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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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NO. 35366-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON

Respondent,

v.

LAURA LEE SMITH,

Appellant

PIERCE COUNTY SUPERIOR COURT

CAUSE NO. 06-1-00352-9

THE HONORABLE FEDEREICK W. FLEMING,

Presiding at the Trial Court

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENT OF ERROR

The State presented insufficient evidence to convict Ms. Smith of possession of stolen property.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the State present sufficient evidence to establish that Ms. Smith possessed the Chevy Astro van with knowledge it was stolen?

C. STATEMENT OF THE CASE

Summary of Testimony

3.5 hearing

● **Deputy Tara Simmelink-Lovely**

Deputy Simmelink-Lovely works for the Pierce County Sheriff's Department. RP 9. On January 20, 2006, she came into contact with Ms. Smith while serving a warrant at a residence. RP 9-10. While the lab team was securing the residence, Ms. Smith was standing in the front lawn and yelling about notifying the newspapers that the police were arresting a minister. RP 10. Deputy Simmelink-Lovely arrested Ms. Smith and advised Ms. Smith of her *Miranda* rights. RP 10. Ms. Smith acknowledged her rights, said she understood them, and said she wanted to talk to Deputy Simmelink-

Lovely. RP 11.

Deputy Simmelink-Lovely read Ms. Smith a copy of the search warrant and Ms. Smith stated that somebody had “snitched her off.” RP 12. Ms. Smith felt that someone had “snitched her off” due to the detailed description of Ms. Smith’s van in the search warrant. RP 12. Ms. Smith told Deputy Simmelink-Lovely that Mark Peterson was her brother and that he resides in the trailer. RP 12. Ms. Smith was found in a different trailer and stated that it was where she lived. RP 13.

Ms. Smith initially denied that the police would find any evidence of a lab, any drug paraphernalia, or any drugs in her trailer, but then changed her statement to indicate that the police might find some paraphernalia or pipes because she lets her friends smoke in her trailer. RP 13. Deputy Simmelink-Lovely asked Ms. Smith about items in the garage area and Ms. Smith indicated that she had no knowledge of those items but that she let friends store things there. RP 13. Ms. Smith could not recall the names of any of the friends she let smoke drugs in her trailer and store items in the garage. RP 13.

Trial

● **Deputy Simmelink-Lovely**

Deputy Simmelink-Lovely is a Deputy for the Pierce County Sheriff's Department. RP 63. On January 20, 2006, Deputy Simmelink-Lovely was involved with serving a search warrant at 17320 82nd Ave. E. RP 63-64. During the execution of the search warrant, Deputy Simmelink-Lovely came into contact with Ms. Smith and Mr. Peterson. RP 65. Deputy Simmelink-Lovely contacted Ms. Smith and Mr. Peterson in front of the home being searched. RP 65. Mr. Peterson was initially located in the mobile home being searched and Ms. Smith was located in a smaller trailer south of the mobile home Mr. Peterson was located in. RP 65-66.

When Deputy Simmelink-Lovely spoke with Ms. Smith, Deputy Simmelink-Lovely advised Ms. Smith of her *Miranda* rights. RP 66. Ms. Smith acknowledged her *Miranda* rights and agreed to speak with Deputy Simmelink-Lovely. RP 67. Prior to being *Mirandized*, Ms. Smith was yelling that she was going to notify the newspapers that the police were arresting a minister. RP 67.

After reading Ms. Smith her *Miranda* rights, Deputy

Simmelink-Lovely read Ms. Smith the search warrant. RP 67. While Deputy Simmelink-Lovely was reading Ms. Smith the search warrant, Ms. Smith commented that “someone snitched us off.” RP 67. Ms. Smith said she believed someone had “snitched her off” because of the detailed description of her van in the search warrant. RP 68.

