

NO. 50137-6-II

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

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STATE OF WASHINGTON, Respondent

v.

OLEG DENIS KORNUA, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02270-7

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BRIEF OF RESPONDENT

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**RESPONSE TO ASSIGNMENTS OF ERROR**

- I. The information properly apprised Kornuta of the charges against him and the State proved every element in the to-convict beyond a reasonable doubt.**
- II. The instructions to the jury were proper.**

**STATEMENT OF THE CASE**

The State charged Oleg Kornuta (hereafter 'Kornuta') with Possession of a Stolen Motor Vehicle in violation of RCW 9A.56.068. CP

6. The information stated:

That he, Oleg Denis Kornuta, in the County of Clark, State of Washington, on or about October 29, 2016, did knowingly receive, retain, possess, conceal, or dispose of a stolen motor vehicle, to-wit: a 1992 Honda bearing Washington License ADM6700 belonging to Keith Meisner, knowing that this property had been stolen, and did withhold or appropriate this property to the use of a person other than the true owner or person entitled thereto, contrary to Revised Code of Washington 9A.56.068.

CP 6. At trial, the State presented testimony from the owner of the vehicle, Keith Meisner, and two police officers involved in the case.

Mr. Meisner testified that he owns a white 1992 Honda Accord. RP 92. He lived in Battle Ground, Clark County, Washington. RP 92. On October 29, 2016, at about 9am, Mr. Meisner noticed that his car, which had been parked outside the front of his house, was missing. RP 93. It had started raining within the ten minutes prior to Mr. Meisner noticing his car

was missing, and he saw a dry spot where his car had been, so he believed the car had been taken very shortly prior to him noticing it was missing.

RP 93. At first, Mr. Meisner speculated his car may have rolled down the hill, but looked down the hill and did not see his car. RP 95. Mr. Meisner then called the police to report his vehicle had been stolen. RP 95. No one else had permission to drive his car except his wife, who did not have the car at the time. RP 96.

Mr. Meisner noticed a file lying on the ground where the driver's door to the vehicle would have been when the car was parked outside his house. RP 96. The file Mr. Meisner found on the ground was admitted at trial as exhibit 18. RP 98.

Joshua Phelps is a police officer for the City of Battle Ground. RP 22. On October 29, 2016, Officer Phelps responded to Mr. Meisner's call that his car had been stolen. RP 24-25. Officer Phelps went out to Mr. Meisner's residence and observed the street from where the car had been taken. RP 26-27. There were dry spots on the pavement where the vehicle had been parked showing something had been parked over the top to prevent the rain from getting the pavement wet. RP 28. As Officer Phelps left Mr. Meisner's residence, heading back to the station, he put the vehicle description out over the radio to the other officers who were working in the area. RP 30. Another officer responded nearly immediately

confirming the vehicle description and indicating he had found it. RP 31. Officer Phelps then responded to the area where the vehicle was found. RP 31.

Sergeant Tim Wilson of the Battle Ground Police Department was working on October 29, 2016 in the morning when he heard a description of a stolen vehicle come out over the radio. RP 67-68. Sgt. Wilson was on patrol and he randomly came across the vehicle. RP 69. After confirming the description and license plate number, Sgt. Wilson approached the vehicle. RP 69. The vehicle was parked in a parking spot and Sgt. Wilson positioned his vehicle behind the car so that it could not leave the parking spot. RP 70. At first, Sgt. Wilson could not see anyone inside the vehicle, but as he approached the vehicle he saw a head pop up in the driver's seat. RP 70. The person inside the vehicle was bent down toward the steering column, sitting in the driver's seat. RP 71. The person had a tool in his hand and appeared to be doing something to the steering column which was exposed. RP 71. Sgt. Wilson announced himself and instructed the man in the car to show his hands. RP 71. The man put his right hand underneath his right leg so Sgt. Wilson again ordered him to put his hands where they could be seen. RP 71. When the man lifted his hands to show Sgt. Wilson, the car started to roll backwards. RP 72. Sgt. Wilson ordered him to pull the brake, which the man did. RP 72. Sgt. Wilson then told the

man to open the door, but at first the man refused to comply. RP 72. The door was locked so Sgt. Wilson could not gain entry. RP 72. Eventually, the man unlocked the door and Sgt. Wilson took him into custody. RP 73. Sgt. Wilson identified this man in court as Kornuta.

