

NO. 40664-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY LLOYD,

Appellant.

FILED IN FEB 18 2011
STATE OF WASHINGTON
BY [Signature]
DEPUTY
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-00753-3

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial Court erred in failing to give the lesser included/inferior degree instruction of Assault in the Fourth Degree when the evidence did not support a claim that Lloyd committed only the inferior offense to the exclusion of the charged offense?

2. Whether Lloyd's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found: (1) that Lloyd did not act in self defense; and (2) that the State proved the essential elements of the crime of possession of a controlled substance beyond a reasonable doubt?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Larry Lloyd was charged by amended information filed in Kitsap County Superior Court with the crimes of assault in the third degree, possession of a controlled substance (cocaine), and driving with license suspended in the first degree. CP 60. At trial, a jury found Lloyd guilty of the charged offenses, and the trial court imposed a standard range sentence. CP 135. This appeal followed.

B. FACTS

At approximately 2:00 am on May 28, 2009, Sergeant Billy Renfro of the Bremerton Police Department was traveling in a patrol car on Callow

Street in Bremerton when he passed by a green minivan driving in the other direction. RP (2/2/10) 16-18, 25, 34. Sergeant Renfro recognized Lloyd (and had previously seen him driving the same vehicle), and Sergeant Renfro recalled that Lloyd's license was suspended. RP (2/2/10) 19, 25. Sergeant Renfro also saw Lloyd commit a traffic infraction, so he made a u-turn and went to catch up with Lloyd while simultaneously attempting to confirm the status of Lloyd's license. RP (2/2/10) 19. Lloyd's license was eventually determined to be suspended in the first degree. RP (2/2/10) 24. Lloyd pulled his car over to the side of the road, got out of his car, and walked around the front of the car as Sergeant Renfro pulled in behind him. RP (2/2/10) 19. Lloyd then took off "sprinting." RP (2/2/10) 19-20. Sergeant Renfro (who was in uniform) said, "Larry, stop. Stop running," but Lloyd kept running. RP (2/2/10) 26. Lloyd then ran through a yard, jumped over a six-foot fence, ran up Snyder Avenue and jumped another fence. RP (2/2/10) 19-20. Sergeant Renfro chased after Lloyd and saw that Lloyd was wearing a hat and a black jacket. RP (2/2/10) 20. Sergeant Renfro caught up to Lloyd in a backyard behind a residence at 1709 Snyder Avenue and found Lloyd with his hands up on another fence and it appeared Lloyd was preparing to jump that fence. RP (2/2/10) 20-21. Sergeant Renfro told Lloyd to turn around and face away from him and told him he was under arrest. RP (2/2/10) 30. Lloyd did not comply, so Sergeant Renfro grabbed a hold of Lloyd, but Lloyd "pulled back"

so Sergeant Renfro used an “arm bar” to take Lloyd down to the ground, after which Lloyd was “fairly compliant.” RP (2/2/10) 30. Sergeant Renfro was then able to place handcuffs on Lloyd, but he did not “double-lock” the cuffs. RP (2/2/10) 30. Sergeant Renfro then turned Lloyd over to Sergeant Cronk who had arrived on the scene, and he escorted Lloyd towards around towards the front of the residence. RP (2/2/10) 21, 33.

Sergeant Renfro noticed that Lloyd was no longer wearing the hat or jacket that he had been wearing moments earlier. RP (2/2/10) 21. Sergeant Renfro then told Officer Rogers that Lloyd had been wearing a black jacket and a hat, and the two officers began looking for the items. RP (2/2/10) 21, 47-49. Sergeant Renfro found the black leather jacket just north of (and thus on the other side of) the fence that Lloyd had been preparing to jump. RP (2/2/10) 21-22, 35, 48. Officer Rogers also found a wallet in that immediate area. RP (2/2/10) 22, 48. Sergeant Renfro also found Lloyd’s hat in the backyard of the residence. RP (2/2/10) 22. Sergeant Renfro then turned these items over to Officer Rogers. RP (2/2/10) 36.

