

67407-2

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NO. 67407-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN WATKINS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAMES ROGERS

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Was evidence sufficient in a case where a single offense can be committed in more than one way, when the jury was unanimous as to guilt for the crime charged and substantial evidence supported each alternative means so that any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt?

2. Does a claim of insufficiency of evidence fail when it is required that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant, where the reasonable inferences to be drawn from the evidence is that the defendant both owned and had constructive possession of the firearm in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Justin Watkins, was charged by information with the crimes of Felony Harassment and Unlawful Possession of a Firearm in the First Degree. CP 1-2. The defendant was convicted of the lesser included crime of Harassment and convicted as charged of Unlawful Possession of Firearm in the First Degree.

CP 49-51. In this appeal, the appellant is only challenging the jury's finding of guilt in the Unlawful Possession of a Firearm in the First Degree charge.

2. SUBSTANTIVE FACTS

During the evening hours of June 1, 2010, Zolboo Lkhundev was working as a clerk at Joe's Mart, a small grocery store located between Pike and Pine Streets on Second Avenue in downtown Seattle. 3/2/11 RP 47-53. Mr. Lkhundev testified at trial that given the fact that Joe's Mart has a constant problem with persons hanging around outside their store, "threatening customers and stuff," his boss had instructed him he had to go outside and tell them to move somewhere else. 3/2/2011 RP 54-55. Mr. Lkhundev testified that on June 1 at about 10 P.M. he saw a person he identified in court as the defendant, Justin Watkins, doing just that, becoming progressively rude to people passing by. 3/2/2011 RP 55.

The defendant was in a group that consisted of five other people and they were all congregating at the store's entrance. After observing the defendant acting this way for about five minutes he went outside to tell him to move away from the store's entrance

because he felt that the defendant was stopping customers from coming into his store. 3/2/2011 RP 56-57.

Mr. Lkhundev contacted the defendant and asked him if he could "move from the store... and go somewhere else." The defendant responded by getting upset and saying, "You want to fight me? You want to go to the parking lot and I will fight you?" Mr. Lkhundev testified that he remembered the defendant saying, "I will fuck you up." 3/2/2011 RP 58-59.

When Mr. Lkhundev did not respond to the defendant's challenge to fight him, the defendant became more upset. The defendant then said, "I have a burner." Mr. Lkhundev noticed that as the defendant was saying this he was reaching towards a purse that was being held by a woman standing next to the defendant. Mr. Lkhundev remembers the defendant saying during this time frame, "I will shoot your ass with it." Mr. Lkhundev also remembers the woman with the purse trying to discourage the defendant from grabbing the purse. 3/2/2011 RP 59-60.

While this was going on, the people who were with the defendant were imploring the defendant to move on and leave. The defendant responded to them, "I don't care... I can do whatever I want... This is my hood." 3/1/2011 RP 61.

Mr. Lkhundev testified that when he heard the defendant ask for his burner and threaten to shoot him with it, he knew the defendant was talking about a gun, as "burner" is a common street term for gun. 3/2/2011 RP 62. Mr. Lkhundev testified that he became scared that once the defendant got the gun from the purse the defendant would probably shoot him or threaten to shoot him. Feeling his life was in danger, Mr. Lkhundev retreated back inside the store where he immediately called 911. 3/2/2011 RP 63.

During this time frame, Michael Hidalgo, who was working as a bouncer at an establishment down the block, looked up the street towards Joe's Mart and saw a person "arguing with one of the employees from Joe's Mart, along with a couple of other people that were standing by him as well." 3/3/2011 RP 168-76. Mr. Hidalgo watched as the person was trying to dig through a woman's purse while saying, "Give me my burner." The woman was trying to deny him access to the purse. 3/3/2011 RP 177.

Mr. Hidalgo, fearing this was going to get "crazy," turned from the crowd and called 911. When Mr. Hidalgo last saw the person who was demanding his gun, he was walking north on Second Avenue away from the store. 3/3/2011 RP 178-79.

Police dispatched to the 911 calls quickly located and arrested the defendant around the corner from Joe's Mart in between Second and Third Avenue. At that time, the defendant appeared to be with a woman. 3/1/2011 RP 22-25; 3/3/2011 RP 148-50. After the defendant was placed in handcuffs, the woman was contacted and taken into custody as well. The woman had a purse with her. Inside that purse was a Glock Model 19 semi-automatic pistol. 3/1/2011 RP 25-28.

C. ARGUMENT

1. APPELLANT ERRONEOUSLY SETS OUT THE LAW TO BE APPLIED IN ALTERNATIVE MEANS CRIMES.

The appellant in their opening brief states, "*When the State alleges a defendant has committed a crime by alternative means, the right to a unanimous jury is offended unless the State elects the means upon which it is relying or the jury is instructed that it must unanimously agree on a single means.*" (emphasis added). The appellant cites to State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) at page 409 as the source of this statement of the law. However, what the Washington State Supreme Court actually stated in their opinion in Kitchen was, "When the prosecution

presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act." Kitchen, *id.* at 709. The court in Kitchen clearly held that the above standard only applies to "multiple acts cases" and is inapplicable to "alternative means cases" such as the case at hand. Kitchen, *id.* at 710. By substituting "alternative means" for what the court was obviously addressing, "multiple acts," the appellant has erroneously set out the law to be applied in this case.

2. A SINGLE OFFENSE WAS COMMITTED IN MORE THAN ONE WAY AND SUBSTANTIAL EVIDENCE SUPPORTED EACH ALTERNATIVE MEANS.

In this case, the correct standard to be applied is when a single offense may be committed in more than one way, the jury must be unanimous as to guilt for the crime charged, but unanimity is not required as to the specific means by which the crime was committed, so long as substantial evidence supports each alternative means. State v. Lillard, 122 Wn. App. 422, 433-34, 93 P.3d 969 (2004) (*review denied* at 154 Wn.2d 1002 (2005)); State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988).

