

NO. 62157-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

SERGEY LAKITTOY,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL C. HAYDEN

**BRIEF OF RESPONDENT**

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**A. ISSUES**

1. A government act that does not constitute a “search,” and which does not offend a “private affair,” will not implicate a defendant’s constitutional rights. A person does not have a reasonable expectation of privacy in an outdoor common area of a storage facility, and, historically, Washington citizens have never held a privacy interest in this area. When the officers entered the common area of a storage facility, did the officers implicate the Fourth Amendment of the United States Constitution or article 1, section 7 of the Washington Constitution?

2. A person can provide officers with permission to enter those areas over which the person has common authority. In this case, a manager and a tenant of a storage facility retained common authority over a storage complex’s common area, and both the manager and a tenant provided the officers with consent to enter the common area of a storage facility. Did the trial court properly rule that the officers lawfully entered the common area of a storage facility after receiving consent to enter?

3. To assert automatic standing, the alleged illegal act must directly lead to the evidence seized. In this case, officers entered the outdoor common area of a storage facility and, when in the common area, contacted the defendant, prompting the defendant to open the door of the storage unit where he was located. After the defendant lifted the door, the

officers saw a stolen vehicle. Was there an intervening event between the entry in the storage complex and the seizure of evidence so that the defendant does not have automatic standing to challenge the officers' entrance into the storage unit?

4. An appellate court reviews a claim of insufficiency of the evidence to determine whether, viewing the evidence most favorable to the State, any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. In this case, the evidence showed that the defendant was near a stripped stolen vehicle, and the defendant had in his hands the vehicle's ignition and a set of keys designed to steal cars. Was there sufficient evidence to convict the defendant for possession of stolen vehicle?

**B. FACTS**

**1. PROCEDURAL FACTS**

Defendant Sergey Lakitoy was charged in King County Juvenile Court with one count of Possession of Stolen Vehicle. CP 29. The trial court found Lakitoy guilty as charged. CP 49-51. At sentencing, the trial court imposed a sentence of five days with credit for five days served. CP 35-40. Lakitoy appealed. CP 41-42.

## 2. SUBSTANTIVE FACTS

On November 27, 2007, Federal Way police officers Walker and Schwan responded to a 911 call reporting suspicious activity in a commercial storage facility on Pacific Highway South. RP 29. The officers contacted the manager of the storage facility, who indicated that she would meet them at the facility and allow them in. RP 31.<sup>1</sup>

The storage facility was a multi-building facility where individuals would rent individual units. RP 33. The complex was secured by a coded gate with a keypad on the inside and the outside of the complex that allowed vehicles to exit and enter the facility. RP 32.

When the officers arrived at the storage facility, they saw someone enter the complex after entering a code into the keypad. RP 31-32. The officers talked with this person, and asked him to return to the gate if he saw anything suspicious within the storage complex. RP 31. At that time, the officers did not enter the facility. This individual returned a few minutes later and indicated that he saw “something suspicious” involving a white van and a white car parked in the far corner of the facility. RP 32. This individual then opened the gate for the officers, and the officers

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<sup>1</sup> The verbatim report of proceedings consists of one volume and will be cited as RP.

entered the outdoor common area of the storage facility in their patrol car.

RP 33.

The officers then drove to the E building and walked to the storage unit where a white Acura and a white Ford van were parked outside.

RP 33. They observed a sliding door approximately 1-2 feet off the ground. RP 33. The officers could hear what sounded like metal against metal noises, similar to someone working with tools. RP 33.

The officers then announced their presence and asked the occupants to come out and talk with them. RP 35. Lakitoy, who was inside the small storage unit, then opened the storage unit's door very slowly while leaning his right hand back towards the interior of the unit. RP 35. Officers observed Lakitoy furtively place an ignition and a set of jiggle keys on the trunk of a partially disassembled Acura that was inside the unit. RP 36, 45, 52, 67, 85; Exs. 1-2, 6. Jiggler keys are special keys used to steal vehicles. RP 36, 45, 52, 67, 85; Ex. 2.

