IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Plaintiff/Respondent, v. VERDON ISAAKO MALO, Defendant/Appellant.	No. 40736-1-II UNPUBLISHED OPINION

Worswick, A.C.J. — Verdon Isaako Malo appeals his convictions for second degree identity theft, second degree possession of stolen property, and motor vehicle theft, arguing that (1) the identity theft and possession of stolen property convictions violate the constitutional prohibition of double jeopardy because the offenses were incidental to, a part of, or coexistent with each other; and (2) the evidence is insufficient to support his convictions for identity theft and motor vehicle theft. In a statement of additional grounds for review,[1] Malo also appeals his conviction for possession of a controlled substance, arguing that the State failed to prove he possessed the methamphetamine officers found in a zippered pouch inside a truck to which Malo possessed the key. We reverse Malo's identity theft conviction, affirm the remaining convictions, and remand for dismissal of the identity theft conviction with prejudice.

FACTS

On October 19, 2009, Ruth Greening reported her van stolen. She had parked her van

[1] RAP 10.10.

outside her gym around 4:30 pm, and the van was gone when she emerged from the gym about an hour later. Police officers found her van nearby in a grocery store parking lot. The lock had been popped out of the driver's door and Greening's belongings were missing. The officers were unable to obtain any usable fingerprints from the van.

Meanwhile, Jessie Clarke, the loss prevention leader at a nearby Shopko store, saw Malo and another male enter the store around 5:10 pm, remove the security devices from a laptop computer and an iPod Touch,[2] and leave the store without paying for the laptop or the iPod. When Clarke confronted the two men in the parking lot, Malo's companion ran away. Malo refused to return to the store with Clarke and walked around a black Ford truck. Clarke called 911 and began to report the truck's license number to the dispatcher. Malo said, "This is not my vehicle," and walked away from the truck. 2 Report of Proceedings (RP) at 228.

Police officers arrived and arrested Malo. They were unable to locate his companion. In a search of Malo's person incident to arrest, the officers found in Malo's pocket the key to the black Ford truck. Malo refused to identify his companion, but he said that if the officers looked up the owner of the black truck, they would find the information they were looking for. The officers never checked the vehicle's registration.

The officers searched the truck pursuant to a warrant and found several of Greening's possessions, including: her purse, checkbook, credit cards, identification cards, digital camera, day planner, sunglasses, and cell phones. The items were scattered across the passenger floorboard, center console, passenger door pocket, backseat, and rear floorboard of the vehicle. The stolen

[2] An iPod Touch is a type of portable digital music player.

cards were laid out on top of the center console of the truck's cab, while the checkbook was on the passenger-side floor. The officers also found tools, including a screwdriver and a pair of scissors, in the center console, and a pink zippered bag containing a crystalline substance (later determined to be methamphetamine) and a glass pipe in the passenger door pocket.

The State charged Malo with (1) second degree identity theft for possession of Greening's credit and identification cards; (2) three counts of second degree possession of stolen property, each based on an individual debit or credit card belonging to Greening; (3) theft of a motor vehicle, for the theft of Greening's van; (4) second degree theft, for the electronic devices taken from Shopko; and (5) unlawful possession of a controlled substance (methamphetamine). After Malo failed to appear for a required court hearing, the State also charged him with bail jumping.

At trial, Clarke and police officers testified to the facts described above. Additionally, Clarke testified that security cameras showed Malo and his companion arriving together in the black Ford truck, but it was unclear who was driving. An officer testified that the tools found in the truck had been altered and would be perfect for jamming open a locked car door.

Greening identified the items found in the truck as items that had been taken from her van. A forensic scientist testified that the substance in the pink zippered bag was methamphetamine.

After the State rested, defense counsel moved to dismiss the motor vehicle theft and identity theft charges, arguing that the State had failed to present sufficient evidence to prove Malo had exerted unauthorized control over Greening's vehicle or that he intended to commit a crime with Greening's identification. The trial court denied this motion.

The jury convicted Malo on all counts. The trial court sentenced Malo to 51 months each

for second degree identity theft, motor vehicle theft, and bail jumping convictions; 29 months each for the possession of stolen property[3] and second degree theft convictions; and 24 months for the unlawful possession of a controlled substance conviction; all to be served concurrently. Malo appeals.

ANALYSIS

I. Double Jeopardy

Malo argues that his convictions for second degree possession of stolen property and second degree identity theft violate double jeopardy. The State counters that the identity theft statute expressly authorizes separate punishments for crimes arising out of identity theft. We agree with the State.

