

NO. 74637-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DMITRY V. NAGORNYUK,

Appellant.

FILED
June 24, 2016
Court of Appeals
Division I
State of Washington

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Dmitry Nagornyuk was contacted by a police officer while standing next to a car in which he had received a brief ride. The car had been stolen the night before. Mr. Nagornyuk insisted he was not driving and did not know the car was stolen. On appeal he contends the evidence was insufficient to establish that he knew the car had been stolen or that he had dominion and control of the vehicle.

B. ASSIGNMENTS OF ERROR

1. Insufficient evidence supported the conviction for taking a motor vehicle and possession of that vehicle.

2. Separate convictions for taking and possessing the same stolen vehicle are improper.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The prosecution was required to prove beyond a reasonable doubt that Mr. Nagornyuk knew the vehicle in question had been taken from the owner without permission at the time he accepted a ride in the car. Mr. Nagornyuk was outside the vehicle when contacted by law enforcement and the evidence failed to otherwise establish that he knew the vehicle had been taken unlawfully. Must his convictions for taking

a motor vehicle and possession of a stolen vehicle be reversed and dismissed for insufficient evidence?

2. A conviction for possession of a stolen vehicle requires the prosecution prove the defendant had actual or constructive possession of car beyond a reasonable doubt. Mr. Nagornyuk was contacted after exiting the vehicle and while standing nearby. Was the evidence insufficient to establish actual or constructive possession of the stolen vehicle?

3. Common law doctrines bar conviction for taking a vehicle and then possession of that stolen vehicle arising out of the same act. Mr. Nagornyuk was convicted of both taking a motor vehicle and possession of that stolen vehicle. Must the conviction for possession of the stolen property be vacated?

4. This Court has discretion to decline to award appellate costs, even where the State substantially prevails. Mr. Nagornyuk was homeless and unemployed at the time of this offense. The trial judge found him indigent for purposes of this appeal. Should this Court exercise its discretion and decline any request to impose appellate costs?

D. STATEMENT OF THE CASE

Dmitry Nagornyuk was 23 years old on June 10, 2015, and looking for a ride from Everett to Marysville. RP 189. Mr. Nagornyuk found a man and two women at a gas station who were going to the casino in Marysville and agreed to give him a ride. RP 190-91. While the man drove with one woman in the front seat and the other in the back with Mr. Nagornyuk, he listened to music on his cell phone. RP 195.

When they arrived at the casino, the driver and the woman riding in the front seat went inside to cash a check before delivering Mr. Nagornyuk to his destination. RP 191-92. The driver asked Mr. Nagornyuk to stay with the car because the battery was in poor condition so he did not want to turn off the ignition. RP 192. Because Mr. Nagornyuk had told the driver of his dire financial circumstances, the man encouraged him to look through items in the trunk for something to sell. RP 190, 192.

While Mr. Nagornyuk was looking through the trunk, he was contacted by Tulalip Police Officer William Santos. RP 132-43. Officer Santos testified he was on routine patrol around 6:30 p.m. when he saw a maroon Honda. RP 134-35. Because these cars are so

frequently stolen, Officer Santos turned around and tried to run the license plate on his mobile computer system. RP 135. It took a while to get a report back and Officer Santos lost sight of the vehicle when it turned into the casino parking lot. RP 139-40.

In the parking lot, Officer Santos found a car that was similar to the one he was looking for and again tried to run the license plate through his computer. RP 140-41. Officer Santos saw Mr. Nagornyuk standing by the trunk and a woman walking toward the casino. RP 141-42. When Officer Santos finally received an alert that the car had been reported stolen from Everett, he immediately arrested Mr. Nagornyuk.¹ RP 143.

When Officer Santos advised Mr. Nagornyuk the car was stolen, he said he did not know it was stolen and explained that he had received a ride and the driver had encouraged him to look through items in the trunk given his situation. RP 144, 150. To document his claim, Mr. Nagornyuk encouraged the officer to obtain the casino surveillance video. RP 153. Unfortunately, when Officer Santos sought

¹ Jose Sandoval testified he owned the Honda and had parked it outside a friend's house in Everett on the evening of June 9th. RP 173-75. When he woke up to go to work the next morning, the car was gone. RP 175.

the surveillance video he determined the casino did not have video for that portion of the parking lot. RP 153-54.

Officer Santos further testified that because the car was still running, he retrieved the key from the ignition. RP 145-46. He later determined the car's key had been filed down. RP 148. Officer Santos explained that keys to Honda cars of this era were fairly similar, so by filing the teeth it was possible to create a master.² Unfortunately, Officer Santos did not attempt to lift fingerprints or DNA from the key

² In a search incident to his arrest, Officer Santos found a file in Mr. Nagornyuk's pants pocket. RP 148.

which might have confirmed Mr. Nagornyuk's explanation that he had not been driving the car. RP 165, 169.

Mr. Nagornyuk was convicted following a jury trial and sentenced to time served. CP 3-18, 22-23.

This appeal followed. CP 2.

E. ARGUMENT

1. The evidence was insufficient to sustain Mr. Nagornyuk's convictions for taking a motor vehicle or possession of a stolen vehicle.

a. The prosecution must prove all the elements of the offense beyond a reasonable doubt.

