No.

IN THE SUPREME COURT OF THE UNITED STATES

NICOLE JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL
First District

PETITION FOR WRIT OF CERTIORARI

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THE QUESTION PRESENTED

Petitioner snatched a patron's purse at a McDonald's restaurant, and a jury convicted her of robbery and receiving stolen property (the getaway pickup truck driven by her co-defendant turned out to be stolen). She also possessed stolen checks and identity information of other persons.

The jury was instructed that facts "may be proved by direct or circumstantial evidence or by a combination of both." Then the court gave a pattern jury instruction which permitted the jury to draw an extraordinary conclusion from a particular *type* of circumstantial evidence: If the defendant knowingly possessed recently stolen property, said the instruction, you may not convict the defendant of robbery or receiving stolen property based on those facts alone, but "if you also find that supporting evidence tends to prove her guilt, then you may conclude that *the evidence is sufficient* to prove she committed Second Degree Robbery . . . or Receiving Stolen Property—Motor Vehicle." [Italics added.] The instruction continued: "The supporting evidence need only be slight and need not be enough by itself to prove guilt."

Shortly after giving that instruction, the court correctly instructed the jury on the elements of robbery—the taking of property from another, against her will, by the use of force or fear, with the intent to permanently deprive the owner of the property—and on the elements of receiving stolen property—taking possession or control of property the defendant knows is stolen.

The question presented is whether proof that the defendant possessed recently stolen property—*any* stolen property, as far as the instruction is concerned, even if the defendant does not know it is stolen—plus "slight" supporting evidence, *is sufficient* to meet the requirement that the State prove beyond a reasonable doubt "the existence of every element of the offense." *Jackson v. Virginia*, 443 U.S. 307, 316 (1979).

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IN THE UNITED STATES SUPREME COURT

NICOLE JOHNSON,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

Nicole Johnson respectfully petitions for a writ of certiorari to the California Court of Appeal, First District, to review its decision affirming her conviction for robbery and for receiving stolen property, namely, a pickup truck in which she was a passenger.

OPINION BELOW

The opinion of the California Court of Appeal appears as Appendix A, and is unreported. The order of the Court of Appeal denying rehearing appears as Appendix B, and is unreported. The order of the California Supreme Court denying discretionary review appears as Appendix C, and is unreported.

JURISDICTION

The judgment of the California Court of Appeal was entered on July 30, 2018. The Court of Appeal denied a timely petition for rehearing on August 17, 2018. The California Supreme Court denied discretionary review on October 10, 2018. This petition is filed within 90 days of the California Supreme Court's order, and is timely pursuant to Rule 13.1 of this Court.

Jurisdiction of this court is invoked pursuant to 28 U.S.C. §1257(a), as a petition for a writ of certiorari to review the judgment of the highest court of a State.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; n*or shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws. [Emphasis added.]

CALIFORNIA PATTERN JURY INSTRUCTION INVOLVED

Judicial Council of California Criminal Jury Instructions, CALCRIM No. 376, Possession of Recently Stolen Property as Evidence of a Crime

> If you conclude that the defendant knew (he/she) possessed property and you conclude that the property had in fact been recently (stolen/ extorted), you may not convict the defendant of _____ <*insert crime*> based on those facts alone. However, if you also find that supporting evidence tends to prove (his/her) guilt, then you may conclude that the evidence is sufficient to prove (he/she) committed _____ <*insert crime*>.
>
> The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove (his/her) guilt of <*insert crime*>.
>
> [You may also consider whether _____ <*insert other appropriate factors for consideration*>.]
>
> Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the

defendant is guilty of that crime has been proved beyond a reasonable doubt.

CALCRIM No. 376, As Given at Petitioner's Trial
(With Emphasis on Relevant Language)

If you conclude that the defendant knew she possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of Second Degree Robbery, Grand Theft, Petty Theft, or Receiving Stolen Property - Motor Vehicle based on those facts alone. However, *if you also find that supporting evidence tends to prove her guilt, then you may conclude that the evidence is sufficient to prove she committed Second Degree Robbery,* Grand Theft, Petty Theft, *or Receiving Stolen Property - Motor Vehicle.*
i

The supporting evidence need only be slight and need not be enough to prove guilt. You may consider how, where, and when the defendant possessed the property together with any other relevant circumstances tending to prove her guilt of Second Degree Robbery, Grand Theft, Petty Theft, or Receiving Stolen Property - Motor Vehicle.

Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt.

(1 CT 251.)[1]

STATEMENT OF THE CASE

Petitioner and Raymond Gilmore possessed stolen checks, credit cards, personal identifying information of others, and a methamphetamine pipe. Petitioner does not contest her convictions arising out of those matters. But she

[1] Petitioner references Volume 1, page 251 of the Clerk's Transcript (CT) contained in the record on appeal. The Reporter's Transcript will be referenced "RT."

does assert she was improperly convicted of the unrelated offenses of robbery and receiving stolen property.

