

FILED
COURT OF APPEALS
DIVISION II

Case No. 49178-8-II

2017 MAR 21 AM 10:24

STATE OF WASHINGTON
IN THE COURT OF APPEALS, DIVISION TWO OF THE STATE
OF WASHINGTON
DEPUTY

STATE OF WASHINGTON
Plaintiff/Respondent.

vs.

LENDIN SAITI,
Defendant/Appellant.

Appeal from the Superior Court of Pacific County

Superior Court Case No. 15-1-00228-5

APPELLANT'S REPLY BRIEF

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1 ARGUMENTS

2 1. *There is Insufficient Evidence to prove Saiti's Unlawful*
3 *Possession of a Firearm.*

4 The State cites *State v. Raleigh*, 157 Wn.App. 728, 238 P.3d 1211
5 (2010) for the proposition that "possession may be actual or constructive"
6 and argues that the "State may establish constructive possession by
7 showing the defendant had dominion and control over the firearm." Brief
8 of Respondent at 10 citing *State v. Murphy*, 98 Wn.App. 42, 46, 988 P.2d
9 1018 (1999), *review denied*, 140 Wn.2d 1018, 5 P.3d 10 (2000). However,
10 the State fails to mention that "dominion and control" requires knowledge,
11 not mere proximity.

12 In *State v. Raleigh*, the police recovered a gun at the scene of a
13 burglary. Raleigh's accomplices testified the gun had been seen the day
14 before in Raleigh's house, Raleigh had placed a shoe box in the vehicle
15 used to travel to the crime scene, Raleigh gave directions to the crime
16 scene, and the gun was found in the shoe box by police at the time of the
17 arrest. The court ruled that based on these facts, there was sufficient
18 evidence for the jury to find Raleigh possessed the gun. *State v. Raleigh*,
19 157 Wn.App. 728, 732, 737, 238 P.3d 1211 (2010). These facts are
20 substantially different from the current case. In the current case, the State
21 provided no evidence to show that Mr. Saiti knew the gun was in the purse
22

1 or that he had ever touched it. The evidence was that Mr. Saiti saw the gun
2 one time, weeks if not months, before the incident. VRP at 77, 151, 170.
3 Mr. Saiti showed no interest in the gun. VRP at 167. Mr. Saiti did not
4 know what Ms. Lopez did with the gun after she showed it to him that one
5 time. VRP at 151, 167 - 168. Ms. Lopez actually moved the gun weekly to
6 a different purse, but it was not always in the purse. VRP at 152, 170. This
7 is insufficient to prove Mr. Saiti knew of the gun's presence on the date in
8 question.

9 In *State v. Murphy*, 98 Wn.App. 42, 46, 988 P.2d 1018 (1999),
10 *review denied*, 140 Wn.2d 1018, 5 P.3d 10 (2000) Murphy and
11 accomplices robbed a home and found a gun cabinet containing seven
12 guns. Murphy and another accomplice broke open the gun cabinet and
13 removed the guns. "Murphy carried the guns out of the house" and
14 distributed them to the other accomplices as they made their getaway.
15 There was some conflicting testimony as to how the guns were divided
16 among the accomplices and the police did not find any guns in Murphy's
17 possession when he was arrested. *State v. Murphy*, 44 - 45. However, it is
18 clear Murphy knowingly took control and possession of the firearms when
19 he took them from the gun cabinet, removed them from the house, and
20 distributed some of them to his accomplices. The court found "Murphy
21 actually possessed" the firearms. *Id.*, at 46. The Court in *State v. Murphy*,

22

1 noted that possession can be "both actual and constructive" and
2 "constructive possession can be established by showing the defendant had
3 dominion and control over the firearm.... *The ability to reduce an object*
4 *to actual possession is an aspect of dominion and control.*" *Id.* citing
5 *State v. Echeverria*, 85 Wash.App. 777, 783, 934 P.2d 1214 (1997)
6 (emphasis added).

7 In Mr. Saiti's case, there is no evidence Mr. Saiti ever touched or
8 handled the gun. This means the State must prove constructive possession
9 beyond a reasonable doubt. To prove this, they must show "the defendant
10 had dominion and control over the firearm." However, to prove "dominion
11 and control" they must also show the "ability to reduce an object to actual
12 possession [as it] is an aspect of dominion and control." *Id.* citing *State v.*
13 *Echeverria*, 85 Wash.App. 777, 783, 934 P.2d 1214 (1997). This, in turn,
14 requires the State to show Mr. Saiti knew the gun was in the purse at the
15 time. *State v. Anderson*, 141 Wn.2d 357, 359, 366 - 367, 5 P.3d 1247
16 (2000); *State v. Turner*, 103 Wn.App. 515, 518, 520, 13 P.3d 234 (Div. 2
17 2000). Without such knowledge, it is impossible for Mr. Saiti "to reduce
18 an object to actual possession is an aspect of dominion and control." *State*
19 *v. Echeverria*, at 783; *State v. Turner*, at 521; *State v. Chouinard*, 169
20 Wn.App. 895, 899, 282 P.3d 117 (Div. 2 2012). In the current case, there
21 is no evidence Mr. Saiti knew the gun was in the purse. There were no
22

