SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 90778-1
	)	COA No. 71966-1-I
	)	PETITION FOR REVIEW
vs.	)	RAP 13.4(b)
	)	
NAAMAN J. WASHINGTON, Petitioner.	)	

A. IDENTITY OF PETITIONER

1. On May 22, 2011, Naaman Jamal Washington, was a passenger in a car, driven by California Usher-Smith, when State Trooper James Meldrum stopped the car on Interstate Five past the M street overpass in Tacoma. Upon approaching the car, Trooper Meldrum was accosted by a strong and very significant odor of marijuana. Washington, a passenger in the car, gave Trooper Meldrum medical marijuana authorization paperwork naming him the designated provider for patient Latoya Cole. Trooper Meldrum questioned the validity of the paperwork and ordered Washington to step outside of the vehicle. While patting Washington down, Trooper Meldrum discovered an unlabeled pill bottle in Washington's pocket containing 22 Hydrocodone tablets.

2. Meldrum arrested Usher-Smith for driving with a suspended license in the third degree, a misdeameanor. He arrested Washington for unlawful possession of a controlled substance with intent to deliver (marijuana) and unlawful possession of a controlled substance with intent to deliver (hydrocodone).

3. After Meldrum arrested Usher-Smith and Washington, Trooper Pearson arrived on scene to assist in preparing Usher-Smith's car for impound because it was stopped in a no-park tow-away zone . Jerry Clark, A Gene's towing truck driver, arrived on scene to impound Usher-Smith's car. At the tow lot, Clark did an impound inventory of the car and found two hand guns inside the car. Clark contacted Washington State Patrol (WSP) dispatch and told them about the guns. WSP dispatch informed Meldrum, who had just booked Usher-Smith and Washington into the Pierce county jail, of Clark's discovery of the guns.

4. Trooper Meldrum left the jail and proceeded to Gene's towing to meet with Clark. Clark told Meldrum he was doing an inventory of the car and found a gun inside the locked glove box and another inside the pocket of a black jacket lying on the back seat of the car on the driver's side.

5. Meldrum observed the black gun lying on the passenger seat and the other gun lying on the roof of the car on top of the black jacket. Clark told Meldrum to take the guns because his company did not like customers possessing guns

when they come to pick up their car after an impound.

6. Trooper Meldrum took the firearms to his patrol car, did a records check and determined someone reported one of the firearms stolen to Seattle P.D. Meldrum subsequently got a warrant to seize the weapons. The state subsequently, amended the information charging two additional counts of unlawful possession of a firearm in the first degree.

7. At trial, defense counsel moved to dismiss both firearm counts counsel argued:

> "I don't think there's been evidence that my client had any dominion or control for the vehicle, the keys. He didn't have the keys. The keys opened the glove box. The keys were in the driver's ignition. We have established that the registered owner was the person driving the car. It was his car. We don't know anything about the jacket. We don't know if it fit my client. We don't know if its his jacket. There's no fingerprints, nothing that ties my client to guns other than his presence. So, based on all of these arguments, I would ask the court to dismiss."

VRP, 01/22/13. pg. 231-232.

8. In response to defense counsel, the prosecutor argued:

> "Counsel states there is no dominion of (sic) control; keys, registered owner, jacket, etc., for reasons why there is insufficient evidence as to that count. The state's contention is that there is presence plus. There was two individuals in the vehicle, two firearms. The trooper testified that the driver was wearing a jacket when he got out of the vehicle, and Mr. Washington, according to the video recording of him being in back of the patrol vehicle, was not wearing a jacket when he exited the vehicle. And I believe additionally the audio recording of Mr. Washington discussing concerns or expressing concerns about the jacket being in the back, in the context of the search of the vehicle, I think that goes to his knowledge and that its also presence plus something else. I think that the totality of the evidence of his statements, the clothing, the number of guns,

> the drugs in conjunction with the guns goes towards the proposition that the state has provided sufficient evidence as to unlawful possession of firearms counts, and the state request the court to deny counsel's motion as to that count as well.

VRP, 01/22/13, pg. 233-234. The court dismissed the firearm found in the glove box. The matter proceeded to trial on the firearm found in the pocket of the black jacket lying on the back seat behind the driver.

9. At trial, for purposes of the unlawful possession of a firearm charge, the parties stipulated Washington had previously been convicted of a serious offense. On January 23,2013, the jury returned verdicts finding Washington guilty of the firearm, marijuana, and hydrocodone, accusations.

10. On February 1, 2013, the court sentenced Washington to 67 months of confinement. Washington filed a timely notice of appeal on February 11, 2013.

11. On appeal, Washington argued: (1) he received ineffective assistance of counsel; (2) he was deprived of his sole defense against the marijuana-possession charge by his attorney's failure to offer an appropriate jury instruction; (3) the evidence was not sufficient to support a conviction for unlawful possession of a firearm, and; (4) the evidence was not sufficient to support the court's finding that he had the ability to pay discretionary legal financial obligations.

12. In his Statement of Additional Grounds for Review, (RAP 10.10), Washington argued (1) his counsel was ineffective because he failed to call witnesses or present relevant

evidence to support his affirmative defense for the unlawful possession of marijuana charge; (2) his 2009 convictions for conspiracy to commit a violation of the Uniform Controlled Substance Act encompassed the same criminal conduct and should have counted as one conviction in his offender score, and; (3) there was insufficient evidence to support his first degree unlawful possession of a firearm conviction.

B. COURT OF APPEALS DECISION

13. in an unpublished decision, filed August 11, 2014, the Court of Appeals ruled that Washington failed in his burden to show that his trial counsel was ineffective. The court found there was sufficient evidence to support both the unlawful possession of a firearm and intent to distribute charges. It also found there was sufficient evidence of Washington's ability to pay non-mandatory legal financial obligations at the time of sentencing. The claims asserted in Washington's Statement of Additional Grounds for Review, the court found, "do not warrant relief." This is Washington's Petition for Review.

