NO. 101692-1

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CURTIS LEE MCKNIGHT, JR,

Petitioner.

Pierce County Superior Court Cause No. 19-1-03392-6
Court of Appeals Cause No. 56250-2-II

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

There is no basis for review under RAP 13.4. It is well established the Sixth Amendment fair cross-section requirement applies to the selection of the venire and not to the selection of the petit jury. The Court of Appeals correctly rejected McKnight's Sixth Amendment fair cross-section claim wherein he challenged not the selection of his venire but the process used to select his jury of twelve. Consistent with statutory authority and case law, the Court of Appeals also correctly determined the trial court did not abuse its discretion when it declined to rearrange McKnight's randomly ordered jury based on race. Granting McKnight's request would have undermined the randomness requirement of jury selection. Finally, the Court of Appeals applied settled sufficiency of the evidence principles and properly found sufficient evidence to support McKnight's unlawful possession of a firearm conviction. This Court should deny McKnight's petition for review.

II. RESTATEMENT OF THE ISSUES

A. The Sixth Amendment fair cross-section requirement applies to the selection of the larger venire and not to the selection of the petit jury. Did the Court of Appeals properly reject McKnight's Sixth Amendment fair cross-section claim, where McKnight conceded he was not challenging the superior court's process of selecting his venire but rather the process of selecting his particular jury of twelve?

B. A randomly selected jury is a right provided by statute and is based on the Legislature's policy of providing an impartial jury. Did the Court of Appeals correctly uphold the trial court's refusal to un-randomize the randomly selected venire?

C. Did the Court of Appeals correctly determine sufficient evidence supports McKnight's conviction for unlawful possession of a firearm, where, viewed in the light most favorable to the State, McKnight had both actual and constructive possession of the firearm he reached for and handled underneath his passenger seat when contacted by police?

III. STATEMENT OF THE CASE

A. McKnight Violently Attacked Multiple People and Reached for a Gun When Contacted by Police.

McKnight brutally attacked his ex-girlfriend, Michelle Curran, and a man who attempted to come to her aid. McKnight repeatedly punched Curran in her face with his fist while also

holding a machete. RP 1040-45, 1060-63, 1075, 1186. Multiple witnesses, including Eugene "Geno" Demapan, attempted to intervene, as Curran was screaming and bleeding badly. RP 995-96, 999-1001, 1187, 1327. Curran suffered from multiple facial fractures, including fractures to her nose and jaw. RP 1063, 1144, 1152-55, 1165.

McKnight was angry with Demapan and those who had witnessed the assault and went looking for them. RP 1677-80. Almost a week later, McKnight found Demapan and attacked him with a metal baseball bat, hitting him multiple times. RP 1196, 1328-34, 1680. Demapan was transported to the hospital, where he was diagnosed with a broken forearm, broken patella, and small subarachnoid hemorrhage in his brain. RP 1296-99, 1441-42, 1694-98. Demapan's patella injury was significant and required surgery. RP 1702-03.

Demapan identified his assailant as McKnight. RP 1209, 1754-56. Police received information as to McKnight's whereabouts and tried to locate him. RP 1425-28, 1611-13.

Tacoma Police Officers Avalos and McCrea observed a male in the passenger seat of a parked vehicle who fit the description of McKnight. RP 1459-61, 1613. As they approached the car, the officers observed the male passenger "quickly hunch[] over" and he "appeared to be shoving some sort of item underneath the seat." RP 1467; *see also* RP 1613, 1616.

The officers contacted the male passenger, and although he provided a false name, they were able to identify him as McKnight. *See* RP 1461-67, 1616-19. They advised McKnight he was under arrest and needed to exit the vehicle. RP 1466-67. Officer Avalos took hold of McKnight's arm, and McKnight "began to lower himself forward again and placed his hand palm down towards underneath the seat." RP 1467-68. The officer lost sight of McKnight's left hand as it reached underneath the seat, and he was concerned that McKnight was reaching for something. RP 1468, 1478, 1495-96; *see also* RP 1619-20, 1643. The officers removed McKnight from the vehicle. RP 1468, 1620. From the open passenger door, the officers could see "the

handle of a gun underneath the passenger seat." RP 1620-21; *see also* RP 1471-72, 1484.

