NO. 99324-6

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY MILLER,

Petitioner.

ON DISCRETIONARY REVIEW FROM THE COURT OF APPEALS,
DIVISION ONE
Court of Appeals No. 81840-6-I
Pierce County No. 18-1-01695-1

PETITION FOR REVIEW

ANSWER

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I. INTRODUCTION

The State alleged actual possession of a stolen vehicle, not constructive possession, where the Defendant was found alone inside the parked vehicle and where he stated that he knew the truck was stolen and was trying to get rid of it. The court of appeals has held that the trial court did not abuse its discretion in refusing to instruct the jury on the limitations of the theory of constructive possession. Such an instruction was not supported by evidence, not relevant to the case, and not necessary for the parties' arguments of their respective theories of the case. The Defendant was not impeded in making his defense that he was in no possession of any kind of the stolen vehicle. This challenge does not present a significant constitutional question.

In support of bail jumping charges, the State presented evidence that the Defendant signed scheduling orders setting hearing dates and times and requiring his presence and would have received copies of the orders. The court of appeals held this was sufficient evidence that the Defendant knew he was required to attend the hearings. This decision does not implicate any consideration under RAP 13.4(b).

II. RESTATEMENT OF THE ISSUES

1. Where constructive possession was not alleged, does the court's refusal to instruct the jury on constructive possession raise a significant constitutional question?

2. Is there any consideration under RAP 13.4(b) which would permit review of the court of appeals' determination that the Defendant's signatures on court scheduling orders provided sufficient evidence that he knew his appearance was required?

III. STATEMENT OF THE CASE

The Defendant Jeffrey Miller has been convicted of possessing a stolen motor vehicle and two counts of bail jumping. CP 1, 43-46, 358.

In the early morning of April 2018, Vladimir Akinshev's work truck disappeared from where he had parked it outside his home. RP 210-15, 230, 257, 300. Mr. Akinshev immediately contacted police. RP 215-16, 334, 346. With the assistance of a GPS tracker, police learned the vehicle had been taken from Mr. Akinshev's home at 4 in the morning and driven for approximately 20 minutes. RP 349-50. Just before 7 a.m., Officer Donald Rose located the vehicle along the Puyallup River. RP 216-18, 259-63, 266, 300, 352, 359-60. It was parked down a long dirt road in a dead end, ringed by trailers. RP 354, 400, 476.

Ofc. Rose saw the Defendant with his arms, head, and torso inside the canopied area of the stolen truck. RP 344-45, 360-63. The officer called for backup, and the Defendant exited the truck and walked away. RP 363-

67, 475. The Defendant crawled underneath an RV and curled up on his side where minutes later he was contacted by police and handcuffed. RP 368-73, 376-77, 476, 479-83.

Items in the canopied bed of the truck were missing, the lockers were broken, and dash panels had been detached. RP 218-21, 225-26, 235, 265-66. One of the items missing was a generator. RP 218, 235.

Post-Miranda, the Defendant said that before five in the morning, someone he knew only as Richie had come over to ask if the Defendant knew anyone who was interested in a generator. RP 381-82, 483. The Defendant provided a general description of Richie and said he lived in Federal Way, but was unable to provide a last name. RP 381-82, 384.

The Defendant said Richie left. RP 383. A half hour later, the Defendant noticed the truck across the fence line from where he had been staying with his friend Carl Gaylor. RP 383, 388, 724. The story was not credible, because the truck would not have been visible from this location. The truck was not parked on Gaylor's property, but on the other side of a long, unbroken fence line. RP 386, 724-26. The fence is too tall to see over. RP 727.

The Defendant repeatedly acknowledged that he knew the truck had been stolen, because "No one leaves a car here that long." RP 380, 384-85. He claimed he had been inside the truck *bed* "trying to find a way to get rid

of it," but ran away when Ofc. Rose arrived, because he knew it would look bad. RP 384-85.

Although he claimed he had not seen Richie in possession of the truck, the Defendant insisted that Richie must have stolen it. RP 380-81, 383. In the end, the Defendant could not provide sufficient information to identify Richie, and the officer was primarily concerned with the Defendant's unlawful possession.[1] RP 381-82, 384, 389-90.

Ofc. Rose left the Defendant in the patrol car for a few minutes, and when he returned, the Defendant's story had changed. RP 386-88. He claimed that he first noticed the truck when he went across the fence line to visit one of the RV tenants, Bob, to borrow a cigarette. RP 388.

The Defendant was arrested and charged with possessing a stolen motor vehicle. CP 1; RP 390. Pending trial, additional counts of bail jumping were added. CP 43-46.