Substantial evidence exists if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Lillard, id. at 434; State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

The respondent would agree with the appellant's assessment that State v. Holt, 119 Wn. App. 712, 82 P.2d 688 (2004), which identifies unlawful possession of a firearm in the second degree as an alternative means offense, is also applicable to unlawful possession of a firearm in the first degree; the crime the defendant was convicted of in this case. See State v. Holt, 119 Wn. App. 712, 718, 82 P.2d 688 (2004).

In this case, a person is guilty of Unlawful Possession of a Firearm in the First Degree, "*If the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted...of any serious offense...*" RCW 9.41.040(1)(a) (emphasis added).

Possession is defined as having the firearm, "In one's custody or control. It may be actual or constructive... Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item... Dominion and control

need not be exclusive to support a finding of constructive possession... Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item... No single one of these factors necessarily controls your decision." WPIC 133.52 (11 *Washington Pattern Jury Instructions; Criminal* (3rd Ed. 2008)).

In this case, the trial court instructed the jury consistent with these legal definitions and indicated in the "to convict" instruction that it must be proven beyond a reasonable doubt that "the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control." CP 73, CP 75. The State acknowledges that because the instructions specifically listed alternative means to possess the firearm (either through ownership or possession or control), there must be substantial evidence to support each alternative means. The State submits that this burden has been met.

First, there is substantial evidence of the fact that the defendant owned the firearm that was later recovered from the purse of a woman who was standing next to the defendant when he threatened Mr. Lkhundev, the victim of the harassment charge in

this case. This is borne out by the statements the defendant made during this time frame. The defendant stated to Mr. Lkhundev, "I have a burner" and, "I will shoot your ass with it." 3/2/11 RP 59-60; 3/3/11 RP 177. The term "burner" was defined for the jury by the witnesses as a gun or pistol. 3/2/11 RP 60; 3/3/11 RP 177. This statement by the defendant clearly shows his ownership interest in the gun being kept in the woman's purse whom he was with.

There is also substantial evidence of the fact that the defendant was in constructive possession or control of the firearm. When the defendant confronted Mr. Lkhundev he was standing two to three feet from the woman who had his gun in her purse. 3/3/11 RP 109. The defendant said he had a burner and then began reaching into the purse to retrieve the gun. 3/2/11 RP 59. As was defined above, constructive possession is the *ability* to take actual possession and it is at that point that the defendant had that ability.

The appellant argues that because the woman who was holding the defendant's gun in her purse appeared to be discouraging the defendant from taking out the gun means he did not have the ability to take actual possession. This is not correct.

First, this argument should be discounted because a claim of insufficiency admits the truth of the State's evidence and requires

that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. State v. Holt, 119 Wn. App. 712, 720, 82 P.2d 688 (2004); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In reviewing the evidence, [the appellate court] give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Holt, *Id.* at 720; State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

A person has constructive possession when he or she has dominion and control over the item. This dominion and control need not be exclusive. State v. Summers, 107 Wn. App. 373, 384, 28 P.3d 780 (2001) (*remanded on other grounds*, 145 Wn.2d 1015 (2002)). Accordingly, the fact that another person may also have had control over the firearm by having it in her purse does not exclude the defendant's ability to also take actual possession of that firearm. Additionally, in the case of unlawful possession of a firearm, there is no requirement that the firearm be immediately accessible. State v. Howell, 119 Wn. App. 644, 650, 79 P.3d 451 (2003). So the fact that the defendant was not quick enough in his efforts to take his gun out of the purse before Mr. Lkhundev

managed to escape does not exclude the defendant from his ability to gain access to his firearm.

Second, appellant's argument would effectively change the definition of possession to exclude constructive possession as a means of possessing an item because under appellant's theory one must *actually take* possession of the item as opposed to just have the *ability* to take actual possession.

The reasonable inference that may be drawn in favor of the State from this evidence is that the reason why the defendant did not finish the process of taking his gun from the purse is not because he could not do so, but because he no longer needed to do so. After he threatened to shoot Mr. Lkhundev while reaching for his gun, Mr. Lkhundev ran for cover inside his store where he called 911. The defendant's misguided necessity for taking out his gun to shoot Mr. Lkhundev may have been gone but his ability to take actual possession remained.

In this case, the defendant was in close proximity to the gun, he knew the gun was there, he told Mr. Lkhundev he had a gun, and he reached for that gun. From these facts, drawing all reasonable inferences in favor of the State and interpreting them most strongly against the defendant, any rational trier of fact could

find the essential element of possession or control over the firearm beyond a reasonable doubt. Accordingly, the State has met its burden of producing substantial evidence to support each alternative means of committing the crime of unlawful possession of a firearm in the first degree.

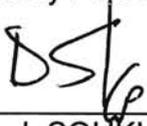
D. CONCLUSION

For the foregoing reasons, the State respectfully requests that this court find that after viewing the evidence in the light most favorable to the prosecution, substantial evidence supports each alternative means and any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt and affirm the jury's verdict finding the appellant guilty of the crime of Unlawful Possession of a Firearm in the First Degree.

DATED this 22 day of March, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, attorney for the Appellant, of the Washington Appellate Project, at the following address: 1511 Third Avenue, Suite 701, Seattle, WA 98101 containing a copy of Brief of Respondent to be sent to Court of Appeals, in State v. Justin Watkins, Cause No. 67407-2-I, in the Court of Appeals for the State of Washington, Division I.

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



Janice Schwarz
Done in Kent, Washington

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