No. 99899-0

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

vs.

Michael Hiatt,

Respondent.

Spokane County Superior Court Cause No. 18-1-05601-3

The Honorable Judge Charnelle M. Bjelkengren

Answer to Petition for Review

Jodi R. Backlund
Manek R. Mistry
Attorneys for Respondent

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case does not merit review. The Court of Appeals' decision does not conflict with any Supreme Court precedent. Instead, the court applied established rules to analyze the sufficiency of the evidence and concluded that the State failed to meet its burden.

The Court of Appeals did not add elements to the offense or otherwise burden the prosecution with proving more than is required by the statute. This case does not present any issues of substantial public interest. The Supreme Court should deny review.

STATEMENT OF THE CASE

While homeless in Spokane, Michael Hiatt slept in his Ford Expedition. RP (7/15/19) 30, 47. The Expedition didn't run. RP (7/15/19) 55. On Christmas day, while Mr. Hiatt was asleep in the vehicle, a police officer approached. CP 84; RP (7/15/19) 19, 61. The officer saw that the Expedition was chained to a Honda Accord, nose to nose. CP 84; RP (7/15/19) 20-22. The Accord had been reported stolen. RP (7/15/19) 22, 71. It had a broken window and "a punched-out ignition key" that could not be removed. CP 85.

Mr. Hiatt said that a friend had asked to lock the Accord to his Expedition, so that it would not get stolen.[1] CP 84; RP (7/15/19) 28, 30. Mr. Hiatt did not have a key to the padlock connecting the two vehicles. RP (7/15/19) 43-44.

Following a bench trial, Mr. Hiatt was convicted of possessing a stolen motor vehicle.[2] CP 86-87. The court made detailed findings and concluded that Mr. Hiatt had constructive possession of the Accord. CP 86.

Mr. Hiatt appealed, and his conviction was reversed for insufficient evidence. Two appellate judges concluded that the evidence and the court's findings did not show that Mr. Hiatt had dominion and control over the Accord. Opinion, pp. 8-9. A dissenting judge opined that the evidence was sufficient. Dissent, pp. 1-8.

The State now seeks review of that decision.

ARGUMENT

I. THE SUFFICIENCY OF THE EVIDENCE IN THIS CASE DOES NOT PRESENT AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

The Court of Appeals majority properly assessed the sufficiency of the evidence in this case. Opinion, pp. 7-9. The court outlined the elements

[1] He declined to name the friend. CP 84.

[2] Mr. Hiatt was also convicted of making or possessing motor vehicle theft tools, having been found with shaved keys. CP 85-86.

of the offense and identified the primary issue as whether Mr. Hiatt had constructive possession of the stolen Accord. Opinion, pp. 7-8. The court then summarized the test for constructive possession and applied established Supreme Court precedent.[3] Opinion, pp. 7-8 (citing, *inter alia*, *State v. Davis*, 182 Wn.2d 222, 340 P.3d 820 (2014)).

Petitioner does not discuss constructive possession or take issue with the Court of Appeals' explication of the relevant law. Petition, pp. 8-12. This may be taken as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009); *State v. McNeair*, 88 Wn.App. 331, 340, 944 P.2d 1099 (1997).

Instead of discussing constructive possession, Petitioner makes a circular argument regarding "gratuitous bailees," an issue that was not briefed in the Court of Appeals. Petition, pp. 9-12. Petitioner claims that Mr. Hiatt was a bailee because he had possession of the Accord. Petition, pp. 9-10. Petitioner then implies that Mr. Hiatt was in possession because he was a bailee. Petition, pp. 9-10. Such circular logic cannot provide the basis for a criminal conviction.

[3] Whether a person had dominion and control is likely a legal question rather than a question of fact. A finding of fact involves a determination of "whether something occurred based on the evidence before the court." *Matter of Welfare of A.L.C.*, 8 Wn.App.2d 864, 872, 439 P.3d 694 (2019). By contrast, when the court "determine[s] the legal significance of those underlying facts," that determination is a conclusion of law. *Id.* Here, for example, the underlying facts include Mr. Hiatt's lack of a key to the padlock. That underlying fact has legal significance in determining whether or not he had dominion and control over the car.

At no point does Petitioner explain how the facts establish constructive possession. Petitioner mentions "dominion and control," but does not analyze factors that might support a finding that Mr. Hiatt had dominion and control over the Accord. Petition, p. 13.

By contrast, the majority opinion outlines the factors necessary to establish dominion and control and applies the law to the facts of this case. Opinion, pp. 8-9. Petitioner's argument appears to be that the Court of Appeals misapplied the law, but the Petition does not provide a different analysis regarding dominion and control or constructive possession. Petition, pp. 8-12.

Petitioner erroneously suggests that the Court of Appeals "require[d] the State to prove more than is required by RCW 9A.56.068." Petition, p. 11. This is incorrect. In keeping with the test for constructive possession, the majority determined "whether, under the totality of the circumstances, the defendant exercised dominion and control" over the Accord. Opinion, p. 8.

