

No. 454696

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DYLAN W. MOORE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE JAMES ORLANDO

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 829
Graham, WA
509.939.3038

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I. ASSIGNMENTS OF ERROR

- A. The State failed to produce sufficient evidence of all of the alternatives of the crime of unlawful possession of a firearm in the first degree.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

- A. Where the State did not elect which of the alternative means of unlawful possession of a firearm it intended to rely, and did not present sufficient evidence of each alternative, must the conviction be reversed and dismissed?

II. STATEMENT OF FACTS

Dylan Moore was charged by information filed in Pierce County Superior Court with one count of unlawful possession of a firearm in the first degree. The information charged three alternatives- knowingly own, possess, or control- a firearm, having been convicted in the State of Washington of a serious offense. CP 1. At trial, Mr. Moore stipulated that the firearm was operable, there were no fingerprints on it, and that Moore had a prior conviction for the purpose of the charge. CP 36-37.

On March 10, 2013, Tacoma police officers responded to a report of "shots fired." Vol.2 RP 78-79. As Officers Waubanascum and Welsh approached the house they thought the shots came from, they heard people yelling and "a large struggle inside the house." Vol. 2RP 82; Vol. 3RP

184-185. One officer banged on the front door and yelled "Tacoma Police." Vol. 3RP 185. The arguing stopped and Dylan Moore peeked out through the window blinds. Vol. 3RP 186.

Officers directed him to open the window and front door. Because he did not have the key to unlock the door, officers directed him to come out through the open window. Vol. 3RP 186. He was quickly apprehended and moved to a patrol car. Vol. 3RP 188.

Believing there were other individuals in the house, officers maintained a sight line through the window and called them out. Vol. 3RP 189. Three people came out of the bedroom on the east side of the house: Alexis Arey, James Henry and Katere Norman. Vol. 3RP 189-90. Kelvin Tatum emerged from the west bedroom, which was later determined to belong to Mr. Moore and his partner, Andrea Lawless. Vol. 3RP 189;206.

The four individuals were told to get on the floor in the front room. Vol. 3RP 190. Ms. Arey told officers she had a key to the front door and she opened it for them. Id. Officers entered and individually removed the four from the home and detained them. Vol. 3RP 191.

During a protective sweep, Officer Welsh observed a rifle style firearm lying near the door in the west bedroom. Vol. 3RP 191. Officers also found a .44 magnum inside of a shoe box inside of a gym bag in the east bedroom. Vol. 2RP 100-103; Vol. 3RP 197. Officers later learned

that Tatum brought the gym bag into the home and Arey put it in the east bedroom. Vol. 2RP 152, 155.

Officer Miller testified that he observed Mr. Moore was intoxicated. Vol. 2RP 115. Prior to receiving Miranda warnings, the officer told him they were investigating a shooting incident. Vol. 1RP 35. Mr. Moore said, "That's not my fucking gun." Vol. 1RP 36. Later, after the officer learned a gun had been found in the home, he advised Mr. Moore of his Miranda rights. Id.

Mr. Moore told the officer that he rented the home from his stepfather and that a second room (the east bedroom) was rented to another person, James Henry. Vol. 1RP 36-37; Vol. 2RP 119. Upon learning that a gun had been found in the house, Mr. Moore stated numerous times that the gun did not belong to him; it belonged to James Henry. Vol. 1RP 37; Vol. 2RP 119;123.

Without giving exact quotes, the officer later testified that Mr. Moore was aware a gun was inside the home and that he had fired the weapon in the past. Vol. 2RP 120-21.

Mr. Moore testified at trial that Henry had moved in to the home about a month earlier, but had not paid any rent. Vol. 3RP 215. Moore had been gone during the day on March 10, 2013, and returned home around 8 p.m. Vol. 3RP 214. James Henry, Katere Norman and Alexis

Aray were already at the home when he got there. Id. Because he had been drinking, he ended up going to bed shortly after he arrived home. Vol. 3RP 216.

He awoke to the sound of gunshots. He then heard a car being parked. Vol. 3RP 216. The car was his 2001 Cadillac; Mr. Henry had borrowed it and parked it on the grass. Vol. 3RP 216; Vol. 2RP 140-41. He also testified that his house key was on the same key ring as the car keys and that was why he did not have a set of keys to open the front door when officers arrived. Vol. 3RP 217.

