Supreme Court No. 90715-3
COA No. 72030-9-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY ANTONIO WILLIS,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Jeffery Antonio Willis requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Willis, No. 72030-9-I, filed July 28, 2014. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. A defendant in a criminal case is entitled to a jury instruction that is a correct statement of the law, as long as there is evidence to support the theory on which the instruction is based. The evidence must be viewed in the light most favorable to the defendant. Did the trial court err in refusing Mr. Willis's proposed jury instruction on "passing control," where the evidence showed that Mr. Willis had only momentary control of the firearm?

2. To prove the crime of unlawful possession of a firearm, the State must prove beyond a reasonable doubt that the defendant had actual or constructive possession of a firearm. In this case, the firearm was not in Mr. Willis's actual possession at the time it was found by the police. Also, the evidence showed that earlier, Mr. Willis had only momentary control of the firearm. Was the evidence insufficient to prove the element of "possession" beyond a reasonable doubt?

C. STATEMENT OF THE CASE

On October 21, 2011, at around 10:30 p.m., Jeffery Willis went to a bar and grill in Tacoma to celebrate having painted his first car in his auto mechanics class. 4/18/12RP 7-9. He stayed for a few hours, drinking vodka and celebrating with friends. 4/18/12RP 8-9. He had not drunk much in the past few months and was not used to the effects of alcohol. 4/18/12RP 20. He became quite inebriated. 4/18/12RP 20.

Toward the end of the evening, at around 1:30 or 2 a.m., Mr. Willis went outside to urinate in the parking lot because he had been told the restroom inside the bar was closed. 4/18/12RP 11. He thought he was urinating on the ground but in fact he was urinating on someone's car. 4/18/12RP 11. As he was urinating, the man who owned the car, a regular at the bar named "Norman," walked by and hit him in the head. 4/16/12RP 26; 4/18/12RP 10.

Norman stormed back into the bar, yelling that Mr. Willis had just urinated on his car and must pay to have it washed. 4/16/12RP 26. Mr. Willis came in behind him and the two men yelled at each other and then broke into a fistfight. 4/16/12RP 27-28. The bartender, Sesilia Thomas, and the bouncer, Mulimauga Semaia, broke up the fight and escorted Mr. Willis outside. 4/16/12RP 28; 4/17/12RP 14.

Norman remained inside the bar. 4/16/12RP 28; 4/17/12RP 14. Ms. Thomas and Mr. Semaia told Mr. Willis to leave the premises. 4/16/12RP 32.

Mr. Willis was agitated and wanted to go back inside the bar to continue his fight with Norman. 4/16/12RP 33. Another man, Perry Griffin, was sitting in an SUV in a parking lot across the street and watching the proceedings. 4/16/12RP 44. Ms. Thomas had ejected Mr. Griffin from the bar earlier that evening for an unrelated incident. 4/16/12RP 34. Mr. Griffin was a "hothead" and a "trouble-maker" and Ms. Thomas had told him to leave and never come back. 4/16/12RP 43-44. When Mr. Griffin saw Mr. Willis, he drove his SUV back into the bar parking lot. 4/16/12RP 34, 44. He got out of his car and handed Mr. Willis what looked like a gun. 4/16/12RP 34. Ms. Thomas said the object looked like a silver semiautomatic handgun. 4/16/12RP 35, 55-56.

Mr. Willis did not know Mr. Griffin and had never seen him at the bar before. 4/17/12RP 16. Nonetheless, according to Ms. Thomas, Mr. Willis took the gun from Mr. Griffin. He tripped and the gun flew out of his hand. 4/16/12RP 35. He got up, grabbed the gun, and pointed it in the air, at which point the magazine fell out of the gun.

4/16/12RP 35. Mr. Willis did not point the gun at anyone and no shots were fired. 4/16/12RP 42, 47. He paced back and forth and walked toward the door of the bar but Ms. Thomas told him to leave. 4/16/12RP 36. He then walked behind a car and Mr. Griffin came over, grabbed the gun, and drove away in his SUV. 4/16/12RP 38-39. No one else handled the gun other than Mr. Griffin and Mr. Willis. 4/16/12RP 39.

Ms. Thomas estimated Mr. Willis had the gun in his hand for about two minutes. 4/16/12RP 49-50. A videotape from a security camera outside the bar showed the man in the parking lot held the gun in his hand for only about 30 seconds. 4/18/12RP 15.

