

NO. 30385-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

NICOLE M. LOPEZ,

Appellant.

FILED
SEPT 19, 2012
Court of Appeals
Division III
State of Washington

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT IN REPLY	1
1. The State’s failure to preserve material, exculpatory evidence violated Ms. Lopez’s constitutional right to due process, requiring reversal of the conviction and dismissal with prejudice.....	1
2. The trial court abused its discretion by excluding the diagnostic test of the vehicle, which was relevant evidence supporting Ms. Lopez’s defense	5
3. As argued in her opening brief, the State presented insufficient evidence that the vehicle Ms. Lopez possessed was stolen.....	8
4. Substantial evidence does not support two alternative means of possession of a stolen vehicle—concealment and disposal....	9
5. Substantial evidence at the time of sentencing does not support the sentencing court’s generic finding that Ms. Lopez had the present or future ability to pay discretionary fees and costs	11
6. The Court should accept the State’s concession that the finding Ms. Lopez ‘used’ a motor vehicle to commit possession of a stolen vehicle should be reversed	14
B. CONCLUSION	14

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<i>Nordstrom Credit, Inc. v. Dep't of Revenue</i> , 120 Wn.2d 935, 845 P.2d 1331 (1993)	11
<i>State v. Brockob</i> , 159 Wn.2d 311, 150 P.3d 59 (2006)	11
<i>State v. Curry</i> , 118 Wn.2d 911, 829 P.2d 166 (1992)	11, 12, 13
<i>State v. Darden</i> , 145 Wn.2d 612, 41 P.3d 1189 (2002)	7
<i>State v. Drum</i> , 168 Wn.2d 23, 225 P.3d 237 (2010)	9
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	9
<i>State v. Jones</i> , 168 Wn.2d 713, 230 P.3d 576 (2010).....	6, 7
<i>State v. Maupin</i> , 128 Wn.2d 918, 913 P.2d 808 (1996)	5
<i>State v. Wittenbarger</i> , 124 Wn.2d 467, 880 P.2d 517 (1994)	1, 5

Washington Court of Appeals Decisions

<i>State v. Burden</i> , 104 Wn. App. 507, 17 P.3d 1211 (2001).....	5
<i>State v. Harris</i> , 97 Wn. App. 865, 989 P.2d 553 (1999)	6
<i>State v. Hayes</i> , 164 Wn. App. 459, 262 P.2d 538 (2011).....	9, 10, 11
<i>State v. Rice</i> , 48 Wn. App. 7, 737 P.2d 726 (1987).....	6

United States Supreme Court Decisions

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).....	9
<i>Arizona v. Youngblood</i> , 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).....	1
<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).....	8

<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).....	1, 5
<i>California v. Trombetta</i> , 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984).....	1
<i>Davis v. Alaska</i> , 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).....	5
<i>Holmes v. South Carolina</i> , 547 U.S. 319, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006).....	5
<i>Illinois v. Fisher</i> , 540 U.S. 544, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004) (per curiam).....	1
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	9
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	9
<i>Pennsylvania v. Ritchie</i> , 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).....	6

Other Federal Decisions

<i>United States v. Cooper</i> , 983 F.2d 928 (9th Cir. 1993).....	5
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Constitutional Provisions

Const. art. I, § 22	5
U.S. Const. amend. IV	5
U.S. Const. amend. XIV	5

Statutes

RCW 10.01.16	11, 12
RCW 46.20.285	14

Rules

ER 401 6

A. ARGUMENT IN REPLY

1. The State's failure to preserve material, exculpatory evidence violated Ms. Lopez's constitutional right to due process, requiring reversal of the conviction and dismissal with prejudice.

As Ms. Lopez argued in her opening brief, the State's failure to preserve the key piece of evidence in this case—Ms. Lopez's Dodge Durango, which had been impounded—violated her right to due process, requiring reversal of the conviction and dismissal of the charge. The vehicle constituted material, exculpatory evidence that Ms. Lopez could not recreate once the State inadvertently released it from its possession.

Fundamental fairness requires that the government preserve and disclose to the defense favorable evidence that is material to guilt or punishment. *California v. Trombetta*, 467 U.S. 479, 480, 485-88, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). The failure to do so violates due process. *E.g.*; *State v. Wittenbarger*, 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994); *Arizona v. Youngblood*, 488 U.S. 51, 57-58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988); *Illinois v. Fisher*, 540 U.S. 544, 547-48, 124 S. Ct. 1200, 157 L. Ed. 2d 1060 (2004) (per curiam). The once-impounded Dodge Durango (Ms. Lopez's Durango)

constituted material, exculpatory evidence because it was the lynchpin in Ms. Lopez's innocence defense. Ms. Lopez maintained that her vehicle, which the police seized, was not the same Durango that Mr. Munoz reported stolen. If the police had maintained the vehicle it seized from Ms. Lopez, she contends she could have proved it.

