IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNETH MCMILLIAN, Appellant.	No. 41408-2-II UNPUBLISHED OPINION

Penoyar, C.J. — Kevin McMillian appeals his convictions for one count of possession of a stolen firearm,[1] three counts of second degree unlawful possession of a firearm,[2] and one count of possession of a controlled substance (methamphetamine).[3] He argues that insufficient evidence supports his possession of a stolen firearm conviction. In his statement of additional grounds (SAG),[4] he argues that the trial court violated his right to a speedy trial and that he was denied his right to effective assistance of counsel. Because the State failed to present sufficient evidence that McMillian knew that the handgun he possessed was stolen, we reverse his possession of a stolen firearm conviction. We remand for resentencing and to correct the scrivener's error in McMillian's judgment and sentence. We affirm his remaining convictions.

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[1] RCW 9A.56.310(1).

[2] RCW 9.41.040(2)(a).

[3] RCW 69.50.4013(1).

[4] RAP 10.10.

FACTS

On June 23, 2010, Lieutenant Steven Barclift and Officer Bryen Finch of the Tumwater Police Department responded to a call from an individual reporting "people coming and going" from a neighboring residence. 1 Report of Proceedings (RP) at 51. The officers knocked on the door, but no one responded, so they returned to their separate vehicles.

As the officers drove away, Barclift noticed a new vehicle parked by the residence. He left his vehicle and noticed a man standing by a car and speaking on a cellular phone. When Barclift approached him, the man hung up his phone. Barclift asked to see the man's identification and learned that the man was McMillian.

McMillian told Barclift that the car he was standing by was not his car. Barclift asked McMillian why he was in the neighborhood, and McMillian told the officer that he was visiting a person named "Fox" or "Robert." 1 RP at 58. Barclift knew that someone "with the name of 'Fox' and 'Robert'" lived in the home that he had just visited. 1 RP at 58.

McMillian began to appear "nervous and fidgety" and placed his right hand in his pocket. 1 RP at 59. Because of McMillian's behavior, Barclift conducted a pat-down search for weapons. Barclift discovered two "Clipit" knives. 1 RP at 64. He also discovered an item that he believed gave him probable cause to arrest McMillian and, thus, placed McMillian under arrest.

After the arrest, Barclift searched McMillian's person and discovered methamphetamine and a key for a Dodge Durango. McMillian told Barclift that he would go to Fox's home and buy methamphetamine if the officer "could give him some type of a break." 1 RP at 67.

McMillian identified a 1999 Dodge Durango, which was parked nearby, as his car. The officers obtained a search warrant for McMillian's vehicle. Inside the vehicle, Finch located an

Heckler & Koch (H & K) 9 mm pistol, a gun holster, a ski mask, two baggies of crystal methamphetamine, two digital scales, two glass pipes, a Smith & Wesson (S & W) .38 caliber revolver, and a 7 mm rifle. The serial numbers on the S & W .38 caliber revolver were ground off, so Finch could not verify whether the revolver had been stolen.

Earlier that year, Robert Martin reported his H & K 9 mm pistol as stolen to the Mason County Sheriff's Department. Martin did not know McMillian. The serial numbers on his missing handgun matched the serial numbers on the H & K 9 mm pistol found in McMillian's vehicle.

The State charged McMillian with two counts of possessing a stolen firearm, three counts of second degree unlawful possession of a firearm, and one count of unlawful possession of a controlled substance (methamphetamine). At trial, McMillian stipulated that he had previously been convicted of a felony. Mason County Deputy Sheriff Sean Colpitts testified at trial that he never discovered who stole Martin's firearm.

At the close of the State's case, McMillian moved to dismiss, for insufficient evidence, one count of possession of a stolen firearm, the charge related to the S & W .38 caliber revolver. The trial court dismissed the charge. The jury convicted McMillian of the remaining charges.[5] McMillian appeals.

[5] Neither party briefs this issue, but McMillian's judgment and sentence erroneously states that McMillian was found guilty of one count of possessing a stolen firearm, two counts of second degree unlawful possession of a firearm, and two counts of unlawful possession of a controlled substance. It does not appear that McMillian was improperly sentenced; however, as the judgment and sentence's sentencing data—seriousness levels and standard ranges—reflects McMillian's actual convictions, we remand to correct the scrivener's error in the judgment and sentence.