Ms. Thomas noted Mr. Griffin's license plate number and called 911 and gave them the information. 4/16/12RP 38. Police officers soon arrived on the scene.

When the police arrived, Mr. Willis was just leaving the parking lot in a car with his brother and his brother's girlfriend. 4/17/12RP 28; 4/18/12RP 21. Mr. Willis was in the back seat. 4/17/12RP 30. Officers stopped the car and arrested Mr. Willis. 4/17/12RP 29, 32. They did not find any guns in the car. 4/17/12RP 34.

Other officers stopped the SUV that Mr. Griffin was driving and he was also arrested. 4/17/12RP 51-52. Mr. Griffin dropped a silver semiautomatic handgun onto the ground as he got out of the car. 4/17/12RP 53, 61. The police seized the gun and entered it into evidence. 4/17/12RP 56.

Mr. Willis was charged with one count of unlawful possession of a firearm in the first degree, RCW 9.41.040(1)(a); and one count of unlawful display of a firearm, RCW 9.41.270(1) and (2). CP 4-5.

At trial, a police officer testified that when police found Mr. Griffin's gun, it had a magazine in it but no round in the chamber. 4/17/12RP 53, 57. The gun would not fire without a round in the chamber. 4/17/12RP 64. The button required to release the magazine was very stiff and a person would need to use considerable force to release the catch. 4/17/12RP 62. Although someone gripping the gun could inadvertently hit the button, the button was so stiff the person would have to use concentrated effort to push hard enough to release it. 4/17/12RP 63.

Mr. Willis stipulated that the gun found on Mr. Griffin was test fired and found to be operational. 4/17/12RP 66.

At the close of testimony, defense counsel proposed the following instruction on "passing control":

> Possession is not established if, at most, there is passing control. Passing control is momentary handling.
>
> It is not enough that the defendant might have been in close proximity to the firearm or that he might have momentarily handled it with a brief and passing control.

CP 8. The trial court refused to give the instruction, saying the evidence did not support it. Counsel objected. 4/18/12RP 82-83.

The jury found Mr. Willis guilty of both counts as charged. 4/19/12RP 42; CP 13-14.

Mr. Willis appealed, arguing among other things that the trial court erred in refusing to provide his proffered jury instruction on "passing control," and that the evidence was insufficient to prove the element of possession. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' conclusion that the defense-proposed jury instruction on passing control was an incorrect statement of law conflicts with State v. Werry, warranting review by this Court under RAP 13.4(b)(2)

It is a fundamental principle of criminal procedure that a defendant in a criminal case has a constitutional right to fully defend against the charges. "The right of an accused in a criminal trial to due

process is, in essence, the right to a fair opportunity to defend against the State's accusations." Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV; Const. art. I, § 3.

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). The trial court must provide an instruction that supports the defense theory, as long as the instruction is an accurate statement of the law and is supported by the evidence. State v. Wanrow, 88 Wn.2d 221, 237, 559 P.2d 548 (1977).

To prove a defendant committed a crime involving the possession of contraband, the State must prove "possession" as an element of the offense. Staley, 123 Wn.2d at 802. "Possession is defined in terms of personal custody or dominion and control." Id. at 798. Possession may be actual or constructive. Id. "Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." Id.

To prove constructive possession, the State must establish "actual control, not a passing control which is only a momentary handling." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Whether the defendant had actual control is a question for the jury, based on the totality of the circumstances. Staley, 123 Wn.2d at 802. The duration of the handling is one factor to be considered in determining whether control, and therefore possession, has been established. Id.

In Callahan, the police executed a search warrant and found drugs in several locations on a houseboat. Callahan, 77 Wn.2d 27. The defendant was merely a visitor to the houseboat but admitted to police that earlier on the day of the search he had handled the drugs the police later found. The court first considered whether the evidence supported a finding of actual possession. Since the defendant was not found with the drugs on his person the court stated that

> the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.

Id. at 29.

The Callahan Court then turned to the issue of constructive possession and determined that proof of mere proximity to the drugs and an earlier momentary handling did not establish dominion and control over the drugs; thus, the evidence was insufficient to "make the issue of constructive possession a question for the jury." Id. at 31. Significant to this determination was testimony that the drugs were owned by another person who had sole control over them. The court said that "[c]onsideration must be given to the ownership of the drugs as ownership can carry with it the right of dominion and control." Id.