The relevant facts are these: One morning Gilmore picked up petitioner in what turned out to be a stolen pickup truck. After driving around, the two went to a McDonald's restaurant, where they spied a purse laying on a table next to a woman diner. They decided petitioner would snatch the purse and Gilmore would be outside in the pickup with the motor running.

Petitioner grabbed the purse and ran, pursued by the woman who owned the purse. At the point where petitioner got into the truck, petitioner's testimony differed from the woman who owned the purse. Petitioner's testimony would have permitted a jury to find she did not use force or fear when the woman tried to retrieve the purse (and so was guilty only of theft), while the woman's testimony would have justified a finding to the contrary, which would permit a conviction for robbery.

Gilmore was able to maneuver the pickup through the parking lot well enough to escape, but he parked the truck in the same shopping center not far from the scene of the crime, and the police arrested both Gilmore and petitioner a short time later.

Petitioner raised the constitutional question sought to be reviewed regarding jury instruction CALCRIM No. 376 in Points II and III of her Appellant's Brief filed in the California Court of Appeal.[2] The opinion of the Court of Appeal addressed petitioner's contentions as described at page 9 of the Appendix: "Defendant argues, however, this jury instruction permitted the jury

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[2] An objection in the trial court is not necessary to preserve a claim that a jury instruction violated due process of law. *People v. Smithey*, 20 Cal.4th 936, 976, fn. 7 (1999), citing Pen. Code § 1259 ["The appellate court may . . . review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"].

to convict defendant of robbery and receiving a stolen motor vehicle on less than proof of all the elements for these offenses. She contends the instruction itself is 'unconstitutional and based on an unreasonable inference.' " The appellate court rejected these contentions at App. 9-10: "Other instructions correctly stated the elements of robbery (CALCRIM No. 1600) and the elements of receiving stolen property (CALCRIM No. 1750). The jury would not have understood CALCRIM No. 376 as instructing it to ignore those elements or to convict on less than a finding that each element of those offenses was proven beyond a reasonable doubt. ¶Moreover, CALCRIM No. 376 has already withstood similar constitutional challenges [citing California cases]. . . . ¶ In short, we reject defendant's constitutional challenge to CALCRIM No. 376."

REASONS FOR GRANTING THE PETITION

THE STATE COURT DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT. THE CALIFORNIA APPELLATE COURT RULED THAT WHEN A CORRECT JURY INSTRUCTION CONTRADICTS A CONSTITUTIONALLY INFIRM INSTRUCTION, A REVIEWING COURT SHOULD NOT CONCLUDE THE JURY IGNORED THE CONSTITUTIONALLY CORRECT JURY INSTRUCTION. THIS COURT HAS HELD THAT A CORRECT INSTRUCTION DOES NOT ABSOLVE THE CONSTITUTIONAL INFIRMITY OF ANOTHER INSTRUCTION, BECAUSE A REVIEWING COURT HAS NO WAY OF KNOWING WHICH INSTRUCTION THE JURORS APPLIED.

CALCRIM No. 376, a pattern jury instruction, is commonly used in criminal cases in California whenever a defendant is found in possession of stolen property.

Petitioner was charged with robbery and receiving stolen property. Instead of telling the jurors that they could conclude from the defendant's possession of recently stolen property that she had some involvement with its theft, CALCRIM No. 376 stated that possession of recently stolen property plus slight supporting

evidence "is sufficient to prove she committed Second Degree Robbery . . . or Receiving Stolen Property - Motor Vehicle."

Another instruction, CALCRIM No. 1600, correctly told the jury that to prove robbery the State had to prove the defendant "used force or fear" to take the victim's property, took it from her immediate presence, against her will, and intended to deprive the victim of it permanently. (2 RT 344, 1 CT 254-255.) Another instruction, CALCRIM No. 1750 (2 RT 348, 1 CT 261) correctly described the requirements to prove receiving stolen property—the defendant received property that had been stolen, and knew it had been stolen. Neither of these instructions informed the jury that it was describing "elements" of the particular crime, and none of the instructions given to the jury told the jury what an "element" of a crime is.

The problem is that CALCRIM No. 376 conflicted with those valid instructions. It said that possessing stolen property plus slight supporting evidence "is sufficient to prove" the defendant committed both those crimes. The instruction does not even require that the defendant know the property she possessed was stolen; all it requires is that she knew she possessed the property. And the instruction tells the jury that the supporting evidence itself "need not be enough to prove guilt."

