

No. 41147-4-II

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STATE OF WASHINGTON
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DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

MARCUS A. CHOUINARD,
Appellant.

APPELLANT'S BRIEF

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 a. "Officer Manos testified that as he shined his flashlight in through the back window of the automobile he noticed a flash suppressor on the barrel of a rifle. Manos testified that he was able to see the rifle through a 3 - 4 inch gap between the back cushion of the rear seatr (sic) and the frame of the car, and that it appeared that the automobile appeared to have been modified so that the trunk area, which normally would have been seperated (sic) from the passenger compartment by the back seat was accessible from

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b. "Manos testified that no officers entered the car prior to him noticing the rifle."

c. "Manos further testified that he then finished 'clearing' the car - that is verifying that there were no other occupants - by flashlight from the outside of the automobile. Manos did not believe that he had, at any point during that process shouted "Gun" or "Weapon."

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I. INTRODUCTION/SUMMARY OF THE ARGUMENT

The Appellant in this case, Marcus A. Chouinard, was convicted after trial of the unlawful possession of a firearm in the first degree.

On appeal, Mr. Chouinard argues that the evidence of the firearm should have been suppressed when the officer the trial court deemed most credible testified he discovered the firearm while explicitly looking for a firearm - a plainly illegal ground for the warrantless search of a vehicle. In addition, when the State's evidence against Mr. Chouinard amounted to his proximity to the weapon, there was insufficient evidence to take the issue to the jury. Finally, when the jury instruction on constructive possession failed accurately to define that term under Washington law and allowed conviction for merely being near contraband, the instruction relieved the State of its burden of proving constructive possession of the firearm and Mr. Chouinard's conviction should be overturned.

II. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The superior court erred in including inconsistent testimony in its *Findings of Fact and Conclusions of Law on Admissibility of Evidence CrR 3.6* without explicitly resolving which testimony was more reliable. See Clerk's Papers (CP) at 132-136.

2. When the court relied primarily on the testimony of Officer Prater to justify the legality of the search, it tacitly ruled his testimony to be most reliable. Thus, the conflicting testimony of Officer Manos set forth in the *Findings of Fact* was unreliable. In particular, the following testimony of Manos conflicted with that of Prater:

a. "Officer Manos testified that as he shined his flashlight in through the back window of the automobile he noticed a flash suppressor on the barrel of a rifle. Manos testified that he was able to see the rifle through a 3 - 4 inch gap between the back cushion of the rear seatr (sic) and the frame of the car, and that it appeared

that the automobile appeared to have been modified so that the trunk area, which normally would have been separated (sic) from the passenger compartment by the back seat was accessible from the passenger compartment." CP 133(6).

b. "Manos testified that no officers entered the car prior to him noticing the rifle." CP 133(7).

c. "Manos further testified that he then finished 'clearing' the car - that is verifying that there were no other occupants - by flashlight from the outside of the automobile. Manos did not believe that he had, at any point during that process shouted "Gun" or "Weapon." CP 133(8).

d. "Officer Manos's (sic) testified that that (sic) no officer entered the car during the sweep." CP 135(19).

3. The superior court erred in finding that once Prater backed away from the car he "was able to see the rifle barrel from the outside of the car." CP 133-34(9).

4. The superior court erred in finding, "Officer Prater testified that he has had prior experience with incidents where a person was hiding in the trunk, and that his observations of the back seat of this car initially gave him concern that it was possible that someone might be in the trunk of this car." CP 134(10).

5. The superior court erred in finding, "Officers Manos, Prater and Noble testified that the rifle was visible through a gap between the rear seat cushion and the frame of the vehicle." CP 135(20).

6. The superior court erred in finding and/or holding, "For safety purposes, the officers conducted a protective sweep of the vehicle. During the conduct of that sweep, Officer Prated (sic) noticed the rear seat askew and had safety concerns about the apparent modification of the vehicle and the possibility of someone in the trunk." CP 135(2) & (3).

7. The superior court erred in holding, "The testimony of the officers was generally credible. The inconsistencies in their testimony did not lead the

Court to conclude that there was any effort to intentionally mislead the Court. In particular, the testimony was consistent that there (sic) the back seat of the vehicle was not attached to the frame, and that there was a gap between the upper cushion and the frame to which it would be normally attached. The rifle was visible wither (sic) through this gap, or through a hole for a speaker in the area of the gap." CP 136 (6).

8. The court erred in holding exigent circumstances justified the initial sweep of the vehicle. CP 136 (7).

9. The court erred in denying the motion to suppress the rifle and magazine. CP 136(8).

10. The superior court erred in giving the issue of unlawful possession of a firearm to the jury when the evidence was insufficient to convict as a matter of law.

