

No. 39305-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

JERMAINE GORE,

Appellant.

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ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Kathryn J. Nelson (trial), Judge

APPELLANT'S OPENING BRIEF

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove all of the essential elements of the crime of first-degree unlawful possession of a firearm.

2. Appellant Jermaine Gore assigns error to Conclusion of Law II in the juvenile court's Findings of Fact and Conclusions of Law, which provides:

II.

That JERMAINE GORE is guilty beyond a reasonable doubt of the crime of Unlawful Possession of a Firearm in the First Degree in that, on 03/19/09, he:

1. Knowingly had a firearm in his possession or control;
2. Had previously been adjudicated guilty as a juvenile of Robbery in the Second Degree, a serious offense; and
3. The possession or control of the firearm occurred in the State of Washington.

CP 9-10.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

To prove unlawful possession of a firearm, the prosecution was required to show that Mr. Gore was either in actual or constructive possession of that firearm and that the possession was "knowing." Did the state fail to meet that burden of proof when it proved only that the firearm was found on the seat in which Mr. Gore had been sitting in a position it could not have been in when he was there and there was no other evidence indicating he was even aware the gun was in the car someone else was driving?

C. STATEMENT OF THE CASE

1. Procedural facts

Appellant Jermaine Gore, a juvenile, was charged by information with unlawful possession of a firearm, making a false or misleading statement to a public servant and unlawful possession of 40 grams or less of marijuana. CP 1-2; RCW 9.41.010; RCW 9.41.040; RCW 9A.76.175; RCW 69.50.101; RCW 69.50.401. After a pretrial motion before the Honorable H. Edward Haarmann, Commissioner, on March 20, 2009, trial was held before the Honorable Judge Kathryn J. Nelson on April 14 and 16, 2009, after which the judge found Jermaine guilty as charged. CP 6-10; RP 112-13.¹

The disposition hearing was continued on April 29, 2009, by the Honorable Mary Beth Holt-Perkins, Commissioner pro tempore. RP 115. At the disposition hearing on May 19, 2009, Judge Nelson imposed a standard-range disposition. RP 126; CP 14-21.

Jermaine appealed and this pleading follows. See CP 25.

2. Testimony at the fact-finding hearing

On March 19, 2009, Tacoma Police Department (TPD) officers responded to a telephone call to the police emergency telephone number, 9-1-1. RP 15. The caller reported seeing a car which he or she believed was “possibly involved in a burglary in an apartment complex sometime before,” and the caller gave the officers the vehicle’s license plate number. RP 15. An officer saw the car, a red/maroon Pontiac, and, along with

¹The verbatim report of proceedings consists of five chronologically paginated volumes, which will be referred to as “RP.”

other officers, conducted “surveillance” on it for about 30 minutes. RP 17, 37. Ultimately, three people got into the car, which pulled out of an apartment parking lot and started driving. RP 17. An officer then “initiated a stop” at a stop sign nearby, using his lights and sirens. RP 17.

After driving through a few intersections over the course of about five blocks, the car stopped. RP 18. The officer following said that five blocks was “pretty close” because of the nature of the road and the difficulty finding a place to pull over, although the officer thought there had been other “opportunities” for the driver of the Pontiac to stop before he had. RP 18-19.

It was dark out when the stop occurred. RP 19. An officer following the car testified that he could not “make out what was happening in the car completely, inside the passenger compartment” as he drove behind. RP 19. The windows in the car were also a little tinted. RP 42.

By the time the car stopped, there were probably three police cars following. RP 18-19. Because of the delay in stopping and the nature of the 9-1-1 call, the officers initiated a “high risk stop,” which meant they ordered all of the car’s occupants out “one at a time from a position of cover.” RP 19, 77. One officer admitted he had his gun out during the stop. RP 20. The officers ordered the driver to turn the car off and throw the keys out of the window, and he complied. RP 39. He was told to walk backwards to the officers and he did, at which point he was detained and restrained. RP 40-41. The driver was identified as Byron Hebert or Herbert. RP 21.

Next, the officers ordered the front passenger out of the car. RP

41, 79. He was ordered to put his hands in the air and to walk backwards towards the officers. RP 41. That person was later identified as Jermaine Gore. RP 21-24. The officer who put Jermaine into the back of a police car said Jermaine had no identification but gave the wrong name when asked to identify himself. RP 42, 22, 80. Jermaine also gave telephone numbers which had been disconnected. RP 81.

Before Jermaine got out of the car, officers did not see “any type of furtive movements on his part.” RP 80.

The backseat passenger, who had been sitting on the right passenger side, climbed out the driver’s side front door even though the car was a “four-door” and he could have gone out the door next to where he sat. RP 21-24. The man, later identified as Aliajuan Satterwhite, had to climb over the center console in order to leave the car the way he did. RP 45-46. He was then ordered to put his hands in the air and restrained, like the others. RP 43.