Ms. Smith stated that Mr. Peterson was her brother, that he lived in the mobile home, that she lived in the smaller camp trailer, and that she didn’t know what went on inside the mobile home. RP 68. Ms. Smith denied having any knowledge of any methamphetamine manufacturing going on at the property. RP 67-68. Ms. Smith initially indicated that the police would not find any drug manufacturing related items or drug paraphernalia in her trailer, but then indicated that the police might find smoking pipes or drug pipes because she allows her friends to smoke drugs in her trailer. RP 68-69. Ms. Smith also indicated that she let people store things in her garage. RP 69.

Deputy Simmelink-Lovely inspected Ms. Smith’s van and observed that the VIN plate normally attached to the dashboard was secured with one rivet and the VIN was unreadable. RP 74. The VIN

plate on the driver's door had been removed and the van had been modified so that it could be started without a key. RP 74.

The clandestine lab team leader went through Ms. Smith's trailer and initially did not see any lab-related items which were hazardous chemicals. RP 78.

Deputy Simmelink-Lovely spoke with Mr. Peterson and Mr. Peterson told her that he allowed friends to store items in the garage area on the property. RP 77.

- **Deputy Shaun Darby**

Deputy Darby is a Deputy for Pierce County. RP 93. Deputy Darby assisted in the service of the search warrant on January 20th, 2006 at 17320 82nd Ave. E. RP 94. Deputy Darby took custody of Mr. Peterson once Mr. Peterson was escorted out of the mobile home. RP 95. Deputy Darby searched Mr. Peterson and placed him in the back of a patrol car. RP 95-96.

Deputy Darby searched a small travel trailer on the property. RP 96. The trailer belonged to Ms. Smith. RP 100. In the trailer, Deputy Darby found some glass pipes of the sort commonly used to smoke narcotics. RP 97, 101-104. Deputy Darby also located a digital

gram scale. RP 98. Deputy Darby also found small zip-loc style baggies in a jewelry box on top of a chest-of-drawers. RP 99-100. Deputy Darby found packages of Sudafed brand cold pills on top of the chest-of-drawers. RP 100-101. Inside a purse on top of the bed in the trailer, Deputy Darby and Deputy Olsen found an identification card. RP 104-105. Deputy Darby located several documents in the name of Laura L. Smith throughout the trailer. RP 105.

During the search of Ms. Smith's trailer, Deputy Darby also found two bottles of the fuel additive Heet, which can be a precursor to the manufacture of methamphetamine. RP 106-107. In the kitchen of the trailer, Deputy Darby found some coffee filters. RP 109-110.

- **Deputy Robert Johanson**

Deputy Robert Johanson is a Deputy Sheriff with the Pierce County Sheriff's Department. RP 121.

Deputy Johanson explained two methods of manufacturing methamphetamine. RP 123-129.

On January 20, 2006, Deputy Johanson responded to a suspected meth lab at 17320 82nd Ave. E. RP 131. Deputy Johanson responded with the lab team and was the finding officer during the

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search. RP 131. The finding officer goes through the scene and looks for items that are related to meth labs. RP 132.

Deputy Johanson searched inside the main house on the property. RP 132. The main house was where Mr. Peterson lived. RP 153. During the search, Deputy Johanson found a test kit for acids and bases. RP 133. Deputy Johanson also found some coffee filters in a glass jar. RP 135. The coffee filters were stained blue. RP 135-136. One of the coffee filters had a reddish-brown substance in it. RP 136. Deputy Johanson found more coffee filters in the laundry room of the residence. RP 138.

Plaintiff's exhibits 18 through 26 are photographs of items found by Deputy Johanson in the laundry room of the residence. RP 144. Exhibit 18 is a picture of a sauce pan. RP 145. Plaintiff's exhibit 20 is a picture of an over-the-counter product called Isoheat. RP 146. Plaintiff's exhibit 19 is a picture of a can labeled "Xylol." RP 147. Plaintiff's exhibit 21 is a picture of some of the coffee filters and a margarine tub which had red crystals in it. RP 148. Plaintiff's exhibit 23 is a picture of a bag of unused coffee filters. RP 149. Plaintiff's exhibit 25 is a picture of a can of denatured alcohol, a bottle of bleach,

a glass jar with some sort of crystal substance in it, and some laundry detergent. RP 150.

