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Division II
State of Washington
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COA NO. 49910-0-II (cons. w/ 49914-2-II)

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

STATE OF WASHINGTON,

Respondent,

v.

CARL E. HOGAN,

Appellant.

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

The Honorable Bryan E. Chushcoff, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE STATE'S BRIEF DOES NOT COMPLY WITH THE RULES OF APPELLATE PROCEDURE.

RAP 10.3(a)(5) requires that the "statement of the case" section of the brief be "[a] fair statement of facts and procedure relevant to the issues presented for review, without argument." The State's "statement of the case" contains argument, in violation of RAP 10.3(a)(5). On page 7, the State writes "Sadly, such recantation is commonly exploited by abusers in domestic violence cases," citing State v. Magers, 164 Wn.2d 174, 186, 189 P.3d 126, 130 (2008). This is not a fact. This is editorializing that has no place in the "statement of the case" section. Under RAP 10.7, this Court has various remedial measures at its disposal.¹ Undersigned counsel does not ask for sanctions or a replacement brief. However, it should be recognized the "statement of the case" section of the State's brief represents unacceptable appellate practice.

¹ RAP 10.7 provides: "If a party submits a brief that fails to comply with the requirements of Title 10, the appellate court, on its own initiative or on the motion of a party, may (1) order the brief returned for correction or replacement within a specified time, (2) order the brief stricken from the files with leave to file a new brief within a specified time, or (3) accept the brief. The appellate court will ordinarily impose sanctions on a party or counsel for a party who files a brief that fails to comply with these rules."

2. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE UNLAWFUL POSSESSION OF A FIREARM CONVICTION BECAUSE THE STATE FAILED TO PROVE THE ELEMENT OF POSSESSION.

The State claims Hogan "challenges every finding through an appendix incorporated by a footnote without citation to authority or meaningful analysis, making it an unreviewable assignment of error." Brief of Respondent (BOR) at 18. Hogan does not challenge every finding though the appendix and a fair reading of the brief does not lend itself to that conclusion. An appendix to the brief may be included "if deemed appropriate by the party submitting the brief." RAP 10.3(a)(8). The written findings of fact and conclusions of law are included as an appendix for the convenience of the Court in reviewing Hogan's sufficiency of evidence claim. This makes sense because this Court must determine whether (1) the evidence supports the findings of fact; (2) the findings of fact support the conclusions of law; and (3) the conclusions of law support the judgment. State v. Enlow, 143 Wn. App. 463, 467, 178 P.3d 366 (2008). Rather than rifling through the designated clerk's papers to locate the findings, it is easier to simply refer to the appendix. The challenged findings of fact are specified in the assignment of error section, in compliance with RAP 10.3(g) and RAP 10.4(c).

In arguing the evidence was sufficient to show the element of possession, the State asserts that Rachel's written statement to police can be considered as substantive evidence because (1) there was no objection or limiting instruction for this evidence; and (2) it was admissible under ER 801(d)(1)(i) as a "Smith" affidavit. BOR at 21. The State is mistaken.

First, this was a bench trial, so there is not going to be a jury instruction limiting the jury's use of the evidence. Cf. State v. Myers, 133 Wn.2d 26, 30, 36, 941 P.2d 1102 (1997) (jury trial). What we have is the judge, sitting as evidentiary gatekeeper and trier of fact, expressly limiting the use of the prior statement to impeachment purposes, not substantive evidence: "Exhibit 7 was admitted but will only be used for impeachment purposes, not as substantive evidence. . . . The court can convict on substantive evidence only." 2CP 23 (FF 4).² The record shows that the judge did not rely on the prior statement as substantive evidence. There is no basis on appeal to contend otherwise. The State assigns no error to finding of fact 4. And the State cites no authority for the proposition that an appellate court has authority to treat a piece of evidence as substantive evidence where the trial court, sitting as trier of fact, expressly did not.

² See also 6RP 137 (court's oral statement that "7 was offered by the defense and admitted. Again, that was kind of an impeachment document. I don't regard that merely because it was entered into evidence that it is truly substantive evidence. The court can only convict Mr. Hogan based on substantive evidence, not on impeachment.").

"Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Dow, 162 Wn. App. 324, 331, 253 P.3d 476 (2011) (quoting State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000)).

For the same reason, whether the prior statement was admissible as a Smith affidavit is irrelevant. The trial court did not admit this statement as a Smith affidavit. See State v. Smith, 97 Wn.2d 856, 857, 861, 651 P.2d 207 (1982) (setting forth standard for when sworn statement given during a police interrogation would be admissible as substantive evidence, with the key being a showing of reliability). The State did not argue at the trial level that this was a Smith affidavit, so there was never any court ruling on whether the statement was reliable enough to justify admission.³ The State on appeal is asking this Court to substitute its own judgment for that of the trier of fact and conclude the information in the prior statement is a substantive fact that supports the sufficiency of the evidence. This the Court cannot do. "Our appellate courts do not weigh evidence and do not find facts." State v. Bennett, 180 Wn. App. 484, 489, 322 P.3d 815, review denied, 181 Wn.2d 1005, 332 P.3d 985 (2014). The facts that were

³ The State below, in asking the trial court to treat the statement as substantive evidence, acknowledged the court could give it "whatever weight it chooses. You are the fact-finder." 6RP 124.

found by the trial court are memorialized in its written findings. There are no additional facts to be found on appeal because an appellate court does not substitute its judgment for that of the trier of fact; the facts are for the "the trial judge to determine, not this court." Id. at 490.

For the same reason, the State's attempt to save the verdict by resorting to a constructive possession theory must fail. BOR at 22-23. The judge determined Hogan actually possessed the firearm. 2CP 25 (FF XV). Hogan challenged this determination in his opening brief. The judge did not find Hogan constructively possessed it and did not enter findings of fact that would sustain such a theory. The State argues the rifle was in the bedroom closet and Hogan was the only person that logically could have put it there. BOR at 23. The trial court did not find these facts so they cannot be relied on in determining sufficiency of evidence. In determining sufficiency, the findings of fact must support the conclusions of law. Enlow, 143 Wn. App. at 467.

In any event, the crux of Hogan's argument is that the State did not prove actual control, a requirement that applies to both actual possession and constructive possession. State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). Hogan relies on the argument set forth in the opening brief.

B. CONCLUSION

For the reasons set forth above and in the opening brief, Hogan requests (1) his convictions be reversed; (2) his case be remanded for resentencing.

DATED this 14 day of December 2017

Respectfully Submitted,

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