

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38677-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

LYNN M. SMYTHE,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE MICHAEL J. SULLIVAN, JUDGE

BRIEF OF RESPONDENT

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T A B L E

Table of Contents

| | |
|---|----|
| RESPONDENT’S COUNTERSTATEMENT OF THE CASE | 1 |
| Factual Background. | 1 |
| Procedural background. | 5 |
| RESPONSE TO ASSIGNMENTS OF ERROR | 6 |
| The state provided ample evidence to prove the defendant’s knowing possession of stolen property (Response to Assignment of Error No. 1). | 6 |
| The court properly set restitution. (Response to Assignment of Error No. 2). | 11 |
| CONCLUSION | 14 |

TABLE OF AUTHORITIES

Table of Cases

| | |
|---|----|
| <u>State v. Chavez</u> , 138 Wn.App. 29, 34, 156 P.3d 246 (2007) | 11 |
| <u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1990) | 11 |
| <u>State v. Donahoe</u> , 105 Wn.App. 97, 18 P.3d 618 (2001) | 13 |
| <u>State v. Endstone</u> , 137 Wn.2d 675, 682, 974 P.2d 828 (1999) | 14 |
| <u>State v. George</u> , 146 Wn.App. 906, 920, 193 P.3d 693 (2008) | 12 |
| <u>State v. Hennings</u> , 129 Wn.2d 512, 519, 919 P.2d 580 (1996) | 13 |

| | |
|--|--------|
| <u>State v. Jeffrey</u> , 77 Wn.App. 222, 227, 889 P.2d 956 (1995) | 12 |
| <u>State v. King</u> , 113 Wn.App. 243, 299, 54 P.3d 1218 (2002) | 13, 14 |
| <u>State v. S.T.</u> , 139 Wn.App. 915, 163 P.2d 796 (2007) | 13 |
| <u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) | 6 |
| <u>State v. Womble</u> , 93 Wn.App. 599, 604, 969 P.2d. 1097 (1999) | 10 |

STATUTES

| | |
|---------------------|---|
| RCW 9A.56.150 | 5 |
|---------------------|---|

OTHER

| | |
|------------------|---|
| WPIC 10.02 | 8 |
|------------------|---|

RESPONDENT'S COUNTERSTATEMENT OF THE CASE

Factual Background.

Steven Carras is a cabinet maker whose business is located on State Street in downtown Olympia. (RP 6-7). In early April 2008 Mr. Carras was making specialty cabinets for a customer. (RP 7-8). The customer had purchased old growth vertical grain fir that was being used, exclusively, to construct the cabinets. (RP 7). The cabinets were made in the shop and, after completion, stored in the back of a Penske van that was parked on the premises. (RP 9). The truck was last seen parked at the business on the evening of April 2, 2008. When Mr. Carras came to work the following morning, the van and the cabinets were gone. (RP 9-10). Mr. Carras testified at trial that there were approximately 30 to 50 cabinets in the van having a value of approximately \$38,000.

As investigation revealed, the van was stolen by an individual named Seth Swan. He denied stealing it from the business premises, but claimed that he found it parked near the bus depot in Olympia with the keys in it. (RP 22-23). He drove the van to 66 Fairgrounds Road the same evening where he eventually met up with Jacob Persell, Steven Lower, and Perry Vicars. (RP 23, 26-27). Steven Lower had seen the van drive by

his trailer. He went outside and saw the van parked nearby. The roll-up door to the back of the van was partially open. Lower observed extension cords, air hoses, furniture, and what he described as “wooden boxes” inside. (RP 34-35). Lower’s roommate, Persell, asked Lower if these items could be “stashed” at Lower’s trailer. He told Persell no.

Swan eventually drove off in the van. According to Swan, he and Perry Vicars drove the van to Larson Hill near the ballpark in Elma. (RP 26-27). According to Swan, they left the van parked there and walked back into town. The van was eventually recovered on April 6, 2008, several miles away from Larson Hill. By this time, the van was empty. (RP 2-4).

In early April 2008 the defendant was living with her mother in Elma. (RP 40-41). She told her mother that she had some “closets” that she was going to bring to the house for her mother to use to remodel. (RP 44). As explained by the mother, Pattie Norris, her daughter later received a phone call in the middle of the night. (RP 44-45). At about 3 a.m. that same night Mrs. Norris looked out her front window to see the defendant and her boyfriend, Shawn Shapansky, loading cabinets from a pickup truck into the house. (RP 46).