In the kitchen of the residence, Deputy Johanson found an electric coffee grinder. RP 154-155. Deputy Johanson also found a box of Sufedrine PE in the kitchen. RP 156. Plaintiff's Exhibits 53-56 are photographs of items found in the kitchen of the residence. RP 157. Plaintiff's Exhibit 53 is a Mason jar with a white substance in it. RP 157. Plaintiff's exhibit 54 is a picture of coffee filters. RP 159. Plaintiff's exhibit 55 is a picture of a can of acetone. RP 160. Plaintiff's Exhibit 56 is a plastic one gallon milk carton. RP 161.

Plaintiff's Exhibit 57 is a photograph of a hand grinder Deputy Johanson found in the bedroom of the residence. RP 162. Plaintiff's exhibit 58 is a picture of a respirator found in the bedroom. RP 163-164. Deputy Johanson found two respirators in the bedroom. RP 165-166. Plaintiff's exhibit 59 is a picture of a syringe filled with liquid found in the bedroom. RP 166.

On a bookshelf in the dining room, Deputy Johanson found a handbook of chemistry and physics. RP 180-181.

In the garage on the property, Deputy Johanson found vinyl

tubing attached to a garden sprayer. RP 181-182. Deputy Johanson also found a glass bottle with vinyl tubing sticking out of the top of it. RP 183-184. Deputy Johanson also found a coffee filters in the garage area. RP 184-185. Deputy Johanson found an HCL generator in the garage area. RP 188-189. Deputy Johanson found a garbage bill addressed to Laura Smith in the garage area. RP 190-191.

Also in the garage, Deputy Johanson found a can of Coleman fuel, coffee filters, a funnel with coffee filters in it, a funnel without coffee filters, Mason jars, vinyl tubing, a plastic pitcher, glass jars, a drinking glass, four containers of Red Devil lye, a spoon, a glass jar with a used coffee filter inside, a drain opener, a sauce pan with coffee filter inside it, used coffee filters, a garden sprayer, a glass jar with liquid in it, a propane tank with a brass fitting which had turned blue from exposure to anhydrous ammonia, and a bottle of muriatic acid. RP 191-208.

Deputy Johanson also searched Ms. Smith's trailer. RP 208. In Ms. Smith's trailer, Deputy Johanson found an electric coffee grinder, rubber gloves, a can of acetone, coffee filters, pills in a blister pack. RP 208-213.

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- **Tammy Kee**

Tammy Kee is a forensic scientist employed by the Washington State Patrol Crime Laboratory. RP 278.

Ms. Key testified as to two methods of manufacturing methamphetamine. RP 281-286.

Plaintiff's Exhibits 67 and 68 are reports prepared by Ms. Kee in Case No. 060200209. RP 286-287. 15 items were submitted to Ms. Kee for testing with Plaintiff's Exhibit 67. RP 289.

Ms. Kee analyzed Plaintiff's Exhibit 3. RP 292. Ms. Kee concluded that Plaintiff's Exhibit three tested positive for the presence of methamphetamine. RP 293. Ms. Kee also analyzed Plaintiff's Exhibit 4. RP 293. Plaintiff's Exhibit 4 contains tablets. RP 293-294. Ms. Kee analyzed one of the tablets and concluded that the tablets contained pseudoephedrine. RP 294. Ms. Kee tested Plaintiff's Exhibit 51, the electric coffee grinder, and determined that the material contained a sugar starch and pseudoephedrine. RP 294, CP 58-63. Ms. Kee also tested Plaintiff's Exhibit 11, some used coffee filters, and determined that they contained pseudoephedrine and a sugar starch. RP 295, CP 58-63. Ms. Kee tested Plaintiff's Exhibit 14 and

determined it contained iodine. RP 295-296.

Ms. Kee tested Plaintiff's Exhibit 15, a baggie with residue, and it tested positive for red phosphorous. RP 297-298, CP 58-63. Ms. Kee tested Plaintiff's Exhibit 16, a baggie with used coffee filters, and determined that the material contained red phosphorous, iodine, methamphetamine, and byproducts. RP 298-299, CP 58-63.

