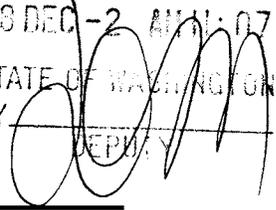


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COURT OF APPEALS
DIVISION II

No. 37829-9-II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

RYAN JOSEPH NYEGAARD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 07-1-02225-4
The Honorable Lisa Worswick, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied Appellant's pre-trial motion to dismiss because the evidence the State planned to present at trial was insufficient to establish the elements of the crimes charged.
2. The trial court erred when it denied Appellant's motion to dismiss at the close of the State's case because the State's evidence was insufficient to establish the elements of the crimes charged.
3. The State failed to present sufficient evidence to establish that Appellant constructively possessed methamphetamine.
4. The State failed to present sufficient evidence to establish that Appellant was armed with a firearm.
5. The State failed to present sufficient evidence to establish that Appellant acted as an accomplice to another person's crime of possession of methamphetamine with intent to deliver, while armed with a firearm.
6. The State failed to present sufficient evidence to establish that Appellant or the other occupants of the sport utility vehicle intended to deliver the methamphetamine.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the State present sufficient evidence to prove that Appellant constructively possessed the drugs found in the sport utility vehicle, when the evidence established that Appellant was a passenger in the vehicle and was sitting in proximity to the items, but the State presented no additional evidence to establish any additional connection to the drugs or the vehicle? (Assignments of Error 1, 2, & 3)
2. Did the State present sufficient evidence to support a special verdict that Appellant was armed with a firearm when the evidence established that Appellant was a passenger in the sport utility vehicle and was sitting in proximity to the firearm, but the firearm was not readily visible, and the State presented no additional evidence that Appellant previously handled the firearm or knew the firearm was present? (Assignments of Error 1, 2, & 4)
3. Did the State present sufficient evidence to prove that Appellant acted as an accomplice to another person's possession of a controlled substance with intent to deliver, while armed with a firearm, when the evidence established that Appellant was a passenger in the sport utility vehicle

and was sitting in proximity to the drugs and firearm, but the State presented no additional evidence to establish that Appellant knew the items were present, or that Appellant had any connection to the drugs, the firearm, the vehicle, or the other occupants of the vehicle? (Assignments of Error 1, 2, & 5)

4. Did the State present sufficient evidence to prove that Appellant or an accomplice intended to deliver the methamphetamine found in the sport utility vehicle, where the amount of methamphetamine was not unusually large, and where two pipes used to ingest methamphetamine were found in the vehicle? (Assignments of Error 1, 2, & 6)

III. STATEMENT OF THE CASE

A. Substantive Facts

Shortly after midnight of April 24, 2007, Lakewood Police Officer Nicholas McClelland observed a sport utility vehicle make a wide turn from South Tacoma Way onto 96th Street, then rapidly accelerate. (RP 137, 139, 140) McClelland followed the vehicle, which was driving at 50 miles per hour in a 35 mile per hour zone. (RP 141)

McClelland activated his emergency lights, and initiated a

traffic stop. (RP 141) He approached the vehicle and noticed three people inside. (RP 142) He contacted the driver, Gary Carter, and learned that Carter's driver's license had expired. (RP 143)

Lakewood Police Officer Eric Bell assisted in the traffic stop. (RP 337, 341) As McClelland talked to Carter, Bell contacted the front seat passenger, Ryan Nyegaard. (RP 343-44) He noticed that Nyegaard was fidgeting and moving his hands around. (RP 344-45) Nyegaard smelled of alcohol and his speech was slurred. (RP 344) Bell also noticed that the passenger sitting directly behind Nyegaard, Richard Arrington, was also fidgeting and moving his hands. (RP 345-46)

Nyegaard asked Bell if he should get out of the vehicle, and Bell told him yes. (RP 347) As Nyegaard exited the vehicle, Bell saw him put his left hand down by the side of the seat. (RP 347) Bell ordered Nyegaard to put his hand up, and when Nyegaard complied, Bell heard a clanking sound. (RP 347) He described it as sounding like glass hitting metal. (RP 347) Bell looked down and saw a glass pipe on the floorboard by the seat. (RP 347) The pipe, which is similar to one used to ingest methamphetamine, had burn marks on it. (RP 146, 316) Nyegaard denied ownership of the pipe and said he did not take drugs. (RP 351-52)

