

No. 44414-3

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY ANTONIO WILLIS,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to instruct the jury that possession could not be established if Mr. Willis had only “passing control” of the firearm, as there was evidence to support the theory on which the instruction was based.

2. The trial court erred in admitting unfairly prejudicial and minimally relevant evidence that Mr. Willis had three prior convictions for driving under the influence.

3. The State did not prove all of the elements of unlawful possession of a firearm beyond a reasonable doubt.

4. The State did not prove all of the elements of unlawful display of a weapon beyond a reasonable doubt.

5. The trial court’s finding that Mr. Willis had the ability to pay the ordered financial obligations is not supported by the record.
Judgment and Sentence Finding of Fact 2.5.

6. The trial court erred in ordering Mr. Willis to pay discretionary legal financial obligations.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant in a criminal case is entitled to a jury instruction that is a correct statement of the law, as long as there is evidence to

support the theory on which the instruction is based. The evidence must be viewed in the light most favorable to the defendant. Did the trial court err in refusing Mr. Willis's proposed jury instruction on "passing control," where the evidence showed that Mr. Willis had only momentary control of the firearm?

2. A trial court may not admit evidence of a defendant's prior bad acts unless the evidence is relevant for a reason other than to show propensity, and only if the probative value of the evidence outweighs its potential for undue prejudice. Did the trial court abuse its discretion in admitting evidence that Mr. Willis was convicted three times several years in the past for driving under the influence, where the potential prejudicial impact of the evidence far outweighed any minimal relevance it might have?

3. To prove the crimes of unlawful possession of a firearm and unlawful display of a firearm, the State must prove beyond a reasonable doubt the defendant possessed an operable "firearm." Did the State fail to prove the crimes where the State did not prove that the firearm in evidence was the same firearm Mr. Willis allegedly possessed?

4. The trial court did not inquire as to Mr. Willis's financial condition or his present or future ability to pay legal financial

obligations but entered a written finding that Mr. Willis had the present or future ability to pay them. Must the court's factual finding be stricken in the absence of any supporting evidence in the record?

C. STATEMENT OF THE CASE

On October 21, 2011, at around 10:30 p.m., Jeffery Willis went to a bar and grill in Tacoma called Latitude 84. 4/18/12RP 7-8. He went to celebrate having painted his first car in his auto mechanics class. 4/18/12RP 8-9. He stayed for a few hours, drinking vodka and celebrating with friends. 4/18/12RP 8-9. He had not drunk much in the past few months and was not used to the effects of alcohol. 4/18/12RP 20. He became quite inebriated. 4/18/12RP 20.

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

Norman stormed back into the bar, yelling that Mr. Willis had just urinated on his car and must pay to have it washed. 4/16/12RP 26.

Mr. Willis came in behind him and the two men yelled at each other and then broke into a fistfight. 4/16/12RP 27-28. The bartender, Sesilia Thomas, and the bouncer, Mulimauga Semaia, broke up the fight and escorted Mr. Willis outside. 4/16/12RP 28; 4/17/12RP 14. Norman remained inside the bar. 4/16/12RP 28; 4/17/12RP 14. Ms. Thomas and Mr. Semaia told Mr. Willis to leave the premises. 4/16/12RP 32.

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

Mr. Willis did not know Mr. Griffin and had never seen him at the bar before. 4/17/12RP 16. Nonetheless, according to Ms. Thomas, Mr. Willis took the gun from Mr. Griffin. He tripped and the gun flew out of his hand. 4/16/12RP 35. He got up, grabbed the gun, and pointed it in the air, at which point the magazine fell out of the gun. 4/16/12RP 35. Mr. Willis did not point the gun at anyone and no shots were fired. 4/16/12RP 42, 47. He paced back and forth and walked toward the door of the bar but Ms. Thomas told him to leave. 4/16/12RP 36. He then walked behind a car and Mr. Griffin came over, grabbed the gun, and drove away in his SUV. 4/16/12RP 38-39. No one else handled the gun other than Mr. Griffin and Mr. Willis. 4/16/12RP 39.

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

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

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

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

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

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

would have to use concentrated effort to push hard enough to release it.
4/17/12RP 63.

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

Mr. Willis testified he was intoxicated that night and could not
remember much of what happened. 4/18/12RP 11. He said he was not
a typical drinker and had not drunk much “since I got a DUI years
ago.” 4/18/12RP 11. The last time he had anything to drink was a few
months earlier. 4/18/12RP 12, 20. He did not remember anyone
handing him a gun and did not remember holding a gun at any time.
4/18/12RP 12, 15, 23.

