

NO. 38439-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

SONJA STRYKER,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
MAY 14 11 04 AM '09
STATE OF WASHINGTON
BY [Signature]

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 08-8-00643-7

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

TODD L. DOWELL
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

P.M. 5-1-2009

SERVICE

Lise Ellner
P.O. Box 2711
Vashon, WA 98070

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED April 30, 2009, Port Orchard, WA [Signature]
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

I. COUNTERSTATEMENT OF THE ISSUES.....1

A. IS THERE SUFFICIENT EVIDENCE OF UNLAWFUL POSSESSION OF A FIREARMS SECOND DEGREE, WHERE A 17 YEAR OLD JUVENILE HAS ACTUAL POSSESSION OF RIFLES WHICH IS NEITHER “TRANSITORY” NOR “FLEETING” BECAUSE SHE TOOK CONTROL OF THE RIFLES BY REMOVING THEM FROM THE POSSESSION OF THEIR RIGHTFUL OWNER?.....1

B. IS APPELLANT’S UNLAWFUL POSSESSION OF FIREARMS NECESSARY WHEN NO IMMINENT DANGER OF INJURY EXISTS, APPELLANT RECKLESSLY PLACES HERSELF IN THE SITUATION REQUIRING POSSESSION, THERE ARE LEGAL ALTERNATIVES TO POSSESSION, AND, THERE IS NO CAUSAL CONNECTION BETWEEN POSSESSION AND AVOIDING DANGER?.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....1

A. THERE IS SUFFICIENT EVIDENCE OF UNLAWFUL POSSESSION OF A FIREARM SECOND DEGREE, WHERE A 17 YEAR OLD JUVENILE HAD ACTUAL POSSESSION OF RIFLES WHICH IS NEITHER “TRANSITORY” NOR “FLEETING” BECAUSE SHE TOOK CONTROL OF THE RIFLES BY REMOVING THEM FROM THE POSSESSION OF THEIR RIGHTFUL OWNER.....1

B. APPELLANT’S UNLAWFUL POSSESSION OF FIREARMS IS UNNECESSARY WHEN NO IMMINENT DANGER OF INJURY EXISTS, APPELLANT RECKLESSLY PLACES HERSELF IN THE SITUATION REQUIRING POSSESSION, THERE ARE LEGAL ALTERNATIVES TO POSSESSION, AND, THERE IS NO CAUSAL CONNECTION BETWEEN POSSESSION AND AVOIDING DANGER.....6

IV. CONCLUSION.....10

TABLE OF AUTHORITIES

Washington State Supreme Court

State v. Callahan, 77 Wn.2d 27, 29, 31, 459 P.2d 400 (1969).....2, 3, 4, 5, 6

State v. Diana, 24 Wn. App. 908, 916, 604 P.2d 1312 (1979).....7

State v. Jeffrey, 77 Wn. App. 222, 224-27, 889 P.2d 956 (1995).....6, 7, 8, 9

State v. Parker, 127 Wn. App. 352, 355, 110 P.3d 1152 (2005).....8, 9

State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).....4

State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....2

State v. Staley, 123 Wn.2d 794, 802, 872 P.2d 502 (1994).....3, 4

Washington State Court of Appeals

State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).....2

State v. Marcum, 116 Wn. App. 526, 534, 66 P.3d 690 (2003).....2

State v. Womble, 93 Wn. App. 599, 602, 969 P.2d 1097 (1999).....2

Federal

U.S. v. Landry, 257 F.2d 425, 431 (7th Cir. 1958).....3

United States v. Lemon, 824 F.2d 763 (9th Cir. 1987).....7

Washington State Statutes

RCW 9.41.040(2)(a)(iii).....2

I. COUNTERSTATEMENT OF THE ISSUES

- A. IS THERE SUFFICIENT EVIDENCE OF UNLAWFUL POSSESSION OF A FIREARM SECOND DEGREE, WHERE A 17 YEAR OLD JUVENILE HAS ACTUAL POSSESSION OF RIFLES WHICH IS NEITHER “TRANSITORY” NOR “FLEETING” BECAUSE SHE TOOK CONTROL OF THE RIFLES BY REMOVING THEM FROM THE POSSESSION OF THEIR RIGHTFUL OWNER?

