NO. 73027-4-I

IN THE COURT OF APPEALS
OFTHE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON

Respondent

v.

VINCENT WILLIAM BARBEE,

Appellant

BRIEF OF RESPONDENT

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1. Was the evidence at trial sufficient to support the charge of Unlawful Possession of a Firearm in the First Degree?

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On August 13, 2014, the State charged the defendant by Information with one count of Unlawful Possession of a Firearm in the First Degree and further alleged that the defendant was on Community Custody when the crime occurred. 1 CP 110; RCW 9.41.040(1); RCW 9.94A.525(19). The Information was amended on October 17, 2014, in order to identify with specificity the defendant's prior 2nd Degree Burglary conviction as the "serious offense" that elevated the charge to 1st degree status.1 CP 79; RCW 9.41.010(21)(a); RCW 9.94A.030. The defendant exercised his right to a jury trial and to make the State prove each element of the charged crime beyond a reasonable doubt.

A. EVIDENCE AT TRIAL.

On July 28, 2014, U.S. Marshalls were actively searching for the defendant in the Marysville area because he had warrants for his arrest. Deputy U.S. Marshall John Westland was looking for a specific vehicle, and learned over the radio that the vehicle had been spotted pulling into the Arco gas station on Fourth and Beach

streets. 3 RP 71-72. He saw the defendant park a green Pontiac Grand Am. The Grand Am also contained Jennifer Olson in the passenger seat, a female whom the U.S. Marshall recognized as the defendant's known girlfriend. Id. at 72. Deputy Westland coordinated the arrest plan via radio while the defendant made a purchase inside the convenience store. When the defendant came out of the convenience store he walked towards the green Grand Am, but upon seeing three or four law enforcement officers approaching, the defendant turned around and ran north. Id. at 74. When the defendant saw the deputies he yelled, "Oh shit!" Id. at 88. Deputy Westland moved his vehicle and cut the defendant off, but the defendant changed course and ran east. Id. at 74.

Ultimately the defendant ran only 40-50 yards across Beach Street to the Chevron gas station across the street. Id. at 79. His escape routes blocked, the defendant turned to a deputy and said, "OK, I give up," then threw his cell phone and "proned himself out on the ground." Id. at 89.

Deputies searched the green Pontiac Grand Am the defendant had been driving. Deputy U.S. Marshall Justin Strock observed that "the trunk and the entire of the backseat, even up to the front seat, was kind of strewn with men's and women's clothes.

A lot of things piled up." Id. at 93. Deputy U.S. Marshall Robert Gerg opened the glove compartment and found a credit card bearing the defendant's name as well as a change of address form in Jennifer Olson's name. 4 RP 31-32. Inside the trunk, Deputy Gerg located a small lockbox. It was located "as you face the trunk, on the left side behind the wheel well, against the fender." Id. He handed this locked box to Washington State DOC probation officer Woodruff. Immediately adjacent to the lockbox in the trunk was a green envelope folder containing "a bunch of documents with [the defendant's] name on it, including bank checks. Id. at 32-33. These documents included blank checks with the defendant's name on them, pay stubs issued to the defendant, and a Cash Express loan application in the defendant's name. Id. at 53-54. The folder also contained an address book with business cards and contact information inside, with the front page bearing the name "Vince Barbee." Id. at 54.

Deputy Woodruff searched the vehicle as well and noticed the extremely cluttered contents. He located a Tulalip Players card in the defendant's name at the very bottom of the vehicle's full center console. He found another Players Club card in the defendant's name, inside a backpack in the backseat. Id. at 49.

Deputy Woodruff attempted to open the small, black, Century lockbox Deputy Gerg had located in the trunk. He tried all of the keys he could find, including the keys on the same key ring as the ignition key and multiple loose keys found on the vehicle's floorboard. None of them opened the lockbox. Deputy Woodruff then located a small knife on the vehicle's floorboard and was able to gently pry the lockbox open with the knife. Id. at 50-51. Inside he found a small handgun and one round of .22 caliber ammunition. He subsequently tested the firearm and confirmed that it was functional. Id. at 52-53.

Deputy Marcus Dill confronted the defendant about the handgun they found in the trunk of his vehicle. The defendant claimed that the car was not his and that he had never accessed the trunk. Id. at 11-12.

