

64068-2

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NO. 64068-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH MASSINGALE,

Appellant.

2010 SEP 2 11:14 AM  
COURT OF APPEALS  
DIVISION ONE

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

The Honorable David Needy

*Reply*  
APPELLANT'S ~~OPENING~~ BRIEF

VANESSA M. LEE  
Attorney for Appellant

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

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A. ARGUMENT

1. THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO SUPPORT EITHER CONVICTION.

The State, arguing both convictions were based on sufficient evidence, relies largely on the tools found in the vehicle. However, there is no evidence that these tools could have been used to steal or start a vehicle or that any of them matched the marks on the ignition. Although the State repeatedly asserts in its Response Brief that they could have been used to start the vehicle,<sup>1</sup> such argument has no basis in the record.

a. The tools do not prove possession of a stolen vehicle.

The evidence was insufficient to prove beyond a reasonable doubt that Massingale was either the driver of the stolen vehicle or was a passenger who knew or should have known the vehicle was stolen. Without evidence that the tools could have been used to steal the vehicle, they cannot provide proof of Massingale's guilty knowledge.

The State argues the evidence in this case was stronger than that in State v. Womble, 93 Wn.App. 599, 605, 969 P.2d 1097, rev. denied, 989 P.2d 1139 (1999). SRB at 18. But in Womble, guilty knowledge was

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<sup>1</sup> “[T]ools that could be used to start the vehicle [were] left in the vehicle.” SRB at 17. “In Womble, there was on damaged ignition and no tools that could be used to enter or start the vehicle inside.” SRB at 18. “Where there was damage to a door lock and ignition and tools inside the vehicle which were capable of damaging the vehicle and starting it...” SRB at 18. “Given that the tools that did not belong to the victim were in the stolen vehicle and could have been sued to commit motor vehicle theft, there was sufficient evidence to support the conviction.” SRB at 22.

inferred from the defendant's "implausible" explanation for riding in vehicle without permission. See also State v. Ford, 33 Wn.App. 788, 790, 658 P.2d 36 (1983) (defendant found in vehicle stolen that day or the day before did not know who owned it but could not explain his possession of it); State v. White, 16 Wn.App. 315, 316, 556 P.2d 255 (1976) (defendant provided contradictory explanations for stolen identification cards found in his pocket); State v. Ladely, 82 Wn.2d 172, 175, 509 P.2d 658 (1973) (defendant gave contradictory explanations for possession of stolen firearm); State v. Beck, 4 Wn.App. 306, 309, 480 P.2d 803 (1971) (defendant's alibi for selling stolen property was demonstrably false). Here, neither Massingale nor Duprey made suspicious or contradictory statements from which guilty knowledge could be inferred. The State's evidence was far weaker in this case than in any of those cases.

b. The State failed to prove the tools were motor vehicle theft. Under RCW 9A.56.063 the State was required to prove beyond a reasonable doubt that at least one of those tools found in the vehicle was "adapted, designed, or commonly used for" motor vehicle theft, *and* Massingale intended to use that tool for motor vehicle theft or knew that someone else intended to do so. In its brief, the State still has not explained how the evidence, construed in the light most favorable to the prosecution, could prove these elements. Again, the record provides no

evidence that the tools in question were adapted, designed, or commonly used for vehicle theft, how they could have been used in this case (for example, how one would use a screwdriver to start a vehicle without damaging the steering column or punching out the ignition), or how one would know the tools were intended for that purpose.

The cases cited by the State are easily distinguished. State v. McIntosh is inapplicable because it concerns only a challenge to the search and seizure, not to the sufficiency of the evidence for the conviction. 42 Wn.App. 579, 712 P.2d 323, rev. denied, 105 Wn.2d 1015 (1986). Therefore the standard of proof was much lower; on appeal the State needed only to establish that the police officer had probable cause to arrest the defendant for possession of burglary tools, not that any reasonable trier of fact would find beyond a reasonable doubt that they actually were burglary tools. Id. at 584. In addition, in McIntosh, the police officer testified that the items he found in the defendant's vehicle could have been used in a burglary. Id. at 581. There was no such testimony in the instant case.

