

68603-6

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NO. 68603-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

TJUAN L. BLYE,

Appellant.

BRIEF OF RESPONDENT

MARK K. ROE
Prosecuting Attorney

CHARLES F. BLACKMAN
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

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I. ISSUES

1. The defendant was a known drug dealer. During a two-week period his car was seen on at least three occasions at a residence and he himself was seen coming out of it. Within two days of a search pursuant to warrant, the defendant drove to sell drugs to a confidential informant in a "controlled buy," coming directly from the residence. He concedes there was probable cause to search his car for drugs. Was there probable cause to search the residence for drugs as well?

2. The search yielded a loaded firearm in a nightstand in the defendant's bedroom. The firearm had been stolen. It bore a serial number in two places. At one of the places, the serial number had been partially filed off. The defendant is a previously convicted felon. Viewed in the light most favorable to the State, was there sufficient evidence to convict him not only of unlawful possession of a firearm, but also of possessing a firearm knowing it had been stolen?

II. STATEMENT OF THE CASE

A. SUMMARY.

The defendant was charged with first-degree unlawful possession of a firearm. 1 CP 103-104. When plea negotiations

proved fruitless, a charge of possession of stolen firearm was added. 1 CP 71-72; 2 CP 169-170. A pretrial motion to suppress the fruits of a search pursuant to warrant was unsuccessful. 1 CP 16-20; 2 CP 53-5; Verbatim Record of Proceedings of 7/15/11 CrR 3.6 Hearing (hereafter "CrR 3.6 Hrg RP") 7-8. A jury convicted the defendant of both counts. 1 CP 52-53; Verbatim Record of Trial Proceedings, Vol. III, 2/29/12 (hereafter 3 Trial RP ") 50-53.¹ The defendant was sentenced within the standard range. 1 CP 3-13. As he did below, the defendant challenges the sufficiency of the warrant to search the residence that yielded the firearm – specifically, whether there was sufficient nexus between any crime alleged and the place to be searched. He separately challenges the sufficiency of the evidence of unlawful possession of firearm – specifically, whether there was sufficient evidence he knew the handgun was stolen.

B. SUPPRESSION HEARING FINDING PROBABLE CAUSE.

Both sides presented argument at a non-evidentiary pretrial hearing on the question of whether there was probable cause to

¹ There are three volumes of trial transcripts, one for each day of trial, 2/27/12, 2/28/12, and 2/29/12. Each is separately rather than sequentially paginated. They are referred here as "1 Trial RP," "2 Trial RP," and "3 Trial RP." (Appellant refers to them as "2RP," "3RP" and "4RP," but they are labeled as Vol. I, II and III on their face sheets, so respondent maintains this numbering.)

search the identified residence. 1 CP 87-90 (defense brief); 2 CP 155-160 (State's response); 1 CP 85-86 (defense reply); CrR 3.6 Hrg RP 2-7. Defense counsel conceded there was probable cause to arrest the defendant and to search his vehicle (a white Tahoe SUV). CrR 3.6 Hrg RP 3. Both sides attached the affidavit of probable cause in question. 1 CP 92-99 and 2 CP 161-168. The trial court denied the motion, entering the following findings of fact and conclusions of law in support of its decision (with corresponding declarations in the search warrant affidavit added here in brackets):

1. Undisputed Facts

The Court finds that:

- a. The defendant was under observation by the police for many months.
- b. The defendant was known to drive a White 2001 Chevrolet Tahoe WA License plate 34XJS during the period of observation by police.
- d. [sic] On 9/29/10 the Defendant was stopped in his White 2001 Chevrolet Tahoe WA License plate 34XJS and was found to have evidence of "crack dealing" including crack cocaine [2 CP 161, 162; the defendant was driving; license plate was 341XJS].
- e. On 3/3/11 the Defendant was contacted and was arrested for possession of a controlled substance with the intent to deliver. The defendant's phone was searched after a warrant was obtained and the search showed texts related to drug dealing. The defendant

was again driving the Tahoe [2 CP 162-64 re stop of vehicle, search warrant of vehicle, and "Ecstasy" found; 2 CP 164 re search warrant of phone, Vicodin found in vehicle too].