Thus a reasonable juror could conclude that petitioner's possession of the checks stolen from Wendy Brown, App. 2, App. 4, plus "slight" additional evidence was "sufficient to prove" petitioner committed both robbery and receiving stolen property.

Other standard pattern instructions suggested what the "supporting evidence" could be.

After petitioner and Gilmore made their escape, petitioner had hidden the victim's purse behind a shipping container in the shopping center. App. 2.

CALCRIM No. 371 told the jury, "If the defendant tried to hide evidence . . . that conduct may show that she was aware of her guilt." (2 RT 340, 1 CT 248.)

Or the "slight" supporting evidence could have been the fact that petitioner fled the scene, because CALCRIM No. 372 told the jury, "If the defendant fled immediately after the crime was committed, that conduct may show that she was aware of her guilt." (2 RT 341, 1 CT 249.) Both these instructions tell the jury "it is up to you to decide" the "meaning and importance" of this conduct.

The stolen property, according to the jury instruction, does not even have to be related to the charged offense. It just has to be stolen property.

1.
The Prosecutor Urged the Jury to Infer From the Stolen Checks and Credit Card in Petitioner's Possession That She Knew the Pickup Truck She Rode in Was Stolen. The Suggested Inference Is Unreasonable.

In the case at bar, petitioner and Gilmore possessed a stolen credit card and stolen checks. In closing argument, the prosecutor urged the jury to consider these stolen items to prove petitioner guilty of receiving a stolen pickup truck—something completely unrelated to the stolen credit card or checks: "Ms. Brown got up on the stand, told you her card and her checks were stolen." (2 RT 368.) The prosecutor emphasized to the jury that CALCRIM No. 376 says "any evidence no matter how slight can be enough for you to find that she *knew* the car was stolen" [emphasis added] (2 RT 374), and then gave the jury examples of just what kind of supporting evidence could be enough. It turned out to be evidence having nothing to do with the stolen pickup truck:

> Any supporting evidence to prove her guilt no matter how slight is enough.
>
> So what do we have? This is a joint operation. There is a forged driver's license on her person other people's debt cards on her person, other people's credit cards on defendant Gilmore's person, other people's checks in both their possession, other people's personal identifying information,

> hers with the Best Western. He had an entire backpack filled with what the officer testified were medical records, looked like dental records, personal identifying information of someone else.
>
> He even had a yellow notepad inside of a zip-lock bag also with personal identifying information.

(2 RT 374.)

One might think it strange that the law would permit evidence of a yellow pad inside a co-defendant's bag to be supporting evidence "sufficient to prove" the defendant guilty of receiving a stolen truck or committing a robbery. But in California juries are routinely told that marginal evidence like that is sufficient. The California Court of Appeal's opinion here tells us that "CALCRIM No. 376 itself accurately describes the law regarding mental state inferences to be drawn from the possession of stolen property," citing several California cases that ruled the instruction "did not infringe on [the] appellant's constitutional rights." App. 10 [brackets by the court].

One wonders how a defendant could ever be found not guilty when this instruction is used, because once the case has reached the trial stage, there will always be *some* additional evidence tending to prove guilt other than possession of someone else's property; otherwise the defendant would not have been held to answer following the preliminary hearing.

A juror who was initially unsure of the logic of CALCRIM No. 376 might recall that the instruction told the jury they could consider any other relevant "circumstances" tending to prove the defendant's guilt (2 RT 342, 1 CT 251), and the jury was told earlier that "circumstantial" evidence, that is, evidence of a fact or group of facts from which the juror could conclude the truth of the fact in question (CALCRIM No. 223, 2 RT 333, 1 CT 234) was just as good as direct evidence. (2 RT 334, 1 CT 234.) A reasonable juror might conclude that a fact or group of facts—say, possession of Wendy Brown's stolen checks, plus flight from

the scene of the crime—were sufficient facts to prove the truth of the "fact" that the defendant committed second degree robbery, because that is precisely what the instruction tells the jury. Moreover, the jurors were told they must follow the law as the court explains it, "even if you disagree with it." (CALCRIM No. 200, 2 RT 334, 1 CT 228.) If they followed CALCRIM 376, the jurors did not need to determine whether appellant pushed the victim's hand away from the car door, because robbery had been proved through circumstantial evidence—"other relevant circumstances," as the jury was told. (2 RT 342, 1 CT 251.)

Such an inference is illogical and unreasonable. There is no rational chain of inferences leading from "she possessed someone's stolen checks" through "plus Gilmore had a yellow notepad with personal identifying information" to the conclusion "therefore, she robbed the victim." The syllogism, if it can be called that, begins without a valid major premise.

