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Court of Appeals
Division III
State of Washington
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No. 36837-8-III

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

STATE OF WASHINGTON, Respondent

v.

VERA HAMILTON, Appellant

APPEAL FROM THE SUPERIOR COURT
OF FERRY COUNTY
THE HONORABLE JUDGE P. MONASMITH

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERRORS

- A. The evidence was insufficient to support the conviction for rendering criminal assistance in the first degree.
- B. The evidence was insufficient to sustain the conviction for possession of a stolen firearm.
- C. The evidence was insufficient to sustain the conviction for possession of stolen property.
- D. The evidence was insufficient to sustain a conviction for making false or misleading statements to a public servant.

ISSUES RELATED TO ASSIGNMENT OF ERRORS

- A. A conviction for rendering criminal assistance requires the State to prove beyond a reasonable doubt the defendant knew the suspect individual was being sought for a crime. Where the jury instructions provide the State must prove the defendant knew the suspect was being sought for assault in the first degree, is the evidence insufficient to sustain the conviction where the State's witness testified he never told the defendant the crime was assault in the first degree?
- B. Possession of a stolen firearm requires the State to prove beyond a reasonable doubt the defendant possessed or was in control of a stolen firearm, knowing it had been stolen, and

withheld it or appropriated it to the use of someone entitled to it. Where the State failed to provide evidence of dominion and control, is the evidence insufficient to sustain the conviction?

C. Possession of stolen property requires the State to prove beyond a reasonable doubt that the defendant knowingly retained, possessed, or concealed, or disposed of stolen property, knowing it has been stolen and withheld it or appropriate the property to the use of someone not entitled to it. Where the State did not prove the defendant knew about or saw the stolen property, is the evidence insufficient to sustain the conviction?

D. Making a false or misleading statement to a public servant required the State to prove beyond a reasonable doubt, that on November 20, 2018, the defendant made a false or misleading statement to a public servant, the statement was material, and the defendant knew it was both material and false and misleading. A material statement is a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his official powers or duties. Where the State did not show the police reasonably relied on

statements made by Ms. Hamilton, must the conviction be reversed?

II. STATEMENT OF FACTS

The State charged Vera Hamilton by amended information with four crimes: Making false or misleading statements to a public servant on November 20, 2018 (RCW 9A.76.175); Rendering criminal assistance in the first degree (non-relative) on November 25, 2018 (RCW 9A.76.070); Possession a stolen firearm on November 29, 2018 (RCW 9A.56.310); and Possession stolen property in the third degree on November 29, 2018 (RCW 9A.56.170). CP 122-124.

On the afternoon of November 20, 2018, Vera Hamilton and her 14-year-old son, Preston, were upstairs in their home. RP 543. About 3 p.m., 32-year-old Todd Griffith, who lived with his grandmother about a mile away, decided he was bored and wanted to visit the Hamilton home. RP 200. Griffith suffered from schizophrenia and supported himself on SSDI¹. RP 190.

Griffith had been drinking alcohol that day and brought a bottle with him as he drove his pickup truck to the Hamilton home.

¹ Social Security Disability Income.

RP 200-201. He had been there a number of times and knew Ms. Hamilton, Preston², her daughter, Destiny, and her daughter's friend Shane Malotte. RP 539-40, 567.

When he arrived, he stumbled walking to the front door. Preston thought Griffith was stumbling because he was drunk. RP 598. Either Destiny or Malotte invited him in, and Ms. Hamilton and her son came downstairs later. RP 543. Griffith and Malotte were drinking. At one point, as Griffith was walking inside the home, he tripped, and burned his hand in the fire. RP 544. He grabbed Preston's head and said he would "F—his ear." He made remarks to Ms. Hamilton's daughter about kicking her in the stomach in case she was pregnant. He kicked her on the leg. RP 244. Ms. Hamilton told Griffith to leave. RP 544,675.

