

TABLE

Table of Contents

INTRODUCTION 1

DECISION OF COURT BELOW 1

ISSUES PRESENTED FOR REVIEW 2

RESPONDENT’S COUNTER STATEMENT OF THE CASE 2

ARGUMENT 6

 1. THE EVIDENCE WAS SUFFICIENT TO CONVICT
 LUDVIGSEN OF POSSESSING STOLEN PROPERTY IN
 THE FIRST DEGREE 6

 a. Ludvigsen possessed the stolen property 7

 b. Ludvigsen knew the property was stolen 9

 2. LUDVIGSEN’S 1982 CONVICTION WAS PROPERLY
 INCLUDED IN HIS CRIMINAL HISTORY AND
 EXCLUDED FROM HIS OFFENDER SCORE AT
 SENTENCING 10

CONCLUSION 13

TABLE OF AUTHORITIES

Table of Cases

State v. Thomas, 150 Wn.2d 821, 874 P.3d 970 (2004) 7

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) 6

<i>State v. Camarillo</i> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990)	7
<i>State v. Rockett</i> , 6 Wash.App. 399, 402-03, 493 P.2d 321 (1972)	9
<i>State v. Thomas E. Ludvigsen</i> , No. 28087-6-II, November 22, 2002	12

STATUTES

Wash. Rev. Code 9A.05.010(1)(b)	9
Wash. Rev. Code 9.94A.030(14)	11
Wash. Rev. Code 9.94A.525(19)	12

OTHER

CP 71, Jury Instructions	7
CP 85, Statement of Prosecutor	11, 12

A. INTRODUCTION

The evidence was sufficient to establish the defendant's dominion and control over the stolen auto parts located at the residence where the defendant was also located. The evidence further sufficiently established the defendant knew the property was stolen based upon the condition of the property, the circumstances surrounding it and the defendant's contradictory statements regarding the stolen property.

The court did not err in including Ludvigsen's 1982 conviction in his criminal history, even though it was washed out. The court further correctly calculated Ludvigsen's offender score at sentencing and did not include the 1982 conviction in the offender score.

B. DECISION OF COURT BELOW

Ludvigsen asks this court to reverse the decision of the Grays Harbor County Superior Court Jury in cause no. 07-1-00163-1 finding Ludvigsen guilty of Possessing Stolen Property in the First Degree due to insufficiency of the evidence and remand this matter for re-sentencing due to the inclusion of Ludvigsen's 1982 conviction in his criminal history and offender score.

C. ISSUES PRESENTED FOR REVIEW

Was the evidence sufficient to support Ludvigsen's conviction for Possession of Stolen Property in the first Degree?

Were Ludvigsen's criminal history and offender score correct as to the 1982 conviction?

D. RESPONDENT'S COUNTER STATEMENT OF THE CASE

Ludvigsen was charged by Information on.

At trial, Detective Sergeant Chastain of the Aberdeen Police Department testified that on November 15, 2006 a vehicle was stolen from Aberdeen Honda.¹ Detective Sergeant Chastain identified the defendant as Thomas Ludvigsen² and testified that the parts recovered were verified through their VIN plates and visual appearance to be from the vehicle stolen from Aberdeen Honda.³ The body of the car was recovered at another location at another time.⁴

TJ Glick of Aberdeen Honda testified the vehicle stolen was a brand new vehicle and that they had provided the police department with

¹ RP 18, ln 8-10.

² RP 19, ln 1-2.

³ RP 19, ln 16-19.

⁴ RP 20, ln 2-3.

the VIN number for the vehicle.⁵ Glick testified the vehicle's engine and some parts were recovered a month or so after the car was stolen.⁶ Glick testified the engine was put altogether.⁷ Glick testified the cost of the parts of the engine was \$12,824 plus tax.⁸ Glick testified you couldn't replace the engine all in one part because Honda doesn't sell it that way.⁹

Officer Mitchell of the Hoquiam Police Department testified that when officers arrived at 360 Lawrence in Hoquiam on December 7, 2006 they saw a V-Tech Honda engine with no grease or dirt partially covered with a tarp on an engine hoist in the driveway of the residence.¹⁰ The engine was between the road and the front door, approximately 10-15 feet front the front door and the officer observed the V-Tech label on the engine as he walked past it to go to the front door.¹¹ Officer Mitchell knocked on the door to the residence which was answered by Klee Ann

⁵ RP 25, ln 15-20.

⁶ RP 26, ln 12-13.

⁷ RP 27, ln 8.

⁸ RP 28, ln 2-3.

⁹ RP 27, 16-21.

¹⁰ RP 29-30.

¹¹ RP 30-31.

