

FILED  
Court of Appeals  
Division II  
State of Washington  
11/21/2017 2:27 PM

NO. 49910-0-II (consolidated with 49914-2-II)

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

STATE OF WASHINGTON, RESPONDENT

v.

CARL E. HOGAN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chushcoff

No. 15-1-05148-4 & 16-1-00047-1

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**Brief of Respondent**

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

1. Did the trial court soundly find defendant competent to proceed to closing argument in the bench trial for his stolen vehicle case when that finding was based on defendant's observed capacity to comprehend the proceedings and actively assist with his defense?
2. Is the possession element of the unlawful possession of a firearm conviction amply proved by evidence he unlawfully carried a rifle from his home towards his car amid an effort to vacate the premises in response to an argument with his wife over an affair?
3. Should this Court remand the case so a stipulation to, or proof of, defendant's convictions can adduced at resentencing as neither occurred before his current sentence was imposed?

B. STATEMENT OF THE CASE.

1. PROCEDURE

Defendant proceeded to successive bench trials for two cases, *i.e.*, No. 15-1-05148-4 (unlawful stolen vehicle possession and bail jumping); No. 16-1-00047-1 (unlawful possession of a firearm in the first degree and assault in the fourth degree). 1CP 3; 2CP 1<sup>1</sup> RP(12/6) 4. His jury trial waiver was accepted based on a coherent colloquy. *Id.* at 4-5. A CrR 3.5 hearing was held for 15-1-05148-4, which was the first case tried. *Id.* at 20-40. A testifying deputy described him as rational when arrested for possessing a

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<sup>1</sup> Clerk's papers for the first case to proceed to trial (15-1-05148-4) will be designated "1CP;" whereas, Clerk's papers for the second case to proceed to trial (16-1-00047-1) will be designated "2CP."

stolen car. *Id.* 20-30. Defendant engaged in a coherent colloquy regarding his right to give testimony. *Id.* at 40. His unchallenged *Miranda* waiver was determined to be knowingly and intelligently made. 1CP 33-35.

Five witnesses established he knowingly possessed a stolen car and jumped bail. 1RP(12/6) 44, 62, 75; 2RP(12/7) 91, 106, 117-23. A recess was called for him to get medical treatment for MRSA.<sup>2</sup> He again engaged in coherent colloquy to explain that condition. 2RP(12/7) 133-35. He gave detailed testimony about his version of events. 3RP(12/12) 141-89. The court saw him rationally respond to cross examination as well as questions posed by the court. *Id.* 155-59, 172-78. According to the court, defendant's 11<sup>th</sup> hour exhibit and witness made it so:

[t]here [wa]s simply no question in the world ... the defense ... violated its discovery obligations ... every which way that [the court] c[ould] think of.

*Id.* 189. The untimely-disclosed evidence was admitted. Cross examination showed he had been convicted of forgery, burglary and possession of stolen property. *Id.* at 155-56. Inconsistencies in his case were exposed by the court's inquiries. *Id.* at 206-10. He rested. *Id.* at 211. In rebuttal, the State proved the person he identified as the stolen car's seller did not exist. *Id.* At

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<sup>2</sup> Methicillin-resistant staphylococcus aureus. ER 201.

213-17. The court refused to admit internet research defendant offered to prove the stolen car's value. *Id.* at 218-20.

Only after those setbacks, defendant's competency was raised. He alleged difficulty recalling details and "following." 3RP 220-23. Counsel sought an evaluation. *Id.* at 221. Defendant opined he was competent. *Id.* at 222. The court agreed based on competency showcased in a several-day proceeding. *Id.* at 223-26. He understood his charges, gave testimony and assisted counsel. *Id.* at 223-24. That led the court to "feel ... quite confident" he was competent. *Id.* at 225. Closing arguments followed. *Id.* at 226-51. He was convicted. *Id.* at 267-70; 1CP 25-35. The court reiterated reasons to believe him competent; to include, he was "fairly dexterous in changing his story to accommodate inconsistencies...." *Id.* at 274.