f. A few days after 3/3/11 the Defendant was seen driving the White 2001 Chevrolet Tahoe WA License plate 34XJS [2 CP 164].

g. In April 2011 a Confidential Source (CS) made a purchase of cocaine from the Defendant. The defendant drove the same Tahoe to the drug transaction [2 CP 165, a "controlled buy" of what looked like "crack" cocaine].

h. On 5/4/11 the Defendant was seen driving a blue Honda rental car, while his Tahoe was being driving [sic] by a woman, Ms. Krug. The woman was stopped for speeding in the Tahoe, and the Tahoe was impounded [2 CP 165].

i. On 5/10/11 the Tahoe was picked up by the defendant and Ms. Krug. The defendant drove the blue Honda rental car to the impound lot, both vehicles then went [to] 805½ 52nd PI W, Everett, WA. The Tahoe was backed into the drive way in front of the garage doors [2 CP 165-66; female companion at impound lot "unknown"].

j. Surveillance showed the rental car also used by the Defendant to be at the 805½ 52nd PI W, Everett, WA address [2 CP 166; on May 11, 2011].

k. On 5/11/11 surveillance showed the Tahoe was parked at the 805 ½ 52nd PI W address [2 CP 166].

l. On 5/24/11 a man matching the Defendant's description was seen leaving the 805 ½ 52nd PI W address [2 CP 166; Tahoe seen backed into driveway].

m. In May 2011 a CS buy was arranged with the Defendant. The Defendant's Tahoe was parked at the 805½ 52nd PI W address. He exited the residence after the buy was arranged by phone between the CS and the Defendant. The Defendant got into the Tahoe with Ms. Krug, and they drove directly to the location where the drug transaction took place [2 CP 166; within past 48 hours from 5/26/11; a "controlled buy;" drug sold was "crack" cocaine].

n. The Defendant, Ms. Krug, and the Tahoe did not go back to the 805½ 52nd PI W address immediately following the drug transaction [2 CP 166].

o. Police testified that the Defendant was secretive about his residence [2 CP 167].

p. As a result of the execution of the warrant, the Defendant was found to be unlawfully in possession of a stolen firearm found in the residence at 805½ 52nd PI W, Everett, WA.

* * *

Court's Conclusions of Law

The Court concludes that

a. There is sufficient evidence to show that the Defendant had been in possession of dealing in controlled substances.

b. There are specific facts that establish a nexus between the Defendant, the Defendant's criminal behavior – dealing/possession of controlled substance, and the residence at 805½ 52nd PI W, Everett, WA. These facts are based on the following:

i. The fact that the Defendant drove his Tahoe there after picking it up from the impound lot, the fact that a man fitting the description of the Defendant was seen at the residence, the fact that the both [sic] the

vehicles the Defendant was in possession of were seen parked at the residence on two occasions over a couple of months, the fact the Defendant has a history of drug possessions/sales, the fact that when the CS contacted the Defendant to make the drug sale, the Defendant was observed leaving the 805½ 52nd PI W address in his Tahoe with the woman who has also been seen at that house, the fact that after he left the house he goes directly to the drug sale, and the other facts found by the Court above are sufficient specific facts to form the required nexus between the residence, the Defendant, and the criminal behavior of either possessing controlled substance(s), or possessing controlled substance(s) with the intent to deliver.

c. Because there is a sufficient nexus between the house, the Defendant, and the controlled substances there was a sufficient basis in fact from which to conclude evidence of illegal activity would likely be found at the place to be searched, and therefore there was probable cause for the search warrant.

1 CP 16-20. The trial court denied the motion. Id.; CrR 3.6

Hrg RP 7-8.