The car was later searched pursuant to a search warrant, and police recovered a .22 caliber revolver underneath McKnight's seat. RP 1399-1400, 1518-22, 1525; Exhibits 60-68. The revolver was loaded and ready to fire. RP 1402-05, 1761-62.

B. McKnight Asked the Trial Court To Manipulate His Randomly Ordered Venire To Increase the Likelihood That Jurors of One Particular Race Would Be Seated on His Jury.

The State charged McKnight with first-degree assault with a deadly weapon enhancement (involving Demapan), second-degree assault with a deadly weapon enhancement (involving Curran), two counts of felony harassment, two counts of witness tampering, and unlawful possession of a firearm in the first degree. CP 1-4, 63-67. The case proceeded to jury trial. *See* RP 1, *et seq.*

The trial court called for 70 jurors on the jury panel. RP 7-8; CP 249-252. The jurors were randomly assigned and numbered. *See* CP 249-252. Due to Covid-19 protocols and the

need for social distancing, the court explained that the venire would be divided into groups for purposes of voir dire.[1] RP 8, 11, 37-38; *see* CP 254-256 (venire panels). The parties agreed to question the group with the highest numbers first and the group with the lowest numbers last, so the jurors "most likely…to be seated" would be freshest in the minds of the parties. RP 45-46.

After speaking to a number of the jurors during individual questioning, McKnight asked the court to rearrange the panels so that the prospective jurors with the higher numbers would be more likely to sit on the jury. RP 704-05. McKnight argued that

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[1] The Washington Supreme Court's Fifth Revised and Extended Order Regarding Court Operations was in effect at that time. *See* Fifth Revised and Extended Order Regarding Court Operations, No. 25700-B-658, at 3, 6-7, 14-15 (February 19, 2021), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/25700-B-658.pdf.
See also, Order Re: Modification of Jury Trial Proceedings, No. 25700-B-631, at 3-4 (June 18, 2020), https://www.courts.wa.gov/content/publicUpload/Supreme%20Court%20Orders/Jury%20Resumption%20Order%20061820.pdf.

starting the jury selection process "from the beginning," as previously discussed, would "effectively remove the three, possibly four…but the African American individuals…would most likely not even come up," and therefore he wanted to start jury selection "from the high numbers and move to the low numbers." RP 704-05.

The trial court denied McKnight's request and explained that "[t]he issue is to have a random selection of jurors. And the random selection of jurors is one through 15 that remain now." RP 706; *see* RP 610-11 (trial court confirms jurors one through fifteen are the presumed jurors, to include alternates). The court stated that the outlined jury selection procedure "has nothing to do at all with excluding somebody based on race," but rather the process was "a random selection of jurors." RP 706-07. The court again explained that the first group of jurors to be questioned would be the highest numbers, and the last group of jurors to be questioned would be the lowest numbers who would be the focus of any peremptory challenges. RP 708, 723.

The next day, after the parties conducted voir dire of the first panel (the jurors with the highest juror numbers) and spoke with the jurors at length, McKnight again asked the court to start jury selection and the exercise of peremptory challenges in reverse order. RP 796-97; *see also*, RP 754-94 (voir dire); CP 256 (venire panel no. 1). McKnight argued,

> …40 percent of this panel was African American. Zero percent of the rest of the two panels will be African American.
> Mr. McKnight is entitled to be tried by a jury of his peers. The fact that somebody is of the same race is not the only matter, but it is certainly relevant and well established in case law and the law in general.
> We could remedy that circumstance again by…that we started at this panel[.]…
> And it is concerning to Mr. McKnight, it's concerning to me that we have an opportunity to give him at least a potentially closer jury to his peers that what we're going to get out of these other two panels.

RP 797.

The trial court responded that it would not select particular members of the venire based on their race and move them around at McKnight's request. The court specifically stated,

> I understand. And I've ruled on this. But just to make the record clear. What the Court does not do is go back and randomly select somebody because of their ethnicity, their race or any other reason that is not in the initial jury panel, the first 12, and the first in this case additional three that happen to be the alternates. We don't go up and find someone who happens to be Number 69 and say okay, because you are a particular race we're going to put you on this panel. We will not do that.

RP 797. The parties selected the jury in the manner previously outlined by the court, starting from the lowest juror number. *See* CP 249-256, 258.