Once everyone was out of the car, the officers walked up to it in order to “clear it” and make sure everyone was out. RP 23, 86-87. An officer said that, at that point, “immediately upon walking up on the car,” he could see a gun on the front seat. RP 23, 43. The gun was sitting on the front passenger seat, where Jermaine had been sitting. RP 26. The barrel of the gun was pointing towards the front of the car and the hand grip was facing towards the driver’ seat. RP 87.

Based upon the gun’s position, an officer opined that it appeared the gun had just been placed there after the car was stopped, because otherwise “you would almost be sitting on top of it if you were sitting

there” on the passenger side of the car. RP 27. Indeed, the officer said, it did not appear anyone would have been riding in the car with the gun in the position in which it was found. RP 43. He did not know who had placed the gun there and opined that any of the three people in the car could have done so. RP 44.

The firearm was listed in the “system” as stolen and was able to fire rounds when later tested. RP 90, 92.

Next to the driver’s door on the ground was found a small plastic “baggy” with “green leafy substance” inside. RP 25. Inside the car, in the center console, there was some “green leafy matter present.” RP 29. An officer who searched Jermaine found a “small baggy” of suspected marijuana in Jermaine’s right front pants pocket. RP 48-49, 82. The total amount of leafy substance found was about one and a third grams and it tested positive later for marijuana. RP 73.

The car was owned by Hebert’s or Herbert’s mom and she showed up shortly after the arrest, as did a girl named Clarissa Jackson who said she was the girlfriend of one of the detained individuals. RP 33. A man the police knew from “prior contacts,” Brandon Starks, also came by at the end of the stop and said “one of his little homeys was getting arrested,” so he wondered if he could help by driving the car away. RP 34. He left when he was informed that the car’s owner was there to do the same. RP 34.

All three of the people in the car, including Jermaine, denied knowledge of the gun. RP 34, 44. Jermaine’s fingerprints were not found on the gun. RP 67.

D. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO PROVE ALL OF
THE ESSENTIAL ELEMENTS OF THE OFFENSE OF
UNLAWFUL POSSESSION OF A FIREARM

Under both the state and federal due process clauses, the prosecution is required to prove every essential element of the charged crime, beyond a reasonable doubt. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), reversed in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). These requirements apply to juvenile cases. See, e.g., State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). As a result, where the state fails in its burden of proof at a juvenile fact-finding, reversal and dismissal of the adjudication of guilt is required. See, e.g., State v. J.M., 101 Wn. App. 716, 731, 6 P.3d 607 (2000).

In this case, this Court should reverse and dismiss the conviction for first-degree unlawful possession of a firearm, because the prosecution failed to prove two of the essential elements of the offense. RCW 9A.1.040(1)(a) defines first-degree unlawful possession of a firearm as follows:

A person, whether an adult or juvenile, is guilty of the crime 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 or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

The crime is not a “strict liability” crime, so the state has the burden of proving not only that the defendant had actual or constructive possession

of a firearm but also that he did so “knowingly.” See State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000).

A juvenile adjudication of guilt may serve as a predicate “serious offense,” and second-degree robbery is such an offense. See State v. McKinley, 84 Wn. App. 677, 680-86, 929 P.2d 1145 (1997). As a result, because it was agreed that Jermaine had a prior adjudication for second-degree robbery, the required predicate offense was established. RP 101.

Thus, the only questions were whether Jermaine was in possession of the firearm found in the car after he was out of it and whether any such possession could be deemed “knowing.”

As a threshold matter, the court’s “conclusions” on these points are actually findings of fact. A finding of fact is the declaration that a certain thing has occurred, independent of its legal effect. Winans v. Ross, 35 Wn. App. 238, 240 n. 1, 666 P.2d 908 (1983). Where a finding of fact is improperly denoted as a conclusion of law, this Court still reviews it as a factual finding. See State v. Evans, 80 Wn. App. 806, 820, 911 P.2d 1344, review denied, 129 Wn.2d 1032 (1996). In juvenile cases, under JuCR 7.11(d), the juvenile court is required to enter findings on the ultimate facts as to each element of the crime and the evidence upon which it relied in reaching its decision. Findings are reviewed to determine whether they are supported by substantial evidence in the record. See, State v. S.E., 90 Wn. App. 886, 886, 954 P.2d 1338 (1998). Evidence only meets that standard if it is sufficient to convince a rational, fair-minded trier of fact of the truth of the declared premise. Miles v. Miles, 128 Wn. App. 64, 69-70, 114 P.3d 671 (2005).