Officer Rogers searched the jacket and wallet and found numerous papers and items in the wallet with Lloyd’s name on them. RP (2/2/10) 49. Inside the right front pocket of the jacket he found a glass pipe that was the type used to smoke methamphetamine or crack cocaine. RP (2/2/10) 50. Officer Rogers saw that the pipe had a screen on it and that there were several

pieces of what appeared to be crack cocaine on the screen. RP (2/2/10) 52. Officer Rogers later booked the items into evidence. RP (2/2/10) 56. Subsequent testing of the pipe's contents showed that it contained cocaine. RP (2/3/10) 21.

While Sergeant Renfro and Officer Rogers were looking for the jacket and hat, Sergeant Cronk escorted Lloyd around towards the front of the residence. RP (2/2/10) 65-67. Lloyd was upset and was yelling obscenities and trying to "twist away" from Sergeant Cronk. RP (2/2/10) 65-66, 73. Sergeant Cronk escorted Lloyd out to the front of the house and turned him over to Officer Fatt. RP (2/2/10) 66-67.

Officer Fatt took custody of Lloyd and took him to his patrol car. RP (2/2/10) 74. At the car Officer Fatt checked Lloyd over and noticed that his handcuffs were not double-locked and that one of the cuffs was a little snug. RP (2/2/10) 74. Officer explained that double-locking handcuffs is important because it prevents a person from escaping from the cuffs and prevents the cuffs from becoming too tight or uncomfortable. RP (2/2/10) 74-75. Officer Fatt then readjusted the handcuff around Lloyd's left wrist. RP (2/2/10) 76. Officer Fatt also explained that when he was adjusting the cuffs he maintained control of (or had a hold of Lloyd) by holding onto Lloyd's wrist. RP (2/2/10) 89, 96. When Officer Fatt went to readjust the cuff on Lloyd's right wrist, however, Lloyd "grabbed a hold of" Fatt's left thumb and "began

to twist on that thumb and caused [Officer Fatt] an extreme amount of pain.” RP (2/2/10) 76. Officer Fatt explained that Lloyd was bending his thumb backwards and sideways. Officer Fatt screamed out in pain and told Lloyd to let go of his thumb. RP (2/2/10) 77.¹ After Lloyd did not respond to several yells for him to let go of his thumb, Officer Fatt was forced to let go of the handcuff key he had been using and started to peel off the four fingers that Lloyd had wrapped around his thumb. RP (2/2/10) 77. Officer Fatt’s handcuff key was bent during the struggle. RP (2/2/10) 78-80.

After Officer Fatt got control of the situation he readjusted Lloyd’s handcuff using a different key, frisked him briefly for weapons, and placed him in a patrol car. RP (2/2/10) 78-79, 82. Officer Fatt then drove Lloyd to a nearby convenience store that had more lighting and was a more secure location. RP (2/2/10) 82. Officer Fatt then waited for the other patrol officers to arrive and once they arrived he felt it was safe for him to get Lloyd out of the car to give him a full search. RP (2/2/10) 83. Officer Fatt opened the door and asked Lloyd to step out so that he could search him. RP (2/2/10) 78. Lloyd responded by rolling over and rolling onto the ground. RP (2/2/10) 78.

¹ Sergeant Renfro heard Officer Fatt scream out in pain and state: “Let go of my thumb.” RP (2/2/10) 23. Officer Rogers also heard Officer Fatt yelling in a loud manner, which he described as a “painful yell.” RP (2/2/10) 54-55. Sergeant Renfro and Officer Rogers went to see what was going on, but by the time they got there Officer Fatt had gained control of the situation. RP (2/2/10) 55.

Officer Fatt asked Lloyd to get up and told him “You need to get up so I can search you.” RP (2/2/10) 83. Officer Fatt tried to grab hold of Lloyd’s hand to get him up, but Lloyd would ball his hands into a fist and pull away from him. RP (2/2/10) 83. Officer Fatt eventually got Lloyd up by using a compliance hold and was able to search him. RP (2/2/10) 83. Lloyd was then secured in the police car and transported to the Kitsap County jail. RP (2/2/10) 84.