C. EVIDENCE AT TRIAL.

As to background, officers testified substantially in accordance with facts found at the pretrial suppression hearing: that they had done a “controlled buy” with the defendant; that they had twice seen him driving the Tahoe; that they had twice seen the Tahoe parked at the 805 ½ 52nd PI. W. address; that they had seen the defendant also drive a newer Honda, and seen that car at the residence also; that they had seen someone matching the

defendant's description outside the residence; and that, when they conducted a second "controlled buy," the defendant and his companion, Gabrielle Krug, had left from the 805 ½ 52nd Pl. W. residence in the Tahoe and gone directly to the "meet" location for the "controlled buy." 1 Trial RP 47-59, 64-65, 104-112; 2 Trial RP 7-14, 66-67, 86. Testimony clarified that the Tahoe was registered to the defendant's sister; that he and his sister had come to claim it from impound earlier in May; that it was released to the defendant's sister; and that the Tahoe was then driven to the 805 ½ 52nd Pl. W. address. 1 Trial RP 47, 52-55, 58; 2 Trial RP 60-61.

Officers described how they prepared for and then executed the search of the residence. 1 Trial RP 66-68, 70-72; 2 Trial RP 29-31, 58-59, 73-75, 85-86. They first waited for the defendant to arrive. 1 Trial RP 68-69; 2 Trial RP 21, 24-26, 58, 62-63, 73-74. They actually sought to stop him some 7-8 blocks away, but when they encountered him there and activated their equipment, the defendant slowly drove to the residence and parked the Tahoe in the driveway, with police lights and sirens behind him all the way. 1 Trial RP 70; 2 Trial RP 58, 84-85.

Once inside, officers found numerous photographs of the defendant and others, including Ms. Krug, on the wall and

elsewhere. 1 Trial RP 72-75, 99-100; 2 Trial RP 34, 66, 75. In a bedroom they found a closet full of men's clothing and "letters of occupancy" bearing the defendant's name. 1 Trial RP 73, 87; 2 Trial RP 32-33, 35. Some of these documents were on or in a night stand on the right side of the bed. 1 Trial RP 73, 81-86. In a drawer of this right-hand-side night stand officers found a Glock .40 cal. handgun, loaded with a round in the chamber. 1 Trial RP 73, 75-77, 114; 2 Trial RP 76. In the night stand on the left side of the bed officers found women's clothing and underwear. 2 Trial RP 32.

The Glock pistol did not have a clip, and the butt of the handle looked as though it had been chewed on. 1 Trial RP 76; 2 Trial RP 43, 49, 93, 95. Test-firing confirmed it was operational. 2 Trial RP 43, 46-47. The pistol bore a serial number in two places, engraved on the slide and on the bottom of the barrel, on a stainless steel plate on the bottom of the frame rail. 1 Trial RP 78-79; 2 Trial RP 43-44. While the serial number on the slide was legible, the serial number on the bottom of the barrel had been partially obscured – scraped or filed off. 2 Trial RP 44-45. To accomplish this required using a tool that was harder than the item being scraped. 2 Trial RP 53. It is not something that could just happen through wear and tear. 2 Trial RP 53.

The original owner of the Glock had reported it stolen in July 2008. 1 Trial RP 91-92; 2 Trial RP 91-95. When he owned it, the butt of the handle had not been damaged, and the second serial number, on the bottom of the barrel, had not been filed off or obscured. 2 Trial RP 93-95.

While officers could not easily read the second, obscured serial number, they thought it could match the legible one on the slide. 2 Trial RP 52-53. The firearm can be disassembled: the two parts are separate, and can be swapped out. 2 Trial RP 53-54.

A detective explained the purpose of serial numbers is to be able to trace a firearm back to its owner. He added it is a crime to obscure a serial number on a firearm.² 2 Trial RP 50.

