NO. 53481-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY MILLER,

Appellant.

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

The Honorable John R. Hickman, Judge

BRIEF OF APPELLANT

CATHERINE E. GLINSKI
Attorney for Appellant

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Federal Cases

Statutes

Constitutional Provisions

A. ASSIGNMENTS OF ERROR

1. The court's refusal to give the defense proposed instructions on possession denied appellant a fair trial.

2. There was insufficient evidence to support the convictions of bail jumping.

Issues pertaining to assignments of error

1. Appellant was charged with possession of a stolen vehicle and he proposed instructions regarding actual and constructive possession, mere proximity, and momentary handling. The court refused to give the proposed instructions, concluding those principles do not apply to possession of a stolen vehicle. Where there was substantial evidence to support the instructions, which accurately stated the law as applied to this charge, is the court's refusal reversible error?

2. Where the evidence failed to establish that appellant received notice of the subsequent court hearings at which his appearance was required, must the bail jumping charges be dismissed?

B. STATEMENT OF THE CASE

Vladimir Akinshev works for a construction business and drives a truck owned by the company. Around 5:50 a.m. on April 27, 2018, he discovered that the truck, which had been parked outside his house, was

missing. RP 212-14. No one had permission to use the truck except Akinshev. RP 228.

Akinshev called the police to report the truck stolen. RP 215. He also called his employer, Ruslan Kurkov, who used the GPS tracker on the truck to locate it. RP 216, 261. Kurkov texted Akinshev screen shots from the GPS tracker, and Akinshev provided the tracking information to the police. RP 216, 263. The tracking information showed that the ignition was started at Akinshev's house at 4:02 a.m. It showed the path the truck traveled, and it showed that the ignition was turned off in an area on River Road at 4:13 a.m. RP 267, 300.

Tacoma Police Officer Donald Rose responded to Akinshev's call, and he drove to the location shown in the truck's GPS tracking information. RP 334, 349-50. He found the truck at that location, in an area where several trailers were parked. RP 352, 354. The canopy doors on both sides of the truck were open. RP 405. As Rose was waiting for backup to arrive, he saw a person leaning into the left side of the truck's cargo area. Rose could tell that the person's upper torso, head, and arms were inside the bed of the truck, but he could not tell what the person was doing. RP 362-63, 418-19. The person stood back up and started walking toward the trailers in the area, and Rose lost sight of him. RP 366-67.

About two minutes later, Deputy Arthur Centoni arrived to assist Rose. RP 369. The officers were searching the area when Centoni noticed some movement by one of the trailers along the fence line. RP 371, 479. Rose approached the trailer, looked underneath, and saw Jeffrey Miller curled up on his side under the end of the trailer. RP 372-73, 481.

Miller was arrested and placed in handcuffs. RP 376. After being advised of his rights and agreeing to answer questions, Miller said he knew the truck was stolen and who had stolen it. RP 380-81. He gave the culprit's name as Richie and described him for the officer. Miller said Richie had come over two hours earlier, and when he left Miller noticed the truck. Miller said it was obvious the truck was stolen because no one would leave a truck there for so long otherwise. RP 383-84. When asked why he was leaning into the truck, Miller said he didn't want to get in trouble for the truck being stolen, so he was trying to figure out a way to get rid of it. RP 384-85.

Rose left Miller in his patrol car for a few minutes while he spoke to Centoni, and then he resumed his conversation with Miller. RP 387. Miller told Rose that he had not seen the truck over the fence between where it was found and where he was living. He first noticed it when he walked around the fence to borrow a cigarette from a neighbor. RP 388,

425, 427. Miller said Richie had asked him if he knew anyone looking for a generator. RP 389.

After he spoke with Miller, Rose contacted Akinshev. RP 389. Akinshev retrieved the truck, which was still in the location shown on the GPS tracking information. RP 218. The generator which had been stored in the back of the truck was missing. RP 220. Centoni searched the area looking for construction equipment but did not find anything that looked like it belonged in the truck. RP 494.

