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Court of Appeals
Division III
State of Washington

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.

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

APPELLANT'S OPENING BRIEF

Marla L. Zink
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. SUMMARY OF ARGUMENT

Nicole Lopez purchased a rebuilt Dodge Durango from a dealership in 2007. She drove her vehicle openly and was once stopped by police for a suspected stolen vehicle. When the officer checked the VIN (or serial) number inside the driver's-side door and license plates on the vehicle, Ms. Lopez was identified as the lawful owner. In early 2009, another police officer searched Ms. Lopez's vehicle and reported the VIN number inside the driver's side door matched a reportedly-stolen vehicle. Ms. Lopez was charged with possession of a stolen vehicle, and later convicted by a jury.

Ms. Lopez's conviction should be reversed on four independent grounds: (1) the State failed to preserve Ms. Lopez's vehicle, which was material, exculpatory evidence, (2) in violation of her right to present a defense, the trial court erroneously prevented Ms. Lopez from presenting evidence showing she had lawfully purchased the impounded vehicle and it was not stolen, (3) the evidence was insufficient to show Ms. Lopez possessed a vehicle that was stolen, and (4) the State failed to prove each of the alternative means presented to the jury.

In the alternative, the assessment of discretionary fees and incarceration costs as well as the special finding revoking Ms. Lopez's license should be stricken from the judgment and sentence.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Ms. Lopez's motion to dismiss the prosecution because the State failed to preserve material, exculpatory evidence.

2. The State's failure to preserve material, exculpatory evidence violated Ms. Lopez's constitutional right to due process.

3. In the absence of sufficient evidence, the trial court erred in finding "the defendant had access to the Durango, thru [sic] her boyfriend, Donald Zyph." (Appendix A, p.2 (Findings of Fact and Conclusions of Law Re: Defendant's Motions to Dismiss))

4. The trial court erred in concluding "There was no spoliation of evidence by the State because the defendant had access to the Durango after its inadvertent release." (Appendix A, p.2)

5. The trial court erred in concluding "The inadvertent release of the Durango did not affect the defendant's right to a fair trial because the defendant had access to the Durango after its release." (Appendix A, p.2)

6. The trial court denied Ms. Lopez her right to present a defense in violation of the Sixth Amendment to the United States Constitution, art. 1, § 22 of the Washington Constitution, and Ms. Lopez's state and federal due process rights.

7. The trial court erred in excluding evidence pertaining to events after January 2009 as irrelevant.

8. In the absence of sufficient evidence to establish beyond a reasonable doubt the vehicle Ms. Lopez possessed was stolen, her conviction violates due process.

9. In the absence of substantial evidence supporting each of the alternative means on which the jury was instructed, Ms. Lopez's conviction violates her constitutional right to a unanimous verdict.

10. The sentencing court erred in imposing discretionary costs and fees, including the costs of incarceration.

11. The trial court erred in finding Ms. Lopez used a motor vehicle in the commission of possession of a stolen vehicle.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The State's failure to preserve evidence that is material and exculpatory violates a defendant's constitutional right to due process. Evidence is material and exculpatory if it possesses an exculpatory

value that was apparent before it was lost or destroyed and is of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. Was Ms. Lopez's right to due process violated where the State failed to preserve material, exculpatory evidence by releasing the vehicle it claimed she illegally possessed, the State failed to record the evidence in any alternative medium, the vehicle itself proved Ms. Lopez's innocence, and Ms. Lopez was precluded from relying upon the vehicle when it was later recovered?

2. The Sixth and Fourteenth Amendments, along with similar guarantees of the Washington Constitution, are violated where a trial court bars a defendant from presenting relevant evidence. The refusal to admit minimally-relevant evidence violates a defendant's rights unless the State can establish the relevance is substantially outweighed by potential prejudice to the fairness of process. Did the trial court abuse its discretion by excluding relevant evidence key to Ms. Lopez's defense where the State failed to show and the court failed to find the relevance substantially outweighed by prejudice?

3. The federal and state constitutions require the State prove all essential elements of a charged offense beyond a reasonable doubt.

Where the State failed to show beyond a reasonable doubt Ms. Lopez possessed a stolen vehicle, should the conviction be reversed?

4. A conviction must be vacated where alternative means of committing a crime are presented to the jury but at least one of those means is not supported by substantial evidence. Where the jury was instructed that to convict Ms. Lopez it must find beyond a reasonable doubt she received, retained, possessed, concealed or disposed of a stolen motor vehicle but substantial evidence did not support concealment or disposal, should the conviction be reversed?

5. Courts may not impose discretionary costs, including the costs of incarceration, on defendants unless they have a present or future ability to pay. A finding of ability to pay must be supported by the evidence. Though the evidence showed Ms. Lopez was indigent, the court entered a generic finding that she had the present or future ability to pay and imposed discretionary costs and fees plus the costs of incarceration. Did the sentencing court err in ordering Ms. Lopez to pay discretionary fees and costs?

6. RCW 46.20.285(4) authorizes the Department of Licensing to revoke a person's driver's license for one year if the person "uses" a motor vehicle in the commission of a felony. The statute applies only

if the offender uses a vehicle to facilitate commission of the crime; it does not apply if the vehicle is only the object of the crime. Did the trial court err in finding Ms. Lopez “used” a motor vehicle to commit the crime of possession of a motor vehicle, where the car was merely the object of the crime?

D. STATEMENT OF THE CASE

1. Ms. Lopez’s vehicle.

Ms. Lopez, who has no criminal history, purchased a rebuilt Dodge Durango from EZ Buy Auto in 2007 (referred to herein as “Ms. Lopez’s Durango”). RP 237, 240; Hearings RP 165-66; CP 113.¹ The interior was gray leather. RP 213-14. Jose Aguilar, the owner of EZ Buy Auto, testified he purchased the vehicle at an insurance auction, repaired it in part, and had it inspected by Washington State Patrol for re-licensing. RP 262. When he sold the vehicle to Ms. Lopez, it still needed some “repairs to the deck and a paint job.” RP 263, 265. Title was lawfully transferred to Ms. Lopez. RP 263, 265.

¹ Verbatim reports of the pretrial hearings, verdict, sentencing and post-trial motion are consolidated in one volume, referred to herein as “Hearings RP,” except for the CrR 3.5 Hearing, which is contained in the verbatim trial reports. The verbatim report of the trial is contained in four consecutively paginated volumes referred to herein simply as “RP.”

The inspector for Washington State Patrol, Marlin Workman, who checked Ms. Lopez's Durango when it was submitted for re-licensing testified at trial. RP 209, 215-16. He confirmed EZ Buy Auto had purchased the vehicle, which had apparently been rear ended, at an auction and rebuilt it. RP 210-12. The VIN number on the dashboard and the sticker on the driver's side door matched and ended in "7932." RP 214. He also used a barcode scanner to read the VIN, which reflected the same number. RP 217-18. The exterior of the vehicle was painted green and the interior was gray leather. RP 210, 213-14. He approved the vehicle for re-licensing and sale. RP 218.

After she purchased the rebuilt vehicle from EZ Buy Auto, Ms. Lopez's boyfriend helped her paint it black with a red stripe, and she re-registered the vehicle to reflect the new exterior. RP 235.

In 2008, Toppenish police officer Derrick Perez stopped Ms. Lopez in the parking lot of a sandwich shop and asked to inspect her vehicle. RP 245-47. The vehicle was black with red striping. RP 249. With Ms. Lopez's permission, Officer Perez checked the VIN number on the inside driver's side door against DOL records. RP 248-49.² The license plate and VIN number both returned as registered to Ms. Lopez.

² The dashboard VIN was obscured by a small layer of debris, resembling dirt, dust or oil. RP 248.