When the door fully opened, the officers also saw another individual, Bogdan Fredas, the renter of the unit, leaning under the hood of the Acura. RP 40, 48. Car seats, cushions, and other car parts apparently belonging to the Acura were on the ground outside of the car. RP 47; Exs. 3-4. The officers then looked into the Acura and noticed that

it was missing several parts, including the seats, cushions, and the ignition. RP 57; Ex. 5.

The officers then detained both Lakitoy and Fredas while they ran a record check of the partially dissembled Acura and confirmed that the vehicle was stolen. RP 44. The officers also ran a record check of the white car that was outside the unit, which was also confirmed as stolen. RP 41. The white van parked outside belonged to Fredas. RP 57. Both Lakitoy and Fredas were then arrested. RP 54.

At trial, Lakitoy moved to suppress the evidence, arguing that the officers violated his constitutional rights by entering the storage facility's common area without valid consent. RP 5-20. The trial court disagreed, concluding that the officers had lawful authority based on the apparent authority of the person who let them into the facility. RP 20. The court rejected the implication by Lakitoy that to enter the complex officers needed to see "a lease agreement, a deed of trust, a mortgage, something to show that they have an ownership interest in the building before the officer can enter." RP 20.

The defense further moved to suppress the evidence arguing that the officers did not have articulable facts to conduct an investigative

Terry<sup>2</sup> stop of Lakitoy while he was inside the storage unit. RP 97. The court denied this motion as well. RP 97.

**C. ARGUMENT**

**1. THE TRIAL COURT CORRECTLY DENIED LAKIToy'S MOTION TO SUPPRESS.**

Lakitoy claims that the evidence should have been suppressed because the officers did not have lawful authority to enter the common area of the storage facility. Lakitoy asserts that the officers' entry into the outdoor common area of the storage complex violated his constitutional rights under the Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington constitution.

The trial court denied Lakitoy's motion to suppress asserting that the person who opened the gate for the officers had the *apparent* authority to allow the officers' entry into the common area of the storage facility. To the extent that this decision was based on the tenant's *apparent* authority, the State concedes error. State v. Morse, 156 Wn.2d 1, 12, 123 P.3d 832 (2005) (holding that consent based on *apparent* authority is not an exception to the warrant requirement under article 1, section 7).

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<sup>2</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

This Court, however, can affirm for any reason stated in the record, even if not considered by the trial court. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). And, for three reasons, this Court should affirm based on alternate reasons. First, the officers' entry into the common area of the storage complex neither constituted a "search" nor implicated Lakitoy's "private affairs." Accordingly, the officers' actions did not implicate his constitutional rights. Second, to the extent that Lakitoy does have a constitutional claim, the officers did receive consent to enter, both from the manager and a tenant of the storage facility. Third, Lakitoy does not have standing to challenge the alleged illegal entry by the police.

**a. The Officers' Entry Into The Common Area Of The Storage Facility Did Not Implicate The Defendant's Constitutional Rights.**

**i. The officers' entry was not a "search" under the Fourth Amendment to the Constitution.**

The Fourth Amendment prohibits unreasonable *searches* by the State. Under the Fourth Amendment, a "search" occurs if the government intrudes upon a legitimate expectation of privacy. United States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980). In deciding this question, the courts focus on whether the citizen had a subjective expectation of privacy to preserve something as private and

whether society recognizes this expectation as reasonable. Smith v. Maryland, 442 U.S. 735, 740, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). The burden of proof is on the defendant to show that he had a legitimate expectation of privacy in a place searched or item seized. Rawlings v. Kentucky, 448 U.S. 98, 104, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980).

In this case, the officers' entry into the outdoor common area of the storage complex did not constitute a "search" under the Fourth Amendment. While a person who rents a single storage unit in a storage facility has a legitimate expectation of privacy in *his individual storage unit*, the tenant, however, does not have an expectation of privacy in a storage facility's common area that is open to other tenants and their guests.