Griffith, Malotte, and Destiny went outside to shoot Griffith's grandfather's SKS rifle. Griffith kept the gun in his unlocked truck. RP 206, 546. He also kept tools, a tow strap, a snatch block, and a "come along"³. RP 200. Griffith retrieved the rifle and the three of them shot the rifle into the dirt. RP 208. When they ran out of

² Because Ms. Hamilton and her son share the same last name, he will be referred to by his first name. No disrespect is intended.

³ A "come along" is a device used to assist in getting a truck unstuck or to get wood in the truck. RP 200.

ammunition, one of them placed the gun back in or near the truck.
RP 685.

Griffith and Malotte then decided to do "body shots"⁴. Because Griffith kept hitting Malotte in the face, Malotte hit Griffith even harder. RP 553. Griffith pulled out his knife. RP 554. Griffith tackled Malotte when he was not looking, and Malotte hit him with a propane torch. RP 555-558. Ms. Hamilton and her daughter called the police. RP 216, 561. Malotte and Destiny told Griffith to stay down on the ground until the police arrived. RP 559, 690. Griffith remembered Malotte kicking and hitting him. RP 215. Griffith reported that he had "lights out" before the fighting began and agreed he might have passed out from drinking. RP 277.

Griffith got up and ran toward his truck. RP 217. When the police arrived, Destiny grabbed the gun from the truck area and gave it to Malotte. RP 686. Malotte told Ms. Hamilton and Preston "I don't want to have anything to do with the cops" or similar words and then ran toward the woods. RP 696.

Officers were dispatched to a "fight in progress" and arrived about 4:25 p.m. RP 295. Deputy Kersten initially ran after Malotte,

⁴ According to Preston Hamilton, "body shots" meant the two were going to hit each other in the body, but not the face. RP 552.

but Destiny, Preston, and Ms. Hamilton pointed out Griffith had run to the patrol car, and he was the one about whom they were concerned. RP 299. Kersten testified he heard more shots, and later saw a hole in his uniform RP 412. The uniform was not admitted at trial, there was no lab test result, and Kersten could not say what caused the hole. RP 412.

Kersten handcuffed Griffith and placed him in the patrol car. RP 302. He observed shell casings on the ground near the truck. The passenger door of the truck was open. RP 313. He took photos of the truck. RP 313. The photo showed the snatch block, the come along, tow straps, and groceries on the ground around the truck. Griffith had no recollection of how or why they were on the ground. RP 235. Officers recovered Griffith's knife but left the items on the ground and did not secure Griffith's truck. RP 413-414, 421.

Kersten asked Ms. Hamilton who it was that ran toward the woods. RP 305. He reported she told him the name "Shane" or "Shawn."⁵ RP 306, 565. She gave a physical description of Malotte

⁵ Shawn was either Shane's father or brother's name that he sometimes used. RP 565.

and said he might be up at Todd Griffith's house..."⁶. RP 307, 566.

The officer never asked Ms. Hamilton or her daughter if Malotte was family, or if he lived at their home. RP 432-433.

Officers left the scene at 5:57 p.m. RP 418. Kersten testified they drove to Griffith's property because Ms. Hamilton said Shane "could be" there. RP 320. They drove to the edge of Griffith's property and "were surveying the property for a little while and then determined it was not gonna happen that night." RP 420. They did not notify dispatch they were pursuing anyone. RP 420. They took Griffith to jail for fourth degree assault, and then transported him to the hospital. RP 282, 322.

The following day Malotte returned to Ms. Hamilton's home and had the gun with him. RP 568. Malotte and Destiny reportedly went through the items on the ground and in the truck. RP 571.

