



TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR .....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE .....	1
D. ARGUMENT .....	5
(1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT McMILLIAN WAS GUILTY OF POSSESSION OF A STOLEN FIREARM (COUNT I).....	5
E. CONCLUSION .....	7

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u>State v. Couet</u> , 71 Wn.2d 773, 430 P.2d 974 (1967) .....	6, 7
<u>State v. Craven</u> , 67 Wn. App. 921, 841 P.2d 774 (1992).....	5
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	5
<u>State v. Jennings</u> , 35 Wn. App. 216, 666 P.2d 381, <i>review denied</i> , 100 Wn.2d 1024 (1983) .....	6
<u>State v. McPhee</u> , 156 Wn. App. 44, 230 P.3d 284 (2010).....	6, 7
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992) .....	5
<u>Federal Cases</u>	
<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979).....	5
<u>Statutes</u>	
RCW 9.94A.589.....	2
<u>Court Rules</u>	
CrR 3.6.....	1

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to take the case from the jury for lack of sufficient evidence to find McMillian guilty of possession of a stolen firearm (Count I).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether, there was sufficient evidence elicited at trial to find McMillian guilty of possession of a stolen firearm (Count I) beyond a reasonable doubt? [Assignment of Error No. 1].

C. STATEMENT OF THE CASE

1. Procedure

Kenneth S. McMillian (McMillian) was charged by first amended information filed in Thurston County Superior Court with two counts of possession of a stolen firearm (Counts I and III); three counts of unlawful possession of a firearm in the second degree (Counts II, IV, and V), and one count of unlawful possession of a controlled substance (Count VI). [CP 11-12].

No pretrial motion regarding CrR 3.6 was made or heard by defense counsel despite McMillian's desire for a suppression hearing. [RP 9-10]. McMillian was tried by a jury, the Honorable Wm. Thomas McPhee presiding. McMillian entered a stipulation acknowledging that he had a prior felony conviction. [CP 17; RP 181-182]. At the close of the State's case, McMillian moved to dismiss Count III (possession of a stolen firearm) as the State had not established that the firearm was stolen only

that the serial number had been removed and could not be recovered. [RP 183-188]. The court granted McMillian's motion and dismissed Count III. [RP 188-190]. McMillian had no objections and took no exceptions to the court's instructions. [RP 192-193]. The jury found McMillian guilty as charged on all of the remaining five counts. [CP 36, 37, 38, 39, 40; RP 253-259].

The court sentenced McMillian to a standard range sentence totaling 50-months (19-months on Count I, 9-months on Count II, 11-months on Count IV, 11-months on Count V all running consecutively pursuant to RCW 9.94A.589 (1)(c); and 24-months concurrent on Count VI) based on an undisputed offender score of 3. [CP 41-48, 49-59; 10-6-10 RP 12-16].

A notice of appeal was timely filed on November 5, 2010. [CP 60-71]. This appeal follows.

## 2. Facts

On June 23, 2010, at approximately 10:38 PM, Tumwater Police Officers Steve Barclift (Barclift) and Bryen Finch (Finch) were dispatched to a residence at 6805 Belmore Court in Tumwater because of suspicious activity at the residence. [RP 51, 109]. Barclift and Finch approached the residence seeing a man standing outside, but as they got closer the man went inside the residence, refused to answer the officers' knock, and

turned out the lights of the residence. [RP 52-54, 110-111]. The officers left, but as they were driving away Barclift noticed a vehicle that hadn't been there earlier. [RP 54, 111]. Barclift stopped, approached the parked car, and saw a man on foot parallel to the car talking on a cell phone. [RP 55]. Barclift contacted the man, who identified himself as McMillian. [RP 57]. McMillian first told Barclift that the car he was standing next to belonged to him then explained that his car (a Durango) was parked on Lively street (a street west of Belmore). [RP 57-58, 62-64]. At Barclift's request, Finch went to investigate McMillian's Durango. [RP 63, 68, 111-112]. McMillian explained to Barclift that he was going to visit "Robert" or "Fox" on Belmore Court. [RP 58]. McMillian was nervous and "fidgety" so Barclift conducted a pat down search for weapons. [RP 58-60, 63-64]. The pat down search revealed two Clipit knives, a small cylindrical flashlight, and "an item that [Barclift] believed gave [him] probable cause to arrest" McMillian. [RP 63-64]. A search of McMillian's person incident to his arrest revealed suspected methamphetamine. [RP 64-66]. Upon his arrest, McMillian offered to go to "Fox's house" to make a buy of methamphetamine as he didn't want to go to jail. [RP 66-67].

