGUMENT

The State failed to establish, beyond a reasonable doubt, either the knowledge element of possession of a stolen motor vehicle or that Mr. Duprie possessed the car.

Count I of the Amended Information charges possession of a stolen motor vehicle using conjunctive elements. Instruction 11 allowed the jury to convict Mr. Duprie based upon disjunctive elements.

The difference in the language between the Amended Information and Instruction 11 violates the essential elements rule.

Alternatively, Count I, as worded, fails to charge a crime.

Mr. Duprie was erroneously sentenced on Count IV as proposed to Count V.

ARGUMENT

I. SUFFICIENCY OF EVIDENCE

“...[T]he relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, *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, 616 P. 2d 628 (1980) quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L.Ed. 2d 590, 99 S.Ct. 2781 (1979).

RCW 9A.56.068(1) defines possession of a stolen vehicle as follows: “A person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle.”

Mr. Duprie contends that the *mens rea* of the crime of possession of a stolen vehicle is “knowledge” that the vehicle is stolen. He draws an analogy to the requirement that “knowledge” is an implied element of taking a motor vehicle without permission under RCW 9A.56.070(1). “Knowledge that the vehicle was taken unlawfully is an essential element of the charge of taking a motor vehicle without permission.” *State v. Simmons*, 30 Wn. App. 332, 335, 635 P. 2d 745 (1981), *reviewed denied*, 97 Wn. 2d 1007 (1982). *See also: State v. Trepanier*, 71 Wn. App. 372, 381, 858 P. 2d 511 (1993).

The possession of a stolen vehicle alternative under Count I of the Amended Information reads as follows:

The possession of a stolen vehicle alternative under Count I of the Amended Information reads as follows:

And further charges the following crime, as an act connected with and as a crime alternative to POSSESSION OF A STOLEN VEHICLE, committed as follows: That the defendant, **RODNEY SCOTT DUPRIE**, in the State of Washington on or about February 22, 2010, did **knowingly receive, retain, possess, conceal, and dispose of** a stolen vehicle, to-wit: a 2005 Ford Taurus, knowing that it had been stolen, and did withhold and appropriate this vehicle to the use of a person other than the true owner or person entitled thereto.

(Emphasis supplied.)

The offense is charged in the conjunctive. Mr. Duprie was notified that the State had to prove that he “knowingly received, retained, possessed, concealed, and disposed of” the 2005 Ford Taurus.

The only thing that the State established at trial was that Mr. Duprie was a passenger in the Ford Taurus. Mr. Duprie was not the driver of the car. The driver was cited for driving while license suspended third degree. The driver had actual possession of the car and also had and dominion and control over it. *See: State v. Potts*, 1 Wn. App. 614, 617, 464 P. 2d 742 (1969).

The State failed to establish that Mr. Duprie had:

- 1). knowledge that the Ford Taurus was stolen;
- 2). actual possession of the Ford Taurus; or

3). constructive possession of the Ford Taurus.

Both Mr. Duprie and the driver indicated that the car had been borrowed from a friend. Victoria Stony tried to recover the car after it was impounded.

No rational trier of fact could determine that the State established each and every element of the offense of possession of a stolen vehicle.

II. INSTRUCTION NO. 11

Instruction 11, the to-convict instruction on possession of a stolen vehicle, sets forth the statutory language in the disjunctive. The disjunctive language is contrary to the conjunctive language used to notify Mr. Duprie of the crime with which he was charged.

... “[T]he word ‘and’ does not mean ‘or’”. *Ski Acres Inc. v. Kittitas County*, 118 Wn. 2d 852, 856, 827 P. 2d 1000 (1992) citing *Childers v. Childers*, 89 Wn. 2d 592, 596, 575 P. 2d 201 (1978).

Failure to correctly charge the offense either violates the essential elements rule or charges a nonexistent crime. *See*: Sixth Amendment to the United State Constitution; Const. art. I § 22.

