Supreme Court No. 100202-5
COA 81019-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TERRELL JOHNSON,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Roger Rogoff

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Terrell Johnson seeks review by this Supreme Court of his conviction for VUFA (unlawful possession of a firearm). Appx. A.

B. COURT OF APPEALS DECISION

Mr. Johnson seeks review of the decision entered August 2, 2021.

C. ISSUES PRESENTED ON REVIEW

1. Due Process prohibits a criminal conviction based on a mere "scintilla" of evidence, which is inadequate under the Fourteenth Amendment's Due Process guarantee. In this case, police planning on serving arrest warrants on Mr. Johnson saw him enter a white Chrysler (which did not belong to him) and drive away from his mother's house. The car's windows were tinted, preventing anyone from seeing if other people were inside.

After a high speed chase, the Chrysler crashed. Mr. Johnson ran and was caught, but not a single witness saw the collision, so as to be able to say that he was the only person who fled the vehicle. A canine team later located a black jacket on a fence in a back yard, with a Remington handgun in a pocket. The vehicle was filled with personal property attesting to the presence of others. Was the evidence insufficient to convict, requiring reversal?

2. Opinions on guilt violate the defendant's right to a fair trial under the Sixth Amendment and the Fourteenth Amendment. Did a police officer's repeated comments opining that Mr. Johnson drove recklessly, and the like, violate those guarantees and prejudice his jury on the charge of knowingly having a firearm in the car?

The defense conceded from the outset that Mr. Johnson tried to elude the officers for fear of arrest on the warrants, but where lay juries are strongly predisposed to believe the testimony of police officers, and the prosecutor argued in closing that Johnson drove in the manner he did to prevent being found with a gun, does the officer's testimony require reversal, because no cautionary instruction by the judge could cure that prejudice?

D. STATEMENT OF THE CASE

(1). <u>Charging and trial.</u> Terrell Johnson, age 23, was charged with eluding a police vehicle and unlawful possession of a firearm ("VUFA"). CP 1-2, 52-53. According to the affidavit of probable cause, on April 4, 2019, Seattle police preparing to serve arrest warrants on Mr. Johnson observed him exit his mother's home on 31st Avenue South, entering the driver's side of a white Chrysler sedan with California license plates. CP 5; RP 217, 252-53.

Officer Quindelia Washington stated that Mr. Johnson was wearing a black beanie cap, "a tan shirt with a black fleece over," and tan pants. RP 36-37. Mr. Johnson was carrying a phone. RP 543. The Chrysler remained in that location for approximately 5 to 10 minutes, and then began driving away. RP 299-300.

The officers in the unmarked car radioed another team in a marked squad car, which drove toward the area on South Andover Street where they were told the Chrysler had driven toward. RP 301. The Chrysler reversed and then turned onto South Andover Street. RP 255-56, 300, 360. The marked vehicle chased the sedan at increased speed but lost sight of it. RP 257. Only after losing sight of the car did the officers locate it on 35th Avenue South, where it appeared to have crashed. RP 256, 261. Officers saw Mr. Johnson running in the vicinity of the car, and chased him on foot, eventually taking him down. RP 269-70, 274-75.

The police also called a canine team to the area. RP 276. Along the route that the police had followed when running after Mr. Johnson, the officers stated they found a black North Face jacket hanging on a fence. RP 277. The jacket had a Remington pistol in its pocket. 277, 308. Officer Benjamin Frieler stated that the jacket was dry, but the ground was wet. RP 435-36.

The dog handler stated that the dog tracked from the white Chrysler and a black "beanie" hat on the ground near the car, along a route near 35th Avenue South and South Ferdinand. RP 397-98. The dog led his handler "down the side yard of a house into a backyard and an alleyway." RP 398. In one of the yards, around the corner of an old green house, past some "sticker bushes," the unit located a black jacket "hanging over a fence." RP 399-401. This was approximately 25 to 40 minutes after the defendant was arrested. RP 405. Notably, the dog handler conceded that the path the dog tracked was the same track that had been followed by multiple *officers* who had run from the area of the crashed car, through the backyard where the jacket was located and the foot chase continued. RP 408-09.