The prosecution must prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). On review, the evidence is sufficient to support a conviction if it permits a rational trier-of-fact to find the essential elements of the crime beyond a reasonable doubt. State v. Kintz, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). This reviewing court will presume the reasonable inferences that a trier-of-fact could draw from the evidence, but the verdict cannot be based on mere speculation. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); Arnold v. Sanstol, 43 Wn.2d 94, 99, 260 P.2d 327 (1953). Circumstantial evidence and direct evidence are equally

reliable, however, the “facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them.” Arnold, 43 Wn.2d at 99; *see also State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

Mr. Nagornyuk was charged in Count I with taking a motor vehicle in the second degree (RCW 9A.56.076).³ The jury was instructed as to the elements that:

To convict the defendant of the crime of taking a motor vehicle without permission in the second degree,

³ RCW 9A.56.075 provides:

(1) A person is guilty of taking a motor vehicle without permission in the second degree if he or she, without the permission of the owner or person entitled to possession, intentionally takes or drives away any automobile or motor vehicle, whether propelled by steam, electricity, or internal combustion engine, that is the property of another, or he or she voluntarily rides in or upon the automobile or motor vehicle with knowledge of the fact that the automobile or motor vehicle was unlawfully taken.

(2) Taking a motor vehicle without permission in the second degree is a class C felony.

each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 10th day of June, 2015, the defendant voluntarily rode in or upon a motor vehicle;

(2) That the motor vehicle was the property of another;

(3) That the motor vehicle had been intentionally taken or driven away without permission of the owner or person entitled to possession;

(4) That at the time of the riding the defendant knew that the motor vehicle was unlawfully taken; and

(5) That the defendant's act occurred in the State of Washington.

CP 34 (emphasis added).

Count II charged possession of a stolen vehicle (RCW

9A.56.068).⁴ The jury was instructed:

To convict the defendant of the crime of possessing a stolen motor vehicle, each of the following

⁴ RCW 9A.56.068 provides:

(1) A person is guilty of possession of a stolen vehicle if he or she possess [possesses] a stolen motor vehicle.

(2) Possession of a stolen motor vehicle is a class B felony.

elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 10th day of June 2015, the defendant knowingly possessed a stolen motor vehicle;

(2) That the defendant acted with knowledge that the motor vehicle had been stolen;

(3) That the defendant withheld or appropriated the motor vehicle to the use of someone other than the true owner or person entitled thereto;

(4) That any of these acts occurred in the State of Washington.

CP 36 (emphasis added).

b. The evidence was insufficient to establish all the essential elements of the crimes charged.

i. Knowledge.

With regard to Count I, in order to obtain a conviction for taking a motor vehicle, the prosecution was required to prove that Mr. Nagornyuk rode in a vehicle without the owner's permission and at the time of the riding he knew that the motor vehicle was stolen. State v. C.M.C., 110 Wn.App. 285, 287-88, 40 P.3d 690 (2002); State v. Robinson, 78 Wn.2d 479, 482, 475 P.2d 560 (1970).

The evidence failed to establish Mr. Nagornyuk "knew that the motor vehicle was unlawfully taken." CP 34. Mr. Nagornyuk testified that he had only just met the driver at a gas station in Everett while looking for a ride to Marysville. RP 189-91. He testified that he rode in the back seat. RP 195. The

back seat was littered with a variety of items, but nothing that would put Mr. Nagornyuk on notice, for example, that the car stereo was missing or that the ignition key was suspicious. RP 195. What remains is nothing more than speculation regarding what Mr. Nagornyuk may have known or how he might have acquired that knowledge. *Cf Arnold*, 43 Wn.2d at 99; *State v. Toms*, 75 Wn.App. 55, 59, 876 P.2d 714 (1997).

Similarly, as to the possession of stolen vehicle charge, the *mens rea* element is not expressly codified in RCW 9A.56.068, but courts have held that RCW 9A.56.068 implicitly incorporates chapter 9A.56 RCW's definition of "possessing stolen property."⁵ *See State v. Hayes*, 164 Wn.App. 459, 479–80, 262 P.3d 538 (2011); *State v. Polo*, 169 Wn.App. 750, 764, 282 P.3d 1116 (2012).

To the extent the prosecution failed to present sufficient evidence to establish the knowledge element for purposes of the

⁵ "Possessing stolen property" means knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto. RCW 9A.56.140(1).

take a motor vehicle charge, the proof similarly fails as to the possession of a stolen vehicle charge.

ii. Possession.

With regard to Count II, the possession element requires evidence of actual or constructive possession. “Actual possession” means the item is in the personal custody of the individual. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1977).

“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). While dominion and control need not be exclusive to establish constructive possession, close proximity alone is insufficient. Other facts must enable the trier-of-fact to infer dominion and control. State v. George, 146 Wn.App. 906, 920, 193 P.3d 693 (2008).

