

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK J. MONTEZ, JR.,

Defendant and Appellant.

F067366

(Super. Ct. No. F11904695)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Denise L. Whitehead, Judge.

Janice Wellborn, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

---

\* Before Cornell, Acting P.J., Gomes, J. and Franson, J.

Following a trial by jury, appellant Frank J. Montez, Jr., was found guilty of one count of receiving stolen property, a motor vehicle (Pen. Code, § 496d, subd. (a))<sup>1</sup>. The jury found him not guilty of resisting an executive officer (§ 69), but guilty of the lesser included offense of resisting, obstructing or delaying a peace officer (§ 148, subd. (a)(1)). In a bifurcated proceeding, the trial court found true the allegations that Montez had three prior serious felony convictions (§§ 667, subd. (b)-(i) & 1170.12, subd. (a)), and had served three prior separate prison terms (§ 667.5, subd. (b)). Montez was sentenced to a total of seven years in state prison.

On appeal, Montez contends there is insufficient evidence to uphold his conviction for receiving stolen property, a vehicle. We disagree and affirm.

### **STATEMENT OF THE FACTS**

At approximately 2:00 in the morning on August 13, 2011, Police Officers Mikal Clement and Nathan Carr were in uniform and on duty in a patrol vehicle heading north on Cedar Avenue, an area known for “[a] lot” of narcotics, gang, and stolen vehicle activity. Officer Clement noticed a black Nissan Altima<sup>2</sup> heading eastbound on Home Avenue at the intersection of Home and Cedar; one of the brake lights was out. The officers activated the patrol lights and siren to execute a vehicle infraction stop.

The Nissan appeared to be pulling over, but then accelerated onto nearby Highway 168. The officers turned off their lights and siren, declining to pursue the Nissan for a minor infraction, but continued to follow the vehicle and alerted other patrol units. The Nissan continued onto Highway 180 and then northbound Highway 41, at times travelling 90 to 100 miles per hour, before it exited on Ashlan Avenue, went into a skid and collided with the traffic light stand on the center divider.

---

<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

<sup>2</sup> The vehicle is referred to as an “Ultima” in the reporter’s transcript.

The officers, who were only about 10 to 15 feet from the Nissan when it came to a stop, saw three people run from the vehicle: Desiree Cruder from the driver's seat; Christopher Rodriguez from the front passenger seat; and Montez from the driver's side rear passenger door. Officer Clement did not see anyone else in the vehicle as he ran past it; Officer Carr "cleared the vehicle" before chasing the suspects and confirmed there was no one inside. The three were eventually apprehended, but not before Montez pushed Officer Douglas Wright, who had been pursuing Montez on a motorcycle, causing the officer to fall and sprain his knee. Montez was then tased.

Keys on a key ring found in the Nissan had been filed or shaved down to jimmy the ignition and start the vehicle. The ignition of the vehicle had been punched.

The Nissan, which had been stolen, belonged to Stephanie Barrett, who had not given Cruder, Rodriguez, or Montez permission to take the car.

### Defense

Cruder testified on Montez's behalf that Montez did not know the Nissan was stolen. Cruder had known Montez for a month before the incident and lived in a house with her friend "Janelle<sup>3</sup>," who was Montez's ex-wife or girlfriend and the mother of his children. Montez spent "a lot" of time at the house. Cruder admitted stealing the Nissan on August 13, 2011. Cruder was prosecuted and sentenced for the offense and had already completed her sentence. According to Cruder, after stealing the Nissan, she went to Janelle's house and picked up Janelle and Rodriguez, and from there they went to pick up Montez at his apartment because he "needed a ride."

When they arrived at the apartment, Montez asked Cruder if the car was stolen. She showed him the keys and said it was not, although she was "sure he thought it was." According to Cruder, Janelle and Montez were in the backseat. When Cruder was about to enter Highway 168, she noticed a police car following her with its lights off. Because

---

<sup>3</sup> Cruder did not identify Janelle's last name.

she had a warrant, she sped up even though everyone in the vehicle was “yelling” at her to slow down. She eventually crashed the vehicle. Cruder insisted Janelle was in the Nissan at the time, although police never found her.

On cross-examination, Cruder explained that she had lived at Janelle’s house for about two months and that Montez stayed there for the second month and she saw him every single night. Cruder was “familiar” with Montez, but claimed they did not talk, although she considered him a “friend.” Cruder admitted that “everyone” knew she stole cars and that she “always” had a “different car” and did not keep the same car for very long. Cruder maintained that she had told Janelle that someone had given her the Nissan, but she acknowledged that Janelle was “not stupid, you know.” On the night in question, she and Janelle were going to go to the store for cigarettes, but Janelle got a call from Montez, so they went to pick him up. Once they picked up Montez, Cruder did not know where they were headed, but she was willing to “take anybody anywhere.” Cruder admitted that she had three prior convictions for crimes of moral turpitude.