RP 249. Ms. Lopez's vehicle was not reported stolen. RP 251. Officer Perez explained to Ms. Lopez the vehicle was hers, told her she was free to leave, and released it back to her. RP 251-52.

2. Mr. Munoz's stolen vehicle.

Raymond Munoz, a resident of Toppenish, Washington, owned an all-black Dodge Durango, model year 2001 (referred to herein as "Mr. Munoz's Durango"). RP 137-38. It had a gray cloth interior. RP 149. Into the late evening one night around October 8, 2008, Mr. Munoz entertained his friend June George and her sister at his home for five or six hours. RP 139, 145. When he went to the bathroom, Ms. George and her sister took the key to his Durango and stole the vehicle. RP 139-40, 149. Mr. Munoz called the police. RP 140-41. When Mr. Munoz questioned Ms. George about the theft, she admitted her sister stole his vehicle but was apparently unable to locate it. RP 145, 148.

Later, Mr. Munoz thought he saw his vehicle in the parking lot of a sandwich shop and asked the police to check into it. RP 141-42. As discussed above, Officer Perez checked the VIN and license plates on the vehicle, which showed Ms. Lopez was the lawful owner. RP 249. He released the vehicle back to her and she was free to leave.

245-46, 252. Mr. Munoz was told the information did not match his stolen vehicle. RP 143, 252.

3. The abandoned Durango, the State's investigation and trial.

On January 8, 2009, Yakima County Sheriff's Deputy Officer Steve Changala obtained a search warrant for an unrelated, suspected stolen vehicle on a gentleman's property in Toppenish, Washington. RP 152-54, 170-71. During the search, he located truckloads full of stolen property that was unrelated to Ms. Lopez. RP 155, 157, 194-95. He also saw a green Dodge Durango (referred to herein as the "abandoned Durango") with no tires or wheels, parts stripped off, no license plates and the VIN on the dashboard removed. RP 155. The interior was brown. RP 168, 183. Officer Changala found a VIN located on a sticker inside the driver's side door. RP 155-56, 172. In a report written 11 days later, he indicated the VIN ended in "7932." RP 156. He checked the records and registration with DOL, which showed a black and red Durango belonging to Nicole Lopez of Zillah, Washington. RP 156. Officer Changala did not photograph the abandoned Durango, or any part thereof, and did not have it towed. RP 157-58; *see* RP 175-77 (did not take fingerprints or other action to

preserve evidence or document observations). He did not report that any other officers viewed the vehicle. RP 173-74.

Over a week after the search but before writing his report, Officer Changala showed up unannounced at the Zillah address he recovered through DOL records. RP 158. Ms. Lopez was housesitting for her mother and answered the front door. RP 158, 160. In response to Officer Changala's inquiry, she informed him she owned a Dodge Durango that was at her residence on East McDonald Road. RP 158. The vehicle was originally green, but her boyfriend, Donald Zyph, had helped her paint it black and red. RP 160-61. It had a flat tire so she had not been driving it lately. RP 161.

Officer Changala went to the McDonald Road address Ms. Lopez provided and searched the vehicle, which was black with a gray interior. RP 161, 167. As he recalls, the VIN on the dashboard was the same as that located on the inside door of the abandoned Durango. RP 164. He thought it looked tampered with. RP 163. The VIN on the dash and the license plates reflected matching registration, which came back as Ms. Lopez. RP 179-80. According to Officer Changala, the inside door of Ms. Lopez's Durango had a different VIN than the dashboard. RP 164 (VIN on door ended in "8028"). He checked the

inside-door VIN in DOL records, which reported Mr. Munoz as the owner and the vehicle as stolen. RP 166. He had Ms. Lopez's Durango towed to the Sheriff's Office for impound as evidence. RP 166-67. He did not photograph the vehicle, in whole or in part. RP 169. He searched for but did not find any additional VIN number locations and did not run a diagnostic test to check the tamper-proof VIN associated with the engine. RP 180-82; *see* RP 217-18 (Workman's testimony that vehicles have a confidential VIN placed in a location only known to law enforcement, which can be checked for the true number associated with the vehicle).

The Sheriff's Office later released Ms. Lopez's Durango, making it unavailable to the defense for inspection. Ms. Lopez moved to dismiss the prosecution. CP 10-20. She argued the State failed to preserve material, exculpatory evidence when it released Ms. Lopez's Durango from the Sheriff's impound lot. *Id.* The evidence was material and exculpatory because the vehicle had the actual VIN numbers (including the confidential VIN discoverable by a diagnostic test), paint colors and interiors for inspection. CP 18. This physical evidence was irreplaceable, particularly because the State failed to photograph or preserve other evidence of the vehicle. CP 18; Hearings

RP 25-26, 73-74. Alternatively, Ms. Lopez argued the governmental misconduct or arbitrary action in releasing Ms. Lopez's Durango formed the basis for dismissal under Criminal Rule 8.3(b). CP 7-9.

The court received testimony on Ms. Lopez's motion to dismiss. Officer Changala testified he had the vehicle towed to the Sheriff's Office for impoundment as evidence. Hearings RP 33-34, 40. It remained on the Sheriff's lot until March 2010. Hearings RP 40.

The Chief Detective with the Yakima County Sheriff's Office, Stew Graham, testified Ms. Lopez's Durango was initially stored securely then moved into the general lot among a couple free spaces. Hearings RP 29-30. The vehicle was broken into and the stereo removed while on the lot. Hearings RP 31. After the vehicle had been in the Sheriff's Office's possession for about a year, Detective Graham called a tow company to pick up the vehicle along with some others. Hearings RP 30. He failed to follow protocol—he forgot to check with the responsible officer or detective whether the vehicle was available for release. Hearings RP 31.

Officer Changala checked the status of the vehicle when the prosecutor's office informed him Ms. Lopez asked to view it; he discovered Ms. Lopez's Durango had been released. Hearings RP 40.

Officer Changala did not take photographs of Ms. Lopez's Durango or its allegedly tampered parts because he had "preserved [the vehicle itself] at the Sheriff's Office the way it was when [he] found it." Hearings RP 51-52. The prosecutor "advised she wanted the vehicle kept as it is, so [he] had the vehicle, [he] had the VIN plates, [he] had the license plates . . . it was [the] evidence." Hearings RP 52. Officer Changala further testified he did not "mess with [the dashboard VIN on Ms. Lopez's Durango] because I wanted to use it as evidence to show that it had been tampered with." Hearings RP 39.

Officer Changala did not impound the abandoned Durango. When he returned some time later to the property on which he had originally seen it, it was no longer there. Hearings RP 41. Months later, the abandoned Durango was located in the "Marion Drain" and impounded by another officer. Hearings RP 42; RP 61 (abandoned Durango located in November 2009 "in a canal, basically abandoned there"). Officer Changala was not aware it was in custody and never inspected it. Hearings RP 51. He has not since been able to locate it. Hearings RP 51.

Because the license plates on the abandoned Durango bore the same letters and numbers as Ms. Lopez's Durango, law enforcement

believes it released both vehicles to the registered owner, Samantha Hawk. Hearings RP 44-46, 48. Samantha Hawk is an acquaintance of Ms. Lopez's boyfriend. She testified at the hearing, confirmed receiving Ms. Lopez's Durango after being contacted by a towing company, but denied ever receiving or knowing about a green Durango (i.e., the abandoned Durango). Hearings RP 59.³ She further testified, Ms. Lopez transferred title of her Durango to Ms. Hawk after it was impounded and that Ms. Hawk sold it for money when it was released to her. Hearings RP 62, 65-66.