He saw Aray, Henry and Tatum come in to the house, and Norman come from the kitchen. Vol. 3RP 217. Mr. Moore said that he never actually saw the gun, but that he and Norman argued about why Norman was shooting a gun and why he brought a gun in to the house. Vol. 3RP 218. The argument became physical. Vol. 3RP 218.

Mr. Moore testified he told officers the gun did not belong to him. Vol. 3RP 220. He also testified that in response to the officer's questioning of whether he shot the gun, Mr. Moore said, "I told him I shot off a gun before"; not the gun. Vol. 3RP 220.

By contrast, Mr. Henry testified that he had not yet moved in to Mr. Moore's house, but stayed there approximately two weeks out of the month. Vol. 2RP 137-38. He said he arrived at the home earlier in the

day, left, and then returned about 10 p.m.; he was with Arey and Tatum. Vol. 2RP 139. As he arrived, he heard gun shots, got scared and ran to the front door. Vol. 2RP 140. Mr. Moore opened the front door, and Arey and Tatum followed him into the house. Vol. 2RP 144. He heard Norman and Mr. Moore argue; both had been drinking. Vol. 2RP 144-45. Along with Mr. Moore, three of the other individuals were also charged with unlawful possession of a firearm: Tatum for unlawful possession of the .22 Walther and Arey for unlawful possession of the .44 magnum. Vol. 3RP 205-06. Henry was also charged with unlawful possession of a firearm, the .44 magnum, but the charge was later dismissed. Vol. 1RP 25. The record was silent as to whether Norman was charged.

Without objection or exception, the court gave jury instruction number 10:

To convict the defendant of the crime of unlawful possession of a firearm in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 10th day of March, 2013, the defendant knowingly owned a firearm or had a firearm in his possession or control (.22 lr Walther Rifle);
- (2) That the defendant had previously been convicted of a felony, which is a serious offense; and
- (3) That the ownership or possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 32.

The court did not give a unanimity instruction regarding the alternative means of committing unlawful possession of a firearm, nor did the court submit a special verdict to the jury regarding the alternative means of committing unlawful possession of a firearm. CP 20-35; 43.

During deliberations, the jury sent one note to the court: "In reference to instruction 8, what is the definition of dominion and control over the premises when the premises are shared?" The jury was instructed to reread the instructions as a whole. CP 19.

After a jury trial, Mr. Moore was found guilty. CP 43. At sentencing, the court imposed a 36-month special drug offender sentencing alternative: with confinement for 18 months and an 18 month DOSA community custody. CP 63. Mr. Moore makes this timely appeal. CP 73-87.

III. ARGUMENT

- A. The State Failed To Present Sufficient Evidence Of Each Of The Alternatives Of The Crime Of Unlawful Possession Of A Firearm In The First Degree.

In reviewing a challenge to the sufficiency of the evidence, the Court views the evidence in the light most favorable to the State, and asks whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). Washington's unlawful possession of a firearm statute provides: "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." RCW 9.41.040.

The factors to consider when determining whether the legislature intended to define a single crime that may be committed by different means are: (1) the title of the act, (2) whether there is a readily perceivable connection between the various acts set forth, (3) whether the acts are consistent with and not repugnant to one another and (4) whether the acts may inhere in the same transaction. *State v. Arndt*, 87 Wn.2d 374, 379, 553 P.2d 1328 (1997). The alternative means, ownership, possession, or control, exist under the single title of unlawful possession of a firearm, and are not repugnant to one another, because proof of one does not disprove the other, there is a clear distinction between owning a firearm

and possessing or controlling a firearm. *See State v. Berlin*, 133 Wn.2d 541, 553, 947 P.2d 700 (1997); *State v. Arndt*, 133 Wn.2d at 383-84. The unlawful possession of a firearm in the first-degree statute is an alternative means statute. *State v. Holt*, 119 Wn.App. 712, 718, 82 P.3d 688 (2004), *overruled on other grounds by State v. Willis*, 153 Wn.2d 366, 103 P.3d 1213 (2005).

A fundamental constitutional right afforded a criminal defendant is that a jury must unanimously agree on guilt. Const. art. 1, § 21; *State v. Stephens*, 93 Wn.2d 186, 607 P.2d 304 (1980).

