

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 39221-6-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

STEVEN A. RALEIGH,  
aka JOSEPH F. LAW

Appellant.

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BRIEF OF APPELLANT

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APPEAL FROM THE SUPERIOR COURT FOR  
MASON COUNTY

The Honorable Toni A. Sheldon, Judge

Cause No. 08-1-00472-4

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Raleigh to be convicted of unlawful possession of a firearm in the first degree (Count II) where the firearm at issue was not operable.
2. The trial court erred in not taking Count II (unlawful possession of a firearm in the first degree) from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing Raleigh to be convicted of unlawful possession of a firearm in the first degree (Count II) where the firearm at issue was not operable? [Assignment of Error No. 1].
2. Whether there was sufficient evidence to uphold Raleigh's conviction for unlawful possession of a firearm (Count II)? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

1. Procedure

Steven A. Raleigh aka Joseph F. Law (Raleigh) was charged by third amended information filed in Mason County Superior Court with one count of residential burglary (Count I) and one count of unlawful possession of a firearm in the first degree (Count II). [CP 59-60].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Raleigh was tried by a jury, the Honorable Toni A. Sheldon presiding. For purposes of Count II (unlawful possession of a firearm in the first degree), Raleigh stipulated to having a prior conviction involving a "serious offense." [CP 56; Vol. X RP 314-315]. Raleigh had no objections and

took no exceptions to the Court's Instructions to the Jury. [CP 27-55; Vol. X RP 320]. The jury found Raleigh guilty as charged of both counts. [CP 24, 25, 26; Vol. X RP 370-372].

The court sentenced Raleigh to a standard range sentence of 68.5-months on Count I (residential burglary) and to a standard range sentence of 101-months on Count II (unlawful possession of a firearm in the first degree) based on an undisputed offender score of 9+ running the sentences concurrently for a total sentence of 101-months. [CP 6-21; Vol. XI RP 392-394].

Timely notice of appeal was filed on May 4, 2009, and this appeal follows. [CP 5].

## 2. Facts

On October 10, 2008, Marilyn Issacson (Issacson) noticed a white SUV come down the driveway she shared with her neighbor Gerald Moroz (Moroz), who was on vacation in Hawaii. [Vol. VIII RP 80-83]. Issacson noticed a woman and two men approach Moroz's home and go around to the back of the house. [Vol. VIII RP 84-87]. She thought this was suspicious and called 911. [Vol. VIII RP 88-91]. She continued to observe Moroz's home and eventually Mason County Sheriff deputies arrived. [Vol. VIII RP 91-97].

Deputy Bradley Trout (Trout) after arriving at the scene in response to Issacson's 911 call and blocking the white SUV from leaving observed two men in the vehicle. [Vol. VIII RP 116-120]. He ordered them out of the vehicle and identified them as Raleigh and Case Letourneau (Letourneau). [Vol. VIII RP 122-124]. The men explained that they were at Moroz's home to borrow tools. [Vol. VIII RP 124]. Raleigh was patted down and a screwdriver was found in his pocket along with a pair of black gloves. [Vol. VIII RP 131]. Additional deputies arrived to investigate and deputy Christopher Gainer (Gainer) headed toward Moroz's home to locate the third person (the woman) who had been seen with the two men. [Vol. VIII RP 125, 155-156]. The woman later identified as Angelia Jay (Jay) appeared and Gainer contacted her. [Vol. VIII RP 126]. Jay told the deputies that she had permission to be at Moroz's house to call her "mom," Linda Green (Green) to verify her claim. [Vol. VIII RP 126, 140-141, 161-162].

The deputies checked Moroz's home and found a screen pried off a window, the window was open, and marks that could have been made by a screwdriver were around the open window. [Vol. VIII RP 143-145, 148, 156-157]. Green was contacted and told the deputies that she was Moroz's girlfriend and that no one had permission to be at/in Moroz's home. [Vol. IX RP 164-165, 167-169]. With Jay's permission her purse

was found in the white SUV on top of a Vans shoebox which appeared to contain a handgun. [Vol. VIII RP 127-129]. After the white SUV was impounded a search of the contents revealed two toy pistols and a rusty loaded firearm (Ex. No. 11) in the Vans shoebox. [Vol. IX RP 188-197].