It is important to remember that CALCRIM No. 376 is worded in terms of "facts," not in terms of "elements" of a crime. For there to be proof "sufficient to prove she committed Second Degree Robbery," the jury, if it decides to follow this instruction, does not have to find proof of each element of the crime beyond a reasonable doubt; they are told they merely have to be convinced "that each *fact essential to the conclusion that the defendant is guilty* of that crime has been proved beyond a reasonable doubt." [Emphasis added.] And the instruction tells them that the only "facts" necessary to conclude that the defendant is guilty are (1) possession of recently stolen property, and (2) "slight" supporting evidence. The actual elements of the crime, under this instruction, need not be proved beyond a reasonable doubt—all that has to be proved is circumstantial evidence consisting of two relatively insignificant "facts" from which the instruction permits the jury to infer the defendant committed the crimes.

This intellectual process, petitioner suggests, violates the Due process Clause of the Fourteenth Amendment, because "the suggested conclusion is not one that reason and common sense justify in light of the proven facts before the jury." *Francis v. Franklin*, 471 U.S. 307, 314-315 (1985). More specifically, the inference in the instruction adversely affects the application of the proof-beyond-a-reasonable-doubt standard because "there is no rational way the trier of fact could make the connection permitted by the inference." *Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979). Possession of stolen property plus slight additional evidence is *not* sufficient under the Due Process Clause to prove a crime.

2.
It Was Unreasonable for the California Court of Appeal to Assume the Jury Disregarded the Constitutionally Infirm Instruction.

The California Court of Appeal concluded that because the trial court also correctly instructed the jury on the elements of the charged crimes, the jury would not have understood CALCRIM No. 376 to permit them to ignore the correct instructions. This court has held otherwise. "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis v. Franklin, supra* 471 U.S. 307, 322

3.
The Constitutionally Infirm Instruction Is in Widespread Use.

It is not rational to say that possession of stolen property plus slight additional evidence "is sufficient to prove" the charged crimes. Nevertheless, California appellate courts continue to approve CALCRIM No. 376 on a recurring basis, mostly in unpublished decisions. In addition to the case at bar, we are

aware of five unpublished appellate decisions last year alone that rejected arguments that CALCRIM No. 376 was an incorrect statement of the law:

People v. Uribe , 2018 WL 850262, 2018 Cal.App.Unpub. LEXIS 1061, *10 (2-14-18). ["The case law that allows only slight corroborating evidence to support the permissive inference of CALCRIM No. 376 does not change the prosecution's burden of proof."]

People v. Singleton, 2018 WL 1281675, 2018 Cal.App.Unpub. LEXIS 1709, *36 (3-13-18). ["Although that evidence cannot be called overwhelming, it is an adequate basis for a permissive inference."]

People v. Garrett, 2018 WL 1632433, 2018 Cal.App.Unpub. LEXIS 2344, *19 (4-5-18). ["We therefore conclude CALCRIM 376 is an accurate statement of the law as applied to the facts of this case, and the trial court did not err by using it to instruct the jury."]

People v. Nguyen, 2018 WL 2001567, 2018 Cal.App.Unpub. LEXIS 3025, *11-12 (4-30-18). ["In short, CALCRIM No. 376 has withstood prior challenges in the appellate courts of this state on the grounds it lessens the prosecution's burden of proof. We see no reason to change course."]

People v. Guerrero, 2018 WL 6382041, 2018 Cal.App.Unpub. LEXIS 8250, *28 (12-5-18) [". . . the court's instruction pursuant to CALCRIM No. 376 did not violate due process by allowing the jury to draw an unconstitutional permissive inference or by unconstitutionally lowering the prosecution's burden of proof."]

It is not unreasonable to conclude that there are other cases where defense counsel did not appeal the use of the instruction because of the complete absence of appellate success in the California courts.

4.

The State Court Decision Justifying the Constitutionally Infirm Instruction Is In Conflict With the Decisions of This Court.

Why should the court grant certiorari? The Court of Appeal opinion concluded that was not likely the jury understood CALCRIM No. 376 in an unconstitutional manner. App. 10. This court, on the other hand, has held that contradictory instructions "create a reasonable likelihood that a juror understood the instructions in an unconstitutional manner." *Francis v. Franklin*, *supra*, 471 U.S. 307, 322, fn. 8. It has been settled law for many years that "when there exists a reasonable possibility that the jury relied on an unconstitutional understanding of the law in reaching a guilty verdict, that verdict must be set aside." *Ibid*., citing *Stromberg v. California*, 283 U. S. 359 (1931).