In an alternative means case, the threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence supports each of the alternative means submitted to the jury. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994); *State v. Smith*, 159 Wn.2d 778, 790, 154 P.3d 873 (2007). If the evidence is insufficient to present a jury question as to whether the defendant committed the crime by any one of the means submitted to the jury, the conviction will not be affirmed. *Ortega-Martinez*, 124 Wn.2d at 708. If one or more of the alternative means is not supported by substantial evidence, the verdict will stand only if the reviewing Court can determine that the verdict was based on only one of the alternative means and that substantial evidence supports that

alternative means. *State v. Rivas*, 97 Wn.App. 349, 351-52, 984 P.2d 432 (1999), *overruled on other grounds by State v. Smith*, 159 Wn.2d at 787.

Mr. Moore was charged and the jury here was instructed that to convict Mr. Moore of unlawful possession of a firearm in the first degree, the State was required to prove beyond a reasonable doubt: (1) That on or about the 10th day of March, 2013, that he knowingly owned a firearm or had a firearm in his possession or control (.22 lr Walther Rifle); (2) That the defendant had previously been convicted of a felony, which is a serious offense; and (3) That the ownership or possession or control of the firearm occurred in the State of Washington. CP 32.

The State did not specify which of the three alternative means it intended to rely in either the charging information or the jury instructions. The State presented no evidence that Mr. Moore owned the rifle at issue. He consistently denied that he owned the rifle and the State produced no witness who claimed he did own it. There is nothing in the record about officers locating or tracing a serial number or investigating the ownership of the rifle. And the parties stipulated there were no fingerprints on the weapon. The record is devoid of any evidence that Mr. Moore owned the rifle.

Mr. Henry was not the defendant in this case and Mr. Moore was not charged with being in unlawful possession of the .44 magnum. Yet, in

closing argument, the State's attorney focused a great deal of attention on the .44 magnum that was found in Mr. Henry's room and the application of Jury Instruction no. 10 to Mr. Henry. (Appendix A). In particular, the prosecutor argued that even though Henry was staying in the bedroom where the bag with the .44 magnum was found, had access to the room, testified that everything in the room belonged to him, and had the potential to exclude others from accessing that weapon, those factors alone did not establish constructive possession and thus, his case was dismissed. (Vol. 3RP 247-252). Mr. Moore argues that the same argument applies to him.

Mr. Moore contends that the sum total of the State's evidence to establish that he had possession or control of the .22 Walther was the fact that it was found propped up against the wall in a room that belonged to him and his girlfriend in a home he was renting. Mr. Moore had given house keys to at least two other people and both Mr. Moore and Mr. Henry testified that Mr. Norman was in the home that evening.

The evidence from officer testimony was that Mr. Moore was the first individual who was removed from the home; and more importantly, there was no testimony that Mr. Moore came out of the bedroom, but rather, that Mr. Tatum was the person who emerged from the bedroom where the rifle was later found. Further, Mr. Henry testified that the second weapon, found in Mr. Tatum's gym bag, was found in a room that

did not belong to Mr. Moore. The evidence presented merely established that other individuals had keys to the home, that Tatum had complete access to Mr. Moore's room, and that Tatum had brought the .44 magnum into the home without Mr. Moore's knowledge.

This becomes especially significant in light of the jury's question to the court: "In reference to instruction 8, what is the definition of dominion and control over the premises when the premises are shared?" Mere proximity to a firearm is insufficient to establish dominion and control. *State v. Chouinard*, 169 Wn.App. 895, 899, 282 P.3d 117 (2012). And mere knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession. *State v. Hystad*, 36 Wn.App. 42, 49, 671 P.2d 793 (1983).

In *Chouinard*, this Court traced a line of cases in which Courts have analyzed the issue of constructive possession, and dominion and control. *Chouinard*, 169 Wn.App. at 899. *State v. Bowen*, 157 Wn.App. 821, 239 P.3d 1114 (2010), evidence was sufficient where the defendant owned, drove and solely occupied a truck containing a firearm in a bag next to his driver's seat. *State v. Turner*, 103 Wn.App. 515, 13 P.3d 234 (2000), evidence showed that Turner had the gun near him in his truck, he knew of its presence, was able to reduce it to his own possession, and that he owned and drove the truck in which the firearm was found. By

contrast, in *State v. Cote*, 123 Wn.App. 546, 96 P.3d 410 (2004), even though the State presented evidence that the defendant had been in proximity to the contraband, and touched it, the evidence was insufficient to establish dominion and control. And finally, *State v. George*, 146 Wn.App. 906, 193 P.3d 693 (2008), in which the Court reversed the conviction because the State did not prove constructive possession of the contraband. Even though Troopers found drug paraphernalia in the exact area George had been sitting, the reviewing Court held there was insufficient evidence because George's mere proximity to the paraphernalia and knowledge of its presence was insufficient to convict him of constructive possession. *Id.* at 923.

