Supreme Court No. 96351-7
Court of Appeals No. 35083-5-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

RANDALL G. BRYANT,

Defendant/Petitioner.

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# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER.

Petitioner asks this Court to accept review of the Court of Appeals decision terminating review, designated in Part II of this petition.

## II. COURT OF APPEALS DECISION.

Petitioner seeks review of the Court of Appeals Opinion filed August 21, 2018, affirming his conviction and sentence. A copy of the Court's unpublished opinion is attached as Appendix A.

## III. ISSUE PRESENTED FOR REVIEW.

Was Mr. Bryant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential elements of the charged crime?

## IV. STATEMENT OF THE CASE.

Blaan McMahon's 1991 Acura was stolen sometime in November, 2016, by persons unknown. RP 76. About one week later, Mr. Bryant was stopped while driving the Acura because the license plate was for a different vehicle. RP 90-91. The ignition key was made from a house key blank not from an automobile blank. RP 99-103. It was unknown when the key was made or by whom. RP 109. There was no damage to the car

or the ignition. RP 107-06. The license plate was not dusted for fingerprints or checked for DNA. RP 108.

Mr. Bryant did not testify. RP 118. He was convicted by a jury of possession of a stolen motor vehicle. CP 24. The jury was instructed in pertinent part:

> To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following elements of the crime must be proved beyond a reasonable doubt: (1) that on or about November 24, 2016, the defendant knowingly possessed a stolen motor vehicle; (2) that the defendant acted with knowledge that the motor vehicle had been stolen; (3) that the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto; and (4) that any of these acts occurred in the state of Washington.
>
> A person knows or acts knowingly or with knowledge with respect to a fact when he or she is aware of that fact. It's not necessary that the person know that the fact is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted, but not required, to find that he or she acted with knowledge of that fact. When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 17-18.

The court of appeals affirmed the conviction. Slip Op. pp. 1–4.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

The considerations which govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept

review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)) and involves a significant question of law under the Constitution of the United States and state constitution (RAP 13.4(b)(3)).

Mr. Bryant's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential elements of the charged crime.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499

P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* "Substantial evidence" in the context of a criminal case, means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068 (citing *State v.*

*Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *Baeza*, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

Here, the jury was instructed in order to convict the defendant of the crime of possessing a stolen motor vehicle, the State had to prove (1) that on or about November 24, 2016, the defendant *knowingly* possessed a stolen motor vehicle; (2) that the defendant acted *with knowledge* that the motor vehicle had been stolen; and (3) that the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto. CP 17 (emphasis added).

At issue is whether the evidence was sufficient to prove the defendant knew the vehicle was stolen even under the broad definition of "knowingly" given to the jury. The Court of Appeals held that when property has recently been stolen, our case law requires only slight

corroborative evidence to prove knowledge. Slip Op. p. 3. In support of this contention the Court cited *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284 (2010), and *State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999). *Id*. However, *McPhee* and *Womble* are easily distinguishable from the present case.

In *McPhee*, the defendant moved the stolen items a couple of days after the owner advertised the stolen items in a local newspaper. The Court held a jury could reasonably infer that McPhee moved the items because he saw the advertisement. *State v. McPhee*, 156 Wn. App. 44, 63, 230 P.3d 284 (2010). Additionally, McPhee worked next door to the owner's residence from where the items were stolen and had opportunity to observe the items, which suggested McPhee knew those items were stolen when he allegedly purchased them. *Id*. Moreover, the fact that McPhee purchased four guns, the field binoculars, and ivory tusks for a mere $100 could lead a reasonable jury to reasonably infer that McPhee suspected the items were stolen. *Id*. Finally, McPhee gave an implausible explanation for moving the items. *Id*.

In *Womble*, the defendant testified and offered an arguably implausible explanation for being in a stolen vehicle. *State v. Womble*, 93 Wn. App. 599, 605, 969 P.2d 1097 (1999). He also fled when confronted

by the owner of the vehicle. *Id*. The Court found there was sufficient evidence to support the conviction. *Id*.

Herein, none of this type of corroborative evidence is present. Mr. Bryant did not testify or attempt to flee. There was no evidence Mr. Bryant stole the vehicle or was associated with the person or persons who did steal the vehicle. The fact that the license plate was for a different vehicle is inconsequential because there was no evidence Mr. Bryant switched the plates or knew they had been switched. Similarly, there was no evidence Mr. Bryant knew the ignition key was made from a house key blank instead of an automobile blank and it was unknown when the key was made or by whom. RP 109.

The Court of Appeals held the unusual nature of the key Mr. Bryant used to operate the Acura provided adequate corroboration to satisfy the sufficiency test because it was readily apparent the key taken from Mr. Bryant was not original to the Acura and had been fabricated from a house key. Slip Op. pp 3-4. Therefore, the Court reasoned, Mr. Bryant's use and possession of the key suggested he knew, or should have known, that the Acura had somehow been separated from its lawful owner without the owner's knowledge or consent. *Id*.