Plaintiff's Exhibit 88 is a metal can which contains several glass vials which contain samples. RP 299-300, CP 58-63. Ms. Kee tested the samples contained in Plaintiff's Exhibit 88 and determined that the samples were of substances which contained pseudoephedrine, an amber liquid with a pH of zero, iodine, red phosphorous and byproducts, pseudoephedrine. RP 299-303. The byproducts contained in one sample were consistent with the methamphetamine manufacturing process that uses red phosphorous and iodine. RP 302.

Ms. Kee testified regarding the significance of different chemicals in the methamphetamine manufacturing process. RP 304-307.

- **Rand Iselin**

Mr. Iselin is a carpenter. RP 331. In 1999, Mr. Iselin owned a

silver 1992 or 1993 model year Chevy Astro van. RP 331-332. The van in Plaintiff's Exhibit 89 looks like the van Mr. Iselin owned. RP 332. Mr. Iselin's van was stolen on November 18, 1999. RP 333-334.

- **Detective Brian K. Stepp**

Detective Stepp is a detective with the Pierce County Sheriff's Department. RP 335.

On January 20, 2006, Detective Stepp responded to 17320 82nd Ave. E. to identify a van. RP 336. Detective Stepp inspected the vehicle and was able to identify the vehicle using its VIN number and determined that the van had been stolen in 1999. RP 336-337. Detective Stepp discovered that the VIN number for the van was not the correct VIN number for the license plates currently on the van. RP 337. On the witness stand, Detective Stepp consulted the Kelly Blue Book and determined that the value of a 1992 Chevy Astro van would be between \$450 and \$2,625. RP 339.

- **Officer Robert Hoag**

Officer Hoag is a police officer for the City of Bonney Lake. RP 341.

Officer Hoag responded to 17320 82nd Ave. E. on January 20,

2006. RP 343. Officer Hoag was assigned to be a sampling officer .
RP 343. A sampling officer takes the items of evidence located by the finding officer and identified as being associated with the manufacture of methamphetamine and decides which items need to be sampled for testing at the crime lab, which items need to be retained fully as evidence, and which items can be documented and destroyed due to their hazardous nature. RP 343.

Officer Hoag described the sampling process for different types of substances. RP 344-346.

Officer Hoag tested Plaintiff's Exhibit 49 for the presence of ammonia and concluded that the cylinder did contain ammonia. RP 346-347.

- **Joel Stutheit**

Mr. Stutheit is the assistant director of Bethel School District transportation. RP 365. Part of Mr. Stutheit's duties include knowledge of bus routes and stops. RP 365. Mr. Stutheit has a router which can take a address and use a computer-based system to map where bus stops are located. RP 365. The router allows Mr. Stutheit to determine the distance from a particular private residence to a

particular bus stop. RP 365-366.

Mr. Stutheit asked his router to make a map of 17320 82nd Ave. E. RP 367. According to the map, there is a school bus stop .17 miles away from the defendant's address. RP 368. Mr. Stutheit also measured the distance between the residence and the bus stop with a measuring wheel and determined the distance to be 782 feet. RP 368-369.

Mr. Stutheit bought the measuring wheel at Home Depot and does not know if it has ever been calibrated. RP 370-371.

- **Officer Gary Backus**

Officer Backus is a police officer with the City of Sumner. RP 373. On January 20, 2006, Officer Backus responded to a suspected meth lab at 17320 82nd Ave. E. RP 374. Officer Backus was the latent fingerprint officer that day and processed items for fingerprinting. RP 374-375. Plaintiff's Exhibit 90 contains the latent prints Officer Backus turned in as evidence. RP 375.

Officer Backus obtained latent fingerprints from a metal can labeled acetone, a mason jar, a glass jar, a metal container labeled Xylol, a one-gallon container labeled Coleman fuel, another glass jar,

a glass drug smoking pipe, and a white hand-mixer. RP 376-381.

Plaintiff's Exhibits 90A through J are the latent prints recovered by Officer Backus at the site. RP 382.