Montez testified in his own defense that he lived in his apartment and only visited his children at Janelle’s house. On the day in question, Janelle called to say that their daughter was sick and she wanted him to come, but he did not have a ride. In a second phone call, Janelle said she would pick him up. When Cruder, Rodriguez and Janelle arrived at his apartment at about 11:30 p.m. or 12:30 a.m., Montez asked whose car it was because he knew Janelle did not have a car and he did not “get into anybody’s car that [he didn’t] really know.” He was assured that the car belonged to a friend. When Montez got into the car, he put his head down on Janelle’s lap in the back seat, claiming he did not want to be recognized by a new girl he had begun dating at the apartment complex. When Cruder began to speed, Montez tried to convince her to slow down. When the vehicle came to a stop, he ran because his parole officer had told him any contact with law enforcement would result in him going “back to jail.” Montez denied

pushing Officer Wright, but that the officer fell when he grabbed Montez by the shirt. According to Montez, he was tased four times.

On cross-examination, Montez claimed he had only met Cruder on two occasions, but admitted that he thought there was a possibility that the Nissan had been stolen and assumed Cruder had done so because he knew “these people don’t have money” for cars.

## **DISCUSSION**

Montez contends there is insufficient evidence to support his conviction for receiving a stolen vehicle. We disagree.

“In determining the sufficiency of the evidence, we review the whole record in the light most favorable to the judgment to determine ‘whether it discloses substantial evidence - that is evidence that is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Russell* (2005) 129 Cal.App.4th 776, 786.)

To sustain a conviction of receiving a stolen vehicle, the prosecution must prove (1) the vehicle was stolen; (2) the defendant knew the vehicle was stolen; and (3) the defendant had possession of the stolen vehicle. (*People v. Land* (1994) 30 Cal.App.4th 220, 223 (*Land*); *People v. Russell* (2006) 144 Cal.App.4th 1415, 1425.) Possession of the stolen property may be actual or constructive and need not be exclusive. (*Land, supra*, at p. 223.) “Physical possession is also not a requirement. It is sufficient if the defendant acquires a measure of control or dominion over the stolen property.” (*Id.* at p. 224.)

“However, ... mere presence near the stolen property, or access to the location where the stolen property is found is not sufficient evidence of possession, standing alone, to sustain a conviction for receiving stolen property.” (*Land, supra*, 30 Cal.App.4th at p. 224; see also *People v. Zyduck* (1969) 270 Cal.App.2d 334, 336 (*Zyduck*)). “Something more must be shown to support inferring of [dominion and

control]. Of course, the necessary additional circumstances may, in some fact contexts, be rather slight.” (*Zyduck, supra*, at p. 336.)

When the defendant is a passenger in a stolen vehicle, presence alone “is not enough to show possession of a stolen automobile.” (*Zyduck, supra*, 270 Cal.App.2d at pp. 335-336.) But, as stated in *Land*, “the fact that a person is a passenger in a stolen vehicle will not necessarily preclude a conviction for receiving stolen property ... additional factual circumstances are necessary to establish a passenger has possession or control of the stolen car.” (*Land, supra*, 30 Cal.App.4th at p. 228.) “[T]here is no single factor or specific combination of factors which unerringly points to possession of the stolen vehicle by a passenger.” (*Ibid.*) However, ““an inference of possession may arise from a passenger’s presence in a stolen automobile when that presence is coupled with additional evidence that the passenger knew the driver, knew that the vehicle was stolen, and intended to use the vehicle for his or her own enjoyment. Those facts could lead a jury to infer that it is more probable than not that the passenger had both the intention and the capacity to control the stolen vehicle. A jury might infer that such a passenger could exert control over the vehicle, an inference that would support a finding of constructive possession ....”” (*Id.* at p. 227.)

In *Land* the defendant and a friend were drinking together. The friend left and returned with a car and the two drove to another town. Once in the car, the friend told the defendant the car was stolen. After they had been driving for some time, the driver said he wanted to rob somebody and stole food from a convenience store. They resumed driving the car, then intentionally bumped another car, robbed and shot the driver of the other car, leaving him for dead, and took off in the shooting victim’s car. (*Land, supra*, 30 Cal.App.4th at pp. 222-223.) The jury convicted the defendant of receiving a stolen vehicle. The issue on appeal was “under what circumstances, [may] a passenger in a stolen car, knowing the car is stolen, be properly found to have possession or dominion and control over the stolen vehicle.” (*Id.* at p. 225.)

Finding no California cases on the subject, the *Land* court reviewed decisions from other jurisdictions and noted with approval an opinion of the New Jersey Supreme Court, *State v. McCoy* (1989) 116 N.J. 293 [561 A.2d 582] (*McCoy*), which found that evidence the defendant had walked over and placed his hands on a stolen vehicle with the intent to ride around as a passenger was not sufficient to establish possession of a stolen vehicle. (*Land, supra*, 30 Cal.App.4th at pp. 226-227, citing *McCoy, supra*, at pp. 585, 588.) In doing so, the *Land* court found persuasive *McCoy's* conclusion that ““an inference of possession may arise from a passenger’s presence in a stolen automobile when that presence is coupled with additional evidence that the passenger knew the driver, knew that the vehicle was stolen, and intended to use the vehicle for his or her own benefit and enjoyment. Those facts could lead a jury to infer that it is more probable than not that the passenger had both the intention and the capacity to control the stolen vehicle. A jury might infer that such a passenger could exert control over the vehicle, an inference that would support a finding of constructive possession ....’ (561 A.2d at p. 588.)” (*Land, supra*, 30 Cal.App.4th at p. 227.)