Bell placed Nyegaard under arrest, and Carter and Arrington were removed from the vehicle. (RP 146, 352) McClelland began a search of the vehicle. (RP 147) Shoved between the floorboard and the front passenger seat, McClelland noticed a brown paper bag. (RP 147-48, 211-12) McClelland found plastic bags containing a white powder substance inside the bag. (RP 147) After he removed the bag, McClelland was able to see a firearm also shoved under the passenger seat. (RP 150-51, 228)

During the search, McClelland also found several cellular phones, a loose \$100 bill, and a second glass pipe. (RP 152, 156, 157) When McClelland searched Carter, he found several separate bundles of cash, totaling \$2,995. (RP 154, 231-32) Carter told McClelland that he borrowed the car and did not know about the drugs or firearm. (RP 157) Nyegaard also denied knowledge of the items. (RP 158)

The contents of the brown paper bag included three large rocks of methamphetamine, valued at roughly \$80 each, and one small rock of methamphetamine, valued at roughly \$20. (RP 294-95) The larger rocks could be broken into smaller pieces for sale or use. (RP 295-96) The bag also contained three one-ounce plastic bags of powder cocaine, with a street value of several thousand

dollars, which is more than is usually possessed when the drug is intended for personal use. (RP 296-98)

Lakewood Police Officer Sean Conlon testified that it is common for someone dealing drugs to carry cellular phones, and to arrange and bundle cash in order to facilitate street sales. (RP 300-02) The cash found on Carter was bundled in a manner consistent with someone conducting drug street sales. (RP 302) Conlon testified that it is unusual for a dealer to also be a user, and therefore unusual for a dealer to possess paraphernalia for ingesting drugs. (RP 303, 315)

B. Procedural History

The State charged Ryan Nyegaard as an accomplice to the crimes of possession of methamphetamine with intent to deliver, and possession of cocaine with intent to deliver (RCW 69.50.401). (CP 1-2) The State also alleged that the principal was armed with a firearm during the commission of the crimes (RCW 9.94A.533). (CP 1-2)

Nyegaard moved to dismiss the charges prior to trial,¹ arguing that the State could not establish either constructive

¹ Pursuant to *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

possession or accomplice liability. (CP 108-14; RP 96-127) The trial court denied the motion.² Nyegaard moved to dismiss again at the close of the State's case-in-chief, but that motion was denied as well.³ (RP 425-36)

The jury convicted Nyegaard of possession of methamphetamine with intent to deliver, and found he was armed with a firearm. (RP 527; CP 78, 80) The jury was unable to agree on a verdict for possession of cocaine with intent to deliver, and the trial court declared a mistrial on that charge. (RP 523-24, 527, 532; CP 79, 81)

Nyegaard had an offender score of zero, and a standard range of 51-68 months. (CP 86-87, 91) The court sentenced Nyegaard to 51 months, to be followed by a 36-month firearm enhancement, for term of confinement totaling 87 months. (RP 537, 540; CP 93-94) This appeal timely follows. (CP 82)

IV. ARGUMENT & AUTHORITIES

"Due process requires that the State provide sufficient evidence to prove each element of its criminal case beyond a

² The trial court denied the motion as it applied to Nyegaard and Carter, but granted the motion and dismissed the charges against Arrington. (RP 127-28)

³ At the close of the State's case, Carter and the State reached a plea agreement, and Carter pleaded guilty to unlawful possession of cocaine with intent to deliver, while armed with a firearm. (RP 442-45)

reasonable doubt.” *City of Tacoma v. Luvane*, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201.

The State charged Nyegaard as an accomplice with possession of methamphetamine with intent to deliver, while armed with a firearm. (CP 1-2) The to-convict instruction did not include accomplice language, but the court did include an accomplice liability instruction. (CP 62, 72) But the State failed to establish that Nyegaard acted either as a principal or an accomplice to the drug possession with a firearm enhancement.

- A. The State failed to prove that Nyegaard acted as a principal to possession with intent to deliver because it did not establish the essential element of possession.

To convict Nyegaard as a principal to possession of methamphetamine with intent to deliver, the State was required to prove that Nyegaard possessed the methamphetamine. RCW 69.50.401(1). Possession may be either actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Because Nyegaard did not have physical custody of the paper bag containing the methamphetamine, the question is whether the State proved that he had constructive possession of the bag and its contents.

Constructive possession is proved when the person charged with possession has dominion and control over either the drugs or the premises where the drugs are found. *Callahan*, 77 Wn. 2d at 30-31. An automobile may be considered a "premises." *State v. Potts*, 1 Wn. App. 614, 617, 464 P.2d 742 (1969). Carter, who was driving the vehicle, told Officer McClelland that he had recently borrowed it from another person. (RP 157) The State presented no additional evidence to establish that Nyegaard had any connection to the vehicle. Nyegaard was neither the owner nor the

driver, but merely a passenger. Accordingly, there was insufficient evidence to support a finding that Nyegaard exercised dominion and control over the vehicle.