After Mr. Willis’s testimony on direct, the deputy prosecutor
moved, out of the presence of the jury, to admit evidence of Mr.
Willis’s three prior convictions for DUI, going back to 1999.
4/18/12RP 23-24. The prosecutor argued the evidence was relevant to
impeach Mr. Willis’s testimony that he was not a typical drinker and
did not have a high tolerance for alcohol. 4/18/12RP 24. The trial
court granted the motion, over defense objection. 4/18/12RP 25-28.

On cross-examination, Mr. Willis testified he had been
convicted of DUI in 1999, 2004, and 2006. 4/18/12RP 40-41. He said

he stopped drinking for a while after his last DUI conviction.

4/18/12RP 63.

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

Possession is not established if, at most, there is passing control. Passing control is momentary handling.

It is not enough that the defendant might have been in close proximity to the firearm or that he might have momentarily handled it with a brief and passing control.

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

The jury found Mr. Willis guilty of both counts as charged.

4/19/12RP 42; CP 13-14.

D. ARGUMENT

1. **The trial court erred in refusing to provide the jury with the defense-proposed instruction on “passing control” because the evidence supported the instruction**

It is a fundamental principle of criminal procedure that a defendant in a criminal case has a constitutional right to fully defend against the charges. “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.” Chambers v. Mississippi, 410 U.S. 284, 294,

93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); U.S. Const. amend. XIV;
Const. art. I, § 3.

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

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

To meet its burden on the element of possession the State must establish “actual control, not a passing control which is only a momentary handling.” State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d

400 (1969). To establish the element of possession, the State must prove more than a passing control; it must prove actual control. Staley, 123 Wn.2d at 802. Whether the defendant had actual control is a question for the jury, based on the totality of the circumstances. Id. The duration of the handling is one factor to be considered in determining whether control, and therefore possession, has been established. Id.

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

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

Id. at 29.

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

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

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

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

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

CP 8. This is a correct statement of the law and should be submitted to the jury if supported by the evidence in the case. State v. Werry, 6 Wn. App. 540, 547, 494 P.2d 1002 (1972).

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

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

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

Finally, as in Callahan, someone else owned the gun and had exclusive control, care and management of it. Id. at 31; Landry, 257 F.2d at 431. Mr. Griffin handed Mr. Willis the gun personally and did not let the gun out of his sight. He retrieved the gun from Mr. Willis after Mr. Willis had handled it for only a brief period of time. Mr. Griffin took the gun with him in his SUV when he left the scene. As the apparent owner of the gun, Mr. Griffin had “the right of dominion and control” over it. Callahan, 77 Wn.2d at 31. He exercised that control by deciding to whom to give the gun, for how long, and under

what circumstances. Although Mr. Willis held the gun briefly, he never had the right of dominion and control over it. Therefore, when the evidence is viewed in the light most favorable to Mr. Willis, it is more than sufficient to support the proposed jury instruction on passing control.

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

Because the jury could have concluded that Mr. Willis had only passing control of the firearm and not actual control and custody of it, the court's failure to give the proposed instruction is not harmless. The conviction for unlawful possession of a firearm must be reversed.

2. **The trial court abused its discretion in admitting unfairly prejudicial and minimally relevant evidence of Mr. Willis's past convictions for driving under the influence**

“Evidence which is not relevant is not admissible” in a criminal trial. ER 402. Evidence is “relevant” if it tends “to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. But even if evidence is relevant, it is not admissible “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” ER 403.

Evidence of a defendant's other crimes, wrongs or acts is categorically excluded if the only relevance of the evidence is “to prove the character of a person in order to show action in conformity therewith.” ER 404(b). “ER 404(b) is not designed to deprive the State of relevant evidence necessary to establish an essential element of its case, but rather to prevent the State from suggesting that a defendant is guilty because he or she is a criminal-type person who would be likely to commit the crime charged .” State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (internal quotation marks and citation omitted). Such evidence is admissible only if it “is logically relevant to prove an essential element of the crime charged, rather than to show the

defendant had a propensity to act in a certain manner.” State v. Wilson, 144 Wn. App. 166, 177, 181 P.3d 887 (2008). If the prejudicial effect of the evidence outweighs its probative value, it must be excluded. Id.

A court’s ER 404(b) ruling is reviewed for abuse of discretion. In close cases, the balance must be tipped in favor of the defendant. Id.