1 finger prints on the gun; no tests were done. VRP at 234. No one saw him
2 with the gun. See, VRP generally. Ms. Lopez, the State's witness, testified
3 Mr. Saiti did see the gun once; however, it was a considerable amount of
4 time prior to the incident. VRP at 77, 151, 170. Ms. Lopez testified Mr.
5 Saiti showed no interest in the gun. VRP at 167. Ms. Lopez testified Mr.
6 Saiti did not see her transfer the gun to different locations. VRP at 152.
7 Ms. Lopez testified Mr. Saiti not only did not see the gun after the first
8 day, but he did not touch it, nor did they discuss it. VRP at 151 - 152, 167.
9 Further, Officer Nawn testified that when he searched the purse for the
10 gun, he had to move various items and dig through the purse to expose the
11 gun. VRP at 215, 231. There was no testimony that Mr. Saiti went through
12 the purse in a manner that would allow him to see the gun. There was no
13 testimony Mr. Saiti saw the gun in the purse. There was no testimony
14 anyone saw Mr. Saiti with the gun. There was no testimony Mr. Saiti
15 touched the gun. Nor was there any forensic evidence to indicate Mr. Saiti
16 touched or saw the gun. There is no evidence Mr. Saiti knew the gun was
17 in the purse or that he intended to take the gun. Additionally, as the State
18 admits in its brief, the [m]ere proximity to the firearm is insufficient to
19 show dominion and control." Brief of Respondent, at 10 citing *State v.*
20 *Raleigh* 157 Wn.App. at 737, 238 P.3d 1211. "knowledge of the presence
21 of contraband, without more, is insufficient to show dominion and control
22

1 to establish constructive possession. Brief of Respondent, at 10 citing
2 *State v. Hystad*, 36 Wn.App. 42, 49, 671 P.2d 793 (1983). As a result, the
3 State failed to show Mr. Saiti had "the ability to reduce an object to actual
4 possession is an aspect of dominion and control." *State v. Echeverria*, at
5 783; *State v. Turner*, at 521; *State v. Anderson*, at 359, 366 - 367.

6 Despite the State's failure to prove knowing possession, the State
7 cites a number of cases it believes support a guilty verdict simply because
8 Mr. Saiti was the "driver/owner of the vehicle where the contraband was
9 found." Brief of Respondent at 10 - 11.

10 *State v. Bowen*, 157 Wn.App. 821, 828, 239 P.3d 1114
11 (2010)(firearm located in nylon bag between the driver and passenger
12 seats); At first glance, *Bowen* seems similar to the current case; however,
13 the evidence is markedly different. In *State v. Bowen*, the defendant was
14 arrested with a gun in a nylon bag located "between the driver and
15 passenger seats." *State v. Bowen*, at 825. However, there was additional
16 testimony to consider.

17 At trial, Kathleen Fultz testified that she owned the firearm
18 discovered in the black truck. She said that she purchased it
19 from Brian Downs, that she stored it in a black nylon holster
20 with a Velcro strap, that she lost the loaded firearm in the black
21 truck " a day or two before" Bowen's arrest. Downs testified
22 that he never sold a firearm to Fultz. Deputy Drogmund
23 testified that the unloaded firearm he discovered in the black
24 truck was inside a container, not a holster.

1 *State v. Bowen*, at 826 - 827 (internal cite omitted). In looking at a claim
2 of insufficiency of the evidence, the court looks at the evidence in the light
3 most favorable to the State and accepts the truth of that evidence. *State v.*
4 *Bowen*, at 827. When one looks at the testimony in the *Bowen* case,
5 several items stand out. Fultz testified the gun was "stored in a black nylon
6 holster" and that "she lost the loaded firearm in the black truck." However,
7 the Deputy "testified that the unloaded firearm he discovered in the black
8 truck was inside a container, not a holster." From this evidence, the jury
9 could infer Bowen was actually aware of the firearm, and removed it from
10 the holster, unloaded the firearm, and placed it in a different container. No
11 one other than Bowen could have done this. The Court in *Bowen* does
12 state that "sole occupancy and possession of a vehicle's keys" will support
13 finding "dominion and control" (*State v. Bowen*, at 828 citing *State v.*
14 *Potts*, 1 Wash.App. 614, 617, 464 P.2d 742 (1969))¹, it also noted that the
15 State "must show more than mere proximity." *State v. Bowen*, at 828
16 citing *State v. George*, 146 Wash.App. 906, 920, 193 P.3d 693 (2008). In
17 finding the evidence sufficient, the Court stated the following:

18 _____
19 ¹ In *State v. Potts* there was no testimony that marijuana discovered in a car driven by the
20 defendant belonged to any other person or that defendant was unaware of marijuana.
21 Further, the defendant was contesting the chain of custody and had argued the
22 prosecution had to prove he owned the car. *State v. Potts*, 1 Wn.App. 614, 464 P.2d 742
(Div. 2 1969). The court held that under such circumstances "it was incumbent upon
23 defendant to establish his possession was unwitting, lawful or otherwise excusable. *Id.*, at
24 618 citing *State v. Morris*, 70 Wash.2d 27, 422 P.2d 27 (1966). *State v. Potts*, does not
apply in the current case because such evidence was presented by the State.