C. ISSUES PRESENTED FOR REVIEW

I. Was the Evidence Presented at Trial Insufficient to Establish that Washington Either Actually or Constructively Possessed a Firearm?

II. Was the Evidence Presented at Trial Insufficient to Establish that Washington Knowingly Possessed a Firearm?

D. ARGUMENT FOR RELIEF

14. The Evidence Presented at Trial was Insufficient

to Establish Washington Either Actually or Constructively Possessed a Firearm. A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn from it. State v. Salina, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Sufficient evidence supports a conviction if, when viewed in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

15. A person commits first degree unlawful possession of a firearm when "the person owns, has in his or her possession, or has in his or her control, any firearm after having previously being convicted of any serious offense as defined in this chapter." RCW 9.41.040(1)(a).

16. Possession may be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). "A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item." State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Dominion and control over an object "means that the object may be reduced to actual possession immediately," Jones, 146 Wn.2d at 333, although dominion and control need not be exclusive, State v. Cote, 123 Wn, App. 546, 549, 96 P.3d 410 (2004), mere proximity to an item is not enough to establish possession. Jones, 146 Wn.2d at 333.

17. To determine whether Washington had constructive

possession of a firearm, the court examines the totality of the circumstances touching on dominion and control. State v. Jeffrey, 11 Wn. App. 222, 227, 889 P.2d 956 (1995); See also State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). Dominion and control over premises raises a rebuttable presumption of dominion and control over objects in the premises. State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996); State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). A vehicle is considered a type of premises for purposes of determining constructive possession. State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000).

18. In addition to the ability to take immediate possession, the court may also consider other factors indicating dominion and control, such as the ownership of the item or the defendant's ability to exclude others from possessing it. See State v. Partin, 88 Wn. 2d. 899, 906, 567 P.2d 1136 (1997); Callahan, 77 Wn. App. 592, 596, 581 P.2d 592 (1978). The cumulative effect of a number of these factors may indicate dominion and control, and, thus constructive possession. Partin, 88 Wn. 2d at 906.

19. At trial the state argued that the "totality the evidence" presented, including Washington's statement at trial, the clothing (apparently the fact that Usher-Smith had a jacket on and Washington did not), the number of people (apparently the fact that there were two people in the car, one a jacket and one not), and the number of guns (two), in conjunction with the drugs goes toward the proposition

that the state had presented sufficient evidence of unlawful possession of a firearm. VRP 01/22/13, pg. 233-234.

20. The state presented no evidence at trial establishing Washington ever had physical custody of the firearm nor of Usher-Smith's vehicle. Thus the court should find that there was insufficient evidence presented at trial upon which a rational trier of fact could conclude that Washington had actual possession of the firearm or of Usher-Smith's vehicle, There was also insufficient evidence presented at trial to support a rational trier of facts finding that Washington had dominion and control over Usher-Smith's car, where the gun was found, as a result, the court should find that there was insufficient evidence to support Washington's conviction on constructive possession basis. Consequently, the court should hold that the state's declaration that the evidence "goes toward the proposition that the state had presented sufficient evidence of...Unlawful possession of a firearm," VRP 01/22/13, pg. 233-234, is not supported by the evidence presented at trial and does not support a conclusion that Washington had dominion and control over the vehicle within which the gun was found or that Washington could easily reduce the guns to actual possession.

21. Analyses in prior decisions are helpful in ndentifying the contours of constructive possession. In State v. Spruell, 57 Wn. 383, 384, 788 P.2d 21 (1990), while searching a house, police found the defendant in the kitchen and cocaine on a plate that had his fingerprints on it. The

the drugs was not enough to establish his dominion and control for purposes of constructive possession.

22. In State v. Cote, 123 Wn. App. 546, 548, 96 P.3d 410 (2004), the police found components of a methamphetamine lab when they searched a stolen truck containing various chemicals. Cote, 123 at 548. The court held that because the evidence demonstrated only that Cote "was at one point in proximity to the contraband and touched it," the evidence was insufficient to establish dominion and control, and thus, constructive possession. Cole, 123 Wn. App. at 540. The court decision in State v. Enlow, 143 Wn. App. 463,178 P.3d 366 (2008) is also insightful.

23. In Enlow, law enforcement officers searching a truck discovered methamphetamine and the materials used to make it and found Enlow hiding under a blanket in the truck's canopy. Enlow, 143 Wn. App. at 466. Because Enlow did not own the truck or live at the address and because there was no evidence that he had even momentarily touched the methamphetamine or the materials to manufacture it, the court held that the evidence was insufficient to establish constructive possession of the contraband. See Enlow, 143 Wn. App. at 46970. Washington's case is analogous.

24. At Washington's trial the state argued:

> "Counsel says that its improbable that there's any way that the coat (containing the gun) could have been Mr. Usher-Smith's coat (counsel mistakenly uses Usher-Smith's name here, but meant Mr. Washington) but think about where the coat was at. First of all, defendant acknowledged by

> his own statements on the audio recording that he knew where it was at. Where was it at? If you're a riding passenger in the front seat of a car, where are you going to put your coat when you get into the passenger seat of the front seat? You going to reach around and rip your shoulder out of a joint putting it behind you? Probably not. You're going to put it behind the driver's seat.

VRP, 01/23/2013, pg. 377-378.

25. In State v. Turner, 103 Wn. App. 515, 51234 (2000), law enforcement officers discovered a rifle inside a partially opened bow case on the back seat in Turner'(s) truck. The court held that was sufficient evidence to establish Turner, the owner and driver of the vehicle's, constructive possession of the rifle, including his dominion and control over 'his' truck, his proximity to the rifle, the extended duration of time the rifle was in his truck, and Turner's lack of objection to the firearm's presence in his truck. Turner, 103 Wn. App. at 524. Turner demonstrates the likelihood of the driver and owner of a vehicle lying a movable item on the back seat behind the driver's seat. Thus, the court should find that the state's proposition that a passenger in a vehicle is "going to put it (his coat) behind the driver's seat," without more, does not establish that Washington had dominion and control over the car; the car was owned by Usher-Smith. The state presented no evidence to suggest that Washington had the ability, while in the car, to immediately reduce the gun to his actual possession, which is a central criteria of constructive possession. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1082 (2002).

