

**FILED**

NOV 20 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

COA No. 30848-1-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

BRIAN CARL BRAGG, Appellant.

---

BRIEF OF APPELLANT

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Spokane, WA 99201  
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## I. ASSIGNMENTS OF ERROR

A. The court erred by admitting prejudicial hearsay evidence based on the excited utterance exception, thus warranting a new trial.

B. The court erred by refusing to add the word "immediate" in Instruction 10 as follows:

In deciding whether the defendant had dominion and control over a vehicle, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the [immediate] ability to take actual possession of the vehicle . . .

C. The State's evidence was insufficient to support the conviction for possession of a stolen motor vehicle.

### Issues Pertaining to Assignments of Error

1. Did the court err by admitting prejudicial hearsay evidence based on the excited utterance exception, thus warranting a new trial? (Assignment of Error A).

2. Did the court err by not adding the word "immediate" in the part of Instruction 10 setting forth the factors that could be considered by the jury in determining whether Mr. Bragg had dominion and control over the vehicle? (Assignment of Error B).

3. Was the State's evidence insufficient to support beyond a reasonable doubt the conviction for possession of a stolen vehicle? (Assignment of Error C).

## II. STATEMENT OF THE CASE

Mr. Bragg was charged by information with one count of possession of a stolen vehicle. (CP 1). The defense stipulated to admission of his statements to law enforcement. (CP 39). Mr. Bragg's statements to be used at trial were those made to Corporal Aaron Hintz of the Moses Lake Police Department. (CP 37). The case proceeded to jury trial.

Alan Mathyer owned Basin Auto Sales, Inc., in Moses Lake, Washington. (4/18/12 RP 57). In October 2011, he had contact with Mr. Bragg, who wanted to get a four-wheel-drive Ford F-150 pickup. (*Id.*). Unable to finance it, Mr. Bragg inquired about a 1995 Toyota 4Runner. (*Id.* at 59). No deal was reached that day as the vehicle was to be sold to someone else. (*Id.* at 59, 68).

On Friday, November 4, 2011, Mr. Mathyer found the 4Runner was stolen from his lot. (4/18/12 RP 60). It was the same vehicle Mr. Bragg had been asking about some three weeks earlier. (*Id.*). Mr. Mathyer contacted the police and later recovered the vehicle on the following Tuesday. (*Id.* at 61). He located it below

the Fairgrounds, between Valley Road and Highway 17 in Moses Lake. (*Id.*).

When Mr. Mathyer saw the vehicle, it had a tarp over it with the wheels and tires still showing along with a little section where “you could tell it was white.” (4/18/12 RP 63). He contacted the police and got it back later on that Tuesday. (*Id.*). The 4Runner was the vehicle stolen off the lot as confirmed by its VIN. (*Id.*). The ignition had been punched out and the license plates were off. (*Id.* at 64). Basin Auto owned the vehicle. (*Id.*). Mr. Mathyer did not know how the 4Runner ended up where it was found. (*Id.* at 70).

Fred Buche III worked for Mr. Mathyer in 2011. (4/18/12 RP 83). Mr. Buche knew Mr. Bragg from having run around in the same circles for a time. (*Id.* at 84). About a month before the vehicle was stolen, Mr. Bragg asked him if he could get the keys to the 4Runner. (*Id.* at 84, 86). Mr. Buche told him he could not do that because Mr. Mathyer was a good guy. (*Id.* at 84). He became aware the 4Runner was stolen in November 2011. (*Id.* at 98).

Michael Bohn knew Mr. Bragg, who lived on his property from about September 2011 to November 2011. (4/18/12 RP 132, 134). He lived in a fifth-wheel trailer over to the side of Mr. Bohn’s house. (*Id.* at 134). Mr. Bragg moved out after he was arrested on

November 6 or 7, 2011. (*Id.* at 135). There was a search warrant for the 4Runner located in the backyard of Mr. Bohn's property. (*Id.*) He had not seen it on November 4, but it was there on November 5. (*Id.*) Mr. Bragg had several vehicles in the backyard. (*Id.* at 136). Mr. Bohn asked him whose vehicle it was and if it was hot. Mr. Bragg did not answer. (*Id.*) A couple days later, he told Mr. Bohn that Matt Lowe had stolen the 4Runner and he had traded him a 1984 Ford Bronco for it. (*Id.* at 137; 4/19/12 RP 202).

