NO. 41689-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS DAVIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Stephanie A. Arend, Judge

BRIEF OF APPELLANT

JENNIFER M. WINKLER
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports appellant's conviction for first degree unlawful possession of a firearm.

2. Insufficient evidence supports appellant's conviction for possession of a stolen firearm.

3. The aggravating factors the court relied on to impose an exceptional sentence for appellant's conviction for first degree unlawful possession of a firearm are legally and factually inapplicable.

4. The court granted appellant's motion to dismiss three out of four original charges of rendering criminal assistance but failed to indicate such dismissal on the judgment and sentence.

Issues Pertaining to Assignments of Error

1. Where the State presented insufficient evidence of the appellant's dominion and control over a stolen firearm, must this Court reverse the appellant's convictions for first degree unlawful possession of a firearm (UPFA) and possession of a stolen firearm?

2. Where the victim of UPFA is the general public, must this court reverse sentencing aggravators for (a) destructive and foreseeable impact on someone *other than* the victim and (b) law enforcement victim?

3. Should the judgment and sentence be corrected to reflect the court's dismissal of three counts of rendering criminal assistance?

B. STATEMENT OF THE CASE[1]

1. Procedural facts

The State charged Douglas Davis (Douglas) with four counts of rendering criminal assistance (counts 1-4), two counts of first degree UPFA (counts 5 and 6) and one count of possession of a stolen firearm (count 7) for conduct occurring in the aftermath of Maurice Clemmons's shooting of four Lakewood police officers.[2] CP 537-41.

The court dismissed one count of UPFA related to the State's allegation regarding one of Clemmons's own firearms. 19RP 50-51; CP 640. The court refused to dismiss the remaining counts, which were based on possession of a gun Clemmons took from one of the slain officers. CP 537-41; 19RP 64-69; 27RP 1036-45; 29RP 1342-58. The court later

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[1] This brief refers to the verbatim report as follows: 1RP – 1/7/10; 2RP – 1/26/10; 3RP – 3/4/10; 4RP – 3/17/10; 5RP – 3/31/10; 6RP – 4/14/10; 7RP – 4/20/10; 8RP – 4/29/10; 9RP – 5/7/10; 10RP – 6/7/10; 11RP – 6/25/10; 12RP – 6/30/10; 13RP – 7/14/10; 14RP – 8/5/10; 15RP – 9/7/10; 16RP – 9/8/10; 17RP – 9/9/10; 18RP – 10/11/10; 19RP – 10/12/10; 20RP – 10/26/10; 21RP – 10/28, 11/2, 11/3, and 11/4/10; 22RP – 11/8/10; 23RP – 11/9/10; 24RP – 11/10/10; 25RP –11/15/10; 26RP – 11/16/10; 27RP – 11/17/10; 28RP – 11/18/10; 29RP – 11/22/10; 30RP – 11/29 and 11/30/10; 31RP – 12/1/10; 32RP – 12/2/10; 33RP – 12/6/11; 34RP 1/14/11; and 35RP – 1/19/11. 21- through 33RP are consecutively paginated and assigned "trial volume" numbers that do not correspond to the volume number assignments in this brief.

[2] Douglas was tried with co-defendants Eddie Davis (Clemmons's cousin, of no relation to Douglas), Rickey Hinton (Clemmons's brother), and Letricia Nelson (Clemmons's aunt).

dismissed two counts of rendering and consolidated the other two counts, which the State had attempted to divide by date. 29RP 1350-53; 30RP 1606. Thus, the jury was eventually instructed on one count of rendering, one count of UPFA, and count of possession of a stolen firearm. CP 695-736.

The jury acquitted Douglas of rendering but convicted on the two firearm-related counts. CP 737-39. It also found by special verdict two aggravators applied to each of the firearm counts under RCW 9.94A.535(3)(r) and (v).[3] CP 735, 740-42. The court found an exceptional sentence was appropriate based on the special verdicts and entered exceptional sentences of 45 months on each count, for a total or 90 months confinement.[4] CP 768-70.

2. Trial testimony

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[3] RCW 9.94A.535(3) provides that the following factors may provide a sentence above the standard range:

> (r) The offense involved a destructive and foreseeable impact on persons other than the victim.
>
> (v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

[4] Because the Sentencing Reform Act requires that sentences for such convictions run consecutively, the standard range for the offenses was 26-34 plus 13-17 months, or 39-51 months. CP 774; RCW 9.94A.589(1)(c).