- **Steven Mell**

Steven Mell is a forensic investigator with the Pierce County Sheriff's Department. RP 383-384.

Mr. Mell explained what latent fingerprints are and explained what a known inked print is. RP 386-387. Mr. Mell described the characteristics of fingerprints and how latent fingerprints are compared to known inked prints. RP 387-389.

Mr. Mell examined Plaintiff's Exhibit 71 in May of 2006. RP 390. Plaintiff's Exhibit 71 is a copy of known impressions of Ms. Smith. RP 390-391. Mr. Mell compared Plaintiff's Exhibit 90F, 90G, and 90H, to Plaintiff's Exhibit 71 and concluded that the fingerprints matched Ms. Smith's. RP 392-393. Ms. Smith's fingerprints were found on the metal container labeled Xylol, a one-quart glass jar one-quarter full of a crystallized substance, and the one-gallon container labeled Coleman fuel. RP 394-396.

- **Deputy Jennifer Eldridge**

Deputy Eldridge works for the Pierce County Sheriff's Department. RP 415.

On January 20, 2006, Deputy Eldridge responded to a meth lab in Puyallup. RP 416. Deputy Eldridge's duties were to assist the finding officer. RP 416. The finding officer would find what items should be collected as evidence and Deputy Eldridge would put a number by the item and photograph it. RP 416-417.

Deputy Eldridge identified photographs as ones she had taken during the investigation and described the contents of the photographs. RP 417-431.

- **Kevin Stanton**

Kevin Stanton has known Ms. Smith for over 20 years. RP 432-433. Mr. Stanton has been in a romantic relationship with Ms. Smith for about 20 years. RP 433. Ms. Smith is an ordained minister. RP 434. Ms. Smith helps teenage girls and women who are homeless. RP 434. Ms. Smith gives the women shelter and lets the women stay at Ms. Smith's home. RP 434-435.

Ms. Smith makes all the women who come into her home give

up any drug paraphernalia. RP 436. Ms. Smith keeps all the paraphernalia in a cabinet. RP 436-437.

Mr. Stanton purchased a Chevy Astro van for Ms. Smith. RP 437. Plaintiff's Exhibit 80 is a picture of the van Mr. Stanton purchased for Ms. Smith "quite a few years ago." RP 437-438. The title for the van was put in Ms. Smith's name. RP 438. When Mr. Stanton purchased the vehicle he received a title and a registration with it. RP 444. When Mr. Stanton purchased the van he did not believe it was stolen. RP 446.

At one point a friend of Ms. Smith's lost Ms. Smith's keys, including Ms. Smith's keys to her van. RP 439. Mr. Stanton removed the ignition from the van and installed a mechanism which allowed Ms. Smith to start the van without her key. RP 439. This happened recently in relation to the date of trial. RP 439.

The registration of the van lists the color of the van as black, but the van was silver and black. RP 444.

- **Shelly Reichl**

Ms. Reichl knows Ms. Smith and Mr. Peterson. RP 456. Ms. Reichl testified regarding her casual relationship with both Ms. Smith

and Mr. Reichl. RP 456-464.

- **Mark Peterson**

Mr. Peterson has resided at 17320 82nd Ave. E. for about a decade. RP 465. Mr. Peterson described his work history as a mechanic and his experience in the Air Force. RP 466-475. Mr. Peterson described his hernia and medical treatment for his hernia. RP 475-477. Mr. Peterson testified that during his recuperation from the hernia, he had numerous visitors through his house. RP 477-478.

Mr. Peterson testified that he let other people store items in the shop on the property. RP 480. Mr. Peterson testified that he has had an ongoing problem of people trespassing on the 20 acre property and getting into buildings on the property. RP 480-482. Mr. Peterson has asked some people who were storing things on the property to remove the items from the property because the items did not appear “legitimate.” RP 482.

Mr. Peterson testified regarding the contents of the shop and the layout of the shop. RP 483-488.

Mr. Peterson denied any knowledge of the blue tote in which the components of the meth lab were found. RP 488-489. Mr.