An accused person has a constitutional right to be informed of the charge he is to meet at trial and cannot be tried for a crime not charged. An erroneous instruction given on behalf of the party in whose favor the verdict was returned is presumed prejudicial unless it affirmatively appears that the error was harmless. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasona-

State v. Jain, 151 Wn. App. 117, 121-22, 210 P. 3d 1061 (2009).

The State failed to correctly inform Mr. Duprie of the nature of the charged offense. Even though the instruction given to the jury is a correct instruction on the law, its variance from the charging language relieved the State of its burden of proof.

RCW 9A.04.100(1) provides:

Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.

The State, by charging the offense in the conjunctive, was required to prove each and every alternative as it pertained to possession of a stolen vehicle. The State's failure to do so requires that Mr. Duprie's conviction be reversed.

"Under **CONST. art. I, § 22**, a defendant has the right to be tried only for offenses charged." *State v. Aho*, 137 Wn. 2d 736, 744, 975 P. 2d 512 (1999).

"Generally, the crime upon which the jury is instructed is limited to the offense charged in the information." *State v. Chino*, 117 Wn. App. 531, 539, 72 P. 3d 256 (2003).

Mr. Duprie contends that he was either convicted of a non-existent crime (since the charge was in the conjunctive), or that instructional error

Mr. Duprie contends that he was either convicted of a non-existent crime (since the charge was in the conjunctive), or that instructional error requires a new trial. *See: State v. Wright*, 131 Wn. App. 474, 480, 127 P. 3d 742 (2006).

III. SENTENCING

The jury found Mr. Duprie guilty on Count V. The Judgment and Sentence indicates that he was found guilty on Count IV.

When a sentence has been imposed for which there is no authority at law, the trial court has the power and the duty to correct the *erroneous* sentence, when the error is discovered.

In re McNutt v. Delmore, 47 Wn. 2d 563, 565, 288 P. (2d) 848 (1955).

CONCLUSION

The State's failure to prove each and every element of the offense of possession of a stolen vehicle requires that Mr. Duprie's conviction on Count I be reversed and dismissed.

Alternatively, if there was instructional error, or if Mr. Duprie was convicted of a non-existent crime, the conviction needs to be reversed and the case remanded for a new trial.

Mr. Duprie was erroneously sentenced on Count IV. He was convicted on Count V; not Count IV. The Judgment and Sentence needs to be corrected.

DATED this 7th 4 day of January, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis W. Morgan", written over a horizontal line.

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APPENDIX "A"

INSTRUCTION 11

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:

- (1) That on or about February 22, 2010, the defendant knowingly received, retained, possessed, concealed, or disposed of a stolen motor vehicle;
- (2) That the defendant acted with knowledge that the motor vehicle had been stolen;
- (3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto; and
- (4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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ADDITIONAL STATEMENT OF AUTHORITIES

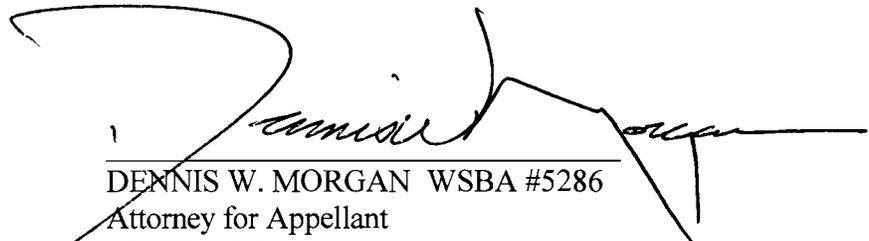
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COMES NOW, RODNEY SCOTT DUPRIE, by and through the undersigned attorney, and requests the Court to consider the following additional authorities in connection with his appeal:

State v. Maupin, 63 Wn. App. 887, 892-93, fn. 3, 822 P. 2d 355 (1992) (recognizing that a difference in conjunctive and disjunctive language may be a basis for assignment of error on appeal).

DATED this 13th day of January, 2011.

Respectfully submitted,



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