FILED
January 2, 2013
Court of Appeals
Division III
State of Washington

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 RESPONDENT

GRANT COUNTY PROSECUTOR'S OFFICE
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I. STATEMENT OF THE ISSUES

A. Under ER 803(a)(2), was there an excited utterance when the declarant (1) opened the door to his home, was greeted by a police officer, and read a search warrant, and (2) immediately after being read this search warrant, blurted out a statement related to the warrant while exhibiting outward manifestations of excitement?

B. Was it proper to refuse to add the word "immediate" in front of the phrase "ability to take actual possession of the vehicle" in Instruction 10?

C. Under WA 9A.56.068, was there sufficient evidence to convict the Defendant of Possession of a Stolen Motor Vehicle where (1) the Defendant admitted he knew the vehicle was stolen, (2) the Defendant admitted to taking possession of the vehicle, (3) the vehicle itself showed signs of being stolen, and (4) the vehicle was found on the property where the Defendant was living and in the same area where the Defendant kept all his other vehicles?

II. STATEMENT OF THE CASE

Procedural History

The Defendant was charged with one count of Possession of a Stolen Motor Vehicle. After a jury trial, the Defendant was convicted of one count of Possession of a Stolen Motor Vehicle. RP 416. This appeal followed.

Statement of Facts

Back in the fall of 2011, Mr. Alan Mathyer was the owner of Basin Auto Sales, Inc., in the city of Moses Lake, WA. RP 57. On November 4, 2011, Mr. Mathyer noticed that his Toyota 4-Runner was missing from his car lot. RP 60. The following Tuesday, Mr. Mathyer located his stolen 4-Runner between Valley Road and Highway 17 in Moses Lake, WA. RP 61. He concluded that it was his stolen 4-Runner because of the matching vehicle identification number (VIN). RP 63. The Defendant had visited the car lot and inquired of Mr. Mathyer about the 4-Runner approximately three weeks before it was stolen. RP 59. Fred Buche III was an employee of Mr. Mathyer during the time of this incident. RP 83-85. Mr. Buche testified that approximately one month before the 4-Runner was stolen, the Defendant asked him (Mr. Buche) for the keys to the vehicle. RP 84. Mr. Buche told the Defendant he wouldn't give him a set of keys for the vehicle and that "Alan was a good guy [and] didn't deserve that." RP 84.

Prior to the vehicle being stolen, the vehicle had a license plate and there was no damage to the ignition. RP 81-82. When the vehicle was eventually located, it was covered with a tarp, the ignition had been punched (drilled out), and the license plate was taken off. RP 63-64, 75.

Michael Bohn testified that the Defendant lived on his property from September of 2011 until November 6-7, 2011. RP 134. Specifically, he testified that the Defendant lived in a fifth-wheel camp trailer near the side of Mr. Bohn's house. RP 134. Mr. Bohn testified that he first observed the 4-Runner around the fifth or sixth day of November and that he didn't know how it got there. RP 135-36. He noted that the vehicle was parked in the same area as all of the Defendant's other vehicles. RP 136. Initially, the Defendant would not give Mr. Bohn an answer when he asked (1) who the 4-Runner belonged to and (2) whether it was stolen. RP 136. Eventually, the Defendant told Mr. Bohn that Matt Lowe had stolen the vehicle and that he (the Defendant) had traded a Bronco to Matt Lowe in return for the stolen 4-Runner. RP 137. Mr. Bohn also noted that he noticed the Defendant's Bronco was gone the same day he first noticed the 4-Runner on his property. RP 203.

Corporal Aaron Hintz executed a search warrant for the vehicle. RP 246. Immediately after Corporal Hintz finished reading the search warrant to Mr. Bohn, Mr. Bohn exclaimed that the white Toyota 4-Runner belonged to the Defendant. RP 248. Corporal Hintz testified that Mr. Bohn appeared excited at the point he made this statement; this was based on Corporal Hintz observing that "[Mr. Bohn's] eyes widened, he was animated in his gestures and pointed. I mean immediately and forcefully

towards the area where the vehicle was . . . he raised his voice and it changed in pitch." RP 248. Corporal Hintz also testified that Mr. Bohn appeared surprised to see Corporal Hintz when he first opened the door. *Id.*

Corporal Hintz also testified that the 4-Runner was located approximately 30 yards away from the Defendant's fifth wheel, and that the Defendant had admitted that all the vehicles around the 4-Runner were his. RP 317.