At trial, the Defendant told a third story. He explained that before he broke up with his girlfriend, he had been living in Federal Way. RP 746-47. Previously he had been unable to provide the last name for Richie from Federal Way. RP 381, 384. At trial the Defendant testified that he had been friends with the 30-year-old Richard Vanderpool for a couple of decades.

[1] Taking a vehicle and possessing a vehicle after it has been stolen are different crimes. RCW 9A.56.065; RCW 9A.56.068; RCW 9A.56.070; RCW 9A.56.075

RP 671, 738. Mr. Vanderpool had asked if he would be interested "making any money dealing with stolen property." RP 729. Although the Defendant is no stranger to property crimes, he claimed he told Mr. Vanderpool to move the truck off Gaylor's property and leave. RP 723, 731. The Defendant said the situation left him stressed out, so he fell asleep. RP 731, 873. In this version, he saw the truck, not thirty minutes later as he had told police, but after a two-hour nap when he went around the fence and saw the truck parked. RP 383, 731-32.

The Defendant denied reaching into the truck. RP 733. He said he was only taking a look when he heard and saw the police officer pull up. RP 734. He fled, only to find himself "trapped with nowhere to go." RP 734. He said he was kneeling down to see if he could get past an obstruction when police found him. RP 735.

The jury convicted the Defendant on all charges. CP 310-12. On appeal, the Defendant challenged the rejection of his proposed instructions on constructive possession and the sufficiency of the evidence demonstrating his knowledge of court dates. Unpub. Op. at 1.

Jury Instructions: Defense counsel proposed jury instructions not drafted by the WPIC. CP 258-60, 262-63, 280-81 (citing drug possession cases); RP 808. Counsel requested the jury be instructed on various limitations to constructive possession. CP 258-60, 262-63; RP 809-10.

The prosecutor explained that she would not be proposing any instruction on constructive possession. RP 812. The court had approved an instruction from WPIC 77.20, which defined unlawful possession as "knowingly to receive, retain, possess, conceal, or dispose." CP 69; RP 812-13. And the prosecutor only argued actual possession in closing argument. RP 876-77.

The court rejected the proposed defense instructions, finding them inappropriate to the facts of this case. RP 820. "[M]omentary handling … has to do with the very [portable] substance in a drug case, where it's being passed among various individuals" or, as referenced in a dissenting opinion, a weapon passed between vehicle passengers. RP 820-21. The instruction regarding the constructive possession of premises made sense "in regards to drugs," but had "nothing do with possession of a stolen vehicle." CP 259; RP 820. It was undisputed that the Defendant was not the owner of the premises where the vehicle was parked, but was only visiting a friend on an adjacent property. RP 724.

On direct appeal, the court of appeals held:

> Here, the trial court gave the jury a complete and accurate statement of the law that did not deprive Miller of his ability to present a defense. Miller was not defending against an allegation of constructive possession.
> ….
> Miller was not precluded from arguing his theory of the case.

Unpub. Op. at 4-5.

Bail jumping: At arraignment, a defendant is given a copy of the scheduling order with hearing dates which include, at the very least, a date for an omnibus hearing and the trial. RP 514, 517. The defendant's presence is required at omnibus, where the parties set out their intentions for trial. RP 515.

In this case, the Defendant Miller signed the "Order Continuing Trial Date," which directed that "the defendant shall be present" for an omnibus hearing at September 13, 2018 at 8:45 AM in Courtroom 260. CP 381; RP 518-19. Deputy prosecutor Nicole Fensterbush testified that additional copies of these orders are made for each attorney and for the defendant. RP 517. The Defendant subsequently failed to appear for the September 13 omnibus hearing, and a bench warrant issued. CP 382-84. This resulted in the cancellation of all previously scheduled court dates and an amended information adding a charge of bail jumping. CP 43-44; RP 536, 538-39.

The warrant was quashed on September 25. CP 385-86. Deputy prosecutor Andrew Logerwell testified the Defendant signed a new scheduling order which indicated that his presence was required for a continuance hearing on November 8 and trial on November 15. CP 389;

RP 588-89, 591-92 (Exhibit 30). A copy was provided to the Defendant. RP 590. He then failed to appear for the continuance hearing on November 8, and another bench warrant issued. CP 390-92; RP 593-98. This warrant was quashed November 16. CP 396. And a second count of bail jumping was added. CP 45-46.

The court of appeals held:

> The State was not required to present witnesses that were present in court on the days that the scheduling orders were entered. The State presented testimony about the procedures by which defendants are typically notified of hearing dates. The State also presented copies of the two scheduling orders, each of which had been signed by both Miller and his attorney. A rational trier of fact could conclude from this evidence that Miller had knowledge of the subsequent hearing dates.

