IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LYNN M. SMYTHE, Appellant.	No. 38677-1-II UNPUBLISHED OPINION

Armstrong, J. — Seth Swan and Perry Vicars stole a truck loaded with custom-built cabinets. A detective discovered seven of the cabinets in Lynn Smythe's residence and the remaining cabinets on a logging road. After a jury convicted Smythe of first degree possession of stolen property, the trial court held Smythe, Vicars, and Swan jointly responsible for $19,963.91 in restitution. Smythe appeals, arguing that insufficient evidence supports her conviction and the restitution order improperly holds her jointly responsible for damage to all of the cabinets. Smythe also argues in a statement of additional grounds that the prosecutor's misconduct violated her constitutional right to a fair trial and hearsay testimony violated her constitutional right to confrontation. We find the evidence sufficient to support Smythe's conviction, but there is no evidence establishing that the cabinets on the logging road were damaged while in Smythe's constructive possession. We affirm the conviction, reverse the restitution order in part, and remand to the trial court.

FACTS

A rental truck loaded with approximately 40 custom-built cabinets disappeared from Steve Carras's shop in Olympia, Washington. The empty truck was discovered several days later near Elma, Washington. Detective Keith Peterson received information that Smythe, who lived in Elma with her mother, Patti Norris, might have some of the stolen cabinets. When Detective Peterson questioned Smythe, she told him that she did not know anything about the stolen cabinets. Norris gave the detective permission to search the house and he found seven of the cabinets inside.

The State charged Smythe with one count of first degree possession of stolen property. Norris testified that Smythe said she was purchasing carpet, linoleum, and closets or cabinets from a man named Scott. One night, the phone rang for Smythe around three in the morning. Norris later saw Smythe and her boyfriend, Shawn Shapansky, unloading cabinets from a pickup truck into the house.

Smythe testified that Scott told her the cabinets were left over from a remodeling project. Scott called Smythe late at night and said she should pick up the cabinets immediately because they were sitting outside and it was starting to rain. Smythe testified that she and Shapansky drove to the South Bank Road in Elma and picked up the cabinets from a field with a barn near the woods.

Detective Peterson testified that Shapansky was present when he searched Smythe's house and found the cabinets. Shapansky told the detective where he and Smythe picked up the

cabinets. Based on Shapanksy's directions, officers went to the Delezine logging road in Elma and recovered the remaining cabinets. The cabinets were scratched, dented, and damaged from being exposed to the rain.

A jury found Smythe guilty of first degree possession of stolen property. In separate proceedings, Swan and Vicars pleaded guilty to stealing the rental truck. At the restitution hearing, Smythe argued that she should be responsible for only the cabinets that she actually possessed. The State argued, "Ms. Smythe clearly knew where the cabinets were, knew where to find them, knew they were out there and had control of enough of them to take what she wanted and leave the rest. She ought to be responsible." Report of Proceedings (RP) (Jan. 22, 2008) at 47. The trial court ruled that "once [Smythe] started dealing with those cabinets and picking and choosing and taking some home," she became responsible for damage to all of the cabinets. RP (Jan. 22, 2008) at 47-48; Clerk's Papers at 123. The court held Smythe, Vicars, and Swan jointly responsible for $19,963.91 in damages to Carras.

ANALYSIS

I. Sufficiency of the Evidence

A. Standard of Review

Smythe first contends that the State failed to prove beyond a reasonable doubt that she knew the cabinets had been stolen. A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We review the evidence in the light most favorable to

the State to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201.

B. Knowledge of Stolen Property

To convict Smythe of possession of stolen property, the State had to prove beyond a reasonable doubt that Smythe "acted with knowledge that the property had been stolen." CP 47; RCW 9A.56.140. The jury may infer that Smythe acted with knowledge if a reasonable person in the same situation would conclude that the property was stolen. RCW 9A.08.010(1)(b)(ii). "When a person is found in possession of recently stolen property, slight corroborative evidence of other inculpatory circumstances tending to show [her] guilt will support a conviction." *State v. Couet*, 71 Wn.2d 773, 776, 430 P.2d 974 (1967) (quoting *State v. Portee*, 25 Wn.2d 246, 253, 170 P.2d 326 (1946)). Examples of corroborative evidence include "secrecy of the possession, denial of the possession," and "an explanation of a kind that could not be checked or rebutted, . . . one that a jury could regard as improbable." *Portee*, 25 Wn.2d at 254.

When viewed in the light most favorable to the State, the evidence shows that Smythe drove to a field in the woods at three in the morning to pick up the cabinets. When Detective Peterson told Smythe that he was investigating the theft of some stolen cabinets, Smythe denied knowing anything about them. The detective testified, "I specifically asked her if there were any cabinets that were new that arrived at her house recently, and she said, no, there were not . . . there were no new cabinets in her residence." RP (Nov. 12, 2008) at 64. Smythe later explained that she bought the cabinets from a man named Scott, but she did not know Scott's last name or

where he lived and she had not seen him since purchasing the cabinets. Based on this corroborative evidence, the jury could have reasonably inferred that Smythe possessed stolen property with knowledge that it was stolen. *See* RCW 9A.08.010(1)(b)(ii); *Salinas*, 119 Wn.2d at 201; *Couet*, 71 Wn.2d at 776; *Portee*, 25 Wn.2d at 253-54.

II. Restitution Order

A. Standard of Review

Smythe next assigns error to the restitution order, arguing that there is no causal connection between her conviction and the order holding her jointly liable for damage to all of the cabinets. The State argues that Smythe had constructive possession of all the cabinets and is therefore liable for their damage. Smythe argues that even if she had constructive possession of all the cabinets, the State failed to prove that the damage occurred while they were in her possession. We review a trial court's restitution award for an abuse of discretion. *See State v. Davison*, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991).