11. The superior court erred in providing a jury instruction on constructive possession of a firearm

that was inadequate and an inaccurate statement of Washington law. CP 128.

B. Issues Pertaining to Assignments of Error

1. When the trial court primarily relied on Officer Prater's account of the search of the vehicle to justify the warrantless search, and Prater testified to conducting the search to look for a weapon, not for safety considerations, did the court err in admitting the disputed evidence?

2. When the State's evidence regarding Mr. Chouinard's constructive possession of a firearm was his proximity to the weapon in the vehicle and a police officer's testimony that Mr. Chouinard knew the rifle was in the car - although the police officer could not say when Mr. Chouinard obtained that knowledge, whether it was before or after the removal of the rifle from the vehicle - was the evidence insufficient for conviction because it showed mere proximity to the weapon?

3. When the jury instruction on constructive possession failed to define "constructive possession"

(except with another legal term of art), "dominion and control," and "proximity" and provided a factor regarding determining dominion and control that allowed for conviction if the defendant were merely near the weapon, did the jury instruction relieve the State of its burden to prove Mr. Chouinard constructively possessed the firearm and violate his constitutional rights?

III. STATEMENT OF THE CASE

A. Procedural History

In a two-count information filed December 2, 2008, the State charged Mr. Chouinard with being an accomplice to a Drive-by Shooting in violation of RCW 9A.36.045(1) and with Unlawful Possession of a Firearm in the First Degree in violation of RCW 9.41.040(1)(a), both committed on or about December 1, 2008. CP 1-2. Informations were separately filed against two codefendants, Deandre Dwanye Robinson (case number 08-1-05704-8) and Quinton Jarod Jones (case number 08-1-05705-6).

Mr. Chouinard moved, *inter alia*, to suppress the firearm, magazine, bullets and any other physical evidence discovered during the search of the relevant vehicle. CP 3-12. After a hearing, the superior court denied the motion. Verbatim Report of Proceedings 3.5/3.6 Hearing, held July 7, 2010, (RP 3.6); CP 112-116.¹

Codefendant Robinson pleaded guilty prior to the suppression hearing. RP 3.6 at 4-5. Mr. Chouinard and codefendant Jones proceeded to trial. After the Government rested its case, the court entered a directed verdict dismissing the Drive-by Shooting charges against Mr. Chouinard and codefendant Jones. RP 8/2/10 at 44-47. It declined to dismiss the unlawful possession charge against Mr. Chouinard. *Id.*

1. Ten volumes of Verbatim Reports of Proceedings were filed in this case; some labeled with volume numbers, some not. In this brief, counsel relies only on the reports for the 3.5/3.6 hearing and the trial. For ease of reference, the report for the 3.6 hearing is designated RP 3.6 and the trial reports are designated by trial date. For example, the report for the trial date July 26, 2010, is designated RP 7/26/10.

at 47-48. The jury convicted Mr. Chouinard of that charge after trial. RP 8/3/10 at 55-57; CP 78.

At sentencing, Mr. Chouinard stipulated to his criminal history. CP 76-77. With an offender score of 2, the standard range sentence was 26 to 34 months. CP 101. The superior court sentenced him to 26 months in prison and no community custody. CP 103-104.

Notice of appeal was timely filed. CP 84-96.

B. Facts Regarding the Suppression Motion

Four police officers testified at the CrR 3.6 hearing. Lakewood Police Officer Shawn Noble was on patrol with Officer Skeeter Manos at 12:47 December 1, 2008, when he responded to a dispatch. The dispatch center advised of a shooting in Tacoma and gave a description of the vehicle involved, a distinctive blue or purple 1980s, Monte Carlo-style car with Spider-Man decals. Noble believed he knew the vehicle from having seen it in Lakewood on several occasions. Accordingly, he positioned his patrol car on southbound I-5 where he could observe vehicles traveling from Tacoma to Lakewood. Shortly thereafter, he saw the vehicle and

stopped it, employing safety measures consistent with a high risk stop. RP CrR 3.6 at 21-26.

Noble removed Mr. Chouinard from the backseat of the car, placed him in handcuffs, read him the Miranda warnings, and put him in the back of his patrol car. In response to Noble's questions, Mr. Chouinard told him about going to an 18-and-over club, that he did not have any weapons, that he did not know if there were any weapons in the vehicle, and that he did not know why they left the club. Id. at 26-31.

After speaking to Mr. Chouinard, while waiting for the Tacoma Police Department to arrive to take over the investigation, an officer told Noble that a rifle was seen in the vehicle. At that time, Noble walked up to the car and saw a rifle protruding from behind the back seat. The back bench-style seat and the back cushion were leaning slightly forward and the rifle protruded from the gap. Noble was not sure whether the seat had been moved forward by anyone on the scene by the time he saw it. RP CrR 3.6 at 38-43. Noble saw a portion

of the barrel of the rifle extending above the flat deck above the top of the rear seat. Id. at 46-47.