Donald Zyph, Ms. Lopez's boyfriend, confirmed she purchased a rebuilt green Dodge Durango from a dealership, and he painted the vehicle black and red for her. Hearings RP 53-54. Ms. Lopez's Durango was on his property when the Sheriff's Office removed it. Hearings RP 56-57.

The trial court found the State's release inadvertent and the evidence was inculpatory. Hearings RP 80. The court further found that because the evidence "passed through" Ms. Lopez's friend when the State released it directly to Ms. Hawk, "I cannot imagine that they – that Ms. Lopez did not have access to this vehicle through her friend

³ The State challenged her credibility. *E.g.*, Hearings RP 66-67.

and boyfriend.” Hearings RP 79-80. The court denied Ms. Lopez’s motion to dismiss. Hearings RP 80; CP 59-60 (also attached as Appendix A).

Before trial, Ms. Lopez’s Durango was recovered (again) and (again) impounded at the Sheriff’s lot. Ms. Lopez requested, and was granted, an order to release the vehicle for diagnostic testing under safeguarded conditions. RP 5; 33-34. The diagnostic test would determine the true identity of the vehicle through a VIN number lodged in the engine of the vehicle that cannot be altered. RP 8-9, 22.

The parties agreed that the diagnostic test showed that the vehicle in the possession of the Sheriff’s Office was Ms. Lopez’s Durango, the same vehicle she purchased from EZ Buy Auto in 2007 and subsequently painted black with a red stripe. RP 60, 93, 100. The VIN as reported by the diagnostic test did not match Mr. Munoz’s Durango, the stolen vehicle at issue in the case. RP 93.

The State moved to exclude the results of the diagnostic test conducted by Ms. Lopez. RP 59-60. The State argued that the case should focus only on what happened prior to and during January 2009; the diagnostic test results were irrelevant. RP 60, 65; *see* RP 106-09. The State argued it could not account for what happened to Ms.

Lopez's vehicle after it released it in March 2010. RP 61, 63-64.

Apparently, the State reasoned that because it released Ms. Lopez's vehicle to an acquaintance of Ms. Lopez, Ms. Lopez could have altered the unalterable information in the vehicle engine to trick the diagnostic test into reporting Mr. Munoz's Durango was actually Ms. Lopez's Durango. *See* RP 64; *accord* RP 75 (the VIN cannot be changed once entered into computer). Alternatively, according to the State, Ms. Lopez could have "switched" the vehicles—presumably the abandoned Durango for Mr. Munoz's Durango, but the State did not elaborate. RP 63; *see* RP 104.

Ms. Lopez argued in response that the test results were relevant to her defense that the vehicle in the Sheriff's possession was her Dodge Durango, lawfully purchased from EZ Buy Auto. RP 66; *see* RP 96-97. She never knowingly possessed a stolen vehicle. RP 66, 99. Ms. Lopez also disputed the factual basis for the State's theory because the VIN revealed by the diagnostic test is unalterable. RP 67-69. The State failed to show any tampering or foul play. *Id.* In addition, to the extent the release of the vehicle created a "chain of custody" issue, the State caused that issue by releasing the vehicle in 2010. RP 68-69.

The court initially reserved ruling. RP 79. Prior to opening statements, the court found irrelevant and excluded the results of the diagnostic test and any evidence subsequent to the seizure of Ms. Lopez's Durango on January 16, 2009. RP 113; *accord* RP 135-36 (confirming ruling).

At the conclusion of the trial, the jury found Ms. Lopez guilty as charged. CP 111. Additional facts are set forth in the relevant argument section below.

E. ARGUMENT

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.

The State failed to preserve the key piece of evidence in this case—Ms. Lopez's Dodge Durango. Because the vehicle constituted material, exculpatory evidence that Ms. Lopez could not recreate once the State inadvertently released it from its possession, the failure to preserve violated Ms. Lopez's constitutional right to due process, and her conviction must be reversed and dismissed.

This Court reviews de novo the legal question whether Ms. Lopez's Durango constitutes material, exculpatory evidence. *State v. Burden*, 104 Wn. App. 507, 512, 17 P.3d 1211 (2001) (citing *United*

States v. Manning, 56 F.3d 1188, 1197 (9th Cir.1995)); *State v. Mullen*, 171 Wn.2d 881, 893-94, 259 P.3d 158 (2011).

- a. The failure to preserve material, exculpatory evidence violates a defendant's constitutional right to due process.

Under the Fourteenth Amendment's due process clause, criminal prosecutions "must comport with prevailing notions of fundamental fairness," and a defendant must have a meaningful opportunity to present a complete defense. U.S. Const. amend. XIV; *California v. Trombetta*, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984); see *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994) (state constitution no broader than federal with regard to material, exculpatory evidence relating to breath-testing program and driving while intoxicated laws). Fundamental fairness requires that the government preserve and disclose to the defense favorable evidence that is material to guilt or punishment. *Trombetta*, 467 U.S. at 480, 485-88; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). Due process is violated when the State fails to preserve material, exculpatory evidence. *E.g.*; *Wittenbarger*, 124 Wn.2d at 475; *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 duty to preserve

evidence extends from the State to agents acting under its authority, including the police. *State v. Vaster*, 99 Wn.2d 44, 53, 659 P.2d 528 (1983).

Material, exculpatory evidence (1) possesses an exculpatory value that was apparent before the evidence was lost or destroyed and (2) cannot be recreated through comparable or substitute evidence if destroyed. *Trombetta*, 467 U.S. at 489. Where evidence is materially exculpatory, it is irrelevant whether the government acted in good or bad faith. *Youngblood*, 488 U.S. at 57.

b. Ms. Lopez moved to dismiss the prosecution based on the State's failure to preserve material, exculpatory evidence.

Upon discovering the State had released Ms. Lopez's Durango, and it was not available for inspection, Ms. Lopez moved to dismiss the prosecution. *See* Section D.3, *supra*. The trial court held an evidentiary hearing at which the evidence showed (1) the vehicle had been tampered with while on the Sheriff's lot, (2) the release was in contravention of Sheriff's Office policies, (3) the State considered the vehicle to be key evidence, and (4) the State retained no photographs or other evidence related to the vehicle. Hearings RP 30-31, 39, 51-52.

The trial court denied Ms. Lopez's motion finding the evidence inculpatory and the State's release inadvertent. Hearings RP 80; CP 59-60

- c. The evidence the State failed to preserve was both material and exculpatory.

The formerly-impounded Dodge Durango (Ms. Lopez's Durango) constituted material, exculpatory evidence. First, the vehicle itself 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. 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 evidence at issue here differs from that considered in *Trombetta*. In *Trombetta*, the defendants were charged with driving while under the influence of alcohol, and objected to the admission of the breath analysis test results because the breath sample had not been retained for testing by the defense. *Trombetta*, 467 U.S. at 482-83. In rejecting the defendants' due process claim, the Court noted that the breath samples were obtained solely for the purpose of conducting the tests, which were completed and the results available, and that, because the breath tests implicated the defendants, the chance the samples

would be exculpatory was extremely low. *Id.* at 487-89 (noting reliability of test used); *see Wiitenbarger*, 124 Wn.2d at 475-76 (discussing *Trombetta*). Moreover, the defendants could demonstrate their innocence in other ways, such as through cross-examination of the officer who administered the test or checking the calibration of the machine. *Id.* at 490. Here, on the other hand, the State did not conduct any tests of the impounded vehicle or retain any physical or descriptive evidence. Absent the vehicle itself, there simply was no evidence for Ms. Lopez to examine.⁴

Similarly in *Fisher*, cocaine seized from the defendant and tested at the crime laboratory was destroyed. The evidence was an integral part of the State's case for possession, but it had been tested four times and the test results implicated the defendant. Thus, dismissal was not required because the cocaine that was destroyed was highly unlikely to help the defendant's case. *Fisher*, 540 U.S. at 545-46, 548 ("At most, respondent could hope that, had the evidence been

⁴ Moreover, unlike in *State v. Judge*, where the defendant had access to the crime scene, Ms. Lopez did not have access to the vehicle while in the State's possession and was precluded from introducing any evidence obtained subsequent to the State's release of the vehicle. *Compare State v. Judge*, 100 Wn.2d 706, 717-18, 675 P.2d 219 (1984) (especially because evidence was equally-available to defendant for investigation, State had no duty to examine, preserve, measure and record evidence at scene of negligent vehicular homicide) *with* RP 113, 135-36.

preserved, a fifth test conducted on the substance would have exonerated him.”) (emphasis in original).