A day later, defendant began a bench trial on the firearm possession and assault charges in case No. 16-1-00047-1. RP (12/13) 1-14. Eyewitness testimony proved he walked out of the marital home he was vacating with a .22 rifle. *Id.* at 42-45, 53-58. Other evidence that defendant understood the proceeding exists in his expressed dissatisfaction his wife was not going to be called by the State. *Id.* at 47. Defendant had her testify. *Id.* Her written statement was admitted by the defense. *Id.* at 66-67. It recorded her account of defendant carrying the rifle from their house to his car. Ex.7. She recanted that account at trial. *Id.* at 66-67. Defendant again testified for the defense.

*Id.* at 93-103. His predicate conviction was admitted. *Id.* at 107-08. The court convicted him of the firearm charge, but acquitted him of the assault. *Id.* at 137, 144; 2CP 22-26. He *fled from the courtroom*. *Id.* 144-45. Counsel was too "embarrassed" to explain his opposition to an arrest warrant. *Id.*

Counsel raised defendant's competency at sentencing. RP (1/13) 13. The court "strongly disagree[d]" with counsel's assessment of defendant. *Id.* at 15-17. Close observation of defendant's manifest cogency over the course of two trials convinced the court of his competency. *Id.* He then feigned confusion about his sentence; to which the court responded:

It is really clear to me ... to some extent you are exaggerating what your situation is. I was here for trial. I saw you every day for several days. ... All I know is, you functioned very well during the course of the trial.

*Id.* at 35. The court imposed a high end sentence for the stolen car due to his effort "to deceive the court" by adducing a "fabricat[ed]" Bill of Sale. *Id.* at 36. That sentence was run concurrent to the one imposed for jumping bail and unlawfully possessing a firearm. *Id.* at 37. A notice of appeal was timely filed in both cases. 1CP38; 2CP 28.

## 2. FACTS

The events underlying defendant's conviction for possessing a stolen vehicle began December 20, 2015. 1RP(12/6) 62, 77-78. Chhan<sup>3</sup> loaned a

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<sup>3</sup> First names are used to identify members of the Kdep family. No disrespect is intended.

1999 Toyota Camry to his retired father, Sarith. *Id.* at 70, 77; 1CP26. Chhan bought the car for \$1,500 about a month before, so his father would have a car to drive in town and estimated it was worth \$2,000 or \$2,5000. *Id.* at 76-77; 1CP 26. Sarith drove the car to visit family for lunch in Tacoma. *Id.* at 78. Once there, he decided to drive to a store. *Id.* at 100-01. It was cold, so he left the car running outside to warm. *Id.* He returned to find it stolen. *Id.*; 1CP 26. His brother Patrick called police. *Id.* at 62-72, 93-04. A stolen vehicle report was entered into a police database. *Id.* at 48, 66.

Deputy Hardesty saw the stolen car while patrolling near Tacoma at around 11:22 PM on December 22, 2015. *Id.* at 45. He stopped the car when it pulled into a 7-Eleven. *Id.* at 49. Defendant exited from the driver's seat. *Id.* He appeared nervous. *Id.* at 52; 1CP 27. There were two passengers in the car. *Id.* at 56-57. According to defendant, his "homeboy" named "white boy ghost" or "white boy Jason" sold it to him for \$50 at the Calico Cat Hotel 20 minutes before being stopped. *Id.* at 53-55; 1CP 27. Defendant did not provide the deputy a Bill of Sale, receipt or registration. *Id.*

The State charged defendant with possession of a stolen vehicle. 1CP 1. He had been previously convicted for burglary, possession of stolen property and forgery. 3RP(12/12) 155-56. On January 28, 2016, he failed to appear for a hearing he signed for while on bail. 2RP(12/7) 106-30; Ex. 5-11. He elected to challenge both charges at a bench trial. 3RP(12/12) 141-

226. He blamed the bail jump on inattention and the lack of a reminder. *Id.* 148-52, 163-78. Regarding the stolen car, he testified to purchasing it from the leader of a car-prowl ring named "white boy ghost." *Id.* at 146-47; 1CP 28. Defendant said he paid \$250 for it since it was a "clunker," which was inconsistent with the decent condition described by the arresting officer and the car's true owner. 1RP(12/6) 57, 77.