1 Here, the evidence established Bowen's dominion and control
2 over the contraband and firearm because he was the owner,
3 driver, and sole occupant of the black truck. Deputy Drogmund
4 discovered the firearm in nothing more than a nylon bag beside
the driver's seat. The jury resolved the conflicting testimony of
the firearm's ownership and the reason for its presence in the
truck against Bowen. His argument fails.

5 *State v. Bowen*, at 828. The Court acknowledges the reason for the
6 presence of a firearm would make a difference and mere proximity is not
7 enough. However, the facts in *Bowen* presented a situation that could not
8 have occurred without the defendant knowing about and handling the gun.
9 As a result, *State v. Bowen* does not support the proposition that "sole
10 occupancy and possession of a vehicle's keys" will support finding
11 "dominion and control" when there is evidence explaining the unknown
12 presence of a firearm. In the current case, there is unrefuted and
13 uncontradicted evidence Mr. Saiti did not know about the gun and could
14 not exercise dominion and control because, without knowledge of the
15 firearm, he lacked the "ability to reduce [the firearm] to actual possession.

16 *State v. Turner*, 103 Wn.App. 515, 521-24, 13 P.3d 234 (2000). The
17 State claims this case stands for the proposition that there is "sufficient
18 evidence where the rifle was inside a bow case that was lying partially
19 open across the back seat behind the driver's seat;" Implying that the mere
20 presence of a gun in the car is enough. Brief of Respondent at 11.
21 However, the court in *Turner* actually held "that where the owner/operator

1 of a vehicle has dominion and control of a vehicle *and knows a firearm is*
2 *inside the vehicle*, there is sufficient evidence of constructive possession
3 of a firearm for the crime of unlawfully possessing a firearm." *State v.*
4 *Turner*, at 518 (emphasis added). In *Turner*, a passenger claimed
5 ownership of the rifle and claimed Turner had not handled the weapon.
6 *State v. Turner*, at 518 - 519. However, the rifle was "in a partially open
7 case in the back seat behind the driver's seat" and was within easy reach.
8 *State v. Turner*, at 521 - 522. More importantly, Turner admitted "that he
9 knew the rifle was in the back seat." *State v. Turner*, at 521. The court
10 reasoned that the "evidence showed that Turner was in close proximity to
11 the rifle, *knew of its presence*, was able to reduce it to his possession, and
12 had been driving the truck in which the rifle was found." *State v. Turner*,
13 at 521 (emphasis added). The court noted, "control over premises is
14 insufficient to show constructive possession." *State v. Turner*, at 523.
15 "Dominion and control" of the vehicle is "but one factor in determining
16 whether the defendant had dominion and control" over the weapon. *State*
17 *v. Turner*, at 523 quoting *State v. Cantabrana*, 83 Wash.App. 204, 921
18 P.2d 572 (1996). Thus, *Tuner* requires the State to prove the Defendant
19 actually knows a firearm is present, in addition to the ability to reduce it to
20 his dominion and control; the mere presence of a gun buried under
21 numerous items in a bag is not enough.

1 *State v. McFarland*, 73 Wn.App. 57, 70, 867 P.2d 660 (1994), *aff'd*.
2 127 Wn.2d 322, 899 P.2d 1251 (1995)(holding that there was sufficient
3 evidence of constructive possession because the defendant knowingly
4 transported the guns in his car); In *McFarland* two masked men, each
5 armed with a sawed off shotgun, attempted to rob a home in Tacoma. One
6 of the men was shot and killed by the victim and the other fled the scene.
7 *State v. McFarland*, at 60. Police recovered a blood-stained mask. The
8 blood on the mask was identified as McFarland's and the location of the
9 blood on the mask matched the location of a wound on McFarland's head.
10 *State v. McFarland*, at 61. In addition, McFarland admitted he was with
11 the deceased man that night until 12 minutes before a 911 call was made,
12 that he observed and handled that guns while driving in a car. *State v.*
13 *McFarland*, at 61, 70. Another witness also testified he had seen
14 McFarland carrying a shotgun at house. *State v. McFarland*, at 70. This
15 evidence is sufficient to show actual possession. However, the court
16 stated:

17 Even assuming a failure of this evidence, McFarland's statements
18 to O'Malley that he touched the guns at Flick's parents' house,
19 that Flick brought the guns along, and that they "handled" the
20 guns en route to the Pub Tavern support a finding of constructive
21 possession. Also, McFarland constructively possessed the guns
22 ***because he knowingly transported them in his car.***

23 *State v. McFarland*, at 70 citing *State v. Reid*, 40 Wash.App. 319, 325-26,
24

1 698 P.2d 588 (1985)(emphasis added). Thus, *McFarland* requires actual
2 knowledge the gun is in the car. Such knowledge was admitted by the
3 defendant himself. In Mr. Saiti's case, there is no such evidence.