Moreover, the value of the evidence here was not speculative. The State recognized the value of the evidence prior to its release. Hearings RP 39, 51-52. Further, both parties agreed that diagnostic testing performed after the vehicle was recovered demonstrated the exculpatory nature of the evidence. RP 60, 93, 100. In fact, the “true” VIN number of the stolen vehicle (discoverable by a simple diagnostic test) was central to the trial, and was the critical information lost when the State failed to preserve the impounded Dodge Durango.

Thus this case is similar to *Burden*. In that case, the evidence was preserved during an initial trial that resulted in a hung jury. 104 Wn. App. at 509-11. When the evidence went missing prior to retrial, the trial and appellate courts could review the material value of the missing evidence in the first trial. *Id.* at 512-13. Upon review, this Court affirmed the trial court’s reversal because the State failed to preserve material, exculpatory evidence.

On the other hand, the instant case is distinguishable from *Youngblood*, where the value of the missing evidence was unknown. In *Youngblood*, the State failed to preserve blood and semen samples

taken from a child rape victim's body and clothing after they were examined by the police criminologist but not yet tested for blood typing. 488 U.S. at 52-53. The trial and reviewing courts could only speculate as to the value of the evidence to Mr. Youngblood. Thus, the *Youngblood* Court concluded the evidence may or may not have exonerated the defendant had it been tested. *Id.* at 57-58.⁵

Finally, the evidence was material because Ms. Lopez was unable to obtain comparable evidence through other reasonably available means. *Burden*, 104 Wn. App. at 513 (citing *Wittenbarger*, 124 Wn.2d at 475); *United States v. Cooper*, 983 F.2d 928, 932 (9th Cir. 1993) (expert testimony regarding possible nature of destroyed evidence insufficiently comparable to examination of actual physical evidence). Like in *Burden*, here the State failed to photograph the vehicle, extract fingerprints, or otherwise record its essential components. 104 Wn. App. at 514 (failure to accurately photograph key evidence renders use of "substitute" evidence meaningless because

⁵ In *Youngblood*, the jury was instructed that it was permitted to infer the evidence that the lost or destroyed evidence would not have been favorable to the State. *Youngblood*, 488 U.S. at 59-60 (Stevens, J., concurring). That defendant also discussed the lost evidence in cross-examination and during summation. *Id.* at 59. Here, the trial court precluded Ms. Lopez from presenting any evidence relating to the retention, release or testing of the vehicle. Section E.2, *infra*.

a proper comparison cannot be had). The lack of comparable evidence is even more egregious here than in *Burden*. In that case the State was willing to stipulate to certain characteristics of the evidence. 104 Wn. App. at 513-14. This Court found even such stipulations inadequate. *Id.* Here, the State actively pursued the exclusion of some of the potentially comparable evidence—the diagnostic test. *E.g.*, CP 91 (State’s Additional Motions in Limine); RP 16, 87.

d. The due process violation requires reversal of Ms. Lopez’s conviction and dismissal of the charge.

Where the State fails to preserve material, exculpatory evidence, any resulting conviction must be reversed and the charges dismissed with prejudice against refiling. *Wittenbarger*, 124 Wn.2d at 475; *Burden*, 104 Wn. App. at 509, 511-12 (affirming dismissal where material, exculpatory evidence lost or destroyed); *Cooper*, 983 F.2d at 933 (dismissal of indictment, and not suppression of evidence, is appropriate remedy).

As set forth above, the State’s failure to preserve the vehicle it alleged Ms. Lopez unlawfully possessed violated due process. 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 was unable to 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. In light of the violation of her constitutional right to due process, Ms. Lopez's conviction for possession of a stolen vehicle should be reversed and dismissed. *See Wittenbarger*, 124 Wn.2d at 475.

2. The trial court abused its discretion by excluding relevant evidence critical to Ms. Lopez's defense.

The trial court's wholesale exclusion of evidence pertaining to the diagnostic VIN test of the impounded Dodge Durango violated Ms. Lopez's due process rights and right to present a defense.

a. Relevant evidence is broadly defined and encapsulates evidence probative of a defendant's defense.

The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a complete defense. *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). Article 1,

section 22 of the Washington Constitution provides a similar guarantee. *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness). A defendant must receive the opportunity to present his version of the facts to the jury. *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[A]t a minimum . . . criminal 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); accord *Washington*, 388 U.S. at 19.

A defendant is entitled to present only relevant evidence; however, relevance is a low threshold. “To be relevant, evidence must meet two requirements: (1) the evidence must have a tendency to prove or disprove a fact (probative value), and (2) that fact must be of consequence in the context of the other facts and the applicable substantive law (materiality).” *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987) (citing 5 K. Tegland, *Wash. Practice* § 82, at 168 (2d ed. 1982)); *Davidson v. Metropolitan Seattle*, 43 Wn. App. 569, 573,

719 P.2d 569, *review denied*, 106 Wn.2d 1009 (1986)). Relevant evidence includes facts that present direct or circumstantial evidence of any element of a claim or defense. ER 401; *Rice*, 48 Wn. App. at 12. Relevant evidence is generally admissible. ER 402. “Evidence 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”).

So long as a defendant’s evidence is minimally relevant, “the burden is on the State to show 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)). Even then, “[r]elevant information can be withheld only ‘if the State’s interest outweighs the defendant’s need.’” *Id.*

Though the trial court has the discretion to determine whether evidence is admissible, a defendant’s inability to present relevant evidence implicates the fundamental fairness of the proceedings and the error must be analyzed as a due process violation. *Jones*, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924.

b. The trial court erred in excluding relevant evidence critical to Ms. Lopez's defense.

The results of the diagnostic test were of material probative value. Through a simple, diagnostic test, Ms. Lopez was able to discover the true, tamper-proof VIN associated with the vehicle in the State's possession. The parties agreed the diagnostic test showed the vehicle had a true VIN registered to Ms. Lopez. RP 60, 93, 100. Thus, the result supported Ms. Lopez's theory that the vehicle she possessed was her lawfully-owned vehicle, and not Mr. Munoz's Durango.

The State's argument against admission of the evidence was related instead to the appropriate weight the jury should ascribe the evidence—and not whether it was admissible. The State argued that the release of the vehicle tainted the reliability of the diagnostic test results because the State could not verify that the vehicle tested was necessarily the same vehicle it had seized in January 2009. Although the State argued this made the evidence irrelevant, the argument pertains to the reliability of the evidence, not its probative value. ER 401 (to be relevant, evidence need only make the existence or nonexistence of a material fact "more or less likely"); *Rice*, 48 Wn. App. at 12 (probative means a tendency to prove or disprove a fact); *State v. Israel*, 113 Wn. App. 243, 267-68, 54 P.3d 1218 (2002)

(inconsistency goes to weight and not admissibility); *see State v. Foxhoven*, 161 Wn.2d 168, 178-79, 163 P.3d 786 (2007) (evidence of modus operandi admissible and arguments as to differences in the graffiti associated with each act goes to the weight of the evidence not its admissibility). Thus, the State may have sought to discredit the evidence, but the evidence should not have been excluded altogether.