Lloyd testified at trial and admitted that he ran when Sergeant Renfro pulled him over and said he did so because he didn’t want to go to jail for driving with a suspended license. RP (2/3/10) 58-60. Lloyd also admitted that he was wearing a jacket, but claimed that he had borrowed the jacket from someone and didn’t know there was a crack pipe in the pocket. RP (2/3/10) 59. He also claimed that during the chase he took the coat off because he was “hot.” RP (2/3/10) 60. Lloyd’s own counsel also asked him why his wallet was found on the ground, and Lloyd claimed that it came out when the officers threw him to the ground when they arrested him. RP (2/3/10) 60-61. When his counsel explained that the officers had found the wallet on the other side of the fence and asked Lloyd about this Lloyd had no explanation. RP (2/3/10) 61.

With respect to his interactions with Officer Fatt, Lloyd denied grabbing Officer Fatt’s thumb while he was initially frisked and placed in a

patrol car at the scene. RP (2/3/10) 63. Lloyd, however, claimed that he grabbed Officer Fatt's thumb later while they were at the convenience store, but claimed he did so because Officer Fatt was wrenching his fingers back and it hurt. RP (2/3/10) 65-66. This testimony was contrary to the testimony of Officer Fatt who never claimed that Lloyd had grabbed his thumb while at the convenience store. RP (2/2/10) 82-84.²

At the conclusion of the evidence the trial court instructed the jury on the applicable law. See CP 93, RP (2/3/10) 127. The trial court and counsel had previously discussed the instructions, and defense counsel had requested an instruction on the use of force to resist arrest (WPIC 17.02.01). RP (2/3/10) 116. The trial court gave the instruction proposed by the defense in this regard, and the jury was thus instructed that a person may use force to resist an arrest by a police officer if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force. RP (2/3/10) 116, CP 106. Defense counsel also asked the trial court to give an instruction on the lesser included/inferior degree crime of assault in the fourth degree. RP (2/3/10) 75-85. The trial court declined to give the instruction on assault in the fourth degree. RP (2/2/10) 120.

² Sergeant Renfro also explained that the altercation he heard (including Officer Fatt screaming in pain and stating: "Let go of my thumb") took place at the scene of the arrest. RP (2/2/10) 23. Officer Rogers also described that this confrontation took place at the scene of the arrest on Snyder. RP (2/2/10) 54-55. Neither officer ever described a similar altercation at the convenience store.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN FAILING TO GIVE THE LESSER INCLUDED/INFERIOR DEGREE INSTRUCTION OF ASSAULT IN THE FOURTH DEGREE BECAUSE THE EVIDENCE DID NOT SUPPORT A CLAIM THAT LLOYD COMMITTED ONLY THE INFERIOR OFFENSE TO THE EXCLUSION OF THE CHARGED OFFENSE.

Lloyd argues that the that the trial court erred in failing to give the jury an instruction on the lesser included/inferior degree offense of assault in the fourth degree. App.'s Br. at 11. This claim is without merit because the evidence does not raise an inference that Lloyd committed only the inferior offense to the exclusion of the charged offense.

A trial court's refusal to give a jury instruction is reviewed for abuse of discretion. *State v. Lucky*, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), *overruled on other grounds by State v. Berlin*, 133 Wn.2d 541, 544, 947 P.2d 700 (1997). An inferior degree offense instruction is appropriate when “(1) the statutes for both the charged offense and the proposed inferior offense ‘proscribe but one offense’; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.” *State v. Fernandez-Medina*, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000), *quoting State v. Peterson*, 133 Wn.2d 885, 891, 948 P.2d

381 (1997). Such is not the case here.

RCW 9A.36.041(1) describes fourth degree assault as follows: “A person is guilty of assault in the fourth degree if, under circumstances not amounting to assault in the first, second, or third degree, or custodial assault, he or she assaults another.” RCW 9A.36.031, in turn, describes third degree assault as follows:

(1) A person is guilty of assault in the third degree if he or she, under circumstances not amounting to assault in the first or second degree:

...

