

**NO. 454696-II**

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

DYLAN WAYNE MOORE, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable James Orlando

No. 13-1-01004-8

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether RCW 9.41.040(1) is an alternative means offense when the statute is written in the disjunctive and the underlying conduct required to commit the offense does not vary.

2. Whether, assuming *arguendo* that RCW 9.41.040(1) is an alternative means offense, the State adduced sufficient evidence to show that defendant owned, possessed, and controlled the rifle found in his home.

B. STATEMENT OF THE CASE.

1. Procedure

On March 11, 2013, the Pierce County Prosecuting Attorney (State) charged Dylan Moore, defendant, with one count of first degree unlawful possession of a firearm. CP 1. Trial began on August 27, 2013, before the Honorable James Orlando. 2RP 77.<sup>1</sup> Defendant stipulated that he had been previously convicted of a serious offense, that the rifle charged in this case was operable, and that there were no fingerprints found on it. CP 36-37; 2RP 173-74.

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<sup>1</sup> The State will refer to the verbatim report of proceedings by the volume number followed by the page number.

At the end of the State's case, defendant made a motion to dismiss the charge, arguing the evidence was insufficient show he possessed the rifle. 3RP 208. The court denied defendant's motion, noting that "this particular weapon was not tucked away...it was laying in plain sight in this bedroom that had been tied to this defendant..." 2RP 211.

On August 29, 2013, the jury found defendant guilty as charged. CP 43; 3RP 287. The court granted defendant a Special Drug Offender Sentencing Alternative, and imposed 18 months confinement with 28 days credit for time served, followed by 18 months DOSA community custody. CP 63; 3RP 298.

On October 10, 2013, defendant filed a timely notice of appeal. CP 73.

## 2. Facts

On March 10, 2013, Tacoma Police officers Dean Waubanasum and Jimmy Welsh were out on an unrelated call when they heard approximately seven gunshots from what sounded like a small caliber rifle in the nearby area. 2RP 79-80. As the officers approached the direction of the gunshots they heard approximately four more shots. 2RP 80. The officers determined the shots had come from defendant's residence. 2RP 81-82.

As they approached the house they heard screaming and a physical struggle coming from inside. 2RP 81-82.

Officer Welsh went up to the house, knocked loudly, and yelled "Tacoma Police." 3RP 185. The arguing immediately stopped. 3RP 185. Officer Welsh called out several more times until defendant eventually peeked through the blinds of the window by the door before quickly retreating back into the house. 3RP 186. Officer Welsh called for defendant to come out. 3RP 186-87. Defendant returned to the window and claimed that he did not have keys to open the door. 3RP 186-87. Officer Welsh ordered defendant to exit through the window, and then detained him in the back of a patrol car. 3RP 187-88.

Officer Welsh then went to the window and, maintaining a line of sight into the living room, called for the rest of the occupants to come out of the house. 3RP 189. James Henry, Katere Norman, and Alexis Arey came out from the east bedroom. 3RP 189-90. Kelvin Tatum came out of the west bedroom. 3RP 189-90. Officer Welsh directed the four individuals to lay face down on the floor in the front room. 3RP 190. Alexis Arey told Officer Welsh that she knew where the keys to the door were and opened the front door. 3RP 190. Officers entered the residence, removed the occupants, and separately detained them. 3RP 191.

The officers proceeded to do a protective sweep of the residence, looking for weapons or any other persons. 3RP 191. Officer Welsh noticed a .22 caliber rifle in the west bedroom of the house, which was later identified as defendant's bedroom. 2RP 138; 3RP 191-92, 230. The rifle was laying on the floor inside the bedroom, in between the closet and the bedroom door. 3RP 191. The rifle was loaded; there was one .22 shell in the chamber and several more shells in the clip. 3RP 193.

As Officer Welsh was checking the outside of the house, he noticed several bullet holes in the detached garage. 3RP 95. He observed a total of three .22 caliber long rifle shells by the back door of the residence; two were inside of the house and one was outside. 3RP 195. Officers also discovered a loaded .44 magnum handgun in a bag in the east bedroom of the house. 2RP 104; 3RP 197. Tatum had brought the bag into the house and directed Arey to put it in the east bedroom. 2RP 151-52, 155-56.