Between the 20th and the 25th, officers did not ask Ms. Hamilton where they could find Malotte. RP 427. Griffith knew Malotte but did not give his name to the officer. The State presented no evidence officers asked Griffith if Malotte lived with

⁶ Officer Ventura testified he did not hear Ms. Hamilton tell Kersten the name Shane and did not hear Ms. Hamilton or her daughter tell Kersten that Shane had the gun and he went into the woods. RP 499.

him. The State presented no evidence the officers ever returned to Griffith's property after that night. RP 428. Rather, Kersten testified that because he had the name "Shane" or "Shawn" and was aware Malotte was from California, he went on Facebook to search for him. RP 323.

Five days later, November 25th, Griffith returned to get his truck. RP 263. Ms. Hamilton saw him and called 911. RP 493. She reported Griffith was trespassing on her property with someone who looked like Malotte. RP 326, 521. Griffith could not find the keys to his truck, the groceries that had been on the ground were gone, along with the snatch block and come along. RP 263. He reported a wallet, which he always kept in his front pocket, was also missing. RP 221,223. Deputy Kersten responded and later testified he could not remember if the truck was still on the property. RP 326.

On November 25th Kersten asked Ms. Hamilton if she knew who Griffith had fought with, and she said he was Griffith's friend, and she did not know him. RP 327. Kersten testified he told Ms. Hamilton he was looking for the person who assaulted Griffith but admitted he did not put that information in his report. RP 475, 478.

Kersten testified he did *not* tell Ms. Hamilton that he was investigating the crime of assault in the first degree. RP 429, 475.

The following day, Griffith went to the sheriff's office to report his missing items and give a statement "since he was now ready to make a statement." RP 328. He said Griffith provided, "a little bit more information into who the subject was." RP 329. Griffith identified Malotte from a mugshot photo identification that Kersten obtained based on his Facebook reconnaissance. RP 230, 323.

On November 29, 2018, five officers served a search warrant on Ms. Hamilton's home, looking for the stolen property. RP 331. Officers found the SKS rifle, a gun case⁷ and a magazine of ammunition upstairs on top of some clothing. RP 337, 460-461. It was in the area between Destiny's bedroom and Preston's bedroom. 591. The SKS rifle had a swastika carved into the woodstock. RP 229, 341. There were no usable fingerprints on the gun, and the State did not present any DNA evidence or evidence of blood on the weapon. RP 461.

Preston reported Malotte carried the gun around with him or next to him. RP 592, 703, 707. He testified he never saw his mother

⁷ The gun case belonged to Preston Hamilton's 22 rifle. RP 589.

handle the gun. After listening to his interview where he said his mother handed the gun to Malotte one time, he said the interview did not refresh his recollection and he actually did not see her hand the gun to Malotte. RP 766-767.

Officers searched a storage area built into the underside of the house, not accessible from inside the home. RP 370. The doors were unlocked and open. RP 370, 433. They located the items Griffith reported stolen: the snatch block, the come along, and the yellow tow straps were all hanging up at the water tank⁸. RP 370, 437. Preston Hamilton testified he had seen the items around but he never saw Ms. Hamilton handle them. RP 608,708.

Between November 20th and November 29th, Malotte went to the town laundromat for showering, used the local Royal Resource Bus for his transportation needs to town and went to the store. RP 465-66, 678, 680, 699. On November 29th, Malotte was arrested on the Resource bus. Ms. Hamilton was arrested later the same day. RP 374, 468.

The court gave jury instruction No. 13:

⁸ Griffith later found his truck with the keys inside, and his wallet on the front seat. RP 226.

A person “renders criminal assistance” if, with intent to prevent, hinder, or delay the apprehension of prosecution of another person who he or she knows has committed a crime, or is being sought by law enforcement officials for the commission of a crime, he or she:

- Harbors or conceals such person; or
- Prevents or obstructs by use of deception anyone from performing an act that might aid in the discovery or apprehension of such person.

CP 146.

