

NO. 41495-3-II



COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent,

v.

DERRICK DEMONE JOHNSON, Appellant.

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APPELLANT'S BRIEF

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by convicting Johnson of unlawful possession of a firearm where there is insufficient evidence that he ever owned or possessed a firearm.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether there is sufficient evidence to support a conviction for unlawful possession of a firearm where there is no evidence that Johnson ever owned, had in his possession, or controlled a firearm.

## **III. STATEMENT OF THE CASE**

On September 4, 2008, at around 8:15 p.m., Billy-Ray Griffin was shot by the passenger in a vehicle in a bar parking lot in Tacoma. 2RP 115-16. Initially, Griffin told bystanders at the scene and later the police that he did not know who shot him. 5RP 549, 7RP 815. For the first time, three weeks after being shot, Griffin told police that he believed the driver of the vehicle was Derrick Johnson, who he knew as “Top Dog.” 3RP 396, 411. He claimed he did not know the other three occupants of the car, including the man who shot him. 2RP 119. Griffin was seriously

injured, but recovered fully from the shooting. 2RP 130. Johnson was charged with attempted first degree murder, drive-by, and unlawful possession of a firearm in the first degree. CP 1-4.

At trial, Griffin testified that as he was walking to his car on the night of September 4, 2008, a dark car approached him and someone inside said, "Is that B.P.?" 2RP 203. Griffin answered, "Yeah, is that Top Dog? Get out of the car." 2RP 203. Then, someone inside said, "Smoke that nigga," and Griffin was shot by the passenger. 2RP 203. Griffin said he was standing toward the back of the passenger side of the vehicle, which also had tinted windows, so that this shooter had to look back at him. 2RP 204, 207. After the shots were fired, the car immediately left. 2RP 125.

Griffin said there were four men in the car, but he did not know anyone, but believed Johnson was the driver. 2RP 116, 119. Griffin testified that although no one answered his question "is that Top Dog," meaning Johnson, he assumed Johnson was there because no one said anything. 2RP 208, 216. Griffin said, "The fact that he didn't answer was confirmation enough." 2RP 216.

Griffin said there had been rumors that Johnson "had a beef" with him, but when Griffin had confronted Johnson about it, Johnson told him

he did not have any problem with Griffin. 2RP 121-22. Their last contact had been months before the shooting. 2RP 122-23.

Police rapidly focused their investigation on Demarco McGown because his mother's car matched a description of a vehicle seen in the area just before the shooting. 1RP 58, 3RP 324, 384. Susie Benavidez, the owner of the car, said her son, McGown, and his friends Brennan Morford and Monteece Brewer were driving her car that night. 3RP 325-26, 386. There was also a fourth man in the car, the driver, who she did not recognize and did not know. 3RP 325-26. Benavidez did not recognize Johnson. 3RP 326.

Morford initially identified McGown as the shooter and told police that Johnson was driving. 3RP 419-20. Then, at McGown's trial, Morford testified that Johnson was the shooter. 5RP 595. In this trial, Morford testified that Johnson was driving the car that night, but he did not remember anything about the shooting. 5RP 564, 571.

Brewer testified that his friend "Roc" was driving the car. 6RP 689. Brewer confessed on the stand that when he saw Griffin approach the car, looking hard inside at them, Brewer became afraid and shot Griffin. 6RP 694-99. Brewer had testified at McGown's trial, that Johnson was the driver of the car earlier in the evening, but that he had not been in the car at the time of the shooting. 7RP 739, 751.

Andrea Smith testified at trial that the night of the shooting, she picked up Johnson between 8 and 8:45 p.m. and he was with her the rest of the evening. 7RP 763-5. This was consistent with the statement she made to police one month after the shooting. 7RP 769.

After a jury trial, Johnson was convicted of being an accomplice to attempted murder in the first degree, drive-by, and unlawful possession of a firearm in the first degree. CP 54. He was also sentenced to two firearm enhancements. CP 58. This appeal timely follows.

#### **IV. ARGUMENT**

**ISSUE 1: THERE IS INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM WHERE THERE IS NO EVIDENCE THAT JOHNSON EVER OWNED, HAD IN HIS POSSESSION, OR CONTROLLED A FIREARM.**

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Johnson was convicted as an accomplice to attempted murder and drive-by shooting based on the actions of McGown, the passenger and

shooter. He was also convicted of unlawful possession of a firearm in the first degree. The unlawful possession of a firearm conviction must be reversed because there is no testimony whatsoever that Johnson ever touched the gun or that he had it in his possession, nor is there any evidence of constructive possession.

RCW 9.941.040(1)(a) provides that a person is guilty 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 convicted . . . of any serious offense.”

Here, because there is no testimony whatsoever to support actual possession or ownership, the State argued below that Johnson constructively possessed McGown’s gun. “Constructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found.” *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Close proximity alone is not enough to establish constructive possession other facts must enable the trier of fact to infer dominion and control. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000).

In this case, the only direct testimony about the gun was that McGown was the shooter and had a gun. 2RP 116, 3RP 307, 5RP 583, 593. There is no evidence or testimony linking the gun to Johnson, who

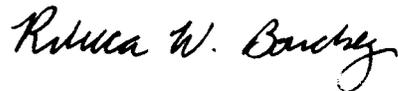
was allegedly the driver during the shooting. 2RP 116, 5RP 583, 593.

The victim testified that Johnson told McGown to shoot him, but this does not place a gun in Johnson's possession or control. See 2RP 116, 123. At best, it is merely evidence of Johnson's influence over the shooter and makes him an accomplice to the shooting, but it does not place the gun in his possession, constructive or otherwise. Because there is insufficient evidence that Johnson possessed the gun, his convictions for unlawful possession must be reversed.

## V. CONCLUSION

Johnson's conviction for unlawful possession of a firearm must be reversed because there was insufficient evidence presented that he owned or possessed a firearm and the only testimony was that the shooting was done by McGown, who had a gun.

DATED: June 15, 2011



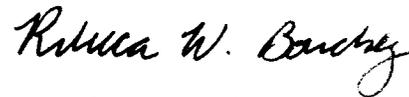
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CERTIFICATE OF SERVICE

I certify that on June 15, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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