We review double jeopardy claims de novo. *State v. Kelley*, 168 Wn.2d 72, 76, 226 P.3d 773 (2010). The double jeopardy clauses of our state and federal constitutions protect defendants from "multiple punishments for the same offense." *State v. Calle*, 125 Wn.2d 769, 772, 888 P.2d 155 (1995); U.S. Const. amend. V; Wash. Const. art. I, § 9. Within this constitutional constraint, the legislature "is free to define criminal conduct and specify its punishment." *State v. Baldwin*, 150 Wn.2d 448, 454, 78 P.3d 1005 (2003). "Where, as here, an act or transaction violates more than one criminal statute, the double jeopardy question turns on whether the legislature intended to impose punishment under both statutes for the same act or transaction." *Baldwin*, 150 Wn.2d

[3] The sentencing court ruled that the three counts of possession of stolen property "encompass the same criminal conduct and should be counted as one crime" for sentencing purposes because all three counts were committed with the same intent, and at the same time and place, against the same victim. Clerk's Papers at 52-53.

at 454.

To determine whether the legislature has authorized multiple punishments for a crime, courts first turn to the statutory language to determine whether the legislature has expressly allowed convictions for the same criminal act under both statutes. *Baldwin*, 150 Wn.2d at 454. The identity theft statute provides: "Every person who, in the commission of identity theft, shall commit any other crime may be punished therefor as well as for the identity theft, and may be prosecuted for each crime separately." RCW 9.35.020(6). Thus, the legislature has expressly authorized multiple punishments for identity theft and crimes committed during the commission of identity theft. Malo's convictions for identity theft and possession of stolen property do not violate double jeopardy and his argument fails.

II. Sufficiency of the Evidence

Malo next contends that the evidence was insufficient to support his convictions for motor vehicle theft, second degree identity theft, and possession of a controlled substance. We agree the evidence was insufficient to support his conviction for identity theft, but disagree as to the other charges.

When determining whether evidence is sufficient to support a conviction, 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. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Salinas*, 119 Wn.2d at 201. We defer to the trier of fact on issues of conflicting testimony, witness credibility, and the

persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). We consider direct and circumstantial evidence equally reliable. *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

A. *Motor Vehicle Theft*

Malo first contends that the State failed to prove he wrongfully obtained or exerted unauthorized control over Greening's vehicle or that the tools found in the black Ford truck were those used to break into Greening's vehicle. The State counters that strong circumstantial evidence, including timing, shows that Malo was responsible for the theft of Greening's vehicle as either a principal or an accomplice.[4] The State is correct.

"A person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle." RCW 9A.56.065(1). "Theft" means "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a).

When viewed in the light most favorable to the State, the evidence shows: approximately 40 minutes after Greening parked her van, Malo and his companion arrived at Shopko in a Ford truck containing Greening's stolen belongings; the truck also contained altered tools perfectly suited for breaking the lock of a car door; and Greening's van was discovered nearby with the lock popped out of the driver's door. Considering the short span of time between the theft of Greening's vehicle and the appearance of her possessions in the Ford truck with Malo and his

[4] "Criminal liability applies equally to a principal and an accomplice because they share equal responsibility for the substantive offense." *State v. Trout*, 125 Wn. App. 403, 409, 105 P.3d 69 (2005).

companion, as well as the presence of tools in the truck that were capable of breaking into a car in the same manner that Greening's van was broken into, a juror could reasonably infer from these facts that Malo wrongfully obtained or exerted unauthorized control over Greening's vehicle or was an accomplice to the person who did. Accordingly, Malo's claim on this point fails.

B. *Identity Theft*

Malo next argues that the State failed to present sufficient evidence to support his identity theft conviction. The identity theft statute provides, in relevant part, "No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime." RCW 9.35.020(1). Malo argues that the State failed to present any evidence showing he intended to commit a crime with Greening's stolen identification. The State argues that the evidence shows Malo separated Greening's credit and identification cards from the other stolen property within a short period of time, and that this demonstrates his intent to use her identification to commit a crime. We agree with Malo.

The evidence here does not support the State's assertion that Greening's identification was separated from her other stolen belongings. Officers found Greening's possessions scattered throughout the truck. Her credit and identification cards had been removed from her purse, but so had other items of little value, such as her sunglasses and day planner. Her credit and identification cards were located on top of the truck's center console, but so were other items, such as a cell phone and Broadband-To-Go card. Finally, Greening's checkbook—another "means of identification or financial information" for identity theft purposes under RCW

9.35.020—was located on the passenger floorboard, not the center console. Even when viewed in the light most favorable to the State, this evidence does not support an inference that Malo separated Greening's identification from the other stolen property.