Although State v West did involve a challenge to the sufficiency of the evidence, that case had fundamentally different facts: the defendants in West were seen attempting to pry open the door of a supermarket with a wrecking bar. 18 Wn.App. 686, 687-88, 571 P.2d 237 (1977), rev. denied,

90 Wn.2d 1001 (1978). This wrecking bar, along with several other tools and both defendants, were found near the door. The defendants did not argue the State had failed to prove the tools were burglary tools, only that it failed to prove they possessed the tools. Given the eyewitness' testimony that he had seen one defendant actually use the wrecking bar in an apparent attempt at burglary while the other kept a lookout, this argument failed. Id. at 688. Here, no witness saw the defendants use the tools in question, the tools were not found in close proximity to the defendants, and no evidence connected the tools to the theft of a vehicle. The inferences urged by the State in the instant case are far greater than the reasonable inferences made in West, and cannot be supported by the record.

In State v. Walters, a police officer testified the celluloid strips found in one defendant's sleeve and in another's car "were commonly used by burglars" for opening locked doors of the type used in the apartment building where the defendants were apprehended, and marks on those strips indicated they had previously been used for that purpose. 56 Wn.2d 79, 83-84, 351 P.2d 147 (1960). The detective opined the strips were burglary tools. Id. Again, there was no such testimony in the instant case.

None of the State's cases are helpful to its argument. The State has identified no authority supporting the proposition that a conviction for possession of vehicle theft tools can be proven beyond a reasonable doubt, without evidence that those tools were actually used or intended to be used for vehicle theft. The State failed to provide sufficient evidence to convict on either charge.

## 2. DENIAL OF MASSINGALE'S PROPOSED INSTRUCTIONS VIOLATED HIS RIGHT TO PRESENT A DEFENSE.

The State concedes that the two instructions proposed by Massingale (CP 90-91) were accurate statements of the law. SRB at 24. The State argues, however, that denial of these instructions was not error because they elaborate on the State's burden of proof and the essential elements of possession of a stolen vehicle. This reasoning is incorrect. Many properly given instructions elaborate on a basic principle or essential element. This does not render the instruction redundant or unnecessary. The salient question is whether the instruction sheds light on "any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) (citations omitted). Here, both instructions provided valuable explanation about the essential element of knowledge, which the State was required to prove.

The necessity of these instructions is clear in light of the problems with the State's evidence (in particular, the insufficient evidence of Massingale's knowledge that the vehicle was stolen) and the prosecutor's misconduct (especially her argument that the vehicle must have been started with the tools found inside it). In light of those errors, it was particularly important for the jury to be instructed that 1) possession of recently stolen property alone does not establish knowledge that the property is stolen, and 2) a passenger in a stolen vehicle should not be presumed to know the vehicle is stolen. These instructions did not merely restate other instructions but explained important aspects that might otherwise be lost or obfuscated.

The State argues the proposed instruction "that a 'mere passenger in a vehicle cannot be presumed to be aware of the vehicle's legal condition' assumes that Massingale or whomever the other person was had no other knowledge." SRB at 25. If the State means that the instruction assumes the passenger in a stolen vehicle does not know the vehicle is stolen, this is correct. This is called the presumption of innocence; the jury is required to presume that the defendant is innocent of every element of the crime charged, including knowledge. If the jury believed Massingale could have been the passenger in the stolen vehicle, it was required to presume he was not aware the vehicle was stolen. That is the

point of this instruction. The fact that a trained and experienced appellate prosecuting attorney apparently overlooked this principle when preparing this brief only underscores the point: it was critical for the court to tell the jury it could not presume the passenger in the vehicle possessed the knowledge necessary for conviction.