Discrepancies emerged between defendant's account of who was at the sale and the account of his driver—11<sup>th</sup> hour witness Polito. 3RP (12/12) 177, 208-10. Polito surfaced right after the State rested in a case pending trial for about a year. *Id.* at 184-85. Polito said he took defendant to a motel to purchase a *Cadillac* priced at \$350, which Polito thought was too expensive despite never looking at the car. *Id.* at 204-05; 1CP 29. Defendant described Polito as his mother's friend, but Polito said he was defendant's friend. The court perceived defendant downplayed their relationship to increase Polito's apparent impartiality. *Id.* at 261-62; 1CP 29. Also odd was Polito's claim the trip to buy the car arose amid their plans to hang out but they immediately parted ways after the purchase contrary to those plans. *Id.* 264-65; 1CP 29.

The Bill of Sale defendant came up with at trial was a forgery. *Id.* 256-61; 1CP 27-28. He could not have retrieved it from the stolen car where he said it was at the time of his arrest since he did not take it with him and

never had subsequent access to the car. 1RP(12/6) 50-60, 83. The Bill's lack of authenticity was evident in the VIN's omission, which indicates it was clumsily drafted when the VIN was unavailable to him due to the car's return to its owner. *Id.* at 260; 1CP 27-29. And the man defendant identified as the seller did not exist. 3RP (12/12) 211-17; 1CP 29.

The events underlying defendant's conviction for unlawful firearm possession occurred around 11:00 PM on May 25, 2015. RP(12/13) 25. An argument between him and his wife Rachel<sup>4</sup> over a rape accusation ensued. 65-66. They were on the porch of their Pierce County home with Rachel's mother, Traci Johnson. *Id.* at 51-56, 64. Rachael flew backward toward Johnson as if struck by defendant. *Id.* at 52. And that was precisely how Rachel described the assault to police that night. *Id.* at 78-79.

She recanted that account at trial where she admitted to being a prior victim of domestic violence, yet claimed defendant never hit her. *Id.* at 64, 76-78. Sadly, such recantation is commonly exploited by abusers in domestic violence cases.<sup>5</sup> Johnson watched him carry what she thought was a .22 rifle or shotgun from his house toward his car when Rachel confronted him. *Id.* at 54-56. The rifle's barrel protruded from a blanket still around it

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<sup>4</sup> Members of the Hogan family will be referred to by first name for clarity. No disrespect is intended.

<sup>5</sup> *State v. Magers*, 164 Wn.2d 174, 186, 189 P.3d 126 (2008) (victim recanting related to the dynamics of a relationship marked by domestic violence).

when it was seized from the porch by police 10 minutes later. *Id.* at 29-33, 54-57; Ex. 7. It was an operable .22 rifle with two magazines; one was loaded. *Id.* at 30-33, 42-45. At trial, Rachel said she carried the rifle from the bedroom closet she shared with defendant to the porch for police. That story was impeached by her discrepant account of putting it on the porch to keep it from her children not knowing police had been called. *Id.* at 88-89.

Defendant moved to admit her handwritten statement at trial without requesting that its probative value be limited in any way. *Id.* at 66-67; Ex.7. The statement was received as impeachment. 2CP 22. Rachael wrote that he removed the rifle from their closet. Ex. 7; *Id.* at 80-84. He put it in his car. *Id.* She removed it as he prepared to drive away. *Id.* A brief struggle for it ensued, then he abandoned it with her. *Id.* According to her, he had been up on a meth for days. *Id.*

C. ARGUMENT.

1. THE TRIAL COURT SOUNDLY DETERMINED DEFENDANT TO BE COMPETENT BASED ON HIS DEMONSTRATED ABILITY TO UNDERSTAND THE PROCEEDINGS AS WELL AS ASSIST HIS COUNSEL PRESENT A DEFENSE.