Where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs is not enough to support a finding of constructive possession. *State v. Spruell*, 57 Wn. App. 383, 388, 788 P.2d 21 (1990); *see also State v. Cote*, 123 Wn. App. 546, 548-50, 96 P.3d 410 (2004). Even proximity coupled with evidence of momentary handling is insufficient to establish constructive possession. *Spruell*, 57 Wn. App. at 388.

For example, in *Spruell*, police entered a room and found co-defendant Luther Hill and another individual near a table on which there was cocaine residue, a scale, vials, and a razor blade. Hill's conviction for possession of the cocaine was reversed for insufficient evidence:

There is no evidence in this case involving Hill other than the testimony of his presence in the kitchen when the officers entered There is no evidence relating to why Hill was in the house, how long he had been there, or whether he had ever been there on days previous to his arrest. There is no evidence of any activity by Hill in the house. So far as the record shows, he had no connection with the house or the cocaine, other than being present and having a fingerprint on a dish which appeared to have contained cocaine immediately prior to the forced

entry of the police. Neither of the police officers testified to anything that was inconsistent with Hill being a mere visitor in the house. There is no basis for finding that Hill had dominion and control over the drugs. Our case law makes it clear that presence and proximity to the drugs is not enough. There must be some evidence from which a trier of fact can infer dominion and control over the drugs themselves.

Spruell, 57 Wn. App. at 388-89.

In *Callahan*, drugs were found on a houseboat. When a search warrant was executed, Callahan was sitting at a desk with another individual and a cigar box filled with various drugs was on the floor between the two men. The defendant admitted that two books on drugs, two guns, and a set of broken scales found on the houseboat belonged to him. He also stated that, while he had been staying on the houseboat for the preceding 2 or 3 days, he was not in the status of a tenant, cotenant, or subtenant. 77 Wn.2d at 31. Callahan also admitted that he had handled the drugs earlier in the day. 77 Wn.2d at 31. The Supreme Court held that this was not sufficient evidence to support a finding of dominion and control over the drugs. 77 Wn.2d at 31.

In *State v. Echeverria*, the defendant was the driver of a vehicle registered to another person. 85 Wn. App. 777, 780, 934 P.2d 1214 (1997). He was charged with unlawful possession of a

firearm and unlawful possession of a dangerous weapon (a martial arts throwing star). 85 Wn. App. at 779. On appeal, the court found sufficient evidence that Echeverria constructively possessed the firearm because it was plainly visible, but insufficient evidence to support possession of the martial arts weapon because it was not. 85 Wn. App. at 783-84.

And in *Cote*, the evidence was insufficient to prove constructive possession where the defendant was a passenger in a truck containing components of a methamphetamine lab, and his fingerprints were found on Mason jars containing chemicals in the back of the truck. 123 Wn. App. at 550.

In this case, the State presented no evidence that established a connection between Nyegaard and the car or the methamphetamine. There was no testimony or evidence that Nyegaard ever touched the bag or the drugs, or that he even knew they existed. The State relied on proximity alone to establish constructive possession, but this is not sufficient to support a conviction. See *Cote*, 123 Wn. App. at 550, *Spruell*, 57 Wn. App. at 388.

B. The State failed to prove that Nyegaard was armed with a firearm because it did not establish a nexus between Nyegaard and the firearm.

A firearm enhancement must be proved beyond a reasonable doubt. See *State v. Tongate*, 93 Wn.2d 751, 754, 613 P.2d 121 (1980). “A defendant is ‘armed’ when he or she is within proximity of an easily and readily available deadly weapon for offensive or defensive purposes, and when a nexus is established between the defendant, the weapon, and the crime.” *State v. O’Neal*, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007) (quoting *State v. Schelin*, 147 Wn.2d 562, 575-76, 55 P.3d 632 (2002)). But mere proximity or mere constructive possession is insufficient to establish that a defendant was armed at the time the crime was committed. *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005).

As with the methamphetamine, there was no evidence in this case that Nyegaard constructively possessed the firearm. There were no fingerprints taken from the firearm and no evidence Nyegaard ever handled the firearm. (RP 219) And the State presented no evidence that Nyegaard even knew the firearm was in the vehicle; the firearm was not visible until the paper bag was removed, and even then the officers used a flashlight to illuminate

the area before they were able to see the firearm. (RP 150-51, 228, 229) Accordingly, the State failed to prove any nexus between Nyegaard and the firearm, beyond mere proximity, and failed to present sufficient evidence to support a firearm sentence enhancement.