The morning of November 29, 2009, Clemmons shot four police officers in a Parkland coffee shop. 22RP 226-27. He killed three officers with guns he brought to the coffee shop. 22RP 231. A fourth officer, Greg Richards, shot but did not incapacitate Clemmons. Clemmons then wrestled Richards's service pistol from him and used the gun to fatally shoot Richards. 22RP 233. When Clemmons was killed by a Seattle police officer the early morning hours of December 1, Clemmons was armed with Richards's gun. 27RP 1131-36.

Within a few hours, authorities identified Clemmons as a suspect based on registration information for a white truck seen speeding from the area. 22RP 251-57; 23RP 421-24. Although the registration eventually led authorities to Clemmons's address, the suspect himself remained at large. 23RP 430.

Clemmons, along with a number of extended family members, came to Washington from Arkansas. By 2009, Clemmons owned a landscaping business and several residences, including a property with two residences at 774 132nd Street South in Parkland. 23RP 280; 29RP 1428. Brother Rickey Hinton lived in the main house, while cousin Eddie Davis and employee Douglas Davis lived in the "mother-in-law" unit. 23RP 279-80. Douglas had moved to Washington from Arkansas after his friend

told him Clemmons could offer Douglas a job in the landscaping business. 29RP 1388-89, 1439.

Clemmons's cousin, Cicely Clemmons (Cicely), and her mother, defendant Letricia Nelson, lived in Pacific. 23RP 275, 283, 493. Cicely, who was not charged with a crime, testified at trial. After bailing out of jail on an unrelated charge, Clemmons attended Thanksgiving dinner at their home. 26RP 915; 27RP 1163. Clemmons was upset by his treatment in jail and threatened to kill police officers if they tried to detain him again. 23RP 302-03, 496-97; 27RP 1163. These remarks upset Cicely but she said nothing to him. Clemmons was often controlling; even family and friends were afraid to contradict him. 23RP 372-74; 29RP 1396-97, 1402, 1423-24.

After Thanksgiving, Cicely next saw Clemmons the morning of November 29. 23RP 283, 304. She was asleep in her bedroom when she heard Clemmons come in and announce he had just killed four police officers. 23RP 307. Cicely heard Clemmons ask Nelson for a shirt and a plastic bag to cover his gunshot wound. 23RP 307. She also heard Clemmons order someone to "tie it tight." 23RP 308-09.

When Cicely emerged from her room, she saw that Eddie and Douglas were also present. 23RP 308. Clemmons remarked that one of the officers shot him in the stomach, but he downplayed the injury and

bragged he shot the officer with his own gun. 23RP 312-13. The wound was covered up by the time Cicely emerged. 23RP 351-52. Clemmons ordered Cicely to give her car keys to Eddie, then told Eddie to call "Quiana" and arrange for her to meet Clemmons at the nearby Auburn Super Mall. 23RP 308, 311, 371, 384-85.

Cicely noticed Clemmons was wearing her uncle's clothing; Clemmons's own clothing was in a Tommy Hilfiger shopping bag on the kitchen counter.[5] 23RP 314. Before the men left, Clemmons demanded to know where the gun was and Eddie answered it was in the bag. Eddie then retrieved the gun for Clemmons. 23RP 320. Douglas was in the room, but Cicely never saw him touch the bag or gun. 23RP 377.

The three men left in Cicely's car and the white Pontiac they had arrived in. 23RP 324. About five minutes later, only Eddie and Douglas returned in Cicely's car. 23RP 322-23.

On November 30, 2009, Clemmons was still at large, and police suspected he might be hiding in a house in Renton. 24RP 543-44, 567. As police surveilled the house, a group of four people, including Eddie Davis, was seen leaving the house and driving away in a black BMW.

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[5] Cicely testified her mother must have gotten the bag for Clemmons because the men would not know where they kept household items. 23RP 396. Nelson confirmed this in her statement to police. 27RP 1175-76.

24RP 545. Police decided to stop the car because Eddie had an unrelated warrant. 24RP 548, 572. Douglas was a backseat passenger in the BMW. 25RP 791. Officers at the Pierce County sheriff's temporary command center, set up in response to the shooting, told officers to detain the other occupants and eventually ordered them sent to the South Hill Precinct for interrogation.[6] 24RP 570, 575; 25RP 791-92.

