

Court of Appeals No. 43801-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

JAMES E. GRAY,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 11-1-01426-4
The Honorable John A. McCarthy, Presiding Judge

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I. ASSIGNMENT OF ERROR

The State presented insufficient evidence to convict Mr. Gray of any crime.

II. ISSUES PRESENTED

1. Did the State present sufficient evidence to support a finding that Mr. Gray had committed the crime of drive-by shooting where the evidence was insufficient to support a finding that Mr. Gray was the individual who fired the gun?
2. Did the State present sufficient evidence to support a finding that Mr. Gray had committed the crime of drive-by shooting where the evidence was insufficient to support a finding that Mr. Gray was ever in possession of the gun?

III. STATEMENT OF THE CASE

A. Factual Background

On October 7, 2011, James Gray called Jicorey Bradford and asked Mr. Bradford to give him a ride. RP 629, 668. Mr. Bradford told Mr. Gray that he had to stop by his brother's apartment to pick up some clothes for work that night. RP 629-630, 669. Mr. Bradford drove to his brother's apartment. RP 631.

Upon arriving at his brother's apartment, Mr. Bradford parked his vehicle and got out. RP 631. Mr. Gray also got out of the car and began following Mr. Bradford to Mr. Bradford's brother's apartment, but Mr. Bradford told Mr. Gray that it was only going to take a second, so Mr. Gray returned to the car, purchasing a cigarette from some people he saw

on the way. RP 631, 670. Mr. Gray returned to the car, sat on the passenger side of the car, and smoked the cigarette. RP 631-632.

On October 7, 2011, Kerry Edwards and Dandre Long were running errands and went to the apartment complex to look for Mr. Long's girlfriend. RP 51, 286-288. The men waited in Mr. Long's girlfriend's apartment for 30-45 minutes, but Mr. Long's girlfriend never arrived. RP 288. Mr. Long and Mr. Edwards left the apartment and returned to Mr. Long's vehicle, a Chevy Caprice. RP 52, 55, 288-289. While returning to his car, Mr. Long saw four men in the breezeway of the apartment building. RP 288. Mr. Long did not interact with the men he saw in the breezeway. RP 288.

When Mr. Bradford exited his brother's apartment, he encountered two men in the breezeway of the apartment building. RP 671. No words were exchanged between Mr. Bradford and the two men. RP 671. Mr. Bradford returned to his vehicle with a bag of clothes, put the clothes in the back seat, and got into the driver's seat. RP 631-632, 672-673.

Mr. Bradford began driving but wanted to change the CD in the stereo so he pulled over to the side of the road. RP 633, 673. As Mr. Bradford was changing the CD, a Chevy Caprice driven by Mr. Long pulled up next to Mr. Bradford's vehicle and stopped. RP 295, 635-636, 673.

Words were exchanged between Mr. Long and Mr. Bradford which ended in Mr. Edwards pointing a pistol at Mr. Bradford and Mr. Bradford pulling a gun and shooting at Mr. Long's vehicle. RP 289-291, 636-638, 673-677. Mr. Gray was unaware that Mr. Bradford had a firearm in the vehicle. RP 638, 643, 715.

When Mr. Bradford started shooting, Mr. Long drove away from Mr. Bradford's vehicle. RP 291, 676. Mr. Bradford drove in the opposite direction of Mr. Long, but Mr. Long's vehicle soon passed Mr. Bradford's vehicle and spun out in front of it. RP 64, 638-639, 677-680. Mr. Bradford saw Mr. Edwards, the passenger in Mr. Long's vehicle, holding a gun out the window so Mr. Bradford exited his vehicle and fired at Mr. Long's vehicle again. RP 654, 680.

When Mr. Bradford jumped out of his car, Mr. Gray jumped from the passenger seat to the driver's seat because he wanted to get away from the area as quickly as possible. RP 652-655, 681. Mr. Gray was about to drive away when Mr. Bradford hit the trunk of the car and then got into the passenger seat. RP 655-656, 681-682.

Mr. Gray drove away from the scene of the second shooting with Mr. Bradford telling him where to drive, but Mr. Gray quickly crashed Mr. Bradford's car into a grass covered embankment in the parking lot of a fire station. RP 641-642, 682. Mr. Gray was scared so he jumped out of

the car, jumped over a fence topped with barbed wire, and hid in a tree for several hours before going home. RP 659-660. When the car crashed on the grassy embankment, Mr. Bradford threw the gun he had been shooting out the passenger door window of the vehicle. RP 660-661, 683.