The Court's reasoning to reach this legal conclusion is simply too big a stretch. First, it is unreasonable to assume a person who is lent the use of a vehicle first examines the key to see if it looks genuine. Moreover, as anyone who drives a vehicle is well aware, keys to modern cars come in all shapes and sizes. In fact, many function electronically and do not resemble a conventional key in any way. The Court of Appeals should have taken judicial notice of this fact.

Second, even if one assumes Bryant should have noticed the key was not a typical car key, this fact by itself does not suggest Bryant knew, or should have known, the vehicle was stolen. There are other innocent explanations for the non-original key. Perhaps the owner/lender lost the original key or wanted a second key made and the only blank key available or in stock to the vendor was a non-standard car key.

The key by itself does not fulfill the criteria for "only slight corroborative evidence to prove knowledge" as set forth in the cases cited by the Court of Appeals. Therefore, since there was no evidence the defendant *knowingly* possessed a stolen motor vehicle, acted *with knowledge* that the motor vehicle had been stolen, or withheld or appropriated the motor vehicle to the use of someone other than the true

owner, the State failed to prove the essential elements of the charged crime.

## VI. CONCLUSION.

For the reasons stated herein, Defendant/Petitioner respectfully asks this Court to grant the petition for review and reverse the decision of the Court of Appeals.

Respectfully submitted September 20, 2018,

s/David N. Gasch
Attorney for Petitioner
WSBA #18270

PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on September 20, 2018, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the petition for review:

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Brian O'Brian/Larry Steinmetz
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August 21, 2018

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CASE # 350835
State of Washington v. Randall G. Bryant
SPOKANE COUNTY SUPERIOR COURT No. 161045449

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:btb
Attachment
c: **E-mail** Honorable Michelle D. Szambelan (Judge Tompkins's case)

c: Randall G Bryant #355032
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**FILED**
**AUGUST 21, 2018**
**In the Office of the Clerk of Court**
**WA State Court of Appeals, Division III**

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

| | | |
|---|---|---|
| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>RANDALL G. BRYANT,<br><br>Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 35083-5-III<br><br><br><br>UNPUBLISHED OPINION |

PENNELL, A.C.J. — Randall Bryant appeals his conviction for possession of a stolen motor vehicle, arguing the jury was presented with insufficient evidence of guilt. We disagree and affirm.

## FACTS

In November 2016, a 1991 Acura Integra was reported stolen from its owner's driveway. Approximately one week later, a patrol officer stopped the Acura after noticing it bore license plates pertaining to a different vehicle type. Mr. Bryant was discovered to be the Acura's driver.

During the traffic stop, Mr. Bryant turned over the key he had been using to operate the Acura. The key appeared to be made from a house key blank, rather than an automobile key blank. At trial, the police officer testified to the differences between

vehicle keys and house keys. Vehicle keys are usually longer than house keys and they often have a chip built into them that coincides with the vehicle's security system.

The officer who stopped Mr. Bryant did not notice any damage to the Acura or its ignition. No statements were admitted against Mr. Bryant and Mr. Bryant did not testify at trial.

A jury convicted Mr. Bryant of possession of a stolen vehicle. Mr. Bryant appeals.

## ANALYSIS

Mr. Bryant's sole argument on appeal is that the State failed to produce sufficient evidence to justify his conviction. Specifically, Mr. Bryant argues the State failed to prove that he knew the Acura was stolen.

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. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences drawn therefrom. *Id.* Circumstantial evidence and direct evidence are equally reliable. *Id.* We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

"'Possessing stolen property' means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). "The elements of possession of stolen property are (1) actual or constructive possession of the stolen property with (2) actual or constructive knowledge that the property is stolen." *State v. Summers*, 45 Wn. App. 761, 763, 728 P.2d 613 (1986). Here, Mr. Bryant only contests the State's proof of the second element, pertaining to knowledge.

When property has recently been stolen, our case law requires only slight corroborative evidence to prove knowledge. *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284 (2010); *State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999). One week in time qualifies as recent. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). Accordingly, the test for sufficiency in this case is whether the State presented slight evidence to corroborate its claim that Mr. Bryant knew or constructively should have known the Acura was stolen.

Here, the unusual nature of the key Mr. Bryant used to operate the Acura provided adequate corroboration to satisfy the sufficiency test. It was readily apparent that the key taken from Mr. Bryant was not original to the Acura and had been fabricated from a

house key. Mr. Bryant's use and possession of the key suggested he knew, or should have known, that the Acura had somehow been separated from its lawful owner without the owner's knowledge or consent. While this evidence of knowledge was far from overwhelming, it was not insufficient to establish knowledge.

## APPELLATE COSTS

Mr. Bryant asks that we not award appellate costs. In accordance with RAP 14.2, we defer the question of appellate costs to our commissioner or clerk/administrator.

## CONCLUSION

Mr. Bryant's judgment of conviction is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, A.C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

## GASCH LAW OFFICE

## September 20, 2018 - 10:24 AM

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