Defendants are legally competent if they can understand the nature of proceedings against them and assist with their defense. *State v. Lord*, 117 Wn.2d 829, 901, 822 P.2d 177 (1991). Hearings to test competency are only needed when there is a substantiated reason to doubt a defendant's fitness.

*Id.*; RCW 10.77.060. They are not required upon request. *Id.* (claimed conversations with the devil inadequate to call competency into doubt); ***In re Pers. Restraint of Fleming***, 142 Wn.2d 853, 863-64, 16 P.3d 610 (2001) ("trial judge did not see any irrational behavior in the courtroom, nor were ... psychiatric reports" adduced); ***State v. Walker***, 13 Wn.App. 545, 536 P.2d 657 (1975) (uncommunicated history of treatment insufficient).

Trial courts have wide discretion in deciding whether defendants are competent to stand trial. Findings of competency are not overturned absent a manifest abuse of discretion. ***State v. Ortiz***, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985) (defendant appreciated adversarial nature of the proceeding with capacity to recall and relate facts). Counsel's representations should be considered, but are never dispositive. ***State v. Crenshaw***, 27 Wn.App. 326, 331, 617 P.2d 1041 (1980) (affirmed despite counsel's reservations).

Competency determination can be based on many factors, including a defendant's appearance, demeanor, conduct, history, behavior, counsel's statements and psychiatric reports. ***State v. Hicks***, 41 Wn.App. 303, 306, 704 P.2d 1206 (1985) (*quoting State v. Johnson*, 84 Wn.2d 572, 576, 527 P.2d 1310 (1974)). Reviewing courts are reluctant to disregard credibility determinations made by trial courts due to their ability to observe demeanor. ***In re Detention of Stout***, 159 Wn.2d 86, 384, 150 P.3d 86 (2007). For

demeanor captures non-verbal communication that cannot be assessed from a cold record. *Id.* ***State v. Wilson***, 71 Wn.2d 895, 899, 431 P.2d 221 (1967).

The court watched defendant for days, including his testimony, by the time competency was raised. He claimed confusion after rebuttal proved he identified a fictitious person as the stolen car's seller and his exhibit was refused. 3RP(12/12) 213-223. A colloquy about competency followed those disappointments:

[**Counsel**]: Your Honor, [defendant] is telling me that he does not understand what is going on here. I don't know.

[**Defendant**]: I'm saying that I don't remember -- I don't remember a lot of it. It has been so long.

[**Counsel**]: I'm not asking you. You were just telling me you don't know what is going on there, correct?

[**Defendant**]: I can't -- I'm not following. I'm not -- I mean, I can't follow.

[**Court**]: Are you asking me to do anything?

[**Defendant**]: That's all I'm saying. I can't follow -- I keep -- my memory -- I can't remember shit.

[**Counsel**]: I would like to have a continuance for [defendant] to have a mental evaluation at Western State.

3RP (12/12) 220-21. A recess was taken for counsel to talk with defendant.

*Id.* at 21. The issue was taken up when they returned:

[**Counsel**]: I'm trying to decide what to do. I have serious questions as to whether he is competent to stand trial. I know it's very, very late in the game; however I didn't know certain

things. There were discussions. I didn't know that he had a social security payee and a VA payee for him because he wasn't competent to handle his affairs. He is sitting here now telling me he can't remember. He doesn't remember this. He doesn't remember that. It is possible because he didn't provide me the witness list until late. I know everyone is upset about it. I don't know.

*Id.* at 221-22. The court corrected counsel making clear it was "not upset about [those issues]." *Id.* at 222. Counsel responded:

I asked [defendant] if he thinks ... he is competent. He thinks that he is competent. [*Id.* at 222]

The court provided a detailed explanation of its reason for deciding defendant was competent to proceed, which warrants careful review:

In this case, it does appear that [defendant] has a factual understanding of the charges against him. He has an understanding generally of what the criminal process is. I think that he understood his obligations to testify – under oath, to testify truthfully. His testimony – he had some moments where he seemed to say things that were conflicting, but that isn't uncommon for many witnesses. He didn't seem to have a problem with providing a factual account of what occurred and a timeframe for that. In other words, he seemed to have a fair memory at least of the events that are surrounding the allegations here.