The jury found McKnight guilty of both counts of assault with deadly weapon enhancements, one count of felony harassment, and unlawful possession of a firearm in the first degree. CP 174-183. McKnight timely appealed. CP 211.

C. The Court of Appeals Affirmed McKnight's Convictions and Rejected His Challenge to the Jury Selection Process.

McKnight filed a direct appeal, wherein he claimed the trial court violated his Sixth Amendment right to a jury drawn from a fair cross-section of the community by declining to reorder his venire during jury selection. The Court of Appeals

disagreed in a partially published opinion, holding the trial court's jury selection procedure did not violate McKnight's Sixth Amendment right, "because that right does not apply to the selection of a particular jury from a properly selected venire." *State v. McKnight*, _ Wn. App _, 522 P.3d 1013, 1018 (2023). The court further held that "randomness is an essential feature of the jury selection process," and the trial court did not abuse its discretion in not reordering the prospective jurors based on their personal characteristics. *Id.* at 1018-19. In the unpublished portion of its opinion, the court held there was sufficient evidence to support McKnight's conviction for unlawful possession of a firearm. *Id.*

IV. ARGUMENT

A. It Is Well Settled the Sixth Amendment Fair Cross-Section Requirement Applies to the Selection of the Larger Venire and Not to the Selection of the Petit Jury.

There is no basis for review under RAP 13.4(b). The Court of Appeals applied well established case law and held that the trial court did not violate McKnight's Sixth Amendment right to

a jury drawn from a fair cross section of the community by refusing to reorder his randomly assigned venire for the purpose of selecting his petit jury. The Sixth Amendment fair cross-section requirement applies to the selection of the larger venire, not to the dismissal of individual jurors at the jury panel stage. The Court of Appeals correctly rejected McKnight's Sixth Amendment claim that conflicted with United States Supreme Court precedent.

Both the federal and state constitution guarantee a criminal defendant the right to a jury trial by a fair and impartial jury. U.S. Const. amends. VI, XIV; Const. art. I, §§ 21, 22. The right to an impartial jury includes the right "to be tried by a jury that is representative of the community." *State v. Hilliard*, 89 Wn.2d 430, 440, 443, 573 P.2d 22 (1977) (citing *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)). But a defendant has no right to be tried by a particular juror or by a particular jury. *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d

1105 (1995); *Taylor*, 419 U.S. at 538 ("[d]efendants are not entitled to a jury of any particular composition").

"The Sixth and Fourteenth Amendments prohibit the *systematic* exclusion of distinctive groups from jury pools." *State v. Clark*, 167 Wn. App. 667, 673, 274 P.3d 1058 (2012) (emphasis added) (citing *State v. Lanciloti*, 165 Wn.2d 661, 671, 201 P.3d 323 (2009)). To demonstrate that a jury is not a fair cross-section of the community in violation of the Sixth Amendment,[2] a defendant must show: "'(1) that the group alleged to be excluded is a 'distinctive' group in the community;

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[2] As the Court of Appeals recognized, McKnight bases his argument on the Sixth Amendment and does not independently argue that the Washington Constitution provides greater protection than the United States Constitution. *See McKnight*, 522 P.3d at 1016 n.1. While McKnight notes this Court is currently considering in *State v Rivers*, No. 100922-4, whether the Washington Constitution is more protective of a criminal defendant's fair cross-section right than the Sixth Amendment, *see* Pet. Rev. at 20, such a holding would not affect this case. At oral argument, petitioner Rivers conceded his fair cross-section claim concerned the selection of the venire and not the petit jury. *See* Oral Arg. at minute 42:16-44 (https://tvw.org/video/washington-state-supreme-court-2022091163/?eventID=2022091163).

(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under representation is due to systematic exclusion of the group in the jury-selection process.'" *State v. Cienfuegos*, 144 Wn.2d 222, 232, 25 P.3d 1011 (2001) (quoting *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979)).