Sgt. Wilson observed that the steering column plastic had been removed; it was in the car still, but was not attached to the steering column. RP 76. There was a wire with a white piece of plastic coming out that appeared to be the ignition. RP 76. The metal mechanisms of the steering column were exposed. RP 76.

When Officer Phelps arrived at the scene, he observed Kornuta being taken into custody by the other officers. RP 32. He saw the white Honda accord had a lot of damage to the steering column, and there were a lot of tools lying on the floorboards of the vehicle. RP 33. Mr. Meisner came to look at the tools that were lying mostly on the driver's side floorboard and indicated they were not his. RP 40. Officer Phelps testified that the flat ends of the spoons could have been used to start a punched ignition. RP 43.

About 40 minutes after he reported his car stolen, Mr. Meisner received a call from the police department indicating that his car had been located at the community center in Battle Ground. RP 99-100. Mr. Meisner went to the community center and found his car parked there. RP

100. There were items inside the vehicle that did not belong to Mr. Meisner including some make-shift tools, some files, a spoon without a handle, a blue sweatshirt, and other tools. RP 101. Mr. Meisner also noticed damage to the steering column that had not been there before. RP 103. Mr. Meisner could not start the vehicle after it was recovered, but he later learned that it would have started with a screw driver. RP 194.

The jury found Kornuta guilty of Possession of a Stolen Motor Vehicle. CP 36. The court sentenced Kornuta to a standard range sentence. CP 236-51. This appeal timely follows.

#### ARGUMENT

**I. The information properly apprised Kornuta of the charges against him and the State proved every element in the to-convict beyond a reasonable doubt.**

Kornuta argues he was denied due process because the information charging him with Possession of a Stolen Motor Vehicle included additional language that he withheld or appropriated the vehicle from its true owner when the State did not need to include such language. Kornuta's argument is essentially that the State over-burdened itself by adding an additional element to the information and including that additional element in the to-convict instruction. Including definitional language in the information does not violate Kornuta's right to due

process and the State proved all the elements of the crime as contained in the to-convict instruction. Kornuta's claim fails.

The information is meant to "apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). The information must be a "plain, concise and definite written statement of the essential facts constituting the offense charged." CrR 2.1(a)(1). Kornuta was charged with possession of a stolen motor vehicle in violation of RCW 9A.56.068. That statute states that "a person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle." RCW 9A.56.068(1). In *State v. Satterthwaite*, 186 Wn.App. 359, 344 P.3d 738 (2015), this Court found that the definition of "possessing stolen property" was an essential element of the crime of possession of a stolen motor vehicle and should be included in the information. *Satterthwaite*, 186 Wn.App. at 365. However, that holding was reversed by *State v. Porter*, 186 Wn.2d 85, 375 P.3d 664 (2016). There, the Supreme Court found that the definition of possessing stolen property was a definitional element of possession of a stolen motor vehicle and not an essential element that had to be included in the information. *Porter*, 186 Wn.2d at 92. However, there is no discussion in the opinion that had the State included this

additional language in the information that it would have been constitutionally deficient.

In fact, Kornuta cites no authority to support his argument that when the State includes a definitional element of a crime that is not an essential element of the crime in the information (essentially, over-sharing with the defendant what it alleges the defendant did) that this is a violation of the defendant's constitutional rights. In fact, this argument defies logic. The purpose of an Information is to put the defendant on notice of the crimes the State alleges the defendant committed. By including additional information about the crime the State alleged Kornuta committed, the most the State did was put Kornuta on high alert about the allegations. Including definitional elements in an Information in no way prejudices Kornuta or deprives him of the right to present a defense or in any other way violates due process. Kornuta's claim is without any merit or legal support.

