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Court of Appeals
Division II
State of Washington
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NO. 52219-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS J. MURPHY,
Appellant.

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

The Honorable James J. Stonier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state presented insufficient evidence that Mr. Murphy knowingly possessed the stolen Honda because the state only proved that Mr. Murphy was in possession of a vehicle that had recently been stolen and that alone is insufficient to prove he acted with knowledge.

2. Mr. Murphy's waiver of appeal is invalid because he did not waive his constitutional right to an appeal knowingly, intelligently, and voluntarily and with a full understanding of the consequences of his waiver.

Issues Presented on Appeal

1. Did the state present sufficient evidence to prove beyond a reasonable doubt that Mr. Murphy knowingly possessed the Honda that had been stolen when the state only proved Mr. Murphy was stopped while in possession of a vehicle that had recently been stolen and this alone is insufficient to prove he had knowledge it was stolen?

2. Is Mr. Murphy's waiver of appeal valid when the written waiver he signed does not inform him of crucial details regarding the right to appeal and the trial court did not

inform him of these details during its colloquy at Mr. Murphy's sentencing?

B. STATEMENT OF THE CASE

Substantive Facts

On March 11, 2018, Justin Jester was working at Christian Brothers Towing and Recovery in Longview, Washington. RP 74. The owner of Christian Brothers, Jerry Marston, had recently purchased a black Chevy S10 pickup truck and a brown Honda Accord at an auction. RP 52-53. On March 11, 2018, both of these vehicles were parked on a public street outside of Christian Brothers with the batteries removed. RP 59, 77. The batteries had been removed because a large number of people were staying in trailers on a neighboring property and Mr. Marston had been experiencing an increase in theft since they had moved in. RP 58-59, 76-78.

Mr. Jester returned from a tow at around 7:00 pm and was filling out paperwork when he heard someone start the Chevy S10 that was parked on the street. RP 78. He ran out of the office and saw an unidentified male driving the truck away. RP 80. He described the suspect as a white male with a shaved head, goatee,

and a large tattoo on his neck. RP 81-82. Mr. Jester also noticed a Honda Accord that had been parked near the truck was missing. RP 84. He called 911 and reported both vehicles as stolen. RP 83.

Officers from the Longview Police Department responded to the scene and issued a notice for other officers to be on the lookout for both vehicles while on patrol. RP 66-67. Officer Gary Bishop was working the graveyard shift on March 11, 2018 and had been briefed on a description of both the Chevy truck and Honda Accord before beginning his shift. RP 138. At about 10:52 pm, he noticed a vehicle matching the Honda's description driving in front of him. RP 139. Officer Bishop followed the Honda and confirmed it was the stolen vehicle using the license plate number. RP 140-41.

The driver pulled the Honda to the side of the road and parked before Officer Bishop had activated his lights or sirens. RP 141-42. The driver began to exit the vehicle, causing Officer Bishop to draw his firearm and hold the driver at gunpoint until backup arrived. RP 144. The driver was arrested and identified as Thomas Murphy. RP 145. Mr. Murphy was cooperative with the officers and appeared to be confused about what was happening. RP 146. The officers noticed that the car was running but no key was in the

ignition and that the Chevy truck that had also been reported stolen was parked in front of where Mr. Murphy had pulled over. RP 146-47.

Mr. Murphy informed the officers at the scene that he had purchased both vehicles from two people earlier in the day because he and his friend regularly buy and sell cars to make a profit. RP 149. He was not able to provide documentation for the sale at the time he was contacted and explained this was because his friend was the one who formalized the purchases. RP 153. He only knew one of the people who sold them the vehicles and identified that person as Anthony Pastorino. RP 157.

Mr. Jester arrived at the scene and informed the officers that he believed Mr. Murphy was the same person who he had seen driving the Chevy away from Christian Brother Towing earlier in the day. RP 161. Mr. Jester and Mr. Marston recovered both vehicles. RP 160. Mr. Jester later identified Mr. Murphy at trial and noted his neck tattoo as a reason why he was able to identify him. RP 81-83.

Before trial, a defense investigator compiled a photo montage to show to Mr. Jester a few days before trial to see if he would pick Mr. Murphy out of the lineup. RP 297. When Mr. Jester

met with the investigator, he picked out a photo of someone other than Mr. Murphy. RP 310-12.

The court allowed the defense to introduce the photo montage even though it improperly contained two photos of the same person. RP 223-26, 230, 310-13.

The state charged Mr. Murphy with one count of theft of a motor vehicle for allegedly stealing the Chevy truck from Christian Brothers Towing and one count of possession of a stolen vehicle based on him being stopped in the Honda. CP 16-17.