The State also called the defendant's girlfriend Jennifer Olson as a witness. In July, 2014, she was dating and living with the defendant at a mutual friend's house. She denied that they were living out of their car, instead claiming that the car was so full of personal items because they were "transporting our stuff from one place to the other." 3 RP at 97. Jennifer Olson told the police on July 28, 2014, that she was in the process of buying the car, but

didn't consider it her own because she had not finished paying it off. Id. at 107. At trial she acknowledged that she and the defendant were in the process of buying the car together. Id. at 114. When asked to describe the contents of the vehicle, she acknowledged that the contents belonged to herself and the defendant. Id. at 108. She specifically recalled that the vehicle's trunk contained her own speakers and the defendant's "bank information." When asked if she participated in loading property into the vehicle's trunk, she answered evasively that she "helped load the whole car," implying that the defendant also helped. Id. at 108-109. The prosecutor followed up by asking if it was true that the defendant was the only one who loaded the trunk. Jennifer Olson's answer, "No, because I helped load the car," further implied that the defendant at least participated in loading the trunk. Id.

The prosecutor showed Ms. Olson her handwritten statement, signed under penalty of perjury, which she gave to the officers on the day of the defendant's arrest. Ms. Olson admitted that she wrote, "Only Vince has been in the trunk." Id. at 112-113. This admission drew no objection, nor any request for a limiting instruction. Ms. Olson asserted that her written statement was false and that one of the deputies had threatened to throw her in jail if

she didn't write what the deputy told her to write. She claimed that she didn't know "what perjury really means." Id. at 110, 112.

The Deputy she accused of threatening her denied making any threats or telling Ms. Olson what to write in her statement. 4 RP 18. Ms. Olson's equivocation on the defendant's sole access to the trunk was further exposed with the subsequent testimony of Deputy Woodruff, who recalled her stating on the date of the incident that the defendant was the only one who had loaded anything into the trunk for about a week or more. 4 RP 63.

The State also presented testimony about extensive but inconclusive forensic testing performed on the lockbox and the handgun it contained. A Washington State Patrol latent print examiner located one fingerprint on the top of the lockbox and excluded the defendant as the person who left the print. 5 RP 15-16. There was no way to determine how many other people may have touched the lockbox or how long the lone fingerprint had been on the lockbox. The handgun did not have any prints on it, which was of no surprise to the forensic scientist due to the gun's brushed metal finish. Id. at 16-17.

Another State Patrol forensic scientist discussed DNA testing performed on the lockbox and the handgun. She swabbed

the sides, top, and handle of the lockbox in an effort to collect "touch DNA," and determined that the collected sample contained a mixture of at least three people's DNA. However, the quantity of DNA was too small to include or exclude the defendant (who voluntarily provided a known DNA reference sample) as a contributor to the lockbox touch DNA mixture. Id. at 29-30. Likewise, the forensic scientist swabbed the handgun to collect potential touch DNA and identified a mixture of DNA contributed by at least three people. But just like the touch DNA on the lockbox, the handgun touch DNA sample was insufficient to include or exclude the defendant as a contributor. Id. at 31.

Just before the State rested, the court instructed the jury pursuant to the parties' stipulation that "the defendant has previously been convicted of a serious offense for purposes of proving that element of the charge of unlawful possession of a firearm in the first degree." Id. at 39.

The defense made a motion to dismiss the charge pursuant to State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). In denying the motion the court discussed the testimony of Jennifer Olson and remarked that,

> "a reasonable fact finder could certainly find that Ms. Olson was quite well impeached by the party which called her, which is certainly allowable under the rules. But in any event, it's clear from the testimony that she and the defendant were using the car to store their property; ..."

Id. at 43. The court also mentioned the defendant's multiple blank checks, bank documents, and casino player's cards as evidence of his dominion and control. In particular, the court noted the "immediately adjacent" proximity of the green folder with many of the defendant's financial documents and the lockbox containing the handgun. Id. at 44. The court ruled that "a reasonable fact finder could find beyond a reasonable doubt, looking at the evidence in the light most favorable to the nonmoving party, a reasonable fact finder could find dominion and control and thus could find knowing possession on the part of Mr. Barbee." Id.

The jury returned a verdict of guilty. CP 44. Before the court imposed a DOSA sentence of 50.75 months in prison followed by 50.75 months on community custody, the trial judge remarked, "In terms of whether you knew the gun was in the trunk or not, the jury made their ruling and they certainly had lots of evidence to support what the jury ruled, what they found beyond a reasonable doubt." 8 RP at 20-21.

III. ARGUMENT

The defendant argues there was insufficient evidence to find him guilty of Unlawful Possession of a Firearm in the First Degree. Evidence is sufficient to sustain a conviction if after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "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). All reasonable inferences are drawn in favor of the verdict, and most strongly against the defendant. State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105, cert denied, 516 U.S. 843 (1995). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the fact finder on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

In order to convict the defendant of Unlawful Possession of a Firearm in the First Degree the jury had to find beyond a reasonable doubt:

(1) That on or about July 28, 2014, the defendant knowingly had a firearm in his possession or control;

(2) That the defendant had been previously convicted of a serious offense; and

(3) That the possession or control of the firearm occurred in the State of Washington.