Contrary to the State's responsive briefing, Ms. Lopez's theory at trial is the same she asserts on appeal. *See* Resp. Br. at 18-19. Ms. Lopez's Dodge Durango, which the police seized from her and then failed to preserve, was not the same Dodge Durango as stolen from Mr. Munoz. Ms. Lopez further asserts that the Dodge Durango eventually returned to police custody before trial was the same vehicle the police seized from her in the first instance (which, again, was distinct from the vehicle stolen from Mr. Munoz). If the State had not released the vehicle in the first instance, Ms. Lopez would have been able to show the vehicle seized was not Mr. Munoz's Durango.

Moreover, because the State collected only the vehicle itself, Ms. Lopez had no evidence to prove her innocence once the vehicle was released from State custody. The police did not photograph or collect evidence from the vehicle. Absent the vehicle itself, Ms. Lopez lacked the ability to examine evidence to counter the State's

accusations. Even the State recognized the significant value of the evidence prior to its release. Hearings RP 39, 51-52.

Nonetheless, the State argues in response that its release of the evidence caused no harm to Ms. Lopez because the vehicle was later found and returned to the police. Resp. Br. at 8. But the State's argument is disingenuous. At trial, the State prevented Ms. Lopez from using any evidence or argument related to the vehicle at issue. At the State's behest the trial court excluded all evidence subsequent to the State's initial seizure of the vehicle in January 2009, including evidence from the vehicle once it was returned to the police. Due to the State's own release of the vehicle, it argued that the chain of custody for the re-seized vehicle could not be substantiated and thus was unreliable. Further, the State had retained no secondary evidence related to the seized vehicle—including photographs, paint chips, fingerprints, or diagnostic testing and results. Accordingly, the State precluded Ms. Lopez from reviewing any evidence related to the originally-seized Durango by releasing it and failing to preserve it through secondary evidence. Likewise, the State precluded Ms. Lopez from using any evidence obtained from the Durango once it was recovered. Thus it is entirely disingenuous for the State to argue Ms. Lopez had access to the

released evidence when the State prevented her from using it in her defense. *See* Resp. Br. at 21-22 (arguing issue was condition of vehicle at time of seizure, which is precisely what Ms. Lopez would have been able to contest if the evidence had been preserved).

The State cannot contend its failure to preserve the vehicle did not result in an unfair trial simply because Ms. Lopez arguably later had access to the evidence, which access was rendered completely meaningless where the chain of custody had been destroyed. Without the actual vehicle, she was unable to prove her vehicle was not the same vehicle Mr. Munoz reported as stolen. The diagnostic test, Officer Perez's testimony, and variations in the interiors, among other evidence, strongly suggested it was not. Because the State did not maintain any photographs or other evidence related to the seized vehicle, Ms. Lopez could not rely on substitute evidence. Moreover, because the State claimed she had access to and may have tampered with the vehicle after the State released it, the court precluded Ms. Lopez from using the vehicle as evidence after it was recovered.

Because the State failed to preserve material, exculpatory evidence essential to Ms. Lopez's defense, the resulting conviction must be reversed and the charges dismissed with prejudice against re-

filing. *Wittenbarger*, 124 Wn.2d at 475; *State v. Burden*, 104 Wn. App. 507, 509, 511-12, 17 P.3d 1211 (2001) (affirming dismissal where material, exculpatory evidence lost or destroyed); *United States v. Cooper*, 983 F.2d 928, 933 (9th Cir. 1993) (dismissal of indictment, and not suppression of evidence, is appropriate remedy). The State's reliance on cases unrelated to the *Brady* issue raised are inapposite and unpersuasive to the issue actually raised. *See* Resp. Br. at 16 (reciting standards and case law on matters unrelated to the State's release of material, exculpatory evidence). Ms. Lopez is not required to prove prejudice beyond that subsumed in the State's failure to preserve material, exculpatory evidence that could not be recreated.

2. The trial court abused its discretion by excluding the diagnostic test of the vehicle, which was relevant evidence supporting Ms. Lopez's defense.

Ms. Lopez's due process rights as well as her right to present a defense were violated when the trial court abused its discretion in excluding relevant evidence. U.S. Const. amends. IV & XIV; Const. art. I, § 22; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct 1727, 164 L. Ed. 2d 503 (2006); *Davis v. Alaska*, 415 U.S. 308, 318, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996).