Indeed, the case law has consistently held that entry into the common area of an apartment complex or a storage facility does not constitute a "search" for purposes of the Fourth Amendment. See, e.g., United States v. Acosta, 965 F.2d 1248, 1252 (3d Cir. 1992) (holding that defendant had no reasonable expectation of privacy in the common areas of an apartment building); United States v. Concepcion, 942 F.2d 1170, 1172 (7th Cir. 1991) (finding that "area outside one's door lacks anything like the privacy of the area inside," in holding that "a tenant has no

reasonable expectation of privacy in the common areas of an apartment building”).

In United States v. Boden, 854 F.2d 983, 985 (7th Cir. 1988), the officers entered, without a warrant, the common area of a self-storage facility. The storage facility was surrounded by a six-foot high barbed-wire fence. Tenants gained entry by using a computerized key card to open a gate. Id. On the day the officers entered, the gate was broken and remained open, but a sign warned that if management found any unauthorized person on the premises, they would call the police. Id.

The officers entered the open gate and observed Boden, a storage-unit renter, loading boxes from his car into his individual storage unit. The court rejected Boden’s contention that he had a legitimate Fourth Amendment privacy interest in the entire storage facility partly, because the gate was open on that day, but also because Boden could not expect that “the facility’s common area could be shielded from another tenant or those that the tenant invited.” Boden, 854 F.2d at 990. Other courts have agreed that entrance into the common area of a storage facility does not constitute a search. See State v. McCrane, 746 F.2d 632, 634 (8th Cir. 1984) (no legitimate expectation in common area of storage area under apartment building); United States v. Novello, 519 F.2d 1078, 1080

(5th Cir. 1975) (no legitimate expectation of privacy in common area of storage warehouse).

This Court should reach the same conclusion here. In this case, the renters of the individual units fully understood that other tenants, and those who the other tenants invited, would have access to the common area of the storage complex. Further, the tenants knew management or other tenants could allow officers into the common areas. Following the reasoning of Boden, McCrane, and Novello, this Court should conclude that there was no Fourth Amendment privacy interest in the common area of the storage unit.

Further, the fact that this storage facility was locked does not make a difference. Even though the complex was locked, the renters knew that other tenants, and their guests, or any other invitee had access to the common area. Also, the storage facility is locked to provide the renters with *security*, not with privacy in the common area of the storage facility to do things outside the public view. As one court stated in the context of locked apartment buildings:

The locks on the doors to the entrances of the apartment complex were to provide security to the occupants, not privacy in common hallways . . . An expectation of privacy necessarily implies an expectation that one will be free of any intrusion, not merely unwarranted intrusions.

Eisler, 567 F.2d at 816. Indeed, the conclusion that tenants do not have a reasonable expectation of privacy in common areas fortifies this security by giving “the tenants the benefit of much-needed police protection” in the common areas. Holland, 755 F.2d at 256.

Based on this reasoning, the vast majority of courts have concluded that individuals do not have a reasonable expectation of privacy in common areas of apartment complexes, *even if locked*. See Nohara, 3 F.3d at 1241 (finding no reasonable expectation of privacy in the hallways of a high-security, high rise apartment complex); Holland, 755 F.2d at 255 (holding that “common halls and lobbies of multi-tenant buildings are not within an individual tenant’s zone of privacy even though they are guarded by locked doors”); Eisler, 567 F.2d at 816 (finding no reasonable expectation of privacy in the hallways of an apartment building notwithstanding locks on the doors to the entryways of the apartment complex); but see United States v. Carriger, 541 F.2d 545, 550 (6th Cir. 1976) (finding a reasonable expectation of privacy in common areas of apartment building where entryway into apartment building was locked). This Court should reach the same conclusion here.

Since the individual tenants did not have a Fourth Amendment privacy interest in the common area of the storage complex, the officers’

entry into the common area did not constitute a “search” and, thus, did not implicate Lakitoy’s constitutional rights.

**ii. The entry into the gated complex does not implicate a private affair.**

Unlike the Fourth Amendment, which prohibits unreasonable searches and seizures, article 1, section 7 prevents intrusions into a citizen’s private affairs without lawful authority. WASH. CONST. ART. 1, § 7; State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000).