As far as I can tell, he was able to communicate this with [counsel]. I think that he has been able to communicate effectively with his counsel. He is certainly able to identify individuals who could be witnesses here.

I don't know -- I have -- I asked some questions when we were in CDPJ. I happened to be the judge presiding at that time about why certain information hadn't come at least to the State earlier like a Bill of Sale and so on. While [the prosecutor] undoubtedly wants to throttle me for letting all

of that stuff in, the fact of the matter is, he has been allowed to present that information, and it is in front of the court. Whatever problems there were have not prejudiced his actual presentation of the evidence in this case. I'm not seeing any reason at this moment in time why he is unable to continue cooperating and communicating with counsel to provide an effective defense.

A lot of times a judge is not in a good position to assess how someone is functioning because they are not dealing with it all of that close [sic]. We're separated by all of this distance. In this case, I think we have heard from [defendant] just this morning. I feel quite confident that he is competent to stand trial by that standard.

I'm not sure there was actually a motion because you said that you weren't sure what to do. I guess I would say that I will tell you that it is my sense that the defendant is competent at this point.

[Counsel] That's enough.

*Id.* 223-25 (emphasis added).

The case proceeded to argument. *Id.* Defendant was convicted. *Id.* 251-71; 1CP 25-35. Counsel renewed his concern about defendant's claimed memory problems. *Id.* 271-73. The court did not find they were proof of incompetence, noting an absence of any medical testimony. *Id.* at 273. Facts supporting its ruling on the issue were reiterated:

I certainly noted – just in seeing [defendant] ... I thought he was capable of responding to questions, being articulate enough to know what we were asking him, to be actually fairly dexterous in changing his story to accommodate inconsistencies, which showed a certain intelligence and awareness of what is going on here. ...

*Id.* at 274. Defendant provided further proof of his competency when he interjected his commitment to return for the next trial after the State asked that he be remanded to custody for his convictions. *Id.* at 276.

He confirmed appreciation for the proceeding and an ability to assist with his defense when he personally prompted his wife's appearance:

**[Counsel]:** Your Honor, prior to [the state's eye witness] testifying, I would like to inform the court that [defendant] was very upset about the fact his wife is not going to be testifying, so he asked me to contact her and see if she would come to court. She is here.

RP(1/13) 47. She supported his defense by claiming she falsely reported that he possessed the rifle. *Id.* 62-91. Defendant provided detailed testimony in his defense. *Id.* at 93-103. He coherently responded to cross examination as well as questions from the court. *Id.* at 95-103. Dramatic proof of his comprehension exists in his decision to flee following the verdict:

**[Court]:** Mrs. Winnie, you should probably call security at this point. ... Mr. Hogan, do not leave the courtroom.

(Defendant exited the courtroom.)

**[Security officer]:** We weren't able to get him before he left the building.

**[Court]:** Thanks, officer.

*Id.* at 144-45. Counsel responded to that escape by betraying an absence of objectivity concerning his client:

[State]: I'm going to ask for a bench warrant.

[Counsel]: I don't think it is appropriate.

[Court]: Okay. Do you want to state a reason on the record or are you embarrassed to do that?

[Counsel]: I'm embarrassed to do that.

[Court]: Well, okay.... it will be a no-bail hold.

*Id.* 144-45 (emphasis added). The final word came at sentencing:

[Counsel]: He was not competent, Your Honor.

[Court]: I strongly disagree. His responses were, if not necessarily believable, were cogent, were responsive. They were not out of the blue, blue sky. ... He was presenting an account of events in a chronological and logical sort of way. There was nothing about them that struck me as delusional. They may have been inventive, but not for purposes of having lost touch with reality, but may have been inventive because he was consciously aware of his legal perils were and was attempting to evade them....