Tacoma Police Officer Steven Miller detained defendant while the other officers were clearing the residence. 2RP 115. Officer Miller noticed that defendant was intoxicated. 2RP 115. Officer Miller detected a strong smell of alcohol emitting from defendant's breath and body. 2RP 115. Officer Miller told defendant that the police were investigating a shooting in the area, to which defendant immediately replied "that's not my gun."

2RP 120. Officer Miller was surprised at defendant's reaction because he had not mentioned any specific gun at that point. 2RP 120.

Upon further questioning, defendant admitted that he knew the rifle was inside the residence. 2RP 120. He also told Officer Miller that the residence was his residence. 2RP 119. Defendant also admitted that he had fired the rifle in the past. 2RP 121. Defendant was subsequently placed under arrest. 2RP 1108-19; 121.

James Henry, defendant's friend who was present during the incident, testified at trial. 2RP 136. Henry stated that he had planned to move into defendant's house in the upcoming weeks, but had not yet done so. 2RP 138. Henry had yet to sign a rental agreement and did not have keys to the house. 2RP 138. On the night of March 10, 2013, Henry arrived at defendant's residence along with Alexis Arey and Kelvin Tatum at approximately 10:00 p.m. 2RP 140-41. As Henry pulled up to defendant's residence, he heard a gunshot and ran to the house. 2RP 140-41. Henry knocked on the door and waited for defendant to open it as Henry did not have a key to the residence. 2RP 142. Defendant opened the door and was clearly intoxicated and giggling. 2RP 142. Henry saw Katere Norman inside the house, and noticed that he was intoxicated as well. 2RP 144.

Tatum brought a backpack into the house and asked Arey to put it in the east bedroom. 2RP 151-52, 155-56. Unbeknownst to Henry, the backpack contained a .44 magnum handgun. 2RP 104; 3RP 197. Henry testified that Tatum did not bring a rifle into the residence. 2RP 148.

Henry and Arey went directly into the east bedroom. 2RP 143. Shortly thereafter, Henry heard an argument ensue between defendant and Norman, following which police arrived at the residence. 2RP 144.

At trial defendant admitted that the west bedroom was his bedroom and that he knew there were guns in the house. 3RP 230, 232.

C. ARGUMENT.

1. RCW 9A.040(1) IS NOT AN ALTERNATIVE MEANS OFFENSE AS THE STATUTE IS WRITTEN IN THE DISJUNCTIVE AND NOT IN SUBSECTIONS AND THE UNDERLYING CONDUCT REQUIRED TO COMMIT THE OFFENSE DOES NOT VARY.

The State acknowledges that *State v. Holt*, 119 Wn. App. 712, 82 P.3d 688 (2004), *overruled on other grounds by, State v. Willis*, 153 Wn.2d 366, 103 P.3d 1213 (2005) holds that unlawful possession of a firearm is an alternative means statute. However, under subsequent case law, the continued validity of the holding is questionable.

"An alternative means crime is one 'that provides that the proscribed criminal conduct may be proved in a variety of ways.'" *State v.*

*Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) citing *State v. Smith*, 159 Wn.2d 778, 784, 154 P.3d 873 (2007). "The legislature has not statutorily defined alternative means crimes, nor specified which crimes are alternative means crimes. This is left to judicial determination." *Id.* at 769. "There is simply no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime. Instead, each case must be evaluated on its own merits." *State v. Klimes*, 117 Wn. App. 758, 769, 73 P.3d 416 (2003).

Washington cases suggest some guidelines for analyzing the alternate means issue. Merely stating methods of committing a crime in the disjunctive do not mean that there are alternative means of committing a crime. *State v. Peterson*, 168 Wn.2d at 770. "A statute divided into subparts is more likely to be found to designate alternative means." *State v. Lindsey*, 177 Wn. App. 233, 241, 311 P.3d 61 (2013). However, "a defendant may not simply point to an instruction or statute that is phrased in the disjunctive in order to trigger a substantial evidence review of her conviction." *State v. Smith*, 159 Wn.2d 778, 793, 154 P.3d 873 (2007).