(g) Assaults a law enforcement officer or other employee of a law enforcement agency who was performing his or her official duties at the time of the assault.³

Generally speaking, an arrestee charged with assault upon a law enforcement officer must show that there was an imminent threat of serious physical harm in connection with an unlawful arrest in order to establish legitimate use of force in self-defense. *State v. Mierz*, 127 Wn.2d 460, 476, 901 P.2d 286 (1995), *citing* RCW 9A.16.020(3). The Washington Supreme Court has also held that although a person who is being unlawfully arrested has a right to use reasonable and proportional force to resist an attempt to inflict injury on him or her during the course of an arrest, that person may not

³ The trial court’s instructions on assault in the third degree can be found at CP 102-06.

use force against the arresting officers if he or she is faced only with a loss of freedom. *State v. Valentine*, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997). The Supreme Court reasoned that endorsing resistance based on the arrestee's belief that his arrest is unlawful encourages violence. *Valentine*, 132 Wn.2d at 21; *See also, State v. Cormier*, 100 Wn. App. 457, 463, 997 P.2d 950 (2000) (“A person may not assault a police officer, even if the officer is illegally detaining, searching, or arresting that person. This is the lesson of *Valentine, Mierz, and McKinlay*”).

Consistent with this law outlined above, the trial court in the present case instructed the jury that a person may use force to resist an arrest by a police officer if the person being arrested is in actual and imminent danger of serious injury from an officer's use of excessive force. RP (2/3/10) 116, CP 106.

Lloyd, however, also argues that the trial court should have given the jury an instruction on assault in the fourth degree. Lloyd's claim in this regard is that such an instruction should be given if a defendant claims that an officer used excessive force, because an officer using excessive force is acting outside the scope of his or her duty by using the excessive force (and thus is not an officer “performing his official duties at the time of the assault” per RCW 9A.36.031). App.'s Br. at 16. Although Lloyd acknowledges that Officer Fatt was responding to a call while on duty, Lloyd claims that Officer

Fatt “went outside the scope of his duties by using excessive force, and illegal force, against Mr. Lloyd.” App.’s Br, at 16.

Contrary to Lloyd’s contention, an allegation of excessive force does not render an arrest outside the scope of an officer’s performance of his or her official duties under RCW 9A.36.031(1)(g). Rather, Lloyd’s allegation of excessive police force in arresting him has no bearing on his criminal conviction for third degree assault on a police officer outside of the well established law regarding when force may be used against an officer. Thus, Lloyd’s recourse was to assert, as he did, that he lawfully used violence to resist an unlawful arrest because it was reasonably necessary to repel an imminent threat of serious physical harm. RCW 9A.16.020(3). Lloyd’s only further recourse, if any exists, lies in tort.

In the present case the evidence showed that as Officer Fatt went to adjust Lloyd’s handcuffs before placing him in a patrol car at the scene of the arrest, Lloyd grabbed Officer Fatt’s thumb and violently twisted it causing Officer Fatt to scream out in pain and to yell at Lloyd to let go of his thumb. These acts were witnessed by several officers who all described that this took place at the scene of the arrest. Lloyd, however, denied that he ever grabbed Officer Fatt’s thumb while at the scene. As Lloyd completely denied twisting Officer Fatt’s thumb at the scene of the arrest (the only assault ever alleged or argued by the State), there was no evidence that he committed only fourth

degree assault. If the jury had believed Lloyd's version of the encounter at the scene of the arrest, then they would have found that he committed no assault at all and acquitted him. Thus Lloyd was not entitled to a jury instruction on the inferior offense of fourth degree assault as the evidence did not support a finding that he committed that offense and not the charged offense.

Furthermore, according to our Supreme Court,

RCW 9A.36.031(1)(g) encompasses all aspects of a law enforcement officer's good faith performance of job-related duties, excluding conduct occurring when the officer is on a frolic of his or her own. RCW 9A.36.031(1)(g) includes assaults upon law enforcement officers in the course of performing their official duties, even if making an illegal arrest.