Private affairs are those “interests which citizens of this State have held, and should be entitled to hold, safe from government trespass.” State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). If a government act does not implicate a private affair, then the act necessarily does not implicate article 1, section 7 of the Washington constitution. State v. Puapuaga, 164 Wn.2d 515, 522, 192 P.3d 360 (2008). The defendant has the burden of showing that his “private affairs” were disturbed in a way that implicates article 1, section 7. State v. Jackson, 82 Wn. App. 594, 601-02, 918 P.2d 945 (1996). To determine whether a government act implicates a “private affair,” the court considers (1) the historical protections afforded to the perceived interest and (2) the nature of the information — “that is, whether the information obtained via

governmental trespass reveals intimate or discrete details of a person's life." Jorden, 160 Wn.2d at 126-27.<sup>3</sup>

Here, the entry into the common area of the storage facility did not intrude on Lakitoy's private affairs. As a preliminary matter, there is no reason to believe that article 1, section 7 provides more protection than the Fourth Amendment *in this particular instance*. Although article 1, section 7 is qualitatively different than the Fourth Amendment, this merely means that, in some situations, article 1, section 7 will afford greater protection than its federal counterpart. See, e.g., State v. Boland, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990) (right to privacy applies to curbside garbage under article 1, section 7, but not under Fourth Amendment). But "a determination that a given state constitutional provision affords enhanced protection in a particular context does not mandate such a result in a different context." State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002) (quoting State v. Johnson, 128 Wn.2d 431, 446, 909 P.2d 293 (1996)). Accordingly, in other situations, the courts have found that the Fourth Amendment provides sufficient protection as required by article 1, section 7. See, e.g., McNabb

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<sup>3</sup> Further, the courts will sometimes consider "the purpose for which the information sought is kept, and by whom it is kept" when the officers search a database or registry that contains personal information. Jorden, 160 Wn.2d at 127.

v. Dept. of Corrections, 163 Wn.2d 393, 401, 180 P.3d 1257 (2008)

(analyzing right to refuse artificial means of nutrition, the court held that “[b]ased on Washington courts’ reliance on the federal constitution, we conclude the protection granted under article 1, section 7 in this context is coextensive with, but not greater than, the protection granted under the federal constitution”).

Here, when dealing with entry into the common area of a storage facility, the protections under the federal and state constitution are co-extensive. Indeed, this case does not involve entry into a home, or even near a home, where article 1, section 7 is most protective. See, e.g., State v. Ferrier, 136 Wn.2d 103, 111-12, 960 P.2d 927 (1998) (quoting State v. Young, 123 Wn.2d 173, 185, 867 P.2d 593 (1994)) (“[I]n no area is a citizen more entitled to his privacy than in his or her home. For this reason, ‘the closer officers come to intrusion into a dwelling, the greater the [article 1, section 7] protection.’”). Further, this case does not involve a random and suspicionless search, another area where article 1, section 7 tends to be more protective than the Fourth Amendment. Jorden,

160 Wn.2d at 122 (holding that random, suspicionless search of a motel registry violated a defendant's constitutional rights).<sup>4</sup>

Moreover, the Jorden factors show that the officers' entry did not offend a "private affair." First, the State knows of no historical protections provided to the common areas of storage facilities. Indeed, unlike a home, the Washington Supreme Court has held that "a commercial storage unit is not the kind of location entitled to special privacy protection." State v. Bobic, 140 Wn.2d at 259 (2000). Second, the information obtained by the officers upon entry into the common area does not reveal "discrete details of a person's life." Jorden, 160 Wn.2d at 126. Indeed, unlike a motel registry, the item searched in Jorden, entrance into the common area of a storage facility — when the contents inside the individual units are blocked from view by a door — does not provide officers with intimate details about another person.

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<sup>4</sup> Further, to show that article 1, section 7 is more protective than the federal constitution in this particular instance, the court has to conduct a Gunwall analysis. State v. Gunwall, 106 Wash.2d 54, 720 P.2d 808 (1986) (listing six factors). Since the courts have already held that article 1, section 7 is more protective than the Fourth Amendment, the courts only have to analyze the fourth (preexisting state law) and the sixth (particular local concern) Gunwall factors when deciding whether article 1, section 7 is more protective in a *particular instance*. State v. Richman, 85 Wn. App. 568, 573-74, 933 P.2d 1088, 1091 (Wn. App. 1997). The State knows of no state law that addresses privacy for common areas of storage facilities, and there is no evidence that this issue addresses a particular local concern.