1 CP 56.

The jury was instructed that a person acts "knowingly" with respect to a fact or circumstance if he is aware of that fact or circumstance, but they were also instructed that if a reasonable person in the same situation would have been aware of the same fact, they were permitted but not required to conclude that the defendant acted knowingly. WPIC 10.02; 1 CP 58. The court also further defined "possession" using a modified version of WPIC 50.03, which allowed the jury to consider the following non-exclusive factors in determining whether the defendant constructively possessed the handgun due to his dominion and control over it:

- Whether the defendant had the 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. CP 59.

A. EVIDENCE OF DOMINION AND CONTROL.

The State's theory was that the defendant had constructive possession of the firearm due to his dominion and control over it. Dominion and control is determined from the totality of the situation, and may be proved through the cumulative effect of a number of factors; no single factor is dispositive. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). For example, in State v. Partin the court found sufficient evidence of dominion and control from the cumulative effect of the defendant's "far from casual" connection to the home where the contraband was found, the presence in that home of bank documents and correspondence in the defendant's name, and a prior police incident in which the defendant spoke for the entire household when officers investigated a noise complaint about the house. Id. at 907-908. Dominion and control need not be exclusive to establish constructive possession. 1 CP 59; State v. Amezola, 49 Wn. App. 78, 86, 741 P.2d 1024 (1987).

In this case the jury had ample evidence to support each of the non-exclusive dominion and control factors listed in the jury instructions. The defendant's ability to take actual possession of the

handgun was demonstrated through the testimony of Deputy Woodruff, who was able to open the lockbox and access the gun by using a knife that he found on the floorboard of the defendant's vehicle. 4 RP 51. The defendant therefore had access to the same knife and could have used it to open the lockbox in the same gentle manner that Deputy Woodruff employed. The defendant also clearly had access to the key to the trunk containing the lockbox. The process of accessing the knife on the floor, opening the trunk, and opening the lockbox would have taken very little time at all, entitling a reasonable juror to conclude that the defendant did have the ability to gain physical custody of the gun.

The evidence also supported a reasonable inference that the defendant could have prevented others from accessing the gun. In fact, the gun was stored in such a way to accomplish that very task. The gun was enclosed within a locked metal box, within a lockable metal trunk, yet easily transportable because it was stored in an automobile. The defendant controlled all three of those access-preventing features due to his actual possession of the car, which in turn contained the gun and two layers of lockable metal containers (lockbox, trunk). While it is true that Jennifer Olson had the only other set of keys to the vehicle and therefore could have

accessed the gun (or prevented access) in the same way, a reasonable fact finder could justifiably conclude that the defendant had the ability to prevent everyone except Jennifer Olson from accessing the gun. This conclusion was supported by the evidence and leads to a permissible but rebuttable inference of the defendant's dominion and control over the gun. WPIC 50.03; 1 CP 59.

Third, the evidence was replete with indications that the defendant exercised dominion and control over the premises in which the gun was found – the green Pontiac Grand Am he drove to the gas station. The fact that he drove the vehicle and possessed the keys was uncontroverted. 3 RP 72, 116. A defendant's sole occupancy and possession of a vehicle's keys sufficiently supports a finding that the defendant had dominion and control over all of the vehicle's contents. State v. Bowen, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010); State v. Dodd, 8 Wn. App. 269, 274, 505 P.2d 830 (1973); State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1969). In this case the defendant was not the sole occupant of the vehicle, but the only other occupant (Ms. Olson) told the police she didn't know what was in the vehicle's trunk. 3 RP 112-113. By the time she testified at trial, Ms. Olson believed the trunk contained only

speakers and bank information. Id. at 108. Her statement to the police that "Only Vince has been in the trunk," though hearsay, was admitted without objection or any request for a limiting instruction. Id., at 112-113. Hearsay statements admitted without objection are competent evidence sufficient to support a finding that the statement is true. See State v. Rochelle, 11 Wn. App. 887, 889, 527 P.2d 87 (1974). The jury was entitled to determine that Ms. Olson's statement to the police was more accurate than her testimony at trial, meaning that her presence in the vehicle should not have altered the well-settled legal principle that a vehicle's sole occupant with possession of the vehicle's keys constructively possesses everything else in the vehicle.

The evidence further showed that the defendant and Ms. Olson had entered into an agreement to purchase the vehicle from the registered owner for $1000, paid in ten monthly installments of $100 each. Id. at 114. This financial arrangement is not substantially different than anyone who takes out a car loan and exerts daily control over the vehicle they have purchased, yet legal title remains with the bank or the car dealership until the loan is fully paid off. Therefore the defendant and his girlfriend were the true owners of the vehicle for all intents and purposes, and it was

reasonable for the jury to conclude as much. The defendant should not benefit from a technical argument that he was not yet the registered owner simply because he may have violated the law by failing to report his purchase of the vehicle. See RCW 46.12.250(7).