26. Because Washington's proximity to the gun alone is not enough to establish constructive possession, Jones, 146 Wn. App. at 333, the court should find the fact that Washington was seated in the front passenger seat of the car when Trooper Meldrum stopped it, without more, was insufficient to support a conclusion that Washington had dominion over the firearm or could reduce Usher-Smith's vehicle to his actual possession.

27. Because Washington did not have dominion and control over Usher-Smith's vehicle, the court should find under Jones, the evidence was insufficient to establish that Washington constructively, or otherwise, possessed a firearm. Consequently, the court should reverse Washington's conviction for unlawful possession of a firearm and, because double jeopardy bars retrial, remand for dismissal of the firearm count with prejudice, consistent with State v. Hickman, 135 Wn. 2d 97, 103, 945 P.2d 900 (1998). It should be so ordered.

28. State v. Breitung does not Relieve the State of its Burden to Prove Beyond a Reasonable Doubt in a Prosecution for Unlawful Possession of a Firearm, that the Defendant Possessed the Firearm Unlawfully. Due process imposes upon the state the obligation to establish guilt beyond a reasonable doubt. In re Winship, 379 U.S. 358 (1970). The essential elements of the crime are the facts that the state must prove beyond a reasonable doubt to establish that the defendant committed the charged crime. State v. Johnstone, 96 Wash. App. 839, 844, 982 P.2d 119 (1999).

29. To convict Washington of the crime of unlawful possession of a firearm in the first degree, as charged in this case, the state had to prove beyond a reasonable doubt that Washington: (1) Unlawfully had a firearm in his possession or control, and; (2) had previously been convicted of a felony which is a serious offense. RCW 9.941.040(1)(a); Court Instruction No. 31.

30. Instruction No. 25 instructed the Jury:

> "A person commits the crime of unlawful possession of a firearm in the first degree when he has been previously been convicted of a serious offense (and) 'Knowingly' owns or has in his possession or control any firearm."

Instruction No. 25. Instruction No. 26 instructed the jury, in relevant part:

> "When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally."

Instruction No. 26.

31. The words "unlawful," "knowingly," and "intentionally," as used in the unlawful possession of a firearm statute, RCW 9.41.040(1)(A), and in jury instructions 25 and 26, implies the existance of a guilty mind. As such, to establish that Washington unlawfully had a firearm in his possession, or under his control, the state was required to submit at trial "evidence sufficient to persuade an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." State v. Collins, 2 Wash. App. 757, 759, 470 P.2d 227, 228 (1970). "Mere possibility, suspicion, speculation, conjecture, or even a scintilla of

evidence, is not substantial evidence." State v. Moore, 7 Wash. App. 1. 499 P.2d 16 (1972).

32. Here, to uphold the jury's finding that Washington unlawfully had a firearm in his possession or under his control at trial, there must substantial evidence in the record, viewed in the light most favorable to the state, that Washington was judicially prohibited from possessing a firearm to establish the essential unlawful, knowing, or intentional element. There is no evidence in the record of these essential elements.

33. The Court of Appeals, in limiting its review of Washington's challenge to the sufficiency of the evidence to support the essential "unlawful," "knowingly," or "intentional" elements cites RCW 9.41.047's requirement that a convicting court give notice of the prohibition to possess firearms, and Washington's failure to assert "lack of notice as an affirmative defense," as justification for not considering the claim any further.

34. This Court should reject that justification, and should hold the general requirement in RCW 9.41.047(1), which requires a convicting court to give notice of the prohibition to possess firearms, without more, does not add up to substantial evidence for purposes of establishing the essential unlawful, knowing, or intentional element.

35. The Court should also hold that the Court of Appeals abused its discretion when it refused to consider Washington's claim "any further" on the ground that Washington failed

to raise "lack of notice" as an affirmative defense.

36. The Court of Appeals Err'ed In Relying on State v. Breitung to Deny Washington's Assertion that the State Failed to Prove that he Possessed a Firearm Unlawfully. The Supreme Court of the United States has interpreted the constitution of the United States to require the State in criminal trials to prove the essential elements of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970). When a defendant challenges the sufficiency of the evidence, the courts review the evidence in the light most favorable to the state, and will affirm the conviction if a rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt. State v. Bergeron, 105 Wash. 2d. 1, 11, 711 P.2d 1000 (1985); State v. Green, 94 Wash. 2d 192, 201, 829 P.2d 1068 (1992). But evidence is not sufficient if the fact finder must guess or resort to speculation or conjecture. State v. Hutton, 7 Wash. App. 726, 728, 502 P.2d 1037 (1972). Here, Washington submits, his unlawful possession of firearm conviction must be vacated because the state failed to present any evidence at trial upon which a rational trier of fact could conclude that he "knowingly" possessed a firearm.

37. To prove Washington "knowingly" possessed a firearm, the state had to prove two elements beyond reasonable doubt: (1) that on or about 22nd day of May, 2011, Washington knowingly had a firearm in his possession or control, and; (2) Washington had previously been convicted of a felony

which is a serious offense.

38. Washington stipulated that he had previously been convicted of a felony which is a "serious offense". His stipulation constituted exclusive evidence of that element. Thus the only remaining element of the crime the state had to establish beyond a reasonable doubt at trial was that Washington "knowingly possessed a firearm," the element Washington did not stipulate to. The situation is similar to that the United States Supreme Court was faced with in Old Chief v. United States, 519 U.S. 172, 117 S.Ct. 644, 136 L.Ed 2d 574 (1997). Like Washington's case, Old Chief involved a prosecution for unlawful possession of a firearm. In Old Chief, as here, there was no factual connection between the earlier crime and the charged offense, and both defendants offered to stipulate to a prior felony conviction. 519 U.S. at___, 117 S.Ct. at 648.