Lowdermilk.¹² While officers were looking at the engine Ms. Lowdermilk went back into the house twice. The second time Ms. Lowdermilk came back out with Ludvigsen.¹³ Officer Mitchell told Ludvigsen the were there to recover the engine which was stolen and asked him if he knew anything about it, where it came from or if he knew it was there. Ludvigsen said he didn't know it was there, didn't know it was stolen and was just coming out to see what was going on.¹⁴ Ludvigsen then went back in the house. A time later he came back out while Officer Mitchell was asking Klee Ann Lowdermilk questions. Ludvigsen came back outside and said he didn't want Klee Ann to be in trouble.¹⁵ Ludvigsen told Officer Mitchell that Jeremy Butts dropped off the motor a couple days but said he didn't no it was stolen.¹⁶ Officer Mitchell observed Klee Ann Lowdermilk was shaking and visibly upset. Ludvigsen was calm but appeared hesitant to give Officer Mitchell any information.¹⁷ Officer Mitchell also recovered two Honda wheels inside the front door of the residence. They had no

¹² RP 30, ln 20-23.

¹³ RP 33, ln 15-22.

¹⁴ RP 34, ln 15-24.

¹⁵ RP 35, ln 3-13.

¹⁶ RP 40, ln 1-3.

¹⁷ RP 40, ln 6-7, 13-14.

grease or dirt chips on them and the same lug pattern as the engine and its transaxle located in the driveway.¹⁸

Detective Krohn of the Hoquiam Police Department testified the door where contact was made with Klee Ann Lowdermilk was on the side of the residence, just off the driveway. In the driveway was a parking area where there was an engine block partially covered with a tarp hanging from the engine hoist. Also in that area were several vehicles, one or two that appeared to be used by residents and a couple that appeared to be broken down.¹⁹ The vehicles were older and none were they type that would use the engine on the hoist.²⁰ The front wheel axle assembly was still attached to the engine and there were several other brand new parts which appeared to belong to the Honda nearby.²¹ Detective Krohn testified the engine had no dirt or grease on it and that he had never seen an engine in this situation with the wheel axles connected.²²

¹⁸ RP 40, ln 20-25.

¹⁹ RP 43, ln 10-25.

²⁰ RP 44, ln 4-9.

²¹ RP 46, ln 17-19; RP 47, ln 20-24.

²² RP 47, ln 1-4.

**E. ARGUMENT WHY APPELLANT’S CONVICTION
SHOULD BE AFFIRMED**

This Court should affirm Ludvigsen’s conviction for Possession of Stolen Property in the First Degree because the evidence was sufficient to support his conviction by the jury and the Court should not remand this matter for re-sentencing as the criminal history and offender score were correct at sentencing.

**1. Was the evidence sufficient to support Ludvigsen’s conviction
for Possession of Stolen Property in the first Degree?**

“The test for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.”²³ “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.”²⁴ All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the defendant.²⁵ Credibility determinations are for the trier of fact

²³ *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

²⁴ *Id.*

²⁵ *Id.*

and are not subject to review.²⁶

The elements of possession of stolen property in the first degree as explained to the jury were:

- (1) That on or about December 7, 2006, the defendant knowingly received, retained, possessed, concealed or disposed of stolen property;
- (2) That the defendant acted with knowledge that the property had been stolen;
- (3) That the defendant withheld or appropriated the property to the use of someone other than the true owner or person entitled thereto;
- (4) That the stolen property exceeded \$1,500 in value; and
- (5) That the acts occurred in Grays Harbor County, Washington.²⁷

On appeal Ludvigsen argues that the State presented insufficient evidence to prove (1) or (2).

a. *Ludvigsen possessed the stolen property.*

Ludvigsen argues the State presented insufficient evidence to establish actual or constructive possession of the stolen property. It is not

²⁶ *State v. Thomas*, 150 Wn.2d 821, 874 P.3d 970 (2004) citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

²⁷ CP 71, Instruction 5.

necessary that the state establish the defendant had dominion and control over the residence or that the defendant resided at that location to establish actual or constructive possession of the engine and parts at the residence. Testimony at trial established circumstantial evidence of Ludvigsen's possession, receipt or concealment of the stolen property.

Officers contacted Klee Ann Lowdermilk who went inside twice before Ludvigsen exited from the residence while officers were looking at the engine which was partially covered by a tarp when officer arrived. Ludvigsen initially denied knowing the engine was there but later came out and told officers he didn't want Klee Ann Lowdermilk to be in trouble and that he did know the engine was there, when it had arrived and who had brought it there. Ludvigsen's continued contact with officers regarding the engine, exiting from the residence and providing information regarding the time of the engine's arrival and knowledge of who had brought it there are circumstantial evidence of his dominion and control over the engine in the driveway of the residence, 10-15 feet from the door. Further, Ludvigsen came outside while officers were talking to Lowdermilk and said he didn't want her to be in trouble. The State presented more than Ludvigsen's mere proximity to the stolen property, Ludvigsen's assertion of himself in the conversation with officers

regarding the engine is evidence of his possession of the stolen property being discussed.

b. *Ludvigsen knew the property was stolen.*

Ludvigsen also argues that the State presented insufficient evidence to establish Ludvigsen had knowledge the engine was stolen. A person knows of a fact by being aware of it or having information that would lead a reasonable person to conclude the fact exists.²⁸

Corroborative evidence of knowledge may consist of a false or improbable explanation or other inconsistent explanation regarding the stolen property.²⁹

There was significant circumstantial evidence Ludvigsen knew the engine was stolen based on the facts and circumstances that would lead a reasonable person to conclude the engine was stolen. The engine was still connected to the drive axle and had no grease or dirt commonly found on a used engine. The engine was unusually still connected to the axle. A vehicle for the engine and parts was not there. The vehicles at the residence were older and none were the type the engine would belong to.