The State requested a non-WPIC jury instruction based on *State v. Anderson*, 63 Wn. App. 257, 818 P.2d 40 (1991). The State wanted to argue that Ms. Hamilton knew the crime was assault, and the State was not obligated to prove she knew it was the crime of assault in the first degree. RP 637-639. The court declined the non-WPIC instruction, stating, “...I’m concerned that there is not a patterned instruction that follows the *Anderson* after all these years, and ultimately I think the knowledge requirement is one that allows the jury to consider all evidence that bears on potential knowledge in order to determine whether a crime occurred.” RP 639. The court gave jury instruction no. 15:

To convict the defendant of the crime of rendering criminal assistance in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about November 25, 2018, the defendant rendered criminal assistance to a person;

- (2) That the person had committed or was being sought for Assault in the First Degree;
- (3) **That the defendant knew that the person had committed or was being sought for Assault in the First Degree;** and
- (4) That any of the defendant's acts occurred in Ferry County, in the State of Washington.

CP 148.

Jury Instruction No. 20

To convict the defendant of the crime of possessing a stolen firearm, each of the following elements of the crime must be proved beyond a reasonable doubt.

- (1) That on or about November 29, 2018, the defendant possessed or was in control of a stolen firearm ;
- (2) That the defendant acted with knowledge that the firearm had been stolen;
- (3) That the defendant withheld or appropriated the firearm to the use of someone other than the true owner or person entitled thereto; and
- (4) That any of these acts occurred in Ferry County, in the State of Washington.

CP 153.

Jury Instruction No. 21

Possession means having a firearm or other item in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession, Dominion

and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located no single one of these factors necessarily controls your decision.

CP 154

Ms. Hamilton was convicted on all counts. CP 168-171. She makes this timely appeal. CP 208.

III. ARGUMENT

A. The Evidence Is Insufficient To Sustain A Conviction For Rendering Criminal Assistance And The Conviction Must Be Reversed And Dismissed With Prejudice.

1) Due Process Requires The State To Prove Every Element Of The Charged Crime Beyond A Reasonable Doubt.

A sufficiency of the evidence review secures the fundamental protection of due process of law. *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). To comport with due process, the State bears the burden of proving every element of the crime beyond a reasonable doubt. U.S. Const. Amend. 14; Wash.

Const. art. I, § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Green*, 94 Wn.2d 216, 222-21, 616 P.2d 628 (1980).

On appellate review, a conviction will be reversed for insufficiency of evidence only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When considering facts in a challenge to the sufficiency of the evidence, the Court will draw all inferences from the evidence in favor of the State and against the defendant. *Id.*

A person is guilty of rendering criminal assistance in the first degree if she renders criminal assistance to a person who has committed or is being sought for murder in the first degree or any class A felony or equivalent juvenile offense. RCW 9A.76.070. Rendering criminal assistance is a specific intent crime: to hinder or delay the apprehension or prosecution of another person *who she knows has committed a crime or is being sought by law enforcement officials*. RCW 9A.76.050.

Parties are bound by the law laid out by the court in the jury instruction, and “sufficiency of the evidence to sustain the verdict is to be determined by the application of the instructions.” *Tonkovich*

v. Dept. of Labor & Industries, 31 Wn.2d 220, 225, 195 P.2d 638 (1948).

Here, to convict Ms. Hamilton of rendering criminal assistance in the first degree, the State bore the burden to prove beyond a reasonable doubt that on or about November 25, 2018, (1) that Ms. Hamilton specifically intended to hinder or delay the prosecution of Malotte using deception, or by harboring or concealing him, preventing anyone from performing an act that might aid in his discovery or apprehension; (2) that Malotte had committed or was being sought for assault in the first degree, and (3) that Ms. Hamilton *knew* Malotte had committed or was being sought for *assault in the first degree*. CP 146, 148.

2) The Record Is Clear That Ms. Hamilton Did Not Know Malotte Was Being Sought For Assault In The First Degree.

The jury instructions explicitly required the State to prove beyond a reasonable doubt that Ms. Hamilton *knew* Malotte had committed or was being sought for *assault in the first degree*. CP 148. This Court must find the State's case fails on this element.