- B. IS APPELLANT’S UNLAWFUL POSSESSION OF FIREARMS NECESSARY WHEN NO IMMINENT DANGER OF INJURY EXISTS, APPELLANT RECKLESSLY PLACES HERSELF IN THE SITUATION REQUIRING POSSESSION, THERE ARE LEGAL ALTERNATIVES TO POSSESSION, AND, THERE IS NO CAUSAL CONNECTION BETWEEN POSSESSION AND AVOIDING DANGER?

II. STATEMENT OF THE CASE

The Respondent is satisfied with the statement of the case set forth in the Brief of Appellant.

III. ARGUMENT

- A. **THERE IS SUFFICIENT EVIDENCE OF UNLAWFUL POSSESSION OF A FIREARM SECOND DEGREE, WHERE A 17 YEAR OLD JUVENILE HAD ACTUAL POSSESSION OF RIFLES WHICH IS NEITHER “TRANSITORY” NOR “FLEETING” BECAUSE SHE TOOK CONTROL OF THE RIFLES BY REMOVING THEM FROM THE POSSESSION OF THEIR RIGHTFUL OWNER**

A trial court's findings are reviewed for substantial evidence. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Evidence is sufficient if, when viewed in the light most favorable to the State, the fact finder could find the essential elements of the crime beyond a reasonable doubt. State v. Womble, 93 Wn. App. 599, 602, 969 P.2d 1097 (1999), *citing*, 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 can be reasonably drawn from it. *Id.*

To be found guilty of Unlawful Possession of a Firearm, RCW 9.41.040(2)(a)(iii), the State must prove the Appellant was under 18 years of age and knowingly possessed a firearm. RCW 9.41.040(2)(a)(iii); State v. Marcum, 116 Wn. App. 526, 534, 66 P.3d 690 (2003). Possession may be actual or constructive. Echeverria, 85 Wn. App. at 783. Actual possession requires a showing that the object was in the personal custody of the person charged with possession. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

In Callahan, the Washington Supreme Court dealt with the question of whether a person's mere handling of an item constitutes sufficient control over it to find the person in actual possession of the item. *Id.* at 29. That case involved the search of a houseboat where illegal drugs were found inside

along with the defendant who had been staying there for a few days but was neither an owner nor a tenant therein. *Id.* at 31.

Although the defendant in *Callahan* was in close proximity to the drugs at the time they were seized, the drugs actually belonged to another person who had sole control over them. *Id.* The only evidence of actual possession was the defendant's admission that he had handled the drugs earlier in the day. *Id.* The court concluded that mere handling of drugs does not constitute sufficient control over them to constitute actual possession:

Since the drugs were not found on the defendant, the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since ***possession entails actual control, not a passing control which is only a momentary handling.*** *Callahan*, at 29, citing, *U.S. v. Landry*, 257 F.2d 425, 431 (7th Cir. 1958) (emphasis added).

The question of whether possession can be found where defendant only momentarily handled an item arose again in the case of *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994). There the Washington State Supreme Court held that the duration of time in which the item is possessed is one factor the court may use to determine if control is exercised sufficient to find the element of possession; however the court will look at the totality of circumstances. *Staley*, 123 Wn.2d at 802. "Depending on the total situation, a 'momentary handling', along with other sufficient indicia of control over

the drugs, may actually support a finding of possession.” *Id.*, citing, *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

In the present case, Appellant argues that, her handling of the rifles belonging to Mr. Michalski, her handling was only “transitory passing control.” Brief of Appellant, page 5. Appellant attempts to compare her possession of the rifles to that of the defendant’s momentary handling of drugs in *Callahan*. Appellant argues that simply taking the rifles from the boys and giving them to her mother is insufficient to establish control. However the Appellant’s argument fails to recognize that the defendant in *Callahan* never removed the drugs he handled from the control of their owner or transferred possession of the drugs to another person, or away from their original location.