In its analysis, Callahan relied on language from United States v. Landry, 257 F.2d 425 (7th Cir. 1958). The facts in Landry were similar to those in Callahan. In neither case was the defendant physically in possession of the drugs. In each case the prosecution attempted to prove actual possession by relying on the defendant's statements that each had handled the drugs at an earlier time. Rejecting the government's argument that the defendant's admission proved his actual possession, the Landry court said "'[t]o "possess" means to have actual control, care and management of, and not a passing control." Landry, 257 F.2d at 431 (citing United States v. Wainer, 170 F.2d 603, 606 (7th Cir. 1948)).

The focus of these cases is the level of control the prosecution must prove to establish possession. Staley, 123 Wn.2d at 802. "To establish possession the prosecution must prove more than a passing control; it must prove actual control." Id.

In this case, the defense proposed the following instruction on the theory of passing control:

> Possession is not established if, at most, there is passing control. Passing control is momentary handling.
>
> It is not enough that the defendant might have been in close proximity to the firearm or that he might have momentarily handled it with a brief and passing control.

CP 8. The Court of Appeals held this instruction was not warranted because it was an inaccurate statement of the law. Slip Op. at 5. But that conclusion is directly contrary to the Court of Appeals' earlier decision in State v. Werry, 6 Wn. App. 540, 547, 494 P.2d 1002 (1972) (approving instruction that stated: "It is not enough that the defendants or either of them might have been in close proximity to the drugs or that either of them might have earlier momentarily handled them with a brief and passing control."). Werry held that a similar instruction should be given to the jury if supported by the evidence in the case. Id.

When determining whether the evidence at trial was sufficient to support the giving of an instruction, the appellate court views the

supporting evidence in the light most favorable to the party that requested the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). Whether the evidence was sufficient to justify a proposed instruction is a question of law reviewed de novo. State v. Bea, 162 Wn. App. 570, 577, 254 P.3d 948, review denied, 173 Wn.2d 1003, 271 P.3d 248 (2011).

Here, when viewed in the light most favorable to Mr. Willis, the evidence was sufficient to support his proposed instruction on "passing control." Like the defendants in Callahan and Landry, Mr. Willis was not in actual physical possession of the firearm at the time of his arrest. Nor did he have constructive possession of the firearm at that time. Instead, the firearm was in the actual physical custody of Mr. Griffin.

Also like the defendants in Callahan and Landry, Mr. Willis handled the gun only momentarily. He held the gun for as little as 30 seconds. 4/18/12RP 15. This suggests he did not have actual control over the firearm but only what amounted to "a momentary handling." Callahan, 77 Wn.2d at 29.

Finally, as in Callahan, someone else owned the gun and had exclusive control, care and management of it. Id. at 31; Landry, 257 F.2d at 431. Mr. Griffin handed Mr. Willis the gun personally and did

not let the gun out of his sight. He retrieved the gun from Mr. Willis after Mr. Willis had handled it for only a brief period of time. Mr. Griffin took the gun with him in his SUV when he left the scene. As the apparent owner of the gun, Mr. Griffin had "the right of dominion and control" over it. Callahan, 77 Wn.2d at 31. He exercised that control by deciding to whom to give the gun, for how long, and under what circumstances. Although Mr. Willis held the gun briefly, he never had the right of dominion and control over it. Therefore, when the evidence is viewed in the light most favorable to Mr. Willis, it is more than sufficient to support the proposed jury instruction on passing control.

Because the proposed instruction on passing control was a correct statement of the law and supported by the evidence, the court erred in refusing to provide it to the jury. Wanrow, 88 Wn.2d at 237. The error is presumed prejudicial and requires reversal of the conviction unless it affirmatively appears to be harmless. Id.; State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984). The error is harmless only if it had no effect on the final outcome of the case. Rice, 102 Wn.2d at 123.

Because the jury could have concluded that Mr. Willis had only passing control of the firearm and not actual control and custody of it, the court's failure to give the proposed instruction is not harmless. This Court should grant review, reverse the Court of Appeals, and remand for a new trial.

2. The evidence was insufficient to prove beyond a reasonable doubt that Mr. Willis "possessed" the firearm

The State bears the burden to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In order to find a defendant guilty beyond a reasonable doubt, the trier of fact must "reach a subjective state of near certitude of the

guilt of the accused." Jackson, 443 U.S. at 315. On review, the Court presumes the truth of the State's evidence and all reasonable inferences that can be drawn from it. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

The statute sets forth the elements of the crime of first degree unlawful possession of a firearm:

> A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

RCW 9.41.040(1)(a).