39. At issue in Old Chief was the Ninth Circuit's acknowledgement of the general rule that:

> "A defendant's rule 403 objection offering to concede a point generally cannot prevail over the government's choice to offer evidence showing guilt and all the circumstances surrounding the offense.

Old Chief, 519 U.S.___, ___, 117 S.Ct. at 654-55. Acknowledging the general rule, the Old Chief court refused to apply it, ruling instead that:

> "The choice of evidence for a prior conviction element is not between eventful narrative and abstract proposition, but between prepositions of slightly varying abstraction, either a record saying that conviction for some crime occurred at a certain time or a statement admitting the

same thing without naming the particular offense." Id.

40. Perhaps most important to this case is the Old Chief, courts clarification that:

> "The statutory language in which the prior-conviction requirement is couched shows no congressional concern with the specific name or nature of the prior offense beyond what is necessary to place it within the broad category of the qualifying felonies."

Id. More importantly, Washington's stipulation to having previously been convicted of a serious offense is not proof that he unlawfully possessed a firearm.

41. As the Supreme Court ruled in Sullivan v. Louisiana, 508 U.S. 275, 277 (1993) and County Court of Ulster Cty v. Allen, 442 U.S. 140, 156 (1979):

> "In criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant; the device must not undermine the fact finders responsibility at trial, based on evidence addressed by the state, to find the ultimate facts beyond a reasonable doubt."

Id. Washington's plea of not guilty put the prosecution to its proof as to all elements of the crime charged. See, e.g., Mathews v. U.S., 485 U.S. 58, 64-65 (1988). Further, Washington's tacticle decision not to contest the previous serious offense element of the crime did not remove the prosecution's burden to prove that element. See, e.g., Estelle v. McGuire, 502 U.S. 62, 69 (1991). Thus, at trial, Washington had the choice to contest the state's proof on the 'serious offense' element or he could, as he did, stipulate that he had been previously been convicted of a serious offense. Whatever his choice, however, the state still bore the burden

of proof on that element, and the element that he Knowingly possessed or had a firearm under his control beyond a reasonable doubt. It failed to do so.

42. In State v. Carter, 127 Wash. App. 713, 112 P.3d 561 (2005); State v. Minor, 162 Wash. 2d 796 (2008); State v. Johnson, 90 Wash. App. at 63, 950 P.2d 981 (1998), State v. Breitung, 173 Wn. App. 617, 622, 142 P.3d 175 (2006), each defendant was charged with unlawful possession of a firearm. And in each charging document, the state identified the specific previous offense in which the defendant was prohibited from possessing a firearm.

43. Unlike the charging documents in Carter, Minor, Johnson, Breitung, and Ortega, the charging document filed in Washington's case did not allege any specific previous convictions, the date of the offense, nor was any evidence presented to the jury clearly establishing a previous conviction which prohibited Washington from possessing a firearm.

44. The only evidence presented at trial bearing upon previous convictions was Washington's stipulation that he had been previously convicted of a serious offense. But the jury could not have relied upon that admission as evidence that Washington knowingly possessed a firearm because the court limited the use of the stipulation to "deciding what weight or credibility to give to Washington's testimony, and for no other purpose." Instruction No.19.

45. In Ortega, to prove that Ortega had previously been

convicted of a serious offense the state introduced proof in the form of a stipulation informing the jury that Ortega had been convicted in (1997) on two counts of protection order violations. Id.

46. During the trial, the court gave a limiting instruction because it admitted evidence of a (2004) conviction. Id. The limiting instruction stated, "Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant, and for no other purpose. Id. Thus, the Ortega Court concluded:

> "Having found that the 1997 convictions did exist, the jury would then follow the limiting instruction and not consider the 1997 convictions as evidence of Ortega's guilt on these charges for which he was on trial."

Id.

47. Again in Ortega, unlike in Washington's case, the state charged in the information the two specific (1997) convictions which prohibited Ortega from possessing or having a firearm under his control. Like Ortega, however, the parties here entered a written stipulation that Washington "had previously been convicted of a felony, which is a serious offense." The trial judge approved the stipulation and read it to the jury. The court also gave the jury a limiting instruction. See Instruction No. 19. The limiting instruction instructed the jury "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight to give to the defendant's testimony, and for

no other purpose." Id. Thus, the limiting instruction limited use of Washington's admission to having been previously convicted of a serious offense to deciding what weight to give his testimony and, therefore, could not be used to establish that Washington knowingly possessed a firearm, the only real factual dispute for the jury to decide. Because the state failed to allege and establish at trial any previous conviction that prohibited Washington from possessing a firearm, the court should conclude that there was insufficient evidence presented at trial and should vacate his conviction for unlawful possession of a firearm.

48. The Court Should Reject the Court of Appeals Admonishment of Washington for Failing to Cite Authority. In his statement of additional grounds Washington argues that the state failed to prove that he possessed a firearm "unlawfully." See, Statement of Additional Grounds, pg. 29. The court of appeals construed Washington's conviction as an assertion that there was insufficient evidence to support his first degree unlawful possession of a firearm conviction. See, Opinion, pg. 17. The court ruled Washington's failure to cite authority in support of this argument would generally warrant no further consideration of it. Id. pg. 17. This court should reject that conclusion.

49. According to the "Rules of Appellate Procedure 10.10 Statement of Additional Grounds for Review" provided to Washington by the clerk of the court of appeals:

> "(c) Citations; Indentification of Errors Reference to the record and Citation to Authorities are

not Necessary or Required...."

See, Attachment A: Rule of Appellate Procedure 10.10 Statement of Additional Grounds for Review. Because the court itself advised Washington citation to authorities were not necessary or required to support his additional grounds for review, this court should rule Washington did not err in failing to cite authorities and that the court of appeals err'd in holding Washington's failure to cite authority insupport of his argument would generally warrant no further consideration of it. See, Opinion, pg. 17.