[Counsel]: I did raise the issue, Your Honor.

[Court]: [Y]ou did. I found that it had no merit, and I still think it has no merit unless something has changed between that time and now.

RP (1/13) 14-15 (emphasis added). The court added:

[I] did observe him. I was able to see firsthand and at close range how he was able to -- what his cognition was, what his memory was, what his ability was to relate information, his ability to hear a question and respond to it in a cogent way. All of those things suggested that he was not in any way mentally impaired for the purposes of all of this. People may have various gradations of mental health problems sufficient that they may be disabled from employment, for instance, ...

that may be part of the reason why he was issued VA benefits but ... whatever issues that he has got or service-connected. That in and of itself does not establish that he is incompetent for all time and all purposes. I'm not seeing or hearing anything new. [T]oday [he] is obviously aware of what is going on.

RP(1/13) 13-17 (emphasis added). He immediately confirmed as much:

[**Defendant**]: I move for 10.77. Upstairs in district, they moved for a 10.77.

[**Court**]: There you go.

*Id.* at 17. He even recalled the statute. The court responded:

It is really clear to me ... to some extent you are exaggerating what your situation is. I was here for trial. I saw you every day for several days. ... All I know is, you functioned very well during the course of the trial.

RP (1/13) 35 (emphasis added).

There is little to add by way of argument. The trial court's record is resounding proof of reasonably-exercised discretion based on observations of defendant pretrial (to include a CrR 3.5 hearing where a deputy described his coherence) and in two trials where he cogently testified. His deceptions showcased ill-purposed cunning far removed from incompetence. When his evidentiary deceptions failed, he feigned confusion. When that failed, he fled; upon arrest, he returned to deception. His attorney's illegitimate tactic

of trial by ambush<sup>6</sup> with his admittedly "embarrass[ing]" attempt to resist a warrant to capture defendant after he *fled from court*, reveals this to be an instance where not much stock can be put in anything that attorney said to advance his client's interests. And defendant's active participation in his cases refutes his allegation that the court's well-founded assessment of his competency is unreasonable. So, his convictions should be affirmed.

2. THE POSSESSION ELEMENT OF DEFENDANT'S FIREARM CONVICTION WAS AMPLY PROVED BY EVIDENCE HE UNLAWFULLY CARRIED A RIFLE FROM HIS HOME TOWARD HIS CAR AMID AN EFFORT TO VACATE THE PREMISES IN RESPONSE TO AN ARGUMENT WITH HIS WIFE OVER AN AFFAIR.

Defendant's conviction for unlawful possession of a firearm in the first degree required proof he knowingly had a firearm in his possession or control, having been convicted of a serious offense. RCW 9A.040(1)(a); WPIC 133.01. He only challenges possession, which is defined as:

Having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when there is actual physical custody. Constructive possession occurs when there is dominion and control.

See WPIC 133.52. The record proved he achieved both forms of possession.

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<sup>6</sup> Court: "[T]here [wa]s simply no question in the world ... the defense ... violated its discovery obligations ... every which way that [the court] c[ould] think of." 3RP (12/12) 189 (emphasis added).

Review of evidentiary sufficiency requires circumstantial evidence be credited to same degree as direct evidence. *State v. Moran*, 181 Wn.App. 316, 321, 324 P.3d 808 (2014); *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127 (1954). A claim of insufficiency admits the truth of the State's proof with every reasonable inference it supports. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

After a bench trial, appellate courts determine if substantial evidence supports the trial court's findings of fact and, in turn, whether those findings support the conclusions of law. *State v. Stevenson*, 128 Wn.App. 179, 193, 114 P.3d 699 (2005). Evidence is substantial if it can persuade a rational, fair-minded person a relevant premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The prosecution need not rule out every hypothesis except guilt. *Wright v. West*, 505 U.S. 277, 296, 112 S.Ct. 2482 (1992). Unchallenged findings are verities. *Stevenson*, 128 Wn.App. at 193. Conclusions of law are reviewed de novo.