ANALYSIS

I. Sufficiency of the Evidence

McMillian contends that the State failed to present sufficient evidence that he possessed a stolen firearm. Specifically, he argues that the State failed to prove that he knew that the H & K 9 mm handgun was stolen. We agree.

A. Standard of Review

When reviewing a claim of insufficient evidence, we view the evidence in the light most favorable to the State in order to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). We draw all reasonable inferences in the State's favor and interpret them most strongly against the defendant. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

We do not consider circumstantial evidence to be any less reliable than direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). We defer to the factfinder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 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).

B. Possession of a Stolen Firearm

A person is guilty of possessing a stolen firearm if he possesses, carries, delivers, sells, or is in control of a stolen firearm. RCW 9A.56.310. The definition of "possessing stolen property" under RCW 9A.56.140 applies to the crime of possessing a stolen firearm. RCW 9A.56.310(4). Under RCW 9A.56.140(1), "[p]ossessing 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."

"Bare possession of stolen property is insufficient to justify a conviction." *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284, *review denied*, 169 Wn.2d 1028 (2010). Possession and other evidence tending to show guilt, however, is sufficient. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967).

In response to McMillian's assertion, the State contends that "[t]he jury's inference of knowledge is strengthened by McMillian's simultaneous possession of the .38 caliber revolver with ground-down serial numbers," methamphetamine, and a ski mask. Resp't's Br. at 3. But the trial court dismissed the possession of a stolen firearm charge relating to the S & W .38 caliber revolver, concluding that the State had failed to prove that it was stolen. We cannot agree with the dissent that possession of another firearm with removed serial numbers tends to show that McMillian knew the gun at issue was stolen. That McMillian also possessed a ski mask, methamphetamine, guns, and drug paraphernalia suggests that he was involved in criminal activity, but it does not suggest that he knew that the H & K 9 mm pistol was stolen property.

Further, the State argues that because McMillian was a convicted felon and could not have obtained the firearm legally, he "must have been aware that the handgun had been stolen regardless of exactly which illegal means he actually employed in obtaining it." Resp't's Br. at 3. But the fact that McMillian illegally possessed the firearm does not indicate that he knew that the firearm was stolen.

Finally, the State points to McMillian's nervous behavior and offer to participate in a controlled buy as evidence that he knew the gun was stolen. McMillian had methamphetamine on

his person and methamphetamine and firearms in his vehicle. McMillian's behavior could be explained by his illegal possession of those materials.

No evidence was presented at trial regarding the manner in which McMillian obtained the H & K 9 mm pistol. Mere possession is insufficient to sustain a conviction for possession of a stolen firearm. We conclude that viewing the evidence in the light most favorable to the State, any rational trier of fact could not have found the essential knowledge element beyond a reasonable doubt.[6]

II. Statement of Additional Grounds

A. Right to a Speedy Trial

In his SAG, McMillian appears to assert that his time for trial right, under CrR 3.3, was violated. We disagree.

[6] The dissent analogizes to two cases standing for the proposition that only slight corroborative evidence is necessary to establish guilty knowledge. In *State v. Womble*, the court found sufficient evidence to support the defendant's conviction of taking a motor vehicle without permission; however, the defendant was arrested on the same night that the vehicle was "taken," the defendant had an "implausible" explanation, the defendant fled when confronted by the vehicle's owner, and the defendant was identified by the vehicle's owner as one of the individuals who got out of her vehicle after it had been moved. 93 Wn. App. 599, 601, 605, 969 P.2d 1097 (1999). In *Couet*, the defendant was found in possession of a stolen vehicle within several weeks after the date of its taking from a new car lot; the court noted that "the defendant was in possession of the new car in a relatively short time after it was stolen." 71 Wn.2d at 776. The court also noted that the defendant's explanation was "an improbable story that a fellow worker, identified only as 'Bill' let defendant have this practically new car while he, the fellow worker, was on vacation. The story is offered without any substantiation." *Couet*, 71 Wn.2d at 776.

Here, the facts are distinguishable, as McMillian was in possession of the gun several months after it was stolen: Martin reported his gun as stolen on March 13, but his firearm was not found in McMillian's vehicle until June 23. Martin did not know McMillian. Colpitts testified at trial that he never discovered who stole Martin's firearm. Here, there is just bare possession of stolen property. The fact that McMillian was found in possession of the stolen firearm three months after it had been reported stolen is not "slight corroborative evidence" to establish sufficient evidence of McMillian's guilty knowledge.