E. CONCLUSION

50. Premises considered, the court should GRANT Washington's Petition for Review and VACATE with prejudice his conviction for unlawful possession of a firearm in the first degree.

It Should be so Ordered.

Dated this 8TH Day of September, 2014

Respectfully Submitted,

By THE PETITIONER:

N.J.

NAAMAN JAMAL WASHINGTON

DOC No. 744016, C4-D-9-4

P.O. Box 2049

Airway Heights, WA 99001-2049

CERTIFICATE OF MAILING

This is to certify that I, the undersigned, deposited in the U.S. mail at the Airway Heights Corrections Center, postage pre-paid addressed, a true and correct copy of his PETITION FOR REVIEW, addressed to the following sources:

Stephen D. Trinen
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955 Tacoma, Ave S. Ste; 301
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Whitney Rivera
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1511 3rd Ave, Ste 701
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DONE this 8TH day of September, 2014

BY THE PETITIONER:

N.J.

NAAMAN JAMAL WASHINGTON

RULE OF APPELLATE PROCEDURE 10.10
STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

(a) Statement Permitted. A defendant/appellant in a review of a criminal case may file a pro se statement of additional grounds for review to identify and discuss those matters which the defendant/appellant believes have not been adequately addressed by the brief filed by the defendant/appellant's counsel.

(b) Length and Legibility. The statement, which shall be limited to no more than 50 pages, may be submitted in handwriting so long as it is legible and can be reproduced by the clerk.

(c) Citations; Identification of Errors. Reference to the record and citation to authorities are not necessary or required, but the appellate court will not consider a defendant/appellant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. Except as required in cases in which counsel files a motion to withdraw as set forth in RAP 18.3(a)(2), the appellate court is not obligated to search the record in support of claims made in a defendant/appellant's statement of additional grounds for review.

(d) Time for Filing. The statement of additional grounds for review should be filed within 30 days after service upon the defendant/appellant of the brief prepared by defendant/appellant's counsel and the mailing of a notice from the clerk of the appellate court advising the defendant/appellant of the substance of this rule. The clerk will advise all parties if the defendant/appellant files a statement of additional grounds for review.

(e) Report of Proceedings. If within 30 days after service of the brief prepared by defendant/appellant's counsel, defendant/appellant requests a copy of the verbatim report of proceedings from defendant/appellant's counsel, counsel should promptly serve a copy of the verbatim report of proceedings on the defendant/appellant and should file in the appellate court proof of such service. The pro se statement of additional grounds for review should then be filed within 30 days after service of the verbatim report of proceedings. The cost for producing and mailing the verbatim report of proceedings for an indigent defendant/appellant will be reimbursed to counsel from the Office of Public Defense in accordance with Title 15 of these rules.

(f) Additional Briefing. The appellate court may, in the exercise of its discretion, request additional briefing from counsel to address issues raised in the defendant/appellant's pro se statement.

Attachment "A"

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. NAAMAN JAMAL WASHINGTON, Appellant.	)	No. 71966-1-I DIVISION ONE UNPUBLISHED FILED: August 11, 2014

Cox, J. – Naaman Jamal Washington appeals his conviction of first degree unlawful possession of a controlled substance with intent to deliver (marijuana), unlawful possession of a controlled substance (hydrocodone), and first degree unlawful possession of a firearm. He fails in his burden to show that his trial counsel was ineffective. The evidence was sufficient to prove unlawful possession of a firearm. And the evidence was also sufficient to show his ability to pay nonmandatory legal financial obligations at the time of sentencing. His claims asserted in his statement of additional grounds do not warrant relief. We affirm.

On May 22, 2011, Washington was a passenger in the front seat of a car that was driven by California Smith-Usher on Interstate 5. Washington State Patrol Trooper, James Meldrum, conducted a random license plate check on the car and saw that its owner's license was suspended.

The description of the car's owner matched that of Smith-Usher, the driver. Accordingly, the trooper pulled the car over in a no-park, tow-away zone on the busy interstate. When he approached the vehicle, the trooper told Smith-

Usher and Washington that the stop was being audio and video recorded by equipment in the trooper's car. The video recording of the events that followed was admitted into evidence at the suppression hearing in this case.

When Trooper Meldrum first spoke to the driver, he smelled the odor of marijuana and saw a bag filled with "pre-packaged baggies of marijuana" sitting at Washington's feet. Washington acknowledged that the bag contained marijuana. He claimed that his possession of the drugs was legally authorized because he was a designated provider for a medical marijuana patient. He gave the trooper two documents to support his claim. They, too, were admitted into evidence at the trial that followed.

Trooper Meldrum stated that he believed the documents did not prove that Washington's possession of the marijuana was authorized. He arrested Washington for possession of marijuana. During a search incident to arrest, Trooper Meldrum found a bottle with no label containing hydrocodone pills in Washington's pocket.

Other troopers arrived at the scene. Trooper Meldrum retrieved Washington's wallet, cell phone, and the bag of marijuana from the front passenger's side of the car. Trooper Collin Overend-Pearson assisted Trooper Meldrum in preparing the car for impound.

Jerry Clark, a private tow truck operator, impounded the car. Clark conducted an impound inventory of the car and found two handguns. One gun was inside the locked glove box, and the other gun was in the pocket of a jacket

on the rear seat. When Clark reported this to the authorities, Trooper Meldrum came to where Clark was and seized the guns pursuant to a warrant.

By amended information, the State charged Washington with unlawful possession of a controlled substance with intent to deliver (marijuana), unlawful possession of a controlled substance (hydrocodone), and two counts of first degree unlawful possession of a firearm, one for the gun in the glove compartment and the other for the gun in the jacket.

Washington's counsel moved to suppress the marijuana arguing that it was the fruit of an unlawful search. The trial court denied this motion. It concluded that the "troopers validly impounded defendants' [sic] car and they lawfully conducted a pre-impound inventory search of the car."

At trial, Washington's counsel moved to dismiss all of the charges after the State rested. The trial court dismissed the unlawful possession of a firearm charge for the gun in the glove compartment but submitted the other charges to the jury.