Intent may be inferred from all the circumstances as a matter of logical probability. *State v. Yarbrough*, 151 Wn. App. 66, 87, 210 P.3d 1029 (2009) (quoting *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994)). But the evidence here showed, at most, that Malo knowingly possessed the stolen means of identification. A defendant's mere possession of a stolen means of identification is insufficient to show the defendant's intent to use said means of identification to commit a crime.[5] Here, lacking any direct or circumstantial evidence of Malo's intent, a reasonable jury could not have found beyond a reasonable doubt that Malo intended to use Greening's identification to commit a crime. We therefore reverse Malo's identity theft conviction and remand with instructions that the charge be dismissed with prejudice. *See State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993) (insufficient evidence as a matter of law requires dismissal with prejudice).

C. *Unlawful Possession of a Controlled Substance*

Finally, Malo contends that the State failed to prove he possessed the methamphetamine found in the zippered pouch inside the truck because the evidence showed only that he possessed

[5] We note that at closing argument, the State appeared to argue the contrary, that Malo's mere possession of the access devices was sufficient to prove the elements of identity theft. 2 RP at 324. We emphasize that this argument was incorrect as a matter of law. RCW 9.35.020(1) (defining both possession and intent to commit a crime as elements of identity theft); *cf.* RCW 9A.56.160(1)(c) (defining simple possession of an access device as second degree possession of stolen property).

the key to the truck. We disagree.

Under RCW 69.50.4013, it is illegal to possess a controlled substance without a prescription or other authorization.[6] Possession can be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). Actual possession is established where the defendant has physical custody of the item. *Callahan*, 77 Wn.2d at 29. And a defendant has constructive possession of an item when the defendant has dominion and control over the item or the premises where the item is located. *State v. Turner*, 103 Wn. App. 515, 524, 13 P.3d 234 (2000). An automobile is considered a "premises" for these purposes. *Turner*, 103 Wn. App. at 521. Dominion and control of a premises can be shared, it need not be exclusive to establish constructive possession of controlled substances found thereon. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Furthermore, "[p]ossession of keys to a locked area is probative of constructive possession of items within that area." *State v. Turner*, 18 Wn. App. 727, 731, 571 P.2d 955 (1977).

We have previously held that, where a person is the sole occupant, owner, and driver of a vehicle, and when the person has the vehicle's keys, constructive possession of the vehicle is established. *State v. Bowen*, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010). But no court has held that all of these factors are *necessary*. Outside the context of automobiles, in *State v. Turner*, the court held that there was sufficient evidence for the jury to find that Turner had

[6] "It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter." RCW 69.50.4013(1).

constructive possession of heroin found in a locker to which he had the keys. 18 Wn. App. at 731. And in *State v. Davis*, the court held that possession of an apartment may be inferred from paying rent for or possessing the keys to the apartment. 16 Wn. App. 657, 659, 558 P.2d 263 (1977). Just as constructive possession may be inferred from possession of the key to a locker or an apartment, so too may it be inferred from possession of the key to an automobile.

Because constructive possession may be shared, the State was not required to prove that Malo was the sole occupant, driver, or owner of the truck. Malo arrived at Shopko in the truck and was later discovered to have its key. Under *Turner* and *Davis*, possession of the key alone would have been sufficient to prove Malo's constructive possession of the truck. But here, Malo was also seen riding in the truck. Malo's riding in the truck, combined with his possession of its key, constituted sufficient evidence for a rational jury to determine that Malo had constructive possession of the truck and, consequently, of the items found on the "premises" of the truck. Malo's arguments on this point fail.

Affirm in part, reverse in part, and remand.

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 in accordance with RCW 2.06.040, it is so ordered.

Worswick, A.C.J.

I concur:

Quinn-Brintnall, J.

Armstrong, J. (dissenting) — Because insufficient evidence supports a finding that Malo constructively possessed the methamphetamine in the truck, I dissent.

The State can prove constructive possession by showing that the defendant has dominion and control over either the drugs or the premises where the drugs are found. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008) (citing *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)). The test is "whether there is substantial evidence that the defendant had dominion and control" of the premises. *State v. Turner*, 18 Wn. App. 727, 730-31, 571 P.2d 955 (1977) (citing *Mathews*, 4 Wn. App. 653). The issue of constructive possession is fact sensitive, which requires us to look at the rules surrounding constructive possession and decisions with comparable facts. *George*, 146 Wn. App. at 920.