The court ruled only that the evidence was not relevant and did not reach the issue of prejudice. However, any argument that the evidence was “so prejudicial as to disrupt the fairness of the fact-finding process at trial” is without merit. First, the evidence was of high probative value because its exclusion prevented Ms. Lopez from arguing her theory of defense. At trial, the State tried to focus the jury’s attention on the VIN numbers of the vehicles Officer Changala found. *E.g.*, RP 295-96, 300, 303, 332, 334 (closing argument). The State theorized there were actually only two vehicles—the abandoned Durango, which belonged to Ms. Lopez, and Mr. Munoz’s Durango, which Ms. Lopez somehow unlawfully obtained and repainted with a red stripe. RP 295. Ms. Lopez’s defense was that her vehicle was not the same as Mr. Munoz’s Durango. The true-VIN number of the impounded vehicle forcefully supported this theory by showing the

vehicle bore the VIN ascribed to Ms. Lopez's registration. Because it was highly probative, "no state interest can be compelling enough to preclude its introduction." *State v. Jones*, 168 Wn.2d at 720-21 (quoting *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)).

Second, relevant evidence can be excluded only if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. *Darden*, 145 Wn.2d at 625. The State failed to meet this burden. The State argued only that admitting the evidence would cause delay. RP 87-88, 90-91. But it made no showing that the time necessary to present the test result (and any rebuttal evidence) "substantially outweighed" its probative value. In fact, at one point the State acknowledged that argument on its motion to exclude the diagnostic test results was taking longer than the actual presentation of the evidence would. RP 106.

In sum, the trial court erred in excluding results from the diagnostic test on Ms. Lopez's Durango because the evidence was highly probative of Ms. Lopez's theory that she never possessed Mr.

Munoz's stolen vehicle and the probative value was not substantially outweighed by the potential prejudice.

c. The error requires reversal of the conviction.

Due process demands a defendant be permitted to present evidence that is relevant and of consequence to her theory of the case.

Jones, 168 Wn.2d at 720; *Maupin*, 128 Wn.2d at 924; *Rice*, 48 Wn. App. at 12. 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 unless the State can prove beyond a reasonable doubt that it "did not contribute to the verdict obtained."

Chapman v California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The State cannot meet its burden in this case. The State's case relied heavily on the VIN number of the vehicle seized from Ms. Lopez's residence. But that evidence derived only from Officer Changala's testimony—the State had no photographs or results from Officer Changala's records search to support his testimony. Further, his testimony was contradicted by Officer Perez who encountered Ms. Lopez with her vehicle, checked the VIN number and license plates

against the registration and released Ms. Lopez as having lawful possession of the Durango. The State cannot show that evidence of the impounded-vehicle's true VIN number would have, beyond a reasonable doubt, had no effect on the jury's verdict.

In *Maupin*, our Supreme Court reversed a murder conviction where the trial court erroneously excluded evidence of a witness who saw the victim with someone other than the defendant on the day of the alleged crime. 128 Wn.2d at 928, 930. Though the excluded evidence would not have necessarily resulted in an acquittal, it “casts substantial doubt on the State’s version of the crime.” *Id.* at 930. Thus it was “impossible to conclude a reasonable jury would have reached the same result beyond a reasonable doubt.” *Id.*

To reverse her conviction, this Court need not find that Ms. Lopez’s version of events is “airtight.” *Jones*, 168 Wn.2d at 724. A reasonable jury hearing evidence of the diagnostic VIN test may have reached a different result. *See id.* Accordingly, the error was not harmless and requires reversal of Ms. Lopez’s conviction with remand for a new trial. *Id.*; *Maupin*, 128 Wn.2d at 924.

3. The State presented insufficient evidence that the vehicle Ms. Lopez possessed was stolen.

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). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, 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. *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).

Here, the State failed to present sufficient evidence that there were in fact only two vehicles—the abandoned Durango and Mr. Munoz’s Durango. That is, the State failed to prove that Ms. Lopez ever possessed Mr. Munoz’s Durango. The State’s theory—that the abandoned Durango was the vehicle Ms. Lopez purchased from EZ Buy Auto and then used its parts (at least the VIN number plate and license plate) on Mr. Munoz’s Durango and painted it with a red

stripe—required the jury to selectively believe the State’s evidence. First, the State’s theory required the fact-finder to disbelieve Officer Changala’s testimony that the abandoned vehicle, which he came upon when investigating a different case, had a brown interior. This disbelief was essential because the vehicle Ms. Lopez purchased had a gray leather interior. RP 213-14, 296. Unless the abandoned Durango belonged to Ms. Lopez, the State’s theory that she used its parts on Mr. Munoz’s Durango could not stand. At the same time, however, the State’s theory required the jury to take Officer Changala at his word as to the remainder of his testimony despite the lack of physical evidence, photographs, or corroborating testimony.

Second, Mr. Munoz testified his vehicle had a gray cloth interior. RP 149. But Mr. Workman, who inspected and re-licensed Ms. Lopez’s Durango for resale, testified the interior of her vehicle was leather. RP 213-14. Officer Changala could not recall the material associated with the seized vehicle. RP 182-83. The State failed to explain this discrepancy.

Third, the State’s theory required the fact-finder to disbelieve Officer Perez’s testimony. Officer Perez testified that when he checked the VIN number on the driver’s-side door of Ms. Lopez’s vehicle, it

showed the Durango was registered to her. This testimony directly contradicted Officer Changala's testimony that the VIN on the driver's side door indicated the vehicle belonged to Mr. Munoz.

The sufficiency standard requires this Court to view the evidence in the light most favorable to the State. Here, the State's theory requires much more to sustain the conviction. The conviction can only be upheld by drawing unreasonable inferences from the evidence. In *State v. Camarillo*, a multiple acts case, a conviction was upheld despite defendant's "bare denial" of the allegations, because the Court determined the alleged victim's testimony was not directly controverted by the other evidence. *State v. Camarillo*, 115 Wn.2d 60, 70-71, 794 P.2d 850 (1990) (finding, e.g., "There was no conflicting testimony which would have placed any reasonable doubt in the mind of a juror that the events did not happen as described by [the victim]."). The fact-finder was entitled to make credibility determinations to believe the uncontroverted testimony that disfavored the defendant. *Id.* at 71-72 (distinguishing case from another where there was insufficient support for multiple acts because in instant case there was no controverting testimony or impeachment). Here, however, the evidence viewed in the light most favorable to the State is directly contradictory.

A rational trier of fact would not simply be required to make a credibility determination but to selectively credit and discredit the State's evidence. Unlike *Camarillo*, therefore, the evidence here is not sufficient to support Ms. Lopez's conviction.

Because the evidence was insufficient to prove each element beyond a reasonable doubt, Ms. Lopez's conviction should be reversed and the charge dismissed with prejudice. *See, e.g., Jackson*, 443 U.S. at 319; *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

4. The State failed to prove each of the alternative means presented to the jury.

If a single offense may be committed in more than one way, the jury must be unanimous as to guilt for the crime charged. *State v. Lillard*, 122 Wn. App. 422, 433, 93 P.3d 969 (2004), *review denied*, 154 Wn.2d 1002, 113 P.3d 482 (2005). The jury need not be unanimous as to the specific means by which the crime was committed only if substantial evidence supports each of the alternative means. *Id.*; *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (“to safeguard the defendant’s constitutional right to a unanimous verdict as to the alleged crime, substantial evidence of each of the relied-on alternative means must be presented”); *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). “Substantial evidence exists if any

rational trier of fact could find the essential elements of the crime beyond a reasonable doubt.” *Lillard*, 122 Wn. App. at 434.