Mierz, 127 Wn.2d at 479(citations omitted). There is no support for a claim that Officer Fatt was on a "frolic" in the present case. Rather, as Lloyd acknowledges, Officer Fatt was responding to Sergeant Renfro's call regarding his chase of Lloyd and Officer Fatt was tasked with transporting Lloyd from the scene of the arrest. App.'s Br. at 16. Thus, it is clear that Officer Fatt was acting in the course of his official duties. Even if it could be argued that his use of force had been excessive, such force would not have rendered his actions outside of his official duties. Rather, as *Mierz* explained, RCW 9A.36.031(1)(g) includes assaults upon law enforcement officers in the course of performing their official duties, "even if making an illegal arrest."

Mierz, 127 Wn.2d at 479. Thus in the present case, if Lloyd committed an assault, the crime was necessarily an assault in the third degree because the victim of the assault was a police officer who was carrying out his duties at the time of the assault.

As outlined above, to defend against third degree assault, under RCW 9A.16.020(3), “a defendant must show evidence of a threat of serious bodily injury, rather than evidence that the defendant violently resisted an otherwise peaceful arrest.” *Mierz*, 127 Wn.2d at 477 n. 11. Thus, as was allowed by the trial court, Lloyd was free to claim self-defense and argue that his use of force was necessary due to a threat of serious bodily injury. Pursuant to the reasoning of *Mierz*, an officer’s excessive use of force in effecting an arrest does not defeat the charge of third degree assault because the officer was not carrying out official duties; rather, at most, it allows a defendant to defeat the charge by showing the necessity for self-defense, which Lloyd was allowed to argue in the present case.

In the present case, the evidence shows that Lloyd assaulted Officer Fatt at the scene of the arrest by violently twisting Officer Fatt’s thumb. Furthermore, Lloyd denied grabbing Officer Fatt’s thumb at all while at the scene. Lloyd’s claim that he later grabbed Officer Fatt’s thumb while at the convenience store was in large part irrelevant Lloyd, therefore, did not establish that he was entitled to a jury instruction on fourth degree assault.

Furhtermore, Lloyd's claim of excessive force, if believed, entitled him to a self defense instruction which he received. It did not not, however, entitle him to an instruction on Assault in the Fourth Degree.

In short, the evidence in the present case showed one of two things: (1) that Lloyd committed an assault, and since the victim was a police officer carrying out his official duties, this assault was by definition an assault in the third degree; or (2) that Lloyd use's of force use force was lawful, and thus not an assault, because Lloyd was in actual and imminent danger of serious injury from an officer's use of excessive force. The evidence, however, did not warrant an instruction on Assault in the Fourth Degree because there was evidence or theory under which Lloyd d committed only the inferior offense to the exclusion of the charged offense. Rather, under Washington law Lloyd either committed an assault in the third degree or he committed no crime at all. The jury was properly instructed on these issues and was allowed to consider both alternatives. Given all of these facts, the trial court did not abuse its discretion in refusing to give Lloyd's requested inferior degree instruction.

B. LLOYD'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND: (1) THAT LLOYD DID NOT ACT IN SELF DEFENSE; AND (2) THAT THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE BEYOND A REASONABLE DOUBT.

Lloyd next claims that the evidence was insufficient to show either that: (1) he did not act in self-defense; or (2) the he was guilty of possession of a controlled substance. These claims are without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found: (1) that Lloyd did not act in self defense; and (2) that the State proved the essential elements of the crime of possession of a controlled substance beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct

evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), citing *State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

1. Sufficiency of the Evidence Regarding Lloyd’s Claim of Self Defense

In the present case the State presented sufficient evidence demonstrating that Lloyd did not act in self-defense when he grabbed Officer Fatt’s thumb at the scene of the arrest. First, Lloyd himself denied grabbing Officer Fatt’s thumb at the scene, thus there was no arguably no claim of self defense at all regarding the assault at the scene of the arrest.

Second, Officer Fatt testified that he was attempting to readjust the handcuff around Lloyd’s wrist and was merely holding onto Lloyd’s wrist

(not Lloyd's fingers) when Lloyd "grabbed a hold of" Fatt's left thumb and "began to twist on that thumb and caused [Officer Fatt] an extreme amount of pain." RP (2/2/10) 76. Officer Fatt explained that Lloyd was bending his thumb backwards and sideways. Officer Fatt screamed out in pain and told Lloyd to let go of his thumb. RP (2/2/10) 77.⁴ Further, Officer Fatt explained that he was forced to let go of the handcuff key he had been using and started to peel off the four fingers that Lloyd had wrapped around his thumb, but that this was done only after Lloyd did not respond to several yells for him to let go of his thumb. RP (2/2/10) 77.