Mr. Bradford was still seated in the passenger seat of his vehicle when the police arrived and arrested him. RP 336-337, 683. Mr. Bradford said that the passenger in Mr. Long's vehicle had produced a gun, so Mr. Bradford started shooting at him. RP 338, 344, 492, 522. Mr. Bradford told police that he started shooting in self-defense. RP 345, 492, 522. The police found a gun 20 feet away from Mr. Bradford's vehicle and Mr. Bradford admitted to throwing that gun to that location as the car crashed into the embankment. RP 339-340, 343-344. Mr. Bradford told police that Mr. Gray had climbed over a fence with barbed wire on top. RP 340.

After Mr. Long dropped him off, Mr. Edwards called the police and told them what had happened. RP 73-74, 204-205. Mr. Edwards then met with the police at the Lakewood Police station and gave a statement. RP 75, 205-206. Mr. Edwards was shown a photomontage and identified a picture of Mr. Bradford as the person who had fired the gun at Mr. Long's vehicle. RP 75-80, 158, 161, 562-563. Mr. Edwards was 100% sure that the individual he identified in the photomontage was the person

who had been shooting and immediately picked Mr. Bradford's picture.
RP 162-163, 528, 563.

The police recovered the handgun Mr. Bradford threw from his vehicle, numerous shell casings, and also recovered a bullet from the headrest of Mr. Long's vehicle. RP 418-419. All shell casings and the bullet were fired from the gun Mr. Bradford threw out the window. CP 185-186; RP 418-419.

The day after the shooting, police returned to the scene of Mr. Bradford's vehicle crashing and discovered a brown paper bag in the grass which contained cocaine. RP 275, 501-502. The bag was located ten feet in front of the vehicle on the passenger side. RP 506.

B. Procedural Background

On October 11, 2011, Mr. Gray was charged with two counts of assault in the first degree with a firearm or deadly weapon while he or an accomplice was armed with a firearm, one count of acting as an accomplice to drive by shooting by discharging a firearm, one count of unlawful possession of a firearm in the second degree, one count of possession of a stolen firearm, and one count of unlawful possession of a controlled substance. CP 109-111.

On May 14, 2012, the unlawful possession of a firearm charge was amended from second degree to first degree. CP 116-118; RP 9-10.

Mr. Gray's trial began on May 15, 2012. RP 37. Also on May 16, 2012, Mr. Gray stipulated that he been convicted of a serious offense prior to October 7, 2011 and that the substance found in the paper bag was cocaine. CP 183-184; RP 15, 275.

After the State had rested its case in chief, Mr. Gray moved to dismiss all charges against him on the basis that the State had failed to present sufficient evidence to convict him of any crime. RP 576-583. The trial court denied the motion as to all counts except the unlawful possession of a controlled substance charge. RP 608-610. The trial court dismissed the charge that Mr. Gray unlawfully possessed a controlled substance. RP 609-610.

The jury found that Mr. Gray had not committed any assault, had not been armed with a firearm, and had not been in possession of a stolen firearm. CP 255-258, 261; RP 876-880. Despite this, the jury did find Mr. Gray guilty of drive-by shooting and unlawful possession of a firearm in the first degree. CP 259-260; RP 876-880. Mr. Gray stipulated to his prior conviction record and offender score. CP 262-263. Notice of appeal was filed on August 9, 2012. CP 283-294.

IV. ARGUMENT

The State presented insufficient evidence to convict Mr. Gray of any crime.

In a criminal matter, the State must prove every element of the crime charged. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). Where a criminal defendant challenges the sufficiency of the evidence, appellate courts review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all of the inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068. Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *Salinas*, 119 Wn.2d at 201, 829 P.2d 1068.

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). If there is insufficient evidence to prove an element, reversal is required and retrial is 'unequivocally prohibited.' *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

Mr. Gray was charged with and found guilty of drive-by shooting in violation of RCW 9A.36.045(1) and unlawful possession of a firearm in

the first degree in violation of RCW 9A.10.040(1)(a). CP 116-118; RP 876-880.