Lakewood Police Officer Jeremy Prater was on patrol when he heard the call that Noble had observed the suspect vehicle. Prater went to the location on southbound I-5 where Noble had stopped the vehicle, the Gravelly Lake exit. The Spider-Man emblem on the vehicle made it distinct. RP 3.6 at 7-9.

Prater was one of the last officers to arrive. When he got there, one person had been removed from the suspect vehicle and the remaining two were in the process of being removed. Id. at 9-10. After all the occupants had been handcuffed and removed from the vicinity of the vehicle, id. at 10 & 14, he and fellow Officer Manos cleared the vehicle. The clearing is intended to ensure no other occupants are in the passenger compartment of the car. Id. at 10 & 52. Manos was behind him as he approached the vehicle from the passenger side. It was dark out, but some streetlights in the area were on. Id. at 9-11. Upon

approaching the car, Prater saw "that there were no other occupants inside the vehicle." Id. at 11.

Nevertheless, "given the type of incident that the people or suspects were alleged to be involved in," RP 3.6 at 11, the officer performed a further, "cursory" check. Id. He noticed that the rear seat appeared to be unfastened. Again "based on the type of incident, somebody being in the back seat," Prater "assumed that it was a reasonable assumption that there may have been a weapon that was placed under or in that area." Id.

Accordingly, Prater lifted the bottom cushion portion of the seat and the rear seat cushion fell forward. At that time, Manos yelled the word "gun" and Prater dropped the seat cushion and backed out of the car. Prater explained he backed away from the vehicle because when Manos indicated the presence of a gun, he became concerned about whether someone was in the trunk: "[T]ypically, on these type of incidents, we also check the trunk to ensure that there are no other people inside the trunk, which has been the case at least one other time in my experience. So all I heard

was 'gun.' I didn't know if somebody else was inside the trunk or not." RP 3.6 at 12. Manos told him he had observed a gun muzzle, but at that point Prater had not seen the muzzle himself. Id. at 11-12. He believed that he had probably seen the weapon through the back window by the time he left the scene, but was not sure. Id. at 20.

Lakewood Police Officer Skeeter Manos remembered being on patrol alone on the night in question when he responded to a dispatch about the vehicle by heading to the location where Noble had stopped the car. After assisting with the detention of two occupants of the vehicle, he and another officer, whose name he did not remember, cleared the car for other occupants. RP 3.6 at 47-52.

At the time Manos and the other officer approached the car, nobody was in the vehicle and no law enforcement had been in the car. As Manos approached, he noticed that the back seat was ajar, pulled away from its normal position in the car. After ensuring no one was in the car, Manos looked behind the seat with his flashlight and saw the tip of a rifle barrel,

specifically, the flash suppressor portion of the weapon. He advised other officers of the situation, telling them a rifle was in the trunk of the car. RP 3.6 at 53-55 & 62.

Manos remembered that the rifle was not protruding above the window deck. Instead, the barrel of the rifle was pushing up against the back seat, preventing the seat from going all the way back. The rifle was at about a 45 degree angle, from the rear to the front, pointing upward toward the roof of the car. Manos did not yell "weapon" when he saw the gun. He was not concerned that anyone was in the trunk at the time the officers cleared the vehicle. Id. at 65-69.

When Tacoma Police Officer Jeff Thiry arrived at the scene, the car had been cleared. He got briefed by one of the officers on the scene and went over to the vehicle to look through the rear windshield with his flashlight. Peering through empty speaker holes on the back dash of the vehicle, he saw a black rifle. RP 3.6 at 71-74. He then viewed the rifle through the opening made by the ajar rear seat. Id. at 96-97.

Upon getting approval from a supervisor, Thiry opened the trunk, removed the rifle and a high-capacity semiautomatic rifle magazine, cleared it and secured it in his vehicle. For safety reasons, he decided to remove the rifle through the trunk. When he removed the rifle, it was parallel with the rear seat, with the muzzle likely pointed toward the driver's side of the car. It was lying flat on the floor of the trunk. Id. 74-81, 97, 98, 101 & 105.

Thiry also spoke with the three individuals who had been removed from the vehicle. He advised Mr. Chouinard of the Miranda warnings. RP 3.6 at 82, 85. In response to Thiry's questions, Mr Chouinard explained that he was at the club earlier that evening and was unaware of hearing any shots. Thiry gave an "exact quote" of Mr. Chouinard's response in regard to Thiry's question about the rifle. He stated when asked if Mr. Chouinard knew about the rifle behind the back seat, Mr. Chouinard replied, "'Yeah, you saw it behind the seat he was sitting in.'" Thiry did not remember if he told Mr. Chouinard they had found a rifle in the

vehicle, but he was "pretty sure" Mr. Chouinard knew police had found a rifle. Id. at 91 & 111-12.