1. Possession of a stolen vehicle charge

Miller was charged with possession of a stolen vehicle. CP 1; RCW 9A.56.068; RCW 9A.56.140. At trial the State presented testimony from Akinshev, Kurkov, Rose, and Centoni.

The defense called Richard Vanderpool as a witness. He testified to his age, his height, and his hair color, but he invoked the 5th Amendment with respect to questions relating to Miller or the stolen truck. RP 664-67, 671.

Miller testified that on the day he was arrested, Vanderpool showed up to his home with a white truck and asked if he wanted to make some money dealing stolen property. RP 729. Miller told Vanderpool to get the truck off the property, and Vanderpool left in the truck. RP 731. Miller fell asleep for a couple of hours, then he walked to a neighbor's

home to get a cigarette. While walking to the neighbor's trailer, he spotted the truck. RP 731-33. The truck was empty when he found it, and Miller testified that at no point did he reach into the truck, take anything out, or move anything in relation to the truck. RP 733.

Miller was next to the truck for less than a minute when he heard a police vehicle pull up. He decided to head back home. RP 733-34. He didn't want to have contact with law enforcement because that had never worked out well for him in the past. RP 762. As he was moving between the trailers to go around the fence, he bumped into a stove pipe. When he crouched down to look under the trailer to see if there was another way around, the officers noticed him. RP 734-35. He was placed under arrest, and he told Officer Rose about Vanderpool. RP 736-38. Miller testified he had no intention of doing anything with the truck. RP 739.

Defense counsel requested several instructions regarding possession, arguing the instructions were supported by the evidence, helpful to the jury, and necessary to the defense theory of the case. RP 809-11; CP 280-82. The proposed instructions would have defined actual and constructive possession and informed the jury that neither momentary handling nor mere proximity is sufficient to establish constructive possession. CP 258-63. The court declined to instruct the jury regarding dominion and control, mere proximity or momentary handling, concluding

those concepts had to do with drug possession and were not relevant in this case. RP 820-22.

2. Bail jumping charges

Miller was also charged with two counts of bail jumping based on Miller's failure to appear at scheduled hearings on September 13, 2018 and November 8, 2018. CP 45-46; RCW 9A.76.170(1), (3)(c); RP 535, 589.

In support of the bail jumping charges, the State presented testimony from the deputy prosecuting attorneys who handled the docket on September 13, and November 8, 2018, the dates Miller was required to appear. RP 500, 582. They testified they polled the gallery on those days, and ultimately bench warrants were issued for Miller. RP 529, 534-35; 594-95. One of the witnesses testified that the proceedings at which the court dates were scheduled were conducted on the record, which can only happen if the defendant is present. RP 600. He also testified that when scheduling orders are created a copy is printed for the defendant. RP 590. The scheduling order setting the November 8, 2018, hearing was admitted as an exhibit. The order had signatures on it, including one next to Miller's name. RP 591-92. The State presented no witness who was present in court when the September 13 and November 8 hearings were scheduled,

however. There was no witness who could testify as to Miller's presence or what information he was given regarding the scheduled hearings.

3. Sentencing

The jury returned guilty verdicts on all three counts. CP 310-12. The standard sentence range for the possession of a stolen vehicle conviction was 43 to 57 months, and the standard range for each bail jumping conviction was 51 to 60 months. CP 361. The State recommended a high end sentence on each count. RP 935. The defense requested exceptional sentences below the standard range, arguing that standard range sentences were excessive and disproportionate to the crimes being sentenced. RP 943-45.

The court imposed a low-end standard range sentence on the possession count. CP 364; RP 950. It found, however, that the standard range for the bail jumping convictions in this case was excessive and disproportionate to the crimes committed. The standard range sentence recommended by the State would be unfair and inequitable. RP 950. The court imposed sentences of 30 months on the bail jumping convictions. CP 364. The court entered findings of fact and conclusions of law in support of the exceptional sentence. CP 402-04.