Unpub. Op. at 6-7.

IV. ARGUMENT

A. No significant constitutional question is raised by the trial court's rejection of an instruction that was unsupported by the facts, irrelevant to the parties' arguments, and unnecessary for the defense to present its theory of the case.

The Defendant argues that the rejection of his proposed jury instruction on constructive possession raises a significant constitutional question. Petition at 7 (citing RAP 13.4(b)(3)). He argues that he was deprived of the ability to argue his theory of defense as to count one. However, where he was not alleged to have been in constructive possession,

the instruction had no relevance to the facts of this case or the defense theory.

A trial court has considerable discretion in the wording of jury instructions. *State v. Portrey*, 102 Wn. App. 898, 902, 10 P.3d 481, 484 (2000). The trial court's choice of jury instructions is reviewed for an abuse of discretion. *State v. Hathaway*, 161 Wn. App. 634, 647, 251 P.3d 253 (2011). Jury instructions are sufficient if supported by substantial evidence, if they allow the parties to argue their theories of the case, and if they advise of the applicable law. *Id*. "It is not error for a trial court to refuse a specific instruction when a more general instruction adequately explains the law and allows each party to argue its theory of the case." *Id*.

> "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. *State v. Staley,* 123 Wash.2d 794, 798, 872 P.2d 502 (1994). "Dominion and control means that the object may be reduced to actual possession immediately." *State v. Jones,* 146 Wash.2d 328, 333, 45 P.3d 1062 (2002).

State v. Lakotiy, 151 Wn. App. 699, 714, 214 P.3d 181, 189 (2009).

In this case, the truck was not on the Defendant's premises, and he was not found in possession of the keys. The State did not suggest there was constructive possession. RP 861-91, 907-19.

The Defendant argues that the jury may have believed that he possessed the truck by his mere proximity. Petition at 9-10. But this was not the State's allegation. The prosecutor argued that Mr. Vanderpool stole the truck and gave it to the Defendant. RP 876. In actual, sole possession of the truck, the Defendant entered the canopy to take inventory of his new property. RP 876-77. He intended to "get rid" of the truck, to transfer it to someone, but not to return it to the true owner. RP 869, 879. There was no allegation that the Defendant was in passing possession of the truck. He was in sole possession of the truck with the ability and intent to dispose of it at will.

The prosecutor presented a case of actual possession. Therefore, the Defendant was not defending against proof of constructive possession. Insufficient evidence of constructive possession is no defense to actual possession. Accordingly, the proposed instructions were irrelevant to the facts of the case.

> [T]he right to present a defense is not absolute. A criminal defendant "has no constitutional right to have irrelevant evidence admitted in his or her defense." *Hudlow*, 99 Wash.2d at 15, 659 P.2d 514.

State v. Fluker, 5 Wn. App. 2d 374, 392, 425 P.3d 903, 915 (2018), *review denied,* 192 Wn.2d 1020, 433 P.3d 814 (2019).

It can be error for a trial court to give an instruction which is not supported by the evidence. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715, 719 (1995). And here there was no evidence of mere constructive possession. Only in the context of constructive possession is a mere proximity instruction relevant. *State v. Castle*, 86 Wn. App. 48, 61, 935 P.2d 656, 662 (1997). Where dominion and control of the premises is not alleged, the jury instruction on constructive possession does not apply. *Portrey*, 102 Wn. App. at 902.

The court correctly noted that the cases cited in the defense memorandum (CP 280-81) were distinguishable. RP 820-22. Indeed, they have not been revisited the Brief of Appellant or Petition for Review.

In fact, one of the cases cited therein militates against the instruction. In *Hathaway*, during a search incident to arrest, the deputy heard a vial of methamphetamine fall out of the defendant's pant leg and roll behind the patrol car's tire. *Hathaway*, 161 Wn. App. at 640. The prosecution did not rely upon a theory of constructive possession due to proximity. *Id.* at 648. It did not, because this evidence "established Hathaway's actual possession of the methamphetamine." *Id.* at 646. In such a case, a mere proximity instruction was not necessary for the defendant to argue his theory of the case. *Hathaway*, 161 Wn. App. at 648.

Similarly, a mere proximity instruction was not required where the defendant was found near a cluster of marijuana plants on neighboring property. *Portrey*, 102 Wn. App. at 903. Nor was it needed when a defendant claimed he had only just discovered the cocaine in his car after the vehicle had been stolen and recovered. *Castle*, 86 Wn. App. at 61-62.