Lamour Burke, who lived on 35th Avenue, was standing outside smoking a cigarette on April 4, and he heard a vehicle collision. RP 506. About half a block down the street, he saw someone running away from the vehicle, wearing "brown tan sweats" and a black shirt. RP 508. There were two other persons walking in the area. RP 507. Mr. Burke could not see the face of the person running, or discern their race. RP 508, 518.

In a search of the car, a magazine for a 9 millimeter Luger was found, along with a magazine with an "R" logo that matched the logo of

Remington guns, and some 40 millimeter ammunition. RP 316-19, 351, 459-60, 465-67. According to a State's witness, the 9 mm magazine would fit a 9 millimeter Remington. RP 469.

(2). Verdict and sentencing. The jury found Mr. Johnson guilty. CP 78, 79. He was given a standard range term of incarceration of 79 months on the conviction for unlawful possession of a firearm, and a term of 18 months on the conviction for eluding. CP 188; RP 592-95.

E. ARGUMENT

1.THE EVIDENCE WAS WHOLLY EQUIVOCAL, AND INSUFFICIENT TO PROVE UNLAWFUL POSSESSION OF A FIREARM BEYOND A REASONABLE DOUBT.

a. The Supreme Court should take review of Terrell Johnson's case under RAP 13.4(b)(3).

No jury's verdict of guilt can be affirmed when, after viewing the evidence in the light most favorable to the prosecution, it cannot be said that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Longshore, 141 Wn.2d 414, 420-421, 5 P.3d 1256 (2000). Yet the Court of Appeals affirmed this violation of Due Process. Appx. A. Review, by the Supreme Court, of this significant constitutional issue

presented in Mr. Johnson's case is warranted under Rule of Appellate Procedure 13.4(b)(3).

b. The State's case did not prove beyond a reasonable doubt that Mr. Johnson possessed the firearm.

The relevant statute and Washington case law provide that a person is guilty of the crime of unlawful possession of a firearm in the first degree if the person knowingly has in his or her possession, or has in his or her control any firearm after having previously been convicted of any serious offense. RCW 9.41.040(1)(a); see State v. Anderson, 141 Wn.2d 357, 360, 5 P.3d 1247 (2000). Per State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), a claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.

At no juncture in trial did a single person, law enforcement or civilian, saw Mr. Johnson possessing the handgun. As the Court of Appeals stated, it is true that circumstantial evidence and direct evidence are equally reliable. Appx. A, at p. 5 (citing State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980)). But the evidence in this case did not prove possession, under the law of actual possession or constructive possession. Actual possession means that the item is in the personal custody of the person charged with possession, whereas constructive possession means

that the item is not in his actual, physical possession, but the person charged with possession has dominion and control over the item. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Importantly, *knowledge* of the firearm is required for a person to be found guilty on a charge of unlawful possession of a firearm. Where the owner, or the operator of a vehicle has dominion and control of a vehicle and knows a firearm is inside the vehicle, there is sufficient evidence of constructive possession. State v. Turner, 103 Wn. App. 515, 13 P.3d 234 (2000). For example, it was reasonable in State v. Simonson to conclude that an accused constructively possessed firearms that were found in a trailer in which he both occasionally lived and kept clothing, and where there was evidence of various pieces of correspondence to and from him located in the trailer. State v. Simonson, 91 Wn. App. 874, 881-82, 960 P.2d 955 (1998).

(i). The jacket could have belonged to anyone.

This evidence was insufficient where the defendant left the view of police running without wearing or carrying a black jacket. As counsel argued in closing, the officers observing the Chrysler sitting outside the house at 31st Avenue South admitted it had darkly tinted windows, and no officer involved in the incident was able to see who was inside the car.