The defendant explained to her mother that the mother of a friend of hers, “Scott,” had remodeled and did not want the cabinets. (RP 48). The defendant later told her mother that she had gone out in the middle of the night to pick up these cabinets because she had received a phone call

telling her that it was beginning to rain and there might be damage to the cabinets. (RP 50).

Detective Peterson of the Grays Harbor County Sheriff's Office received information that the stolen cabinets might be at the defendant's residence. On April 16, 2008, Peterson went to the residence and spoke to the defendant who was outside. She denied knowing anything about any cabinets or moving any cabinets into her mother's residence. (RP 64). She also denied permission to search the residence saying that it was her mother's residence and only her mother could give permission.

A short time later, Pattie Norris, the defendant's mother, arrived. She granted permission to search. Peterson went into the house and found a number of Carras' stolen cabinets. (RP 64-65, Ex. 1, 3-7). He found U-Haul blankets in the defendant's bedroom that were similar to those that had been in the stolen van at the time it was taken. He also found matching trim pieces for the cabinets. (RP 66-67).

At the time Peterson arrived at the Norris residence the defendant was present with her boyfriend, Shawn Shapansky. Shapansky directed the officers to the location of additional cabinets that were on a logging road off of Delezene Road in rural Grays Harbor County, Washington. (Ex. 2). Shapansky explained that this is where they had gone to pick up the cabinets that were later recovered from the defendant's residence. (RP 68). Sheriff's deputies recovered these cabinets. They were later identified by Mr. Carras.

Mr. Carras identified the cabinets recovered from the Norris residence as being a portion of the cabinets stolen from him. He valued these cabinets at \$5,000. (RP 12, Ex. 3 - 8).

A restitution hearing was held following sentencing in which the court determined restitution for all three defendants. The testimony at the restitution hearing established that the cabinets were stolen from the business in Olympia on April 3, 2008. (Restitution hearing, RP 25). The stolen van was driven by defendant Swan from Olympia to the Fairgrounds Road address where he met up with co-defendant Perry Vicars. (Restitution hearing, RP 25-26). The cabinets were in the van at that time. (Restitution hearing, RP 26). Swan and Vicars drove off in the van and eventually, Swan claimed, parked it by the baseball field on Larson Road. (Restitution hearing, RP 27). The van was later recovered, empty, at Workman Creek Road. (Restitution hearing, RP 28).

Seven of the cabinets were recovered in the defendant's residence. (Restitution hearing, RP 32). All of the cabinets, both from the house and the logging road, were damaged in some way or another. Almost all of them had water damage. (Restitution hearing, RP 19).

It was established at trial that the defendant and her boyfriend, in the middle of the night, drove to a remote location in Grays Harbor County where they retrieved the cabinets that were later seized from her residence. The balance of the cabinets were located on a logging road by Detective

Peterson. (Restitution hearing, RP 29-30). Those cabinets had been sitting out in the rain for some considerable period of time.

Following the hearing, the court set forth its reasoning regarding the culpability of the defendants.

I find that it's very clear that Mr. Swan, Mr. Vicars had full control over the truck and all of the contents thereof. As far as I'm concerned, they're fully responsible for whatever happens to anything in that truck or the truck from the moment they touched the truck.

As far as Ms. Smythe, when she went out with Mr. Shapansky and took a look at the treasure that she was going to turn into cabinets for herself and/or sell it, I can reasonably infer that she was not up to good. I look at her criminal history, you know, that she were - part of the sentencing here and it's obvious that this - this wasn't a good faith trying to salvage things for the unknown victim out there. She was part of it or she would have kept hands off and not gotten involved and she wouldn't be responsible. But as far as I'm concerned once she started dealing with those cabinets and picking and choosing and taking some home, she's on board for the whole - whole bit.

(RP 47-48).

Procedural background.

The defendant was charged by Information on May 20, 2008, with Possession of Stolen Property in the First Degree, RCW 9A.56.150. The matter was tried to a jury on November 12, 2008. The jury returned a

verdict of guilty. The defendant was sentenced on December 10, 2008, to a standard range sentence of 18.5 months in prison. A restitution hearing was held. The court ordered restitution in the total amount of \$19,963.91 jointly with co-defendants Perry Vicars and Seth Swan. This represented \$201 for the rental of the truck to travel to Grays Harbor County to pick up the recovered cabinets, the cost of repair of all the cabinets, \$9,867.52, and the additional cost to Mr. Carras for work that he had to do for his purchaser in order to convince the purchaser to take the damaged cabinets which he had repaired, \$9,895.39.