Petitioner cited *Francis v. Franklin* at pp. 37, 43 and 45 of her Appellant's Brief filed in her state appeal, and *Ulster County Court v. Allen* at p. 37, but neither case was addressed, or even mentioned, in the State's answering brief. Petitioner pointed out in her reply brief at pp. 23, 24, 25, and 27 that *Francis v. Franklin* rejected an argument similar to the argument the State had raised in it's answering brief, namely, that there was no error because the trial court gave correct, as well as incorrect, instructions. However, the Court of Appeal did not mention *Francis v. Franklin* or *Ulster County Court v. Allen* in its opinion, and instead readily agreed with the State's argument that giving good instructions cured the bad instruction. App. 9-10. Because other instructions properly described the elements of robbery (CALCRIM No. 1600) and receiving stolen property (CALCRIM No. 1750), the court concluded, without any analysis, that the jury would have disregarded the constitutionally erroneous language:

> The jury would not have understood CALCRIM No. 376 as instructing it to ignore those elements or to convict on less than a finding that each element of those offenses was proven beyond a reasonable doubt.

App. 10. The law, however, has long recognized that a lay jury does not "know enough to disregard the judge's bad law if in fact he misguides them." *Bollenbach v. United States* 326 U.S. 607, 613-614 (1946). A reviewing court simply "has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." *Francis v. Franklin, supra* 471 U.S. 307, 322; see also *Yates v. United States*, 354 U.S. 298, 312 (1957) ["proper rule to be applied is that which requires a verdict to be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected"]; *Leary v. United States*, 395 U. S. 6, 31-32 (1969) ["It has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside"].

CONCLUSION

The instruction in question allows the State to prove a crime not by proof of all the elements, but by proof of two "facts" that are not even elements—possession of recently stolen property plus any other fact, such as flight from the scene. The Due Process Clause does not permit shortcuts like that.

In the case at bar the appellate opinion failed to apply controlling case precedent of this court on an important question of federal constitutional law. This conflict with relevant decisions of this court is good reason to grant the petition. Supreme Court Rule 10(c).

Respectfully submitted,

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Appendix A

Decision
of the California Court of Appeal

Filed 7/30/18 P. v. Johnson CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. NICOLE JOHNSON, Defendant and Appellant.	A147912 (Contra Costa County Super. Ct. No. 51511468)

Defendant Nicole Johnson was convicted of second degree robbery and receiving a stolen vehicle after she and an accomplice stole a purse from a customer at McDonalds and used a stolen truck to make their getaway. Defendant now contends no substantial evidence supports the conviction for receipt of a stolen vehicle, and that the trial court erred in using jury instruction CALCRIM No. 376 to instruct the jury on possession of recently stolen property as evidence of a crime. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On May 30, 2015, Ramon Martin's white Silverado truck was stolen in Antioch.

On the afternoon of June 12, 2015, Anamarie Farias and her children went to a McDonald's in Martinez with other parents and children. Farias sat at a table talking with a friend with her purse on a table to her left. Farias noticed defendant standing behind her friend, and then defendant lunged across the table and grabbed Farias's purse. Defendant ran toward the exit and Farias followed. Outside McDonald's, a white truck pulled up, and defendant jumped in on the passenger side. Farias was able to grab the outside handle of the passenger door. From inside the truck, defendant tugged the door

closed with her left hand and swatted Farias's hand away from the door handle with her right hand. The truck accelerated, and Farias had to let go of the door handle. A car blocked the truck from the front, so the truck backed up, maneuvered to the left, and recklessly drove out of the parking lot.

Estee Smalley was in the McDonald's parking lot that afternoon. She noticed a white pickup truck going the wrong way in the parking lot and then a woman running to the truck with people chasing after her. Smalley took pictures of the truck with her phone.

Martinez Police Officer Miles Williamson was dispatched to McDonald's, where he spoke with Farias and other witnesses, including Smalley, and viewed surveillance video taken inside the restaurant.

After speaking with the police, Smalley drove to a nearby Walmart, where she saw the white truck again. She reported this to the police.

Williamson and his partner drove to the Walmart, about half a mile away, where they found the white truck from Smalley's photo, as well as the two suspects—later identified as defendant and Raymond Gilmore—who appeared in the McDonald's surveillance video and Smalley's photos. Defendant and Gilmore were walking toward the truck, and each was carrying a backpack or bag. Williamson told them to sit on the curb, and they complied. When the officer told them why he stopped them and asked if they had any property related to the crime, defendant responded that she had some of the property and told him the purse was nearby, pointing behind a shipping container. Another officer retrieved Farias's purse. Soon after Williamson located the truck, Farias and Smalley arrived at the Walmart parking lot. Farias identified defendant. Smalley identified defendant, Gilmore, and the truck.

Williamson arrested defendant and Gilmore and searched them incident to arrest. In Gilmore's wallet, Williamson found checks for personal accounts other than Gilmore's or defendant's. These included checks with the name Wendy Brown. He also had a credit or debit card for Wendy Brown.