During interrogation, Eddie Davis initially denied contact with Clemmons the morning of November 29 but eventually admitted to police that Clemmons arrived at the Parkland property, announced he had been shot, and demanded Eddie drive him to Auburn. Eddie complied. 26RP 958, 965; 27RP 1011-12.

En route to the Auburn area, Clemmons bragged that he incurred his gunshot while shooting four police officers.[7] 26RP 965, 968-69, 995-96; 27RP 1012. Clemmons showed Eddie the wound, which was not serious. 26RP 966. At Cicely's residence, Clemmons, who remained mobile despite his injury, obtained peroxide and a change of clothes.

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[6] Police kept the car's occupants in custody based on directions from an FBI agent, who had received a tip from a confidential informant. The officers who testified at the suppression hearing, however, did not did not know the informant's identity, if he or she was reliable, or the basis of informant's information. 20RP 151-55. The trial court nonetheless ruled Douglas's statement was admissible. CP 799-802.

[7] Eddie acknowledged Clemmons previously said he planned to shoot police officers while dancing with a gun. 27RP 1014, 1022.

26RP 967. Afterward, Eddie drove Clemmons to the "Discount Tire" store at the Super Mall. 26RP 971-73, 998.

Like Eddie, Douglas eventually admitted contact with Clemmons the morning of November 29 after police confronted him with information gleaned from interviews with the other occupants of the BMW. 27RP 1081.

Douglas told the officers he was sleeping when Clemmons beat on the door at the Parkland residence and ordered him to accompany Clemmons to Auburn. 27RP 1081. Douglas complied because Clemmons was armed with a gun. 27RP 1081-82, 1115-19. Douglas described the gun and noted it was one he had never seen before. 27RP 1081-82. En route to Auburn, Clemmons told Douglas he had been shot by a police officer and that he "had to take care of his business." 27RP 1104-06; Ex. 69 at 7.[8] Douglas did not ask Clemmons to explain further, as Clemmons was making him nervous. 27RP 1120.

At the home near Auburn, Douglas used peroxide to clean Clemmons's wound, which was not serious. 27RP 1085-87. They stayed there about 15 minutes. 27RP 1085. As the men were leaving, Clemmons asked Douglas to follow him in the other car, and Clemmons got into a car

[8] Portions of the heavily redacted interview, transcribed as Exhibit 69, were published to the jury during the State's examination of Karr.

with a woman at an apartment complex. 27RP 1089. Douglas believed Clemmons took his clothes with him in a bag. 27RP 1111. Douglas was not certain what happened to the gun, but believed Clemmons kept it. 27RP 1088, 1110.

Police interviewed Letricia Nelson on December 2. Nelson acknowledged she retrieved the Tommy Hilfiger shopping bag for Clemmons and placed Clemmons's gun in the bag for him. 27RP 1175-76.

C. ARGUMENT

1. INSUFFICIENT EVIDENCE SUPPORTS THE APPELLANT'S FIREARM CONVICTIONS BECAUSE THE STATE DID NOT PROVE HE ACTUALLY OR CONSTRUCTIVELY POSSESSED THE STOLEN FIREARM.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

Under RCW 9.41.040(1)(a),

> A person . . .is guilty of the crime of unlawful possession of a firearm in the first degree, if the person . . . has in his or her possession [or] control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter.[9]

[9] Chapter 9.41 RCW does not define "control." In its ordinary meaning, "control" means "[t]o exercise power or influence over." Black's Law Dictionary 330 (7th Ed. 1999); see also State v. Holt, 119 Wn. App. 712, 720, 82 P.3d 688 (2004) (control means "[t]o exercise authority or influence over," citation omitted). Where the State must establish "dominion and control" to prove constructive possession, the term is redundant.

See CP 727 (Instruction 29). The State must prove knowing possession. State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000).

Under RCW 9A.56.310(1), "A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a stolen firearm." See CP 728 (Instruction 30).

The State's theory under both counts was that Douglas possessed the stolen firearm. The State acknowledged, however, there was no evidence that he actually possessed the firearm. Instead, the State's theory was that Douglas constructively possessed the gun that Clemmons stole, which must have occurred when Douglas was in Clemmons's presence. 32RP 1888-89.