On November 25th, the date the crime of rendering criminal assistance was alleged to have happened, officers responded to

Ms. Hamilton's 911 call. Deputy Kersten testified told her he was looking for the person who assaulted Griffith and the person he alleged shot at him. He admitted his written report did not indicate he told her he was seeking Malotte for assault. Kersten testified unequivocally he did *not* tell Ms. Hamilton that Malotte was being sought for *assault in the first degree*.

3) *State v. Anderson* Does Not Apply Under The Jury Instructions Given In This Case.

A person may be convicted of rendering criminal assistance without knowing the degree of the crime committed by the person sought by the police: "By its plain terms, RCW 9A.76.070 does not require that the person rendering assistance know the degree of crime committed by the principal. It appears then, that the person rendering assistance must have knowledge of the principal's crime, but not of facts disclosing the degree of that crime." *Anderson*, 63 Wn. App. at 260.

However, in this case, the jury instruction did not ask the jury to decide if Ms. Hamilton knew officers were looking for Malotte because he was suspected of committing an assault. Rather, the jury received a very specific 'to convict' instruction: the instruction

directed the jury to decide if the State had proved beyond a reasonable doubt that Ms. Hamilton knew Malotte was being sought for *assault in the first degree*. Additional elements become the law of the case when they are included in instructions to the jury. *State v. Hobbs*, 71 Wn. App. 419, 423, 859 P.2d 73 (1993).

Deputy Kersten testified he did *not* tell Ms. Hamilton the degree of assault. The State did not prove beyond a reasonable doubt that Ms. Hamilton knew the crime was assault in the first degree. Where the evidence is insufficient on an element, the conviction must be reversed and dismissed with prejudice. *State v. Hickman*, 135 Wn.2d 97, 101-02, 954 P.2d 900 (1998).

B. The Evidence Is Insufficient To Sustain A Conviction For Possession Of A Stolen Firearm.

A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a stolen firearm. RCW 9A.56.310(1). Moreover, the State must prove beyond a reasonable doubt that the defendant knew the firearm in his possession was stolen. *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284 (2010). Even viewing the evidence in the light most favorable to the State, the State's evidence failed to prove Ms. Hamilton possessed a stolen firearm.

The court instructed the jury that possession meant having a firearm in one's custody or control, either actual or constructive. CP 154. Actual possession means physical custody of the item. *State v. Callahan*, 77 Wn.2d.27, 29, 459 P.2d 400 (1969). Here, evidence established that Malotte, not Ms. Hamilton had actual possession of the firearm. He carried it around with him, kept it near him when he was in the home and purchased ammunition for it. He carved a swastika into the woodstock. The day the gun was found Malotte and Destiny were the last two people in the house, and the gun was in a clothes basket in or next to their bedroom. RP 589-90, 698-99. Preston testified he had never seen Ms. Hamilton touch the weapon. Ms. Hamilton did not have actual possession of the gun. The State therefore needed to prove Ms. Hamilton had constructive possession.

Constructive possession is the exercise of dominion and control over the contraband. *State v. Roberts*, 80 Wn. App. 342, 908 P.2d 892 (1996); *Callahan*, 77 Wn.2d at 29-30. Constructive possession is evaluated by using a totality of the circumstances analysis. *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994).

The totality of the circumstances analysis requires substantial evidence for a fact finder to reasonably infer the defendant had dominion and control over the item. *State v. Enlow*, 143 Wn. App.463, 469, 178 P.3d 366 (2008); *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). The ability to take immediate possession, ownership of the item, the defendant's ability to exclude others from possessing the item are nonexclusive factors of dominion and control. *Callahan*, 77 Wn.2d at 31; *State v. Wilson*, 20 Wn. App. 592, 596, 581 P.2d 592 (1989).

Dominion and control *is not* established by knowledge of, mere proximity to, or momentary handling of the item. *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983); *State v. Davis*, 182 Wn.2d 222, 227-228, 235, 340 P.3d 820 (2014).