Similarly, here, even viewing the evidence in a light most favorable to the State, the evidence was insufficient for any rational trier of fact to conclude beyond a reasonable doubt that Mr. Moore owned the firearm at issue.

Mr. Moore argues that it is possible that some jurors may have convicted Mr. Moore because they believed he owned the firearm, others basing a verdict on possession and yet others basing a decision on the alternative means of control. Having failed to produce the requisite evidence necessary to prove beyond a reasonable doubt all the alternatives and the omission of a unanimity instruction or special verdict form, this

conviction should be reversed. Where the evidence is insufficient, as a matter of law, the remedy is dismissal with prejudice. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Moore respectfully asks this Court to reverse his conviction and dismiss the charges with prejudice.

Submitted this 21st day of April, 2014.

s/ Marie Trombley
WSBA 41410
Attorney for Dylan Moore
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net

APPENDIX A

1 and the Court, but you're bound by the law.

2 So I want to talk to you briefly about
3 James Henry. He indicated to you that he was staying in
4 this east bedroom right here, and when officers came in the
5 house, they found a bag in that bedroom. The bag wasn't
6 open. The bag was closed. It was the blue bag I showed
7 you, and that blue bag contained some things. What did the
8 officers tell you? The officers told you,
9 Officer Waubanasum told you that in the blue bag was a pair
10 of socks and a pair of shoes size 12. The bag was closed.
11 He was initially arrested, but he was set free. And you
12 might say, well, it was in his room, and he said that all
13 his stuff was in that room.

14 How did that bag get in here? He testified that
15 his girlfriend placed the bag and took the bag from a man
16 that he arrived at the house with, and he said that person
17 was Kelvin Tatum. He said he and his girlfriend and Kelvin
18 Tatum arrived at the house right when the shooting was
19 happening, and he says that during a ruckus, his girlfriend
20 took the bag from Mr. Tatum and put it in his room. Whether
21 you believe that or not, but obviously when you look at him,
22 you see the long hair, you see the tattoc on his neck, and
23 you see his overall demeanor, right? This is a kid, he
24 said, look, I grew up on the hill, I didn't finish school,
25 but this is what I'm saying. That gun is not mine. That

1 .44 pistol was not mine. I didn't know about it.

2 So the question for the Court is and for the state
3 is in looking at him and in looking at the facts
4 surrounding that, I'm going to call your attention to
5 Instruction No. 10. Now, when you apply this analysis to
6 James Henry with regards to that .44 magnum, and that's a
7 scary gun, a big gun, .44-caliber pistol, huge barrel. But
8 that being said, and even though he has the tattoos on his
9 neck, we have to look at this analysis right here and look
10 at it. Did the defendant knowingly own or and possess,
11 control the firearms. So we have to look. Possess or
12 control, what does that mean? What does that mean?

13 And now you're forced to turn back to Jury
14 Instruction No. 7 -- I mean No. 8. I'm sorry, No. 8. And
15 our Court provides a definition, and this is important when
16 you ask, well, why were these other people let free? Why
17 weren't they charged? Well, you have to look at the
18 elements and see if the state can prove them beyond a
19 reasonable doubt. So possession means having a firearm in
20 one's custody or control. It may be actual or constructive.
21 Actual possession occurs when the firearm is in the actual
22 physical custody of the person charged with possession. So
23 we're not talking actual physical possession, because the
24 state hasn't presented any evidence that a witness observed
25 anyone with the .44 or with the rifle.

1 So now we go to the constructive possession, and
2 it says this: Constructive possession occurs when there is
3 no actual physical possession, but there is dominion and
4 control over the item, and such dominion and control may be
5 immediately exercised. Okay? Now, we're thinking about
6 Mr. Henry. We're saying that gun is in his bedroom, and if
7 that's his bedroom, and he has access -- he's in the house
8 and he has access to that bedroom, he could take immediate
9 possession of that gun.

10 So now we look and we say proximity alone without
11 proof of dominion and control is insufficient to establish
12 constructive possession, right? So now we're saying, well,
13 hold on. Just because he's in this house that doesn't mean
14 necessarily that he had constructive possession, because it
15 says proximity alone is not enough. So everyone in that
16 house, just because they're in that house, that fact alone
17 doesn't equate to constructive possession. Dominion and
18 control need not be exclusive to support a finding of
19 constructive possession. So what is the Court telling you?
20 The Court is saying just because you're in the house, that
21 doesn't equate to constructive possession, and it says,
22 well, even though there's multiple people, it doesn't
23 matter. It doesn't have to be exclusive. That means that
24 all of us could possess a certain item under particular
25 facts.