As a preliminary matter, the same definition of "possession" governs drug and firearm cases in Washington.[10] Constructive possession is the exercise of dominion and control over an item. State v. Enlow, 143 Wn. App. 463, 468-469, 178 P.3d 366 (2008) (citing State v. Callahan, 77 Wn.2d 27, 29-30, 459 P.2d 400 (1969)). "Dominion and control means that the object may be reduced to actual possession immediately." State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). To determine if there is

[10] See Comment, WPIC 133.52 ("WPIC 133.52 parallels the instruction used for drug offenses (WPIC 50.03, Possession—Definition). For a discussion of issues relating to constructive possession, see the Comment to WPIC 50.03.").

sufficient evidence of dominion and control, this Court examines the totality of the circumstances, including the proximity of the property and ownership of the premises where the contraband was found. Enlow, 143 Wn. App. at 469.

WPIC 133.52, provided to jurors as instruction 20, summarizes the law as follows:

> Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.
>
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP 717.

Ownership of a vehicle or premises is thus one factor to consider when assessing whether an accused has asserted dominion and control. State v. Turner, 103 Wn. App. 515, 521-24, 13 P.3d 234 (2000). An

automobile may be considered a "premises." State v. George, 146 Wn. App. 906, 920-21, 193 P.3d 693 (2008). But a passenger who is not the driver or owner of the vehicle does not exercise dominion and control over it. Id. at 920; State v. Cote, 123 Wn. App. 546, 550, 96 P.3d 410 (2004). Here, Douglas Davis did not own or drive the car where the gun was found, nor did he live at the residence where Clemmons stopped to change clothes and tend to his wound. Accordingly, this factor weighs against a finding Douglas had dominion and control of any weapon present on the premises.

The Callahan case and its progeny are instructive. Callahan did not own the houseboat he was found on, but he was seen near drugs and he admitted handling the drugs earlier that day. Callahan, 77 Wn.2d at 28-31. Callahan had been on the houseboat for two or three days and had with him two books, two guns, and a set of broken scales. Id. at 31, 459 P.2d 400. The Court found insufficient evidence to find Callahan in constructive possession of the illegal drugs. Id.

In State v. Spruell, 57 Wn. App. 383, 384, 788 P.2d 21 (1990), police raided Spruell's home and observed Luther Hill, a guest, stand up from a table where there were drugs and drug paraphernalia. The court found no constructive possession even though Hill's fingerprints were on a plate containing cocaine residue. Id. at 388-89.

In Cote, the evidence showed Cote arrived at a residence as a passenger in a stolen truck and his fingerprints were found on mason jars containing precursor chemicals in the back of the truck. This Court held the evidence was insufficient to establish constructive possession of illegal substances. The Court reasoned:

> The evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it. But under Callahan and Spruell this is insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession.

Cote, 123 Wn. App. at 550.

Finally, in State v. Enlow, 143 Wn. App. 463, 178 P.3d 366 (2008), police serving a search warrant found Enlow hiding under a blanket in the canopy-covered back of a pickup truck. They found Enlow's Washington identification card in the back of the truck and Enlow's inmate identification card in a shirt pocket in the cab. The truck was registered to someone else. Id. at 466, 468.

The officers found Enlow's fingerprints on several items in the bed of the truck. Other items had various residues and chemicals used in the manufacture of methamphetamine, but none had Enlow's fingerprints. Id. at 468-69. Citing Callahan, Spruell and Cote, the Court found the State failed to prove constructive possession. Enlow, 143 Wn. App. at 468-69.

Because Douglas did not own or control the premises or vehicle where the gun was located during the events in question, as in the preceding cases, this factor weighs against a finding of dominion and control.

Other factors to consider are (1) whether the defendant had the immediate ability to take actual possession of the item and (2) whether the defendant had the capacity to exclude others from possession of the item. WPIC 133.52. Like the ownership factor, these factors likewise fail to support constructive possession by Douglas.

Preliminarily, the proximity of a weapon goes only to its accessibility, not to dominion or control, which must be proven to establish constructive possession. United States v. Soto, 779 F.2d 558, 560-61 (9th Cir.1986), cert. denied, 484 U.S. 833 (1987). But in any event, there was no evidence Douglas was ever near enough to the gun to take it into his immediate possession. Cf. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (finding a rational trier of fact could reasonably infer that the defendant controlled a gun that was within arm's reach within a vehicle he owned).