The proposed instructions on constructive possession were irrelevant to the defense theory. The Defendant did not argue that he had passing, momentary possession of the truck. He argued that he did not possess it under any meaning of the law. RP 901 ("Mr. Miller did not knowingly receive, retain, possess, conceal, or dispose of that vehicle."). Counsel argued the Defendant had not concealed the truck. RP 897. It was along a roadway. *Id*. He had not moved it, had not touched any item within the truck, and had not even touched the truck. *Id*. The attorney argued that the officer had been mistaken. The Defendant had not been inside the truck, but was only bent at the waist looking into the truck. RP 896-97. She argued that the Defendant's statement that he wanted to "get rid" of it, was mere wishful thinking, not acted upon. RP 898.

> So the Defense would say that what you have with the possession of a stolen vehicle is a man standing next to a truck thinking "Man, this isn't supposed to be here. I don't want this here." And that is not possession of a stolen motor vehicle.

RP 901.

Defense acknowledged that there was no question of constructive possession, because "neither one of these places is Mr. Miller's residence." RP 894. And she argued that her client could not have taken possession of the truck, when he had no key, screwdriver, or other device to start the engine. RP 897.

The court's instructions did not prevent the Defendant from arguing his theory of the case. There was no abuse of discretion. And there is no significant constitutional question raised by the court of appeals' decision rejecting this claim.

B. The opinion, which holds that a signature on an order is sufficient evidence that the signator knew the contents of the document signed, does not raise any RAP 13.4(b) consideration.

The Defendant seeks review of the court of appeals' opinion holding that the Defendant's signatures on court orders provided sufficient evidence that he knew his presence was required. Petition at 10-13. The Defendant cites RAP 13.4(b)(3) and (4), provisions which permit review of significant constitutional questions or matters of public interest. Petition at 10. However, he appears to argue a different provision, namely RAP 13.4(b)(2). *See* Petition at 12-13 (arguing a conflict with *State v. Cardwell*, 155 Wn. App. 41, 226 P.3d 243, 245 (2010)).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*,

119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id.* A reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas,* 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d at 201.

Knowledge of the requirement to appear is an element of the bail jumping offense. RCW 9A.76.170. The Defendant complains that the State did not prove the element in a particular way, i.e. with testimony from witnesses present at the hearing during which the orders were signed or transcripts of the hearings. Petition at 13-14. But there is no requirement for how the State must prove its case. The State reasonably chose to prove knowledge through the Defendant's signature and through testimony about standard procedures.

The attorneys who were present on the days the scheduling orders were entered were the same attorneys who tried the case, Sarah Tofflemire

and Claire Vitikainen. CP 381, 389; RP 523-24, 526. If they had been necessary witnesses, they would not have been able to advocate at the trial. RPC 3.7. In this case, if the State had proposed to call Ms. Tofflemire and Ms. Vitikainen, the court could have excluded their testimony, because other witnesses could provide the evidence.

The evidence was that the Defendant signed and received copies of the scheduling orders which provided the dates and the requirement of his presence on those dates. CP 381, 389; RP 519, 588-92. That is sufficient evidence of his advisement and knowledge.

The Defendant argues that the decision conflicts with *State v. Cardwell*, 155 Wn. App. 41, 226 P.3d 243 (2010), *review granted, cause remanded,* 172 Wn.2d 1003, 257 P.3d 1114 (2011). Petition at 12-13. But that case does not dictate how the state must prove its case, nor does it bear any similarity to the facts here.

There, the state mailed notice of an arraignment hearing to the defendant Cardwell. *Cardwell*, 155 Wn. App. at 47. On the day of the hearing, Cardwell's father appeared in court to advise that the notice had been sent to his house, that his son did not live with him, and that he did not know where his son was. *Id*. at 45. In other words, Cardwell did not receive the mailed notice. *Id.* at 47. Here, the Defendant received copies of the scheduling order in person after he signed them.

In the cited case, "the State maintained that as long as Cardwell knew that he would have to appear at some time in the future, it did not have to prove that he knew about the December 14, 2005 court hearing date." *Cardwell*, 155 Wn. App. at 47. Here, the State made no such claim, but provided evidence that the Defendant had notice of the exact dates.

There is no merit to the Defendant's challenge and no consideration which would permit review under RAP 13.4(b).

V. CONCLUSION

For the reasons stated above, the State respectfully requests that this Court deny review.

RESPECTFULLY SUBMITTED this 21st day of December, 2020.

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12-21-20 *s/Therese Kahn*
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

December 21, 2020 - 4:38 PM

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