Moroz testified that he knew Jay, but that she did not have permission to be in his home. [Vol. IX RP 172-173, 175]. Moroz did not give either Raleigh or Letourneau, whom he did not know, permission to be in his home. [Vol. IX RP 173-176]. He also testified that nothing had been taken from his home, but he did notice that several items of personal property had been gathered together and left at the top of the stairs. [Vol. IX RP 177-178]. He had not left the items there before leaving on vacation. [Vol. IX RP 177-178].

Mason County Sheriff's Office Sergeant Bruce Bennett (Bennett) testified that the firearm recovered was an Egyptian made Helwan Brigadier 9 mm pistol. [Vol. IX RP 211]. He testified that the gun was approximately 55 years old, "rather rusty, and beat up." [Vol. IX RP 211, 215]. Bennett testified that the firing pin on the gun was stuck in the forward position and only at the request of the State on the day he testified had he stripped off the slide, used penetrating oil and a hammer punch to loosen the firing pin from the channel thus making the firearm operable, specifically stating that it was "absolutely operable," in response to the

State's specific question whether or not the firearm was operable "in the state in which you examined it today." [Vol. IX RP 213-215, 218]. The State failed to ask whether the firearm was operable on October 10, 2008.

Jay testified that she, Letourneau, and Raleigh had gone to Moroz's home because they needed gas money in order to drive to Olympia to commit a robbery. [Vol. X RP 273, 275, 276]. She knew Moroz because he was her "mom's," Linda Green's; boyfriend and she had cleaned his house in the past. [Vol. X RP 273-274]. When they got to Moroz's home and no one answered their knock, Raleigh opened the window, shoved Jay into Moroz's home, and told her to look for guns and jewelry. [Vol. X RP 277, 291]. Jay panicked once inside Moroz's home and just as she decided to leave the home she saw Letourneau and Raleigh trying to leave in the white SUV when the police stopped the two men. [Vol. X RP 278-279]. She left Moroz's home and was contacted by the police. Vol. X RP 279]. Jay admitted that the Vans shoebox was hers but denied knowing that it was in the white SUV as the last time she had seen it was in the RV she shared with Raleigh. [Vol. X RP 280-281]. Jay testified that the firearm belonged to Letourneau. [Vol. X RP 293, 295].

Letourneau testified that he accompanied Jay and Raleigh to Moroz's home, but had no idea what they planned to do once there because he thought they were going to the house to take a welder with the

owner's permission. [Vol. IX RP 228, 231-232]. He was driving the white SUV that belonged to his friend Matthew Logan Arthur. [Vol. IX RP 229]. Upon arriving at Moroz's home, Raleigh used a screwdriver to open a window, and hoisted Jay inside at which point Letourneau decided to leave. [Vol. IX RP 231-232]. Letourneau testified that either Jay or Raleigh placed the Vans shoebox into the vehicle he borrowed, but he believed it had been Raleigh and had seen the firearm found in the shoebox at Raleigh's home. [Vol. IX RP 235-237]. He did not know the firearm was in the shoebox when it was placed in the SUV he was driving. [Vol. IX RP 236].

Raleigh did not testify at trial.

D. ARGUMENT

- (1) THE TRIAL COURT ERRED IN ALLOWING RALEIGH TO BE CONVICTED OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (COUNT II) WHERE THE FIREARM AT ISSUE WAS NOT OPERABLE.

Recently our State Supreme Court determined what constituted a "firearm" per RCW 9A.01.010(1) for purposes of imposing a firearm sentence enhancement. Before a firearm enhancement may be imposed, the State must prove "beyond a reasonable doubt [that] the weapon in question falls under the definition of a 'firearm:' 'a weapon or device from which a projectile may be fired by an explosive such as gunpowder.'"

State v. Recuenco, 163 Wn.2d 428, 437, 180 P.2d 1276 (2008), *quoting* 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 2.10.01 (Supp. 2005) (WPIC); *see also* RCWs 9.94A.533(3) and 9.41.010(1)

The State Supreme Court held that the firearm enhancement applies only to working firearms:

We have held that a jury must be presented with sufficient evidence to find a firearm operable under this definition in order to uphold the enhancement.

