

NO. 42133-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

BEAU E. NUGENT,

Appellant.

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

The Honorable Amber Finlay, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt the essential element of possession in the possession of a stolen vehicle charge.

2. The state failed to prove beyond a reasonable doubt the essential element of knowledge in the possession of a stolen vehicle charge.

3. The state failed to prove beyond a reasonable doubt the essential element of possession in the charge of possession of motor vehicle theft tools.

4. The state failed to prove beyond a reasonable doubt the essential element of knowledge in the charge of possession of motor vehicle theft tools.

Issues Presented on Appeal

1. Did the state fail to prove beyond a reasonable doubt the essential element of possession in the possession of a stolen vehicle charge?

2. Did the state fail to prove beyond a reasonable doubt the essential element of knowledge in the possession of a stolen vehicle charge?

3. Did the state fail to prove beyond a reasonable doubt the essential element of possession in the charge of possession of motor vehicle theft tools?

4. Did the state fail to prove beyond a reasonable doubt the essential element of knowledge in the charge of possession of motor vehicle theft tools?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Beau Nugent was charged by amended information with making a false statement to a police officer, possession of a stolen vehicle and possession of motor vehicle theft tools. CP 61-62. Nugent was convicted as charged following a jury trial the honorable Amber Finlay presiding. CP 34-36. The court imposed a standard range sentence. RP 7-20. This timely appeal follows. CP 6.

2. SUBSTANTIVE FACTS

Officer Mathew Dickinson was on routine patrol driving past 621 California Street in Shelton, a known transient shelter when he saw a Honda Accord parked in the driveway that he did not recognize. RP 48-49, 136. Dickinson ran a license plate check which revealed that the car was stolen. Id. Dickinson called for backup and Officer Penz came to assist. RP 49. Dickinson peered through a window and saw a male asleep on a couch. After knocking several times a woman answered the door. RP 50. Nugent was one

of seven other occupants who exited the house. RP 51, 66, 80. No one in the house recognized the Honda or knew how it got there and no one could identify Nugent, except Tracie Doyle, who knew Nugent but had not known that he was staying at the house. RP 51-53.

Nugent told Dickinson that a friend dropped him off at the house after he had been partying. RP 52. Cammie Van Brunt knows Nugent and gave him a ride to 621 California Street the night before the arrest. RP 89. Van Brunt estimated that she picked Nugent up sometime between 10:00pm and midnight. RP 90. Van Brunt remembered that Nugent had two bags with him when she saw him walking down the street. RP 91.

Joseph Tindall was with Nugent the night before the arrest and obtained a ride from Van Brunt along with Nugent. RP 110. Tindall remembered that Nugent had a computer in a laptop bag. RP 112. April Bunting has known Nugent for a long time and had just moved into 621 California Street which had been without power for a long time. RP 132-33. Bunting was in the back bedroom and bathroom all day cleaning out mold and did not have any interaction with the comings and goings of the day. Bunting did not know that Tindall and Nugent were in the house until later in the evening when she took a break from cleaning. RP 135. When the police

arrived Bunting was taking a bath with the bathroom door locked. RP 134. Bunting had no idea if Nugent arrived at the house with luggage or how he arrived, and had no idea that the Honda in the driveway was stolen. RP 138-139.

Nugent gave a false name when approached by the police who eventually recognized him as Beau Nugent. RP 53-54. After Nugent was arrested, the police retrieved a screwdriver from his jacket pocket. RP 54. The police did not know if the screwdriver or any of the items from the Honda were used to start or steal the car. RP 86.

The police found shaved keys somewhere in the car, a computer laptop bag, large speakers and a bag with two photos of Mr. Nugent in it along with a social security administration letter, and an eye glass case. None of these items were stolen items. RP 57-59, 61-63. None of the items in the car belonged to the owner and only two of the 70 other items found in the Honda were associated with Mr. Nugent. None of the items were stolen. RP 68. The only items associated with Mr. Nugent were a black bag containing a note pad, a multi-tool, 2 knives, and a flashlight. RP 53-54, 68, 70. The police also found a driver's license for Eleazar Ramirez Abundas. RP 76.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THE ESSENTIAL ELEMENT OF POSSESSION IN THE CRIME OF POSSESSION OF A STOLEN VEHICLE.

The state bears the burden of proving all elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). The standard of review for determining the sufficiency of the evidence 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.” Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S. Ct. 2781 (1979); Green, 94 Wn.2d at 94.