In *Land* the evidence established that the driver and the defendant were friends and presumably knew each other well, the defendant knew the car was stolen near the defendant’s residence and the two drove in it within an hour after its theft, and they used the vehicle for their own benefit and enjoyment. The court concluded that based on defendant’s “close relationship to the driver, use of the vehicle for a common criminal mission, and stops along the way before abandoning it,” the defendant was in a position to exert control over the vehicle thereby supporting a finding of constructive possession. (*Land, supra*, 30 Cal.App.4th at p. 228.)

In contrast, the Court of Appeal in *In re Anthony J.* (2004) 117 Cal.App.4th 718 (*Anthony J.*) concluded there was insufficient evidence of possession of a stolen vehicle where the minor was a passenger in the backseat of a stolen vehicle for approximately 20 to 30 minutes, he did not know the driver well and did not know the vehicle was stolen.

In *Anthony J.*, the defendant was at a fast-food restaurant when a friend of his told him to “come on” and they got into a nearby vehicle. The defendant had seen the driver once before at his cousin’s house, but did not know him well and he did not know the vehicle was stolen. The group drove for 20 to 30 minutes, listening to the radio. When the vehicle stopped, everyone in the vehicle got out to go into a store. As they were walking to the store, the defendant dropped something and bent down to pick it up. At that point, the others with him began to run. He did not know why they were running, but ran after them. When he caught up with them, he heard them say the vehicle was stolen. The group was then detained by officers. The vehicle had been stolen three days before. (*Id.* at pp. 722-724.) The court concluded the evidence did not show the minor had either actual or constructive possession of the vehicle, stating:

“The facts as they existed at the close of the People’s case did not comport with those in *Land*, and the People’s case at most demonstrated mere presence by [the minor] in the stolen vehicle. The only evidence presented at that time was that four young men got out of a car, they ran as a patrol car drove nearby, a set of keys was found near them when they were detained, and the driver of the vehicle was identified by a witness, but [the minor] was not. There were no facts showing that [the minor] and the driver were friends, that they engaged in criminal activity together in the past, that he was a passenger shortly after the vehicle was stolen, or that [the minor] and the driver jointly used the vehicle to commit crimes. Thus, the People’s evidence did not demonstrate beyond a reasonable doubt that [the minor] had possession of the vehicle, either actual or constructive.” (*Id.* at p. 729.)

The facts of this case, although not as strong as those in *Land*, lie closer to *Land* than to *Anthony J.* There was evidence that Montez and Cruder knew each other well and spent time in the same house together. Montez, by his own admission, knowing Janelle did not have a vehicle, had suspicions that the vehicle was stolen when Cruder arrived at his apartment to give him a ride and he asked her whose car it was. On cross-examination he admitted that he thought there was a possibility the vehicle had been stolen and he assumed Cruder had stolen it. Cruder, although first denying that Montez

knew the vehicle was stolen, then testified that she was “sure” Montez thought the car was stolen and that “everyone” knew she stole cars. In addition, unlike *Anthony J.*, the vehicle here was stolen shortly before Montez got into it as a passenger and he demonstrated a consciousness of guilty by fleeing when the vehicle came to a stop. (*Anthony J.*, *supra*, 117 Cal.App.4th at p. 729.)

There was also evidence that Montez had some control or constructive possession over the vehicle. According to Montez, when he needed a ride, Cruder willingly went to his apartment to pick him up so that he could, ostensibly, see his sick child. Cruder herself testified that, once she picked up Montez, she did not know where she was going, but was willing to take him or anyone in the vehicle wherever they wanted or needed to go. As such, there is evidence that Montez “intended to use the vehicle for his ... own benefit.” (*Land*, *supra*, 30 Cal.App.4th at p. 227.) There is also evidence from both Montez and Cruder that Montez and the others in the vehicle directed Cruder’s actions while she drove, telling her to slow down when she sped up.

While Montez contends that the evidence is insufficient to sustain his conviction, his challenge really goes to the credibility of the witnesses and we will not substitute our determination for that of the trier of fact. (*People v. Warren* (1959) 175 Cal.App.2d 233, 244.) Here, the jury could reasonably conclude that Cruder and Montez were close friends, that Montez knew the vehicle was stolen, and that he intended to use it for his benefit.

“The credence and ultimate weight to be given the evidence of the various particular circumstances are of course for the trier of fact, and ‘[i]t is the trier of fact, not the appellate court, that must be convinced of a defendant’s guilt beyond a reasonable doubt....’” (*People v. Redrick* (1961) 55 Cal.2d 282, 289.) We conclude the record in this case contains additional facts beyond mere presence or access, which when coupled with his status as a passenger, give rise to the inference Montez had constructive

possession of the stolen vehicle. There is sufficient evidence to support Montez's conviction and we reject his claim to the contrary.

**DISPOSITION**

The judgment is affirmed.