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Division II
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No. 49534-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JERMOHNN E. GORE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. The State has not established the warrantless seizure of the Cadillac De Ville was lawful.

Contrary to the State's argument, Gore preserved his challenge to the warrantless seizure of the Cadillac De Ville. The State did not bear its burden to show the seizure of the car was lawful because it did not present evidence to prove the officers had probable cause to believe the car contained contraband or evidence of a crime at the time of the seizure. Thus, it is immaterial whether the officers had probable cause at the time they obtained the search warrant.

Prior to trial, Kitt's attorney moved to suppress the items found in the search of the DeVille. RP 269-88. Counsel expressly argued the warrantless seizure of the car itself was unlawful. RP 288. That was because, in part, the car was not associated with the crime. RP 273, 288. Counsel argued the officers did not have probable cause to seize the car *at the time of the seizure*. RP 270-88. Counsel was not challenging the search warrant but the warrantless seizure of the car which occurred *before* the officers applied for a search warrant. As argued in the opening brief, the warrantless seizure of an automobile must either be supported by probable cause *at the time of the seizure* or

must fall under another narrow, well-established exception to the warrant requirement.

Both Gore and Krentkowski joined in Kitt's motion to suppress the items found in the car. RP 269. Therefore, Gore's challenge to the unlawful seizure of the car is preserved and this Court must reach it.

Regardless of the validity of the search warrant that the police later obtained, the State did not prove the warrantless seizure of the car itself was lawful.

The State bears the burden to prove that the warrantless impoundment of a vehicle was lawful. State v. Houser, 95 Wn.2d 143, 148, 622 P.2d 1218 (1980). Of course, the State must present the requisite evidence to the trial court at the time the court hears the suppression motion. The question on review is whether substantial evidence in the record supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. State v. Z.U.E., 178 Wn. App. 769, 778, 315 P.3d 1158 (2004), aff'd, 183 Wn.2d 610, 352 P.3d 796 (2015).

Therefore, this Court must reject the State's attempt to rely on a later opinion from this Court entered in another case. That opinion is

not part of the record in this case and does not sustain the State's burden to prove that the warrantless seizure *in this case* was lawful.

As argued in the opening brief, the evidence in the record of this case is not sufficient to sustain the State's burden.

The State relies upon State v. Huff, 64 Wn. App. 641, 826 P.2d 698 (1992) to argue that the police may impound a vehicle for the amount of time necessary to obtain a search warrant. SRB at 19. But that case is distinguishable because there the officer had probable cause to search the vehicle at the time it was impounded. Id. at 648-51. The officer was aware of sufficient facts and circumstances to cause a reasonable person to believe the car contained methamphetamine. Id. at 648-49. In other words, he could have immediately searched the car without a warrant. Id. at 649. Thus, he was authorized to impound the car for the amount of time necessary to obtain a search warrant. Id. at 650-51.

Here, by contrast, the State did not prove the officers were aware of sufficient facts and circumstances *at the time they seized the Cadillac* to believe it contained contraband or evidence of a crime. The warrantless seizure of the Cadillac was unlawful and the evidence found in the car must be suppressed.

2. Gore’s constitutional right to a unanimous jury verdict was violated because it is possible the jurors did not unanimously agree he possessed a particular firearm.

The State cites no specific authority for the proposition that a unanimity instruction is not required when a person is charged with a single count of unlawful possession of a firearm and the State presents evidence that he possessed multiple firearms. To the contrary, if it is possible some jurors could rely on one firearm and others a different firearm, a unanimity instruction is necessary in order to safeguard the constitutional right to a unanimous jury verdict.

“The determination of whether a unanimity instruction was required turns on whether the prosecution constituted a ‘*multiple acts* case.’” State v. Furseth, 156 Wn. App. 516, 520, 233 P.3d 902 (2010) (quoting State v. Bobenhouse, 166 Wn.2d 881, 892, 214 P.3d 907 (2009)) (emphasis in Furseth). “A multiple acts prosecution occurs when ‘several acts are alleged and any one of them could constitute the crime charged.’” Furseth, 156 Wn. App. at 520 (quoting State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988)).

In State v. Hanson, 59 Wn. App. 651, 656-57, 800 P.2d 1124 (1990), this Court set forth a three prong analysis for determining whether a unanimity instruction is required. First, what must be proven

under the applicable statute? Is it a single event, such as a burglary or robbery, or a continuing course of conduct, such as operating a prostitution enterprise? Id.

Second, what does the evidence disclose? The Court must view the evidence in the light most favorable to the proponent of the instruction. Id.

Third, does the evidence disclose more than one violation of the statute? This requires a comparison of what the statute requires with what the evidence proves. Id. If the evidence discloses two or more violations, then a unanimity instruction is required. Id.

Under this analysis, it is apparent a unanimity instruction was required in this case. The unlawful possession of a firearm statute criminalizes a single event, not a continuing course of conduct. The statute expressly provides: “Each firearm unlawfully possessed under this section shall be a separate offense.” RCW 9.41.040(7). Thus, each firearm possessed is a single event. Although the possession of a single firearm over time may be a continuing course of conduct, each separate firearm possessed is a single, separate event. Possession of multiple firearms at the same time therefore cannot be a continuing course of conduct.