Kornuta also alleges the State failed to present sufficient evidence of the elements of the crime found in the to-convict. In reviewing a claim of insufficient evidence, this Court considers the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the State's evidence. *State v. Pacheco*, 70 Wn.App. 27, 38-39, 851 P.2d

734 (1993), *rev'd on other grounds*, 125 Wn.2d 150, 882 P.2d 183 (1994). All reasonable inferences from the evidence must be drawn in favor of the State. *Salinas*, 119 Wn.2d at 201. This Court also defers to the jury's resolution of conflicting testimony, evaluation of the credibility of witnesses, and its view on the persuasiveness of the evidence. *State v. Lubers*, 81 Wn.App. 614, 619, 915 P.2d 1157 (1996). This Court should affirm the convictions if any rational trier of fact could have found the essential elements of the crime. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence is as probative and reliable as direct evidence, and the State may rely upon both in presenting its case. *State v. Kroll*, 87 Wn.2d 829, 842, 558 P.2d 173 (1976); *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880 (1991); *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977).

The to-convict instruction in Kornuta's case stated the elements as:

- 1) That on or about October 29, 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;
- 4) That any of these acts occurred in the State of Washington.

CP 32. The State proved every element in this case beyond a reasonable doubt.

The State proved the car was stolen. The owner of the vehicle, Keith Meisner, testified that his vehicle “disappeared” from outside the front of his house. RP 93. Mr. Meisner believes he noticed his vehicle was missing within 10 minutes of it being taken as there was a dry spot on the street where his car had been parked and it had only been raining for about 10 minutes. RP 93-94. Mr. Meisner looked to see if his car had rolled down the hill, but when he found it had not he called police to report his car had been stolen. RP 95. No one other than Mr. Meisner’s wife had permission to drive the car. RP 96. This evidence clearly establishes the vehicle was stolen.

The State proved that Kornuta was in possession of the vehicle. Possession can be actual or constructive. “Actual possession means that the goods are in the personal custody of the person charged with possession.” *State v. Plank*, 46 Wn.App. 728, 731, 731 P.2d 1170 (1987) (quoting *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)). “Constructive possession is established by examining the totality of the situation and determining if there is substantial evidence” tending to establish circumstances “from which a jury can reasonably infer the defendant had dominion and control over the item.” *State v. Jeffrey*, 77 Wn.App. 222, 227, 889 P.2d 956 (1995). Dominion and control does not need to be exclusive to establish constructive possession. *See e.g., State v.*

*George*, 146 Wn.App. 906, 920, 193 P.3d 693 (2008); *State v. Turner*, 103 Wn.App. 515, 521-22, 13 P.3d 234 (2000); *State v. Mathews*, 4 Wn.App. 653, 656-58, 484 P.2d 942 (1971). The evidence showed that Kornuta was sitting in the driver's seat of the vehicle in a parking lot. He was the only person around or inside the vehicle when police found him. He was bent down toward the steering column, sitting in the driver's seat, with a tool in his hand and appeared to be doing something to the exposed steering column, and he was inside the car with the door locked. RP 70-73. Kornuta was clearly in actual possession of the vehicle. He was sitting in it. No one else was in or around the vehicle. Under either an actual possession or constructive possession analysis, it is clear from the evidence that a reasonable juror could find that Kornuta possessed the vehicle.

Kornuta also withheld or appropriated the vehicle to the use of someone other than the owner. The vehicle was taken without the owner's permission. The owner did not know where his vehicle was or who had taken it. The owner was unable to use the car during the time that Kornuta possessed it. By possessing it in a parking lot, away from the true owner, he withheld the vehicle from the true owner and he appropriated its use to himself. The State clearly proved this element.