3. THE PROSECUTOR'S REPEATED AND FLAGRANT MISCONDUCT DENIED MASSINGALE A FAIR TRIAL.

In closing and rebuttal argument, the prosecutor repeatedly emphasized to the jury that there was no evidence that the defendants found, possessed, or used a key, or that they used anything other than the alleged motor vehicle theft tools to start the vehicle. 6/3/09RP 224, 261. The longer excerpts provided by the State in its brief do not change the character of those remarks. The only possible interpretation of these remarks was that to prove his innocence, Massingale should have produced that evidence. Of course he had no such burden. Massingale had no obligation to prove the vehicle was started with a key or by any other manner; it was the State's burden alone to prove beyond a reasonable doubt that the vehicle was started with the tools found in the vehicle and that Massingale knew or should have known that fact.

The State fails to distinguish either Traweek<sup>2</sup> or Fleming.<sup>3</sup> In fact, both cases are directly applicable. The prosecutor in Traweek argued:

Mr. Traweek doesn't have to take the stand and you can't hold that against him. That doesn't mean the defense counsel can't put other witnesses on if they have explanations for any of these questions, any of this evidence. Where has it been? Why hasn't it be [ sic] presented if there are explanations, which there aren't? ...

Id. at 106. This is functionally identical to the remarks at issue in the instant case. The prosecutor in Traweek asked why the defense presented to alternate explanations; the prosecutor in this case asked why the defense presented no alternate means of starting the car. As in Traweek, the remarks were improper. However, the evidence against Traweek was overwhelming. As discussed above, the evidence in this case fell far short, and the convictions must therefore be reversed.

In Fleming, the prosecutor argued,

[T]here is absolutely no evidence ... that [the victim] has fabricated any of this or that in any way she's confused about the fundamental acts that occurred upon her back in that bedroom. *And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged of rape in the second degree.*

83 Wn.App. at 214 (emphasis in the original). Again, these statements are functionally identical to those at issue here. The prosecutor in Fleming

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<sup>2</sup> State v. Traweek, 43 Wn.App. 99, 715 P.2d 114, rev. denied, 106 Wn.2d 1007 (1986).

<sup>3</sup> State v. Fleming, 83 Wn.App. 209, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997)

identified one type of evidence which could exculpate the defendants and emphasized the absence of such evidence; the prosecutor in this case did exactly the same thing. There as here, the burden-shifting impact of the prosecutor's remark was unmistakable.

This Court observed that

trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case.

Id. at 215 (internal quotations omitted). The same is true here; as argued at length above and in the opening brief, the evidence was close on both counts. As in Fleming, the misconduct was not harmless.

This Court reached that conclusion even though in Fleming, as here, the improper remarks were made in the context of “lengthy, legitimate arguments” explaining the State’s theory of the case. Id. at 216. However, the legitimate arguments did not cure the erroneous remarks.

The State must convict on the merits, and not by way of misstating the nature of reasonable doubt, misstating the role of the jury, infringing on the right to remain silent, and improperly shifting the burden of proof to the defense. [The victim’s] credibility cannot properly be bolstered by invasion of these fundamental constitutional precepts.

Id.

A prosecutor can point out a defendant’s failure to produce certain evidence only “in limited situations” – “if the defendant testified about an

exculpatory theory that could have been corroborated by an available witness.” State v. Barrow, 60 Wn.App. 869, 872, 809 P.2d 209, rev. denied, 118 Wn.2d 1007, 822 P.2d 288 (1991). This was not the situation here. Massingale did not testify. The defense did not put before the jury – either through witnesses or argument – an exculpatory theory regarding the spare key. Argument that Massingale had any obligation to produce this evidence was blatantly improper, requiring reversal.

The prosecutor committed further misconduct by claiming the defense had argued all the police officers lied. 6/3/09RP 256-7. Again, any legitimate argument surrounding these improper remarks does not cure the error. Although the State attempts to distinguish Barrow, here, just as in Barrow, “[i]t was a mischaracterization to say that the defendant was calling the officers liars.” 60 Wn.App. at 875. The mischaracterization in this case was misleading, inflammatory, and prejudicial.

Finally, the prosecutor made several claims in closing argument which were not supported by the evidence. There was no evidence that the tools were “clearly used in order to operate this car,” that “the only way into this car or to use this car was by use of the tools that are on the floorboard of the vehicle,” or that the defendants “had to have used those tools on the floorboard of the vehicle.” 6/3/09RP 224-25, 261. These

statements are not logical inferences from the facts; they are blatant mischaracterizations and baseless conclusions. The State's brief fails to explain how these remarks are supported by the evidence.