RESPONSE TO ASSIGNMENTS OF ERROR

The state provided ample evidence to prove the defendant's knowing possession of stolen property (Response to Assignment of Error No. 1).

The test for determining the sufficiency of the evidence is well-known and understood. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992):

The test for determining the 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 a guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's

evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

The court instructed the jury concerning the elements of possession of stolen property in the first degree. (Instruction No. 4). The State was required to prove beyond a reasonable doubt that the defendant knowingly possessed stolen property, with knowledge that it had been stolen, did withhold the property to the use of someone other than the true owner, and that the property had a value in excess of \$1500. There is ample evidence to support each of the required elements of the crime.

The defendant's possession of the stolen items is uncontroverted . She traveled to a remote location in the middle of the night, loaded her truck with the stolen property and brought it back to her residence. The defendant's mother saw her and the boyfriend loading the items from the truck into the mother's residence. The stolen cabinets remained in the living room until discovered by Detective Peterson. Other items of stolen property were found in the defendant's bedroom, including blankets that were identical to those that were in the van at the time of its theft.

The cabinets were obviously withheld from the true owner, Steven Carras. The burglary occurred on the night of April 2-3, 2008. These cabinets were not recovered until April 16, 2008, when Peterson went to the defendant's residence.

Mr. Carras testified that the cabinets recovered from the defendant's residence had a value of \$5,000. The total value, including those recovered on the logging road, was over \$35,000.

Likewise, there is more than ample evidence to support a finding that the defendant knew that the property was stolen. The jury was properly instructed concerning the definition of knowledge. WPIC 10.02.

A person knows or acts knowingly or with knowledge when he or she is aware of a fact, circumstance or result which is described by law as being a crime, whether or not the person is aware that the fact, circumstance or result is a crime.

If a person has information which would lead a reasonable person in the same situation to believe that facts exist which are described by law as being a crime, the jury is permitted but not required to find that he or she acted with knowledge.

Clearly, under the facts of this case, there was direct evidence that the defendant at least should have reasonably known that the items were stolen. The State invites the court to take a look at the pictures of the cabinets, both the cabinets that were recovered in the house and those that were found on the logging road. These were specialty, hand-built cabinets made from high quality fir. They were in mint condition when stolen days before. Certainly the jury could determine that the defendant, upon viewing these cabinets, would realize that the owner had not discarded them on a logging road.

Coincidentally, the defendant had U-Haul blankets in her bedroom that were identical to the U-Haul blankets that were in the van at the time that it was stolen. This evidence connects her to the van in which the stolen cabinets had been stored.

Additionally, the circumstances of the defendant's possession of these cabinets supports a determination that she must have known they were stolen. These cabinets were retrieved from a logging road by the defendant and her boyfriend in the middle of the night. This is not the way that one customarily deals with goods which they believe they legitimately possess.

When the detective showed up at her house and asked about the cabinets, she lied. She was standing outside the house where she had placed the cabinets a day or two earlier. She lied about the fact that they were there and that she and her boyfriend, Shapansky, had placed them there. Certainly this statement supports her guilty knowledge.

Even the defendant's version of events, as testified to a trial, was suspect. She got a call from "Scott" whose last name she did not know. "Scott" called after midnight to tell her that it was beginning to rain and that she had better come and get the property. The explanation was that his parents were remodeling their house. Interestingly enough, she did not go to a house to pick up the cabinets. Rather, according to the defendant, she simply drove to a location on the South Bank Road where she parked her car and picked them up from the side of the road. (RP 89). According

to the defendant, she had never seen the items prior to that time. (RP 89-90). She testified that she had no idea where “Scott’s” parents lived. (RP 93). Even the defendant admitted that they were a lot nicer than she had expected and that it was “a very good deal.” (RP 97).

The courts have addressed the issue of knowledge in the similar circumstances. See State v. Womble, 93 Wn.App. 599, 604, 969 P.2d. 1097 (1999):

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. Although knowledge may not be presumed because a reasonable person would have knowledge under similar circumstances, it may be inferred. Once it is established that a person rode in a motor vehicle that was taken without permission, “slight corroborative evidence” is all that is necessary to establish guilty knowledge.

Thus, in Womble, the court found supporting evidence of the defendant’s guilty knowledge upon the following facts. The defendant had gone to a party at “Justin’s” house, but was vague about where Justin lived. The defendant testified that he did not think it was strange that his co-defendant had parked the vehicle a half-mile from the party. The defendant testified that he claimed that he did not know the car was stolen until it became stuck in a driveway and they were confronted by the owner.