Williamson found identification cards on defendant that did not belong to her. Defendant had a Visa debit card in the name of a woman other than herself. She had a driver's license with her photograph but another woman's identifying information (different from the name on the debit card). In defendant's duffel bag, Williamson found a notepad with three pages of names and what appeared to be "identity theft related items" such as social security numbers and credit card numbers with expiration dates and security numbers.

The keys to the white truck were found in the ivy near where Gilmore was seated on the curb. The truck had a Washington state license plate on the back and no front plate. The license plate did not match the truck. Inside the truck behind the seats, the police found some clothes, a laptop computer, a pencil box, and a notebook pouch. The pencil case contained syringes, methamphetamine pipes, and dirty baggies, and the pouch contained mail and miscellaneous items with various names other than defendant's or Gilmore's. There was a checkbook in the driver door storage compartment. The first check was written out to defendant. In the bed of the truck, there were other license plates in a plastic container.

The white truck Gilmore and defendant used in stealing Farias's purse was Martin's stolen truck.

Defendant and Gilmore were charged with second degree robbery (Pen. Code,[1] § 211; count 1) receiving stolen property, a motor vehicle (§ 496d, subd. (a); count 3), unauthorized use of personal identifying information (§ 530.5, subd. (a); count 5), and misdemeanor possession of a smoking device (Health & Saf. Code, § 11364; count 6). Gilmore was also charged with taking a vehicle without consent (Veh. Code, § 10851, subd. (a); count 2), and defendant was charged with possession of a forged driver's license (§ 470b; count 4) and misdemeanor fraudulent possession of personal identifying information (§ 530.5, subd. (c)(1); count 7). Gilmore reached a plea agreement and did not go to trial.

[1] Further undesignated statutory references are to the Penal Code.

Defendant testified on her own behalf at trial. Gilmore was her friend, and she had known him off and on for a year and a half. Gilmore had a car during the time defendant knew him, and it was not the white truck. Defendant saw Gilmore driving the white truck on June 11, 2015, when he picked her up in the truck. The next morning, Gilmore again picked up defendant in the white truck. They drove around and parked and sat in a couple of different parking lots.

In the afternoon of June 12, defendant and Gilmore were eating at McDonald's when they saw Farias and her purse. They made a plan that Gilmore would get the white truck, defendant would remain in the restaurant and grab the purse, and Gilmore would be outside in the white truck for their getaway. Defendant admitted she took the purse, ran for the exit, and jumped in the truck. She closed the door of the truck and, immediately after that, Farias opened it. Defendant shut the door again and locked it. Gilmore and defendant then drove to the Walmart parking lot. Gilmore went through Farias's purse and handed defendant a wallet. They walked around the parking lot and hid the purse. Defendant had clothing in a duffel bag in the truck. Gilmore got their belongings out of the truck.

Defendant testified that the pencil case that was found in the truck belonged to Gilmore. She knew it contained drug paraphernalia because she had seen the contents that day, and she recognized the pipes and syringes as drug paraphernalia because she was an addict. Defendant had used methamphetamine with Gilmore in the past and shared pipes with him, but she denied using methamphetamine with him on June 11 or 12, 2015. In the checkbook for Wendy Brown, there were two checks written payable to Gilmore and one check payable to defendant. Defendant admitted that she had written the checks earlier that day and then given them to Gilmore. She said Gilmore asked her to write the checks.

Defendant's primary defenses were that she did not use force in taking Farias's purse, and therefore did not commit robbery (count 1), and that she did not possess the stolen truck, and therefore did not receive stolen property (count 3). Following a jury trial, defendant was found guilty of all counts as charged.

DISCUSSION

A. *Sufficiency of the Evidence of Receiving a Stolen Vehicle*

"[T]o sustain a conviction for receiving stolen property, the prosecution must prove (1) the property was stolen; (2) the defendant knew the property was stolen; and, (3) the defendant had possession of the stolen property." (*People v. Land* (1994) 30 Cal.App.4th 220, 223 (*Land*).)

Defendant contends the prosecution in this case failed to prove two of these elements: that she possessed the property and that she knew the property was stolen. We are not persuaded.

" 'When a defendant challenges the sufficiency of the evidence, " '[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " ' . . . 'Although a jury must acquit if it finds the evidence susceptible of a reasonable interpretation favoring innocence, it is the jury rather than the reviewing court that weighs the evidence, resolves conflicting inferences and determines whether the People have established guilt beyond a reasonable doubt.' [Citation.] ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " (*People v. Casares* (2016) 62 Cal.4th 808, 823–824.)