McKnight makes no attempt to demonstrate the second and third prongs of the *Duren* test, *i.e.*, that (1) underrepresentation of Black jurors in venires, not just his venire, from which juries are selected is not fair and reasonable, and (2) such underrepresentation is due to the systematic exclusion of Black individuals in the jury selection process. Rather, McKnight concedes he is "not challenging the Pierce County Superior Court's process of selecting the jury venire, nor does he claim that the larger jury venire called in this case was not representative of the Pierce County community." Pet. Rev. at 14; *see also McKnight*, 522 P.3d at 1018 (noting McKnight's

concession). McKnight thus concedes he does not have a valid Sixth Amendment fair cross-section claim. *See Cienfuegos*, 144 Wn.2d at 232 ("Cienfuegos has made no attempt at showing the second or third factors, and therefore this challenge fails under *Hilliard* and *Duren*."). McKnight attempts to expand the reach of the Sixth Amendment's fair cross-section requirement to the conduct of voir dire and selection of the petit jury, but, as the Court of Appeals recognized, his claim is foreclosed by United States Supreme Court precedent.

It is well established the Sixth Amendment fair cross-section requirement applies to the selection of the *venire* and not to the selection of a particular jury. *See Holland v. Illinois*, 493 U.S. 474, 480, 482-83, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990) ("The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a *representative* jury (which the Constitution does not demand), but an *impartial* one (which it does.") (emphasis in original); *Berghuis v. Smith*, 559 U.S. 314, 319, 130 S. Ct. 1382, 176 L. Ed. 2d 249 (2010) ("The Sixth

Amendment secures to criminal defendants the right to be tried by an impartial jury *drawn from sources* reflecting a fair cross section of the community.") (emphasis added); *Lockhart v. McCree*, 476 U.S. 162, 173, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986) ("We have never invoked the fair-cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large."); *Taylor*, 419 U.S. at 538 ("[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population.").

The Court of Appeals properly applied the United States Supreme Court's interpretation of the Sixth Amendment to McKnight's case and held that his constitutional right to have a jury drawn from a fair cross-section of the community was not violated. *See McKnight*, 522 P.3d at 1016-18. McKnight fails to show the decision of the Court of Appeals conflicts with settled law of the Supreme Court or Court of Appeals under RAP

13.4(b)(1) and (2), and therefore this Court should decline to accept review.

B. Washington Law Requires a Randomly Selected Jury, Not a Jury of Any Particular Composition.

Courts have a duty to ensure the continued random selection of juries. The Court of Appeals correctly adhered to statutory and constitutional principles when it determined the trial court did not abuse its discretion in declining to manipulate McKnight's randomly selected jury to increase the likelihood that jurors of a particular race would be seated on his jury. Again, review is not warranted.

A trial court's ruling on challenges to the venire process is reviewed for abuse of discretion. *State v. Davis*, 141 Wn.2d 798, 825, 10 P.3d 977 (2000); *State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991). When a jury selection process substantially complies with the applicable statutes or rules, a defendant must show prejudice from the selection process. *Tingdale*, 117 Wn.2d at 600.

"A randomly selected jury is a right provided by statute and is based on the Legislature's policy of providing an impartial jury." *Tingdale*, 117 Wn.2d at 600; *see* RCW 2.36.080(1). Washington's statutes are replete with references to the randomness requirement. *See, e.g.,* RCW 2.36.065 (trial court has a "duty…to ensure continued random selection of the master jury list and jury panels" and "[n]othing in this chapter shall be construed as requiring uniform equipment or method throughout the state, so long as fair and random selection of the master jury list and jury panels is achieved."); RCW 2.36.010(9) ("jury panel" means "those persons randomly selected for jury service for a particular jury term"); RCW 2.36.010(12) ("master jury list" means "the list of prospective jurors from which jurors summoned to serve will be randomly selected"); RCW 4.44.120 ("a panel of potential jurors shall be selected at random from the citizens summoned for jury service who have appeared and have not been excused.").

In light of this clear expression from the Legislature, the Court of Appeals recognized that "randomness is an essential feature of the jury selection process." *See McKnight*, 522 P.3d at 1018. By all accounts, McKnight had a randomly selected and numbered jury venire. *See* CP 249-252. He does not claim otherwise. Rather, McKnight claims the trial court erred in declining to reorder his randomly ordered jury.

The Court of Appeals correctly determined "the trial court did not abuse its discretion in implementing its jury selection procedure and in not reordering the prospective jurors." *McKnight*, 522 P.3d at 1019. First, the trial court's decision was consistent with the Legislature's stated policy of ensuring a randomly selected jury. Purposefully rearranging the order of prospective jurors, as suggested by McKnight, would only undermine the randomness requirement.