Both a key taken from the Tahoe and a key on a lanyard around the defendant's neck opened the front door of the residence. 1 Trial RP 89, 96, 115; 2 Trial RP 26, 28, 39-40, 65-66, 78-80.

Officers had expected to find drugs in the search, not a firearm. 1 Trial RP 67. The defendant did not testify. 2 Trial RP 119.

² RCW 9.41.140 and RCW 9.41.810 make altering or obliterating an identifying mark on a firearm a misdemeanor offense.

III. ARGUMENT

A. THE AFFIDAVIT OF PROBABLE CAUSE ACCOMPANYING THE SEARCH WARRANT.

1. A Magistrate's Probable Cause Determination Is To Be Made In Commonsense Manner. The Standard For Reviewing That Determination Is Deferential.

A search warrant must be based upon probable cause. State v. Cole, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). A search warrant application must specify the underlying facts so the magistrate can make a detached and independent assessment of the evidence. State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). Probable cause exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched. Id.

An affidavit of probable cause must show "a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." State v. Merkt, 124 Wn. App. 607, 612-13, 102 P.3d 828 (2004) quoting Thein, 138 Wn.2d at 140. Simply put, (1) there must be probable cause to believe a crime is being or has been committed, and, (2) there must also be probable cause that evidence of that crime will be found at the place to be searched.

The magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. In re Pers. Restraint of Yim, 139 Wn.2d 581, 596, 989 P.2d 512 (1999) (quoting State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975)).

In determining probable cause, the magistrate makes a practical, commonsense decision, taking into account all the circumstances set forth in the affidavit and drawing commonsense inferences. Illinois v. Gates, 462 U.S. 213, 238, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983); State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003). Probable cause requires only a probability or likelihood, of criminal activity, not a prima facie showing of criminal activity. Gates, 462 U.S. at 238, 103 S.Ct. 2317; State v. Maddox, 152 Wn.2d 499, 505, 510, 98 P.3d 1199 (2004); State v. Seagull, 95 Wn.2d 898, 907, 632 P.2d 44 (1981); State v. Patterson, 83 Wn.2d 49, 55, 515 P.2d 496 (1973). Common sense is "the ultimate yardstick" of probable cause. Patterson, 83 Wn.2d at 55, 515 P.2d 496.

An issuing magistrate's determination of probable cause is reviewed for abuse of discretion and is given great deference by the reviewing court. State v. Clark, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001); State v. Anderson, 105 Wn. App. 223, 228, 19 P.3d

1094 (2001). All doubts are resolved in favor of the warrant's validity. State v. Kalakosky, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993); Anderson, 105 Wn. App. at 228. The reviewing court considers solely the information provided the issuing magistrate. Anderson, 105 Wn. App. at 229, 19 P.3d 1094.

Both a realistic and commonsense approach to the magistrate's determination of probable cause, as well as the deferential standard of review of that decision, are designed to promote and encourage the use of search warrants whenever it is practicable for police to obtain them. Illinois v. Gates, 462 U.S. at 236-37; United States v. Miller, 24 F.3d 1357, 1361 (11th Cir.1994). The policy is to encourage police "to seek the intervention of judicial officers," so that "existence or want of probable cause [can] be decided prima facie by a judicial officer and not by officers of the executive branch" State v. Chenoweth, 160 Wn.2d 454, 477-78, 158 P.3d 595 (2007) (quoting Patterson, 83 Wn.2d at 57-58).

2. The Affidavit Of Probable Cause Provided A Sufficient Nexus To The Place To Be Searched.

The defendant conceded at the hearing below that there was probable cause to arrest him and search the Tahoe. CrR 3.6 Hrg RP 3. He does so here as well. BOA 7. The question is whether

police had probable cause to search the residence as well. They did.