As the State concedes, to be relevant, evidence need only satisfy a low threshold. *See* Resp. Br. at 21; Op. Br. at 26-27. Further, a defendant must receive the opportunity to present her version of the facts to the jury. *E.g.*, *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[C]riminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

Because relevant evidence includes facts that present direct or circumstantial evidence of any element of a claim or defense, the court abused its discretion in excluding diagnostic test evidence related to Ms. Lopez’s theory of the case. *See* ER 401; *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). As this court has previously held, “[e]vidence tending to establish a party’s theory, or to qualify or disprove the testimony of an adversary, is always relevant and admissible.” *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999); *see Rice*, 48 Wn. App. at 12 (“Facts tending to establish a party’s theory of the case will generally be found to be relevant”).

The State argues that the diagnostic test results did not support its theory of the case. But obviously the constitution and rules of

evidence do not limit relevancy to those facts which support the prosecution only. The weight to be ascribed the evidence and the credibility of each side's witnesses were to be determined by the jury. The court invaded the province of the jury by ruling relevant evidence was inadmissible.

The parties agreed the diagnostic test showed the vehicle had a true VIN registered to Ms. Lopez. RP 60, 93, 100. Though the parties may have disagreed as to the significance of the results, Ms. Lopez was entitled to argue to the jury that they supported her theory that the vehicle she possessed was her lawfully-owned vehicle, and not Mr. Munoz's Durango. The weight to ascribe the evidence was a matter for the jury to determine. *See* Resp. Br. at 27 (arguing same as related to subsequent issue, sufficiency of the evidence). But because the evidence was relevant, the court should not have excluded it.

Notably, the State does not argue that "the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial." *Jones*, 168 Wn.2d at 720 (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). As set forth in Ms. Lopez's brief, it could not satisfy its burden on prejudice even if it sought to do so.

Because the court's exclusion of relevant evidence denied Ms. Lopez's Sixth Amendment right to present a defense, the error requires reversal of her conviction. The State has not demonstrated the error was harmless beyond a reasonable doubt.

3. As argued in her opening brief, the State presented insufficient evidence that the vehicle Ms. Lopez possessed was stolen.

In her opening brief, Ms. Lopez argued the state presented insufficient evidence that the Dodge Durango she possessed was a stolen vehicle as opposed to the Durango she had lawfully purchased. Op. Br. at 33-36. The State's argument in response fails to overcome this contention. Ms. Lopez relies primarily on the argument in her opening brief. However, to the extent the State argues the insufficiency of the State's evidence should be subjected to a harmless error or "overwhelming untainted evidence" test, Ms. Lopez vigorously disagrees. *See* Resp. Br. at 29-30 (citing case law irrelevant to sufficiency of evidence standard).

A criminal defendant may only be convicted if the State proves every element of the crime beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348,

147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A conviction thus must be reversed on review if, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *E.g.*, *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010). Where the evidence is insufficient, the remedy is dismissal of the charges with prejudice. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

4. Substantial evidence does not support two alternative means of possession of a stolen vehicle—concealment and disposal.

Ms. Lopez argues that the State failed to present substantial evidence for two of the five alternative means of possession presented to the jury: concealment and disposal. Op. Br. at 36-39.

With regard to the “dispose of” alternative, the State is required to prove the vehicle was “transfer[red] into new hands or to the control of someone else.” *State v. Hayes*, 164 Wn. App. 459, 481, 262 P.2d 538 (2011). However, no evidence showed Ms. Lopez changed ownership or control of the vehicle prior to the 2009 charges in this case. In response, the State argues Ms. Lopez disposed of the vehicle

by parking it in the driveway of her boyfriend's home but using it openly. *See* Resp. Br. at 35. Presumably because it cannot, the State cites no case law and provides no other argument to support this interpretation of the "dispose of" alternative. Ms. Lopez plainly was not seeking to hide it at that location because she directed Officer Changala directly to the vehicle upon request. She also openly drove the vehicle and was told by the police that she was the lawful registered owner. Further, as this Court found in *Hayes*, whether Ms. Lopez moved the vehicle to make it less likely for the police to find it could be relevant to the "concealment" alternative, it does not pertain to "disposal." *Hayes* 164 Wn. App. at 481. Moreover, "disposal" is not proven by temporarily parking the vehicle at her boyfriend's home while he fixes a flat tire.

As set forth in her opening brief, the State also failed to prove she "concealed" a stolen vehicle because Ms. Lopez drove her vehicle openly, including on the occasion Mr. Munoz reported to the police, who informed him she was the lawful registered owner. Op. Br. at 38.

The State failed to present sufficient evidence that Ms. Lopez concealed or disposed of the allegedly-stolen Dodge Durango. Because the State failed to present sufficient evidence to support at least two of

the alternative means instructed, Ms. Lopez's conviction should be reversed and remanded for a new trial. *Hayes*, 164 Wn. App. at 481.

5. Substantial evidence at the time of sentencing does not support the sentencing court's generic finding that Ms. Lopez had the present or future ability to pay discretionary fees and costs.