The majority concluded that the totality of the circumstances did not establish dominion and control. The court then outlined facts that *could* have proved dominion and control but did not suggest that any particular facts were required. Opinion, pp. 8-9. This is consistent with the caselaw, which permits examination of "a variety of factors to determine

whether an individual has dominion and control over an item." *State v. Listoe*, 15 Wn.App.2d 308, 326, 475 P.3d 534 (2020). The pattern jury instruction defining dominion and control makes this explicit as well:

> In deciding whether the defendant had dominion and control over a substance, you are to consider *all the relevant circumstances in the case*. Factors that you may consider, *among others*, include… [listing examples]

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 50.03 (5th Ed) (emphasis added).

Petitioner falsely claims that the majority "adds an additional non-statutory and non-common law element to the offense – use of or benefit from the stolen goods."[4] Petition, p. 11. Nowhere in the Opinion does the majority suggest that the prosecution must prove that the defendant used or benefited from stolen goods in order to possess them. Opinion, pp. 6-13.

The evidence was insufficient for conviction. Mr. Hiatt did not have dominion and control over the stolen Honda Accord. *See Davis*, 182 Wn.2d at 234 (Stephens, J., dissenting, for a majority of the court). He did not have the key to the padlock securing the Honda to the Ford Expedition. RP (7/15/19) 43-44; CP 83-87. Nothing suggests that he helped his friend chain the two vehicles together. RP (7/15/19) 30; CP 83-

[4] In support of this false claim, Petitioner cites to Judge Pennell's dissent. Petition, p. 11 (citing Dissent, p. 3).

87. He could not tow the Honda away, as the two vehicles were "nose to nose" and the Ford Expedition was broken down. RP (7/15/19) 22, 57; CP 83-87.

The Court of Appeals correctly analyzed the issue and reversed Mr. Hiatt's conviction, relying on established precedent. This case does not present an issue of substantial public interest that should be determined by the Supreme Court under RAP 13.4(b)(4). The court should deny review.

II. THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH ANY SUPREME COURT DECISIONS.

Relying on Supreme Court precedent, the Court of Appeals applied the proper test for reviewing the sufficiency of the evidence. Opinion, pp. 7-8 (citing *State v. Homan*, 181 Wn.2d 102, 330 P.3d 182 (2014)). The court viewed the evidence in the light most favorable to the State and determined whether any rational trier of fact could have found guilt beyond a reasonable doubt. Opinion, pp. 8-9 (citing *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992)). The court concluded that the evidence was insufficient. Opinion, p. 9.

Petitioner appears to take issue with the *Homan* court's assertion that "appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings

support the conclusions of law." *Homan*, 181 Wn.2d at 105–06. Petitioner suggests that this language is inconsistent with *Homan's* requirement that evidence be taken "in the light most favorable to the prosecution" to determine if "any rational fact finder could have found the elements of the crime beyond a reasonable doubt." *Id.,* at 105. The *Homan* court did not see any conflict between these two statements. *Id.*

Furthermore, this case does not provide a reason to re-examine *Homan*. The Court of Appeals applied the language favored by Petitioner, viewing the evidence in the light most favorable to the State and considering whether any rational trier of fact could have found guilt beyond a reasonable doubt. Opinion, pp. 8-9. This is the standard outlined in *Homan.* It is also the standard outlined in *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). *See* Petition, pp. 1, 7, 16-17 (alleging a conflict between this case and *Jackson*).

Petitioner is apparently dissatisfied with the majority's application of that standard but does not itself apply the standard to analyze the issue of dominion and control or constructive possession.[5] Petition, pp. 8-12.

[5] Instead, Petitioner delves into whether or not Mr. Hiatt was a gratuitous bailee. Petition, pp. 9-12. Neither party briefed this issue for the Court of Appeals. Furthermore, Petitioner's circular argument regarding bailment does not provide a basis for proof of possession beyond a reasonable doubt.

The majority correctly refused the dissent's invitation to disregard the trial court's findings because they were "faulty." Opinion, p. 12. Appellate courts do not "hear or weigh evidence, find facts, or substitute their opinions for those of the trier-of-fact.'" *Yorkston v. Whatcom Cty.*, 11 Wn.App.2d 815, 831, 461 P.3d 392, *review denied*, 195 Wn.2d 1020, 464 P.3d 202 (2020) (quoting *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn.App. 710, 717, 225 P.3d 266 (2009)).

As the majority noted, "the trial court found what it believed it could find, in what was a weak State case." Opinion, p. 12. The majority relied on those findings and concluded that the evidence was insufficient for conviction. Opinion, pp. 8-9.

The Court of Appeals decision does not conflict with any Supreme Court precedent. RAP 13.4(b)(1) does not provide a basis for review. The Supreme Court should deny the petition.

CONCLUSION

There is no basis to review the Court of Appeals' opinion. The sufficiency of the evidence does not raise an issue of substantial public interest. Nor does the opinion conflict with Supreme Court precedent. The petition should be denied.

Respectfully submitted on July 7, 2021,

BACKLUND AND MISTRY

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date I mailed a copy of Respondent's Answer to the Petition, postage prepaid, to:

Michael Hiatt, DOC #864049
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 99362

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on July 7, 2021.

Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

July 07, 2021 - 8:16 AM

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Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com
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