Mr. Murphy moved for dismissal of the charges against him at the close of the state's case-in-chief based on sufficiency of the evidence. RP 252-53. The trial court denied the motion as to both counts. RP 253. The jury acquitted Mr. Murphy of stealing the Chevy in count one but found him guilty of possessing the Honda in count two. RP 253. At sentencing, Mr. Murphy agreed to waive his right to appeal in exchange for a low-end standard range sentence. CP 85-86; RP 447-50. The trial court followed the recommendation of the parties and imposed a 43-month sentence RP 449. Mr. Murphy filed a timely notice of appeal. CP 103-04.

C. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE THAT MR. MURPHY KNOWLINGLY POSSESSED THE HONDA

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime beyond a reasonable doubt. *State v. Phuong,* 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia,* 433 U.S. 307, 317-18, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine "whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *State v. Homan,* 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

The relevant elements of possession of a stolen vehicle are that the defendant knowingly possessed a stolen motor vehicle. RCW 9A.56.068(1). In the case of Mr. Murphy, the state failed to present sufficient evidence to prove he possessed the Honda.

To prove Mr. Murphy had knowledge the Honda was stolen, the state relied on establishing that Mr. Murphy stole the Chevy that was initially parked next to the Honda. However, the jury acquitted

Mr. Murphy of the theft of the Chevy, thus the record contains insufficient evidence that Mr. Murphy was associated with the Chevy.

Considering this problem, the fact that the Chevy and Honda were in proximity to each other at some point, the fact that Mr. Murphy was found driving the Honda is insufficient to prove he knew that it was stolen, with or without the presence of the Chevy. *State v. Womble,* 93 Wn. App. 599, 604, 969 P.2d 1097 (1999) (citing *State v. Couet,* 71 Wn.2d 773, 775, 430 P.2d 974 (1967)) (holding that "mere possession of recently stolen property" is insufficient to prove the possessor had knowledge it was stolen). This fact must be corroborated by other evidence to prove the defendant acted knowingly. *Couet,* 71 Wn.2d at 775.

Courts have held that lacking an explanation for being in someone else's vehicle, flight, and damage consistent with theft are sufficient corroborative evidence to prove knowledge once it is established that the vehicle was taken without the owner's consent. *State v. Terry,* 181 Wn. App. 880, 896, 328 P.3d 932 (2014) (citing *Womble,* 93 Wn. App. at 604).

The fact that Mr. Murphy was found in possession of the

Honda is insufficient on its own to prove he acted with knowledge it was stolen. The record contains testimony suggesting Mr. Murphy purchased the Honda from another person, which would explain his possession without knowing it had been stolen. RP 149. He also did not flee when Officer Bishop stopped him. RP 146. The record does not contain any evidence of theft-related damage. The ignition in both vehicles had been pulled out but Mr. Jester admitted this was done before they were taken from Christian Brothers Towing. RP 240.

The state presented insufficient evidence to prove every element of possession of a stolen vehicle. The remedy when an appellate court reverses for insufficient evidence is dismissal of the charge. *State v. Hickman,* 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing *State v. Hardesty,* 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). This court should reverse Mr. Murphy's conviction for possession of a stolen vehicle and dismiss the charge with prejudice.

2. MR. MURPHY'S WAIVER OF HIS RIGHT TO APPEAL WAS INVALID AS IT WAS NOT MADE INTELLIGENTLY, VOLUNTARILY, AND WITH AN UNDERSTANDING OF THE CONSEQUENCES

The Washington State Constitution guarantees criminal defendants the right to appeal "in all cases." Wash. Const. art. I, § 22. "A criminal defendant may waive his or her constitutional right to appeal, but the waiver is valid only if made intelligently, voluntarily, and with an understanding of the consequences." *State v. Smith,* 134 Wn.2d 849, 852, 953 P.2d 810 (1998) (citing *State v. Perkins,* 108 Wn.2d 212, 218, 737 P.2d 250 (1987)). To show understanding, the State must prove that the defendant understood both his right to appeal and the effect of a waiver. *State v. Neff,* 163 Wn.2d 453, 459, 181 P.3d 819 (2008) (citing *State v. Kells,* 134 Wn.2d 309, 314, 949 P.2d 818 (1998)). The state bears the burden of showing a valid waiver of the right to appeal. *Smith,* 134 Wn.2d at 852.

The fact that the defendant signed a waiver statement creates a presumption that the waiver is valid, but it is not conclusive. *Neff,* 163 Wn.2d at 459 (citing *Smith,* 134 Wn.2d at 852). A waiver may still be declared invalid if the defendant signed

a written statement and the record reflects that the defendant did not sign that statement with a full understanding of the consequences. *Smith,* 134 Wn.2d at 853-54. Mr. Murphy claimed he understood the consequences of waiving his right to appeal and signed a written statement to that effect, but the record shows that he did not make his waiver with a full understanding of his appeal rights and the consequences of waiving them in accord with *Perkins. Perkins,* 108 Wn.2d at 218.