C. Trial Evidence of Possession of a Firearm

At trial, Officers Noble, Prater and Manos testified with no relevant deviations from their testimony at the CrR 3.6 hearing. See RP 7/27/10 at 133-44 (Noble's testimony); RP 7/28/10 at 163-187 (same); & RP 7/26/10 at 74-142 (Prater's & Manos's testimony). Officer Noble clarified earlier testimony, stating that when he saw the rifle in the car, it was sticking up three to four inches above the seat. RP 7/28/10 at 174.

Officer Thiry's testimony about what Mr. Chouinard said about his knowledge of the gun changed somewhat. At trial, Thiry said that when asked if he knew about the rifle, Mr. Chouinard responded "that yes, he saw it behind the seat." RP 7/27/10 at 48. Thiry said that he wrote down exactly what Mr. Chouinard said about seeing the rifle behind the seat. Id. However, Thiry did not ask Mr. Chouinard when he saw the rifle, whether it was while or before he was in the car, or

after he was out of the car when the police searched the vehicle and removed the rifle. Id. at 74-76.

Sean Coleman, the security guard at the nightclub, Juno, where the shots were alleged to have been fired, testified at trial. On the night at issue, Coleman was working outside the club at the front door on 9th Street in Tacoma. At some point, he came to believe that someone was trying to break into a blue car with a Spider-Man decal that was parked directly across the two-lane road and one car back from the club. One of his colleagues alerted the party inside the club that was associated with the car. RP 7/26/10 at 154-58.

A group of men came out of the club, went over to the Spider-Man car and became agitated, yelling challenges and boasts back at the club. One Hispanic-looking man in the group with straight hair and wearing a white t-shirt was quiet and on the fringe of the commotion. RP 7/26/10 at 171-73. An African American with dread locks, also part of the group, made three trips to car parked near by, a red sedan. He retrieved something from the trunk of the sedan and seemed to put it in his waistband before yelling more challenges

toward the club. RP 7/26/10 at 159-64. In his written statement to the police, Coleman had said that the man retrieved a handgun from the trunk. He also stated that that man got into the blue car before leaving. RP 7/26/10 at 188-89.

After the man's third trip to the car, the group got into the two cars and left the club, pretty much together, the red car leaving first. One of the two cars, driving from Coleman's left to right, drove back in front of the club and someone yelled something out of the car. Once the vehicle was well past the club, a rifle came out of the passenger's side and shots were fired. RP 7/26/10 at 170, 173-77 & 190. In an interview months later with a police detective, Coleman said it was the Hispanic-looking man who fired the shots. No evidence at trial tied this Hispanic-looking man to either of the defendants. Id. at 191-93.

Coleman did not identify either defendant at trial. RP 7/26/10 at 154-217.

Tacoma Police Officer Rodney Halfhill was dispatched to Juno's around 1 a.m. the night of the incident to investigate the shooting. He met up with

Coleman and took him to the site of the stopped Spider-Man car to determine whether Coleman recognized any of the three men from the Spider-Man vehicle. Coleman did not identify either defendant at the scene. RP 8/2/10 at 9-17.

The night of the shooting, the owner of Juno Bar and Grill looked for evidence in an area about 50 feet from the club where he understood the shooting happened. He found several cartridge cases, put them in a plastic bag, and turned them over to Thiry. RP 7/26/10 at 220-27.

The State's forensic scientist determined that the fired cases appeared to have been fired from the rifle that was recovered from the trunk of the Spider-Man car. RP 7/27/10 at 100-102.

Police records established that around 15 minutes had elapsed from the initial reporting of the shooting to the stop of the Spider-Man car. RP 7/28/10 at 193-99.

Mr. Chouinard stipulated to having been convicted of a prior qualifying offense which prohibited him from

owning, possessing, or controlling a firearm. RP 8/2/10 at 25.

After the case against him was dismissed, Quinton Jones testified for the defense. He did not see the backseat of the Spider-Man car askew at any time that evening, nor did he see the barrel of a firearm sticking up. RP 8/2/10 at 53. Given the way the seat was unattached from the frame, a person sitting in the backseat of the car would probably be able to lean forward and pull the back seat forward to reach a hand behind the seat. Id. at 58-67.

Jones also discussed arriving and leaving Juno. Both the Spider-Man car and the red sedan, a Crown Victoria, belonged to him. He drove the Spider-Man car to Juno with a group of people. When the group left, he drove the Crown Victoria with Mr. Chouinard and a friend, Jeff Clifton, as passengers. Jones was so upset and frustrated when the group left that he left in the Crown Victoria without knowing for sure who was driving the Spider-Man car. It turned out it was a guy named Williams - someone Jones met that night - who drove the Spider-Man car with Deandre Robinson.

