

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 64873-0-I
)	
Respondent,)	DIVISION ONE
)	
v.)	UNPUBLISHED OPINION
)	
DAVID P. FENDICH,)	
)	
Appellant.)	FILED: August 1, 2011
)	
)	
)	

Appelwick, J. — Fendich appeals his conviction of several counts of possession of stolen property, arguing that he was arrested without probable cause. He also appeals two convictions of third degree possession of stolen property on double jeopardy grounds. Because the officer had probable cause to arrest Fendich for possession of a stolen motor vehicle based on the totality of the facts and circumstances, we affirm the trial court’s denial of his motion to suppress evidence obtained in a search incident to arrest. Accepting the State’s concession of error regarding double jeopardy, we remand for the trial court to vacate one count of third degree possession of stolen property.

FACTS

On January 8, 2009, Des Moines Police Officer Fred Gendreau saw a car that had been reported stolen within the past four hours parked in a motel parking lot in SeaTac. Officer Gendreau was watching the car from behind some bushes when he observed Kimberly Porta and David Fendich approach the car. Fendich opened the right rear door and placed a backpack on the back seat.

Porta opened the left rear door and placed a jacket on the back seat and then opened the driver's door. Officer Gendreau went to his police car, planning to return and stop Porta and Fendich. By the time Officer Gendreau returned to the parking lot, he saw Fendich walking away. Officer Gendreau arrested Fendich and another officer arrested Porta. Officer Gendreau searched Fendich incident to arrest and found five credit cards and two driver's licenses belonging to someone else in his jacket pocket.

The State charged Fendich with five counts of second degree possession of stolen property and two counts of third degree possession of stolen property. Fendich filed a motion to suppress the evidence seized in the search, arguing a lack of probable cause to arrest. Following a CrR 3.6 hearing, the trial court determined that Officer Gendreau had probable cause to arrest both Porta and Fendich for possession of a stolen vehicle when he saw them place personal items into a car that he knew had been recently reported as stolen. The trial court denied the motion to suppress the evidence and entered written findings of fact and conclusions of law. Thereafter, a jury found Fendich guilty as charged. Fendich appeals.

DISCUSSION

Fendich first contends that the trial court erred in concluding that Officer Gendreau had probable cause to arrest him. We review the determination of whether probable cause exists de novo. State v. Wagner-Bennett, 148 Wn. App. 538, 541, 200 P.3d 739 (2009). Probable cause for arrest exists "where the facts and circumstances within the arresting officer's knowledge and of which

the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.” State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). The inquiry is not technical and the officer need not have evidence proving each element of the crime beyond a reasonable doubt. Terrovona, 105 Wn.2d at 643; State v. Knighten, 109 Wn.2d 896, 903, 748 P.2d 1118 (1988) (standard for probable cause to arrest should not be confused with higher standard for conviction). The totality of facts and circumstances must point to the probability of criminal activity but a prima facie showing of guilt is not required. State v. Seagull, 95 Wn.2d 898, 906-07, 632 P.2d 44 (1981).

“A person is guilty of possession of a stolen vehicle if he or she . . . [possesses] a stolen motor vehicle.” RCW 9A.56.068 (second alteration in original). Possession may be actual, that is, in the physical custody of the person charged with possession, or constructive, meaning within the defendant’s dominion and control. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Dominion and control need not be exclusive and is determined by considering the totality of the circumstances. State v. Summers, 107 Wn. App. 373, 384, 28 P.3d 780, 43 P.3d 526 (2001).

Relying on State v. Plank, 46 Wn. App. 728, 733, 731 P.2d 1170 (1987), Fendich contends that Officer Gendreau’s observations could only lead to the conclusion that Fendich was about to ride as a passenger in the car, which is not sufficient to prove possession of the car. In Plank, the driver and passenger of a car were both tried for possession of a stolen vehicle. Id. at 729. Since the co-

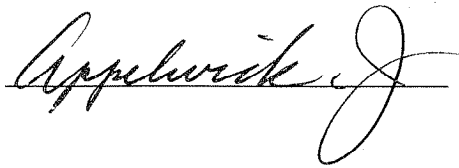
defendant was driving, and therefore in possession of the car, at the time of apprehension, the central issue at trial was whether there was sufficient evidence to prove constructive possession in the passenger. Id. at 731. The State's only evidence was that the passenger was riding in an allegedly stolen vehicle and did not contradict the driver's statement to the officer that they had borrowed the car from an acquaintance. Id. at 733. Based on its analysis of other cases involving the question of constructive possession of a vehicle by a person other than the owner or driver, the court reversed the passenger's conviction because the evidence presented was not sufficient to allow a rational trier of fact to find beyond a reasonable doubt that the passenger had dominion or control of the vehicle. Id. at 731-33 (examining Callahan, 77 Wn.2d at 29 (houseboat guest); State v. McCaughey, 14 Wn. App. 326, 541 P.2d 998 (1975) (companion of car's owner sleeping near car); State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975) (driver's wife while a passenger)).

But, here, Porta was not driving and Fendich was not riding in the car as a passenger. Fendich fails to argue or establish that the decision in Plank would prevent the State from charging both Porta and Fendich with possession of a stolen vehicle on a constructive possession theory. Officer Gendreau did not testify to seeing either Porta or Fendich in possession of car keys or driving the car, or even sitting in the car. Instead, Officer Gendreau observed both Porta and Fendich opening doors and placing personal items in the back seat of a car that had been reported stolen within the past four hours. Under these circumstances, the totality of the facts and circumstances point to the probability

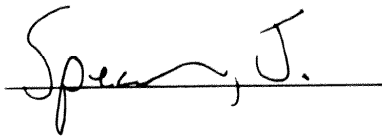
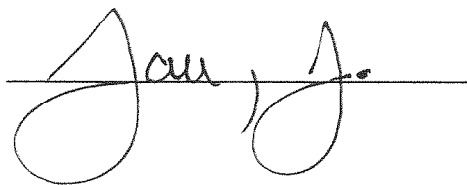
that both Porta and Fendich knowingly possessed a stolen motor vehicle and justify Officer Gendreau's decision to arrest Fendich without a warrant.

Fendich also challenges his conviction of two counts of third degree possession of stolen property for two driver's licenses on double jeopardy grounds under State v. McReynolds, 117 Wn. App. 309, 335-36, 71 P.3d 663 (2003) (continuous possession of property stolen from several owners constitutes a single unit of prosecution). The State concedes that the holding in McReynolds applies here. We accept the State's concession and remand for the trial court to vacate one of the convictions for third degree possession of stolen property.

Affirmed in part and remanded.

A handwritten signature in cursive script, appearing to read "Appelwick J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Spear, J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Jau, J.", written over a horizontal line.