In conclusion, since the entry by the officers into the common area of the storage facility did not implicate a “private affair,” Lakitoy’s article 1, section 7 rights were not violated when the officers drove into the storage facility on Pacific Highway.

**b. The Officers Had Lawful Authority To Enter The Complex.**

Further, even if the officers’ entry implicated his constitutional rights, the officers had lawful authority to enter the complex, as the officers received permission from both the manager of the unit and the person who opened the gate for them.

The State has the burden of showing that a warrantless search falls within one of the exceptions. One recognized exception to the warrant requirement is the consent to search. State v. Mathe, 102 Wn.2d 537, 541, 688 P.2d 859 (1984). A third party “may consent to a search if he or she possesses ‘common authority over or other sufficient relationship to the premises or effects sought to be inspected.’” State v. Holmes, 108 Wn. App. 511, 520, 31 P.3d 716 (2001) (quoting United States v. Matlock, 415 U.S. 164, 171, 94 S. Ct. 988, 39 L. Ed. 2d 242 (1974)). Common authority exists when there is a “mutual use of the property by persons generally having joint access or control for most purposes.” Id. at 518

(quoting Matlock, 415 U.S. at 171 n.7). To show valid consent, however, the State must prove that the person consenting to the search had actual authority to consent. “Access and permission to enter are the hallmarks of common authority.” Id. at 520.

In this case, the manager — who has actual authority over the common areas by virtue of managing the property — provided the officers with the necessary consent. The manager told the officers that she would come to the facility and allow them in. Although she did not physically allow them in, the manager provided them with consent to enter by indicating that she would allow them inside once she arrived.

Further, the tenant who physically allowed the officers to enter the gate also had actual authority to give permission to the officers to enter. This person had access to the storage complex because he had the keypad code to the facility. Further, this person had permission by virtue of the fact that he could enter and exit at his discretion. See Seattle v. McCready, 124 Wn.2d 300, 307, 877 P.2d 686 (1994) (holding that tenants of apartment complex had authority to consent to search of common areas).

Lakitoy appears to concede that authority to consent would have been established as long as the police confirmed that the person was a *current* patron of the storage complex. Br. of App. at 12. Lakitoy,

however, surmises that it is possible that the person was a “*former* tenant of the storage complex who still retained his security code to the gate.” Br. of App. at 13 (emphasis added). Although possible, it seems incredibly unlikely that a former tenant, for some unknown reason, would frequent a storage facility where he does not retain an individual unit. To the contrary, the reasonable conclusion is that this person was a tenant who had actual and common authority to allow the officers into the complex.

Lakitoy, relying on State v. Leach, 113 Wn.2d 735, 736-44, 782 P.2d 1035 (1989), also argues that even if the tenant who allowed the officers into the complex had actual authority over the common area, the officers needed to obtain permission from *all* other present tenants before entering the complex. In Leach, officers received consent to search a travel agency from someone with common authority over the premises. When the officers arrived at the travel agency, the officers searched the premises even though Leach, who also had common authority, was present and did not provide officers with permission to search. The court concluded that one who has equal or lesser control over a premise does not have authority to consent for those who are present and have equal or greater control. Id.

For two reasons, Leach is inapposite. *First*, in Leach, the defendant, or the person challenging the search, *was the person who had equal control over the premises*. In this case, Lakitoy conceded that he had no authority with respect to the storage facility. The State knows of no case where a defendant challenging a search under the Leach rule did not have any authority in the premises.

*Second*, this rule stated in Leach — that an officer must obtain consent from all the tenants who are present and have an equal interest in the premises — applies to homes and offices, but *not* to a commercial storage complex. In State v. Cantrell, 124 Wn.2d 183, 875 P.2d 1208 (1994), for example, the Washington Supreme Court refused to extend the Leach rule to searches of automobiles. The court noted that although individuals have a privacy interest in an automobile, this does not rise to the level of a home or office. Id. at 190. Accordingly, the Cantrell court held that an officer who receives permission to search a car has valid consent *unless* and *until* a person with equal or lesser control specifically objects to the search. Id.