Shortly after leaving, Jones called Robinson on his cell phone and asked him to meet them at a nearby gas station. RP 8/2/10 at 54, 68-73 & 82-86.

At the gas station, the group switched cars to expedite dropping people at their homes. Williams and Clifton took the Crown Victoria and Jones, Mr. Chouinard and Deandre Robinson took the Spider-Man car. At that time, Jones did not realize shots had been fired from the Spider-Man car or that a rifle had been put in the trunk of the car. He drove the car to the freeway and headed home. Id. at 73-78, 82-88 & 91-94.

D. The Court's Jury Instruction

The court gave the jury the standard instruction defining possession:

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP 112-131 (Instruction No. 14).

IV. ARGUMENT

Point I: The Trial Court Erred in Denying Mr. Chouinard's Suppression Motion When the Officer the Court Deemed Most Credible Testified He Found the Rifle While Searching for a Gun

This Court should reverse the superior court's order admitting the evidence in this case because the search through which the evidence was discovered violated federal and state constitutional law. This Court reviews legal issues de novo and treats unchallenged findings of fact as verities on appeal. State v. Afana, 169 Wn.2d 169, 176, 233 P.3d 879 (2010) (citations omitted). The Court must determine whether challenged findings of fact are supported by

substantial evidence. Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises." State v. Gibson, 152 Wn. App. 945, 951, 219 P.3d 964 (2009) (citations omitted). This Court does not review credibility determinations on appeal. Id.

The search in this case violated both article I, section 7 the Washington Constitution and the Fourth Amendment to the federal constitution. U.S. Const. amend. IV; Wash. Const. art. I § 7. A warrantless search of a vehicle is legal only if it falls "within one of the carefully drawn exceptions to the warrant requirement." Afana, 169 Wn.2d at 177. In this case, the superior court held that the search fell into the "exigent circumstances" exception: "For safety purposes, the officers conducted a protective sweep of the vehicle. During the conduct of that sweep, Officer Prated (sic) noticed the rear seat askew and had safety concerns about the apparent modification of the vehicle and the possibility of someone in the trunk." CP 134(10) & 136(2) & (3); see Assignment of Error 6. These findings and conclusions are erroneous when

Officer Prater's testimony directly contradicts them. Contrary to the court's conclusions, Prater did not find the rifle while searching for other occupants of the car, but while searching for a gun.

Prater and Manos initially approached the vehicle to ensure it contained no other occupants. RP 3.6 at 10. When Prater got close to the car, he "observed that there were no other occupants inside the vehicle." Id. at 11. Despite this fact, he did a further "cursory check" because he was looking for a gun: "given the type of incident that the people or suspects were alleged to be involved in, I did a cursory check." Id.

It was only during the further, "cursory check" that Prater noticed the rear seat appeared to be unfastened. Then, explicitly looking for a "weapon," Prater went into the vehicle and searched it further: "Based on the type of incident, somebody being in the back seat, I assumed that it was a reasonable assumption that there may have been a weapon that was placed under or in that area" so he lifted up the seat cushion to find it. Id. at 11-12.

By the officer's unequivocal testimony, he went into the vehicle and searched the car because he was looking for a gun - not out of safety concerns. His safety concern about someone being in the trunk did not arise until after he moved the seat and Officer Manos shouted, "gun." At that point, Prater said he backed away from the vehicle because he "didn't know if somebody else was inside the trunk or not." Id. at 12.

Under these facts, the superior court's findings regarding the search for the gun are not supported by substantial evidence. As a result, the superior court's conclusion of exigent circumstances is also erroneous. By Prater's own words, safety concerns did not prompt him to move the car seat - instead, he was simply looking for a weapon. Thus, the superior court's holding was erroneous and this Court should reverse and remand the order.²

2. Prater's testimony directly contradicts several of the court's findings and conclusions. It contradicts most of Manos's testimony regarding the discovery of the rifle as well as the court's conclusions regarding the reason for the search. Assignments of Error 2, 4, & 6. In addition, some of the findings do not make clear when an individual could observe the weapon through the gap behind the back seat (which, according

Prater's explanation of what happened that night falls directly afoul of the Supreme Court's recent case law on searches of vehicles incident to arrest. Prater openly admitted he was searching the vehicle for a gun. But our Supreme Court has made clear that that type of warrantless search is illegal. An officer cannot search a vehicle for a weapon without a warrant unless the arrestee poses a safety risk or the vehicle contains evidence that could be concealed or destroyed:

The search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.