Matthew Bohn also testified at trial; he is the son of Michael Bohn and lived with his father at all relevant times. RP 300. Matthew Bohn testified that the Defendant also lived on their property in a fifth wheel trailer, and that the Defendant stored around four or five of his vehicles on their property. RP 302. Matthew Bohn noted that the Defendant kept all of these vehicles near his fifth wheel trailer and all of the Bohns' vehicles were kept in the driveway. RP 302.

The parties rested, jury instructions were discussed, and the Defendant took an exception to the court's refusal to add the word "immediate" to Instruction 10. CP 88.

III. ARGUMENT

A. The trial court did not abuse its discretion in ruling that Mr. Michael Bohn made an excited utterance.

Hearsay is generally inadmissible unless an exception applies. ER 802. One exception to the hearsay rule is "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the condition or event." ER 803(a)(2). This rule has three closely connected requirements: (1) a startling event or condition must have occurred; (2) the statement must have been made while the declarant was under the stress of excitement caused by the event or condition; and (3) the statement must relate to a startling event or condition. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992).

The standard of review for a trial court's decision to admit evidence is abuse of discretion, and a trial court only abuses its discretion when its decision is manifestly unreasonable or is based on untenable reasons or grounds. *State v. C.J.*, 148 Wn.2d 672, 677, 63 P.3d 765 (2003). A defendant's failure to assign error to the findings of fact made by the trial court renders those facts binding on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

In the present case, the trial court ruled that there was an excited utterance and that all three conditions were met. RP 263-267. First, there

was a startling event. The sudden and unexpected appearance of a law enforcement officer coupled with the reading of a search warrant at Mr. Bohn's front door was a sudden and startling event. Not only would a normal person be startled by this, it was obviously a startling event to Mr. Bohn based on his physical reaction to it: widened eyes, higher pitched voice, change in the volume of his voice, extremely animated gestures, etc. RP 248.

Second, the statement was made while Mr. Bohn was still under the stress of the event. As mentioned previously, the statement was made immediately after Corporal Hintz finished reading him the warrant, and the instant physical reaction by Mr. Bohn showed he was still under the stress of the excitement: widened eyes, raised voice, changed pitch, animated gestures, etc. RP 248.

Finally, Mr. Bohn's statement that the vehicle belonged to the Defendant was related to the startling event or condition; it was both substantively related and temporally proximate. Specifically, Mr. Bohn's statement that the vehicle belonged to Brian Bragg related to the search warrant itself (part of the search warrant mentioned locating the Toyota 4-Runner). RP 249. Additionally, the statement was temporally proximate in that it occurred immediately after Corporal Hintz finished reading the search warrant to him. RP 248.

Based on the trial court's findings of fact (RP 263-67), it was not an abuse of discretion to rule that the statement made by Mr. Bohn was an excited utterance.

B. The court properly excluded the word "immediate" from Instruction10.

Jury instructions are sufficient as long as they permit each party to argue his or her theory of the case, are not misleading, and, when read as a whole, properly inform the jury of the applicable law. *State v. Howell*, 119 Wn. App. 644, 649, 79 P.3d 451 (2003). An alleged error in a jury instruction is an issue of law and is reviewed de novo. *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010). In the present case the court used the following language in Instruction 10:

> Factors that you may consider [in deciding whether the defendant had dominion and control over the vehicle] 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.

If the crime itself does not require possession of the item to be immediately accessible, then it is unnecessary for the jury instruction defining possession to require it. *Howell,* 119 Wn. App. at 650. Immediate

accessibility is also not an element of Possession of a Stolen Motor Vehicle. RCW 9A.56.068. *See State v. McReynolds*, 117 Wn. App. 309, 341, 71 P.3d 663 (2003) (defining dominion and control without using the immediacy requirement); *but see also State v. Lakotiy*, 151 Wn. App. 699, 714, 214 P.3d 181 (2009) *citing to State v. Jones*, 146 Wn.2d 794, 798, 872 P.3d 1062 (2002) (defining dominion and control as the ability to reduce the object to actual possession immediately).