C. ARGUMENT

1. THE COURT'S REFUSAL TO GIVE THE DEFENSE PROPOSED INSTRUCTIONS ON POSSESSION DENIED MILLER DUE PROCESS.

An accused person has a due process right to have the jury accurately instructed on the theory of defense, provided the instruction is supported by substantial evidence and accurately states the law. U.S. Const. amends. V, VI, XIV; *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct., 2528, 81 L.Ed.2d 413 (1984); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). If these prerequisites are met, it is reversible error to refuse to give a defense-proposed instruction. *State v. Agers*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). The court below denied Miller due process by refusing to give his proposed instructions on possession.

To convict Miller of possession of a stolen vehicle, the State had to prove he knowingly possessed a stolen motor vehicle and he knew the vehicle was stolen. RCW 9A.56.068(1); CP 328. "'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). Miller admitted at trial and

to the investigating officer that he knew the truck was stolen. RP 753. The issue at trial was whether the State proved possession. RP 868, 892.

Possession may be actual or constructive. *State v. Lakotiy,* 151 Wn. App. 699, 714, 214 P.3d 181 (2009), *review denied*, 168 Wn.2d 1026 (2010). Actual possession means the property was in the personal custody of the defendant, while constructive possession means there was no actual physical possession, but the defendant had dominion and control over the property. *Id*. (citing *State v. Staley,* 123 Wn.2d 794, 798, 872 P.2d 502 (1994) and *State v. Jones,* 146 Wn.2d 328, 333, 45 P.3d 1062 (2002)); *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)). Momentary handling, without more, is insufficient to prove possession. *Callahan*, 77 Wn.2d at 29. Moreover, mere proximity to the property is insufficient to establish constructive possession. *Id*.

The defense proposed instructions setting forth these principles. CP 257-65. The proposed instructions would have defined actual and constructive possession, identified factors for the jury to consider, and informed the jury that mere proximity or momentary handling were insufficient to establish possession. *Id*.

The defense theory was that, while Miller knew the truck was stolen, he was never in possession of the vehicle. RP 808-11. He testified

that he was merely standing next to the truck looking at it when Rose arrived. RP 733-34. The jury could conclude from this evidence that his mere proximity to the truck was insufficient to establish constructive possession. Even with Rose's testimony that Miller leaned inside the truck before walking away, the jury could conclude this casual and brief inspection of the stolen vehicle did not amount to possession. Because the proposed instructions were supported by substantial evidence and accurately stated the law, Miller was entitled to have the jury instructed on this theory of defense. *See Agers*, 128 Wn.2d at 93.

The court refused to instruct the jury on constructive possession, dominion and control, mere proximity, or momentary handling, however. It concluded that those concepts applied in drug cases but did not apply to a charge of possession of a stolen vehicle. RP 820-22. The court was wrong.

Plank involved possession of a stolen vehicle, and the Court of Appeals applied principles of constructive possession developed in stolen property and contraband cases. *Plank*, 46 Wn. App. at 731. The court noted that since the co-defendant was driving the vehicle, the issue at trial was whether the defendant was in constructive possession. *Id*. It found no evidence the defendant had dominion and control over the vehicle and reversed the conviction. *Id*. at 733.

The Court of Appeals also applied constructive possession principles to a conviction for possession of a stolen vehicle in *Lakotiy*. *Lakotiy*, 151 Wn. App. at 714-15. There, the defendant argued the evidence was insufficient to prove possession, but the Court held that the evidence showed more than mere proximity or momentary handling and supported a reasonable inference that he was in constructive possession of the vehicle. *Id*. at 715.