Where the trial court includes alternative means of committing a crime in the to-convict instruction, the State assumes the burden of proving each of the alternative means by substantial evidence. *Lillard*, 122 Wn. App. at 434-35; *State v. Hayes*, 164 Wn. App. 459, 478-82, 262 P.2d 538 (2011).

Here, the jury was instructed that to convict Ms. Lopez it had to find beyond a reasonable doubt she “knowingly received, retained, possessed, concealed or disposed of a stolen motor vehicle.” CP 107 (jury instruction 13). Where the trial court includes these words in the to-convict instruction, the terms are treated as alternative means the State must prove. *Lillard*, 122 Wn. App. at 434-35. The State proposed the instruction and did not subsequently object to the language. CP 152 (Sub # 21 (State’s proposed jury instructions (to-convict instruction)));⁶ *see* RP 271, 276. The State thereby assumed the burden of proving each alternative means by substantial evidence. *Hayes*, 164 Wn. App. at 481. The verdict cannot be found to be based only on a particular means as no special verdict was provided and the

⁶ The trial court has been requested to supplement the clerk’s paper with the State’s proposed jury instructions, sub # 21.

parties relied on the alternative means. *E.g.*, RP 308 (defense closing argument arguing all five means presented in instruction); *see State v. Nicholson*, 119 Wn. App. 855, 863-64, 84 P.3d 877 (2003) (reviewing court must vacate conviction unless it can determine verdict was based on one of the means supported by substantial evidence), *overruled on other grounds, Smith*, 159 Wn.2d 778. Thus to affirm the conviction, this Court must find substantial evidence supports each of the five alternatives. *See* CP 107.

The State failed to present sufficient evidence that Ms. Lopez concealed or disposed of the allegedly-stolen Dodge Durango. The evidence did not show Ms. Lopez hid her vehicle from law enforcement. *See Hayes*, 164 Wn. App. at 481 (vehicle concealed “by moving it, or arranging to have it moved, to where the police were less likely to see it”). Ms. Lopez told Officer Changala where her vehicle was located and he recovered it from the precise location she indicated. The State failed to prove she “concealed” the Dodge Durango.

“Dispose of” means “to transfer into new hands or to the control of someone else.” *Hayes*, 164 Wn. App. at 481. The State did not allege, and the evidence did not show, that Ms. Lopez transferred control of Dodge Durango prior to the charges in 2009. As discussed,

the Dodge Durango was within Ms. Lopez's control at the time of its seizure and she directed law enforcement to it. Though it was parked at her boyfriend's residence, Ms. Lopez told Officer Changala that she lived with her boyfriend. She also reported she had not been driving the vehicle because it had a flat tire. There is no evidence that Ms. Lopez transferred control of, or disposed of, the vehicle.

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 (reversing convictions for possession of stolen vehicle where sufficient evidence did not support each alternative, instructed means).

5. The sentencing court erred in finding Ms. Lopez had the present or future ability to pay and in imposing discretionary fees and costs.

Alternatively, if the conviction is affirmed, this Court should strike the erroneous imposition of discretionary fees. The sentencing court imposed the following discretionary fees: \$200 for a "criminal filing fee"; \$600 for court-appointed attorney recoupment (RCW 9.94A.760); and the costs of incarceration. CP 115; RCW 9.94A.760.⁷

⁷ The remaining fees were mandatory and are not disputed here. See *State v. Curry*, 118 Wn.2d 911, 917, 829 P.2d 166 (1992) (victim assessment

The court did not make an oral finding that Ms. Lopez had the ability to pay these costs. In fact, 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 judgment and sentence contains only boilerplate language stating under finding 2.7 that:

The Court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including defendant's financial resources and the likelihood that the defendant's status will change. The Court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

CP 113.⁸ Although mandatory fees were properly imposed, it was improper for the court to impose an additional \$800 in costs and fees, and to require Ms. Lopez to pay the cost of incarceration, because Ms. Lopez lacks the present and future ability to pay.

Courts may not require a defendant to reimburse the state for costs unless the defendant has or will have the means to do so. *Curry*,

mandatory); *State v. Thompson*, 153 Wn. App. 325, 336, 223 P.3d 1165 (2009) (DNA laboratory fee mandatory).

⁸ The court's boilerplate finding as to Ms. Lopez's resources and ability to pay is factual and should be reviewed under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 403-04, 267 P.3d 511 (2011); *State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116 (1991).

118 Wn.2d at 915-16; RCW 10.01.160(3). The court must consider the financial resources of the defendant before imposing discretionary costs. *Id.* This requirement is both constitutional and statutory. *Id.*; *see* RCW 9.94A.760(2) (requiring court to consider defendant's ability to pay prior to assessing incarceration costs). Additionally, a trial court's findings of fact must be supported by substantial evidence. *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)).

The sentencing court erred in imposing discretionary costs and fees upon Ms. Lopez without specifically finding she had the ability to pay. Substantial evidence did not support the court's boilerplate finding. Contemporaneous to the imposition of these costs, Ms. Lopez was found indigent for purposes of appeal. Hearings RP 178. Ms. Lopez informed the court at sentencing that she receives governmental assistance because health conditions prevent her from working. Hearings RP 172. She specifically requested that costs be waived. Hearings RP 172. The court did not take Ms. Lopez's financial status into account; instead, the court imposed the costs and fees, including

the costs of incarceration, without any reference to Ms. Lopez's present or future ability to pay. Hearings RP 175.

This case is contrary to others in which this Court has affirmed the imposition of costs. In *Richardson*, this Court affirmed the imposition of costs because the defendant stated at sentencing that he was employed. *State v. Richardson*, 105 Wn. App. 19, 23, 19 P.3d 431 (2001). In *Baldwin*, this Court affirmed the imposition of costs because a presentence report "establishe[d] a factual basis for the defendant's future ability to pay." *Baldwin*, 63 Wn. App. at 311.

But unlike the defendant in *Richardson*, Ms. Lopez is not employed and her medical condition prevents her from obtaining employment in the future. Unlike in *Baldwin*, the State did not submit evidence establishing a factual basis for Ms. Lopez's future ability to pay. To the contrary, the totality of the evidence showed Ms. Lopez was indigent at the time of sentencing and likely to remain so. Thus, the court's finding that Ms. Lopez had the ability to pay was clearly erroneous and this Court should strike the discretionary costs imposed.

6. Because the car was merely the object of the crime, the trial court erred in finding Ms. Lopez ‘used’ a motor vehicle to commit possession of a stolen vehicle.

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).

- a. RCW 46.20.285(4) requires DOL revoke a convicted felon’s driver’s license if a motor vehicle was used to facilitate commission of the crime, but not if the car was merely the object of the crime.

RCW 46.20.285(4) mandates that DOL revoke a driver’s license for one year where the driver has a final conviction for “[a]ny felony in the commission of which a motor vehicle is used.”⁹ The application of this statute to a given set of facts is a matter of law reviewed de novo. *State v. B.E.K.*, 141 Wn. App. 742, 745, 172 P.3d 365 (2007).