RP 315, 442; see RP 569-70. This was also not Mr. Johnson's vehicle, and by all indications, it never had been. The physical evidence found in the vehicle after the crash also suggested that any number of other individuals, or more, were inside the Chrysler.

As the officers excited their marked vehicle to give chase on foot, Mr. Johnson was spotted and eventually tackled. RP 365-66. According to Officer James, Mr. Johnson was wearing a tan jogging suit when he was seen running from the crash. RP 285. This was confirmed by Officer Ward, who observed the crashed vehicle, and saw Mr. Johnson at the same time. RP 363.

> Once we got to the vehicle, [I] started scanning the area [visually] and one block to the south I saw the suspect running eastbound on the southbound sidewalk.

RP 363. Officer Ward testified that when he saw the defendant, he was wearing "a tan or brownish jump suit or jogging suit" RP 363.

Officer Benjamin Frieler also saw the location of the Chrysler where it crashed, and then saw Mr. Johnson running approximately one block away. RP. 418. As he testified, Mr. Johnson was wearing "tan clothes." RP 419. Officer Frieler was one of the officers, soon after the canine team, that observed a black jacket "on a chain link fence between the two houses where I saw the suspect running through the yard." RP

425-26; see State's exhibit 14. But Frieler answered no when he was asked if he saw Mr. Johnson throw a black jacket, or even if he saw Mr. Johnson "with" a black jacket - he repeated that Mr. Johnson was running in a "tan sweat suit." RP 443.

Crucially, when Officer Frieler saw Mr. Johnson running in a tan sweat suit, this was before Mr. Johnson ran into the area of several houses where the black jacket was later found. RP 444. As the officer confirmed, he did not see Mr. Johnson wearing or carrying any black jacket. RP 445. This was further confirmed when, shortly after the canine team found the jacket, the handler asked Officer Frieler if the suspect had been wearing a black jacket, and Frieler told him no. RP 445-46.

Officer James observed the defendant running from the "accident scene," i.e., the area of the crashed car, but he did not see the actual collision, and could not say that Mr. Johnson was the only person who fled the vehicle. RP 267, 362-63. Officer Daniel Ward also did not see the crash, and he, too, could not say that no one else exited the Chrysler. RP 367-68; see RP 267, 285 (Officer Brandon James), 368 (Officer Daniel Ward).

Mr. Burke, a neighborhood resident, heard the crash but also did not see it. When he did look toward where he heard the crash and saw the

car, and said that someone fled the area wearing brown sweat pants and a black shirt - but he could not tell the person's race. RP 505-6, 518.

(ii). Faced with the fact of a black jacket that the police did not see on Mr. Johnson before he disappeared into the area of the houses where the jacket was later found, the police understandably deemed forensic evidence crucial. But there was none.

Mr. Johnson's case was notable for an even more strained prosecution explanation for a lack of evidence than the typical case. The police officers assigned to collect the gun took care to handle the gun with gloves and then the police had the SPD forensic department specifically examine the firearm and other items closely for fingerprints, using multiple techniques - gaseous chamber fuming, dye staining, and dry powder, all with no results, although the scientist admitted the lab successfully detect usable prints on similar items. RP 316-19, 342-45, 351. None of these methods were able to detect Mr. Johnson's prints in this case,. RP 347-49.

The deputy prosecutor then spent 12 pages of testimony having the scientist repeatedly state that it really didn't really mean anything that none of Mr. Johnson's fingerprints were found on any of the items the police submitted, because something like a gun being in a pocket could wipe fingerprints off of it just like a purposeful wipe-down with a rag. RP

336-347. During this testimony the prosecutor carefully had the witness identify State's exhibit 9 and note as in her records that the gun was logged as a Remington RP9, reading off the serial number. RP 344-48.

The jacket did not have any evidence of dominion and control in it, such as a wallet with identification, a school ID, or the like. RP 315-16. At some point, the absence of proof that Mr. Johnson could have possessed the gun personally, along with the abundant evidence of individuals who had dominion and control over the car – unlike Mr. Johnson, who was not the Chrysler's former owner, or its present owner – allows only one result, which is a not guilty verdict. See State v. Vasquez, 178 Wn.2d 1, 14, 309 P.3d 318 (2013) (equivocal evidence does not prove a criminal case).