4. THE COURT ABUSED ITS DISCRETION BY DENYING MASSINGALE'S REQUEST FOR A DOSA BASED ON UNTENABLE GROUNDS.

The State's response to this argument largely misses the point and fails to address the central issue. The State bases its response in the fact that the court, not the defense, suggested DOSA evaluation for Massingale. SRB at 38-41. But if anything, this fact helps Massingale's case. It shows that the court recognized Massingale's potential and enough factors weighing in favor of DOSA that it was willing to postpone proceedings in order to hear from an evaluator. What changed between that day and the time of the court's ruling? Only the strenuous recommendations from the evaluator and the prosecutor arguing Massingale should not receive a DOSA because he had supposedly refused to take responsibility for his crimes.

The court's denial of DOSA was based on only two factors: Massingale's "substantial criminal history" and the recommendations of the evaluator and prosecutor, who "have very strong reasons for believing that you are not the kind of person we want to put in [DOSA]."

8/13/09RP 10. The court already knew Massingale's criminal history

when it suggested he be evaluated for DOSA eligibility; this factor had not changed. As for the second factor, that Massingale was “not the kind of person we want to put in [DOSA]” can only mean one thing in the context of the evaluator’s report and the prosecutor’s argument. There was a singular theme running through their arguments: that Massingale had sought to avoid responsibility by exercising his rights to trial and appeal. The State’s brief offers no other explanation for what the court meant by “the kind of person we want” in DOSA.

The court’s oral ruling describes someone who, like most DOSA candidates, has a substantial and recidivist criminal history. It also describes someone who, unlike most DOSA candidates, has been successful in short-term drug treatment and who has decided to be a committed father to his child. In the context of these remarks, the basis for the denial can only be based in the reasoning of the evaluator and prosecutor – reasoning which was inherently flawed, factually incorrect, and constitutionally offensive.

The State agrees Massingale was statutorily eligible for DOSA; aside from that fact, this case is indistinguishable from State v. Montgomery, 105 Wn.App. 442, 17 P.3d 1237 (2001). The State has failed to distinguish Montgomery on any other basis.

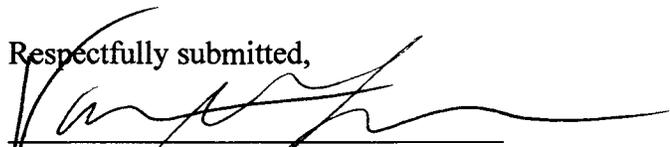
The State does not and cannot dispute that denying DOSA because an offender chose to exercise his rights to trial and appeal would constitute both an abuse of discretion and a serious constitutional violation. The court's oral ruling, taken in context, show that is exactly what happened here.

B. CONCLUSION.

For the reasons presented above and in the opening brief, Massingale respectfully requests this Court reverse and dismiss both convictions, as they were not supported by sufficient evidence or, in the alternative, remand for retrial in light of the instructional errors and prosecutorial misconduct. In the alternative, he requests this Court reverse the judgment and sentence and remand for reconsideration of his DOSA request.

DATED this 2<sup>nd</sup> day of September, 2010.

Respectfully submitted,



\_\_\_\_\_  
VANESSA M. LEE (WSBA #37611)

Washington Appellate Project  
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
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v.	)	NO. 64068-2-I
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JOSEPH MASSINGALE,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2<sup>ND</sup> DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X] | RICHARD WEYRICH, DPA<br>ERIK PEDERSEN, DPA<br>SKAGIT COUNTY PROSECUTOR'S OFFICE<br>COURTHOUSE ANNEX<br>605 S THIRD ST.<br>MOUNT VERNON, WA 98273 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X] | JOSEPH MASSINGALE<br>892330<br>CEDAR CREEK CC<br>PO BOX 37<br>LITTLE ROCK, WA 98556  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 2<sup>ND</sup> DAY OF SEPTEMBER, 2010.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
☎(206) 587-2711