

No. 41408-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

---

STATE OF WASHINGTON,

Respondent,

v.

KENNETH SEAN McMILLIAN,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Wm. Thomas McPhee, Judge  
Cause No. 10-1-00967-5

---

BRIEF OF RESPONDENT

---

Carol La Verne  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5540

**TABLE OF CONTENTS**

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ..... 1

B. STATEMENT OF THE CASE ..... 1

C. ARGUMENT ..... 1

    1. There was sufficient evidence presented at trial to support McMillian's conviction for possession of a stolen firearm. ..... 1

D. CONCLUSION..... 5

**TABLE OF AUTHORITIES**

**Washington Supreme Court Decisions**

State v. Delmarter,  
94 Wn.2d 634, 618 P.2d 99 (1980)..... 2

State v. Green,  
94 Wn.2d 216, 616 P.2d 628 (1980) ..... 2

State v. Salinas,  
119 Wn.2d 192, 829 P.2d 1068 (1992) ..... 1, 2

**Decisions Of The Court Of Appeals**

State v. Davis,  
39 Wn. App. 916, 696 P.2d 627 (1985)..... 3

State v. McPhee,  
156 Wn. App. 44, 230 P.3d 284 (2010)..... 2

A. ISSUE PERTAINING TO ASSIGNMENT OF ERROR.

1. Whether there was sufficient evidence to support McMillian's conviction for possession of a stolen firearm.

B. STATEMENT OF THE CASE.

The State accepts McMillian's statement of the case, with the addition that the search of McMillian's vehicle also revealed a dark blue ski mask [RP 121]. Robert Martin testified that the 9mm handgun in McMillian's possession had been stolen from his home sometime between the end of February, 2010, and March 13-15, 2010. [RP 97-98].

C. ARGUMENT

1. There was sufficient evidence presented at trial to support McMillian's conviction for possession of a stolen firearm.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, 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).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to

the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom,” interpreting those inferences most strongly against the defendant. Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, 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).

McMillian correctly notes that the State carried the burden to prove, beyond a reasonable doubt, that he possessed the handgun at issue with knowledge that it had been stolen, a burden for which the jury was properly instructed. State v. McPhee, 156 Wn. App. 44, 62, 230 P.3d 284 (2010); [RP 213]. While “bare possession” of a recently stolen firearm is insufficient to sustain a conviction without proof of knowledge that the firearm was stolen, such possession combined with “other evidence tending to show guilt” is sufficient to sustain a conviction. McPhee, *supra*, at 62. In addition, a jury is permitted to infer that a defendant has knowledge of a particular fact where the defendant was aware of information that would lead a reasonable person to believe that such a fact

exists. State v. Davis, 39 Wn. App. 916, 919, 696 P.2d 627 (1985); [RP 213].

Viewing the evidence in the light most favorable to the prosecution, sufficient evidence supports the jury's reasonable inference that McMillian had knowledge that the handgun in his possession had been stolen. The jury was aware that McMillian, a convicted felon, had no legal right to possess a firearm and therefore could not have purchased the handgun legally. [RP 181-82, 214, 233]. This fact tends to support the inference that McMillian, having circumvented any legal means of purchasing a firearm, must have been aware that the handgun had been stolen regardless of exactly which illegal means he actually employed in obtaining it. At the very least, a jury could reasonably determine that by obtaining a handgun through illegal means McMillian would have been aware of information that would lead a reasonable person in the same situation to believe that the handgun had been stolen.

The jury's inference of knowledge is strengthened by McMillian's simultaneous possession of the .38 caliber revolver with ground-down serial numbers. [RP 121-22, 234]. McMillian's illegal possession of an additional firearm, particularly one that had been physically altered so as to render it untraceable, is evidence tending to show that McMillian was knowingly possessing stolen

weapons. While the .38 caliber revolver could not be proved to have been stolen without its serial number, a jury might at the very least consider its presence to be additional information that would suggest to a reasonable person that the weapons he was illegally possessing were likely to have been stolen.

The ski mask recovered among McMillian's belongings provides additional evidence tending to show that McMillian was knowingly in possession of a stolen firearm. [RP 121, 232]. While insufficient to prove that McMillian had himself stolen the 9mm handgun, the concealment of the mask does suggest McMillian's involvement in a theft of some kind and, considered in addition to the fact that the handgun had been stolen from the home of Robert Martin only a few months earlier, points toward a reasonable explanation of how McMillian obtained the handgun. [RP 97-98, 128, 232-33]. Lastly, the defendant's visibly nervous demeanor and eagerness to avoid arrest by making a purchase of methamphetamines tends to support the jury's reasonable conclusion that McMillian was in knowing possession of a stolen firearm. [RP 58-59, 66-67, 234-35].

A jury could reasonably determine that McMillian, having obtained the 9mm handgun through illegal means and having chosen to conceal it in his car alongside methamphetamines, an additional illegal weapon that had been rendered untraceable, and

a ski mask suggesting possible involvement in theft, acted with knowledge that the 9mm handgun in his possession had been stolen. Such an inference is strengthened by McMillian's visibly nervous demeanor and eagerness to avoid prosecution. Beyond this, a jury could rationally conclude that any reasonable person who, like McMillian, was confronted with the information presented at trial would at the very least believe that the handgun in his possession had been stolen. Viewed in the light most favorable to the prosecution, the evidence presented at trial and described above would therefore allow any rational trier of fact to reasonably determine that McMillian had knowledge that the handgun in his possession had been stolen.

#### D. CONCLUSION

The evidence presented at trial was more than sufficient to allow a reasonable trier of fact to find, beyond a reasonable doubt, that McMillian had possessed a handgun with knowledge that it had been stolen such that he could be properly convicted of possessing a stolen firearm. The State respectfully asks this court to affirm his conviction.

Respectfully submitted this 6<sup>th</sup> day of June, 2011.

  
\_\_\_\_\_  
Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: DAVID C. PONZOHA, CLERK  
COURT OF APPEALS, DIVISION II  
950 BROADWAY, SUITE 300  
MS-TB-06  
TACOMA, WA 98402-4454

--AND--

PATRICIA ANNE PETHICK  
ATTORNEY AT LAW  
PO BOX 7269  
TACOMA, WA 98417-0269

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

Dated this 6th day of June, 2011, at Olympia, Washington.

  
Chong McAfee