Peterson also denied any knowledge of the propane tank containing ammonia gas. RP 489.

Mr. Peterson had recently obtained a hot tub and had received a chlorine test kit with the hot tub. RP 491.

Mr. Peterson denied making methamphetamine or any knowledge of how to make methamphetamine. RP 492.

Factual Background

On January 20, 2006, a search warrant was served on the residences located at 17320 82nd Ave. E. RP 63-64. During the search, police inspected Ms. Smith's van and observed that the VIN plate normally attached to the dashboard was secured with one rivet and the VIN was unreadable. RP 74. The VIN plate on the driver's door had been removed and the van had been modified so that it could be started without a key. RP 74. The van had a "turn key" device in place of the ignition so that the van could be started without a key. RP 74.

On January 20, 2006, Detective Stepp responded to 17320 82nd Ave. E. to identify a van. RP 336. Detective Stepp inspected the vehicle and was able to identify the vehicle using its VIN number and determined that the van had been stolen in 1999. RP 336-337.

Detective Stepp discovered that the VIN number for the van was not the correct VIN number for the license plates currently on the van. RP 337.

Kevin Stanton has known Ms. Smith for over 20 years. RP 432-433. Mr. Stanton has been in a romantic relationship with Ms. Smith for about 20 years. RP 433. Mr. Stanton purchased a Chevy Astro van for Ms. Smith. RP 437. Plaintiff's Exhibit 80 is a picture of the van Mr. Stanton purchased for Ms. Smith "quite a few years ago." RP 437-438. The title for the van was put in Ms. Smith's name. RP 438. When Mr. Stanton purchased the vehicle he received a title and a registration with it. RP 444. When Mr. Stanton purchased the van he did not believe it was stolen. RP 446.

At one point a friend of Ms. Smith's lost Ms. Smith's keys, including Ms. Smith's keys to her van. RP 439. Mr. Stanton removed the ignition from the van and installed a mechanism which allowed Ms. Smith to start the van without her key. RP 439. This happened recently in relation to the date of trial. RP 439.

Procedural Background

On January 20, 2006, a search warrant was served on the Smith, Laura L. - Opening Brief - COA No. 35366-1-II

residence located at 17320 82nd Ave. E. RP 63-64.

Based on evidence located during the search, on January 23, 2006, Ms. Smith was charged with unlawful manufacturing of a controlled substance, unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, possessing stolen property in the first degree, and unlawful use of drug paraphernalia. CP 1-4.

On August 22, 2006, the charges were amended to include an allegation that the crime of unlawful manufacturing of a controlled substance was committed within 1000 feet of a school bus stop route. CP 143-145.

On August 22, 2006, a 3.5 hearing was held in which the court ruled that the statements made by Ms. Smith to Deputy Simmelink-Lovely would be admissible. RP 21.

At the close of the State's case, Ms. Smith moved for a directed verdict on the charge of unlawful use of drug paraphernalia on the grounds that the State had presented insufficient evidence to establish that Ms. Smith had ever used drug paraphernalia. RP 407-408. The trial court denied the motion. RP 408.

The jury found Ms. Smith guilty of unlawful manufacturing of a controlled substance, guilty unlawful possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, and guilty of unlawful use of drug paraphernalia. CP 108, 109, 112. The jury found Ms. Smith not guilty of the crime of possession of stolen property in the first degree (CP 110), but found Ms. Smith guilty of possession of stolen property in the second degree. CP 111.

Notice of Appeal was timely filed on September 15, 2006. CP 119. On January 19, 2007 this Court consolidated COA No. 33574-4-II to this cause number (35366-1-II).

D. ARGUMENT

The State presented insufficient evidence to establish that Ms. Smith knew the Chevy Astro van was stolen, therefore, the State presented insufficient evidence to convict Ms. Smith of possession of stolen property.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all

inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case. *State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972), cited in *Hutton*, 7 Wn.App. at 728, 502 P.2d 1037.

The State failed to present substantial evidence sufficient to convince an unprejudiced, thinking mind that Ms. Smith possessed the Chevy Astro van with knowledge it was stolen.