Mr. Murphy signed a written waiver of appeal at his sentencing hearing. CP 85-86. He agreed to waive his right to appeal in exchange for the state recommending a sentence at the low end of the standard range instead of seeking an exceptional sentence upward. RP 447. The trial court held a brief colloquy with Mr. Murphy where he indicated he had signed the written waiver and simply stated that he understood it after consulting with counsel. RP 450-51. The written waiver simply states that Mr. Murphy is aware he has the right to appeal and is waiving it in order to receive a specific sentencing recommendation. CP 85. The trial court's colloquy simply reviewed the waiver without any discussion of Mr. Murphy's right to appointed counsel on appeal at public

expense:

> [TRIAL COURT]: All right. One more thing, one or two. Is this your signature on the waiver of your right to appeal?
>
> [MR. MURPHY]: Yes, sir.
>
> [TRIAL COURT]: And do you feel you understand it?
>
> [MR. MURPHY]: Yes, sir.
>
> [TRIAL COURT]: And are you giving up your right to appeal voluntarily?
>
> [MR. MURPHY]: Yes, sir.
>
> [TRIAL COURT]: And you consulted with your attorney on this; is that right?
>
> [MR. MURPHY]: Yes, sir.

RP 450-51.

In previous cases involving a waiver of the right to appeal, courts have required a greater showing that the defendant understood the consequences of waiving their appellate rights than is present in the record of Mr. Murphy's case. In *Perkins,* the court upheld the defendant's waiver, but did so because the trial court took care to discuss the details of the defendant's waiver on the record. *Perkins,* 108 Wn.2d at 218-19. In *Perkins,* the trial court discussed that the defendant had the right to appeal and the procedure for invoking that right. *Perkins,* 108 Wn.2d at 219. It also

informed the defendant that he had the right to court-appointed counsel on appeal and that the appeal could be heard at the public's expense. *Perkins,* 108 Wn.2d at 219. The state Supreme Court specifically cited this portion of the record as necessary to its holding and attached the transcript of it as an appendix to its decision upholding the waiver. *Perkins,* 108 Wn.2d at 219-220. These critical points are absent from the record of Mr. Murphy's case.

Neither the trial court nor the written waiver Mr. Murphy signed at sentencing discussed the consequences of his decision in any detail. The written waiver simply states that Mr. Murphy is aware he has the right to appeal and is waiving it in order to receive a specific sentencing recommendation. CP 85. The trial court's colloquy at sentencing consisted of a restatement of this written waiver on the record but did not discuss any of the details of the right to appeal or ensure Mr. Murphy had a full understanding of what he was waiving. RP 450-51. Critical details such as Mr. Murphy's right to appointed appellate counsel, the right for the appeal to be heard at public expense, and the procedure for invoking the right to appeal are not mentioned anywhere in the

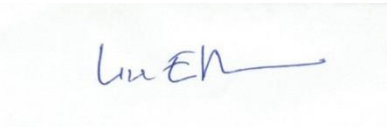
written waiver Mr. Murphy signed or in the transcript of his sentencing. CP 85-86; RP 450. This record is insufficient to show that Mr. Murphy waived his right to appeal knowingly, intelligently, and voluntarily and with a full understanding of the consequences. Thus, the waiver is invalid and should not preclude review of Mr. Murphy's case.

D. CONCLUSION

Mr. Murphy's waiver of appeal is invalid because the record does not demonstrate that he waived his right to appeal knowingly, intelligently, and voluntarily and with a full understanding of the consequences. Should the court find his waiver to be invalid, the court should reverse his conviction for two reasons. First, Mr. Murphy received ineffective assistance of counsel in violation of his Sixth Amendment rights. Second, the state failed to present sufficient evidence to prove beyond a reasonable doubt that Mr. Murphy acted with knowledge the vehicle he was possessing had been stolen. This court should reverse his conviction and dismiss the charge of possession of a stolen vehicle. In the alternative, this court should reverse his conviction and remand for a new trial where Mr. Murphy will receive effective assistance of counsel.

DATED this 19th day of February 2019.

Respectfully submitted,



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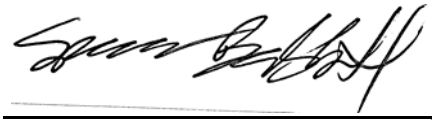

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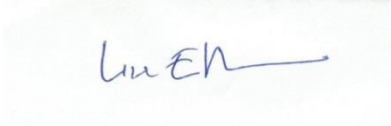

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