Possession can be actual or constructive. Callahan, 77 Wn.2d at 29. Actual possession requires personal, physical custody. State v. George, 146 Wn. App. 906, 919, 193 P.3d 693 (2008). Here, the evidence did not show Mr. Willis had actual possession of the gun. The gun was in the personal possession of Mr. Griffin and discovered by the police after Mr. Griffin dropped it onto the ground as he got out of the car some seven miles from where Mr. Willis was arrested. 4/17/12 RP 51-53, 56, 61.

The State therefore needed to prove Mr. Willis had constructive possession of the gun. Constructive possession means the defendant had dominion and control over the firearm. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012), review denied, 176 Wn.2d 1003 (2013). "The totality of the circumstances must provide substantial evidence for a fact finder to reasonably infer that the defendant had dominion and control." State v. Enlow, 143 Wn. App. 463, 469, 178 P.3d 366 (2008).

Mr. Willis momentarily handled the gun found in Mr. Griffin's possession. 4/16/12RP 34-35, 38-39, 49-50. But an earlier momentary handling is not sufficient for a charge of possession because, as noted in Callahan, "possession entails actual control, not a passing control which is only a momentary handling." Callahan, 77 Wn.2d at 29. "To 'possess' means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature." United States v. Landry, 257 F.2d 425, 431 (7th Cir. 1958).

Here, the evidence presented was that Mr. Willis momentarily handled the gun found later over seven miles away in Mr. Griffin's vehicle.

In Chouinard, the Court of Appeals held the evidence was insufficient to convict for firearm possession where the State demonstrated only the defendant's proximity to the weapon and his knowledge of its presence. Chouinard, 169 Wn. App. at 899, 903.

Here, the State did not even establish Mr. Willis's knowledge of the firearm's presence in Mr. Griffith's vehicle, or that he was in close proximity to the firearm. Ms. Thomas testified Mr. Willis had the gun in his hands for about two minutes before Mr. Griffin grabbed the gun and drove away in his SUV. 4/16/12RP 38-39, 49-50.

Nor did the State prove Mr. Willis had dominion and control over the premises. "Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found." Chouinard, 169 Wn. App. at 899-900.

But here, Mr. Willis did not own the SUV that Mr. Griffin was driving. Mr. Griffin was the owner of the vehicle. 4/16/12RP 38-39. And Mr. Willis was not driving the car when it was stopped by the police. 4/17/12RP 51-52. Mr. Willis neither owned the SUV nor was

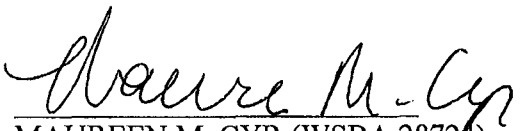
he driving it. The gun was seized by the police from Mr. Griffin more than seven miles from where Mr. Willis was arrested. 4/17/12RP 56.

When the evidence is viewed in the light most favorable to the State, even if it is believed, it does not establish Mr. Willis possessed the firearm. He therefore cannot be guilty of the crime on a theory of either actual or constructive possession. The conviction must be reversed and the charge dismissed.

E. CONCLUSION

The Court of Appeals' conclusion that Mr. Willis's proposed instruction on passing control is an inaccurate statement of the law directly conflicts with State v. Werry, 6 Wn. App. 540, warranting review by this Court under RAP 13.4(b)(2). Additionally, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Willis had actual or constructive possession of the firearm.

Respectfully submitted this 26th day of August, 2014.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEFFERY ANTONIO WILLIS, Appellant.	)	No. 72030-9-I DIVISION ONE UNPUBLISHED OPINION FILED: July 28, 2014

TRICKEY, J. — Jeffery Willis appeals his jury convictions for first degree unlawful possession of a firearm and unlawful display of a firearm. He asserts that the evidence was insufficient to support both convictions; that the trial court erred when it declined to give his proposed jury instruction concerning the element of "possession"; and that the trial court erred when it imposed legal financial obligations based upon a finding that he had the ability to pay. Finding no error, we affirm.