4 Finally, the State cites *State v. Echeverria*, 934 P.2d 1214, 85
5 Wn.App. 777 (Wash.App. Div. 3 1997) as supporting its case. However,
6 *Echeverria* actually supports Mr. Saiti's position. In *State v. Echeverria*,
7 the juvenile defendant was the under-aged driver of a car. After arresting
8 the defendant, the officer checked the car and discovered a firearm in plain
9 view protruding from under the driver's seat. The officer removed the gun
10 and also found a "throwing star" that was also under the seat but not
11 visible. *State v. Echeverria*, at 780. The defendant was charged with
12 possession of a firearm by a minor and possession of a dangerous weapon
13 (throwing star). *State v. Echeverria*, at 779. The trial court found the
14 defendant guilty of both charges because "the gun was in plain sight."
15 *State v. Echeverria*, at 782. On appeal, the Court affirmed the possession
16 of a firearm charge because "the gun was in plain sight" and this was an
17 unchallenged fact. *State v. Echeverria*, at 783. However, because the
18 throwing star was not in plain sight and there was no evidence the
19 defendant knew it was under the seat or carried it, the Court found the
20 evidence to be insufficient and reversed the second charge. Therefore,
21 *State v. Echeverria* demonstrates that unless the State proves knowledge

1 of a weapon, it cannot meet its burden.

2 Each of the cases cited by the State demonstrate knowledge is an
3 element of the crime and that it cannot be inferred from mere proximity to
4 a firearm, even if that firearm is in the car and within reach. In Mr. Saiti's
5 case, there is no evidence Mr. Saiti knew the gun was in the purse. There
6 were no admissions by Mr. Saiti as there were in *State v. Turner*, and *State*
7 *v. McFarland*. There were no facts to show the weapon had been moved
8 or handled as there was in *State v. Bowen*. And there was no evidence the
9 firearm was ever in plain sight as there was in *State v. Turner* and *State v.*
10 *Echeverria*.² In fact, the evidence presented at trial in Mr. Saiti's case
11 actually showed a lack of knowledge. The gun was not visible in the
12 purse, Officer Nawn had to search through the purse and move other items
13 to make it visible. VRP at 215, 231. Mr. Saiti never handled the gun. VRP
14 at 77, 152. Mr. Saiti showed no interest in the gun. VRP at 167. Mr. Saiti
15 did not observe Ms. Lopez move the gun between purses or see it after the
16 first day. VRP at 151 - 152. These facts presented by the State's own
17 witnesses, along with a complete lack of any evidence to show knowledge,
18 clearly demonstrate the State failed to prove the element of knowledge and
19 therefore failed to prove its case. This is an insufficiency of evidence and
20 the conviction for unlawful possession should be overturned.

21 _____
22 ² Officer Nawn actually searched through the purse to find the gun. VRP at 215.

1 The State attempts to get around the lack of knowledge by arguing
2 "Saiti and Lopez were together when she purchased the firearm and Saiti
3 observed Lopez put the firearm in her purse." Brief of Respondent at 11.
4 This is true; however, this event took place long before Mr. Saiti was
5 accused of having possession of the gun. Ms. Lopez testified she had a
6 collection of at least ten purses and changed them on a weekly basis. VRP
7 at 151, 170. Ms. Lopez moved the gun between purses on a number of
8 occasions. *Id.* The State's claim that the purse Ms. Lopez had on
9 December 20, 2015, "was the only place she ever kept her pistol" (Brief of
10 Respondent at 11 - 12), is false. VRP at 152, 170. As is the State's claim
11 that the gun was clearly visible in the purse. Brief of Respondent at 12.
12 Officer Nawn testified he had to move the contents of the purse to uncover
13 the gun, only then was it clearly visible and only then could he photograph
14 the gun. VRP at 215, 231. The missing cash and car keys add nothing to
15 the State's argument because they were on top of the other items in the
16 purse. VRP at 155. Further, there is no evidence Mr. Saiti searched
17 through the purse. VRP generally. The State's claim if Mr. Saiti went into
18 the purse to retrieve the \$80.00 in cash from Lopez's wallet, he would
19 have further observed the firearm and extra magazine" (Brief of
20 Respondent at 12), is not only not evidence, it is not supported by the
21 evidence. This claim is nothing more than an attempt by the State to

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23 Appellant's Reply Brief

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1 include alleged facts that it failed to prove in court; it is mere speculation.