The defendant's dominion and control over the vehicle was so extensive, in fact, that he and Ms. Olson had transformed the vehicle into a storage vessel for most of their possessions, if not a de facto residence. 3 RP 117. The reason for using the car in this manner was because they did not feel their belongings were safe inside the various homes where the couple spent the night. Id. In other words, the pair felt that the lockable confines of their newly-purchased vehicle was the most effective place to protect their valuables from theft. From this evidence, plus the fact that the defendant and Ms. Olson were the only ones with keys to the vehicle, the jury was entitled to infer that the green Pontiac Grand Am was actually the one premises in the world over which the defendant exerted more thorough and exclusive control than any other premises. This inference naturally leads to the conclusion that the defendant constructively possessed every item inside the vehicle, including the gun.

B. EVIDENCE OF KNOWLEDGE.

The State also needed to prove that the defendant knew, or reasonably should have known, that he possessed the gun. 1 CP 58. Under the particular facts of this case, such a showing equates to proving that the defendant knew, or reasonably should have known, what was inside the black metal lockbox in the trunk of the defendant's vehicle. The prosecutor's closing argument highlighted the defendant's choice to run from the police when he first encountered them as "consciousness of guilt" evidence, supporting an inference that he knew about the gun and therefore wanted to physically separate himself from the prohibited firearm. 5 RP 61. The prosecutor connected the defendant's consciousness of guilt to his subsequent denial to the police that the car belonged to him or that he had ever accessed the trunk at all. Id. The defendant did not object to the argument, and both arguments were proper; "evidence of flight is admissible if it creates a reasonable and substantive inference that a defendant's departure from the scene was an instinctive or impulsive reaction to a consciousness of guilt or was a deliberate effort to evade arrest and prosecution. State v. Nichols, 5 Wn. App. 657, 660, 491 P.2d 677 (1971). It was reasonable for the jury to follow the prosecutor's suggestion that

the defendant's flight, combined with his minimization of his connection to the vehicle and his claim of never accessing the trunk, together supported the conclusion that the defendant's guilty conscience was directly related to his knowledge of contraband inside the car.

The defendant claims that the evidence of his flight was equivocal in nature because he also knew that he had warrants for his arrest, and that it was "purely speculation to conclude that he ran because he knew there was a firearm in the trunk." Br. App. 14-15. This claim ignores the defendant's efforts to convince the police that he had a minimal association with the vehicle, which should not have mattered if he was only concerned about his active warrants. To the contrary, the jury could have reasonably concluded that the defendant's minimization was directly related to the reason he chose to flee the police on foot rather than use his vehicle. The defendant's attempted analogy to State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 313 (2013), is therefore misplaced. Although the defendant asserts that Vasquez prohibits an inference of *knowledge* from evidence that is patently equivocal, the case actually prohibits an inference of *intent to injure or defraud* from evidence of mere possession in a forgery case. Id. Courts have

similarly held that *intent to deliver* controlled substances cannot be inferred from mere possession of the substance. State v. O'Connor, 155 Wn. App. 282, 290, 229 P.3d 880 (2010). But the State was not required to prove anything about the defendant's intent in this case; rather, the State needed only to prove that the defendant knew a gun was in the lockbox. The defendant's flight from officers, and his car, followed by his attempts to minimize his association with the car and its contents, is not patently equivocal evidence.

Case law supports the jury's finding of knowledge. A reasonable inference of knowledge of the item possessed can come from an extended period of control of the premises. State v. Gerke, 6 Wn. App. 137, 142, 491 P.2d 1316 (1971). Thus it was particularly relevant that the defendant tried to minimize his connection to the vehicle and the trunk when speaking with the officers, because his statements were contradicted by the evidence that he had possessed the green Grand Am for roughly one month and that he was the only one who accessed the trunk at all. 3 RP 112-113, 115.

Finally, the jury likely concluded from common experience that a reasonable person would necessarily know about a gun in

their own vehicle because of the dangerous yet valuable power of firearms. A gun with ammunition is an inherently valuable item, not necessarily because of its monetary worth, but because of its functional capabilities. A gun is a powerful object capable of fundamentally altering the dynamics of any situation, and its presence dramatically increases the chances that deadly force will be employed, whether accidentally or otherwise. This fact increases the likelihood that any reasonable person would have known about its presence in his own vehicle, a fact from which the jury was allowed to further infer that the defendant had knowledge of the gun in this case.

IV. CONCLUSION

For the reasons stated above, the State respectfully requests that the Court affirm the defendant's conviction for Unlawful Possession of a Firearm in the First Degree.

Respectfully submitted on October 28, 2015.

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DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 28th day of October, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Maureen M. Cyr, Washington Appellate Project, wapofficemail@washapp.org and maureen@washapp.org.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of October, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
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