Because there was evidence to support the defense theory that Miller's mere proximity to or momentary handling of the truck did not amount to possession, it was reversible error for the court to refuse to give the proposed instructions. *See Agers*, 128 Wn.2d at 93. The court's refusal to give the proposed instructions denied Miller his right to a fair trial by an adequately instructed jury. His conviction of possession of a stolen vehicle should be reversed and the case remanded for a new trial.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE BAIL JUMPING CONVICTIONS, AND THOSE CHARGES MUST BE DISMISSED.

The burden of proving the essential elements of a crime unequivocally rests on the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. Proof beyond a reasonable doubt of all essential elements is an

"indispensable" threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364. Therefore, as a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Chapin*, 118 Wn.2d 681, 826 P.2d 194 (1992); *State v. Green*, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Any element of the offense may be proved by circumstantial evidence. *State v. J.P.*, 130 Wn. App. 887, 893, 125 P.3d 215 (2005). But the State cannot meet its burden through pure speculation. *State v. Prestegard*, 108 Wn. App. 14, 22, 28 P.3d 817 (2001). On appeal, the reviewing court must be convinced that substantial evidence supports the State's case. *Id*. at 22-23. Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." *Id*. (quoting *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972)). Substantial evidence requires more than "guess, speculation, or conjecture." *Id*. To rise above speculation and conjecture, evidence must support a reasonable inference. *State v. Burkins*,

94 Wn. App. 677, 690, 973 P.2d 15, *review denied*, 138 Wn.2d 1014 (1999).

Miller was charged with bail jumping under RCW 9A.76.170(1) [1], which required the State to prove he had been released by court order with knowledge of the requirement of a subsequent personal appearance before that court. "In order to meet the knowledge requirement of the [bail jumping] statute, the State is required to prove that a defendant has been given notice of the required court dates." *State v. Cardwell*, 155 Wn. App. 41, 47, 226 P.3d 243, 245 (2010), *review granted, remanded on other grounds*, 172 Wn.2d 1003 (2011).

In *Cardwell*, the defendant was charged with bail jumping for failing to appear at a scheduled hearing. His father appeared in court on the hearing date and explained that the notice of hearing was mailed to the address Cardwell had given when he was released from custody, except that the zip code was wrong. Although the notice was delivered to the address Cardwell provided, Cardwell had not seen it because he did not actually live at that address. *Cardwell*, 155 Wn. App. at 45. Because Cardwell did not receive notice of the hearing date, the evidence was not

[1] RCW 9A.76.170(1) provides as follows:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

sufficient to establish bail jumping, and that charge was dismissed with prejudice. *Id*. at 47-48.

Here, as in *Cardwell*, the circumstances do not support an inference that Miller actually received notice of the scheduled hearings. There was no testimony from anyone present in court when those hearings were scheduled. While there was evidence those proceedings were conducted on the record, which means the defendant must be present, there was no evidence as to what was said or what Miller was told. No recordings or transcripts from those proceedings were entered in evidence. A scheduling order was admitted as an exhibit, but there was no testimony that Miller received a copy of that order, that the signature on the order was his, or how or when the signature was placed there. The State's argument that Miller had knowledge of the required court appearances was based on speculation and conjecture, not substantial evidence. The evidence is insufficient for a rational trier of fact to find beyond a reasonable doubt that Miller had notice of the September 13 or November 8 hearings. His convictions for bail jumping must be reversed and the charges dismissed.

D. CONCLUSION

The court's refusal to give the defense proposed instructions on possession violated Miller's due process right to a fair trial. The

conviction for possession of a stolen vehicle must be reversed and the case remanded for a new trial. Moreover, the bail jumping charges must be dismissed for insufficient evidence.

DATED November 7, 2019.

Respectfully submitted,

_____
CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Appellant

Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant in *State v. Jeffrey Miller,* Cause No. 53481-9-II as follows:

Jeffrey Miller/DOC#728191
Cedar Creek Corrections Center
PO Box 37
Littlerock, WA 98556

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

Catherine E. Glinski
Done in Manchester, WA
November 7, 2019