Ms. Smith was charged with possessing stolen property in the

first degree in violation of RCW 9A.56.140(1) and RCW 9A.56.150(1). CP 143-145. This charge stemmed from Ms. Smith's possession of the Chevy Astro van which had been stolen six years prior to the date of the search of the property. CP 143-145; RP 547-548.

The jury found Ms. Smith guilty of possession of stolen property in the second degree. CP 111.

RCW 9A.56.104(1) provides,

"Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

"[T]he elements of possession of stolen property are: (1) actual or constructive possession of stolen property, and (2) actual or constructive knowledge the property is stolen." *State v. Jennings*, 35 Wn.App. 216, 219, 666 P.2d 381, *review denied* 100 Wash.2d 1024 (1983), *citing* RCW 9A.56.140(1).

Possession alone is insufficient to infer that a person knew the property was stolen. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). A person knows of a fact by being aware of it or having

information that would lead a reasonable person to conclude that the fact exists. RCW 9A.08.010(1)(b).

“It is not essential that there be actual and positive knowledge that the goods were stolen. It is sufficient if there is constructive knowledge through notice of facts and circumstances from which guilty knowledge may be inferred.” *State v. Rye*, 2 Wn.App. 920, 927, 471 P.2d 96 (1970), *citing State v. Salle*, 34 Wn.2d 183, 208 P.2d 872 (1949).

Possession of *recently* stolen property coupled with “slight corroborative evidence” sufficiently proves culpable knowledge. *State v. Womble*, 93 Wn.App. 599, 604, 969 P.2d 1097, 138 Wn.2d 1009, *review denied*, 138 Wn.2d 1009, 989 P.2d 1139 (1999) *citing Couet*, 71 Wn.2d at 776 (emphasis added). Examples of slight corroborative evidence include false or improbable explanations and explanations the police cannot rebut or check. *State v. Portee*, 25 Wn.2d 246, 253, 254, 170 P.2d 326 (1946), *overruled on other grounds*, *State v. Matuszewski*, 30 Wn.App. 714, 637 P.2d 994 (1981).

In *Couet*, someone stole a new car from a car dealership lot. *Couet*, 71 Wn.2d at 773-74. After the police saw Couet drive the car,

he told police that his friend lent him the car and that he did not know it was stolen. *Couet*, 71 Wn.2d 774-75. The court, in affirming the conviction, held that sufficient evidence supported the finding that Couet knew the car was stolen because he possessed a recently stolen car and gave an improbable story that the police could not check or rebut. *Couet*, 71 Wn.2d at 776.

Here, unlike in *Couet*, the Chevy van was stolen six years prior to it being discovered in Ms. Smith's possession. RP 336-337. Mr. Stanton testified that he had purchased the van for Ms. Smith and that he had paid around \$1500 for the van and had received keys for the van, a bill of sale, a title, and a registration for the van when he bought it. RP 438-439. Ms. Smith continuously insured the van and renewed the tabs on the van each year. RP 440.

The only evidence presented by the State which might support an inference that Ms. Smith had information that would lead a reasonable person to conclude that the van was stolen was that the VIN plate on the dash had been tampered with, the VIN number on the door had been removed, and the license plates on the van at the time of the search were registered to a black 1986 Chevy Astro van, rather than to

the silver and black 1992 Chevy Astro van in Ms. Smith's possession. RP 70-72, 337-338. The State established the discrepancy in the license plates by introducing Plaintiff's Exhibits 73 and 83, the registrations matching the VIN number of the van in Ms. Smith's possession and the license plates on the van at the time of the search, respectively. CP 58-63, RP 70-73, 337-338.

The State did not establish which registration was in Ms. Smith's possession at the time the van was searched by police. Instead, the police introduced Plaintiff's Exhibits 73 and 83 as public documents. RP 72-73, 337-338. During the questioning of Mr. Stanton, the man who purchased the van and gave it to Ms. Smith, the State indicated that the registration Mr. Stanton had received when he purchased the van was the registration for the license plates on the van at the time of the search. RP 444-445. The State emphasized that the registration which Mr. Stanton signed was a registration for a black 1986 Chevy Astro van, but the vehicle he gave Ms. Smith was a silver and black 1992 Chevy Astro van. RP 444-445.