Here, in boilerplate language, without providing any explanation for the evidence it claimed supported these “conclusions,” the juvenile court simply declared that Jermaine was guilty because he “[k]nowingly had a firearm in his possession or control.” CP 9-10. And in its oral ruling, the juvenile court simply declared its “basic understanding that a gun that can be placed within access of all three people” can be constructively possessed by all three of them, because they “all three. . . have immediate potential for actual possession.” RP 112.

But neither the court’s written nor its oral findings on this point were supported by substantial evidence in the record. Because the state could not prove actual possession, it could only prove Jermaine’s guilt by proving possession was “constructive.” See, State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Constructive possession is proven only if there is substantial evidence from which it can be reasonably inferred that the defendant had “dominion and control” over the relevant item, taking into account the “totality of the circumstances.” See State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016 (1995). “Dominion and control” means that the item “may be reduced to actual possession immediately,” although it need not be “exclusive.” See State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

Mere proximity to an item, however, is not enough to establish “dominion and control” and thus constructive possession. Jones, 146 Wn.2d at 33. Instead, proximity must be accompanied by other facts in order to show the defendant had “dominion and control” over the item in

question. See State v. Turner, 103 Wn. App. 515, 13 P.3d 234 (2000). Further, the state must prove not only that the defendant *could* have reached for and reduced an item to his control but that he *knew* the item was there and thus was in “knowing” constructive possession. See, e.g., Anderson, 141 Wn.2d at 366-67.

Thus, in Turner, this Court found the evidence sufficient to prove the defendant had constructive possession of a firearm when there were additional facts besides mere proximity proving that possession by proving not only dominion and control but also knowledge. The defendant was found urinating alongside a truck and was belligerent when police approached. 103 Wn. App. at 518. Another man, Graham, was sitting in the passenger seat of the “small, import pickup.” Id. When questioned, Graham said a bow inside the pickup was his. Id. A rifle was found inside a bow case lying partially open across the back seat of the truck, behind where the driver, Turner, had sat. Id. Graham said the rifle was his and that Turner had not handled it or had it in his possession that day, and Turner said that, while he knew Graham had the rifle with him, Turner had not touched it. 103 Wn. App. at 519.

In finding the evidence was sufficient to support Turner’s conviction for unlawful possession of the rifle, this Court noted that Turner was not only close to the gun but knew it was in the back seat and could easily have been “able to reduce it to his possession.” 103 Wn. App. at 521-22. In addition, this Court found it significant that Turner had been driving the truck - and indeed owned the truck - in which the rifle was found. 103 Wn. App. at 521-22. Ultimately, this Court held, the evidence

was sufficient to show constructive possession because the defendant had “control of a vehicle and knowledge of a firearm inside it,” proximity to the firearm over an extended period of time, and he had done “nothing to reject the presence of the firearm in the truck.” 103 Wn. App. at 524.

Here, there was no such additional evidence aside from the allegation of potential prior proximity. Jermaine was not driving the car in which the gun was found. He did not own the car. It did not even belong to his family. RP 33.

Nor was there any evidence that the firearm was ever in his reach or even in his sight when he was in the car. The evidence showed only that the gun was resting on the seat where Jermaine had been sitting, after he got out of the car. But the officer admitted that it was not likely that the gun had been in that position when the car was in motion or Jermaine was sitting there. RP 27, 44. In fact, he said, it appeared that the gun had just been placed there. See RP 27, 44.

Nor was Jermaine seen making any movements at all indicating he was doing something with a gun.

Thus, there was no evidence that Jermaine ever knew there was a gun in the car, let alone had it in close enough proximity to have reduced it to his possession. The only evidence was that there was a gun found in the car after he vacated it. That was simply not sufficient evidence to convince a fair-minded, rational trier of fact that Jermaine was in knowing, constructive possession of the firearm. This Court should so hold and should reverse and dismiss the conviction for first-degree unlawful possession of a firearm with prejudice.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the conviction for unlawful possession of a firearm.

DATED this 15th day of September, 2009.

Respectfully submitted,



KATHRYN A. RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFICATION OF SERVICE BY MAIL

I hereby declare under penalty of perjury under the laws of the State of Washington that I deposited a true and correct copy of the attached document to opposing counsel and appellant by placing it in the United States Mail first-class postage prepaid to the following addresses:

TO: Kathleen Proctor, 946 County City Building, 930 Tacoma Ave. S, Tacoma, WA. 98402;

TO: Jermaine Gore, Maple Lane School, 20311 Old Hwy. S, Centralia, WA. 98531.

DATED this 19th day of September, 2009.


KATHRYN A. RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

CERTIFIED BY
BY 
DATE
2009-09-19 10:00 AM
1037 NE 65th St
Seattle, WA 98115