When Finch approached McMillian's Durango he observed a woman moving around the passenger side of the vehicle. [RP 113]. The

woman, Sierra Woodward, exited the Durango, explained that she was McMillian's girlfriend, and was just waiting for his return. [RP 114-115]. After telling Finch that her only property in the Durango was her purse, Woodward was allowed to leave. [RP 116-117]. Barclift informed Finch that McMillian was under arrest and Finch called for a narcotics canine to come to the scene. [RP 115]. The narcotics canine came to the scene and sniffed around the Durango. [RP 116].

A search warrant for the Durango was obtained. [RP 116, 118]. The search revealed three firearms (a 9 mm H&K handgun, a Smith & Wesson .38 special revolver with the serial number removed, and a 7 mm Weatherby rifle), and suspected methamphetamine found in two baggies in a prescription pill bottle with McMillian's name on the label. [RP 118-131, 70-75, 85-89].

Robert Martin (Martin) testified that he owned a 9 mm H&K handgun, but that the handgun had been stolen from his home. [RP 97-98]. Martin identified the 9 mm H&K handgun found in McMillian's Durango as his handgun—the serial number matched. [RP 98]. Martin testified that he did not know McMillian. [RP 99].

Frank Boshears, a forensic scientist with the Washington State Patrol Crime Lab, testified that the substances found on McMillian's

person and in the baggies found in McMillian's Durango contained methamphetamine. [RP 175-176, 180-181].

McMillian did not testify.

D. ARGUMENT

(1) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT McMILLIAN WAS GUILTY OF POSSESSION OF A STOLEN FIREARM (COUNT 1).

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 would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201 P.2d 1068 (1992); Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct, 2781 (1979). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, McMillian was charged and convicted in Count I of possession of a stolen firearm. [CP 11-12, 36]. It has long been the law in Washington that the essential elements of possession of a stolen firearm include that the defendant knows/has knowledge that the firearm is in fact stolen—mere possession of the stolen firearm is insufficient. *See State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967); *State v. Jennings*, 35 Wn. App. 216, 219, 666 P.2d 381, *review denied*, 100 Wn.2d 1024 (1983); *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284 (2010).

As instructed in Instruction No. 15, the State bore the burden of proving beyond a reasonable doubt the following:

- (1) That on or about June 23, 2010, the defendant possessed, carried, delivered, sold, or was in control of a stolen firearm, specifically, a 9 mm H&K pistol;
- (2) That the defendant acted with knowledge that the firearm had been stolen;
- (3) That the defendant withheld or appropriated the firearm to the use of someone other than the true owner or person entitled thereto; and
- (4) That the possession or control of the firearm occurred in the State of Washington.

[Emphasis added]. [CP 29; RP 213-214].

As instructed in order to sustain McMillian's conviction for possession of a stolen firearm, the State bore the burden of proving

beyond a reasonable doubt that he knew the 9 mm H&K handgun was stolen. This is a burden the State cannot meet.

While it cannot be disputed that the 9 mm H&K handgun was found in the Durango belonging to McMillian, that the handgun was reported stolen by Martin and Martin did not know McMillian; the sum of the evidence elicited at trial does not establish that McMillian knew the handgun was stolen. There was no evidence elicited at trial regarding how McMillian obtained the handgun. All the evidence establishes is McMillian's possession of the handgun and mere possession of a stolen firearm absent evidence that the person possessing the firearm knows it is stolen is insufficient to sustain a conviction for possession of a stolen firearm. *See State v. Couet, supra* and *State v. McPhee, supra*. This court should reverse and dismiss this conviction.

E. CONCLUSION

Based on the above, McMillian respectfully requests this court to reverse and dismiss his conviction on Count I for possession of a stolen firearm.

DATED this 11<sup>th</sup> day of April 2011.

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CERTIFICATE OF SERVICE

11 APR 12 AM 11:39

Patricia A. Pethick hereby certifies under penalty of perjury under

STATE OF WASHINGTON  
DEPUTY

the laws of the State of Washington that on the 11<sup>th</sup> day of April 2011, I

delivered a true and correct copy of the Brief of Appellant to which this

certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 11<sup>th</sup> day of April 2011.

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