(iii). There was no possession.

Possession in this case, in order to be actual, would have to be premised on a theory showing why every single police officer who saw the defendant running from the crash area was wrong when they said he did not have a black jacket, and therefore he must have shed it in some manner that allowed it to be found on a fence in a back yard - even though he was observed running, in tan clothing, *before* he entered the back yard location where it was found.

In order to show constructive possession, the defendant would need to have dominion and control over a car that he did not own, and in which items of identification were found that showed dominion and control over the car by everyone *except* him.

Both theories are inadequate. The Court of Appeals stressed that evidence can be circumstantial. Appx. A, at p. However, the essential proof of guilt in a criminal case cannot be supplied solely by a pyramiding of inferences so weak, individually and as a whole, that no reasonable, rational jury could find guilt beyond a reasonable doubt. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (citing State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

c. Reversal and dismissal are required.

No rational jury could conclude that the State proved all of the elements of the crime of VUFA beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. at 319. A conviction based on insufficient evidence contravenes the Fourteenth Amendment. U.S. Const. amend. XIV; Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Mr. Johnson is therefore entitled to reversal of his VUFA conviction, and dismissal of the charge. U.S. Const. amend. V.

2.THE COURT OF APPEALS AGREED THAT THE POLICE OFFICER UTTERED WRONGFUL TESTIMONY, BUT FAILED TO RECOGNIZE THAT THIS WAS A BELL THAT COULD NOT BE "UNRUNG" ONCE THE JURY HEARD IT.

a. Review is warranted under RAP 13.4(b)(1),(2) and (3).

When the State elicits opinions on guilt spoken by trial witnesses, these invade the job of the jury and jeopardize the right to a fair trial, and such practice is therefore constitutionally prohibited. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (such testimony invades the exclusive province of the finder of fact.); City of Vancouver v. Kaufman, 10 Wn. App.2d 747, 487-89,765-66, 450 P.3d 196 (2019); U.S. Const. Amend. VI; State v. Barr, 123 Wn. App. 373, 380-81, 98 P.3d 518 (2004); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). The Court of Appeals decision raises a question of substantial constitutional concern, and it conflicts with cases from other Courts of Appeal and from the Supreme Court. Review is warranted.

b. Improper opinion testimony on guilt uttered by a law officer and not possible for a lay jury to disregard prejudiced the outcome of the trial, which would have been different.

The Court of Appeals agreed with Mr. Johnson's argument that police officer Benjamin Frieler improperly stated legal conclusions and opinion testimony. See Appellant's SAG, at pp. 12-14; Appx. A, at pp. 8-

10. No witness, even by inference, may opine that the defendant acted guilty. Black, 109 Wn.2d at 348; see also City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). In this case the prosecutor elicited the improper testimony:

> Q. Could you describe his driving as you were pursuing him?
> A. His driving was reckless --
> MR. DUBOW: Objection to legal conclusion.
> THE COURT: So I will sustain the objection. I'm going to strike the response and ask the state to lay the foundation, please.
> MS. LEE: Okay.
> BY MS. LEE:
> Q. What did you observe the car do?
> A. The vehicle was -- or the driver of the vehicle had increased speed, was driving erratically and with a disregard for the safety of any pedestrians or other vehicles in the area.
> MR. DUBOW: Object to that last portion. Improper opinion. Legal conclusion and foundation.
> THE COURT: I will again sustain the objection and strike the response and ask the state to rephrase.
> MS. LEE: All right. Are you striking the entire response?
> THE COURT: The last part of the response.

RP 566. This testimony was prejudicial error. Even looking to the portion of the testimony not stricken by the judge alone, reversal is required. A law enforcement officer's improper opinion testimony is particularly prejudicial because it carries a special aura of expertise and reliability for lay juries. State v. Lang, 12 Wn. App.2d 481, 488–89, 458

P.3d 791, 795 (2020) State v. King, 167 Wn.2d 324, 331, 219 P.3d 642 (2009).