The State also proved that Kornuta knew the vehicle was stolen. Possession of recently stolen property, coupled with “slight corroborative evidence,” is sufficient to prove knowledge. *State v. Womble*, 93 Wn.App. 599, 604, 969 P.2d 1097, *rev. denied*, 138 Wn.2d 1009 (1999). The jury may infer knowledge if “a reasonable person would have knowledge under similar circumstances.” *Id.* (citing *State v. Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980)). The ignition was punched – the outside plastic shell of the steering column had been removed and things were hanging down from the steering column. RP 71. Kornuta had a tool of some sort in his hand, that the officer believed to be a screwdriver, and appeared to be doing something to the exposed steering column. RP 71, 75. After Kornuta was removed from the vehicle, officers noticed there was a lot of damage to the steering column and there were a lot of tools lying on the floorboards of the vehicle, including long metal pieces that did not belong to the owner of the car. RP 33-38. This evidence shows Kornuta knew the vehicle was stolen. There was a very short time frame from when the vehicle went missing to when police found Kornuta inside of it. That, coupled with the punched ignition and Kornuta’s use of a tool to “do something” to the steering column is more than “slight corroborative evidence” and does prove knowledge that the vehicle was stolen. *See State v. L.A.*, 82 Wn.App. 275, 276, 918 P.2d 173 (1996).

The State proved every element of the crime contained in the information and the to-convict beyond a reasonable doubt. The evidence was sufficient to support Kornuta's conviction. His conviction should be affirmed.

## **II. The instructions to the jury were proper.**

Kornuta argues the trial court erred in giving a to-convict instruction that incorporated the broader definition of possessing stolen property in RCW 9A.56.140(1), and that this allowed the jury to convict Kornuta even though the State did not prove Kornuta possessed the vehicle or knew that it was stolen. This argument is without merit.

RCW 9A.56.068(1) states that a person is guilty of possession of a stolen vehicle if he or she "[possesses] a stolen motor vehicle." The statute does not further define the phrase. However, RCW 9A.56.140(1) states that "[p]ossessing 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." The to-convict instruction in Kornuta's case stated the elements as:

- 1) That on or about October 29, 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;
- 4) That any of these acts occurred in the State of Washington.

CP 32. The court also instructed the jury that “[p]ossessing a stolen motor vehicle means knowingly to receive, retain, possess, conceal, or dispose of a stolen motor vehicle 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.” CP 31.

Kornuta argues that RCW 9A.56.140(1) defining possession of stolen property does not apply to possession of a stolen motor vehicle under RCW 9A.56.068. However, as this Court noted in its recent unpublished case of *State v. Hernandez*, 198 Wn.App. 1019 (2017)<sup>1</sup>, the holding in *Satterthwaite* that found RCW 9A.56.140(1) applies to RCW 9A.56.068 is still good law. *Hernandez*, 198 Wn.App. 1019, slip. Op. at 3 (discussing *State v. Satterthwaite*, 186 Wn.App. 359, 344 P.3d 738 (2015)). In *Satterthwaite*, this Court held that RCW 9A.56.068 “implicitly incorporates RCW 9A.56.140(1)’s terms because the terms apply to other possession of stolen property offenses in the same chapter.” *Satterthwaite*, 186 Wn.App. at 364. The Supreme Court’s opinion in *State v. Porter*, 186

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<sup>1</sup> GR 14.1 allows for citation to unpublished opinions of the Court of Appeals issued on or after March 1, 2013. These opinions have no precedential value and are not binding upon any court.

Wn.2d 85, 375 P.3d 664 (2016) did not disapprove of the holding in *Satterthwaite* that RCW 9A.56.068 incorporates the definition of possessing stolen property in RCW 9A.56.140(1). *Porter*, 186 Wn.2d at 92. That portion of the *Satterthwaite* holding remains untouched.

The trial court's instructions to the jury properly informed the jury of the applicable law. The instructions were proper and Kornuta's conviction should be affirmed.

#### CONCLUSION

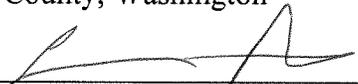
Kornuta has failed to show any error below. His conviction should be affirmed.

DATED this 28<sup>th</sup> day of September, 2017.

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