If the Court does not reverse the conviction on one of the above grounds, Ms. Lopez requests the Court strike the imposition of discretionary fees because it is unsupported by substantial evidence that Ms. Lopez has or will likely have the future ability to pay.

The constitution and statutes require the sentencing court to find the defendant has an ability to pay by substantial evidence. *State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3). That substantial evidence must be presented at sentencing. *See* RCW 10.01.160(3). Though fees and costs may not be collected immediately, the court must have substantial evidence at the time it enters the finding. *State v. Brockob*, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)).

Substantial evidence does not support the boilerplate finding in the judgment and sentence here. *See* CP 113. The State presented no evidence at sentencing that Ms. Lopez had or would have the ability to

pay these costs. In contrast, Ms. Lopez presented evidence of her inability to pay and the court signed an order of indigency. Hearings RP 172, 178.

The State concedes the issue was not decided by the sentencing court as required. *Curry*, 118 Wn.2d at 915-16; RCW 10.01.160(3). As mentioned, the State did not present evidence on the issue. Nonetheless, the State now argues the discretionary costs should not be stricken or the matter should be remanded to the sentencing court to provide it another opportunity to make the finding. Resp. Br. at 35-41.

First, the State alleges substantial evidence supports an ability to pay because Ms. Lopez sought a home-monitoring sentencing alternative. Resp. Br. at 36. Ms. Lopez sought home monitoring in lieu of confinement so that she could care for her family. The record does not indicate where the funding would have come from had Ms. Lopez been granted this sentence, but she was not. And the record does show she is “unable to work . . . is not employed, she’s not working, [and] she doesn’t have any funds of her own.” Hearings RP 170. The request for home monitoring is not substantial evidence of an ability to pay the costs of incarceration, a \$200 “criminal filing fee” and \$600 for court-appointed attorney recoupment. CP 115.

Next, the State argues that substantial evidence supports an ability to pay because the court “noted that some the paper [sic] smelled of smoke and they contained information that she Lopez [sic] smoked.” Resp. Br. at 36. Ms. Lopez disputes the implication that she smokes. The court acknowledged it did not actually know whether Ms. Lopez smoked or whether its information was current. Hearings RP 173-74. Even if her court papers did smell like cigarette smoke, the odor could have derived from her attorney, someone in her family that smokes, or having the papers in an open area where smoke is found. Nor does the State reference any other case where this Court has upheld \$800 plus the cost of incarceration in discretionary fines (on top of mandatory fines) based on scant evidence that the defendant smokes or associates with people who smoke.

Finally, the State argues that substantial evidence shows Ms. Lopez had the ability to pay at sentencing because years earlier she had retained private counsel. Resp. Br. at 36-37. But the State ignores that at sentencing the court found Ms. Lopez indigent for purposes of appeal. Hearings RP 177-78.

Substantial evidence does not support the court’s boilerplate finding that Ms. Lopez has or will likely have the ability to pay the

significant discretionary costs imposed. *Cf. Curry*, 62 Wn. App. at 683 (affirming imposition of discretionary costs where evidence before trial court showed likely future ability to pay). The Court should decline the State's request to receive a second opportunity to prove ability to pay by substantial evidence.

The discretionary costs were erroneously imposed and this Court should strike that portion of the judgment and sentence.

6. The Court should accept the State's concession that the finding Ms. Lopez 'used' a motor vehicle to commit possession of a stolen vehicle should be reversed.

The State concedes that if Ms. Lopez's convictions are upheld, the court's special finding that her possession of a motor vehicle was a felony in the commission of which a motor vehicle was used should be reversed. *See* CP 112 (Judgment and Sentence); Resp. Br. at 41-42. The Court should accept the concession and reverse the finding. The Dodge Durango was merely the object of the possession of a stolen vehicle crime; it was not "used" to commit the crime for purposes of RCW 46.20.285(4).

B. CONCLUSION

As set forth above and in Ms. Lopez's opening brief, this Court should reverse Ms. Lopez's conviction and dismiss the charge because

(1) the State failed to preserve material, exculpatory evidence and (2) the State failed to prove beyond a reasonable doubt Ms. Lopez possessed Mr. Munoz's Durango. Ms. Lopez's conviction should be reversed and remanded for a new trial because (1) the trial court erroneously excluded relevant evidence that supported her defense and (2) substantial evidence does not support each of the alternative means set forth in the to-convict instruction.

In the alternative, the Court should strike the discretionary costs imposed because the finding that Ms. Lopez has the present or likely future ability to pay is clearly erroneous. The court should also accept the State's concession and reverse and vacate the special finding revoking Ms. Lopez's driver's license.

DATED this 19th day of September, 2012.

Respectfully submitted,



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RESPONDENT,)	
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v.)	NO. 30385-3-III
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NICOLE LOPEZ,)	
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APPELLANT.)	

AMENDED DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF SEPTEMBER, 2012.

X _____ 