The Court of Appeals, however, stated that it would "presume that jurors follow a trial court's instructions to disregard improper testimony." Appx. A, at pp. 12-14;. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013). However, no lay jury could ignore the repeated improper testimony from this witness. The remaining testimony could not be ignored or forgotten by the jury despite the court's command. Not only is it well known that juries place great trust in the opinions of law enforcement witnesses in criminal trials, but further, as "both the Washington Supreme Court and the United States Supreme Court have frankly acknowledged, the naive assumption that prejudicial effects can be overcome by instructions to the jury is a commonplace invocation that all practicing lawyers know to be unmitigated fiction. State v. Newton, 109 Wn.2d 69, 74 n. 2, 743 P.2d 254 (1987) (quoting Krulewitch v. United States, 336 U.S. 440, 453, 69 S.Ct. 716, 723, 93 L.Ed. 790 (1949).

The error requires reversal. As noted, Mr. Johnson conceded in opening statement that he did drive in a manner that made him guilty of eluding. However, the prosecutor – supported by the police officer's improper opinion testimony before the jury - expressly argued that Mr.

Johnson led the pursuing police on a high speed car chase because he was trying to get away since he "knew he was not supposed to possess that firearm." RP 566. The error was not harmless.

F. CONCLUSION.

Based on the foregoing, Terrell Johnson asks that this Supreme Court accept review under RAP 13.4(b), on both issues presented, and on review the Court should reverse his judgment and sentence.

Respectfully submitted this 23rd day of August, 2021.

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

THE STATE OF WASHINGTON, Respondent, v. TERRELL TRAYSHAWN JOHNSON, Appellant.	)	No. 81019-7-I UNPUBLISHED OPINION

BOWMAN, J. — Terrell Trayshawn Johnson argues insufficient evidence supports his conviction for one count of first degree unlawful possession of a firearm. In a statement of additional grounds for review (SAG), Johnson claims the trial court erred in denying his motion to suppress evidence of a warrantless search and in admitting opinion testimony at trial. Johnson also contends his trial counsel was ineffective by not introducing other suspect evidence. We affirm.

FACTS

The Seattle Police Department anti-crime team (ACT) investigates crimes, conducts "tactical operations," and coordinates arrests of violent suspects. It also searches for people with outstanding arrest warrants. In April 2019, ACT officers were searching for Johnson.

On April 5, 2019, plainclothes ACT officers learned that Johnson was at his mother's home in Rainier Valley. They believed Johnson might be armed.

When police arrived at the house, they saw parked out front the white Chrysler Sebring with California license plates they knew Johnson sometimes drove.

Officers watched the car for about 15 minutes[1] before seeing Johnson leave the house and get in the driver's seat. Johnson was wearing a black "beanie" hat, a tan shirt under a black North Face fleece jacket, and tan pants. Officers did not see Johnson carrying a gun. Johnson sat in the car for about 10 minutes[2] before driving away.

Uniformed officers tried to stop Johnson. Johnson briefly stopped the car but as an officer approached on foot, Johnson backed up and drove away. Johnson then turned onto a residential street and began driving at "a very high rate of speed." Officers activated their emergency lights and followed Johnson for about a mile. Johnson crashed into an unoccupied parked car and a school fence, got out of the car, and ran.

Police lost sight of Johnson for "less than a minute" during the car chase. But when they reached the crash site, bystanders pointed them in the direction Johnson ran. Lamour Burke, who lived nearby, told the officers he saw a man wearing "tan sweats" and "a black shirt" running a half-block away from the car just after it crashed. Officers quickly saw Johnson[3] running through alleys and yards, but he was wearing only a "tan . . . jogging suit." At times during the foot chase, officers lost sight of Johnson, but for only a moment. Police caught

[1] One officer estimated they watched the car for 10 to 15 minutes. Another officer said it was 35 to 45 minutes.