Mr. Bohn said the gate to the fence around his property was locked from November 5 to 8, 2011, but he could not remember if it was locked on November 4. (4/19/12 RP 173, 176). The 4Runner was inside the fence on his property. (*Id.* at 174). There were other vehicles in the way of getting to the 4Runner. (*Id.* at 177). The day the Toyota showed up, Mr. Bragg's Bronco was gone. (*Id.* at 203).

In the State's offer of proof, Moses Lake Police Corporal Aaron Hintz testified he executed a search warrant at Mr. Bohn's property on November 8, 2011. (4/19/12 RP 246). The corporal said that immediately after the search warrant was read to him, Mr. Bohn told him the white 4Runner was Mr. Bragg's. (*Id.* at 247-48). Corporal Hintz said Mr. Bohn was animated and excited, with eyes

rights. (*Id.*). He had no knowledge of the vehicle or when or how it got there. (*Id.* at 317, 330). Corporal Hintz said there were no efforts to take fingerprints or DNA. (*Id.* at 332-33).

The State rested. (4/19/12 RP 342). The defense's motion to dismiss was denied. (*Id.* at 342-44, 359). Mr. Bragg presented no witnesses. (*Id.* at 350, 352).

The State had no exceptions to the court's instructions. (4/19/12 RP 354). The defense excepted to the court's refusal to add the word "immediate" to Instruction 10 as follows:

In deciding whether the defendant had dominion and control over a vehicle, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the [immediate] ability to take actual possession of the vehicle. . . (CP 88).

The jury convicted Mr. Bragg of possession of a stolen vehicle. (CP 94). The court imposed a standard range sentence. (CP 98). This appeal follows. (CP 118).

### III. ARGUMENT

A. The court erred by admitting prejudicial hearsay evidence based on the excited utterance exception, thus warranting a new trial.

Immediately after Corporal Hintz read the search warrant to him, Mr. Bohn said the 4Runner belonged to Mr. Bragg. (4/19/12 RP 315). The State made an offer of proof and the court decided the statement was admissible under the excited utterance exception to the hearsay rule. (4/19/12 RP 246-67). But Mr. Bohn's statement was no excited utterance at all and should have been excluded.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801 (a), (c). Hearsay is inadmissible unless there is an exception. ER 802. The hearsay rule is designed to keep out unreliable evidence, that is, statements made out of court as they are not subject to cross examination or the jury's scrutiny. *State v. Young*, 160 Wn.2d 799, 822, 161 P.3d 967 (2007).

But there are exceptions based on the circumstances when they were made that show the reliability of what are inherently unreliable statements. *Young*, 160 Wn.2d at 822-23. The excited utterance exception in ER 803(a)(2) is one:

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

The reason for it was explained in *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992):

[U]nder certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control. The utterance of a person in such a state is believed to be a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock, rather than an expression based on reflection or self-interest.

Here, the startling event or condition was the reading of the search warrant to Mr. Bohn, who was supposedly under the stress of excitement caused by it. (4/19/12 RP 262-67). But being read a search warrant was certainly no startling event to Mr. Bohn, who had been arrested before and a prior warrant served on him. (*Id.* at 277). In the first instance, then, there was no startling event and the reading of the warrant could hardly be an external circumstance of physical shock to the declarant. *Chapin*, 118 Wn.2d at 686.

The touchstone of reliability is that the utterance of a person in the shocked state must have been a spontaneous and sincere response to the perceptions produced by the shock. But there is no reliability in Mr. Bohn's statement that the 4Runner was Mr. Bragg's. Instead of a spontaneous and sincere response, Mr. Bohn crafted his words and shifted any culpability for the vehicle to Mr.

Bragg, even though it was on his property; he knew it was stolen; and he was not bothered by it being on his property as “it wasn’t mine” and “I had nothing to do with it.” (4/19/12 RP 202).

Mr. Bohn’s testimony is crystal clear that he was not even remotely startled by having a search warrant read to him. Instead of a spontaneous and sincere response under the stress of a physical shock, he fabricated a measured and calculated statement taking the focus off him and putting the blame for any stolen property squarely on Mr. Bragg. See *State v. Brown*, 127 Wn.2d 749, 753, 903 P.2d 459 (1995). Mr. Bohn’s statement was not an excited utterance and had no indicia of reliability. *Chapin, supra*.

The admission of evidence is left to the court’s discretion. *State v. Williamson*, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000). A decision based on an incorrect legal analysis or error of law is an abuse of that discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007). The court improperly applied the law in allowing the hearsay statement under the excited utterance exception and thereby abused its discretion. *Brown, supra*.