Where the vehicle is the object of the crime, “use” of a motor vehicle cannot be found. RCW 46.20.285(4) does not define “use.” In *State v. Batten*, our Supreme Court held there must be a sufficient nexus between the crime and the offender’s use of a motor vehicle to justify revocation of his license under the statute. *State v. Batten*, 140 Wn.2d 362, 365-66, 997 P.2d 350 (2000). The court determined the

⁹ A copy of the full statute is attached as Appendix B.

term “used” in the statute means “employed in accomplishing something.” *Id.* at 365 (quoting *State v. Batten*, 95 Wn. App. 127, 131, 974 P.2d 879 (1999), *aff’d*, 140 Wn.2d 362, 997 P.2d 350 (2000) (quoting *Webster’s Third New International Dictionary* 2524 (3d ed. 1966)). Thus, “the use of the motor vehicle must contribute in some reasonable degree to the commission of the felony.” *Id.* at 365 (quoting *Batten*, 95 Wn. App. at 131). In *Batten*, a sufficient nexus existed between Batten’s use of a car and the crimes of unlawful possession of a controlled substance and unlawful possession of a firearm, where Batten used the car as a place to store, conceal, and transport the contraband over a period of time. *Id.* at 365-66. Because Batten’s use of the car contributed to the accomplishment of the crime, and was not merely incidental to the crime, DOL was authorized to revoke Batten’s driver’s license. *Id.*

Courts do not apply RCW 46.20.285(4) where the vehicle was not “an instrumentality of the crime, such that the offender use[d] it in some fashion to carry out the crime.” *B.E.K.*, 141 Wn. App. at 748. A car is merely incidental to a crime, and not “used” to commit the crime, if it is simply a means of transportation. *See, e.g., State v. Wayne*, 134 Wn. App. 873, 875-76, 142 P.3d 1125 (2006) (insufficient nexus

existed between use of car and crime of possession of cocaine, where Wayne merely drove car while possessing cocaine on his person); *State v. Hearn*, 131 Wn. App. 601, 610-11, 128 P.3d 139 (2006) (insufficient nexus existed between use of car and crime of possession of methamphetamine, where drugs were merely found inside car); *State v. Griffin*, 126 Wn. App. 700, 708, 109 P.3d 870 (2005), *review denied*, 156 Wn.2d 1004, 128 P.3d 1239 (2006) (sufficient nexus existed between use of car and crime of possession of cocaine, where Griffin obtained the cocaine in exchange for giving someone a ride in his car).

In accordance with the reasoning of *Batten* and the other cases cited above, courts also hold that, if a car is merely the object of the crime and not used independently as an instrument to facilitate commission of the crime, the statute does not apply. *B.E.K.*, 141 Wn. App. 742; *State v. Dykstra*, 127 Wn. App. 1, 110 P.3d 758 (2005), *review denied*, 156 Wn.2d 1004, 128 P.3d 1239 (2006). In *B.E.K.*, the juvenile offender was adjudicated guilty of second degree malicious mischief for spray painting a police patrol car. *Id.* at 744. In determining whether the car was “used” to commit the felony, the Court acknowledged the car was a necessary ingredient of the crime. *Id.* at 747. Second degree malicious mischief, as charged, required

proof that the offender perpetrated the mischief on an emergency vehicle.¹⁰ Thus, there was a “clear relationship” between the vehicle and the crime. *Id.* “But a relationship in any form between the vehicle and the crime is not sufficient.” *Id.* Instead, “the vehicle must be an instrumentality of the crime, such that the offender uses it in some fashion to carry out the crime.” *Id.* at 747-48. Because “B.E.K. did not employ the patrol car in any manner to commit his act of mischief but simply made the patrol car the object of the crime,” there was not a sufficient nexus between the crime and B.E.K.’s use of the car to justify suspending his driver’s license under RCW 46.20.285(4). *Id.* at 748.

In *Dykstra*, by contrast, a car was “used” to commit the crime of car theft, but only because the car was *both* the object *and* an instrumentality of the crime. 127 Wn. App. at 12. Dykstra was charged and convicted of five counts of first degree theft for his role in an auto theft ring. *Id.* at 6. Thus, cars were the object of the crimes. *Id.* at 12. But they were also “used” to facilitate commission of the crimes, where: Dykstra and his cohorts used cars to drive around looking for other cars to steal; they took possession of the stolen cars

¹⁰ Under RCW 9A.48.080(1)(b), a person is guilty of the felony of second degree malicious mischief if he knowingly and maliciously “[c]reates a substantial risk of interruption or impairment of service rendered to the public, by physically damaging or tampering with an emergency vehicle.”

by driving them away from the scene; they sat in cars while acting as lookouts; and, after dismantling the engines, they used cars to carry the unwanted parts away for disposal. *Id.*

California courts similarly hold that, for a car to be “used” to commit a crime, it must be more than merely the object of the crime or a means of transportation.¹¹ *See People v. Gimenez*, 36 Cal. App. 4th 1233, 42 Cal. Rptr. 2d 681 (1995) (sufficient nexus between use of car and crime of vehicle burglary where defendant used car to carry burglary tools and intended to use car to carry away stolen car radio); *In re Gaspar D.*, 22 Cal. App. 4th 166, 27 Cal. Rptr. 2d 152 (1994) (sufficient nexus between use of car and crime of vehicle burglary where juvenile offender used car to carry and conceal stolen car stereo and burglary tools); *People v. Paulsen*, 217 Cal. App. 3d 1420, 267 Cal. Rptr. 122 (1989) (sufficient nexus between use of car and crime of fraud where defendant used truck to carry and conceal stolen merchandise); *People v. Poindexter*, 210 Cal. App. 3d 803, 258 Cal. Rptr. 680 (1989) (insufficient nexus between use of car and crime of

¹¹ California's statute, which requires license revocation for an offender who is convicted of “[a]ny felony in the commission of which a motor vehicle is used,” is almost identical to RCW 46.20.285 (4). California Vehicle Code § 13350(2); *Batten*, 140 Wn.2d at 366. As such, California cases interpreting the California statute are persuasive authority for Washington courts interpreting RCW 46.20.285(4). *Batten*, 140 Wn.2d at 366; *Batten*, 95 Wn. App. at 130.

theft where defendant used car merely as a means of transporting himself to and, with stolen property, away from scene).

Though Ms. Lopez did not object at sentencing, review on appeal is proper. *State v. Ford*, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999) (“illegal or erroneous sentences may be challenged for the first time on appeal”).

- b. The trial court erred in finding Ms. Lopez ‘used’ a car to commit possession of a stolen vehicle where the car was merely the object of the crime.

In this case, the Dodge Durango was merely the object of the possession of a stolen vehicle crime. The car was a necessary ingredient of the crime and there was a “clear relationship” between the vehicle and the crime. *B.E.K.*, 141 Wn. App. at 747. “But a relationship in any form between the vehicle and the crime is not sufficient.” *Id.* If the vehicle is merely the object of the crime, it is not “used” to commit the crime for purposes of RCW 46.20.285 (4). *Id.* at 748. Here, the car was merely an object of the crime. Indeed, it was the crime. Thus, under the above cited authorities, a car was not “used” to commit the crime for purposes of RCW 46.20.285(4).¹²

¹² In *State v. Contreras*, this Court held that a car was “used” to commit the crime of possession of a stolen vehicle because the defendant tried to assert ownership of the car by re-licensing it. *State v. Contreras*, 162 Wn. App. 540,

In sum, the trial court erred in finding Ms. Lopez “used a motor vehicle in the commission of the offense.” CP 5. At the least, the statute is ambiguous when applied to these facts and, under the rule of lenity, this Court must construe the statute in favor of Ms. Lopez.¹³

B.E.K., 141 Wn. App. at 745.

- c. The finding that Ms. Lopez ‘used’ a motor vehicle in the commission of count two must be reversed and vacated.

When a trial court erroneously finds an offender “used” a motor vehicle in the commission of a felony, the court’s order that DOL be notified of the offender’s conviction must be reversed and vacated.