[2] Another officer testified Johnson stayed in the car for 30 minutes.

[3] Officers did not see him get out of the car but saw him running "[w]ithin seconds" after the crash.

Johnson about a block and a half from where he crashed the car. When police arrested Johnson, he was wearing a "tan brown jogging suit." He was not carrying a firearm.

Because police believed Johnson was armed, they brought K-9 Officer Blitz to the scene to search for a firearm. The dog and his handler arrived within 20 minutes of Johnson's arrest and first alerted on Johnson's black beanie. Officer Blitz found the beanie on the ground just outside the driver's side door of the crashed Chrysler. After searching the surrounding area for 6 to 7 minutes, Officer Blitz alerted on a black North Face jacket hanging on a backyard fence near where Johnson had run. His handler testified that Officer Blitz's strong reaction during the search suggested the jacket had not been there long and was still "saturated with fresh human odor." Officers found a "wall plug charger," some cash, and a loaded 9 mm Remington handgun in the jacket pockets.

Officers later identified the jacket as the same one they saw Johnson wearing when he left his mother's home and got into the Chrysler. When tested, the gun did not reveal any usable fingerprints. Detectives did not test the jacket or the charger for fingerprints and tested none of the items for DNA.[4]

Police obtained a warrant to search the Chrysler. The search revealed boxes of 9 mm ammunition in the driver-side door and front center console, an unfired 9 mm bullet in the center crease of the backseat, a loaded magazine for a 9 mm semi-automatic Remington pistol under the front passenger seat, and a box of .40 caliber ammunition in the trunk. Officers also discovered an

[4] Deoxyribonucleic acid.

identification card under the back passenger seat behind the driver's seat for a person named Dominique Freman and credit and debit cards bearing several other names. A bill of sale inside the Chrysler suggested Aiden Riche sold the car to Aaron Tinselly a few weeks earlier. Police did not find any items identifying Johnson in the car.

The State charged Johnson with attempting to elude a pursuing police vehicle and first degree unlawful possession of a firearm.

Johnson moved to suppress evidence pretrial, alleging police conducted an unlawful search of the jacket.[5] The trial court denied the motion, ruling Johnson abandoned the jacket. At trial, Johnson conceded he was guilty of the eluding charge but argued the State did not prove beyond a reasonable doubt that he knowingly possessed a firearm. A jury convicted Johnson on both charges and the trial court sentenced him to a standard-range sentence.

Johnson appeals the unlawful possession of a firearm conviction.

ANALYSIS

Sufficiency of Evidence

Johnson argues the evidence at trial was insufficient to prove he possessed a gun because "[n]ot a single person, law enforcement or civilian, saw [him] possessing the handgun." We disagree.

We review a sufficiency of the evidence challenge de novo. State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Due process requires the State to prove each element of the charged crime beyond a reasonable doubt. State v.

[5] The record refers to the North Face item intermittently as a "jacket" and a "sweatshirt." We use the term "jacket" for consistency.

Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); State v. Johnson, 188 Wn.2d 742, 750, 399 P.3d 507 (2017). In considering a challenge to the sufficiency of evidence, we examine the facts in the light most favorable to the State and determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Such a challenge admits the truth of the State's evidence and all reasonable inferences from it. Salinas, 119 Wn.2d at 201.

Circumstantial evidence is as equally reliable as direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). And we defer to the fact finder's decision in our review. State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). "We do not consider 'questions of credibility, persuasiveness, and conflicting testimony.' " Davis, 182 Wn.2d at 227 (quoting In re Pers. Restraint of Martinez, 171 Wn.2d 354, 364, 256 P.3d 277 (2011)).