Here, the State presented evidence that Gore possessed two firearms at the same time. Each firearm possessed was a single event. Therefore, a unanimity instruction was required. Hanson, 59 Wn. App. at 656-57.

Division One's decision in Furseth, 156 Wn. App. 516, supports this analysis. There, Furseth was charged with one count of possessing depictions of minors engaged in sexually explicit conduct in violation of former RCW 9.68A.070.¹ Id. At trial, multiple images found on Furseth's computer were introduced into evidence. Id. at 518-19. In deciding whether a unanimity instruction was required, the court relied on the Washington Supreme Court's decision in State v. Sutherby, which held that the unit of prosecution was each "possession," not each image possessed. Furseth, 156 Wn. App. at 520-21 (citing State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009)). In light of the unit of prosecution, the court concluded this was not a "multiple acts" case because Furseth could be convicted of only a single criminal act, i.e., a single possession regardless of the number of images possessed. Id. at 521-22.

¹ The statute has since been amended to clarify that "[f]or the purposes of determining the unit of prosecution under this subsection, each depiction or image of visual or printed matter constitutes a separate offense." RCW 9.68A.070(1)(c).

Here, unlike in Furseth, Gore *could* be convicted of multiple acts based on the evidence presented. Each firearm a person unlawfully possesses is a separate criminal act. RCW 9.41.040(7). Because two acts were alleged and either one of them could constitute the crime charged, a unanimity instruction was required. Furseth, 156 Wn. App. at 520; Kitchen, 110 Wn.2d at 411.

For these reasons, the drug possession cases cited by the State do not apply. SRB at 45. Like the crime of possession of child pornography under former RCW 9.68A.070, the crime of possession of a controlled substance, or possession of a controlled substance with intent to deliver, criminalizes a single “possession” regardless of the quantity of drugs involved. See RCW 69.50.401; RCW 69.50.4013. Thus, when a person possesses a quantity of drugs at the same time, only a single criminal act occurs, even if the drugs are divided and found in different places. See, e.g., State v. Love, 80 Wn. App. 357, 363, 908 P.2d 395 (1996) (defendant charged with one count of possession with intent to deliver after five rocks of cocaine found on his person and forty more found in his residence; unanimity instruction not required because evidence established “a continuing course of conduct involving an ongoing enterprise with a single objective”); State

v. Fiallo-Lopez, 78 Wn. App. 717, 726, 899 P.2d 1294 (1995) (defendant charged with one count of cocaine delivery after he provided a “small sample” at one site and then delivered “significantly larger amount” at different location; unanimity instruction not required because defendant’s acts were part of a “continuing course of conduct”).

It does not make sense to say that a person’s unlawful possession of multiple firearms at the same time “serves the same objective.” SRB at 45-47 (citing State v. Locke, 175 Wn. App. 779, 307 P.3d 771 (2013) (holding in prosecution for threats against the governor that three communications sent within four minute time span constituted a continuous course of conduct because they “served the same objective of communicating” a single threat to the governor); State v. Crane, 116 Wn.2d 315, 330, 804 P.2d 10 (1991) (multiple acts of assault committed over two-hour time period resulting in fatal injury constitute continuing course of conduct)).

Unlike the kinds of crimes referenced by the State, such as assault or making threats against the governor, the crime of unlawful possession of a firearm does not involve any purpose or “objective.” The only *mens rea* for the crime is that the defendant “knowingly”

possessed the firearm. State v. Anderson, 141 Wn.2d 357, 365-66, 5 P.3d 1247 (2000). The State need not show the defendant had any intent or purpose in possessing or using the firearm. Regardless of whether the defendant intended to use multiple firearms for a single purpose, each firearm unlawfully possessed constitutes a separate crime.

Finally, contrary to the State's suggestion, the multiple firearms do not constitute alternative means. SRB at 47. The statutory alternative means for the crime of unlawful possession of a firearm are that the defendant (1) owns, (2) possesses, or (3) controls a firearm. RCW 9.41.040(1)(a); State v. Holt, 119 Wn. App. 712, 718, 82 P.3d 688 (2004), overruled in part on other grounds by State v. Easterlin, 126 Wn. App. 170, 107 P.3d 773 (2005).

Here, the jury was instructed it must find Gore knowingly had a firearm "in his possession or control." CP 364. "Possession or control" are the alternative means, not the multiple firearms.

B. CONCLUSION

For the reasons provided above and in the opening brief, the warrantless seizure of the Cadillac De Ville was unlawful and the evidence found in the car as a direct result of that seizure must be

suppressed. Also, the conviction for unlawful possession of a firearm must be reversed because Gore's constitutional right to a unanimous jury verdict was violated.

Also, as the State acknowledges, Gore must receive a new sentencing hearing that complies with Miller v. Alabama, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012) and the Washington cases applying that decision.

Finally, for the reasons provided in the opening brief, the conviction for second degree murder must be vacated because it violates Gore's constitutional right to be free from double jeopardy.

Respectfully submitted this 29th day of June, 2018.

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