FACTS

During the late hours of October 21, 2011, Willis was patronizing a bar in Tacoma, Washington.[1] At around closing time, Willis engaged in a physical altercation with another bar patron.[2] The manager of the bar, Sesilia Thomas, and the security guard separated the two men.[3] Willis was escorted outside of the bar, while the man with whom he was fighting remained inside.[4] Thomas then asked Willis to leave.[5]

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[1] 1 Report of Proceedings (RP) (April 16, 2012) at 20, 24-26.
[2] 1 RP at 26-28, 33, 41.
[3] 1 RP at 28.
[4] 1 RP at 28, 32.
[5] 1 RP at 32.

Perry Griffin was sitting in his vehicle parked in a nearby parking lot, observing Willis while he exited the bar.[6] Thomas witnessed Griffin as he drove to the bar's parking lot and handed Willis a silver gun.[7] Thomas was standing approximately ten feet away from Willis.[8] The security guard, standing approximately five feet away from Willis, also noticed the gun.[9]

Willis then fell to the ground, causing the gun to slip out of his hand.[10] He stood up, retrieved the gun, and proceeded toward the front door of the bar.[11] Thomas stepped in front of him and asked him to leave.[12] Willis waved the gun in the air and attempted to pull the trigger.[13] Griffin then ran over to Willis, seized the gun, and departed in his vehicle.[14] Thomas called 911 and reported Griffin's license plate number.[15]

Police officers subsequently arrested Willis after stopping the vehicle in which he was riding.[16] No firearms were discovered inside the vehicle.[17] Police officers also soon located Griffin's vehicle.[18] While handcuffing Griffin, an officer observed a silver semiautomatic handgun lying on the pavement outside of the

[6] 1 RP at 34, 44.
[7] 1 RP at 34-35, 44.
[8] 1 RP at 35.
[9] 2 RP (April 17, 2012) at 16.
[10] 1 RP at 35.
[11] 1 RP at 35-36.
[12] 1 RP at 36.
[13] 1 RP at 35, 53.
[14] 1 RP at 38, 40, 45.
[15] 1 RP at 38.
[16] 2 RP at 18, 29-30, 32.
[17] 2 RP at 34.
[18] 2 RP at 50, 52.

driver's door.[19]

The State charged Willis by amended information with first degree unlawful possession of a firearm, in violation of RCW 9.41.040(1)(a),[20] and unlawful carrying or handling, in violation of RCW 9.41.270(1) and (2)[21].[22]

Following trial, the jury found Willis guilty as charged.[23] The trial court imposed concurrent sentences of 102 months.[24] The trial court also imposed $800 in legal financial obligations.[25]

Willis appeals.

ANALYSIS

Willis first contends that the trial court erred in declining to give his proposed jury instruction. He argues that as a result of this alleged error, he is entitled to a reversal of his conviction for unlawful possession of a firearm. We disagree.

A defendant is "entitled to have the trial court instruct upon [his or her]

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[19] 2 RP at 53-54. The parties stipulated that the handgun was test fired by the police and found to be operational. 2 RP at 66.

[20] RCW 9.41.040(1)(a) provides:

> A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

[21] RCW 9.41.270(1) provides, in relevant part:

> It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, . . . in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

RCW 9.41.270(2) provides that violation of RCW 9.41.270(1) is a gross misdemeanor.

[22] Clerk's Papers (CP) at 4-5.

[23] CP at 13-14.

[24] CP at 43.

[25] CP at 41.

theory of the case if there is evidence to support the theory." State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986) (citing State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980); State v. Dana, 73 Wn.2d 533, 536, 439 P.2d 403 (1968)). But a defendant is not entitled to a jury instruction that misstates the law or is not supported by evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994) (citing State v. Hoffman, 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991)).

To convict Willis of unlawful possession of a firearm as charged, the State was required to prove that Willis knowingly owned a firearm or had one in his possession or control, and that he had been previously convicted of a serious offense.[26] See RCW 9.41.040(1)(a).

"Possession of property may be either actual or constructive." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person has actual possession when he or she has personal custody of the property. Callahan, 77 Wn.2d at 29. A person has constructive possession when he or she has dominion and control over the property. Callahan, 77 Wn.2d at 29. "[P]ossession entails actual control, not a passing control which is only a momentary handling." Callahan, 77 Wn.2d at 29. "[W]e focus not on the length of the possession but on the quality and nature of that possession." State v. Summers, 107 Wn. App. 373, 386, 28 P.3d 780 (2001) (citing Staley, 123 Wn.2d at 801). "The length of time is but a factor in determining whether it was actual or passing possession." Summers, 107 Wn. App. at 386 (citing Staley, 123 Wn.2d

[26] CP at 23, 27.

at 801). Thus, even a momentary handling can be sufficient to establish possession if there are "other sufficient indicia of control." Summers, 107 Wn. App. at 386 (citing Staley, 123 Wn.2d at 802).