Like the Court's holding in Cantrell, this Court should also refuse to extend the Leach rule to commercial storage units. Like the situation of an automobile, to the extent that someone has a privacy interest in a common area of a storage facility, it does not rise to the level of a person's

expectation of privacy to a home or working space. Accordingly, this Court should hold that as long as a person with common authority over the common area of a storage facility consents to an officer's entry, that consent is valid unless a person with equal interest is present and objects to that entry. Since there is no other evidence that any other tenant objected to the officers' entry, the officers acted with the appropriate consent.

**c. Lakitoy Does Not Have Standing To Challenge The Officers' Entry Into The Common Area Of The Storage Complex.**

To assert automatic standing, a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the item at the time of the search or seizure. State v. Jones, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). Further, a person does *not* have automatic standing when the alleged illegal act did not *directly* lead to seizure of the evidence. State v. Williams, 142 Wn.2d 17, 23, 11 P.3d 714 (2000) (defendant did not have automatic standing to challenge officers' entry into home where officers discovered drugs in defendant's pocket after officers arrested the defendant on an outstanding warrant).

In this case, like the situation in Williams, Lakitoy here does not have the requisite nexus between the alleged illegal entry and the discovery of evidence to support the application of automatic standing. For this reason, Lakitoy would have automatic standing to challenge the search of the individual storage unit, but not the alleged entry into the storage facility.

**2. SUFFICIENT EVIDENCE EXISTS TO SUPPORT LAKIToy'S CONVICTION FOR POSSESSION OF STOLEN VEHICLE.**

Lakitoy also argues that there was not sufficient evidence to conclude that he possessed the stolen vehicle. This is also wrong. To prove the crime of Possession of Stolen Vehicle, the State has to prove that the defendant possessed a stolen motor vehicle. RCW 9A.56.068. An accomplice is someone who, "with knowledge that it will promote or facilitate a crime, he . . . aids or agrees to aid such other person in planning and committing" the crime. RCW 9A.08.020. Possession can either be actual or constructive. Actual possession requires physical custody. State v. Cantabrana, 83 Wn. App. 342, 353, 908 P.2d 892 (1996). Constructive possession requires dominion and control over the contraband or the premises containing it. Id. Deciding whether constructive possession exists requires this Court to examine the totality of the situation to

conclude if substantial evidence exists to establish circumstances from which the trier of fact can reasonably infer the defendant had dominion and control over the contraband. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

An appellate court reviews a claim of insufficiency of the evidence to determine whether, viewing the evidence most favorable to the State, any rational juror could have found the elements of the charged crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In evaluating whether this standard has been met, the State's evidence is accepted as true — indeed, in challenging the sufficiency of the evidence, the defendant is deemed to have admitted the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. Smith, 155 Wn.2d at 201. The appellant has an exacting burden since the reviewing court will only reverse a conviction for insufficiency of the evidence where no rational trier of fact could find that all the elements of the crime were proved beyond a reasonable doubt. Id. Further, the appellate court will defer to the trier of fact for purposes of determining credibility, resolving conflicting testimony, and evaluating the evidence. State v. Jackson, 129 Wn. App. 95, 109, 117 P.3d 1182 (2005), rev. denied, 156 Wn.2d 1029, 133 P.3d 484 (2006).

In this case, the testimony showed the following: (1) that Lakitoy was inside a small storage unit standing next to a stolen vehicle; (2) the vehicle had been partially disassembled, including the ignition; (3) several parts of the car were on the ground next to the car; (4) another person in the storage unit was working on the partially disassembled car; and (5) when the defendant saw the officers, he furtively placed an ignition and a set of jiggle keys on the rear of the vehicle.

Under these facts, there exists more than sufficient evidence for a reasonable finder of fact to conclude that Lakitoy possessed the stolen vehicle or, at the very least, was an accomplice to possession of the stolen vehicle. The combination of his presence next to the stolen vehicle in an enclosed storage unit, the fact that the car was in the process of being stripped, and that he possessed an ignition and the jiggle keys shows that he had dominion and control — or unfettered access — over the stolen Acura.