In Thein, officers conducted two “controlled buys” at one location, obtained a warrant to search it, and discovered over half a pound of marijuana, marijuana “grow op” equipment, and materials incriminating the defendant. And witnesses described the defendant as linked to drug operations at the first location as well. Officers learned where the defendant lived and obtained a warrant to search the second location, the defendant’s residence, based on officers’ street knowledge that drug traffickers will typically store at least a portion of their drug inventory, and maintain drug sale proceeds, at their own homes. State v. Thein, 138 Wn.2d at 136-40. The search of the defendant’s residence at the second location then uncovered a “grow op.” Thein, 138 Wn.2d at 136.

The Supreme Court held that this was not enough: even if there was probable cause to arrest a suspected drug trafficker, generalized conclusions about what he or she might maintain at their residence did not justify a search, absent specific facts tying the particular residence to the suspected criminal conduct. Thein, 138 Wn.2d at 140-49, specifically at 148-49.

By contrast, in G.M.V., a juvenile had moved out of an upstairs bedroom in her parent's home and into the basement. The juvenile's boyfriend left the house to complete a "controlled buy" and returned to the house. He went to a second "controlled buy" from a different location, but returned to G.M.V.'s home. Officers searched the home and found marijuana in the basement room. State v. G.M.V., 135 Wn. App. 366, 369-70, 144 P.3d 358 (2006). The appellate court upheld the search (in the context of an ineffective assistance claim) because the search "did not rely on generalized beliefs about the habits of drug dealers[.]" Rather, it was to search the place the boyfriend "left from and returned to before and after he sold drugs." G.M.V., 135 Wn. App. at 371-72.

In Perez, police suspected that a particular location was a "safe house" to store drugs. An informant tipped them off to a dealer with new inventory, whom officers twice observed go directly to the suspected "safe house" location immediately after two "controlled buys." State v. Perez, 92 Wn. App. 1, 3, 5-7, 963 P.2d 881 (1998) Finding this was more than an officer's belief about where drug dealers typically hide evidence, this Court upheld a subsequent search of the "safe house" location. Perez, 92 Wn. App. at 7-8.

These cases do not hold that police generalizations, based on training and experience, are somehow inherently suspect or irrelevant. They just are not enough. “While generalizations regarding common habits of drug dealers, *standing alone*, cannot establish probable cause, such generalizations may support probable cause where a factual nexus supported by specific facts is also provided and where the generalizations are based on the affiant's experience. State v. Maddox, 152 Wn.2d 499, 511, 98 P.3d 1199 (2004) (emphasis in original); Thein, 138 Wn.2d at 148.

The search of 805 ½ 52nd Pl. W. was not based on a generalized conclusion that drug dealers simply tend to keep contraband in their homes. Officers did note that the defendant had prior drug convictions. 2 CP 164. Prior convictions of a suspect may be used in determining probable cause, particularly when a prior conviction is, like here, for a crime of the same general nature. State v. Clark, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001); see also State v. Stone, 56 Wn. App. 153, 158, 782 P.2d 1093 (1989).

The search warrant affidavit also noted that, in officers' experience, turning powder cocaine into crack cocaine typically requires an indoor environment. 2 CP 166. And the September 2010 stop, the April 2011 “controlled buy,” and the late May 2011

“controlled buy” had all yielded what appeared to be “crack” cocaine. Finding of Fact 1.d. (2 CP 161, 162), Finding of Fact 1.g. (2 CP 165), Finding of Fact 1.m. (2 CP 166). The experience and expertise of an officer can be taken into account in determining whether probable cause has been established. Maddox, 152 Wn.2d at 511, citing State v. Remboldt, 64 Wn. App. 505, 510, 827 P.2d 282 (1992); United States v. O'Campo, 937 F.2d 485 (9th Cir.1991) (magistrate properly considers officer's training and experience in totality of circumstances establishing probable cause).