Afana, 169 Wn.2d at 177-78 (refusing to recognize good faith exception to rule), quoting, State v. Patton, 167 Wn.2d 379, 394-95, 219 P.3d 651 (2009); see State v. Buelna Valdez, 167 Wn.2d 761, 777, 224 P.3d 751 (2009) (reiterating warrantless search of automobile permissible only "when that search is necessary to

to Prater's testimony, was after he moved the cushion) or that Prater was not sure if he ever saw the rifle. Assignments of Error 3, 5 & 7.

preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest."); see also Arizona v. Gant, --- U.S. ----, 129 S. Ct. 1710, 1723, 173 L. Ed.2d 485 (2009) (holding under federal law "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest").

Here, it was undisputed that the arrestees posed no safety risk to the officers. CP 133 (4) & (5). In addition, the record contains no indication of any concern that the evidence could be destroyed or concealed. Indeed, with the occupants of the vehicle arrested and placed in the back of police cars, no such concern could exist. Under these circumstances, no exigent circumstances justified the search, the search was not lawful as incident to an arrest, and this Court should reverse and remand the case.

A problem with this case is that two officers, Prater and Manos, each claimed to have discovered the gun differently and the court did not explicitly

resolve the conflicting testimony. Contrary to Prater's testimony, Manos testified he was the first officer to approach the car and he saw the weapon without anyone else going into the car or moving anything. In other words, he saw the weapon in "open view." RP 3.6 at 53-55 & 62; see State v. Gibson, 152 Wn. App. 945, 955-56, 219 P.3d 964 (2009).

Instead of explicitly resolving this credibility issue, the court merely included both accounts in its findings of fact. However, it apparently believed Prater offered the more reliable account, because it is Prater's account upon which the court based its "Reasons for Admissibility." There, the court stated that the weapon was not visible until Prater moved the seat cushion, at which point the weapon was in plain view. CP 135 (3) & (4). Thus, the court tacitly found Prater's version of events more credible than Manos's. Because this Court does not review credibility decisions, that conclusion must stand.

Accordingly, there are no grounds to conclude that Manos's version was the correct version of the search and that the weapon was legally discovered through the

"open view" doctrine. Nor are there grounds to conclude that Thiry and Manos discovered it through the "open view" doctrine. Thiry and Manos did not look in the car for a weapon until they were told that a weapon had been located. Thus, in no sense can they be said to have performed the search that revealed the weapon. Moreover, there is no argument that officers would inevitably have discovered the rifle even without Prater's illegal search. State v. Winterstein, 167 Wn.2d 620, 634-36, 220 P.3d 1226 (2009) (holding the inevitable discovery doctrine "incompatible with the nearly categorical exclusionary rule under article I, section 7"). For all these reasons, this Court should reverse and remand the superior court's order and reverse Mr. Chouinard's conviction.³

Point II: The Evidence Was Insufficient to Convict Mr. Chouinard of Possession of a Firearm When It Showed Mere Proximity to the Weapon

The evidence was insufficient to convict Mr. Chouinard of unlawful possession of a firearm in the

3. Because the initial search resulting in discovery of the weapon was illegal, there is no need to determine whether exigent circumstances justified the seizure of the weapon. See CP 136(7).

first degree. A challenge to the sufficiency of the evidence requires the Court to view the evidence in the light most favorable to the State. The relevant question is whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, ¶ 9, 133 P.3d 936 (2006); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In claiming insufficient evidence, the defendant admits the truth of the State's evidence and all reasonable inferences that can be drawn from it: "All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Hosier, 157 Wn.2d at 8, ¶ 9; Salinas, 119 Wn.2d at 201.

To establish the crime of conviction in this case, the State was required to prove beyond a reasonable doubt that Mr. Chouinard, while in this State, "own[ed], ha[d] in his . . . possession, or ha[d] in his . . . control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter." RCW 9.41.040(1)(a). Mr. Chouinard stipulated to his prior qualifying crime and it was

undisputed that the events in question occurred in Washington. Thus, the only issue to be proven at trial was Mr. Chouinard's possession or control of the firearm.

There was no evidence of Mr. Chouinard's actual possession of the rifle. See RP. Thus, the State needed to rely on constructive possession, a fact it failed to establish at trial. To establish constructive possession, the State had to show Mr. Chouinard had dominion and control over the firearm. State v. Bowen, 157 Wn. App. 821, 827-28, 239 P.3d 1114 (2010), *citing*, State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). The State need not show exclusive control, but mere proximity is not enough to establish constructive possession. Bowen, 157 Wn. App. at 828.