2 On appeal, the Court takes the State's evidence as true. However,
3 this does not mean the Court will cherry pick the facts, make up facts that
4 are not there, or infer facts not supported by the evidence. The State has
5 the burden of proving every element of its case beyond a reasonable
6 doubt. *State v. Strong*, 272 P.3d 281, 167 Wn.App. 206, 210 (Wash.App.
7 Div. 3 2012) citing *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25
8 L.Ed.2d 368 (1970). This includes the element of knowledge. *State v.*
9 *Anderson*, 141 Wn.2d 357, 359, 366 - 367, 5 P.3d 1247 (2000); *State v.*
10 *Coates*, 107 Wn.2d 882, 890, 735 P.2d 64 (1987). The State failed to do
11 this. As a result, Mr. Saiti is entitled to an acquittal on the unlawful
12 possession of a firearm charge.

13 2. *There is insufficient evidence to support the conviction for theft*
14 *of a Motor Vehicle.*

15 The State argues the "credibility and veracity of witnesses are best
16 determined by the fact finder." Brief of Respondent at 13. That "[w]here
17 there is no direct evidence of the actor's intended objective or purpose,
18 intent may be inferred from circumstantial evidence. *Id.* That "[a] jury
19 may infer criminal intent from a defendant's conduct. *Id.*, at 14. However,
20 such inferences must reasonable and based on the facts presented at trial.
21 See, *State v. Theroff*, 25 Wash.App. 590, 593, 608 P.2d 1254, aff'd, 95

1 Wash.2d 385, 622 P.2d 1240 (1980)." *State v. Salinas*, 119 Wn.2d 192,
2 201, 829 P.2d 1068 (1992). In this case, the State's evidence does not
3 support a conviction.

4 The insufficiency of evidence is especially clear in the Theft of a
5 Motor Vehicle charge. The State lists some facts in its brief it believes are
6 sufficient to find the defendant guilty. These are:

- 7 1. Saiti and Lopez argued over money. Brief of Respondent at 14.
- 8 2. Saiti persisted in requesting money and Lopez declined. *Id.*
- 9 3. Saiti asked to use the car and Lopez declined. *Id.*
- 10 4. Saiti asked to use her phone and Lopez declined. *Id.*
- 11 5. Saiti was seen leaving the restaurant with Lopez's purse. *Id.*
- 12 6. Lopez was upset and told a co-worker that Saiti stole the car.
Id.
- 13 7. Lopez testified that she did not give anyone, including Saiti,
14 permission to take her vehicle on December 20, 2015. *Id.*
- 15 8. Lopez was angry that Saiti had taken her car and was clear the
16 car was stolen. . *Id.*, at 15

17 Items 1, 2, and 4 are almost irrelevant to the Theft of a Motor Vehicle
18 charge. However, they do show Mr. Saiti was interested in something
19 other than the car.

20 Item 3, the claim Mr. Saiti asked to use the car is completely false
21 and unsupported by the evidence. A review of the trial transcripts in
22 general and the pages cited by the State (See Brief of Respondent, at 14)
23 give no indication the use of the car was discussed by Mr. Saiti and Ms.
24 Lopez. However, the following testimony does exist.

Q. You let Lendin borrow the car in the past?

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A. Yes.
Q. On the date that this all happened, you don't remember Lendin asking you for permission to use it?
A. No.
Q. But if he'd asked for permission, you would have said yes?
A. Yes.
Q. Because you knew he would return the car?
A. Yes.

VRP at 161. Ms. Lopez testified she did not discuss the car with Mr. Saiti.
VRP at 161. Ms. Lopez also testified Mr. Saiti used the car on a regular basis. VRP at 149 - 150. Ms. Lopez testified that had Mr. Saiti asked to take the car, she would have said "yes." VRP at 161. More importantly, Ms. Lopez testified she knew Mr. Saiti would return the car. VRP at 161. Item 7 is related to item 3 and the testimony because Ms. Lopez testified she did not give anyone permission. VRP at 74, 161, 176. The problem for the State is this testimony means absolutely nothing because there is no testimony that Mr. Saiti was required to ask for permission to use the car, not is Mr. Saiti told he could not use the car. See, VRP generally. However, there is ample testimony that Ms. Lopez and Mr. Saiti shared the use if the car and Mr. Saiti used it on a regular basis. VRP at 149 - 150. It is common and normal behavior for families and couples living together to share the use of vehicles without requiring either party to ask permission. For someone to be guilty of stealing the family car they have to, at a minimum, know they are not allowed to drive it. This is generally

1 done by telling the person they cannot take the car, and there is no
2 evidence this was ever communicated to Mr. Saiti. In fact, Ms. Lopez is
3 never even asked if she had told Mr. Saiti he could not drive the car, only
4 that she did not say he could take the car on December 20, 2015. By itself,
5 this amounts to insufficiency of the evidence on the vehicle theft charge.

6 The other items 5, 6, and 8 add little to the case. The fact Mr. Saiti
7 is seen leaving is not in dispute and has no bearing on the Theft of a Motor
8 Vehicle charge. The fact Ms. Lopez was angry is irrelevant except to the
9 extent it explains why she said the car was stolen.