In *Jones*, the Washington Supreme Court held that "dominion and control means that the object may be reduced to actual possession immediately." *Jones* at 798. The Court in *Jones* cited to *State v. Simonson*, 91 Wn. App. 874, 881, 960 P.2d 955 (1988) in support of its definition for dominion and control. However neither of the two cases cited by the court in *Simonson* for its definition of dominion and control include the word "immediate." *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); *State v. Roberts*, 80 Wn. App. 342, 353, 908 P.2d 892 (1996) (holding that dominion and control over the premises is but one factor in determining whether the defendant had dominion and control of the contraband). Because neither of these cited cases use the word "immediate" and because the court in *Simonson* never provided any reasoning or explanation for including the word, it is unclear why the court in *Simonson* included "immediate" at all.

Furthermore, it appears that the Court in *Jones* did not intend to overrule the previous totality of the circumstances (multi-factor) test for dominion and control. The reasoning behind this is twofold. First, the Court never mentioned the totality test nor provided any reasoning of why it should be overruled. And second, appellate courts continue to use the toatlity test even after the decision in *Jones* came out. *See State v. Chavez*, 138 Wn. App. 29, 35, 156 P.3d 246 (2007).

Defining dominion and control as the ability to reduce an object to actual possession immediately would effectively eliminate constructive possession. For example, a person would not have dominion and control over his house or any of his property items inside it if he were away from the house (and thus not able to take "actual possession immediately" of those items). Requiring the word "immediate" to accompany the ability to take actual possession imposes too strict a definition on constructive possession and essentially limits constructive possession to those items within arm's reach of the person. As such, it was not error to omit the word "immediate" from Instruction 10.

C. <u>There was sufficient evidence to support a conviction for the crime of Possession of a Stolen Motor Vehicle</u>.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the

essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874 P.3d 970 (2004).

> A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom . . . Credibility determinations are for the trier of fact and are not subject to review. [The appellate] court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.

Thomas at 874-75. For the crime of Possession of a Stolen Motor Vehicle, the State must prove (1) that the Defendant knowingly possessed, concealed, or retained a stolen motor vehicle; (2) that the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner; (3) that the defendant acted with knowledge that the motor vehicle had been stolen; and (4) that any of these acts occurred in the State of Washington. RCW 9A.56.068.

There is sufficient evidence for all of these elements. First, there is no question all these events occurred in the State of Washington. RP 280-81.

Second, there is sufficient evidence that the Defendant knew the vehicle was stolen. Not only did the Defendant tell Mr. Bohn that Matt Lowe had stolen the vehicle and that he had traded Mr. Lowe for the vehicle, RP 137, but there were also outward indicia that the car had been

stolen including a removed license plate, a punched ignition, and a tarp over the vehicle concealing it, RP 63-64, 75. Also, knowledge may be inferred by the fact that the Defendant denied knowing anything about the vehicle yet had recently asked both Fred Buche and Alan Mathyer about acquiring. RP 59, 84.

` Third, there is sufficient evidence that the Defendant possessed or concealed the vehicle and withheld it from its true owner. The Defendant admitted to taking possession of the vehicle after trading his Bronco to Matt Lowe in exchange for the 4-Runner. RP 137. Mr. Bohn corroborated this statement by noting that the Bronco disappeared on the same day he first noticed the 4-Runner on the property. RP 203.

Additionally, the vehicle was found in the area of the property that the defendant had dominion and control over, i.e., where the Defendant stored all of his other vehicles. RP 136, 302, 317. The vehicle was in close proximity to the Defendant's residence. RP 317. And finally, Matthew Bohn testified that only the Defendant kept vehicles in this area of the property, and that all the Bohn's vehicles were kept near the driveway. RP 302. The 4-Runner was located in a fenced area and covered by a tarp, thereby concealing it from its owner. RP 63.

Based on this evidence, there is sufficient evidence supporting the conviction for Possession of a Stolen Motor Vehicle.

IV. CONCLUSION

For the reasons set out above, the State respectfully requests that the Court affirm the trial court's conviction.

DATED: December 28, 2012

Respectfully submitted:
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Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 30848-1-III
	)	
vs.	)	
	)	
BRIAN CARL BRAGG,	)	DECLARATION OF SERVICE
	)	
Appellant.	)	
	)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Kenneth H. Kato
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That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

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Walla Walla WA 99362

Dated: January 2, 2013.

Kaye Burns