

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34624-2-III

STATE OF WASHINGTON, Respondent,

v.

TERI LOUISE TROWER, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. Trower's temporary proximity to the stolen vehicle two days after it was stolen is insufficient to establish either that she had dominion and control over it, or that she was causally responsible for its permanent loss.

In arguing that Trower possessed the stolen truck that was towed by another vehicle in which she was a passenger, the State overlooks that Washington courts have routinely held that the driver has dominion and control over the vehicle. *See State v. Turner*, 103 Wn. App. 515, 524, 13 P.3d 234 (2000); *State v. Plank*, 46 Wn. App. 728, 733, 731 P.2d 1170 (1987). Instead, the State relies upon *State v. Mathews*, 4 Wn. App. 653, 484 P.2d 942 (1971), a drug possession case that is distinguishable on the facts. *Respondent's Brief*, at 7-9.

In *Mathews*, the defendant admitted buying and shooting heroin earlier in the day. 4 Wn. App. at 655. Police later found a balloon with heroin under the carpet near the seat in which he was sitting, as well as a paper bag containing syringes and known heroin adulterants in an empty area beneath his seat. *Id.* at 655-56. On his person, the defendant had a nylon stocking that was commonly used to tie off a heroin user's arm prior to injecting the drug. *Id.* at 657. The *Mathews* court concluded that these facts presented sufficient circumstantial evidence linking the defendant

with the heroin to raise a jury question as to whether he constructively possessed it. *Id.* at 658.

Similarly, when the defendant was seen removing things from his pockets and had two syringes in his seat, the evidence was sufficient to find that he constructively possessed drugs found under his seat. *State v. Potts*, 93 Wn. App. 82, 88, 969 P.2d 494 (1998).

The facts in the present case fall far short of raising the circumstantial inferences that were present in *Mathews* and *Potts* and highlights the differences between establishing possessing of small, highly portable items and a large item like a towed vehicle. A person can exercise dominion and control over a baggie of drugs in their close proximity by simply picking them up. It is less than evident how Trower could have exercised dominion and control over the towed vehicle when she was not driving the truck that was towing it, and therefore was unable to control where the truck was being taken.

The State further suggests that Trower possessed the towed vehicle because she was the registered owner of the trailer with which it was being towed. *Respondent's Brief*, at 9. But the trailer was a passive instrument that only served to allow the truck, which was driven by somebody else, to pull the stolen vehicle to the destination chosen by the driver. By analogy,

if one person loans a suitcase to another, and the borrower uses the suitcase to transport illegal items, ownership of the suitcase does not render the owner complicit in the borrower's illegal activity or take control of the secreted contraband.

Simply put, the State's evidence in this case fails to establish any time or manner in which Trower, as a passenger, could have taken actual control of the towed vehicle. The trailer on which the stolen vehicle sat functioned as nothing more than an extension of the truck, which it is undisputed that Trower did not control. For these reasons, the case is far more analogous to *Plank*, which the State does not address at all in its brief, than to cases involving possession of small, easily hidden packages of narcotics found inside passenger compartments.

Similarly, as to the restitution order, the State seeks to distinguish *State v. Acevedo*, 159 Wn. App. 221, 249 P.3d 526 (2001), by arguing that Trower's proximity to the stolen vehicle within two days after it was taken from the Chandler's driveway was the cause of its permanent loss. *Respondent's Brief*, at 12-16. In *Acevedo*, this court observed that loss or damage occurring before the act constituting the crime is not caused by the crime. 159 Wn. App. at 230 (citing *State v. Woods*, 90 Wn. App. 904, 909, 953 P.2d 834 (1998)).