"When the crime charged can be committed by more than one means, the defendant does not have a right to a unanimous jury determination as to the alleged means used to carry out the charged crime or crimes *should the jury be instructed on more than one of those means*...But, in order to safeguard the defendant's constitutional right to a

unanimous verdict as to the alleged crime, substantial evidence of each of the *relied-on* alternative means must be presented." *State v. Peterson*, 168 Wn.2d 763, 769, 230 P.3d 588 (2010) citing *State v. Smith*, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (emphasis theirs).

In *State v. Peterson*, 168 Wn.2d 763, our State Supreme Court discussed the characteristics of what constitutes an alternative means crime. The court held that the crime of failure to register<sup>2</sup> as a sex offender is not an alternative means crime. The Court compared it to that of the crime of theft,<sup>3</sup> noting:

The alternative means available to accomplish theft describe distinct acts that amount to the same crime. That is, one can accomplish theft by wrongfully exerting control over someone's property or by deceiving someone to give up their property. In each alternative, the offender takes something that does not belong to him, but his conduct varies significantly. In contrast, the failure to register statute contemplates a single act that amounts to failure to register: the offender moves without alerting the appropriate authority. His conduct is the same—he either moves without notice or he does not. The fact that different deadlines may apply, depending on the offender's residential status, does not change the nature of the criminal act: moving without registering.

*State v. Peterson*, 168 Wn.2d at 770.

Similarly, in order to be guilty of the crime of unlawful possession of a firearm the statute requires the defendant acquire a firearm. This can

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<sup>2</sup> RCW 9A.44.130

<sup>3</sup> RCW 9A.56.020

either be done through ownership of the firearm or through possession or control over the firearm. However, as the Supreme Court noted in *Peterson*, the defendant's underlying conduct ultimately amounts to a single act: he either obtains a firearm or he does not. The exact method by which he does so does not vary significantly and thus does not constitute alternative means.

Furthermore, RCW 9.41.040(1) is written as follows:

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.

The construction of the statute does not include subsections, which is usually indicative of an alternative means crime, but is rather written in the disjunctive, which does not generally trigger an alternative means analysis. See *State v. Smith*, 159 Wn.2d at 793; *State v. Lindsey*, 177 Wn. App. at 241.

The fact that first degree unlawful possession of a firearm is not an alternative means offense is further evidenced by defendant's deliberate decision not to offer a jury unanimity instruction. 3RP 234. Prior to the court's instruction to the jury, defendant commented in regard to jury unanimity, WPIC 4.26:

...I had looked at and debated offering, but I don't believe I need to offer one. I want to make a record that I'm making that decision. I'm making the decision not to offer it...I had looked and had a discussion with the state about WPIC 4[.]26. It just doesn't seem like it fits or is necessary with the state having elected.

3RP 234-35.

Defendant's conscious and deliberate decision not to request a jury unanimity instruction further demonstrates that the statute does not contemplate alternative means of committing the crime of unlawful possession of a firearm, so much so that defendant himself did not think it necessary to instruct the jury as such during trial.

As such, this court should decline to extend the reasoning in *Holt* to this case and find that first degree unlawful possession of a firearm is not an alternative means offense.

2. ASSUMING ARGUENDO THAT RCW 9.41.040(1) IS AN ALTERNATIVE MEANS OFFENSE, THE STATE ADDUCED SUFFICIENT EVIDENCE TO SHOW THAT DEFENDANT OWNED, POSSESSED, AND CONTROLLED THE FIREARM THAT WAS FOUND IN HIS BEDROOM IN HIS HOME OF WHICH HE WAS THE SOLE OCCUPANT OF.

Even under the analysis of *Holt*, the State provided sufficient evidence of all three alternative means to show that defendant unlawfully possessed the rifle found in his home.

In an alternative means case, there is no requirement for express

jury unanimity as to each alternative means of a single crime so long as an inference of unanimity is present. *See State v. Fortune*, 128 Wn.2d 464, 475, 909 P.2d 930 (1996); *State v. Ortega-Martinez*, 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). The threshold test on review is whether sufficient evidence exists to support each of the alternative means presented to the jury. *State v. Smith*, 159 Wn.2d 778, 790, 154 P.3d 873 (2007).

The State bears the burden of proving each and every element of a criminal offense beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). In considering

this evidence, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

- a. Evidence was sufficient to show that defendant owned the rifle found in his bedroom.