The two elements of the crime of unlawful possession of a firearm are (1) knowingly possessing a firearm and (2) having a prior "serious offense" conviction. RCW 9.41.040(1)(a); State v. Nielsen, 14 Wn. App. 2d 446, 452, 471 P.3d 257 (2020), review denied, 196 Wn.2d 1035, 478 P.3d 94 (2021). Because Johnson stipulated a court had convicted him of a serious offense and he received notice that he was ineligible to possess firearms, the only issue at trial was whether he knowingly possessed a gun.

The State may prove possession by showing a defendant had actual or constructive possession of a firearm. State v. Manion, 173 Wn. App. 610, 634,

295 P.3d 270 (2013). A person actually possesses something if it is in his physical custody. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession can be established by showing the defendant had " 'dominion and control' " over the firearm. Manion, 173 Wn. App. at 634[6] (quoting State v. Lee, 158 Wn. App. 513, 517, 243 P.3d 929 (2010)). Dominion and control need not be exclusive. State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). But the State must prove more than a passing control; it must prove actual control. State v. Staley, 123 Wn.2d 794, 801, 872 P.2d 502 (1994). The fact finder determines whether one has actual control under the totality of the circumstances. Staley, 123 Wn.2d at 802.

Here, the record shows police saw Johnson get into a car wearing a black beanie cap and a black North Face jacket over a tan shirt and tan pants. When confronted by police officers, Johnson sped away and crashed into a parked car and a school fence. Neighbor Burke saw a man running a half block from the crash site wearing "tan sweats" and a "black shirt." Johnson ran through backyards and alleys until police caught him. When police arrested Johnson, he was wearing just a tan tracksuit. Officers found Johnson's beanie cap on the ground just outside the crashed car and his black North Face jacket hanging on the fence of a backyard near where he had run. The jacket was dry even though the surrounding area was wet. A police canine tracked Johnson's scent from his beanie cap to the jacket. A loaded 9 mm Remington handgun was in the jacket pocket. Inside the car Johnson was driving, police found boxes of 9 mm

[6] Internal quotation marks omitted.

ammunition and a loaded magazine for a 9 mm semi-automatic Remington pistol. Considering the evidence in the light most favorable to the State, a reasonable trier of fact could find beyond a reasonable doubt that Johnson was wearing the black North Face jacket and possessed the Remington handgun.

Statement of Additional Grounds

Johnson filed a SAG, arguing the trial court erred in denying his motion to suppress evidence based on an unlawful search of the jacket. Johnson also claims the trial court erred by allowing officers to testify that he drove recklessly and contends his attorney was ineffective because he did not present other suspect evidence.

A. Suppression of Evidence

"We review conclusions of law in an order pertaining to suppression of evidence de novo." State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), abrogated on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, L. Ed. 2d 132 (2007). We consider unchallenged findings of fact as verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

Johnson argued below that officers unlawfully searched his jacket "incident to arrest" where he "was not wearing [it] at the time of the search but he had not abandoned it." In his motion, Johnson admitted he dropped the jacket while fleeing but claimed it was inadvertent and not an intentional surrender of the item.

Police may search voluntarily abandoned property without a warrant. State v. Reynolds, 144 Wn.2d 282, 287, 27 P.3d 200 (2001). This is because a

criminal defendant has no reasonable expectation of privacy in abandoned items. Reynolds, 144 Wn.2d at 287-88. We determine whether an individual voluntarily abandoned property based on actions and intent. State v. Dugas, 109 Wn. App. 592, 595, 36 P.3d 577 (2001). We may infer intent from words spoken, acts done, and other objective facts and should consider all the relevant circumstances at the time of the alleged abandonment. Dugas, 109 Wn. App. at 595. The defendant bears the burden of showing he had an actual, subjective expectation of privacy and that his expectation was objectively reasonable. State v. Evans, 159 Wn.2d 402, 409, 150 P.3d 105 (2007).