Mr. Chouinard's actions did not meet the definition of "constructive possession" provided in the jury instructions. The jury instruction gave as factors to consider in deciding dominion and control, "whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from

possession of the item, and whether the defendant had dominion and control over the premises where the item was located.” CP at 128. When the weapon in this case was in the trunk behind the seat Mr. Chouinard was sitting on in a moving vehicle, he lacked the immediate ability to take actual possession of the firearm. Moreover, there was no evidence of his ability to exclude others from possession of the rifle or of his dominion and control over the vehicle. Accordingly, the State did not prove constructive possession as defined in the jury instructions.⁴

Nor did it prove constructive possession as defined in case law. When determining whether an individual had constructive possession over a weapon found in a vehicle, mere proximity to the weapon is insufficient as a matter of law. See State v. Jones 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Other facts must be established before constructive possession is established. Most typically, courts consider whether the defendant owed the vehicle, drove the vehicle or

4. Mr. Chouinard also challenges the adequacy of the jury instructions. See Point III, below.

otherwise exercised control over the vehicle. See Jones 146 Wn.2d at 333 (holding defendant had constructive possession of purse in his car because he exercised control over his car and the contents therein, he stored items in the purse, and he admitted that the gun in the purse belonged to him); Bowen, 157 Wn. App. at 827-28 (holding constructive possession of contents of vehicle established when defendant was driver, sole occupant of vehicle, and possessed the keys); State v. Turner, 103 Wn. App. 515, 524, 13 P.3d 234 (2000) (holding issue was appropriate for the jury when defendant owned and drove truck and knew he was transporting firearm behind him most of the day but did nothing to remedy situation); State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (finding constructive possession when weapon was sticking out in plain sight at defendant's feet); State v. McFarland, 73 Wn. App. 57, 70, 867 P.2d 660 (1994) (defendant constructively possessed firearms when he knowingly transported them in his car); State v. Reid, 40 Wn. App. 319, 325, 698 P.2d 588 (1985) (defendant constructively possessed gun when he admitted having

gun in his car and moving it so it would not be seen by police); *but see State v. George*, 150 Wn. App. 110, 120, 206 P.3d 697 (2009) (holding jury could find defendant constructively possessed gun found in vehicle when defendant could have easily reached it).

Here, the evidence only established mere proximity and thus was insufficient as a matter of law to establish constructive possession. All the State proved was that Mr. Chouinard was in the back seat of a car that potentially allowed access (albeit difficult access) to a rifle in the trunk. In contrast to the situations in Jones, Bowen, Turner, McFarland and Reid, the car was not his. RP 8/2/10 at 54. In contrast to Turner, he had been in the car with the rifle for a short, 15-minute drive, neither owning nor driving the car, without necessarily knowing the rifle was there. RP 7/28/10 at 193-99. See RP. While a police officer stated Mr. Chouinard said he knew the rifle was in the car, it was unclear at trial when Mr. Chouinard learned the rifle was in the car. RP 7/27/10 at 48 & 74-76. He could have obtained that information after the car was searched and the rifle removed.

Further, in contrast to the situation in Echeverria, the rifle was not in Mr. Chouinard's plain sight. In addition, no evidence suggested the rifle was his. The only case finding constructive possession on similar facts, George, is distinguishable because there the weapon was within easy reach. George, 150 Wn. App. at 120. In this case, by contrast, there was no evidence that Mr. Chouinard had easy access to the weapon. Although he might have been able to reach it if he worked at it, he would have had to pull the seat he was sitting on forward, far enough to be able to reach over the seat back and into the trunk, while the car was in motion. See RP 8/2/10 at 58-67. This would not have been an easy feat.

For these reasons, all the State proved was that Mr. Chouinard was near the weapon, which was insufficient to establish his constructive possession. Accordingly, the evidence was insufficient to establish Mr. Chouinard's possession and control over the weapon and this Court should reverse his conviction.

**Point III: When the Jury Instruction on
Constructive Possession Allowed
Conviction if the Defendant Were Merely
Near the Contraband, it Misled the Jury
about the Relevant Law and Relieved the
State of its Burden to Prove
Constructive Possession**

The constructive possession jury instruction in this case allowed conviction if the defendant were merely near the weapon, in violation of state law. As a result, it relieved the State of its burden to prove every element of its case at trial and this Court should reverse Mr. Chouinard's conviction.

Instructing a jury so as to relieve the State of its burden to prove all of the elements of the case is reversible error. State v. Linehan, 147 Wn.2d 638, 643, 56 P.3d 542 (2002), citing, State v. Scott, 110 Wn.2d 682, 690, 757 P.2d 492 (1988). Generally, the failure to object to jury instructions at trial precludes appellate review. See RAP 2.5(a). But an instruction that relieves the State of its burden to prove every element of an offense is a constitutional error that may be raised for the first time on appeal. See State v. Hanna, 123 Wn.2d 704, 709-10, 871 P.2d 135 (1994); RAP 2.5(a)(3).