10 To convict someone of theft, the State must prove the Defendant
11 *wrongfully* obtained or exerted *unauthorized* control over the property of
12 another, *with intent to deprive* him or her of such property. RCW
13 9A.56.065(a). To be guilty of Theft in the First Degree, as was charged in
14 this case, the property taken had to be a motor vehicle. RCW
15 9A.56.030(1)(a). In this case, the State did not prove "unauthorized
16 control." Mr. Saiti lived with Ms. Lopez and freely used the vehicle in the
17 past. There was no evidence presented by the State to show there was any
18 restriction on Mr. Saiti's use of the car, there was no evidence he was
19 required to ask permission to use the car, or any denial of such permission.
20 In a case such as this, where the parties cohabit and share the use of the
21 vehicle, the fact that Ms. Lopez did not tell Mr. Saiti he could take the car

1 means nothing because he was never told he could not take the car. The
2 failure to communicate a prohibition on the vehicle use is fatal to the
3 State's case. Further, the State failed to prove an "intent to deprive" Ms.
4 Lopez of the vehicle. While Washington law does not require the intent to
5 deprive permanently, the "intent to deprive" must of a "greater duration
6 than that required for taking a motor vehicle without permission." *State v.*
7 *Walker*, 75 Wn.App. 101, 107 - 108, 879 P.2d 957 (Div. 1 1994). The
8 State's evidence showed Mr. Saiti drove the car to different location a
9 relatively short distance away. VRP at 259. However, it also showed Mr.
10 Saiti would return with the car because he lived with Ms. Lopez. Further,
11 Ms. Lopez testified she knew Mr. Saiti would return the car. VRP at 161.
12 Under these facts, the State failed to prove its case beyond a reasonable
13 doubt and the evidence is insufficient to support a conviction. Mr. Saiti's
14 conviction for Theft of a Motor Vehicle should be overturned.

15 3. *There is insufficient evidence to the jury's verdict Saiti used his*
16 *position of trust*

17 In the current case, Mr. Saiti merely took Ms. Lopez purse without
18 her knowledge. VRP at 66. Mr. Saiti did not lie or decieve Ms. Lopez in
19 any way to gain access to the purse. He simply walked through the kitchen
20 without Ms. Lopez's knowledge, during business hours, and took the bag.
21 VRP at 66. The State argues it was Mr. Saiti's relationship that allowed

1 him to do this, because Ms. Leback "recognized Saiti as Lopez's
2 boyfriend" and because "Saiti was permitted to work matters out with
3 Lopez in the employee-only area while the manager, Leback, returned to
4 her office." Brief of Respondent at 16. However, there is no evidence Mr.
5 Saiti was talking with Ms. Lopez in an "employee-only area." VRP at 109
6 - 111. Further, there is no evidence either of these factors played a role.
7 Mr. Saiti left the restaurant after the discussion the State described and
8 returned later and took the purse without the knowledge of Ms. Lopez.
9 VRP at 66. Mr. Saiti was only seen after he left the building. VRP at 66.
10 This was something anyone could do. Essentially, the State is arguing that
11 Mr. Saiti violated a position of trust simply because he knew Ms. Lopez.

12 The only case the State cites for its position is *State v. Hyder*, 159
13 Wn.App. 234, 244 P.3d 454 (Div. 2 2011). *Hyder* was a case where the
14 defendant was convicted of molesting his daughter. *State v. Hyder*, at 240.
15 The defendant argued his status of father met both the incest element and
16 trust element of the aggravating factor, making them the same thing. *State*
17 *v. Hyder*, at 262. The Court in *Hyder* merely held the "aggravating factor
18 requires that he used his position of trust to facilitate the crime" and is,
19 therefore, not the same. *Id.* In other words, *Hyder* stands for the idea that
20 the aggravating factor requires something more than just committing the
21 charged crime; it requires some additional act that involves abusing a

1 position of trust, such as lying about the reason for taking the car. In this
2 case, there is no such act. As a result, the aggravating factor is
3 unsupported by the evidence.

4 *4. There is insufficient evidence to the jury's verdict Saiti Invaded*
5 *Lopez's Privacy*

6 The state only argues Mr. Saiti entered an "employee-only area"
7 Brief of Respondent, at 17. The State claims, without any supporting
8 evidence whatsoever, that Ms. Lopez put her purse in this area "that day to
9 keep these items away from Saiti who she feared would take them and
10 purchase heroin." *Id.* Even if this were true, it would be irrelevant to the
11 issue. The issue is whether Ms. Lopez's privacy was violated. However,
12 Ms. Lopez was not in the area, she was only upset that Mr. Saiti took her
13 purse. If the Court adopted the State's position that Mr. Saiti's conduct was
14 a criminal violation of privacy, then every act done without permission
15 would be an invasion of privacy. If this is sufficient evidence for an
16 invasion of privacy, then the State has been entirely relieved of its burden
17 to prove a violation.