After the close of the evidence and before the jury began its deliberations, the trial court read a stipulation to the jury. The stipulation was that Washington "had previously been convicted of a felony, which is a serious offense." Among the court's instructions to the jury was one on Washington's affirmative defense regarding designated providers for medical marijuana patients.

The jury convicted on all remaining charges. The trial court sentenced Washington to confinement and imposed mandatory and nonmandatory legal financial obligations.

Washington appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

Washington argues that his trial counsel was ineffective. Because he fails in his burden to show that counsel's performance fell below an objective standard of reasonableness, we disagree.

A criminal defendant has the right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution.[1] To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that this deficient performance prejudiced his trial.[2]

There is a strong presumption of effective representation of counsel, and the defendant must show that there was no legitimate strategic or tactical reason for the challenged conduct.[3] To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different.[4] If we conclude that either prong has not been met, we need not address the other prong.[5]

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[1] State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

[2] Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

[3] McFarland, 127 Wn.2d at 335-36.

[4] In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998).

[5] Strickland, 466 U.S. at 700.

Failure to Present Evidence

Washington first argues that his counsel was ineffective because he failed to present evidence during the suppression hearing that would have established the "illegality of the marijuana seizure." He contends that this evidence, which includes portions of a video recording showing the search, supported the argument that Trooper Meldrum's marijuana seizure was not part of an inventory search. We disagree.

"Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution, warrantless searches and seizures are per se unreasonable, with few exceptions."[6] One of the exceptions is a "noninvestigatory inventory search" accompanying a lawful vehicle impound.[7] This search must be conducted in good faith.[8] It cannot be a pretext for an investigatory search.[9]

"The principal purposes of an inventory search are to (1) protect the vehicle owner's property; (2) protect the police against false claims of theft by the owner; and (3) protect the police from potential danger."[10]

Here, the trial court concluded that Trooper Meldrum and Trooper Pearson "validly impounded defendants' car [sic] and they lawfully conducted a pre-

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[6] State v. Green, 177 Wn. App. 332, 340, 312 P.3d 669 (2013).

[7] State v. Tyler, 177 Wn.2d 690, 701, 302 P.3d 165 (2013).

[8] Id.

[9] Id.

[10] Green, 177 Wn. App. at 340.

impound inventory search of the car." To support this conclusion of law, it entered the following finding of fact:

> Trooper Pearson arrived to assist. The troopers prepared the car for impound because Smith-Usher's car was in a no-park, tow-away zone. Trooper Meldrum retrieved defendant's wallet, cell phone, and the bag from the front passenger's side of the car. The marijuana was in a Taco Bell bag which held several separate pre-packaged baggies of marijuana.[11]

This unchallenged finding is a verity on appeal. Washington correctly argues that he need not challenge this finding to argue that his trial counsel was ineffective.

Specifically, Washington asserts that his trial counsel was deficient because he did not point to particular portions of the video recording that would support the argument that Trooper Meldrum was not conducting a good faith inventory search when he retrieved the bag of marijuana. He asserts that Trooper Meldrum was actually conducting an investigatory search when he seized the bag.

Given the strong presumption of effective representation, Washington fails to show that his counsel was deficient for failing to point to certain portions of the video recording. Our review of the record shows that portions of the recording include the troopers' discussion about whether a warrant was needed; Trooper Meldrum retrieving a wallet, cell phone, and the bag of marijuana from the car; and Trooper Pearson separately walking around the car with a clipboard inventorying the contents of the car.

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[11] Clerk's Papers at 189.

But these portions of the video recording do not support the argument that Trooper Meldrum was conducting an investigatory search. Rather, the recording shows that Trooper Meldrum and Trooper Pearson were jointly conducting in good faith an inventory search prior to the vehicle being impounded. Based on this record, an argument by counsel to the contrary would not have been successful. Thus, Washington fails to show that his trial counsel's performance was deficient for failing to point to certain portions of the recording. Because he fails to show the first prong of the controlling test, we need not reach the second prong, prejudice.

Failure to Propose a Jury Instruction

Washington next argues that his counsel was ineffective for failing to propose a jury instruction that would have supported his sole defense. We again disagree.

To establish ineffective assistance based on counsel's failure to request a jury instruction, the defendant must show that he was entitled to the instruction, counsel was deficient in failing to request it, and failure to request the instruction caused prejudice.[12]

Washington argues that his counsel was deficient because he failed to propose a jury instruction that would have supported his designated provider defense under the medical marijuana act. He asserts that his counsel "never proposed an instruction that would have allowed the jury to acquit based on this

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[12] Strickland, 466 U.S. at 687; State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007).

defense." But Washington's counsel proposed an instruction stating an affirmative defense to the only marijuana charge. Instruction 11 states:

> It is a defense to a charge of ***delivery of marijuana*** that:
>
> (1) the defendant is eighteen years of age or older; and
>
> (2) the defendant was designated as a designated provider to a qualifying patient prior to assisting the patient with the medical use of marijuana; and
>
> (3) the defendant possessed no more marijuana than necessary for the qualifying patient's personal, medical use for a sixty-day period; and
>
> (4) the defendant presented a copy of the qualifying patient's valid documentation to any law enforcement official who requested such information; and
>
> (5) the defendant did not consume any of the marijuana obtained for the personal, medical use of the qualifying patient for whom the defendant is acting as designated provider; and
>
> (6) the defendant was the designated provider to only one qualifying patient at any one time.
>
> The defendant has the burden proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find that the defendant has established this defense, it will be your duty to return a verdict of not guilty as to this charge.[13]

While the charge in this jury instruction, "delivery of marijuana," is not the charge in this case, "possession of marijuana with intent to deliver," the trial court, the prosecutor, and defense counsel treated this jury instruction as providing Washington with an affirmative defense to his only marijuana charge.

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[13] Clerk's Papers at 117 (emphasis added).