In Plank for example, this Court found that the fact defendant was a passenger in an allegedly stolen vehicle and failed to contradict codefendant's statements that they borrowed the car from an acquaintance failed to show that defendant had dominion and control

over the vehicle in question. State v. Plank, 46 Wn.App. 728, 732, 731 P.2d 1170 (1987). Thus, the evidence was insufficient to support defendant's conviction for possession of stolen property in the second degree. Id. at 733.

Similarly, in McCaughey the appellant and a companion were sleeping several feet from a station wagon parked off a side road. They were detained because the license plates on the car belonged on another vehicle. State v. McCaughey, 14 Wn.App. 326, 541 P.2d 998 (1975). An inventory search of the station wagon revealed the presence of stolen property. The court recognized that the appellant did not have actual physical possession, nor constructive possession of the stolen property, because the only evidence presented was that the appellant had access to the property and was in close proximity. The court held this was not sufficient and the same is true here. Id. at 329.

The same result followed in State v. Harris, 14 Wn.App. 414, 542 P.2d 122 (1975), where a husband and a wife were convicted of possession of marijuana. The police had a warrant to search the car and found marijuana in the trunk. The court reversed the wife's conviction, stating:

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."

at 417. The Harris court found:

Whether a passenger's occupancy of a particular part of an automobile would constitute dominion and control of either the drugs or the area in which they are found *would depend upon the particular facts in each case*. Mere proximity to the drugs is not enough to establish constructive possession—it must be established that the defendant exercised dominion and control over either the drugs or the area in which they were found.

Harris, 14 Wn.App. at 417 (original emphasis).

Cases from other jurisdictions demonstrate a reluctance to find a passenger exerted dominion and control over a stolen vehicle. *See* Commonwealth v. Scudder, 490 Pa. 415, 416 A.2d 1003 (1980); In re Dulaney, 74 N.C.App. 587, 328 S.E.2d 904 (1985); State v. Bartlett, 77 N.C.App. 747, 336 S.E.2d 100 (1985). The same is true under the facts of Mr. Nagornyuk's case.

Officer Santos acknowledged that when he first saw the Honda he was struggling with his computer. RP 167. The Honda he found in the parking lot was very similar, but he cannot say the plate he first entered was the one he ultimately found on the

vehicle in the parking lot. Moreover, he did not get a good look at the person driving the first Honda. RP 169.

In the parking lot, Officer Santos never saw Mr. Nagornyuk behind the wheel, nor in the front seat, or with the keys in his hands. RP 169. Mere presence or proximity to stolen item is not enough to establish dominion or control over it. State v. Summers, 45 Wn.App. 761, 763-64, 728 P.2d 613 (1986). The evidence fails to establish dominion and control over the vehicle and, therefore, fails to support the conviction for possession of the stolen vehicle.

2. Defendants may not be convicted of taking a motor vehicle and possession of that stolen vehicle.

This Court has observed that:

[i]f the State charges both theft (or in this case, TMV) and possession arising out of the same act, the fact finder must be instructed that if it finds that the defendant committed the taking crime, it must stop and not reach the possession charge.

State v. Melick, 131 Wn.App. 835, 841, 129 P.3d 816 (2006), *citing* Milanovich v. United States, 365 U.S. 551, 81 S.Ct. 728, 5 L.Ed.2d 773 (1961). For example, in United States v. Gaddis the Court held that a person convicted of robbing a bank cannot also be convicted of receiving or possessing the proceeds of that robbery. United States v.

Gaddis, 424 U.S. 544, 547, 96 S.Ct. 1023, 47 L.Ed.2d 222 (1976); *see also* State v. Hancock, 44 Wn.App. 297, 301, 721 P.2d 1006 (1986) (“one cannot be both the principal thief and the receiver of stolen goods.”). The remedy is to vacate the possession of stolen property charge. Melick, 131 Wn.App. at 844.

3. The Court should not impose costs against Mr. Nagornyuk on appeal.

In the event the State is the substantially prevailing party on appeal, this Court should exercise its discretion and decline to impose appellate costs upon Mr. Nagornyuk. *See* RAP 14; *see also* RAP 1.2(a), (c); RAP 2.5. State v. Blazina, 182 Wn.2d 827, 835, 344 P.3d 680 (2015); State v. Sinclair, 192 Wn.App. 380, 367 P.3d 612 (2016).

Mr. Nagornyuk testified that at the time of the incident he was unemployed and homeless. RP 189, 192. The sentencing judge found him indigent for purposes of this appeal by order filed herein. This felony conviction will only make it more difficult for Mr. Nagornyuk to support himself and fulfill these obligations. Blazina, 182 Wn.2d at 835-36. He requests therefore that this Court exercise its discretion and decline to impose appellate costs.

F. CONCLUSION

Mr. Nagornyuk asks this Court to find the evidence was insufficient to establish that he knew the car in which he was riding had been unlawfully taken and the evidence failed to establish he had dominion and control over the vehicle. In the event the Court sustains the convictions, the possession of stolen vehicle offense must be vacated and no costs should be awarded on appeal.

DATED this 24th day of June, 2016.

Respectfully submitted,

s/ David L. Donnan

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Attorney for Appellant

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STATE OF WASHINGTON,)	
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Respondent,)	
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DMITRY NAGORNYUK,)	
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 24TH DAY OF JUNE, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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