A defendant detained in jail shall be brought to trial within 60 days of arraignment. CrR 3.3(b)(1), (c)(1). The trial court is responsible for ensuring compliance with the time for trial rule. CrR 3.3(a)(1). The trial court may grant a continuance where it is required in the administration of justice; however, the defendant cannot be substantially prejudiced in the presentation of his defense. CrR 3.3(f)(2).

The trial court arraigned McMillian on July 6, 2010. McMillian remained in custody. On August 18, the State moved to continue the trial, explaining that "on August 2nd [the State] requested the Tumwater police to gain fingerprint identification, and that examination has not been completed. Additionally, the weapons have not yet been test fired." RP (Aug. 18, 2010) at 3. The trial court then set the trial for September 7, a date that fell "within the [original] speedy trial period." RP (Aug. 18, 2010) at 5. Trial commenced, however, on September 13, 2010. It appears that the trial was continued because the prosecutor assigned to McMillian's case had another trial on the week of September 7.

The record does not, however, include the transcript from the continuance hearing or an order granting a continuance.[7] Because the record is insufficient to evaluate McMillian's claim, we do not address it. *See* RAP 9.2(b) (appellant to provide an adequate record to review issues raised).[8]

[7] The record contains merely a reference to the order granting a continuance. On the first day of trial, defense counsel stated that the trial court had continued the trial the previous week. The trial court stated that it would abide by the "criminal presiding department['s]" ruling. RP (Sept. 13, 2010) at 9.

[8] Further, it is unlikely that, because of the 6-day delay, McMillian suffered prejudice in the presentation of his defense.

B. Ineffective Assistance of Counsel

Finally, McMillian asserts that he received ineffective assistance of counsel. He asserts that counsel (1) failed to "get my suppression hearing" and (2) misinformed him of his potential sentence, leading him to decline the State's plea bargain offer. SAG at 1. We disagree.

1. Standard of Review

To prevail on a claim of ineffective assistance of counsel, McMillian must show both that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *Brockob*, 159 Wn.2d at 344-45. To show prejudice, McMillian must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

We presume that counsel was effective. *McFarland*, 127 Wn.2d at 335. Trial strategy and tactics cannot form the basis of a finding for deficient performance. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

2. Failure to Move to Suppress

With regard to McMillian's first claim, defense counsel made a reasoned decision not to move to suppress the evidence found on McMillian's person or in his vehicle. Before trial, defense counsel stated:

> [T]his matter had been originally noted for a suppression hearing several weeks ago. I struck that when the State gave me additional information, including the affidavit that—or the transcript of the telephone call that was made to obtain the search warrant. I had—at the time that I had noted the hearing, I had

> questioned the initial stop. That additional information led me to believe that I would not prevail on the suppression motion.
>
> My client has asked me to pursue a suppression motion. I have declined, because I don't believe that I have a good faith basis to do that.

1 RP at 9-10. Defense counsel evaluated the evidence and determined he would not have prevailed on a motion to suppress. This was a reasonable trial tactic. Accordingly, McMillian's claim of ineffective assistance of counsel fails.

3. Plea Bargaining

McMillian next contends that he received ineffective assistance of counsel when the State offered him a plea bargain of 18 months' imprisonment[9] and defense counsel informed him "that my range was from 30 to 36 months if I was convicted of everything. He said the court would not be able to convict me of either . . . possession of stolen firearm charge." SAG at 2. McMillian asserts that he would have accepted the State's offer if his attorney had not misinformed him.

During plea bargaining, defense counsel has a duty to assist his or her client in "actually and substantially" determining whether to plead guilty, aid the defendant in evaluating the evidence against him, and discuss the possible direct consequences of a guilty plea. *State v. S.M.*, 100 Wn. App. 401, 410-11, 996 P.2d 1111 (2000).

At sentencing, defense counsel stated:

> I need to put briefly on the record that when I talked to Mr. McMillian about this case, before and during trial, and these potential consequences, I had misread the statute and I had believed that erroneously that the three unlawful possession of firearms would run concurrently and then the possession of the stolen firearm would run consecutively to that. As [the prosecutor] points out in

[9] Aside from McMillian's assertion in his SAG that the "plea bargain was 18 months," there is no evidence in the record of the terms of the State's plea bargain. SAG at 2.