The trial court stated that the medical marijuana defense instruction should be given based on the evidence presented at trial. It further explained that whether Washington "met the required elements on his burden of proof" was an issue for the jury. During closing argument, both the prosecutor and defense counsel argued whether Washington met these required elements. Thus, Washington has failed to show that his trial counsel's performance was deficient for failing to propose an instruction supporting his affirmative defense.

Washington acknowledges that Instruction 11 is "similarly worded" to the affirmative defense for possession of marijuana with intent to deliver. But Washington fails to persuasively explain how a differently worded instruction would have resulted in a different outcome at trial.

In his opening brief, Washington cites State v. Brown for the elements of the affirmative defense for possession of marijuana.[14] But that case does not provide all of the elements for the defense. Rather, it merely states the statutory definition for "designated provider."[15]

According to the Washington Pattern Jury Instructions: Criminal 52.11, the medical marijuana defense instruction for "possession," "delivery," and "manufacture" of marijuana is the same.[16] Thus, Washington's counsel proposed a jury instruction that would have allowed the jury to acquit Washington.

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[14] Appellant's Opening Brief at 22-23 (citing State v. Brown, 166 Wn. App. 99, 102-03, 269 P.3d 359 (2012)).

[15] Brown, 166 Wn. App. at 102-03 (citing RCW 69.51A.010(1)).

[16] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 52.11 (3d ed. 2008) (citing RCW 69.51A.040(3); RCW 69.51A.010(1)).

Moreover, given the way the parties treated Instruction 11, there is no reason to believe that the jury did not consider whether Washington met the elements for the affirmative defense to the marijuana charge.

The State contends that Washington failed to put forth sufficient evidence to show that he was entitled to the affirmative defense instruction. Because of our resolution of the ineffective assistance of counsel issue, we need not address this argument.

SUFFICIENCY OF EVIDENCE

Washington argues that there was insufficient evidence to support his first degree unlawful possession of a firearm conviction. Specifically, he contends that a limiting instruction prevented the jury from considering a stipulation to prove that Washington had been previously convicted of a serious offense. He is mistaken.

"Jury instructions, when not objected to, become the law of the case."[17] "A defendant may assign error to elements added under the law of the case doctrine, and that assignment 'may include a challenge to the sufficiency of evidence of the added element.'"[18]

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[17] State v. Ortega, 134 Wn. App. 617, 622, 142 P.3d 175 (2006), review denied, 160 Wn.2d 1016 (2007).

[18] Id. (quoting State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998)).

In State v. Ortega, this court considered whether a limiting instruction prevented the jury from considering a stipulation regarding prior convictions.[19] There, the parties agreed that "prior convictions were elements that had to be proved to the jury."[20] Consequently, the State "introduced proof in the form of a stipulation informing the jury that [Reynaldo] Ortega had been convicted in 1997 on two counts of protection order violations."[21]

During the trial, the court gave a limiting instruction because it admitted evidence of a 2004 conviction.[22] The limiting instruction stated, "Evidence that the defendant has previously been convicted of a crime is not evidence of the defendant's guilt. Such evidence may be considered by you in deciding what weight or credibility should be given to the testimony of the defendant and for no other purpose."[23]

This court concluded that "[e]ven if the limiting instruction became the law of this case as to the 1997 convictions, it did not deprive the jury of sufficient evidence upon which to find that Ortega had been twice convicted in the past."[24] The court explained:

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[19] 134 Wn. App. 617, 621-22, 142 P.3d 175 (2006), review denied, 160 Wn.2d 1016 (2007).

[20] Id. at 621.

[21] Id.

[22] Id.

[23] Id.

[24] Id. at 622.

> The limiting instruction required the jury to consider "evidence of a prior conviction" for no purpose other than evaluating the weight and credibility of Ortega's testimony. To use the prior convictions for the purpose of evaluating Ortega's testimony, the jury would first have to find that those prior convictions existed. The jury could properly consider the stipulation as evidence of the existence of the two prior convictions. This is the finding they made when they filled out the special verdict form. Having found that the 1997 convictions did exist, the jury would then follow the limiting instructions and not consider the 1997 convictions as evidence of Ortega's guilt on the three charges for which he was on trial.[25]

Here, a similar conclusion is appropriate. The parties entered into a written stipulation that Washington "had previously been convicted of a felony, which is a serious offense." The trial court read this stipulation to the jury before it read the jury instructions. The jury instructions included a limiting instruction that stated, "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose." To use the prior conviction for the purpose of evaluating Washington's testimony, the jury would first have to find that the prior conviction existed. The jury could properly consider the stipulation as evidence that Washington had been previously convicted of a serious offense to prove that element of unlawful possession of a firearm. Then, the jury would follow the limiting instruction and not consider the prior conviction for any other purpose.

Washington argues that Ortega should not control this case because it is factually distinguishable and logically infirm. We disagree and conclude that Ortega controls.

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[25] Id.

While Ortega involved multiple prior convictions and this case involved only one prior conviction, this factual distinction does not change the result. Washington asserts that "evidence was introduced here as to only one conviction, and the limiting instruction therefore cannot be interpreted to apply to anything but the evidence of that one conviction." But, as just discussed, the limiting instruction can apply after the jury considers the stipulation as evidence that Washington had been previously convicted of a serious offense. Washington fails to cite any authority that casts doubt on Ortega's analysis. Thus, Ortega controls this case, and we reject Washington's challenge to the sufficiency of the evidence.

The State argues that Washington is "precluded from bringing a claim that there was not sufficient evidence of that element" because he stipulated that he had been previously convicted of a serious offense. Thus, the State contends that Washington waived his right to hold the State to its burden of proof as to that element. But given the previous discussion, we need not address this argument.

LEGAL FINANCIAL OBLIGATIONS

Washington challenges the trial court's imposition of $250 in nonmandatory legal financial obligations. In the judgment and sentence, the trial court made a finding that Washington "has the ability or likely future ability to pay the legal financial obligations imposed herein." Washington argues that this finding is not supported by sufficient evidence in the record. We disagree.