Lakitoy contends that there could have been non-criminal explanations for his actions. For example, he asserts that it is possible that the Honda ignition in his hands was not the ignition that was missing from the Acura. Br. of App. at 18. Even if this were *possible*, however, this Court must consider all reasonable inferences in favor of the State, not the defendant. And in this case, a reasonable inference is that the jiggle keys

were used to start the stolen, partially-stripped Acura, that the ignition in Lakitoy's hands belonged to the stolen Acura, and that Lakitoy was in the process of stripping the vehicle. A reasonable inference is also that Lakitoy furtively discarded the jiggler keys and ignition when he saw the officers because he knew that he had committed a crime. Viewing all the reasonable inferences in favor of the State, sufficient evidence exists to support a verdict that Lakitoy possessed this stolen vehicle. See State v. Bobic, 94 Wn. App. 702, 715, 972 P.2d 955 (1999), aff'd in part, rev. in part on other grounds, 140 Wn.2d 250, 996 P.2d 610 (2000) (possession of stolen vehicle parts and other circumstantial evidence constituted sufficient evidence to support possession of stolen property verdict).

Lakitoy also cites to several cases showing that (1) mere proximity *by itself* is not sufficient to show possession; and (2) that mere possession of a car part, *by itself*, is not sufficient to show possession of the stolen car. See Br. of App. 17-19 (citing cases). That may be true, but the State does not rely on mere proximity to the stolen vehicle or mere possession of a car part to show possession. To the contrary, the evidence shows (1) proximity to the stolen vehicle; (2) possession of a stolen car part; (3) furtive actions; and (4) possession of jiggler keys.

Finally, Lakitoy relies on State v. Spruell, 57 Wn. App. 383, 788 P.2d 613 (1986), and State v. Callahan, 77 Wn.2d 27, 459 P.2d 400

(1969). Both cases are inapposite. In Spruell, the defendant was charged with possession of cocaine, and the only evidence against him was that he was found near drugs and that his fingerprint was on a plate that contained the drugs. Understandably, the court held that mere proximity and presence near drugs did not establish possession, and the fingerprint on the plate merely meant that he had touched the plate at some previous point. 57 Wn. App. at 387-89.

In Callahan, the court found that there existed insufficient evidence to convict the defendant for possession of narcotics where the evidence against the defendant was that he was near the drugs, that a few of his items were on the houseboat where the drugs were found, and that he had admitted that he had fleeting possession of the drugs earlier that day. 77 Wn.2d at 30-32. In that case, however, another person testified that he had sole possession of the drugs, which was not challenged by the State and substantiated by other witnesses. The court found this point particularly compelling, and indicated that “it is not within the rule of reasonable hypothesis to hold that proof of possession by the defendant may be established by circumstantial evidence when undisputed direct proof places exclusive possession in some other person.” Id. at 31.

The situation here is vastly different than what occurred in Spruell and Callahan. Unlike the situation in Spruell, the basis for Lakitoy’s

conviction is not based solely on mere presence and proximity, but that he was near the stripped car, that he contained the vehicle's ignition and a set of jiggler keys, and that he acted furtively when first found by the officers. See State v. Huff, 64 Wn. App. 641, 654, 826 P.2d 698 (1992) (furtive behavior can show dominion and control). And unlike the situation in Callahan, nobody here claimed exclusive ownership of the stolen vehicle, and Lakitoy was found with an ignition and a set of jiggler keys.

Accordingly, sufficient evidence existed in this case to support the trial court's verdict, and this Court should affirm.

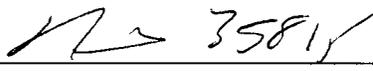
**D. CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm.

DATED this 5<sup>th</sup> day of June, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Casey Grannis, attorney for the appellant, at Nielsen, Broman, & Koch, PLLC, 1908 East Madison, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in State v. Sergey Lakotiy, Cause No. 62157-2-I, in the Court of Appeals, Division I. of the State of Washington.

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

W Brame

Name

Done in Seattle, Washington

6/5/09  
Date

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