In this case it is undisputed that the rifles belonging to Mr. Michalski were unlawfully taken from his residence by Mikey Stryker and Sean Wiggins. RP 16-18, 54-56, 78-79. At some point Appellant heard the boys shooting the stolen rifles outside her home and went out to see what was going on. RP 17, 40. Appellant found the boys in possession of the rifles and took them away. RP 40, 49. Appellant took the rifles and gave them to her mother. RP 41. The guns were eventually located inside Appellant’s home where they were handed over to law enforcement by the Appellant’s mother. RP 89- 90, 94-95. Appellant and her mother lacked permission to

possess the rifles to the exclusion of their rightful owner, Mr. Michalski. RP 78-79.

In Callahan, the owner of the drugs never lost possession of them. The decision in Callahan, rested on the fact that the contraband handled was never removed from the possession and control of its owner. Id at 31. Unlike the Callahan, the rifles in this case did not remain inside Mr. Michalski's residence, or his possession and control; instead they were stolen by Mikey Stryker and Sean Wiggins and taken next door to the Appellant's residence where they were fired. RP 17.

In Callahan, the defendant's handling of the drugs did not involve transferring possession of them to a third party. Unlike Callahan, the Appellant took actual physical control of the rifles by removing them from the boys and transferring actual physical possession of the rifles to her mother, where they eventually ended up inside Appellant's residence to the exclusion of their rightful owner Mr. Michalski. RP 40, 49. The rifles were not returned until Mr. Michalski reported them missing and law enforcement persuaded Appellant's mother to locate them. RP 80-84, 94.

This case might be similar to Callahan if the Appellant had simply handled the rifles outside and left them at the scene. But that did not happen in this case. Instead, Appellant took control and dominion over the rifles,

removing them from the scene and transferring possession to a third party.

This is more than “fleeting” or “momentary” handling. *Callahan*, supra.

In conclusion, there was sufficient evidence to support Appellant’s actual possession of firearms.

B) APPELLANT’S UNLAWFUL POSSESSION OF FIREARMS IS UNNECESSARY WHEN NO IMMINENT DANGER OF INJURY EXISTS, APPELLANT RECKLESSLY PLACES HERSELF IN THE SITUATION REQUIRING POSSESSION, THERE ARE LEGAL ALTERNATIVES TO POSSESSION, AND, THERE IS NO CAUSAL CONNECTION BETWEEN POSSESSION AND AVOIDING DANGER.

Appellant cites *State v. Jeffrey*, 77 Wn. App. 222, 889 P.2d 956 (1995), for the proposition that her possession was “necessary” under the circumstances. Brief of Appellant, page 7. However, the circumstances in this case do not provide any of the conditions necessary to prove the defense of necessity.

First, Appellant never asserted the defense at trial, nor was there any proof that she reasonably believed her possession of the rifles was necessary.

Second, at the time the guns were being shot, Appellant was responsible for supervising the boys, and therefore recklessly placed herself in the situation where she was forced to possess the rifles. Third, the Appellant fails to show that she lacked any legal alternatives to taking control of the weapons herself.

And, finally, there was no causal relationship between her unlawful possession of rifles and avoiding harm.

The *Jeffrey* case provides an affirmative defense to unlawful possession of a firearm where the possession was necessary to avoid greater injury than the violation itself. *Id* at 224-25. The purpose of the defense is to cover “unforeseen and sudden” situations where a person is “threatened with impending danger”. *Id* at 226.