At best, this information would lead to an inference that Mr. Stanton had information that would lead a reasonable person to

conclude that the van was stolen. The State presented no evidence that Ms. Smith should have been aware of any facts which would lead her to the conclusion that the van was stolen. The registration she received when the van was given to her matched the license plates which were on the van when the search occurred.

The only discrepancies of which Ms. Smith could arguably have been aware would be the discrepancy in the year of the van and the color of the van. However, the discrepancy in the color of the van was insufficient to lead a reasonable person to conclude that the van was stolen: the registration described the van as black but the van was actually two-tone silver and black. RP 437, 444-445. The discrepancy in the year of the vehicle listed on the registration would be even less likely to lead a reasonable person to believe that the van had been stolen since the only way Ms. Smith would have been aware that the vehicle was not a 1986 model year vehicle would be to either decode the VIN number on the vehicle or be very familiar with the differences in the physical appearance of Chevy Astro vans between the 1986 and 1992 model years—areas of knowledge most people are unfamiliar with.

Similar to the discrepancy in the description of the van in the registration, the fact that a VIN number was missing from the driver's doorjamb area and the disfigurement of the VIN number on the dash would not lead a reasonable person to believe the van was stolen since most people are unfamiliar with the location of VIN numbers or where VIN numbers should be or how they should look.

The State presented no evidence that Ms. Smith actually knew the van was stolen. The State also did not present any evidence that Ms. Smith should have constructively known the van was stolen. The van was given to Ms. Smith as a gift by Mr. Stanton and Ms. Smith had successfully renewed the tabs for the vehicle every year. Even if Ms. Smith had been aware of the discrepancies in the description of the van in the title given to her with the van, or the damaged and missing VIN plates, these facts are insufficient to lead a reasonable person to assume that the van was stolen.

Unlike the vehicle in *Couet*, the van in Ms. Smith's possession had been stolen six years prior to the police discovering it in her possession. Even if this court finds that the evidence introduced by the State constituted "slight corroborative evidence" of Ms. Smith's

knowledge the van was stolen, the van was not recently stolen and the State therefore needed more substantial evidence than “false or improbable explanations and explanations the police cannot rebut or check.”

Even taking all evidence in the light most favorable to the State, the State presented insufficient evidence to establish that Ms. Smith was even aware of the discrepancies in description of the vehicle in the registration and, even if Ms. Smith was aware of the discrepancies, the discrepancies were not sufficient to lead a reasonable person to conclude the van was stolen. The State failed to present substantial evidence that Ms. Smith knew or should have known the van was stolen. Any inference that Ms. Smith was aware that the van was stolen or was in possession of sufficient evidence to lead a reasonable person to believe the van was stolen would be based on speculation or conjecture, and not on the facts introduced by the State at trial.

E. CONCLUSION

The State presented insufficient evidence to establish that Ms. Smith knowingly possessed stolen property. Where the evidence is insufficient to support a conviction, the Double Jeopardy Clause

requires reversal and remand for judgment of dismissal with prejudice.

State v. Rodgers, 146 Wn.2d 55, 60, 43 P.3d 1 (2002).

This court should reverse Ms. Smith's conviction for possession of stolen property and remand the case for dismissal with prejudice.

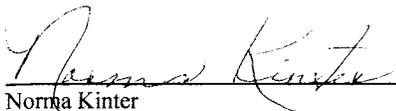
RESPECTFULLY SUBMITTED this 13th day of April, 2007.



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CERTIFICATE OF SERVICE

The undersigned certifies that on April 13, 2007, she hand delivered this Opening Brief to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and delivered by U.S. mail to: appellant, Laura L. Smith, DOC # 720888, Washington Corrections Center for Women, 9601 Bujacich Road Northwest, Gig Harbor, Washington 99001, true and correct copies of this Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on April 13, 2007.



Norma Kinter