The defendant concedes the Tahoe was sufficiently tied to the defendant to afford probable cause. BOA 7; see, e.g., Finding of Fact 1.g, 2 CP 165 (defendant drove Tahoe to “meet” location to sell drugs in “controlled buy” in April 2011). The newer Honda (a rental car) was tied to the defendant as well. Finding of Fact 1.i., 2 CP 165-66; Finding of Fact 1.j., 2 CP 166. On May 10, 2011, a female companion drove the released Tahoe from the impound yard, while the defendant drove the newer Honda, to the 805 ½ 52nd Pl. W. address. Finding of Fact 1.i., 2 CP 165-66. Both the Tahoe and the Honda were seen parked at that address a day later. Findings of Fact 1.j. and 1.k., 2 CP 166. The Tahoe was

seen again at the residence, sometime before May 16, 2011. 2 CP 166. On May 24, an officer saw the defendant come out of the 805 ½ 52nd Pl. W. residence, while the Tahoe was parked in the driveway. Finding of Fact 1.l., 2 CP 166. Lastly, sometime between May 24 and May 26 officers arranged another “controlled buy;” the defendant drove to the “meet” location, in the Tahoe, directly from the 805 ½ 52nd Pl. W. address. Finding of Fact 1.m., 2 CP 166. The search took place the evening of May 26, 2011, some eight hours after the affidavit was signed. 1 Trial RP 66, 69; 2 Trial RP 20, 62, 83; 2 CP 168.

This is more than a general conclusion that drug dealers keep contraband in their homes. As outlined above, the Tahoe was seen at the 805 ½ 52nd Pl. W. residence on May 10, May 11, sometime again before May 16, and on May 24 (with the defendant observed coming out of the residence). Lastly, and most significantly, the defendant and his companion Ms. Krug drove *directly from the 805 ½ 52nd Pl. W. residence to a “controlled buy” to sell “crack” cocaine*, sometime between May 24 and May 26, 2011.

This is enough. It is not the situation in Thein, where there was no connection to the location sought to be searched other than

that the suspected drug-dealing defendant happened to be living there.

In Perez, a defendant twice went back to a suspected “safe house” after “controlled buys.” This was enough to search the suspected “safe house.” Perez, 92 Wn. App. 7-8. If going *back* to a location after a sale is enough, then coming *from* a location to a drug buy “meet” to effect the sale affords an even stronger basis for probable cause. In G.M.V., a defendant drove to and from a residence to sell drugs in a “controlled buy;” this was enough to justify a search of that location. G.M.V., 135 Wn. App. at 371-72. The same analysis applies here.

The defendant disagrees. BOA 7-9. First, he argues that no informant spoke of drugs in the residence, nor had police been able to observe drugs in the residence. But the case law does not require this. Secondly, he asserts the affiant provided no facts that this was the defendant’s primary residence. But probable cause does not require proof of primary residence. Of greater import is that the defendant was associated with the residence, and sold cocaine right after driving from it, very close in time to the actual search. Thirdly, he argues mere presence at the residence (as indicated by the parked Tahoe) could be innocuous, but that

overlooks the facts of the last “controlled buy.” Lastly, he distinguishes G.M.V., arguing it requires multiple trips to and from a residence to “controlled buys,” whereas here, the defendant drove to one “controlled buy” from the residence, and then did not return to it. This is the kind of hypertechnical rather than commonsense approach that the cases condemn. See State v. Walcott, 72 Wn.2d 959, 962, 435 P.2d 994 (1967) (quoting United States v. Ventresca, 380 U.S. 102, 109, 85 S. Ct. 741, 13 L. Ed.2d 684 (1965) (“when a magistrate has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common-sense, manner”). The case law requires specific facts, but does not require more than one trip, or more than one “controlled buy.” The affidavit contains sufficient specific facts to establish probable cause to search the residence at 805 ½ 52nd Pl. W. The trial court properly so found. It should be affirmed.