Second, the trial court was clear at the beginning of the jury selection process that the presumed jury, including alternates, would be jurors one through fifteen (i.e., the jurors

with the lowest numbers). *See* RP 45-46, 610-12. This approach was entirely consistent with the "struck" method of jury selection used by courts in this state. *See State v. Clark*, 143 Wn.2d 731, 762-63 n.3, 24 P.3d 1006 (2001) (describing "struck" method of voir dire); *McKnight*, 522 P.3d at 1018 (taking judicial notice of same). Nothing in the record suggests the trial court's method of jury selection was influenced by the prospective jurors' race. Rather, the jury selection process complied with normal courtroom practice as well as applicable statutes and court rules requiring a randomly selected jury.[3]

Third, the trial court's decision aligned with this Court's recognition that a defendant has no right to be tried by a particular juror or by a particular jury. *Gentry*, 125 Wn.2d at 615; *see also Hilliard*, 89 Wn.2d at 442 ("a defendant is not entitled

[3] Additionally, McKnight fails to show prejudice from the jury selection process in his case. *See Tingdale*, 117 Wn.2d at 600 (when a jury selection process substantially complies with the applicable statutes or rules, a defendant must show prejudice from the selection process.).

to exact cross-representation in the jury pool, nor need the jury selected for his trial be of any particular composition"); *State v. Salinas*, 87 Wn.2d 112, 114, 549 P.2d 712 (1976) ("A criminal defendant possesses no constitutional right to be tried by a petit jury which contains a proportionate number of members of his own race."). McKnight asked the trial court to reorder the venire to increase the likelihood that the Black prospective jurors would be seated on his jury. But McKnight had no constitutional right to be tried by a jury that included members of his own race. The trial court was right to reject his request.

Granting McKnight's request to reorder the venire based solely on race would not only have been inconsistent with the randomness requirement of jury selection procedures, but would also have raised equal protection concerns. Qualified jurors have a personal constitutional equal protection right to an equal opportunity to serve on a jury. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 140-46, 114 S. Ct. 1419, 128 L. Ed. 2d 89 (1994) (individual jurors have a right to nondiscriminatory jury

selection procedures); *Powers v. Ohio*, 499 U.S. 400, 409-10, 414, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991) (individual jurors have an equal protection right not to be excluded from a jury on account on race).

Deliberately manipulating McKnight's jury venire based on race would have violated the equal protection rights of the other prospective jurors in his case. *See, e.g., United States v. Ovalle*, 136 F.3d 1092, 1105-06 (6th Cir. 1998) (holding jury selection plan which provided for random removal of specified number of "white or other" potential jurors from list violated equal protection); *People v. Hollins*, 366 Ill. App. 3d 533, 540-42, 852 N.E.2d 414, 304 Ill. Dec. 164 (2006) (holding "any arbitrary manipulation of any jury pool on the basis of race, constitutes an actionable due process violation," and deliberate manipulation of jury pool to exclude white jurors from venire violated the equal protection clause of the fourteenth amendment). The trial court did not abuse its discretion in not

reordering the prospective jurors, and the Court of Appeals properly found the same.

McKnight fails to demonstrate the decision of the Court of Appeals conflicts with a decision of the Supreme Court or Court of Appeals. This Court should decline to accept review.

C. The Court of Appeals Properly Viewed the Evidence in the Light Most Favorable to the State and Found Sufficient Evidence to Support McKnight's Conviction For Unlawful Possession of a Firearm.

The Court of Appeals applied well established sufficiency of the evidence principles and determined sufficient evidence supports McKnight's conviction for unlawful possession of a firearm. McKnight hid a firearm underneath his passenger seat when approached by police and reached for the firearm when advised he was under arrest. The grip of the firearm was plainly visible to police from outside the vehicle. Because the Court of Appeals decision adheres to established case law regarding actual and constructive possession, review is not warranted.

Evidence is sufficient to support a conviction when, viewing the evidence in the light most favorable to the State, any

rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *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." *Id.* Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A person is guilty of unlawful possession of a firearm in the first degree if he knowingly has a firearm in his possession or control and has previously been convicted of a serious offense. *See* RCW 9.41.040(1)(a); CP 165-166. Here, McKnight stipulated that he had previously been convicted of a serious offense. CP 90; RP 1809. Thus, the only remaining issue was McKnight's claim there was insufficient evidence to support that he knowingly possessed the firearm underneath his seat.