1 Let's keep reading. In deciding whether the
2 defendant had dominion and control over an item, you are to
3 consider all of the relevant circumstances of the case. The
4 fact that you may consider, among others, include whether
5 the defendant had immediate ability to take actual
6 possession of the item. Well, we know Henry could have went
7 there and picked up the gun. It was in his room, he was in
8 the house. Whether the defendant had the capacity to
9 exclude others from the possession of the item. Again, he
10 was in the house. If he is in his house, he didn't prevent
11 someone from entering the house and take possession of the
12 gun, so we say okay. Whether the defendant had dominion and
13 control over the premises where the item was located. Well,
14 you begin to argue, did he have dominion and control? Well,
15 he said that was his room, he lived in this residence part
16 time, sometimes with his mom, but can we say dominion and
17 control? It says no single one of these factors necessarily
18 controls decision. Okay.

19 So now we go back to the to-convict instruction
20 and we look at it. We say James Henry was in the room and
21 we put that analysis together. We said, look, he was in the
22 room, he lived in the room in the house, he had the ability
23 to exclude others from accessing the gun, and he had
24 dominion and control over the premises because he lived
25 there. Okay? So the question is, did he know it was in the

1 bag? When you look at No. 1, it says did the defendant
2 knowingly. So we've established dominion and control,
3 constructive possession, but does he know it's there? Does
4 he know the item is there? Can we prove it? Well, we
5 looked in the bag and you saw me put the shoe next to his
6 shoe and it indicated those weren't his shoes. So can the
7 state prove to you beyond a reasonable doubt that he knew
8 what was inside of a bag that had a pair of shoes that did
9 not fit his feet. That would be the question if we charged
10 him and brought him into Court today.

11 The second question is that the defendant had
12 previously been convicted of a felony which is a serious
13 offenses. Do you have any evidence that he was a felon,
14 that he was convicted of a serious offense? No. Mr. Henry
15 is not here. He's not charged. And the ownership or
16 possession or control of a firearm occurred in the state of
17 Washington. Well, we know if we met the burden, if we could
18 prove that he knew the gun was in that bag, if we could
19 prove that he was a convicted felon, we know it happened in
20 Washington. But we can't prove the first two elements
21 against James Henry. So someone could argue the government.
22 Because I'm no longer James. Some people call me the
23 government. So if I'm the government, let's just use that.
24 The government, right, and the police officers, they
25 arrested James Henry. But his case, he was dismissed. He

1 was free. He walked out of the courtroom. So is that the
2 government making a mistake or is that the government
3 getting it right? You make that decision.

4 When you look at this analysis and apply it to the
5 individuals in the house, and there are other people in the
6 house. Did Terry Norman, Alexis Arey, can you prove these
7 elements? Can you prove beyond a reasonable doubt that they
8 had been previously convicted of a felony? You have to
9 prove all these elements and we don't have evidence before
10 you that tells you either way, right? Do we know if any of
11 them could fit the shoes? No. Do we know if anyone handled
12 the bag? We had the testimony that Mr. Tatum handled the
13 bag, right? But do we know if he's a felon?

14 So when you think about the analysis about what
15 about all these other people, there are other factors, and
16 you have to look at this case in isolation, but I want to
17 address that because one can argue, whoa, a lot of people
18 got arrested. Well, we don't know what happened in those
19 cases. We don't know what was going on with them. That's
20 not relevant. But it's important that you look at the
21 analysis in this case.

22 So the Court instructed you that you are the sole
23 judge of credibility, and you're going to judge the
24 credibility of all the officers you heard from;
25 Officer Miller, Officer Waubanascum, and Officer Welsh.

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Dylan Moore, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's brief was mailed by USPS, postage prepaid, first class, on April 21 2014, to:

Dylan W. Moore DOC # 344801
Monroe Correctional Center
PO Box 777
Monroe, WA 98272

And by electronic service by prior agreement between the parties
to:

EMAIL: PCpatcecf@co.pierce.wa.us
Kathleen Proctor
Pierce County Prosecuting Attorney's Office

s/ Marie Trombley
WSBA 41410
Attorney for Dylan Moore
PO Box 829
Graham, WA 98338
509-939-3038
marietrombley@comcast.net

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