B.E.K., 141 Wn. App. at 748. Here, the trial court erroneously found Ms. Lopez “used” a motor vehicle to commit the crime of possession of a stolen vehicle. CP 112. Thus, that portion of the court’s order must be reversed and vacated. *See B.E.K.*, 141 Wn. App. at 748.

254 P.3d 214, 217, *review denied* 172 Wn.2d 1026, 268 P.3d 225 (2011). In contravention of the above-cited authorities, *Contreras* was wrongly decided.

¹³ A statute is ambiguous if it can reasonably be interpreted in more than one way. *B.E.K.*, 141 Wn. App. at 745 (citing *Vashon Island Comm. for Self-Gov’t v. Wash. State Boundary Review Bd.*, 127 Wn.2d 759, 771, 903 P.2d 953 (1995)). Under the rule of lenity, if two possible statutory constructions are permissible, the Court construes the statute strictly against the State in favor of a criminal defendant. *B.E.K.*, 141 Wn. App. at 745 (citing *State v. Gore*, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984)).

F. CONCLUSION

This Court should reverse Ms. Lopez's conviction and dismiss the charge because the State failed to preserve material, exculpatory evidence. The conviction should also be reversed because the trial court erroneously excluded relevant evidence that supported Ms. Lopez's defense. Finally, the conviction should be reversed because the State failed to prove beyond a reasonable doubt Ms. Lopez possessed Mr. Munoz's Durango or because 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 reverse and vacate the special finding revoking Ms. Lopez's driver's license because a vehicle was not "used" in the commission of this crime.

DATED this 30th day of March, 2012.

Respectfully submitted,



Marla L. Zink – WSBA 39042
Washington Appellate Project
Attorney for Appellant

APPENDIX A

2010 OCT 22 AM 11:45

EX. OFF. CLERK
SUPERIOR COURT
YAKIMA WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR YAKIMA COUNTY

STATE OF WASHINGTON,
Plaintiff,
v.
NICOLE MARIE LOPEZ,
Defendant.
D.O.B. 11/21/85

Case No. 09-1-02276-9

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE: DEFENDANT'S MOTIONS
TO DISMISS

This matter came on regularly before the Court on October 15, 2010, on the Defendant's motion to dismiss. The State appeared by and through Yakima County Deputy Prosecuting Attorney Richard Gilliland. The defendant appeared personally and through her attorney Kimberly Grijalva. The Court has considered the memoranda and arguments of counsel, the testimony of Yakima Sheriff's Chief Stew Graham, Yakima Sheriff's Deputy Steve Changala, Donald James Zyph, Samantha J. Hawk and the records and files herein, hereby issues the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The release of the black Durango (the subject matter of the defense motions to dismiss; hereinafter "Durango") Chief Stew Graham of the Yakima County Sheriff's Office was inadvertent.

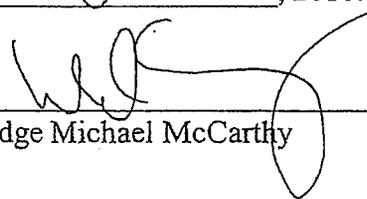
2. Chief Graham released the Durango to Elite Towing.
3. Elite Towing released the Durango to Samantha Hawk.
4. After Elite Towing released the Durango to her, Samantha Hawk gave the Durango to Donald James Zyph.
5. Donald James Zyph is the defendant's boyfriend.
6. The defendant has lived with Donald James Zyph during the course of this case.
7. ~~The defendant was aware of the Durango's release to Samantha Hawk and subsequent possession by Donald James Zyph and had access to the Durango,~~ *then her boyfriend, Donald Zyph*

CONCLUSIONS OF LAW

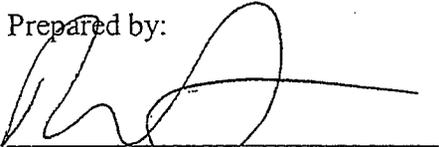
1. There was no spoliation of evidence by the State because the defendant had access to the Durango after its inadvertent release.
2. The inadvertent release of the Durango did not affect the defendant's right to a fair trial because the defendant had access to the Durango after its release.

THEREFORE, the defendant's motions to dismiss are denied.

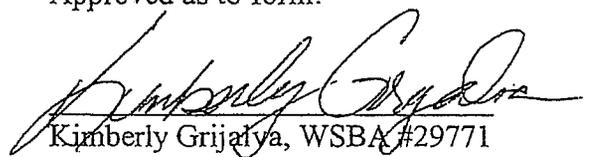
Respectfully submitted this 22 day of Oct, 2010.



 Judge Michael McCarthy

Prepared by:


 Richard Gilliland, WSBA #
 Deputy Prosecuting Attorney

Approved as to form:


 Kimberly Grijalva, WSBA #29771
 Attorney for Defendant

APPENDIX B

RCW 46.20.285
Offenses requiring revocation.

The department shall revoke the license of any driver for the period of one calendar year unless otherwise provided in this section, upon receiving a record of the driver's conviction of any of the following offenses, when the conviction has become final:

- (1) For vehicular homicide the period of revocation shall be two years. The revocation period shall be tolled during any period of total confinement for the offense;
- (2) Vehicular assault. The revocation period shall be tolled during any period of total confinement for the offense;
- (3) Driving a motor vehicle while under the influence of intoxicating liquor or a narcotic drug, or under the influence of any other drug to a degree which renders the driver incapable of safely driving a motor vehicle, for the period prescribed in RCW 46.61.5055;
- (4) Any felony in the commission of which a motor vehicle is used;
- (5) Failure to stop and give information or render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or personal injury of another or resulting in damage to a vehicle that is driven or attended by another;
- (6) Perjury or the making of a false affidavit or statement under oath to the department under Title 46 RCW or under any other law relating to the ownership or operation of motor vehicles;
- (7) Reckless driving upon a showing by the department's records that the conviction is the third such conviction for the driver within a period of two years.

[2005 c 288 § 4; 2001 c 64 § 6. Prior: 1998 c 207 § 4; 1998 c 41 § 3; 1996 c 199 § 5; 1990 c 250 § 43; 1985 c 407 § 2; 1984 c 258 § 324; 1983 c 165 § 16; 1983 c 165 § 15; 1965 ex.s. c 121 § 24.]

Notes:

Effective date -- 2005 c 288: See note following RCW 46.20.245.

Effective date -- 1998 c 207: See note following RCW 46.61.5055.

Intent -- Construction -- Effective date -- 1998 c 41: See notes following RCW 46.20.265.

Severability -- 1996 c 199: See note following RCW 9.94A.505.

Severability -- 1990 c 250: See note following RCW 46.18.215.

Effective dates -- 1985 c 407: See note following RCW 46.04.480.

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

Intent -- 1984 c 258: See note following RCW 3.34.130.

Legislative finding, intent -- Effective dates -- Severability -- 1983 c 165: See notes following RCW 46.20.308.

Revocation of license for attempting to elude pursuing police vehicle: RCW 46.61.024.

Vehicular assault, penalty: RCW 46.61.522.

Vehicular homicide, penalty: RCW 46.61.520.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF MARCH, 2012, I CAUSED THE ORIGINAL **OPENING 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:

[X]	JAMES HAGARTY, DPA YAKIMA CO PROSECUTOR'S OFFICE 128 N 2 ND STREET, ROOM 211 YAKIMA, WA 98901-2639	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X]	DAVID BRIAN TREFRY ATTORNEY AT LAW PO BOX 4846 SPOKANE, WA 99220-0846	() () (X)	U.S. MAIL HAND DELIVERY E-MAIL VIA COA PORTAL
[X]	NICOLE LOPEZ 2380 MAPLE GROVE RD. SUNNYSIDE, WA 98944	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF MARCH, 2012.

x 