Given all of these facts and viewing the evidence in a light most favorable to the State, the evidence was sufficient to show that Lloyd did not act in self-defense. While Lloyd may have presented an alternative story, the jury was free to reject Lloyd's version of events.

2. *Sufficiency of the Evidence Regarding the Charge of Possession of a Controlled Substance.*

To convict Lloyd of possession of a controlled substance, the State had to prove that he (1) unlawfully possessed (2) a controlled substance.

⁴ Sergeant Renfro heard Officer Fatt scream out in pain and state: "Let go of my thumb." RP (2/2/10) 23. Officer Rogers also heard Officer Fatt yelling in a loud manner, which he described as a "painful yell." RP (2/2/10) 54-55. Sergeant Renfro and Officer Rogers went to see what was going on, but by the time they got there Officer Fatt had gained control of the situation. RP (2/2/10) 55.

RCW 69.50.4013.⁵ Cocaine is a controlled substance. RCW 69.50.206.

Possession of a controlled substance may be either actual or constructive. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). Actual possession occurs when officers find a controlled substance in a person's physical possession. *Mathews*, 4 Wn. App. at 656, citing *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969). Constructive possession occurs when a person has dominion and control over the controlled substance. *Mathews*, 4 Wn. App. at 656, 484 P.2d 942. Proximity to the substance coupled with other circumstances linking the defendant to the substance is sufficient to show constructive possession. *State v. Sanders*, 7 Wn. App. 891, 893, 503 P.2d 467 (1972). Furthermore, "evidence of momentary handling, when combined with other evidence, such as ... a motive to hide the item from police, is sufficient to prove possession." *State v. Summers*, 107 Wn. App. 373, 386-87, 28 P.3d 780 (2001). A court is to examine the totality of the situation to determine if substantial evidence exists that tends to establish circumstances from which any trier of fact could reasonably infer that the defendant had dominion and control over the area in question and the drugs found there. *State v. Porter*, 58 Wn. App. 57, 60, 791 P.2d 905 (1990)

⁵ RCW 69.50.4013 states that: (1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

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

In the present case there was sufficient circumstantial evidence that Lloyd constructively possessed the cocaine. First, the officers found the cocaine in the pipe found in the pocket of the jacket that Lloyd was wearing when he ran from Sergeant Renfro. Although Lloyd claimed that he had borrowed the jacket and was unaware of the cocaine, the jury was free to disbelieve this testimony. Furthermore, the fact that Lloyd chose to take the jacket off and put in on the other side of a fence⁶ is strong circumstantial evidence that he was well aware of the contents of the jacket and wanted to ensure that it was not on his person when he was arrested by Sergeant Renfro.

While Lloyd's claim that he only removed his jacket because he was hot was something the jury could consider, the jury was certainly free to disbelieve this testimony, especially since it would not explain why Lloyd felt the need to toss the jacket over the fence rather than merely dropping it where he stood.

In short, viewing the facts in favor of the State, any rational trier of fact could find beyond a reasonable doubt that Lloyd was guilty of the crime of possession of a controlled substance. Lloyd's sufficiency of the evidence

⁶ Sergeant Renfro found the black leather jacket just north of the fence that Lloyd appeared to have been preparing to jump when Sergeant Renfro finally caught up to him. RP (2/2/10) 21-22, 48. Sergeant Renfro also explained that the jacket was found on the other side of the fence from where Lloyd had been arrested. RP (2/2/10) 35.

challenge, therefore, must fail.

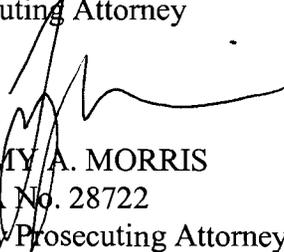
IV. CONCLUSION

For the foregoing reasons, Lloyd's conviction and sentence should be affirmed.

DATED February 17, 2011.

Respectfully submitted,

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