B. Causal Connection

A trial court may order restitution "only for losses incurred as a result of the precise offense charged." *State v. Miszak*, 69 Wn. App. 426, 428, 848 P.2d 1329 (1993). In other words, the trial court can order restitution only if the crime caused the loss. *State v. Griffith*, 164 Wn.2d 960, 965-69, 195 P.3d 506 (2008). "'[I]t is clear that if the loss or damage occurs before the act constituting the crime, there is no causal connection between the two.'" *State v. Woods*, 90 Wn. App. 904, 909, 953 P.2d 834 (1998) (quoting *State v. Hunotte*, 69 Wn. App. 670, 675, 851 P.2d 694 (1993)). In *State v. Tetters*, 81 Wn. App. 478, 479-80, 914 P.2d 784 (1996), the

defendant was convicted of possessing a stolen vehicle and ordered to pay restitution for items missing from the vehicle. Because the State did not present any evidence suggesting that the defendant possessed the vehicle at the time the items were taken, the court held that the necessary causal relationship between the crime and the victim's loss had not been established. *Tetters*, 81 Wn. App. at 481.

Like *Tetters*, the State did not establish a causal connection between Smythe's crime and the victim's loss. Even if Smythe constructively possessed all of the cabinets when she selected a few and left the remainder on the logging road, there is no evidence that the damage to the remaining cabinets occurred after she possessed them. Carras testified that the cabinets appeared to have suffered damage during transportation, unloading, and from exposure to the rain. The cabinets were left outside for at least 10 days, and there is no evidence showing when Smythe learned of their location during that time.[1] Thus, there is no evidence that Smythe constructively possessed the cabinets during transportation and unloading, or that most or even all of the water damage occurred after she learned of the cabinets' location. Accordingly, we reverse the portion of the restitution order holding Smythe jointly liable for damage to all of the cabinets.

Smythe admitted at the restitution hearing that she is obligated to pay restitution for the cabinets that she actually possessed. Because she possessed 7 of approximately 40 cabinets, she requested that the trial court hold her responsible for one fifth of the total restitution award. We agree and remand for the trial court to enter a restitution order holding Smythe responsible for

[1] The rental truck was stolen on April 3, discovered empty in Elma on April 6, and the cabinets were recovered on April 16. Smythe testified that she did not remember when she picked up the cabinets.

her percentage of the damages.

III. Statement of Additional Grounds

A. Prosecutorial Misconduct

Smythe argues the prosecutor committed misconduct by (1) repeatedly questioning Norris about whether Smythe knew Vicars, creating a connection in the jurors' minds between her and the men convicted of stealing the rental truck, (2) eliciting hearsay testimony from Detective Peterson when he testified that Shapansky told the officers that the remaining cabinets were on the Delezine logging road, and (3) presenting testimony regarding the stolen truck, which was not relevant to Smythe's charge.

As a threshold matter, Smythe alleges as part of her argument that the prosecutor went to Norris's home two days before trial to question her about Smythe's connection to Vicars. This information is not in the record and we cannot address matters outside the record on direct appeal. *See State v. McFarland*, 127 Wn.2d 322, 338 n.5, 899 P.2d 1251 (1995).

To prove prosecutorial misconduct, a defendant must show that the prosecuting attorney's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Conduct is prejudicial when there is a substantial likelihood it affected the jury's verdict. *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). If defense counsel fails to object to an improper remark, we will reverse only if the remark is "so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice." *State v. Jackson*, 150 Wn. App. 877, 883, 209 P.3d 553 (2009).

Even if the State's conduct was improper, Smythe has not established that it was so

prejudicial that it affected the jury's verdict. *See Belgarde*, 110 Wn.2d at 508. The untainted evidence supporting Smythe's conviction is compelling. She picked the cabinets up in the middle of the night from a suspicious location. She also denied that she had any new cabinets in her mother's home and then gave an implausible story about how she acquired the cabinets. Smythe has not shown that the challenged conduct, which her counsel did not object to, was "so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice." *See Jackson*, 150 Wn. App. at 883.

B. Hearsay and the Right to Confrontation

Smythe next argues that the State violated her constitutional right to confront adverse witnesses when Detective Peterson testified to Shapansky's statements regarding the location of the remaining cabinets. Because Smythe testified that she picked up the cabinets from the South Bank Road, not the Delezine logging road, she argues this hearsay testimony was the only evidence that she knew where the remaining cabinets were located.

The Sixth Amendment confrontation clause prohibits the admission of testimonial hearsay statements in a criminal case without an opportunity for cross-examination. *State v. Hopkins*, 134 Wn. App. 780, 790, 142 P.3d 1104 (2006). Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Detective Peterson did not repeat Shapanksy's statements to prove that Smythe knew the cabinets were located on the Delezine logging road. Rather, he was explaining how he located the cabinets—Shapanksy described where the cabinets were located and, based on his directions, officers went to the Delezine logging road and found the remaining cabinets. Because Detective Peterson's testimony was not hearsay, there is no

Sixth Amendment violation.

Lastly, Smythe supplements the arguments in her opening brief regarding her knowledge that the cabinets were stolen and her constructive possession of the cabinets on the Delezine logging road. We have already addressed these issues.

We affirm the conviction, reverse the restitution order in part, and remand to the trial court.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, P.J.

Quinn-Brintnall, J.