Here, Willis proposed the following jury instruction on the theory of passing control:

> Possession is not established if, at most, there is passing control. Passing control is momentarily handling.
> It is not enough that the defendant . . . *might have* momentarily handled [the firearm] with a brief and passing control.[27]

As the State correctly points out, this instruction is an inaccurate statement of the law. It does not convey to the jury that momentary control *can* amount to actual possession when other indicia of control are present. See Summers, 107 Wn. App. at 387. Under this proposed instruction, a jury would have been required to find Willis not guilty of unlawful possession if it found that he had momentary control of the firearm, even if the totality of the circumstances showed that he had control of the firearm. This is not the law. Additionally problematic is the proposed instruction's unclear and misleading language. The inclusion of the phrase "might have" skews the focus of the inquiry, improperly suggesting to the jury that the question is whether there was a *likelihood* of momentarily handling. We hold that the trial court did not abuse its discretion when it declined to give Willis's proposed instruction.[28]

Nevertheless, Willis argues that the State presented insufficient evidence

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[27] CP at 8 (emphasis added).
[28] See CP at 15-33; 3 RP (April 18, 2012) at 82-83.

to support his convictions. He contends that the State failed to prove that he had actual or constructive possession of the firearm.[29] He further claims that the evidence was insufficient to convict him of unlawful possession of a firearm and unlawful display of a firearm because, he claims, no gun was found on him when he was arrested. We disagree.

As set forth above, to convict Willis of unlawful possession of a firearm, the State was required to prove, among other elements, that Willis was in possession of a firearm. To convict Willis of unlawful display of a firearm, the State needed to establish that he carried, exhibited, displayed, or drew a firearm, in a manner, under circumstances, and at a time and place that manifested an intent to intimidate another or that warranted alarm for the safety of other persons.[30] See RCW 9.41.270(1).

The State must prove every element of the crime charged beyond a reasonable doubt. State v. Williams, 136 Wn. App. 486, 492–93, 150 P.3d 111 (2007). When reviewing a claim for sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Deference must be given to the trier of

[29] Willis raises this argument in a Statement of Additional Grounds.
[30] CP at 28.

fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence." State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989).

Here, the evidence was sufficient for a reasonable fact finder to find that Willis had actual possession of a firearm. At trial, the State presented the testimony of the bar manager and the security guard, both of whom were eyewitnesses to the events that had transpired that night. They testified that Willis received, carried, brandished, and pointed a silver gun in the air.[31] They estimated that they were approximately five to ten feet away from Willis.[32] The State also displayed photographs and video footage of the incident, captured by surveillance cameras.[33] Testimony presented at trial showed that the gun the police recovered from Griffin matched the description provided by the witnesses.[34] From this evidence, a rational trier of fact could infer that Willis had actual possession of the gun and that the object he possessed was a firearm. Accordingly, the State presented sufficient evidence to support both of Willis's convictions.

Willis next contends that the trial court erred when it admitted evidence of his prior convictions. We disagree.

At trial, Willis testified that on October 21, he had drunk four or five double

[31] 1 RP at 35, 45-46; 2 RP at 15-17.
[32] 1 RP at 35; 2 RP at 16.
[33] 1 RP at 29; 2 RP at 9.
[34] 2 RP at 56.

shots of liquor and became intoxicated.[35] He also testified that he was not a "typical drinker."[36] When asked on direct examination how often he drank alcohol, Willis responded that he had not had a drink "since [he] got a DUI [(driving while under the influence)] years ago."[37] He then stated that he had imbibed alcohol a few months before the incident and that he drank "every few months."[38] With regard to the firearm, Willis testified that because of his previous conviction of a serious offense, which prohibited him from possessing a firearm, he would not possess or own a firearm in light of his concerns for the law and his children.[39] Willis admitted that he had "some prior recent convictions for dishonesty."[40]

After direct examination, the State moved to question Willis's credibility based on his prior convictions and his testimony on direct examination.[41] The trial court considered Willis's testimony before granting the State's request.[42] Prior to cross-examination of Willis, the trial court instructed the jury that it could consider the evidence of Willis's prior convictions for the sole purpose of assessing his credibility.[43] The following exchange then took place during the State's cross-examination of Willis:

Q. Mr. Willis, on direct examination, you indicated that you don't

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[35] 3 RP at 10-12.
[36] 3 RP at 11.
[37] 3 RP at 11.
[38] 3 RP at 12.
[39] 3 RP at 17-18.
[40] 3 RP at 18.
[41] 3 RP at 24-25.
[42] 3 RP at 28-30, 32-33, 39.
[43] 3 RP at 40.

drink a lot. That's not true, is it, Mr. Willis?
A. Yes, sir.
Q. In fact, you were convicted of DUI in 1999, correct?
A. Yes, sir.
Q. And you were convicted of DUI again in 2004, isn't that right?
A. Yes, sir.
Q. And, again, you were convicted of DUI in 2006, right?
A. Yes, sir.
Q. And, again, on direct examination, you testified that you were convicted of a serious offense, and, therefore, you would not possess a firearm. That's not true, is it, Mr. Willis?
A. Yes, sir.
Q. In fact, your serious offense conviction was from December 20th of 1996, correct?
A. Yes, sir.
Q. As part of that, you also plead to Unlawful Possession of a Firearm, correct?
A. Yes, sir.
Q. And, again, you were convicted of Unlawful Possession of a Firearm on December 8th of 2000, correct?
A. Yes, sir.
Q. And, again, convicted of Unlawful Possession of a Firearm on January 9th, 2004, correct?
A. Yes, sir.[44]

Willis asserts that the admission of evidence of his prior convictions violated ER 404(b). But the State did not seek admission of the evidence based on this evidentiary rule.[45] Rather, the State correctly argued, as it does on appeal, that Willis opened the door to questioning about his prior convictions when he testified to his drinking habits and past experience with drinking, and when defense counsel asked him about whether he would possess a firearm in light of his previous conviction of a serious offense.[46]

"A party's introduction of evidence that would be admissible if offered by

[44] 3 RP at 40-41.
[45] 3 RP at 25-27.
[46] 3 RP at 23-24.

the opposing party 'opens the door' to explanation or contradiction of that evidence." State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006) (citing State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995)). When a witness "opens the door," the trial court has the discretion to admit otherwise inadmissible evidence. See State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008); State v. Brush, 32 Wn. App. 450, 451, 648 P.2d 897 (1982). The "open door" doctrine promotes fairness by preventing one party from raising a subject to gain an advantage and then barring the other party from further inquiry. Avendano–Lopez, 79 Wn. App. at 714 (quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). We review for abuse of discretion a trial court's decision to allow cross-examination under the open-door rule. Ortega, 134 Wn. App. at 626 (citing State v. Wilson, 20 Wn. App. 592, 594, 581 P.2d 592 (1978).

Here, Willis's testimony on direct examination created the impression that he was not a frequent drinker, that he was heavily intoxicated on the night in question, and that drinking was out of his character. His testimony similarly implied that possessing a gun was out of his character. Therefore, Willis opened the door to the State's questions regarding his prior convictions. Furthermore, the jury is presumed to have followed the trial court's instructions to consider the evidence of Willis's prior convictions solely for the purpose of assessing his credibility. See State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The trial court did not abuse its discretion by allowing the State to introduce evidence of Willis's prior convictions.

Willis contends, finally, that the trial court impermissibly imposed legal

financial obligations based on a finding of his ability to pay that was not supported by the record. Again, we disagree.

Following his sentencing hearing, the trial court entered a finding that after considering his past, present, and future ability to pay legal financial obligations, Willis "has the ability or likely future ability to pay the legal financial obligations imposed herein."[47] Willis now challenges the trial court's imposition of a $200 criminal filing fee.[48] But he did not object to the imposition of this obligation at his sentencing hearing.[49] Therefore, Willis has waived his ability to challenge the fee obligation on appeal. RAP 2.5(a); State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), review granted, 178 Wn.2d 1010, 311 P.3d 27 (2013).

Moreover, a criminal filing fee is required by RCW 36.18.020(h) and, thus, is a mandatory legal financial obligation. The courts are not required to consider a defendant's ability to pay when imposing mandatory fees. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Accordingly, "the trial court's 'finding' of a defendant's current or likely future ability to pay them is surplusage." Lundy, 176 Wn. App. at 103.

Affirmed.

Tiney, J

WE CONCUR:

Schindler, J

[47] CP at 41.
[48] CP at 41.
[49] See 5 RP (May 4, 2012) at 13-14.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 72030-9-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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