Here, the trial court admitted, over defense objection, evidence that Mr. Willis was convicted of DUI three times: in 1999, 2004, and 2006. 4/18/12RP 25-28. The prosecutor claimed the evidence was relevant to undermine Mr. Willis’s testimony that he was not a typical drinker, that he had not drunk much since his conviction for DUI “years ago,” and that he was consequently not used to the effects of alcohol. 4/18/12RP 11-12, 20, 24.

Mr. Willis had already admitted he was previously convicted of DUI. The evidence that he had two additional convictions for DUI years earlier did nothing to undermine his testimony that he had not drunk much since his most recent conviction in 2006. Therefore, the evidence was not relevant to impeach his credibility, as the prosecutor claimed. The only possible relevance of the evidence was to suggest that Mr. Willis was a “criminal-type person who would be likely to

commit the crime charged.” Foxhoven, 161 Wn.2d at 175. As such, the evidence was inadmissible. ER 404(b).

The erroneous admission of evidence in violation of ER 404(b) requires reversal if, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. State v. Gresham, 173 Wn.2d 405, 433, 269 P.3d 207 (2012). Here, the evidence of Mr. Willis’s multiple convictions for DUI probably affected the outcome of the trial. The evidence suggested not only that he was a “criminal-type person” who likely committed the current crime, but also that he was a heavy drinker who could not control his behavior when intoxicated. It is therefore likely the evidence distracted the jury’s attention from the facts of the case and Mr. Willis’s behavior on this particular occasion, and encouraged the jury to rely on evidence of his past crimes. Because the evidence was unfairly prejudicial and likely affected the outcome of the case, the convictions must be reversed.

3. **The State did not prove all of the elements of the crimes beyond a reasonable doubt because it did not prove the gun found on Mr. Griffin was the same gun allegedly possessed by Mr. Willis**

An accused in a criminal case is presumed innocent of the charge and the State has the burden of proving guilt beyond a reasonable doubt. State v. Copeland, 130 Wn.2d 244, 294, 922 P.2d 1304 (1996). Constitutional due process requires the State to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence to uphold a criminal conviction, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Vasquez, ___ Wn.2d ___, 2013 WL 3864265, at *2 (No. 87282-1, July 25, 2013); Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The reviewing court presumes the truth of the State's evidence and all reasonable inferences that can be drawn from

that evidence. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

To prove unlawful possession of a firearm, the State was required to prove Mr. Willis, having previously been convicted of a serious offense, knowingly owned or had in his possession or control any firearm. CP 23; RCW 9.41.040(1)(a). To prove unlawful display of a weapon, the State was required to prove beyond a reasonable doubt that Mr. Willis carried, exhibited, displayed, or drew a firearm, in a manner, under circumstances, and at a time and place that manifested an intent to intimidate another or that warranted alarm for the safety of other persons. CP 28; RCW 9.41.270(1).

As an element of both offenses, the State was required to prove Mr. Willis possessed or displayed a “firearm.” A “firearm” is “a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” CP 24; RCW 9.41.010(7).

To prove the presence of a “firearm” under this definition, the State must present sufficient evidence for the jury to find the firearm was “operable.” State v. Recuenco, 163 Wn.2d 428, 437, 180 P.3d 1276 (2008). The State must prove the presence of a gun *in fact*; the

evidence is not sufficient if it establishes only that the defendant was armed with a “gun-like object.” State v. Pam, 98 Wn.2d 748, 753-54, 659 P.2d 454 (1983). A gun-like object incapable of being fired is not a “firearm” under this definition. Id.

In State v. Pierce, 155 Wn. App. 701, 705, 230 P.3d 237 (2010), an intruder ransacked and robbed a home while “holding what appeared to be a handgun.” The Court held the evidence was insufficient to sustain the firearm enhancement because there was “no evidence that the firearm with which Pierce was armed was capable of firing a projectile.” Id. at 714-15. Although the State need not necessarily have the weapon in evidence to prove it was operable, there must be “other evidence of operability, such as bullets found, gunshots heard, or muzzle flashes.” Id. at 714 n.11.

Here, the only weapon in evidence was the firearm found on Mr. Griffin when he was arrested. 4/17/12RP 56. Police test-fired the weapon and found it to be operational. 4/17/12RP 66.

But no gun was found on Mr. Willis. Witnesses testified he briefly handled an object that looked like a handgun in the parking lot of the bar. 4/16/12RP 35, 55-56. He pointed the object in the air and something fell out of it that looked like a gun magazine. 4/16/12RP 35.

But no shots were fired. 4/16/12RP 42, 47. There is no direct evidence that the object in Mr. Willis's hand was an "operational" firearm.