- C. The State failed to prove that Nyegaard acted as an accomplice to possession with intent to deliver, while armed with a firearm, because it did not establish that Nyegaard knowingly aided in the commission of the crime.

A person is an accomplice of another person in the commission of a crime if he or she knowingly facilitates, encourages or aids in the planning or commission of the crime. RCW 9A.08.020(3)(a). To prove that a person present at the commission of a crime is an accomplice, the State must establish that the person is ready to assist in the commission of the crime. *State v. Rotunno*, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); *In re Wilson*, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979). Physical presence and awareness of the criminal transaction alone are insufficient to establish accomplice liability. *Wilson*, 91 Wn.2d at 491.

In this case, the State proved nothing more than Nyegaard's presence in the vehicle and that he might be a drug user. It did not

present any evidence to establish that Nyegaard possessed or even knew about the contents of the bag, the presence of the firearm, or the large amount of cash in Carter's possession. The State did not establish how long Nyegaard had been in the vehicle, or present any facts to indicate the nature of his acquaintance with Carter. The State failed to present any evidence that Nyegaard knowingly facilitated, encouraged or aided Carter or another person in the possession of the drugs or the firearm.

D. The State failed to prove that Nyegaard acted as a principal or accomplice to possession with intent to deliver, while armed with a firearm, because it did not establish that any of the occupants of the vehicle intended to deliver the methamphetamine.

Bare possession of a controlled substance is not enough to support a conviction of intent to deliver. *State v. Hagler*, 74 Wn. App. 232, 235-36, 872 P.2d 85 (1994); *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). The defendant's intent "must logically follow as a matter of probability from the evidence." *State v. Campos*, 100 Wn. App. 218, 222, 998 P.2d 893 (2000) (citing *State v. Davis*, 79 Wn. App. 591, 594, 904 P.2d 306 (1995)).

An inference of intent to deliver requires at least one additional factor indicative of distribution in addition to possession of the narcotics. See *Campos*, 100 Wn. App. at 224; *State v.*

Taylor, 74 Wn. App. 111, 123, 872 P.2d 53 (1994). And an officer's opinion that a quantity is greater than an amount considered normal for personal use is itself insufficient to support an inference of intent to deliver. *State v. Hutchins*, 73 Wn. App. 211, 217, 868 P.2d 196 (1994).

In this case, there were roughly thirteen doses of methamphetamine found in the paper bag.⁴ Officer Conlon testified that it is unusual for a dealer to use his product, and therefore unusual for a dealer to also possess paraphernalia for ingesting the product. (RP 303, 315) But the officers found two glass pipes for smoking methamphetamine inside the vehicle, both with residue burn marks. (RP 347-48) One of the pipes was dropped by Nyegaard when he exited the vehicle. (RP 347-48)

The evidence therefore does not support a finding that Nyegaard, or any of the occupants, intended to sell rather than use the methamphetamine. The State did not prove that the three men intended to deliver the methamphetamine, and Nyegaard's conviction and firearm enhancement must be reversed on this ground as well.

⁴ Officer Conlon testified that the value of the rocks was roughly \$260, and that a single dose sells for roughly \$20. (RP 294-95)

V. CONCLUSION

The State's case relied on nothing more than presence and proximity. The State presented no additional facts to connect Nyegaard to the drugs, the firearm, the vehicle or even to Carter. The State failed to meet its burden of proving beyond a reasonable doubt that Nyegaard, as a principal or as an accomplice, aided in the possession of the drugs, the intent to deliver the drugs, or the possession of the firearm. His conviction and firearm enhancement must be reversed.

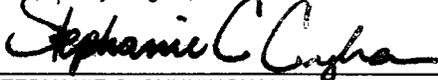
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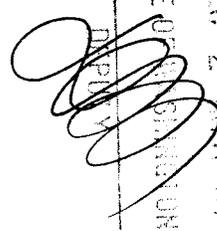
STEPHANIE C. CUNNINGHAM
WSBA No. 26436
Attorney for Ryan J. Nyegaard

CERTIFICATE OF MAILING

I certify that on 12/01/2008, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: (1) Kathleen Proctor, DPA, Prosecuting Attorney's Office, 930 Tacoma Ave. S., Rm. 946, Tacoma, WA 98402; and (2) Ryan J. Nyegaard, DOC# 319526, Airway Heights Corrections Center, P.O. Box 1839, Airway Heights, WA 99001-1839.



STEPHANIE C. CUNNINGHAM
WSBA No. 26436

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