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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. Did the trial court err by allowing Raleigh to be convicted of unlawful possession of a firearm in the first degree (UPF1) when with a minimal amount of time and/or effort, Raleigh could have made the 9mm Helwan handgun fully operable by unsticking the firing pin?
2. Should the trial court have taken Count Two (UPF1) from the jury for lack of sufficient evidence when:
 - (a) Raleigh told Ms. Jay to look for guns inside the burglary victim's house; and
 - (b) Mr. LeTourneau thought that Raleigh tossed the red and black shoebox with the 9mm handgun inside of it into the Jeep that LeTourneau was driving?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Raleigh's recitation of the procedural history and facts and adds the following:

Sergeant Bennett of the Mason County Sheriff's Office (MCSO) and Mason County Jail (MCJ) testified that he is a certified firearms instructor for the MCJ. RP Vol.IX 208: 3-4; 12-23. In assessing State's Exhibit No. 11, Sgt. Bennett identified it as, "...a Helwan Brigadier 9mm pistol...[m]ade in Egypt." RP Vol.IX 211: 1-4. The condition of the pistol was, according to Sgt. Bennett, distinctive, because when he "checked the weapon for overall functionality," he noted that the magazine was "rather bright and shiny," while the gun itself was "rather rusty and beat up." RP Vol.IX 211: 11-13.

As Sgt. Bennett noted, the magazine in the pistol was "a replacement magazine." RP Vol.IX 211: 15. Elaborating on this detail, Sgt. Bennett explained that the magazine:

...[A]ppears to be new. The gun comes with a blued magazine, which is like the weapon itself, blued steel. And judging by the overall finish, as you can see it's pretty rusted and beat-up. A blued magazine would have gone with this gun and certainly didn't work anymore, didn't function any more. And someone's purchased a new magazine that works. RP Vol.IX 211: 18-23.

Describing the overall functionality of the firearm, Sgt. Bennett explained that:

...[T]he magazine in this works, the safety works. It blocks the hammer back from firing. And the slide functions and it will—it would load at that point if there was ammunition in the magazine. RP Vol.IX 212: 15-18.

Although the firing pin of this gun was stuck “forward” and had to be loosened by Sgt. Bennett, the oil, hammer and punch that he used to fix it were common and could be found in virtually any household toolbox. RP Vol.IX 214: 13-14; 22-24. The slide-stock of the gun did not affect its functionality, and simply locked “the slide back” when the magazine was empty. RP Vol.IX 216: 18-22. The deputy prosecutor for the State specifically inquired whether the pistol would need to have the firing pin replaced in order to fire, and Sgt. Bennett said, “No.” RP Vol.IX 218: 11-13. In a demonstration using an 8mm pencil, the “firing pin went into the chamber area” of the 9mm Helwan, indicating that:

If the bullet were in the chamber of the gun and in the barrel, which is in the slide, and the trigger was pulled back, as I demonstrated, the gun would go off.
RP Vol.IX 218: 15-16, 21-25; 219: 1-9.

3. Summary of Argument

The trial court did not err by allowing Raleigh to be convicted of unlawful possession of a firearm in the first degree (UPF1) when with a minimal and not even the reasonable amount of time and/or effort allowed under Releford, he (Raleigh) could have made the 9mm Helwan handgun operable by unsticking the firing pin. As Sgt. Bennett from the Mason County Jail testified, the firing pin of the 9mm Helwan did not need to be

replaced, but merely unstuck, which he (Sgt. Bennett) accomplished quickly and with common, household tools.

Taking all reasonable inferences in favor of the State and interpreting them most strongly against the defendant, the trial court also did not err by not taking Count Two (UPF1) from the jury for lack of sufficient evidence because: (a) Raleigh told Ms. Jay to look for guns inside the burglary victim's house; and (b) Mr. LeTourneau thought that Raleigh tossed the red and black shoebox with the 9mm handgun inside of it into the Jeep that LeTourneau was driving. It was for the jury, and not the trial court judge, to determine whether Raleigh had dominion and control over the handgun, and error did not occur. The State respectfully requests the Court to affirm the decision of the trial court as being complete and correct.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR BY ALLOWING RALEIGH TO BE CONVICTED OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (UPF1) BECAUSE WITH A MINIMAL AMOUNT OF TIME AND/OR EFFORT RALEIGH COULD HAVE MADE THE 9MM HELWAN HANDGUN OPERABLE BY UNSTICKING THE FIRING PIN.

The trial court did not err by allowing Raleigh to be convicted of unlawful possession of a firearm in the first degree (UPF1) when with a

minimal amount of time and/or effort, he (Raleigh) could have made the 9mm Helwan handgun operable by unsticking the firing pin.

For the purposes of the offense of unlawful possession of a firearm in the first degree, “firearm” is defined as “a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” State v. Releford, 148 Wash.App. 478, 490, 200 P.3d 729 (2009); see RCW 9.41.010(1). This definition is ambiguous because it is unclear exactly what “may be fired” means. Accordingly, the courts have attempted to provide certainty with respect to the statute’s application by interpreting it in such a way that, for the purposes of unlawful possession of a firearm, “a disassembled firearm that can be rendered operable with reasonable time and effort and within a reasonable time period is a firearm within the meaning of RCW 9.41.010(1).” Releford, 148 Wash.App. at 490-491.

In Releford, the defendant asserted that because a replica pistol he possessed did not have its firing flint, the leather piece that around the flint, its gunpowder or its projectile ball and wadding, that the pistol had never been fully assembled. Releford, 148 Wash.App. at 491. Because the pistol had not been fully assembled and could not be rendered operable within a reasonable time or with reasonable effort, Releford contended that it was therefore not a firearm under RCW 9.41.010(1).