In *State v. Turner*, 103 Wn. App. 515, 524, 13 P.3d 234 (2000), we found the evidence sufficient to show the defendant, one of two occupants of a truck, had dominion and control over a gun in the back seat behind both occupants. We reasoned that the defendant was close enough to the gun to obtain actual possession and was the driver and owner of the truck. *Turner*, 103 Wn. App. at 521-22. We have also found the evidence sufficient where the defendant was "the owner, driver, and sole occupant" of the vehicle containing the contraband. *State v. Bowen*, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010). Finally, we have found the evidence sufficient where the defendant had the keys to the vehicle and was the driver and sole occupant. *State v. Potts*, 1 Wn. App. 614, 617, 464 P.2d 742 (1969).

But, Division One of this court found the evidence insufficient to prove constructive possession of marijuana and a marijuana pipe where the defendant was a backseat passenger when

a police officer pulled the car over and smelled burnt marijuana coming from inside the car. *George*, 146 Wn. App. at 912. The court reasoned that George did not have dominion and control over the premises because he was a mere passenger and not the owner of the car. *George*, 146 Wn. App. at 920. Similarly, Division Three of this court found the evidence insufficient to prove dominion and control over the drugs in a stolen car where the defendant was only a passenger, even though his fingerprints were on the drug container. *State v. Cote*, 123 Wn. App. 546, 550, 96 P.3d 410 (2004).

Like *Cote* and *George*, Malo's connection to the truck was minimal. The State did not prove he owned the truck or that he had actually driven it. At most, the evidence shows that Malo either rode in or drove the truck sometime during the 40 minutes between the car theft and when the truck pulled into the Shopko parking lot, and that he may have been the intended driver when it left. And, the State presented no evidence that Malo had any connection to the methamphetamine found in a baggie in a passenger door pocket. Thus, the evidence here is even less persuasive than in *Cote* where the defendant was a passenger in the vehicle and his fingerprints were on the drug container. *Cote*, 123 Wn. App. at 550.

To avoid applying the vehicle cases discussed above, the majority turns to cases involving dominion and control of fixed premises. For example, in *Turner*, 18 Wn. App. at 731, Division I reasoned that evidence of "keys to a locked area is probative of constructive possession of items within that area." But, in that case the defendant "admitted that he lived in the apartment and that one of the keys on the ring" was to his front door, and on the same key ring was a key to a basement storage locker containing heroin. *Turner*, 18 Wn. App. at 731. Moreover, the court

characterized the defendant's possession of a key as "probative" not "proof" of constructive possession. Unlike *Turner*, Malo specifically denied owning the truck, and the State produced no evidence that he regularly drove, rode in, or had any meaningful history with the truck.

The majority also relies on *State v. Davis*, for the proposition that "possession of an apartment may be inferred from paying rent or possessing the keys to the apartment." Majority at 9-10 (citing *State v. Davis*, 16 Wn. App. 657, 659, 558 P.2d 263 (1977)). That language, however, was dicta intended to support the rule that constructive possession in a house cannot be based on mere presence within the house. *Davis*, 16 Wn. App. at 659. The *Davis* court actually found the evidence insufficient to prove constructive possession of the drugs where the police found no drugs on the defendant's person or in his personal belongings he kept in the house. *Davis*, 16 Wn. App. at 659. The court explained that:

> [a]bsent evidence of actual possession of the controlled substance or of participation in its processing, even additional facts of temporary residence, personal possessions in the premises, or knowledge of the presence of controlled substances are insufficient to show dominion and control of the premises.

Davis, 16 Wn. App. at 659 (citing *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969)). Applying that reasoning here, the State presented no evidence that Malo had anything more than a temporary presence in the truck.

Nonetheless, the majority reasons that the fact we have required more in other cases does not prevent us from allowing less here. As an abstract logical proposition, that statement may be true. But, with each lessening of the necessary quantity of evidence to prove a crime, we reduce the State's burden to prove the charge beyond a reasonable doubt. Thus, the question is not whether we can continue to cut and still logically reason that there will always be *some* evidence

in support of the conviction. Rather, the question is whether, after the cutting, we can confidently say the State has still carried its burden of proof *beyond a reasonable doubt*: here, that Malo, while walking toward the truck with a key in his pocket, possessed all the truck's contents, even those out-of-sight in a door pocket. Because I find this proposition to be almost entirely speculative, I dissent.

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Armstrong, J.