An evidentiary error that does not violate the constitution requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not

occurred. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). Here, the evidence against Mr. Bragg was entirely circumstantial and the State's case built on inference upon inference. Adding fuel to the fire through the use of improper hearsay evidence under a strained, and incorrect, interpretation of the excited utterance exception was unduly prejudicial and materially affected the trial. *Id.* Mr. Bragg is entitled to a new trial.

B. The court erred by refusing to add the word "immediate" in Instruction 10.

Mr. Bragg's counsel took exception to Instruction 10 only to the extent the court refused to add "immediate" to this part of the instruction:

In deciding whether the defendant had dominion and control over a vehicle, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the [immediate] ability to take actual possession of the vehicle. (CP 88).

Counsel argued:

Presuming that the court is inclined to give a possession instruction, I think it's appropriate to give the instruction that it's proposing, if it's inclined to give one, which is WPIC 50.03, with one exception. And that's the word immediately. The court was kind enough to go through the instruction with both counsel

previously. And the reason why I'd want the word immediately is two-fold: I don't see any harm that it would cause to the jurors and in the preface of – and I'm referring to again Instruction No. 10, the WPIC 50.03 – the word immediately refers to just – it's in the context of just one of the factors that the jurors could consider.

And by eliminating that, I started wondering why that word is so important. And the concept of possessing something is here and now. And I think that's what they're kind of getting at. And what I mean by that is if someone abandons a vehicle – let's say for instance they steal a vehicle and they end up possessing it, they come in contact with a stolen vehicle by possession. And then they abandoned it. I get the impression that if the person abandons it, leaves it alone, are they in possession any longer? Well, we know they had possession of it. But the time had passed. (4/19/12 RP 356, 357).

Accepting the court's instructing the jury on possession, counsel confirmed his exception to not including the word "immediate" to Instruction 10. (4/19/12 RP 359).

Instruction 10 provided:

Possession means having a vehicle in one's custody or control. Actual possession occurs when the vehicle is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the vehicle.

Proximity alone without proof of dominion and

control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over a vehicle, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the vehicle, whether the defendant had the capacity to exclude others from possession of the vehicle, and whether the defendant had dominion and control over the premises where the vehicle was located. No single one of these factors necessarily controls your decision. (CP 88).

The court adapted WPIC 50.03, the possession of drugs instruction, to this possession of a stolen vehicle case. See *State v. Lakotiy*, 151 Wn. App. 699, 714, 214 P.3d 181 (2009), *review denied*, 168 Wn.2d 1026 (2010). But in *Lakotiy*, a possession of a stolen vehicle case, this language from *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002) was quoted with approval:

Dominion and control means that the object may be reduced to actual possession immediately.

In analyzing the crime of possession of a stolen vehicle, the *Lakotiy* court likened it to the crime of possession of stolen property. 151 Wn. App. at 714. It stated the general principles of possession:

Possession may be actual or constructive. . .  
"Actual possession" means that the goods

were in the personal custody of the defendant; “constructive possession” means that the goods were not in actual, physical possession, but the defendant had dominion and control over them. . . . *Id.* (cites omitted).

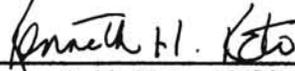
Since Instruction 10 embodied these principles and followed *Lakotiy*, the court here should also have added the word “immediate” as urged by Mr. Bragg’s counsel. The *Lakotiy* court approved the concept and quoted language from *Jones* that dominion and control meant the object may be reduced to actual possession immediately. 151 Wn. App. at 714. In these circumstances, the court erred by refusing to add the word “immediate” to Instruction 10 as dictated by *Lakotiy*. The instruction as given misstated the law and so prejudiced Mr. Bragg as to warrant a new trial since he was unable to fully argue his theory of the case to the jury. *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947).

C. The State’s evidence was insufficient to support a finding of guilt beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-

DATED this 20<sup>th</sup> day of November, 2012.

Respectfully submitted,

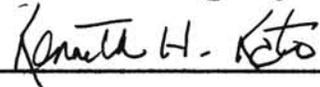


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#### CERTIFICATE OF SERVICE

I certify that on November 20, 2012, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Brian C. Bragg, # 771393, 1313 N. 13<sup>th</sup> Ave., Walla Walla, WA 99362; and by email, as agreed by counsel, on Ryan Valaas at [kburns@co.grant.wa.us](mailto:kburns@co.grant.wa.us).



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