As the Court of Appeals properly recognized, possession may be actual or constructive. *McKnight*, 522 P.3d at 1019; *see* CP 168; *State v. Manion*, 173 Wn. App. 610, 634, 295 P.3d 270

(2013). Actual possession occurs when the firearm is in the actual physical custody of the person charged with possession and may be proved by circumstantial evidence. *Manion*, 173 Wn. App. at 634. Constructive possession occurs when the firearm is not in actual, physical possession, but the person charged with possession has dominion and control over the firearm. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). "The ability to reduce an object to actual possession is an aspect of dominion and control." *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). While control need not be exclusive, the State must show more than mere proximity to the firearm. *State v. Bowen*, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010).

The Court of Appeals here found sufficient evidence to support both actual and construction possession of the firearm. *McKnight*, 522 P.3d at 1019. The court found sufficient evidence to support actual possession, because police observed McKnight "quickly hunch[] over" and he "appeared to be shoving some sort of item underneath the seat." *See* RP 1467, 1613, 1616. A

reasonable inference from the evidence is that McKnight held the gun in his hand and attempted to hide it when contacted by police. McKnight's actions and the subsequent discovery of the gun underneath his seat constitute sufficient circumstantial evidence that he had actual possession. *See, e.g.,. Manion,* 173 Wn. App. at 634-37 (finding sufficient circumstantial evidence of actual possession based on Manion's flight, his proximity to the discarded firearm, and his contributing DNA on the firearm). The Court of Appeals decision was consistent with case law.

The Court of Appeals also found sufficient evidence to support a theory of constructive possession. Its decision is consistent with *State v. Nyegaard*, 154 Wn. App. 641, 226 P.3d 783 (2010), *remanded on other grounds*, 172 Wn.2d 1006 (2011). In that case, the court found sufficient evidence to prove constructive possession of a firearm and drugs where a car passenger continually moved his hands out of police sight before he was asked to step out of the vehicle, and he dropped a glass drug pipe in the area where police subsequently found a gun and

other contraband. *Nyegaard*, 154 Wn. App. at 644-45, 648. Both the drugs and the firearm had been "within Nyegaard's reach while a passenger in the car because they were located under his seat and, therefore, closer to him than to the other occupants." *Id.* at 648. "From this evidence, the jury could have reasonably concluded that Nyegaard had placed the firearm and bag containing the drugs at his side or at least had manipulated them in some way to hide them, thereby exercising dominion and control over both the firearm and the contraband." *Id.*

Nyegaard is analogous to this case. Due to the fact the butt of the gun was in plain sight underneath McKnight's seat and the reasonable inference that he knew it was there, a rational trier of fact could find that he constructively possessed the gun that was within his reach and closer to him than the driver of the vehicle. Moreover, McKnight repeatedly moved his hands, including out of sight, when first approached by police and when asked to exit the vehicle. From this evidence, the jury could have reasonably concluded that McKnight placed the gun under his seat to

initially hide it, and then attempted to grab the gun when advised he was under arrest, thereby exercising dominion and control over it. As the Court of Appeals recognized, the ability to take actual possession of an object is an aspect of dominion and control. *McKnight*, 522 P.3d at 1019.

Both *Chouinard* and *George*, on which McKnight relies, are distinguishable. *See State v. Chouinard*, 169 Wn. App. 895, 897-98, 282 P.3d 117 (2012); *State v. George*, 146 Wn. App. 906, 193 P.3d 693 (2008). In both cases, the court found the defendant's knowledge and mere proximity to the contraband at issue were insufficient to establish dominion and control. *Chouinard*, 169 Wn. App. at 899, 903; *George*, 146 Wn. App. at 922-23. But there was no evidence either defendant handled or attempted to handle the contraband. *See Chouinard*, 169 Wn. App. at 901; *George*, 146 Wn. App. at 922-23. Here, on the other hand, there was evidence to suggest McKnight manipulated the gun to at first hide it and then to grab it.

The Court of Appeals properly concluded there was sufficient evidence McKnight had possession or control of the firearm underneath this seat. Because sufficient evidence supports McKnight's conviction, review is not warranted.

V. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court deny McKnight's petition for review.

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RESPECTFULLY SUBMITTED this 14th day of March, 2023

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PIERCE COUNTY PROSECUTING ATTORNEY

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