Similarly, the State offered no evidence Douglas had the capacity to exclude others from possessing the gun. The evidence instead established Maurice Clemmons controlled the movement of the gun, even

while it was out of his hands, and retained control of the gun after he parted from Douglas and the others. 23RP 320; 27RP 1088, 1110, 1131-36. Douglas told police he complied with Clemmons's order to ride in the car with him because *Clemmons* was armed with a gun. 27RP 1081-83. Evidence of actual possession by another may be sufficient to defeat a conviction based on a theory of constructive possession. See, e.g., Parnell v. State, 438 So. 2d 407, 407-08 (Fla. App. 1983) (evidence insufficient to prove Parnell's constructive possession of rifle on floor of back seat when car's owner admitted he possessed it); Woodall v. State, 97 Nev. 235, 627 P.2d 402, 403 (1981) (evidence showed Woodall or other occupant had equal access to gun found in truck; other occupant's admission of possession created reasonable doubt of Woodall's possession); Henderson v. State, 715 N.E.2d 833, 838 (Ind. 1999) (fact that passenger could have picked up gun at his feet did not establish dominion and control where gun was registered to and within reach of driver, and no evidence showed passenger made any movement or action to exercise dominion).

The evidence at trial suggested that, in addition to Clemmons, Eddie Davis and Letricia Nelson handled the gun. Even assuming such

"passing control"[11] was sufficient to establish possession, there was no similar evidence regarding Douglas.[12] 23RP 377. The State offered not a scintilla of evidence Douglas had the capacity to exclude others from possession of the firearm.

While the above factors weigh strongly against a finding a dominion and control, Douglas anticipates the State will argue that a trier of fact could find constructive possession based on some other undefined circumstance or residue of the rendering charge, of which Douglas was acquitted. In rebuttal, for example, the State suggested that because Clemmons had been shot, he must have been incapacitated, and therefore Douglas must have engaged in some sort of cooperative possession of the firearm on behalf of the incapacitated Clemmons. 32RP 1890. But the State's argument is not evidence. State v. Ford, 137 Wn.2d 472, 483 n. 3, 973 P.2d 452 (1999). And as set forth above, the evidence did not support the State's theory. A trier of fact must review both the evidence and lack of evidence in reaching its verdict. See WPIC 4.01 (the presumption of

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[11] See George, 146 Wn. App. at 920 ("[P]ossession entails actual control, not a passing control which is only a momentary handling.") (quoting Callahan, 77 Wn.2d at 29).

[12] Clemmons may have been briefly physically incapacitated when Douglas helped tend to his wound. But if, as the evidence showed, Douglas was the one tending to him with peroxide, this only confirms that Douglas was not in charge of handling the gun.

innocence continues until overcome by proof beyond a reasonable doubt; "[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence").

Finally, in denying Douglas's motion to dismiss the charges, the trial court determined that the evidence of dominion and control was "slim," but because there was some evidence suggesting Douglas may have been *aware* there was a gun present somewhere in the vicinity, the State showed more than mere proximity. 29RP 1353-58.

The trial court was mistaken as to the legal consequence of such knowledge. The facts of the cases discussed above clearly demonstrate that the defendants in Callahan, Spruell, Cote, and Enlow *knew* about the contraband they were found near, because the items were in plain view or there was telltale fingerprint evidence. Yet in each case, the reviewing court found insufficient evidence the defendants possessed the contraband. Those cases control the result here.

In many ways, the State's evidence is weaker than in those cases: There was no fingerprint evidence or admission to handling the item, even briefly. It was also clear in this case who retained control of the item at all times. That person was not Douglas Davis. The State therefore did not prove that Douglas had dominion and control over the weapon. In fact,

throughout its lengthy case, the State's evidence proved the opposite proposition.

The convictions, based as they are on insufficient evidence, must be reversed and dismissed. Smith, 155 Wn.2d at 504-05; State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). .

2. THE EXCEPTIONAL SENTENCE ON THE UPFA COUNT MUST BE REVERSED BECAUSE THE AGGRAVATORS ARE LEGALLY AND FACTUALLY INAPPLICABLE TO THAT COUNT.

This court reviews a jury's special verdict finding the existence of an aggravating circumstance under the sufficiency of the evidence standard. State v. Chanthabouly, __ Wn. App. ___, __ P.3d ___, 2011 WL 4447863 at 21 (Sept. 27, 2011) (citing State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010); RCW 9.94A.585(4) (stating that this court may reverse a sentence outside the standard range if "the reasons supplied by the sentencing court are not supported by the record")).

The jury must find the facts supporting an aggravated sentence beyond a reasonable doubt. State v. Hyder, 159 Wn. App. 234, 259-60, 244 P.3d 454, review denied, 171 Wn.2d 1024 (2011). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. Smith, 155 Wn.2d at 502.