The evidence in the case at hand is similar to the evidence in Womble. The defendant had no idea of “Scott’s” last name, where he lived, or where his parents, who were apparently remodeling, lived. The defendant picked the cabinets up in the middle of the night from a remote location in rural Grays Harbor County.

The jury in this case had the opportunity to assess the evidence, especially the defendant’s credibility. It is not for this court to disturb such determinations. In the end, there was ample evidence from which the jury could find proof beyond a reasonable doubt of the defendant’s guilty knowledge. See State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1990) (possession of recently stolen property together with slight corroborative evidence of other inculpatory circumstances supports a conviction for possession of stolen property.)

This assignment of error must be denied.

**The court properly set restitution.
(Response to Assignment of Error No. 2).**

Under the facts presented at trial and at the restitution hearing, the State established that the defendant was in possession of all of the recovered cabinets. The parameters of possession have been well established by the law. State v. Chavez, 138 Wn.App. 29, 34, 156 P.3d 246 (2007):

Actual possession exists where goods are in the personal custody of the person charged with possession. Constructive possession

exists where a person not in actual possession still has dominion and control over the object or the place where the object was found.... Dominion and control need not be exclusive and can be established by circumstantial evidence. State v. Weiss, 73 Wn.2d 372, 375, 438 P.2d 610 (1968).

The question of constructive possession is fact-sensitive. State v. George, 146 Wn.App. 906, 920, 193 P.3d 693 (2008). The court must look to the totality of the circumstances and determine if there are substantial facts from which the court at the restitution hearing could infer that the defendant had dominion and control over both the items in her residence and the items found by the defendant on the logging road. State v. Jeffrey, 77 Wn.App. 222, 227, 889 P.2d 956 (1995).

Obviously, the defendant had actual control over the cabinets that she loaded into the pickup truck and took to her residence. At the time of her arrest she certainly was in constructive possession of the cabinets in the living room and other stolen property located in her bedroom, including blankets from the van.

Likewise, the defendant was in constructive possession of the cabinets on the logging road. The evidence supports the fact that she knew where to go to pick them up, drove there in the middle of the night and took what she wanted at that time. She learned about the cabinets from “Scott” and “Perry.” (RP 48). In short, while her dominion and control over this property may not have been exclusive, she did have constructive possession of the property.

The defendant is responsible for the damage to the property that occurred while in her possession. Thus, for example, a defendant is responsible for restitution for the value of property taken from a stolen car which he had later abandoned. State v. S.T., 139 Wn.App. 915, 163 P.2d 796 (2007). Likewise, a defendant is responsible for restitution when a third person is allowed access to the stolen property and causes damage to the stolen property during the time that it is in the defendant's possession. State v. Donahoe, 105 Wn.App. 97, 18 P.3d 618 (2001).

The testimony at the restitution hearing was that all of the recovered cabinets were damaged in some way. All but one or two had water damage. Clearly, a reasonable inference from the facts is that these cabinets were damaged by exposure to the weather during the time the defendant was in possession of them.

The restitution statute is to be interpreted broadly to carry out the legislature's intent. State v. Hennings, 129 Wn.2d 512, 519, 919 P.2d 580 (1996). The only question is whether the damages suffered by Mr. Carras were causally connected to the defendant's crime. State v. King, 113 Wn.App. 243, 299, 54 P.3d 1218 (2002). The defendant's crime was possession of the cabinets during the course of this crime. She was in possession of them during a time when they were left out in the weather. It is certainly reasonable to impose restitution for the damages that occurred while the goods were in the constructive possession of the defendant.

The trial court's decision should be reviewed for abuse of discretion. State v. Endstone, 137 Wn.2d 675, 682, 974 P.2d 828 (1999). The decision of the trial court is based on the facts of this case. There was no abuse of discretion. The decision rested on a tenable basis. King, supra, 113 Wn.App. at 299. This court must affirm the restitution order.

CONCLUSION

Based on the foregoing, this court must affirm the conviction and the restitution order.

Respectfully Submitted,

By: 
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

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STATE OF WASHINGTON,

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No.: 38677-1-II

v.

DECLARATION OF MAILING

LYNN M. SMYTHE,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 31ST day of August, 2009, I mailed a copy of the Brief of Respondent to Peter B. Tiller; Attorney at Law; P. O. Box 58; Centralia, WA 98531-0058, and Lynn M. Smythe; 768406; Washington Corrections Center for Women.; P. O. Box 17; Gig Harbor, WA 98332, 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.

DATED this 31ST day of August, 2009, at Montesano, Washington.

Barbara Chapman