"Under RCW 10.01.160(3), '[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the

amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.'"[26]

Here, the trial court made the following finding:

> **ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS.** The court has considered the total amount owing, the defendant's past, present and future ability 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.[27]

First, we question whether Washington can raise this issue for the first time on appeal under RAP 2.5(a).[28] But even if he can raise this issue, sufficient evidence supports the trial court's finding.

In State v. Calvin, this court explained that "[w]e review the trial court's decision to impose discretionary financial obligations under the clearly erroneous standard."[29] "'A finding of fact is clearly erroneous when, although there is some

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[26] State v. Calvin, ___ Wn. App. ___, 316 P.3d 496, 507 (2013) (alteration in original) (quoting RCW 10.01.160(3)), petition for review filed, No. 89518-0 (Wash. Nov. 12, 2013).

[27] Clerk's Papers at 170.

[28] See Calvin, 316 P.3d at 507 ("[T]he sentencing court's consideration of the defendant's ability to pay is not constitutionally required. Accordingly, the issue raised by Calvin is not one of constitutional magnitude that can be raised for the first time on appeal under RAP 2.5(a).") (citations omitted); State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 ("While we addressed the finding of current or future ability to pay in Bertrand for the first time on appeal under RAP 2.5(a), that rule does not compel us to do so in every case."), review granted, 178 Wn.2d 1010 (2013).

[29] ___ Wn. App. ___, 316 P.3d 496, 508 n.1 (2013).

evidence to support it, review of all the evidence leads to a 'definite and firm conviction that a mistake has been committed.'"[30]

Here, Washington testified at trial that he was a mechanic and owned his own mechanic business. He presented no evidence of any disability that would limit his ability to work in the future. Additionally, at the sentencing hearing, the trial court determined that Washington had retained, not appointed, counsel at trial. These facts are sufficient to support the challenged finding under the clearly erroneous standard.[31]

We also note that the trial court must again consider Washington's ability to pay when the State seeks to enforce the payment of the legal financial obligations.[32] Thus, Washington will have the ability to raise the issue again, if appropriate.

Washington relies on an earlier version of State v. Calvin to request that we strike the finding that Washington had the ability to pay the nonmandatory obligation.[33] But that version was amended on reconsideration.[34] Accordingly, we reject this argument.

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[30] Id. (quoting Schryvers v. Coulee Cmty. Hosp., 138 Wn. App. 648, 654, 158 P.3d 113 (2007)).

[31] See Calvin, 316 P.3d at 507.

[32] State v. Blank, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997); State v. Baldwin, 63 Wn. App. 303, 310-11, 818 P.2d 1116 (1991).

[33] Appellant's Opening Brief at 34 (citing State v. Calvin, 176 Wn. App. 1, 302 P.3d 509, amended on recons., ___ Wn. App. ___, 316 P.3d 496 (2013)).

[34] See Calvin, 316 P.3d at 507-08.

STATEMENT OF ADDITIONAL GROUNDS

Washington raises several issues in his statement of additional grounds. None have merit.

First, Washington argues that his counsel was ineffective because he failed to call witnesses and present evidence to support Washington's affirmative defense for the unlawful possession of marijuana charge. But Washington's counsel submitted into evidence the documentation that Washington had to support the defense, and the trial court admitted this evidence. Moreover, Washington testified about the validity of these documents. Washington fails to specify what other witnesses should have been called and how they would have further supported his defense. "'Generally the decision whether to call a particular witness is a matter for differences of opinion and therefore presumed to be a matter of legitimate trial tactics.'"[35] Such tactics do not amount to deficient performance.

Additionally, Washington asserts that his counsel failed to move to dismiss Washington's marijuana charge. But defense counsel moved to dismiss the marijuana charge, and the trial court denied this motion for this charge.

Given this record, Washington fails to show that his counsel's performance fell below an objective standard of reasonableness and that this prejudiced his trial. Thus, these claims fail.

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[35] In re Pers. Restraint of Morris, 176 Wn.2d 157, 171, 288 P.3d 1140 (2012) (quoting In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004)).

Second, Washington contends that his two 2009 convictions for conspiracy to commit a violation and violation of the Uniform Controlled Substance Act encompassed the same criminal conduct and should have counted as one conviction in his offender score. Although a criminal defendant may challenge an offender score for the first time on appeal, a defendant waives that right when the alleged error is based on a factual dispute or trial court discretion.[36] Where a defendant is convicted of more than one crime, the trial court must make both factual and discretionary decisions in determining whether those crimes arose from the same criminal conduct.[37] Thus, by failing to raise the issue of same criminal conduct at sentencing, a defendant waives the right to argue that issue on appeal.[38] Because Washington did not argue at sentencing that his offenses constituted the same criminal conduct, he cannot raise this issue for the first time on appeal.

Third, Washington asserts that there was insufficient evidence to support his first degree unlawful possession of a firearm conviction. Specifically, he contends, without citation to authority, that there was no evidence proving that he had prior notice that he was prohibited from possessing a firearm. The failure to cite authority in support of this argument would generally warrant no further consideration of it. Nevertheless, in State v. Breitung, the supreme court

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[36] State v. Graciano, 176 Wn.2d 531, 538-39, 295 P.3d 219 (2013); In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

[37] State v. Nitsch, 100 Wn. App. 512, 523, 997 P.2d 1000 (2000).

[38] State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009); In re Pers. Restraint of Shale, 160 Wn.2d 489, 496, 158 P.3d 588 (2007).

explained that RCW 9.41.047(1) "requires a convicting court to give notice of the prohibition of the right to possess firearms."[39] But it also stated that "[l]ack of notice under RCW 9.41.047(1) is an affirmative defense, which [a defendant] must establish by a preponderance of the evidence."[40] Here, Washington did not assert this affirmative defense at trial. Thus, we will not consider this claim any further.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Trickey, J

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[39] 173 Wn.2d 393, 401, 267 P.3d 1012 (2011).

[40] Id. at 403.