1. Possession

"Possession of the stolen property may be actual or constructive and need not be exclusive." (*Land*, *supra*, 30 Cal.App.4th at p. 223, fn.) "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.) In the case of a stolen vehicle, it has been recognized that mere presence in the vehicle is not sufficient to show possession (*In re Anthony J.* (2004) 117 Cal.App.4th 718, 729 (*Anthony J.*)), but actually driving the

vehicle is not necessary to establish possession (*Land*, *supra*, at p. 223, fn. 2). The facts of *Land* and *Anthony J.* are instructive.

In *Land*, the defendant's friend arrived in a white car and told defendant the car was stolen. Defendant Land and his friend drove to the San Fernando Valley in the stolen car, and the friend stole some food from a 7-Eleven. Then Land and his friend robbed a man at rifle point. They made the victim crawl into the stolen white car, shot him in the back, and drove off in the victim's car. (*Land*, *supra*, 30 Cal.App.4th at pp. 222–223.) Land was convicted of, among other things, receiving stolen property (the white car), and he argued on appeal the conviction had to be reversed because there was no evidence he possessed the vehicle. (*Id.* at p. 223.) The Court of Appeal rejected Land's argument. After surveying cases from other jurisdictions, the court distilled the following: "[A]dditional factual circumstances are necessary to establish a passenger has possession or control of the stolen car. . . . [But] there is no single factor or specific combination of factors which unerringly point to possession of the stolen vehicle by a passenger." (*Id.* at p. 228.) Rather, "the question of possession turns on the unique factual circumstances of each case." (*Ibid.*)

Turning to the facts at hand, the *Land* court concluded, "The evidence established the driver and [Land] were friends. They drank together, did drugs together, and presumably knew each other well. [Land] knew the car was stolen. The car was stolen near [Land's] residence and they drove in it within the hour of its theft. They used the vehicle for their own benefit and enjoyment. The car was instrumental in their joint criminal enterprise that evening. They first used the car to transport them to the [San Fernando] Valley to commit the theft at the 7–Eleven store. Then they used the car in the robbery, assault and attempted murder of [the victim]. [¶] From the facts of [Land's] close relationship to the driver, use of the vehicle for a common criminal mission, and stops along the way before abandoning it (during which [Land] apparently made no effort to disassociate himself from his friend or the stolen vehicle) a reasonable juror could infer [Land], as the passenger, was in a position to exert control over the vehicle. This

inference, in turn, would support a finding of constructive possession." (*Land*, *supra*, 30 Cal.App.4th at p. 228.)

In *Anthony J.*, in contrast, the minor Anthony testified his friend told him, " 'come on,' " and then Anthony and his friend got in the backseat of a BMW. (*Anthony J.*, *supra*, 117 Cal.App.4th at p. 723.) Anthony had seen the driver once before at a cousin's house, but he did not know the driver well. They drove around for 20 or 30 minutes and parked. Soon after, all the occupants of the BMW were detained. (*Id*. at pp. 722–724.) The Court of Appeal held this was not sufficient to establish Anthony received stolen property. The court explained, "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 Anthony J. 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 Anthony J. was not. There were no facts showing that Anthony J. and the driver were friends, that they had engaged in criminal activity together in the past, that he was a passenger shortly after the vehicle was stolen, or that Anthony J. and the driver jointly used the vehicle to commit crimes. Thus, the People's evidence did not demonstrate beyond a reasonable doubt that Anthony J. had possession of the vehicle, either actual or constructive." (*Id*. at p. 729.)

Here, the facts are closer to *Land* than to *Anthony J*. Defendant and Gilmore were friends, they had done drugs together in the past, they spent the morning driving around and parking, and they planned to steal Farias's purse together using the stolen truck as the getaway car. Then they followed through with their plan. In addition, defendant kept her belongings in the truck (her duffel bag contained her clothes), she was familiar with the contents of the truck, and a check written out to her was found in the driver side storage compartment, further evidence suggesting she exerted a measure of control over the truck together with Gilmore. And, as we will explain, there was sufficient evidence for a reasonable jury to infer defendant knew the truck was stolen. Taken together, we

conclude this was sufficient evidence to support a finding of constructive possession of the stolen truck.

2. Knowledge

Defendant argues that even if she possessed the white truck, there was no evidence she knew the truck was stolen. We disagree.

"Knowledge [that property has been stolen] may be circumstantial and deductive. [Citations.] Among the elements from which knowledge may be inferred are that the property was obtained from a person of questionable character [citation], and the failure of the accused to satisfactorily explain his possession. [Citation.] Possession of stolen property, accompanied by an unsatisfactory explanation of the possession or by suspicious circumstances, will justify an inference that the property was received with knowledge it had been stolen. [Citation.] It is enough if, considering all the evidence, which may be circumstantial, an inference of guilt may be found." (*People v. Boinus* (1957) 153 Cal.App.2d 618, 621–622.)