A person is guilty of possession of a stolen vehicle if he possesses a stolen motor vehicle. RCW 9A.56.068(1). To convict Nugent of unlawful possession of a stolen vehicle, the State had to prove beyond a reasonable doubt that Nugent knowingly possessed a stolen vehicle and that he acted with knowledge that the vehicle was stolen. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 77.21, at 177 (3d ed. 2008) (WPIC). In other words, the State must have proved beyond a reasonable doubt that Nugent not only possessed the stolen vehicle but that he possessed

it knowingly or with knowledge that it was stolen.

a. Possession

Possession can be actual or constructive. “Actual possession means that the goods are in the personal custody of the person charged with possession.” *State v. Plank*, 46 Wn.App. 728, 731, 731 P.2d 1170 (1987), quoting, *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Nugent was not in actual possession of the stolen vehicle when he was arrested. Therefore, the Court must determine whether there was sufficient evidence to establish that Nugent had constructive possession of the vehicle.

“Constructive possession cases are fact-sensitive.” *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). “Constructive possession is established by examining the totality of the situation and determining if there is substantial evidence” tending to establish circumstances “from which a jury can reasonably infer the defendant had dominion and control over the item.” *State v. Jeffrey*, 77 Wn.App. 222, 227, 889 P.2d 956 (1995). Dominion and control need not be exclusive to establish constructive possession but close proximity alone is insufficient; other facts must enable the trier of fact to infer dominion and control. *See e.g., George*, 146 Wn.App. 920; *State v. Turner*, 103 Wn.App. 515, 521-22, 13 P.3d 234 (2000); *State v. Mathews*, 4

Wn.App. 653, 656-57, 484 P.2d 942 (1971).

In *State v. McCaughey*, 14 Wn.App. 326, 541 P.2d 998 (1975) the State attempted and failed to establish that McCaughey possessed stolen merchandise police found in a vehicle within 5-10 feet from where McCaughey slept. McCaughey did not have actual, physical or personal possession of the stolen stereo merchandise in the car, nor did he possess the merchandise constructively. There was an inference that McCaughey had recently been in the station wagon but that established only that he had access to the stereo equipment. The Court citing to *State v. Mathews*, held that mere proximity to the stolen merchandise was not enough to establish dominion or control over the merchandise or the vehicle. *McCaughey*, 14 Wn. App. at 327, 329.

The State argued that McCaughey's presence and the statements of a second person associated with the vehicle established constructive possession. *McCaughey*, 14 Wn.App. at 329. This Court held that evidence of McCaughey's proximity to the vehicle and inconsistent statements about the stolen merchandise were insufficient to prove that McCaughey possessed the stolen merchandise in the vehicle. *McCaughey*, 14 Wn.App. 327, 329.

In *State v. Cote*, 123 Wn.App. 546, 96 P.3d 410 (2004) Division

Three of this Court held that the fact that Cote had been a passenger in a truck in which drugs were found was insufficient to establish his constructive possession of the drugs. Cote was not in or near the truck at the time of arrest. *Cote*, 123 Wn.App. 546, 96 P.3d 410.

In *State v. Harris*, 14 Wn. App. 414, 542 P.2d 122 (1975), a married couple were convicted for possession of marijuana. The police searched the car they occupied and found marijuana in the trunk. The court reversed the wife/passenger's conviction, stating at page 417:

The only evidence tending to prove dominion and control on her part is circumstantial and consists of the fact that she was a passenger in the automobile and the deputy's testimony that he obtained the keys to the trunk from "either Mr. or Mrs. Harris."

Id.

Here, Nugent was not in or near the car when he was arrested; he was asleep inside the house associated with the driveway where the Honda was parked. Police found about 60 items in the Honda, only two of which were associated with Mr. Nugent. RP 68-69. Eleazar Ramirez Abundas' driver's license was found in the Honda along with large speakers, and many other things not associated with Mr. Nugent or the owner of the Honda. RP 76.

There was no fingerprint evidence linking Nugent to the Honda or to any of the items in the Honda and no one saw Nugent in the stolen car. The seven people inside the residence arguably had equal access to the Honda and could have owned any number of the items in the Honda, but the police did not check. RP 67-71.