It is well-established that merely being near contraband is insufficient to establish constructive possession. See, e.g., State v. Jones 146 Wn.2d 328, 333. But the jury instruction used in this case allowed for conviction on just that. The court gave the jury the standard instruction defining possession:

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP 128 (Instruction No. 14). This instruction tracked the language of the pattern jury instruction. 11A Washington Pattern Jury Instructions: Criminal 133.52.

Although a standard instruction, the challenged jury instruction incorrectly informed the jury of the applicable law. "Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law." State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Whether a jury instruction correctly states the relevant law is a question of law reviewed *de novo*. Linehan, 147 Wn.2d at 643.

The challenged instruction was an inaccurate statement of the law both because it failed to define the key concepts and because it allowed conviction for merely being near the weapon. The instruction started by defining constructive possession to be dominion and control: "Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item." But then it failed to define dominion and control, stating only that "[p]roximity

alone without proof of dominion and control is insufficient" and "[d]ominion and control need not be exclusive" CP 128. These statements in no way elucidate what "dominion and control" actually means. As a result, the instruction defining constructive possession only replaced one legal term of art with another.

Next, and even more significantly, the instruction failed entirely to define "proximity." It informed the jurors that proximity alone was insufficient for conviction, but did not tell them what proximity means. Under these circumstances, a juror who did not have a clear understanding of the legal meaning of this term could have known that "proximity" was not enough to convict and still believe conviction required if the defendant was near the contraband.

Moreover, the instruction emphasized dominion and control as the key concept to focus on regarding constructive possession. See CP 128. Since that term was left undefined, the jury had to rely on the "factors" the instruction provided to decide whether the defendant had dominion and control. And here the

instruction went further astray. Despite the previous warning about proximity, the first dominion and control factor apparently allowed conviction for proximity. Jurors may consider "whether the defendant had the immediate ability to take actual possession of the item." This factor was clearly describing situations where the defendant was near the weapon. If a defendant was near a weapon, he would have had the immediate ability to take actual possession of it except in the rare situation (for example, if the weapon were in the trunk behind the seat on which the defendant was sitting).

As a result, the jury was told that proximity alone (the term left undefined) was not sufficient for a conviction, but if the defendant were near enough to the weapon so that he could have immediately taken actual possession of it, conviction was required. Under these circumstances, this factor, even combined with the proximity warning, allowed conviction for proximity alone in violation of Washington law.

It is illuminating to compare the Washington instruction with the model federal jury instruction.

The federal jury instructions resolves the vagueness of the terms "proximity," "dominion and control" and "constructive possession" by avoiding them entirely. Instead, the model instruction regarding unlawful possession of a firearm reads,

To "possess" means to have something within a person's control. This does not necessarily mean that the defendant must hold it physically, that is, have actual possession of it. As long as the firearm is within the defendant's control, he possesses it. If you find that the defendant either had actual possession of the firearm, or that he had **the power and intention to exercise control over it**, even though it was not in his physical possession, you may find that the government has proven possession.

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35.49. In this instruction, the phrase, "the power and intention to exercise control over [the firearm]" both makes clear that more than proximity is required to find constructive possession and eliminates any confusion over terms such as "dominion and control."

When assessing the effect of specific language in a jury instruction, an appellate court considers the jury instructions as a whole and analyzes the challenged portions in the context of all the

instructions. See State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in this case, none of the instructions eliminated the misapprehension created by Instruction 14 - that nearness to a weapon was sufficient to find constructive possession. See CP 112-131. Accordingly, recourse to other jury instructions given in this case does not resolve the issue.

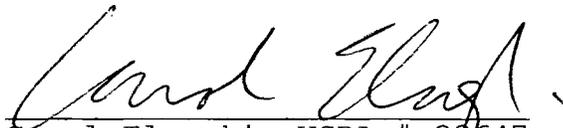
Because the challenged instruction failed to define "constructive possession" (except with another legal term of art), "dominion and control," and "proximity," the instruction failed adequately to describe Washington law. Moreover, the first factor given for determining dominion and control allowed for conviction if the defendant were merely near the weapon, misleading the jury as to the relevant law. For all of these reasons, the jury instruction on constructive possession in this case relieved the State of the burden of proving such possession. Accordingly, this Court should reverse and remand Mr. Chouinard's conviction.

V. CONCLUSION

For all of these reasons, Marcus A. Chouinard respectfully requests this Court to reverse the superior court's order denying suppression of the firearm and magazine and reverse his conviction.

Dated this 5th day of March, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 5th day of March 2011, I caused a true and correct copy of Appellant's Brief to be served by U.S. mail on:

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Carol Elewski

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