18 *5. Confrontation clause.*

19 The State argues "[a] party who objects to the admission of
20 evidence on one ground at trial may not assert a different ground for
21 excluding that evidence on appeal." Brief of Respondent, at 19. However,
22

1 this does not apply to violations of the confrontation clause because it is a
2 constitutional right. *State v. Sublett*, 176 Wn.2d 58, 127, 292 P.3d 715
3 (2012).; U.S. Const. Amend. VI

4 The State asserts evidence relating to pressure placed upon Ms.
5 Lopez to testify in a certain way was inadmissible because it is "[e]xtrinsic
6 evidence of collateral matters may not be offered to impeach a witness."
7 Brief of Respondent, at 19. The State goes on to make a number of
8 irrelevant arguments that irrelevant collateral evidence is not admissible.
9 Brief of Respondent, at 19 - 20.³ The problem is Ms. Lopez's testimony
10 was not extrinsic, collateral, or irrelevant. Ms. Lopez's testimony occurred
11 during trial and integral to the State's case. VRP at 44 - 199. Ms. Lopez's
12 statement was made for the current case the day before trial, after her
13 arrest on a material witness warrant signed by the trial judge. VRP at 54 -
14 55; Record at 177. The objections, arguments, and threats of prosecution
15 all occurred on the record, in court, in front of the witness, during her
16 testimony. VRP at 52 - 62. All of this was directly relevant to why Ms.
17 Lopez might testify one way or the other. This information was relevant
18 because it went directly to the veracity of the witness in the current case.
19 The truthfulness of a witness is a relevant issue and it is a violation of the
20 confrontation clause to prevent a defendant from exploring the reasons

21 ³ The State cites a number of cases that all deal with matters unrelated to the current case.
22

1 why a witness might be less than truthful. *Delaware v. Van Arsdall*, 106
2 S.Ct. 1431, 475 U.S. 673, 679 (1986); *See also, Davis v. Alaska*, 415 U.S.
3 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974); *Olden v. Kentucky*,
4 109 S.Ct. 480, 488 U.S. 227, 102 L.Ed.2d 513 (1988) citing *Delaware v.*
5 *Van Arsdall*, 475 U.S. 673, 680 (1986). The State attempts to distract from
6 this by claiming that "[a]dmitting testimony regarding Lopez
7 understanding her obligation is not at the heart of whether Saiti unlawfully
8 took her vehicle." Brief of Respondent, at 22. This is an absurd argument;
9 it is the believability of the witness that, to a great extent, determines the
10 jury verdict. If a witness has been pressured to testify in a certain manner
11 and the Defendant is prohibited from inquiring about the pressure, it calls
12 into question any verdict that is obtained.

13 The State attempts to argue there was nothing wrong with what the
14 court did because the judge explained what perjury was when Ms. Lopez
15 said she did not know. and asks Lopez, "the court is not telling you to
16 testify in any certain way except expects you to tell the truth," that it was
17 not telling her to agree with the prosecutor, and she should not worry.
18 Brief of Respondent, at 22. However, the State made a motion earlier,
19 outside the presence of the jury, implying the perjury was involved. VRP
20 at 54 - 55. The Court then explained what perjury was because Ms. Lopez
21 did not understand what it was and explained that her prior statement was

1 covered by it. VRP at 56. The Court then told Ms. Lopez the State could
2 charge her with perjury (VRP at 56), and that it was a felony. VRP at 57.

3 Defense counsel then objected, stating he saw a

4 huge problem in the way that this conversation is going,
5 because now we've got a witness who has been told outside the
6 presence of the jury that if she continues to do what she's going
7 to do, she is going to potentially be charged with perjury.

8 VRP at 58. Despite the State's protestations to the contrary, this is exactly
9 what Ms. Lopez had been told. The trial court realized the problem and
10 then began trying to fix it by making the statements the State mentioned in
11 its brief but others as well. The trial court first tried to give Ms. Lopez an
12 out by saying that everything will be okay if she just cannot remember
13 because "[t]hat's not perjury. VRP at 59. The trial court tells Ms. Lopez:

14 You understand the Court is not telling you to agree with
15 what the prosecutor might want you to say? In other words,
16 you say what you know.

17 VRP at 60. The trial court then adds "the prosecutor can do whatever the
18 prosecutor thinks he needs to do to work around or handle whatever
19 statements you make." VRP at 60 -61. The Prosecutor then points that

20 [t]he State has an obligation to in some case to tell witnesses
21 the ramifications of testifying untruthfully. Not threatening
22 witnesses in order to change testimony. The State is concerned
23 that the testimony it heard yesterday is not the testimony it's
24 hearing today. The State is informing this witness of the
imperative nature that the truth must be testified to here,
whatever the truth is, not that she has to testify to what the
State wants to hear.

1 VRP at 61. Finally, the trial court tries to calm the witness by telling her,
2 "Don't even worry about it." VRP at 62. This would, of course, be
3 impossible at this point. Further, because these events created a real and
4 justified concern the witness's testimony is now tainted, the defense should
5 have been allow to bring the issue before the jury.