The person asserting the defense must prove the following conditions by a preponderance of evidence: (1) They reasonably believed there was a present threat of death or serious bodily injury to themselves or another; (2) They did not recklessly place themselves in the situation where they are forced to engage in the conduct; (3) They had no reasonable legal alternative; and, (4) A causal connection exists between the criminal act and avoidance of harm. *Id* at 224, citing, *United States v. Lemon*, 824 F.2d 763 (9th Cir. 1987). The burden of proving the defense rests upon the defendant unlawfully possessing the weapon. *Jeffrey* at 224, citing, *State v. Diana*, 24 Wn. App. 908, 604 P.2d 1312 (1979).¹

In the present case the defense of necessity was never asserted by the Appellant, who had the burden of also presenting corroborative evidence that taking the rifles was necessary to prevent what she believed to be a present threat of death or serious bodily harm to herself or another person. *Id.*

¹ “To support the defendant's assertions that he reasonably believed his actions were necessary to protect his health, corroborating medical testimony is required...Defendant bears the burden of proving the existence of necessity, an affirmative defense, by a preponderance of the evidence.” *State v. Diana*, 24 Wn. App. at 916 (citations omitted).

However, even if the Appellant had asserted the defense, she would be unable to prove it.

First, like the defendant in *Jeffrey*, the Appellant was unable to show by a preponderance of evidence that “a threat of imminent serious bodily injury or death” existed at the time she took the weapons from the boys. *Jeffrey* at 227; See also, *State v. Parker*, 127 Wn. App. 352, 355, 110 P.3d 1152 (2005).

In this case there is no evidence that the boys had threatened to shoot anyone, or were aiming the rifles at each other. Instead, they each shot the rifles at a tree just prior to Appellant coming out and taking the rifles away. RP 17. While one could speculate the potential danger of unsupervised children firing rifles, mere speculation does not provide immediate danger or proof of such by a preponderance of evidence.

Second, in addition to failing to establish imminent danger existed, there were reasonable alternatives available to the Appellant, including telling her mother or calling law enforcement to remove and take possession of the rifles. There is no indication the Appellant did anything prior to coming outside. There is no evidence Appellant attempted to contact anyone else about the boys shooting the rifles prior to taking them. In sum, Appellant fails to establish that she had attempted to use alternative means, had insufficient time to use them, or, could otherwise show the futility of using

them. Parker, 127 Wn. App. at 355.

Third, even if Appellant could prove danger, the Appellant recklessly placed herself in the situation where she was forced to take the rifles away. Jeffrey at 224. Appellant was supposed to be supervising Sean Wiggins and Mikey Stryker while they were at the Stryker residence, but wasn't very responsible that day. RP 39, 45, 52-53. In addition, Appellant had assisted the boys in burglarizing Mr. Michalski's residence prior to them entering and taking the rifles. RP 15.

Finally, there is no direct causal relationship between the criminal action and the avoidance of harm by the stolen rifles and ammunition. Jeffrey at 224. In this case Appellant took the rifles and gave them to her mother. RP 41. There is no indication that the guns and ammunition were locked up or made inaccessible to the boys or anyone else in the Appellant's home. Instead, they were placed behind a bookcase in the hallway of the Appellant's home. RP 94.

In addition, Sean's parents were never notified by Appellant or her mother that the boys had been shooting rifles. RP 52-53. Sean's parents, Cara and Jeff Baylies, first learned of the incident because Cara found live ammo rounds in her couch that had been given to Sean by Mikey. RP 37-38. Similarly, the guns were not turned over to law enforcement until the matter had been reported by the victim and the weapons were requested by Officer

McVey. RP 94-95.

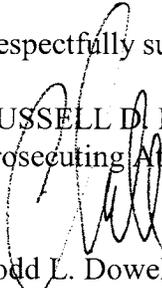
In summary, the Appellant failed to establish any of the conditions necessary to prove her possession of firearms was necessary under the circumstances.

III. CONCLUSION

For the foregoing reasons, the Appellant's conviction should be affirmed.

DATED April 30, 2009.

Respectfully submitted,


RUSSELL D. HAUGE
Prosecuting Attorney

Todd L. Dowell
WSBA No. 18505
Deputy Prosecuting Attorney