Under RCW 9A.36.045(1),

A person is guilty of drive-by shooting when he...recklessly discharges a firearm...in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

Under RCW 9A.10.040(1)(a),

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.

1. *The State presented insufficient evidence to establish that Mr. Gray discharged the firearm.*

Virtually all evidence at trial, including Mr. Bradford's own testimony, indicated that Mr. Bradford was the individual who fired the gun at Mr. Long's vehicle. The only evidence pointing to Mr. Gray being the shooter was Mr. Edwards' in court identification of Mr. Gray as the shooter. RP 49-50, 61-64. However, Mr. Edwards' in-court identification of Mr. Gray as the shooter was contradicted by the physical evidence recovered and observed by police as well as by Mr. Edwards' own statements to police and defense counsel for Mr. Gray.

Mr. Edwards was shown a photomontage and identified a picture of Mr. Bradford as the person who had fired the gun at Mr. Long's vehicle. RP 75-80, 158, 161, 562-563. Mr. Edwards was 100% sure that the individual he identified in the photomontage was the person who had been shooting and immediately picked Mr. Bradford's picture. RP 162-163, 528, 563.

At trial, Mr. Edwards testified that the shooter was wearing a blue coat or a blue sweater with fleece like a rain jacket and sweat pants. RP 55, 63, 69-70. Mr. Bradford testified and police testimony confirmed that on the day of the shooting Mr. Bradford had been wearing a blue sweatshirt that was open in the front. RP 346, 497-500, 528, 683-685. Mr. Gray had been wearing a blue Mariner's jacket with white sleeves and white khaki pants. RP 661.

Given that Mr. Edwards' statements to police contradicted and discredited his own testimony at trial, even when viewed in the light most favorable to the State Mr. Edwards' testimony lacked any credibility. Because Mr. Edwards' testimony was the only evidence suggesting that Mr. Gray was the shooter, and because Mr. Edwards' testimony was self-contradictory and ambivalent, at best, Mr. Edwards' testimony was an insufficient basis to support a finding that Mr. Gray discharged a firearm beyond a reasonable doubt.

The State's evidence was insufficient to support a rational belief beyond a reasonable doubt that Mr. Gray possessed a firearm and discharged it.

2. *The State presented insufficient evidence to establish that Mr. Gray possessed the firearm.*

Knowing possession is an essential element of the crime of unlawful possession of a firearm. *State v. Anderson*, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000).

Possession may be actual or constructive. *State v. Echeverria*, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997). A jury can find a defendant constructively possessed a firearm if the defendant had dominion and control over it or over the premises where the firearm was found. *Echeverria*, 85 Wn.App. at 783, 934 P.2d 1214. A vehicle is a "premises" for purposes of this inquiry. *State v. Mathews*, 4 Wn.App. 653, 656, 484 P.2d 942 (1971). One can be in constructive possession jointly with another person. *State v. Morgan*, 78 Wn.App. 208, 212, 896 P.2d 731, *review denied*, 127 Wn.2d 1026, 904 P.2d 1158 (1995).

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. Spruell*, 57 Wn.App. 383, 388-89, 788 P.2d 21 (1990). The ability to reduce an object to actual possession is an aspect of

dominion and control. *Echeverria*, 85 Wn.App. at 783, 934 P.2d 1214. No single factor, however, is dispositive in determining dominion and control. *State v. Collins*, 76 Wn.App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995). The totality of the circumstances must be considered. *Collins*, 76 Wn.App. at 501, 886 P.2d 243.

Both Mr. Gray and Mr. Bradford testified that Mr. Gray had no knowledge that a firearm was in Mr. Bradford's vehicle. RP 638, 643, 715. The evidence introduced at trial clearly established that once Mr. Bradford had produced the firearm he kept it in his actual possession until he threw it out the window of the vehicle and Mr. Gray would not have been able to reduce the firearm to his actual possession. The State presented insufficient evidence to establish beyond a reasonable doubt that Mr. Gray ever was in actual or constructive possession of a firearm.

VI. CONCLUSION

The State presented insufficient evidence to establish that Mr. Gray possessed a firearm and discharged it. Indeed, the jury found that Mr. Gray did not commit any act of assault and did not possess a stolen firearm where the assaults and the possession of the firearm were the same acts that formed the basis of the drive-by shooting and unlawful possession of a firearm charge charges.

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