In the present case, Defendant was charged with unlawful possession of a firearm for the .22 Walther Rifle found in his home. CP 32. The rifle was found in defendant's house, and defendant admitted to police officers that it was in fact his residence. 2RP 119. The rifle was found in defendant's bedroom, laying in plain view on the floor in between the closet and the bedroom door. 3RP 191. The rifle was not hidden away in defendant's bedroom, but was rather displayed in such a position that would support a conclusion that defendant knew of its presence. The rifle was loaded with .22 caliber ammunition. 3RP 193, 195. The same type of ammunition casings were found both inside and outside of defendant's residence by the back door. 3RP 193, 195. Defendant's detached garage also had "fresh damage" bullet holes. 2RP 97. Defendant admitted to police that he knew the rifle was inside the house and that he had previously handled and fired the rifle. 2RP 120-21. Defendant also made a spontaneous statement to Officer Miller, stating "that's not my gun,"

without being questioned about a gun. These are actions from which a rational trier of fact could infer a consciousness of guilt and thus reasonably conclude that defendant owned the firearm.

By challenging the sufficiency of the evidence, defendant admits the truth of the State's evidence and to all reasonable inferences that could be drawn from it. *State v. Goodman*, 150 Wn.2d at 781; *State v. Salinas*, 119 Wn.2d at 201. Thus, defendant admits that the rifle was found in his residence, over which he had dominion and control. Defendant's argument regarding Henry and the possession of another gun is completely irrelevant. The only issue before this Court is the sufficiency of the evidence against defendant, not Henry.

When looking at the evidence in a light most favorable to the State, the circumstantial and direct evidence adduced at trial is sufficient to show that defendant owned the rifle found in his home.

- b. Evidence was sufficient to show that defendant had possession: dominion and control over the rifle.

Possession may be actual or constructive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A defendant actually possesses an item if he has physical custody of it; he constructively possesses the item if he has dominion and control over it. *Id.* at 333.

A person has dominion and control of an item if he has immediate access to it. *State v. Jones*, 146 Wn.2d at 333. Thus, the court looks to the various indicia of dominion and control with an eye to the cumulative effect of a number of factors. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). While mere proximity is not enough to establish possession, *State v. Hagen*, 55 Wn. App at 499, courts have recognized a number of factors in establishing dominion and control, including dominion and control over the *location or premises where the prohibited item is found*, proximity, the ability to exclude others, and the ability to take immediate or actual possession. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (affirming dominion and control over the premises as a factor) (emphasis added); *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007) (holding that dominion and control is one factor from which constructive possession may be inferred); *State v. Edwards*, 9 Wn. App. 688, 690, 514 P.2d 192 (1973) (considering proximity as one factor and exclusion of others as another factor); *State v. Wilson*, 20 Wn. App. 592, 596, 581 P.2d 592 (1978) (recognizing ability to exclude as a factor); *State v. Hagen*, 55 Wn. App. at 499 (identifying both proximity and the ability to reduce an object to actual physical control as factors).

No single factor 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. *Id.* at 501.

Here, defendant had immediate control over the premises where the rifle was found; it was located in his bedroom in the house of which he was the sole occupant. Defendant had the ability to exclude others from accessing the rifle, and had the ability to take it into his immediate and actual control because it was found in his own bedroom which he exclusively occupied. Based on these facts, a jury could reasonably conclude that defendant constructively possessed the firearm.

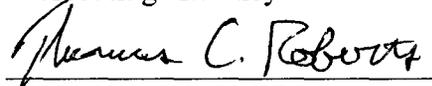
D. CONCLUSION.

The State adduced sufficient evidence to show that defendant owned, possessed, and controlled the rifle found on the floor of his bedroom in his home of which he was the sole occupant of. For the

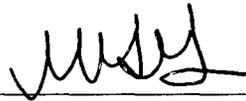
foregoing reasons, the State respectfully requests this court to affirm defendant's conviction and sentence.

DATED: JUNE 30, 2014.

MARK LINDQUIST  
Pierce County  
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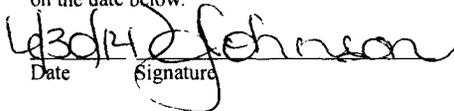
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Miryana Gerassimova  
Rule 9

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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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**June 30, 2014 - 2:43 PM**

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