[Emphasis added]. State v. Recuenco, 163 Wn.2d at 437 (*citing State v. Pam*, 98 Wn.2d 748, 754-55, 659 P.2d 454 (1983), *overruled in part on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988)) (seeming to overrule sub silencio State v. Faust, 93 Wn. App. 373, 867 P.2d 1284 (1998) which upheld the imposition of a firearm enhancement even where the firearm at issue was “technically inoperable”).<sup>1</sup>

Here Raleigh was convicted in Count II of unlawful possession of a firearm pursuant to RCW 9.41.040(1)(a), which defines a “firearm” under the same definition set forth in RCW 9.41.010(1) used for a firearm sentence enhancement. Based on the State Supreme Court’s holding in

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<sup>1</sup> This court should note reasoning set forth in State v. Padilla, 95 Wn. App. 531, 978 P.2d 1113, *review denied*, 139 Wn.2d 1003 (1999) in which the court found a disassembled but easily assembled firearm to be “operable” under the definition contained in RCW 9.41.010(1) does not apply to the instant case as the firearm at issue was not disassembled; it simply did not work.

Recuenco defining what constitutes a firearm, the firearm at issue must be operable. The gun introduced at trial, Exhibit No. 11, was not operable, and thus did not qualify as a firearm for purposes of the crime of unlawful possession of a firearm (Count II). First, the firearm was rusty and beat up and at least 55 years old. More importantly, the firing pin was frozen rendering the firearm inoperable. Bennett testified that he only rendered the firearm operable on the day of trial at the State's request by adding penetrating oil and a hammer punch to loosen the firing pin from the channel. He did not testify that the firearm was operable on October 10, 2008.

Under these circumstances, the State has failed to prove beyond a reasonable doubt that the gun, Exhibit No. 11, qualified as a firearm. *See* Instruction No. 21—defining a firearm as “a weapon or device from which a projectile may be fired by an explosive such as gunpowder.” [CP 51]. Exhibit No. 11 was not operable and therefore not a firearm by definition. State v. Recuenco, 163 Wn.2d at 437. Raleigh's conviction for unlawful possession of a firearm reversed and dismissed.

(2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO FIND RALEIGH GUILTY BEYOND A REASONABLE DOUBT OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (COUNT II).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, the State charged and Raleigh was unlawful possession of a firearm in the first degree (Count II). [CP 24, 59-69]. The State bore the burden of proving beyond a reasonable doubt that Raleigh was 1) either in actual or constructive possession 2) a firearm. *See* Instruction No. 22 (the

to-convict instruction for Count II) [CP 52]. This is a burden the State cannot meet.

First, as argued in the proceeding section of this brief adopted and incorporated to this argument, the gun at issue in the instant, Exhibit No. 11, did not constitute a firearm within the meaning of RCW 9.41.010(1) as it was not operable on October 10, 2008. Thus, Raleigh's conviction for the crime of unlawful possession of a firearm in the first degree cannot stand.

Moreover, the State cannot establish that Raleigh was in possession of the firearm. Raleigh did not have "actual" possession of the firearm as it was not found on his person. Thus the only means for the State to establish the essential element of this crime was to elicit proof beyond a reasonable doubt that Raleigh had "constructive" possession of the firearm. "Constructive" possession as instructed by the court in Instruction No. 20, [CP 50], means that Raleigh had dominion and control over the firearm. The sum of the evidence elicited at trial establishes that the firearm was found in a vehicle driven by Letourneau, the firearm was in a Vans shoebox that Jay admitted belonged to her, Jay's purse was on top of the shoebox, and Jay testified that the firearm belonged to Letourneau. While it is true that Letourneau testified that he believed the firearm belonged to Raleigh because he had seen it in Raleigh's home, Jay

testified that she shared the home with Raleigh. Given these facts, the evidence establishes that it was either Jay who had constructive possession of the firearm as it was found in her shoebox or that Letourneau had constructive possession of the firearm as it was in the vehicle he was driving and Jay testified that it belonged to him. The evidence does not establish beyond a reasonable doubt that Raleigh had constructive possession of the firearm. This court should reverse and dismiss his conviction for unlawful possession of a firearm in the first degree.

E. CONCLUSION

Based on the above, Raleigh respectfully requests this court to reverse and dismiss his conviction for unlawful possession of a firearm in the first degree (Count II).

DATED this 14<sup>th</sup> day of October 2009.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 14<sup>th</sup> day of October 2009, I delivered a true and correct copy of the Petition for Review to which this certificate is attached by United States Mail, to the following:

Steven A. Raleigh  
DOC# 630873  
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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

Signed at Tacoma, Washington this 14<sup>th</sup> day of October 2009.

Patricia A. Pethick  
Patricia A. Pethick