6 *6. The Appellant's California misdemeanor theft conviction is not*
7 *comparable to a Washington felony theft conviction*

8 The State claims "California's Grand Theft statute is comparable to
9 Washington's Second Degree Theft." Brief of Respondent, at 26. In
10 support of this claim the State says:

11 While California law provided that a person committed theft
12 by feloniously taking, Washington's "wrongfully obtain" is
13 the substantial equivalent. In addition, California courts have
held that theft "requires a specific intent permanently to
deprive the rightful owner of his property.

14 *Id.* The State cites *People v. Kunkin*, 107 Cal.Rptr. 184, 9 Cal.3d 245, 251,
15 507 P.2d 1392 (1973), however, this entire statement is a direct quote
16 from *State v. Tauscher*, 061213 WACA, 42423-1-II, one of two
17 unpublished cases cited later in the State's brief.⁴ *California v. Kunkin*
18 does not actually say what the State claims. *California v. Kunkin* does not
19 specifically deal with "grand theft," rather it states "It has been settled for
20 at least 78 years that theft by larceny requires a specific intent permanently

21 ⁴ The Appellant was only able to locate on of these cases, *State v. Tauscher*, 061213
22 WACA, 42423-1-II.

1 to deprive the rightful owner of his property." *People v. Kunkin*, 107
2 Cal.Rptr. 184, 9 Cal.3d 245, 251, 507 P.2d 1392 (1973). The intent to
3 deprive someone of their property applies to all levels of theft, not just
4 felonies. RCW 9A.56.020. Additionally, the State argues "California law
5 provided that a person committed theft by feloniously taking,
6 Washington's "wrongfully obtain" is the substantial equivalent." Brief of
7 Respondent, at 26. California law does not say this, which is why the State
8 provides no citation, but it goes without saying that one cannot commit
9 theft unless one "wrongfully obtain[s]" the item. However, this also
10 applies to all levels of theft. The State's arguments mean nothing.

11 The State also makes an argument based on the value of the stolen
12 property. Brief of Respondent, at 26. As in the section quoted above, the
13 entire argument is a direct quote from *Tauscher* rather than an argument
14 for the current case. *State v. Tauscher*, 061213 WACA, 42423-1-II.
15 *Tauscher* differs in a number of ways from the present case. Firstly;
16 Tauscher was convicted in California in 1995, 14 years before Mr. Saiti
17 plead to his theft charge in California. Second, Tauscher was convicted of
18 *Cal. Penal Code* § 487a (Grand theft; stealing, transporting, appropriating,
19 etc., carcass of animal) and the court was comparing that crime to a
20 Washington State statute that existed in 1995. This means that State is
21 arguing *State v. Tauscher*, not the current case.

22

1 In Washington, the court will compare the statutes to see if they
2 are comparable. RCW 9.94A.525(3). Because of the "wobbler" theft
3 statute used in California,⁵ a direct comparison cannot be made. Further,
4 the known facts from the California conviction support the contention the
5 case is only a misdemeanor in both California and Washington (\$200
6 restitution, maximum sentence less than a year, defined as a misdemeanor
7 by California). It is the State's burden to prove the foreign conviction is
8 comparable. *State v. Thomas*, 135 Wn.App. 474, 487, 144 P.3d 1178 (Div.
9 1 2006); RCW 9.94A.010. The State failed to do this. As a result, this
10 Court should find the California conviction does not count against Mr.
11 Saiti criminal history score.

12 CONCLUSION

13 The Court should find for Appellant as requested in his initial
14 brief.

15 **DATED** this 20 day of March, 2017.

16
17 
18 Eugene C. Austin, WSBA # 31129
Attorney for Defendant/Appellant

19
20
21 ⁵ See, *People v. Saucedo*, __ Cal.Rptr.3d __, 3 Cal.App.5th 635, 641 (2016); *Davis v. Municipal Court*, 249 Cal.Rptr. 300, 46 Cal.3d 64, 70, 757 P.2d 11 (1988), for description of "wobbler" statutes in California.

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DIVISION II

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STATE OF WASHINGTON

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4 **IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II**

5 STATE OF WASHINGTON

6 Plaintiff/Respondent,

7
8 vs.

9 LENDIN SAITI,

10 Defendant/Appellant.
11

Case No. 49178-8-II

Superior Court No. 15-1-00228-5

CERTIFICATE OF SERVICE

12
13 I certify under penalty of perjury under the laws of the State of
14 Washington that a true and correct copy of the **APPELLANT'S REPLY**
15 **BRIEF** in the above entitled case was sent, via

16 Emailed to:

17 Mark D McClain
18 Pacific County Prosecutor's Office
19 PO Box 45
20 South Bend, WA 98586-0045
21 mmclain@co.pacific.wa.us
22 (360) 875-9361 EXT 8

23 U.S.P.S. First Class mail to:

24 Certificate of Service
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DATED this 20th day of March, 2017.


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