The evidence when viewed under the totality of the circumstances, in the light most favorable to the state, is insufficient to support a finding by a reasonable juror that Nugent had dominion and control over the vehicle.

b. Knowledge

The state also could not prove that Nugent knew that the car was stolen. *Plank*, 46 Wn.App. at 731. Here, the State had to prove beyond a reasonable doubt that Nugent possessed a stolen motor vehicle, knowing that it was stolen. 11A WPIC 77.20, at 176. Knowledge may be inferred if “a reasonable person would have knowledge under similar circumstances.” *State v. Womble*, 93 Wn.App. 599, 604, 696 P.2d 1097 (1999).

Mere possession of recently stolen property is insufficient to establish that the possessor knew the property was stolen. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967). Evidence of “a damaged ignition, and an improbable explanation or fleeing from the stolen when stopped” has

constituted sufficient corroborative evidence to support knowledge that a vehicle is stolen. *State v. L.A.*, 82 Wn.App. 275, 276, 918 P.2d 173 (1996).

In this case however there was no corroborative evidence to support the possession or knowledge elements. There was no fleeing, there was no improbable explanation and there was no linking Nugent to the damaged ignition sufficient for a reasonable juror to infer that Nugent possessed the Honda or that he knew that it was stolen. Nugent was never placed in or near the car. Rather Nugent was asleep inside the house with seven other people. The car was parked in the driveway and two out of 60 items were identified as Nugent's. The only link between Nugent and the car was the one bag found in the trunk with the letter and photos of Nugent. RP 61-62.

The police found a screw driver in Nugent's pocket and shaved keys in the car, but there was no connection between Nugent and the shaved keys and there was no evidence that the screw driver was used to drive the car. As in *McCaughey* and *Cote*, Nugent's proximity to the car along with his two bags in the car was insufficient evidence for a reasonable jury to find that Nugent was ever in possession or control of a stolen vehicle or that he knew anything about the stolen vehicle. For these reasons this Court must reverse the charge and dismiss with prejudice.

2. THE STATE FAILED TO PROVE BEYOND
A REASONABLE DOUBT THE ESSENTIAL
ELEMENT OF POSSESSION OF MOTOR
VEHICLE THEFT TOOLS

As stated supra, in Argument #1, the state bears the burden of proving all elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. at 364. RCW 9A.56.063 provides, in pertinent part:

(1) Any person who makes or mends, or causes to be made or mended, uses, or *has in his or her possession* any motor vehicle theft tool, that is adapted, designed, or commonly used for the commission of motor vehicle related theft, under circumstances evincing an intent to use or employ, or allow the same to be used or employed, in the commission of motor vehicle theft, or knowing that the same is intended to be so used, is guilty of making or having motor vehicle theft tools.

(2) For the purpose of this section, motor vehicle theft tool includes *any other implement shown by facts and circumstances that is intended to be used in the commission of a motor vehicle related theft*, or knowing that the same is intended to be so used.

RCW 9A.56.063 (emphasis added).

Here, shaved keys were found in the stolen car, a screwdriver was found in Nugent's pocket and there was evidence that the car was started with the use of tools other than a key. However, there was no evidence presented at trial that the screwdriver was adapted, designed, or commonly used for

vehicle theft or that the damage to the ignition was, in fact, made by the screw driver. The screwdriver is a type of tool commonly possessed for proper, benign purposes, and did not appear to be altered in any way.

While there was testimony that shaved keys are often used to steal cars, there was no evidence connecting Nugent to possessing the shaved keys and no evidence that the shaved keys were used to steal the Honda. Thus the state failed to prove the essential elements that the screwdriver was “adapted, designed, or commonly used for the commission of motor vehicle related theft”, or that Nugent possessed the shaved keys. RCW 9A.56.063. For these reasons, this charge too must be reversed and dismissed with prejudice for insufficient evidence of essential elements.

D. CONCLUSION

Mr. Nugent respectfully requests this Court reverse his convictions for possession of a stolen vehicle and possession of motor vehicle theft tools and dismiss the charges with prejudice based on insufficient evidence.

DATED this 27th day of November 2011.

Respectfully submitted,

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I, Lise Ellner, a person over the age of 18 years of age, served the Mason County Prosecutor's office electronically at timw@co.mason.wa.us.
And Beau Nugent DOC# 788829 Stafford Creek Corrections Center
191 Constantine Way Aberdeen, WA 98520. Service was made on November 27, 2011 by depositing in the mails of the United States of America, properly stamped and addressed.

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