B. SUFFICIENCY OF THE EVIDENCE.

1. Deferential Standard Of Review In General.

Under the applicable standard of review, there will be sufficient evidence to affirm a criminal conviction if any rational trier of fact, viewing the evidence most favorably toward the State, could

have found the essential elements of the charged crime were proved beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010); State v. Wentz, 149 Wn.2d 342, 347, 68 P.3d 282 (2003); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the States' evidence. Salinas, 119 Wn.2d at 201; State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284, review denied, 169 Wn.2d 1028 (2010). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006); Salinas at 201; State v. Soderholm, 68 Wn. App. 363, 373, 842 P.2d 1039 (1993).

In testing the sufficiency of the evidence, the reviewing court does not weigh the persuasiveness of the evidence. Rather, it defers to the trier of fact on issues involving conflicting testimony, credibility of witnesses, and the weight of the evidence. State v. Stewart, 141 Wn. App. 791, 795, 174 P.3d 111 (2007) (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)); State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

The rules apply equally to a circumstantial evidence case, for circumstantial evidence is no less reliable than direct evidence.

State v. Stewart, 141 Wn. App. at 795; State v. Delmarter, 94 Wn..2d at 638; State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991); see WPIC 5.01. Direct and circumstantial evidence carry the same weight. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Circumstantial evidence is sufficient to prove any element of a crime. State v. Garcia, 20 Wn. App. 401, 405, 579 P.2d 1034 (1978) (citing State v. Lewis, 69 Wn.2d 120, 123-24, 417 P.2d 618 (1966)).

2. Viewed In the Light Most Favorable To The State, There Was Sufficient Evidence For A Jury To Infer That The Defendant Knew The Firearm In a Drawer Of His Bedside Table, With A Serial Number Partially Scraped Off, Had Been Stolen.

A person is guilty of possession of a stolen firearm if he or she (1) possesses, carries, delivers, sells or is in control of a stolen firearm; (2) acted with knowledge that the firearm had been stolen; and (3) withheld or appropriated the firearm to the use of someone other than the true owner or person entitled thereto. WPIC 77.12 (definition); WPIC 77.13 (elements); 1 CP 41, 43 (Court's Instructions # 8 [definition] and # 10 ["to convict"], following the pattern instructions); RCW 9A.56.140 (definition of "possessing stolen property;" RCW 9A.56.310 (possessing stolen firearm). Knowledge that the property (here, the firearm) was stolen may be

inferred if the defendant was aware of facts and circumstances which would have led a reasonable person to conclude the property was stolen. RCW 9A.08.010(1)(b); WPIC 10.02; 1 CP 47 (Court's instruction # 14, on knowledge); State v. Tembruell, 50 Wn.2d 456, 457-59, 312 P.2d 809 (1957); State v. Saile, 34 Wn.2d 183, 193-94, 208 P.2d 872 (1949). A jury is free to draw this inference or reject it. WPIC 10.02; 1 CP 47 (Court's instruction # 14); State v. Bryant, 89 Wn. App. 857, 869, 950 P.2d 1004 (1998); State v. Russell, 27 Wn. App. 309, 311-14, 617 P.2d 467 (1980).

That the defendant knowingly and unlawfully possessed the gun as a felon was established by overwhelming evidence: He had stipulated to the predicate prior felony. The gun was in the drawer of a night stand that also contained documents with the defendant's name on it, in a bedroom with men's clothes, in a house for which defendant had the key around his neck. The defendant does not challenge the sufficiency of this evidence. The issue, rather, is what evidence there was of facts and circumstances, of which the defendant was aware, which would have led a reasonable person to conclude the gun was *stolen*.

Respondent agrees that bare possession of a stolen firearm is insufficient to justify a conviction. State v. McPhee, 156 Wn. App.

44, 62, 230 P.3d 284, review denied, 169 Wn.2d 1028 (2010). Appellant points out, BOA 15, and respondent agrees, that the defendant's status as a convicted felon, standing alone, is not sufficient either, for he could have acquired the gun through a "straw" purchaser or from a friend without knowing it was stolen. But that does not make the defendant's status as a convicted felon irrelevant. His inability to buy a gun at a gun shop or from a dealer did make it that much more likely he would have to turn to the black market in stolen firearms to acquire one.