For example, in *Davis*, the Court held there was insufficient evidence to sustain the conviction for possession of a stolen firearm. There, after the shooter murdered four police officers, he brought a gun into the defendant's home. The defendant knew the weapon was stolen. The defendant put the gun and some clothing into a shopping bag and when the shooter was ready to leave, told him where the gun was, and handed the shopping bag to him. *Davis*, 182 Wn.2d at 225.

The *Davis* Court noted the ability to immediately take actual possession of an item can establish dominion and control, *but mere proximity by itself does not establish dominion and control. Id.* at 234. Thus, even though the defendants in *Davis* were in their own home, had physical control over the weapon, and handed it back to the shooter, they did not exercise dominion and control over the firearm. The Court held having dominion and control over the premises did not by itself prove constructive possession. *Id.*

Here the State's evidence established that Malotte took the weapon and ran into the woods. Later, he carried it around with him, spent time carving into the woodstock, and purchased ammunition for it. When he did not have it in his hands, he kept it near him in the house. Preston testified, that based on Malotte's behavior, he believed Malotte intended to keep the rifle for himself.

Malotte used Ms. Hamilton's home, but as in *Davis*, this is insufficient to prove constructive possession. Similarly, her mere physical proximity to the firearm is insufficient to establish dominion and control. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012).

The State produced no evidence that Ms. Hamilton ever asserted any interest in the firearm. Unlike the defendants in *Davis*,

the State presented no evidence that Ms. Hamilton had the ability to take immediate possession, to maintain exclusive possession, or exert ownership over the firearm.

Finally, Malotte carried the firearm around with him inside the home. However, Ms. Hamilton's knowledge of the presence of the firearm does not, by itself, sustain a conviction for constructive possession. *Chouinard*, 169 Wn. App. at 903.

This conviction must be reversed for insufficient evidence and dismissed with prejudice.

C. The Evidence Is Insufficient To Sustain A Conviction for Possession Of Stolen Property in the Third Degree.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014).

Under RCW 9A.56.170(1) and RCW 9A.56.140(1), a person is guilty of possessing stolen property in the third degree when he knowingly receives, retains, possesses, conceals or disposes of stolen property, of a value not exceeding 750 dollars, knowing that it has been stolen, and withholds or appropriates the property to the

use of a person other than the true owner or person entitled thereto. Due process requires the State to prove all elements of the crime beyond a reasonable doubt. *State v. W.R.*, 181 Wn.2d 757, 762, 336 P.3d 1134 (2014). The elements of possession of stolen property are (1) actual or constructive possession of the stolen property with (2) actual or constructive knowledge that the property is stolen. *State v. Summers*, 45 Wn. App. 761, 763, 728 P.2d 613 (1986).

- 1) Ms. Hamilton did not have actual or constructive possession of the stolen property.

Actual possession requires the goods to be in the personal custody of the individual charged. *Callahan*, 77 Wn.2d at 29. To establish constructive possession, the State must show by substantial evidence that the defendant had dominion and control over the property. *State v. Lakotiy*, 151 Wn. App. 699, 714, 214 P.3d 181 (2009). As discussed supra, dominion and control means the object may be reduced to actual possession immediately, and is examined under a totality of the circumstances analysis. *Id.* at 714.

In *Lakotiy*, the defendant was found standing next to a stolen car in a small storage unit, the car was partially disassembled and

the ignition removed, car parts were on the ground next to the car, another individual was working on the stolen car, and when the defendant saw police, he placed a set of jiggler keys and an ignition on the rear of the car. *Lakotiy*, 151 Wn. App. at 714. Such evidence was sufficient to convict the defendant of constructive possession of stolen property.