Under this principle, Trower is not responsible for the initial theft of the vehicle, or changes to the condition of the truck between the initial taking and the time of her possession, because the acts in which she was involved occurred after the truck was already taken. The State therefore seeks to argue that Trower disposed of the stolen truck at a different location and prevented police from recovering it. *Respondent's Brief*, at 15-16. But even if Trower knowingly possessed the stolen truck on April 14, 2016, when she was a passenger inside the truck that was towing it, her possession of the truck on that date did not deprive the Chandlers of the truck except as to that date. Had Trower been convicted of **stealing** the truck, which would require proof that she wrongfully exerted unauthorized control over the truck with the intent to deprive the true owner of it, the fact that the truck was not recovered could be causally attributed to her having stolen it. RCW 9A.56.020, 9A.56.065. Similarly, had she been convicted of **trafficking** the stolen truck, which would require proof that she knowingly or recklessly disposed of the stolen truck to another or possessed it with intent to dispose of it to another, she would be causally responsible for disposing the truck where it could not be recovered. RCW 9A.82.010(19), 9A.82.050, 9A.82.055. But the State never charged nor proved that Trower's control over the truck reached this level.

The State also attempts to distinguish *State v. Griffith*, 164 Wn.2d 960, 195 P.3d 506 (2008), by arguing incorrectly that Trower possessed the vehicle “in the same condition it had been when it was stolen from the Chandlers.” *Respondent’s Brief*, at 15. Contrary to the State’s contention, Connor Chandler testified that the truck had a rollbar and lights that were removed in photos taken of the truck on Trower’s trailer by store surveillance video. RP 54, 56, RP 161-62. Thus, the record does not support the State’s contention that Trower possessed the vehicle in the same condition it was in when it was stolen from the Chandlers.

But most significantly, the State misstates the standard for restitution by arguing there was a “causal connection between the conduct of Ms. Trower and the loss which was suffered by the victims.” *Respondent’s Brief*, at 15. Ms. Trower’s conduct is not at issue; the standard is whether, but for the **charged crime**, the loss would have occurred. *Griffith*, 164 Wn.2d at 966 (citing *State v. Tobin*, 161 Wn.2d 514, 524, 166 P.3d 1167 (2007)) (emphasis added). In evaluating whether a causal connection exists, the court considers “the underlying facts of the charged offense.” *Id.* (quoting *State v. Landrum*, 66 Wn. App. 791, 799, 832 P.2d 1359 (1992)). The facts of the charged offense in this case are simply that Trower was convicted of possessing the stolen motor vehicle on April 14, 2016. CP 1-2. The State seeks to expand the restitution

standard to ask the court to hold her responsible for the uncharged crimes of disposing of the truck (trafficking) or permanently depriving the owner of it (theft). But her possession of the truck on a single day in April did not cause the permanent and ongoing loss, any more than a person who temporarily handles a stolen credit card is responsible for what other, later possessors may do with it.

In short, the State seeks to overcome the limitations of its evidence and/or its charging decisions by conflating the crime with the cover-up. *Respondent's Brief*, at 15-16. But evidence that Trower sought to distance herself from the stolen vehicle is not proof of any greater involvement in its later disposition. Had the State convicted her of trafficking in the stolen truck, or stealing it, its argument for a causal connection between the permanent loss and the conduct comprising the crime would be on solid footing. But the conduct for which she was convicted was temporary possession on a single day in April. The conviction would certainly render her responsible for the Chandler's loss of use of the truck on that day. But absent additional criminal conduct with which she was not charged, her possession alone did not cause the permanent loss.

II. CONCLUSION

For the foregoing reasons, Trower respectfully requests that the court REVERSE and DISMISS the conviction; or, in the alternative, STRIKE the restitution award and discretionary legal financial obligations and REMAND for resentencing.

RESPECTFULLY SUBMITTED this 6 day of June, 2017.

A handwritten signature in black ink, appearing to read "Andrea Burkhart". The signature is written in a cursive style with a horizontal line underneath it.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

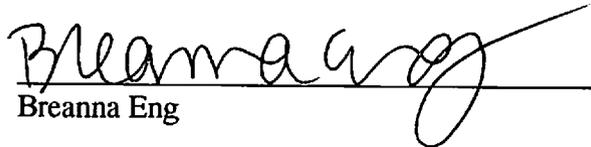
I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Reply Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 6 day of June, 2017 in Walla Walla, Washington.


Breanna Eng

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