A critical factor in determining whether someone has abandoned property is the status of the area where the item was located. State v. Hamilton, 179 Wn. App. 870, 885, 320 P.3d 142 (2014). "Generally, no abandonment will be found if the searched item is in an area where the defendant has a privacy interest." Hamilton, 179 Wn. App. at 885. Here, officers found Johnson's jacket "hanging over a [metal] fence" near a tool shed in a yard Johnson passed through while fleeing police. Johnson had no privacy interest in the area. We agree with the trial court that Johnson relinquished his reasonable expectation of privacy by discarding the jacket. The warrantless search of Johnson's abandoned jacket was lawful.

B. Opinion Testimony

Johnson claims the trial court "erroneously allowed police officers to testify that [he] drove recklessly or eluded the police."

We review a trial court's evidentiary rulings for an abuse of discretion. State v. Arndt, 194 Wn.2d 784, 797-98, 453 P.3d 696 (2019). Questions of relevancy and the admissibility of testimonial evidence are within the sound discretion of the trial court. In re Welfare of Shope, 23 Wn. App. 567, 569, 596 P.2d 1361 (1979); Roper v. Mabry, 15 Wn. App. 819, 822, 551 P.2d 1381 (1976); State v. Temple, 5 Wn. App. 1, 4-5, 485 P.2d 93 (1971). We will reverse a trial court's rulings on those issues only if there is "a reasonable possibility that the testimony would have changed the outcome of trial." State v. Fankhouser, 133 Wn. App. 689, 695, 138 P.3d 140 (2006).

At trial, the prosecutor asked an officer to describe Johnson's driving during the pursuit. He responded that Johnson drove "reckless[ly]." Defense counsel objected to the testimony as an improper legal conclusion. The trial court sustained the objection and struck the response but suggested the State lay a foundation. When then asked to describe what actions he saw, the officer testified that "the driver of the vehicle had increased speed, was driving erratically and with a disregard for the safety of any pedestrians or other vehicles in the area." Defense counsel again objected and the trial court again sustained the objection and struck the improper portion of the response. The officer then testified without objection that Johnson was traveling at an "increasing speed" that the officer could not "keep up with" while also clearing intersections where pedestrians and other cars might be present.

We presume that jurors follow a trial court's instructions to disregard improper testimony. State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013).

Because the trial court sustained Johnson's objections at trial and struck the improper testimony, Johnson identifies no error. Johnson did not request a curative instruction and cites no authority that the court must offer one sua sponte.

C. Ineffective Assistance of Counsel

Johnson claims his attorney was ineffective because "he failed to research or know the relevant law on evidence of other suspects" and "did not admit other suspect evidence."

A successful ineffective assistance of counsel claim requires both deficient performance and a showing of prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). We need not "address both components of the inquiry if the defendant makes an insufficient showing on one." Strickland, 466 U.S. at 697.

To admit other suspect evidence, a defendant "must establish a train of facts or circumstances as tend clearly to point out someone besides the defendant as the guilty party." State v. Strizheus, 163 Wn. App. 820, 830, 262 P.3d 100 (2011). Remote acts, disconnected and outside the crime itself, do not suffice. State v. Franklin, 180 Wn.2d 371, 380, 325 P.3d 159 (2014).

Johnson provides no evidence that his attorney was not fully informed about these legal requirements for introducing "other suspect" evidence.[7] Nor does he show that the evidence at trial pointed to someone other than him wearing the black North Face jacket where officers found a gun. At best, the

[7] We do not review matters outside the record on direct appeal. State v. McFarland, 127 Wn.2d 322, 337-38, 899 P.2d 1251 (1995).

evidence at trial suggested that people other than Johnson may have had access to the white Chrysler Sebring. And Johnson's attorney argued to the jury that "many other people had access to the car" and police found "nothing, not one item or anything that tied Mr. Johnson to that car." He urged the jury to consider also that "it's not unreasonable to think that someone else in the car if they were in the back passenger side could have gotten out quicker and run around the corner without anyone having seen." Johnson's attorney was not deficient.

We affirm Johnson's conviction for one count of first degree unlawful possession of a firearm.

WE CONCUR:

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. 81019-7-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 or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: September 10, 2021
Washington Appellate Project

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September 10, 2021 - 3:03 PM

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