Where a statute is clear on its face, its meaning must derive from the plain language of the statute alone. Absent a specialized statutory definition, this Court will give a term its plain and ordinary meaning ascertained from a standard dictionary. State v. Webb, 162 Wn. App. 195, 252 P.3d 424 (2011) (citing State v. Watson, 146 Wn.2d 947, 954-55, 51 P.3d 66 (2002)).

For the first aggravator to apply, the plain language of the statute required the jury to find that the offense involved a destructive and foreseeable impact on persons *other than* the victim. RCW 9.94A.535(3)(r); CP 735 (Instruction 36). The victim of unlawful possession of a firearm, however, is the public. State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000) (analogizing UPFA to possession of a controlled substance). "Public" is defined as the people as a whole. Webster's Third New International Dictionary 1836 (1993). Because the "public" is all encompassing, there can be no person "other than" the victim. By its plain language, the aggravator could not apply.

As to the second aggravator, the jury also found "[t]he offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense." RCW

9.94A.535(3)(v); CP 735 (Instruction 36). For this aggravator to apply, however, the statute's plain language requires that the "victim" of the charged crime be a law enforcement officer. Yet, unlike a conviction for possession of stolen property, the victim of unlawful possession based on prior convictions is the public, i.e., the people as a whole. Haddock, 141 Wn.2d at 111 (victim of crime of possession of a stolen firearm is the firearm's true owner). Thus the evidence that the victim was a particular law enforcement officer was necessarily insufficient as to the UPFA count.

Because there was insufficient evidence to support the aggravators, this court should remand for the entry of a standard range sentence on the UPFA count. Webb, 162 Wn. App. at 211-12 (remedy where insufficient evidence of aggravating factor is resentencing based on the standard range for the crime).

3. THE TRIAL COURT PROPERLY GRANTED MOTIONS TO DISMISS VARIOUS RENDERING COUNTS BUT FAILED TO SET FORTH ITS RULING IN THE JUDGMENT AND SENTENCE.

The court dismissed count 6 based on insufficient evidence. 19RP 50-51. The court also dismissed two rendering counts, counts 1 and 2, for insufficient evidence. 29RP 1348-52. The court later determined

rendering counts 3 and 4 were a single unit of prosecution, and ruled only one count could go to the jury. 30RP 1606.

The court entered a separate order dismissing count 6, but did not enter an order dismissing the other counts. CP 640. The judgment and sentence, which contains a blank space for the court to list dismissed charges, does not mention the charges. CP 775.

This Court should remand for amendment of the judgment and sentence to reflect the court's dismissal of three out of four of the rendering counts or, in the alternative, enter an order dismissing the counts. See State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's error referring to wrong statute on judgment and sentence form); see also State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

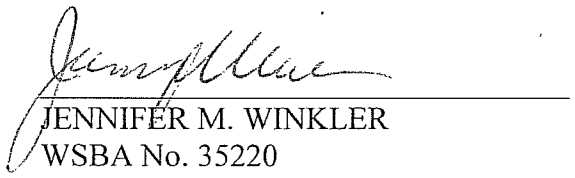
D. CONCLUSION

Because the evidence of constructive possession is insufficient, this Court should vacate counts 5 and 7 and remand to the trial court with directions to dismiss the charges with prejudice. Alternatively, because there was insufficient evidence of each aggravator, this Court should remand for resentencing on the UPFA count based on the standard range for the crime. In any event, this Court should remand for a written order dismissing three rendering counts to reflect the trial court's oral rulings dismissing the charges.

DATED this 30TH day of September, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



JENNIFER M. WINKLER
WSBA No. 35220
Office ID No. 91051

Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 41689-1-II
	)	
DOUGLAS DAVIS,	)	
	)	
Appellant.	)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DOUGLAS DAVIS
NO. 326926
LARCH CORRECTIONS CENTER
15314 NE DOLE VALLEY ROAD
YACOLT, WA 98675

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER 2011.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

September 30, 2011 - 2:26 PM

Transmittal Letter

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Case Name: Douglas Davis
Court of Appeals Case Number: 41689-1

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Patrick P Mayavsky - Email: **mayovskyp@nwattorney.net**

A copy of this document has been emailed to the following addresses:

PCpatcecf@co.pierce.wa.us

karecrire@aol.com

SCCAttorney@yahoo.com