In order to conclude the object that Mr. Willis handled was the same operational firearm found on Mr. Griffin at the time of his arrest, the jury had to rely upon guess, speculation or conjecture. But the State may not rely upon conjecture to prove an element of a crime. Colquitt, 133 Wn. App. at 796. Therefore, the evidence was insufficient to prove the charges.

4. The record does not support the court's finding that Mr. Willis had the ability to pay court costs

Without inquiring into Mr. Willis's present or future ability to pay court costs, or his actual financial condition, the court imposed \$200 in discretionary court costs, which became part of his judgment and sentence. 5/04/12RP 13; CP 41. The judgment and sentence included the following boilerplate finding:

The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

CP 41. The court’s finding, and the imposition of non-mandatory costs, must be stricken because the record does not support the finding that Mr. Willis had the ability to pay them.

Courts are authorized by statute to order convicted defendants to pay costs. RCW 10.01.160(1). Costs are limited to “expenses specially incurred by the state in prosecuting the defendant.” RCW 10.01.160(2). But a court may not order an offender to pay costs “unless the defendant is or will be able to pay them.” RCW 10.01.160(3). In determining the amount of costs to impose, “the court shall take account of the financial resources of the defendant and the nature and burden that payment of costs will impose.” *Id.*

When ordering discretionary costs, the court need not enter a formal finding that the defendant has the ability to pay. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). But if the court *does* enter such a finding, it must be supported by evidence. *State v. Calvin*, ___ Wn. App. ___, 302 P.3d 509, 521 (2013).

In *Calvin*, after the defendant was convicted of third degree assault and resisting arrest, the court imposed a total of \$1,300 in mandatory and discretionary costs. 302 P.3d at 521. The court also

entered the following boilerplate finding on the judgment and sentence, identical to the court's finding in this case:

The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein.

Id.

Despite the trial court's finding, the record did not show that Calvin had the present or future ability to pay the costs, or that the court actually took his financial resources or ability to pay into account. Id. at 521-22. The only evidence of past employment was Calvin's testimony at trial that he used to be a carpenter. Id. The only evidence of his financial resources was his testimony that he lived in a mobile home that did not have running water. Id. At sentencing, the court made no inquiry into Calvin's resources or employability. Id. Thus, the record did not support the court's finding that Calvin had the ability to pay, or that the court took his financial resources into account. Id. at 522. The Court of Appeals therefore remanded for the trial court to strike the finding and the imposition of court costs. Id.

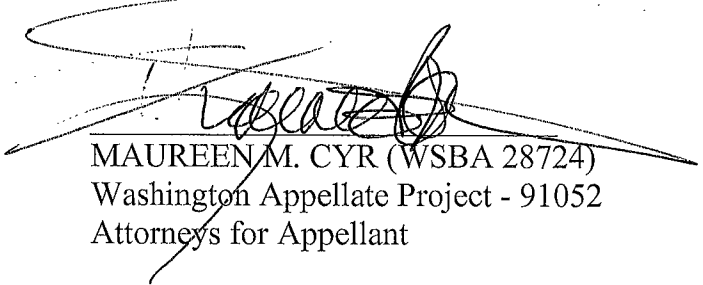
Calvin requires this Court impose the same remedy in Mr. Willis's case. The trial court made a boilerplate finding that Mr. Willis had the ability to pay the costs imposed and that the court took his financial resources into account. CP 41. But there is no evidence in the record to support the court's finding. There is no information about Mr. Willis's financial resources. At sentencing, the court asked no questions about his financial circumstances and made no inquiry into his employability. Therefore, the record does not support the court's finding that Mr. Willis had the ability to pay, or that the court took his financial resources into account. This Court must remand the case for the trial court to strike the finding and the imposition of court costs. Calvin, 302 P.3d at 522.

E. CONCLUSION

The trial court erred in refusing to instruct the jury on "passing control" and in admitting evidence of Mr. Willis's multiple convictions for DUI. Therefore, the convictions must be reversed and remanded for retrial. Also, the evidence was insufficient to prove Mr. Willis handled an "operational" firearm, requiring reversal of the convictions and dismissal of the charges. In the alternative, the court's finding that Mr. Willis had the present or future ability to pay discretionary court costs

is not supported by the record, requiring that the finding, and the imposition of costs, be vacated.

Respectfully submitted this 30th day of August, 2013.



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Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 44414-3-II
)	
JEFFERY WILLIS,)	
)	
APPELLANT.)	

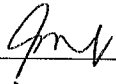
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CONNELL, WA 99326-0769

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF AUGUST, 2013.

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Court of Appeals Case Number: 44414-3

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