In McPhee the defendant possessed firearms that had been stolen less than a month earlier. He also admitted he knew they were stolen. In finding sufficient evidence to support a conviction of possessing a stolen firearm, the McPhee court stated that "possession of recently stolen property in connection with other evidence tending to show guilt is sufficient." McPhee, 156 Wn. App. at 62. This does not, however, mean that evidence of recent theft is *required*. Rather, since neither possession, nor defendant's status as a felon, are alone sufficient, McPhee stands for the straightforward proposition that there must be some other evidence tending to show guilt as well. Here, there was.

As noted above, the jury received an instruction on knowledge that provided, in part:

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

1 CP 47 (Court's instruction # 14), reflecting language of WPIC 10.02. This instruction amounted to a definition of constructive knowledge, entitling the jury to draw reasonable inferences about what the defendant did or did not know.

This was an unusual firearm. The Glock pistol did not have a clip, and the butt of the handle looked as though it had been chewed on. 1 Trial RP 76; 2 Trial RP 43, 49, 93, 95. It bore a serial number in two places, engraved on the slide and on a stainless steel plate on the bottom of the barrel. frame rail. 1 Trial RP 78-79; 2 Trial RP 43-44. The serial number on the slide was legible, but the serial number on the bottom of the barrel had been obscured by being partially scraped or filed off. 2 Trial RP 44-45. To accomplish this had required using a tool that was harder than the stainless steel plate being scraped. 2 Trial RP 53. It could not have just happened through wear and tear. 2 Trial RP 53. A detective testified he "could not easily read" the scraped numbers, but by

referring to the legible serial numbers on the slide, he was “able to compare it and make inferences” that the numbers were the same in both places. 2 Trial RP 52-53.

Given this description, it is hard to imagine any circumstances under which one could have acquired this handgun and not be highly suspicious of where it came from. Because the purpose of serial numbers on a gun is to track it to its owner, it is a crime to obscure the identifying numbers on a firearm, RCW 9.41.140, and a firearm so defaced is, in effect, illegal. 2 Trial RP 48-50. And a jury is permitted but not required to infer that knowing possession of a gun, so defaced, evinces constructive knowledge that the gun is stolen.

The defendant argues that the serial number was “readable” and merely “scratched.” BOA 5, 14. But, as discussed above, the evidence showed more: Officers had to guess at the numbers. Filing the numbers off had taken some work. The defendant also argues there are other reasons to alter a serial number, such as seeking to subvert federal licensing laws. But possible alternate explanations are not considered. When examining a claim of insufficient evidence, all reasonable inferences are drawn in favor of the State and interpreted most strongly against the defendant.

Hosier, 157 Wn.2d at 8; Salinas, 119 Wn.2d at 201; Soderholm, 68 Wn. App. at 373. And evidence favoring the defendant is not considered. State v. Randecker, 79 Wn.2d 512, 521, 487 P.2d 1295 (1971) (negative effect of defendant's explanation on State's case not considered), State v. Jackson, 62 Wn. App. 53, 58 n.2, 813 P.2d 156 (1991) (defense evidentiary inference cannot be used to attack sufficiency of evidence to convict).

The possession-of-stolen-firearm count was certainly a “triable” case from a defense point of view. But that is not the standard on review. Taken in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to find that the defendant had information *from the firearm itself* that would lead a reasonable person to believe the firearm was stolen. Consequently, the jury was entitled to conclude that he knowingly possessed a firearm, knowing it was stolen.

IV. CONCLUSION

The judgment and sentence should be *affirmed*.

Respectfully submitted on March 6, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

CHARLES FRANKLIN BLACKMAN, WSBA #19354
Deputy Prosecuting Attorney
Attorney for Respondent