²⁸ RCW 9A.05.010(1)(b).

²⁹ *State v. Rockett*, 6 Wash.App. 399, 402-03, 493 P.2d 321 (1972).

No alternative explanation was given as to why the engine was there. Testimony showed the engine could not be purchased by itself as the engine itself is not sold separately. Furthermore, the brand new engine was covered by a tarp and surrounded by numerous other new car parts. The condition of the engine, its concealment, the fact it was a brand new engine for a new car without the car, and the random assortment of new parts, again without a car to put them on, are all circumstantial evidence that would lead a reasonable person to conclude the engine was stolen.

Lastly, Ludvigsen's demeanor when talking to officers and contradictory statements indicate his possession and knowledge of stolen property. Ludvigsen initially stated he didn't know the engine was there and then later told officers when it had arrived and who had brought it there. The evidence presented at trial was sufficient to prove the defendant possessed the stolen property and knew it was stolen thus supporting the Jury's verdict that Ludvigsen is guilty of Possessing Stolen Property in the First Degree. The verdict should be affirmed.

2. **Was Ludvigsen's 1982 conviction properly included in his criminal history but excluded from his offender score?**

The State did not error by including the 1982 conviction in the

criminal history. RCW 9A.94.030(14) defines “Criminal history” as “the list of a defendant’s prior convictions and juvenile adjudications, whether in this state, in federal court, or elsewhere.”³⁰ RCW 9A.94.030(14) further states:

(b) A conviction may be removed from a defendant’s criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.020, or similar out-of-state statute, or if the conviction has been vacated pursuant to a governor’s pardon.

(c) The determination of a defendant’s criminal history is distinct from the determination of an offender score. A prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant’s criminal history.³¹

Ludvigsen argues the 1982 drug conviction should not be included in Ludvigsen’s offender score. The State agrees. Ludvigsen’s 1982 drug conviction was not included in Ludvigsen’s offender score. Ludvigsen’s Criminal History, listed in section 2.2 of the Judgment and Sentence listed ten prior criminal convictions, including Ludvigsen’s conviction in 1982 for two counts of Violation of the Uniform Controlled Substances Act.³²

³⁰ RCW 9.94A.030(14).

³¹ *Supra.*

³² CP 85.

This is correct according to RCW 9.94A.030(14). While Ludvigsen's appeal found the 1982 conviction to wash out, it did not vacate that conviction.³³

While the 1982 conviction was included in the criminal history, it was not included in calculating the Offender Score. The convictions were not discussed by anyone at sentencing, but the defendant, who asked the court to consider them and grant him a DOSSA.³⁴ The State did not ask the court to consider the 1982 conviction in calculating the offender score and it was not included in the calculation.

The Sentencing Data in section 2.3 lists the Offender Score as 10.³⁵ This is correct. As set forth in the Statement of Prosecutor, Ludvigsen was on Community Custody at the time he committed the offense.³⁶ RCW 9.94A.525(19) states "If the present conviction is for an offense committed while the offender was under community custody, add one point."³⁷

³³ *State v. Thomas E. Ludvigsen*, No. 28087-6-II, November 22, 2002.

³⁴ RP pg. 77, ln. 6-19.

³⁵ CP 85.

³⁶ CP 85.

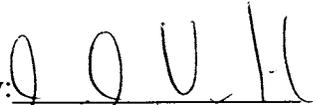
³⁷ RCW 9.94A.525(19).

The offender score did not include Ludvigsen's prior 1982 conviction. The offender score was correctly comprised of nine prior felony convictions and one point because Ludvigsen was on community custody. The Court should not remand this matter for re-sentencing as the offender score and criminal history were correctly determined at the original sentencing.

F. CONCLUSION

The State respectfully requests the Court affirm the verdict of the jury finding Ludvigsen guilty of Possessing Stolen Property in the First Degree and affirm the criminal history and offender score relied upon at sentencing.

Respectfully Submitted,

By: 
MEGAN M. VALENTINE
Deputy Prosecuting Attorney
WSBA #35570

FILED
COURT OF APPEALS
DIVISION II

08 DEC 10 PM 12:40

STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

No.: 37548-6-II

v.

DECLARATION OF MAILING

THOMAS LUDVIGSEN,

Appellant.

DECLARATION

I, Carol Thomas hereby declare as follows:

On the 9th day of December, 2008, I mailed an original and one copy of the Brief of Respondent to Mr. David Ponzoha,, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454, a copy to Elaine L. Winters, Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101, and a copy to Thomas Ludvigsen #631543, Coyote Ridge Corrections Center, P. O. Box 769, Connell, WA 99326, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