In this case, defendant knew Gilmore had a car, but the white truck was not that car. According to defendant, Gilmore showed up with the white truck the day before they stole the purse. The truck had an out-of-state license plate and there were two additional license plates in "plain view" in the bed of the truck.[2] These suspicious circumstances were such that defendant could infer the truck was stolen. Moreover, as the Attorney General notes, the evidence showed Gilmore and defendant were involved in identity theft together and planned to steal a purse together, further evidence that would have suggested to defendant that the white truck Gilmore showed up with may have been stolen. We conclude the evidence was sufficient for a reasonable jury to find defendant knew the white truck was stolen.

[2] Again, defendant kept her belongings in the truck and was familiar with its contents, and she had spent hours with Gilmore driving around and parking the truck. It could be inferred that she would have noticed the two license plates in plain view in the truck bed.

B. *CALCRIM No. 376*

The trial court instructed the jury with CALCRIM No. 376 as follows: "If you conclude that the defendant knew she possessed property and you conclude that the property had in fact been recently stolen, you may not convict the defendant of Second Degree Robbery, Grand Theft, Petty Theft, or Receiving Stolen Property—Motor Vehicle based on those facts alone. However, if you also find that supporting evidence tends to prove her guilt, then you may conclude that the evidence is sufficient to prove she committed Second Degree Robbery, Grand Theft, Petty Theft, or Receiving Stolen Property—Motor Vehicle.

"The supporting evidence need only be slight and need not be enough by itself to prove guilt. You may consider how, where, and when the defendant possessed the property, along with any other relevant circumstances tending to prove her guilt of Second Degree Robbery, Grand Theft, Petty Theft, or Receiving Stolen Property—Motor Vehicle.

"Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

"CALCRIM No. 376, is based on a 'longstanding rule of law [that] allows a jury to infer guilt of a theft-related crime from the fact a defendant is in possession of recently stolen property when coupled with slight corroboration by other inculpatory circumstances [that] tend to show guilt.' " (*People v. Lopez* (2011) 198 Cal.App.4th 698, 709 (*Lopez*).) Defendant argues, however, this jury instruction permitted the jury to convict defendant of robbery and receiving a stolen motor vehicle on less than proof of all the elements for these offenses. She contends the instruction itself is "unconstitutional and based on an unreasonable inference." We are not convinced.

The instruction reminded the jury it was not allowed to convict unless "convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt." Other instructions correctly stated the elements of robbery (CALCRIM No. 1600) and the elements of receiving stolen property

(CALCRIM No. 1750). The jury would not have understood CALCRIM No. 376 as instructing it to ignore those elements or to convict on less than a finding that each element of those offenses was proven beyond a reasonable doubt.

Moreover, CALCRIM No. 376 has already withstood similar constitutional challenges. In *People v. O'Dell* (2007) 153 Cal.App.4th 1569, 1573, the appellant argued the use of CALCRIM No. 376 "violated his Sixth Amendment right to have each element of the charged offense proved beyond a reasonable doubt and violated his Fourteenth Amendment right to due process of law." The reviewing court disagreed, concluding, "The instructions repeatedly informed the jury that each element of the offense must be proved beyond a reasonable doubt, and thus the giving of CALCRIM No. 376 did not remove the issue of intent from the jury. [Citations.] CALCRIM No. 376 itself accurately describes the law regarding mental state inferences to be drawn from possession of stolen property. The instruction did not infringe on [the] appellant's constitutional rights." (*Id*. at p. 1577.) Other cases are in accord. (See *Lopez*, *supra*, 198 Cal.App.4th at pp. 710–711; *People v. Solorzano* (2007) 153 Cal.App.4th 1026, 1036.)

In short, we reject defendant's constitutional challenge to CALCRIM No. 376.

DISPOSITION

The judgment is affirmed.

_____
Miller, J.

We concur:

_____
Kline, P.J.

_____
Richman, J.

Appendix B

Order
of the California Court of Appeal
Denying Petition for Rehearing

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 2

THE PEOPLE,
Plaintiff and Respondent,
v.
NICOLE JOHNSON,
Defendant and Appellant.

A147912
Contra Costa County No. 51511468

BY THE COURT:

Appellant's petition for rehearing is denied.

Date: AUG 17 2018

_____ P.J.

Appendix C

Order of the California Supreme Court Denying Review

Court of Appeal, First Appellate District, Division Two - No. A147912

S251068

IN THE SUPREME COURT OF CALIFORNIA

En Banc

THE PEOPLE, Plaintiff and Respondent,

v.

NICOLE JOHNSON, Defendant and Appellant.

The petition for review is denied.

Corrigan, J., was absent and did not participate.

CANTIL-SAKAUYE
Chief Justice