Here, the evidence presented by the State was that Destiny and Malotte rummaged through the items found on the ground near Griffith's truck: the groceries, the tow straps, the come along, and the snatch block. When Griffith later had his property returned to him, he reported it was "all dirty and stinky" presumably a result of having been in the mud. RP 227, 315.

The State presented no evidence Ms. Hamilton saw the items on that had been on the ground or was ever told about them. The items found nine days later, were hanging near a water tank and on the floor in an open shed. She did not have physical actual possession of the items. Moreover, mere proximity is insufficient to establish possession even if the items were found in an open shed outside of her home.

2) The Evidence Was Insufficient To Prove Ms. Hamilton Knowingly Possessed Stolen Property.

Knowledge that an item is stolen is an essential element of possession of stolen property. RCW 9A.56.170. A person knows or acts knowingly or with knowledge when he is aware of a fact or has information that would lead a reasonable person to conclude the facts exist. RCW 9A.08.010(1)(b).

The only evidence introduced at trial concerning Ms. Hamilton's knowledge that there was stolen property was the fact that the property was found in her shed. The only evidence of what happened to the items between the time they were seen strewn on the ground and nine days later when they were found in the shed, was that Malotte and Destiny had rummaged through them. Without conceding that Ms. Hamilton never saw or knew about the items, their condition as "dirty and stinky" lends credence to the idea that even if Ms. Hamilton had somehow seen them they would have been indistinguishable from the other items used on her property.

The State failed to present sufficient evidence of either actual knowledge or constructive knowledge to support the

conviction. This conviction must be reversed and dismissed with prejudice.

D. The Evidence is Insufficient To Sustain A Conviction For Making A False and Misleading Statement.

1) The Requirements of RCW 9A.76.175

RCW 9A.76.175 provides a person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. "Material statement" means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official duties or powers. Thus, there are two components: (1) knowingly making a false or misleading statement and (2) the statement must be one on which the public servant was reasonably likely to rely on his carrying out his duties.

2) The Statement Could Not Be One On Which The Officer Would Reasonably Rely Because The Statement Was Not Informative.

Here, the factual allegation is that Ms. Hamilton made a false and misleading statement to police. However, Kersten twice testified that Ms. Hamilton told him only that Malotte *might be* or *could be* at Griffith's home. Ms. Hamilton did not give a definitive

answer. She had no idea where he was going, Malotte had run off into the woods.

Kersten testified they made a cursory drive by Griffith's home, with Griffith in the car. If there was a possibility the officer would rely on the noninformative statement, it would have been incumbent on them to check on Ms. Griffith, Todd Griffith's grandmother, who actually resided in the home. However, they never went onto the Griffith property, that night or any other time. The officers never asked Griffith that night if Malotte lived at or might be his grandmother's home. The officers never asked Ms. Griffith (Todd Griffith's grandmother) if Malotte was ever there.

Ms. Hamilton's reluctance to provide an exact statement to law enforcement is insufficient to conclude that her statement of he "might be" or "could be" at Griffith's home was false or misleading.

Some " 'individuals [] mistrust law enforcement officials and refuse to speak to them not because they are guilty of some crime, but rather because 'they are simply fearful of coming into contact with those whom they regard as antagonists.' "

State v. Burke, 163 Wn.2d 204, 219, 181 P.3d 1 (2008)

(quoting *People v. De George*, 73 N.Y.2d 614, 618–19, 541 N.E.2d 11, 543 N.Y.S.2d 11 (1989)).

This conviction must be reversed and dismissed with prejudice for insufficient evidence.

IV. CONCLUSION

Based on the foregoing facts and authorities, Ms. Hamilton respectfully asks this Court to reverse all convictions and dismiss with prejudice.

Submitted this 28th day of February 2020,



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on February 28, 2020, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Ferry County Prosecuting Attorney at kiburke@wapa-sep.wa.gov and TBell@wapa-sep.wa.gov and to Vera Hamilton, 857 Park Drive, Vernonia, OR 97064.

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February 28, 2020 - 4:50 PM

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