The Court rejected Releford's argument, reasoning that the absence of all these components did not render the pistol inoperable, but rather indicated that it was simply unloaded. Releford, 148 Wash.App. at 492. To make the pistol fully operable within a reasonable time and with reasonable effort, the Court opined that all Releford had to do was to make a trip to a nearby specialty gun shop to obtain these components. Releford, 148 Wash.App. at 492-493.

This rationale is applicable to Raleigh's case, because as Sgt. Bennett described, all that the 9mm Helwan needed to be operable was to have its firing pin unstuck; something that he (Bennett) was able to quickly remedy with a drop of oil and the common, household tools of a hammer and punch. See: RP Vol.IX 214: 13-14; 22-24. The blued magazine for the handgun did not need to be replaced, as someone had already done so prior Raleigh's arrest, and the slide-stock did not affect the Helwan's overall functionality. See: RP Vol.IX 211:18-23; 216: 18-22.

Hypothetically, had Sgt. Bennett testified that the gun would not have fired unless the firing pin had been replaced and/or that the gun was significantly defective in another way, then Raleigh's argument might have greater merit. Based on the record, the action that Sgt. Bennett took to unstick the firing pin with oil, a hammer and a punch required no more

effort than needed to fix a rusty door hinge. Put another way, with simply minimal and not even the reasonable time and effort permitted by Releford, Raleigh could have easily made the 9mm Helwan in this case operable, and the trial court did not err by allowing this charge to go to the jury.

2. THE TRIAL COURT DID NOT ERR BY NOT TAKING COUNT TWO (UPF1) FROM THE JURY FOR LACK OF SUFFICIENT EVIDENCE BECAUSE:
 - (a) RALEIGH TOLD MS. JAY TO LOOK FOR GUNS INSIDE THE BURGLARY VICTIM'S HOUSE; AND
 - (b) MR. LETOURNEAU THOUGHT THAT RALEIGH TOSSED THE RED AND BLACK SHOEBOX WITH THE 9MM HANDGUN INSIDE OF IT INTO THE JEEP THAT LETOURNEAU WAS DRIVING.

The trial court did not err by not taking Count Two (UPF1) from the jury for lack of sufficient evidence because: (a) Raleigh told Ms. Jay to look for guns inside the burglary victim's house; and (b) Mr. LeTourneau thought that Raleigh tossed the red and black shoebox with the 9mm handgun inside of it into the Jeep that he (LeTourneau) was driving.

Sufficiency of the Evidence

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must

prove each element of the alleged offense beyond a reasonable doubt.

State v. Alvarez, 128 Wash.2d 1, 13, 904 P.2d 754 (1995).

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. Salinas, 119 Wn.2d at 201. Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. State v. O'Neal, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007).

Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992).

Actual and Constructive Possession

Possession of property may be either actual or constructive.

Actual possession means that the goods are in the personal custody of the person charged with possession. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); see State v. Partin, 88 Wash.2d 899, 905, 567 P.2d 1136 (1977). Constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has

dominion and control over them. Callahan, 77 Wn.2d at 29; see State v. Walcott, 72 Wn.2d 959, 967, 435 P.2d 994 (1967). Whether a person has dominion and control is determined by considering the totality of the situation. Partin, 88 Wash.2d at 906.

The record here shows that Raleigh told Ms. Jay to look for guns inside the burglary victim's home, and that Mr. LeTourneau thought that Raleigh tossed the red and black shoebox with the 9mm handgun inside of it into the Jeep that LeTourneau was driving. Drawing all reasonable inferences in favor of the State and interpreting them most strongly against the defendant, and in considering the totality of the situation under Partin, any jury could conclude that Raleigh constructively possessed the 9mm handgun. Raleigh had guns on his mind when he went to commit this residential burglary, and it was for the jury, not the judge, to decide whether he constructively possessed the handgun.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 9TH day of DECEMBER, 2009

Respectfully submitted by:

#34591

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Deputy Prosecuting Attorney for Respondent
Gary P. Burleson, Prosecuting Attorney
Mason County, WA

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

| | | |
|----------------------|---|------------------|
| STATE OF WASHINGTON, |) | |
| |) | No. 39221-6-II |
| Respondent, |) | |
| |) | DECLARATION OF |
| vs. |) | FILING/MAILING |
| |) | PROOF OF SERVICE |
| STEVEN A. RALEIGH, |) | |
| |) | |
| Appellant, |) | |
| _____ |) | |

I, EDWARD P. LOMBARDO, declare and state as follows:

On WEDNESDAY, DECEMBER 9, 2009, I deposited in the U.S.

Mail, postage properly prepaid, the documents related to the above cause
number and to which this declaration is attached, BRIEF OF
RESPONDENT, to:

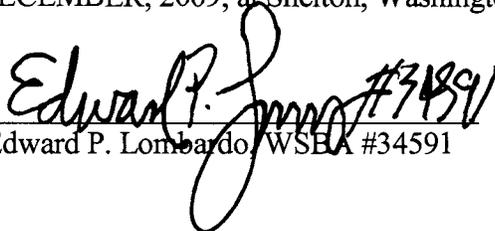
Patricia A. Pethick
PO Box 7269
Tacoma, WA 98417

09 DEC 10 PM 12:18
STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS
DIVISION II

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 9TH day of DECEMBER, 2009, at Shelton, Washington.


Edward P. Lombardo, WSBA #34591