> the State's memorandum, that's clearly in error. . . . Mr. McMillian had received an offer earlier on in the case which would have rendered that point moot.

RP (June 24, 2010) at 6-7. But the record does not contain the actual terms of the State's plea offer or evidence of McMillian's willingness to plea bargain when he received the offer. The record is inadequate to determine whether counsel's performance prejudiced McMillian and, thus, we do not address it.

We reverse McMillian's unlawful possession of a stolen firearm, remand for resentencing and to correct the scrivener's error in the judgment and sentence, and affirm his remaining convictions.

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.

Penoyar, C.J.

I concur:

Armstrong, J.

Quinn-Brintnall, J. (dissenting) — Because I believe sufficient evidence supported the jury's finding that Kenneth McMillian possessed a stolen firearm in violation of RCW 9A.56.310(1), I respectfully dissent. While I agree with the majority's reliance on *State v. McPhee*, 156 Wn. App. 44, 62, 230 P.3d 284, *review denied*, 169 Wn.2d 1028 (2010), for the proposition that "bare possession" of a recently stolen firearm is insufficient to sustain a conviction, any reasonable juror could conclude that McMillian's possession of the stolen firearm "in connection with other evidence tending to show guilt" warranted a conviction. *State v. Couet*, 71 Wn.2d 773, 775, 430 P.2d 974 (1967).

Here, while searching McMillian's vehicle pursuant to a lawful search warrant, Officer Bryen Finch found an H & K 9 mm pistol, a gun holster, a ski mask with holes cut out, a .38 caliber revolver, a 7 mm rifle, and several drug-related items. Finch was unable to determine if the .38 caliber revolver was stolen because the serial numbers had been filed off but did verify the H & K pistol was stolen. This weapon is the focus of the contested charge.

The majority contends that insufficient evidence supports the jury's verdict because McMillian's possession of items indicating criminal activity "does not suggest that he knew that the H & K 9 mm pistol was stolen property," "the fact that [he] illegally possessed the firearm does not indicate that he knew that the firearm was stolen," and "McMillian's behavior could be explained by his illegal possession of those materials." Majority at 5-6.

However, when viewing the evidence in the *light most favorable to the jury's verdict* there is sufficient evidence to uphold McMillian's possession of a stolen firearm conviction. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In analogous situations, appellate courts have held that "[a] person knows of a fact by

being aware of it or having information that would lead a reasonable person to conclude that the fact exists. Although knowledge may not be presumed . . ., it may be inferred." *State v. Womble*, 93 Wn. App. 599, 604, 969 P.2d 1097 (footnotes omitted) (citing RCW 9A.08.010(1)(b); *State v Shipp*, 93 Wn.2d 510, 516, 610 P.2d 1322 (1980)), *review denied*, 138 Wn.2d 1009 (1999). In *Womble*, an automobile theft case, Division One of this court stated, "Once it is established that a person rode in a vehicle that was taken without the owner's permission, 'slight corroborative evidence' is all that is necessary to establish guilty knowledge." 93 Wn. App. at 605 (citing *Couet*, 71 Wn.2d at 776).

McMillian's possession of the .38 caliber revolver with ground-down serial numbers allows for a reasonable inference that McMillian knew the other handgun was stolen. *See Salinas*, 119 Wn.2d at 201 (A claim of insufficiency admits the truth of the evidence and *all reasonable inferencees that a trier of fact can draw from that evidence*.). Also, the jury could have inferred knowledge from the fact that McMillian, a convicted felon, could not have legally obtained a firearm. RCW 9.41.040(1)(a). Given that he would have had to illegally obtain a firearm and it was proven the gun was stolen, the jury can infer McMillian's possession of the gun is the "corroborative evidence" that indicated McMillian knew the gun was stolen when he obtained possession. *Womble*, 93 Wn. App. at 605 (citing *Couet*, 71 Wn.2d at 776).

Because this court defers to the trier of fact on issues of credibility of witnesses and persuasiveness of the evidence, I would uphold the jury's possession of a stolen firearm conviction. *See State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

QUINN-BRINTNALL, J.