Defendant specifically challenges two findings of fact:

**XIII:** Traci Johnson testified that the barrel of a gun was visible when defendant carried it out of the house and that she knew it was a gun. It is not reasonable to believe that Racheal did not know defendant was carrying a gun out of the house as she would not bother to struggle over the gun if she did not know it was a gun. Rachael Hogan therefore knew that the item defendant was carrying out of the house was a gun. [CP 24-25]

**XV:** At the time defendant carried the gun from the bedroom and out of the house, it was in his hands and therefore in his actual possession. Defendant attempted to put the gun in his car because he was trying to secure his possession, including the firearm. [CP 25]

App.Br. at 1 (citing FF XIII & XV); CP 24-25. He further challenges every finding through an appendix incorporated by a footnote without citation to authority or meaningful analysis, making it an unreviewable assignment of error.<sup>7</sup> So each finding beside XIII and XV should be treated as a verity. He ultimately challenges the conclusion about his guilt. *Id.* (CL III.; 2CP 26).

- i. Defendant's actual possession of the rifle was established by evidence he tried to take the rifle from the marital home he was vacating to the car he was using to take his belongings with him, ostensibly never to return.

Actual possession means physical custody of an object that is more than passing control. Yet control is not passing because it is momentary. *State v. Summers*, 107 Wn.App. 373, 385, 28 P.3d 780 (2001). The quality and nature of control matters more than duration. *State v. Davis*, 182 Wn.2d 222, 237, 340 P.3d 820 (2014) (Stephens dissenting with four concurring); *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994) (brief duration is not

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<sup>7</sup> *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005); *Riley v. Iron Gate Self Storage*, 198 Wn.App. 692, 713, 395 P.3d 1059 (2017) (citing RAP 10.3 (a)(4) and (6)); *Arnold v. Laird*, 94 Wn.2d 867, 874, 621 P.2d 138 (1980).

a legal excuse for possession); *State v. Callahan*, 77 Wn.2d 27, 29-30, 459 P.2d 400 (1969)). Momentary handling with other indicia of control can prove possession. *Staley*, 123 Wn.2d at 802; *Summers*, 107 Wn.App. at 386 (e.g., momentary handling combined with dominion over the premises). *Id.* Courts assessing if momentary control proved possession consider the nature of the control and why it terminated. *Summers*, 107 Wn.App. at 385; *State v. Werry*, 6 Wn.App. 540, 494 P.2d 1002 (1972) (control interrupted by police); *State v. Bowman*, 8 Wn.App. 148, 504 P.2d 1148 (1972).

There is ample proof to support the applicable findings. Eye witness Johnson testified defendant was moving things out of his house and taking them to his car when he emerged from the house carrying what appeared to be a rifle. RP(12/13) 52-56. Like his earlier trips, he appeared to be taking the rifle to the car he was loading. *Id.* at 56-58. That control was interrupted by Rachael when she wrestled it away from him. And the rifle remained on the porch until seized by police 10 minutes later. *Id.* Defendant's control of the rifle while carrying it along with its presence on his premises and his resistance to the rifle being taken proves actual possession. Rachael's efforts to protect him by recanting her sworn statement about his actual possession of the rifle supports another inference of this guilt when added to the fear she manifested when the incident occurred as well as Johnson's account of their struggle for the rifle before it was seized by police.

That proof of control is reinforced by several unchallenged findings of fact, which are verities in this appeal. Unchallenged findings V, VIII and XIV prove he and Rachael "got into a scuffle over a gun" as he removed his belongings from their marital home. CP 23-24. Unchallenged finding VII combined with unchallenged finding XII and Johnson's testimony proves neither Rachael nor Johnson knew of the rifle's existence until defendant carried it outside. *Id.*; RP(12/13) 52-56. Rachael said it was in the closet of a bedroom she shared with defendant, which made him the only person who would have logically put it there. RP(12/13) 70. Unchallenged finding XIV provided the rifle stayed on the porch after Racheal took it from him. 2CP 25. Unchallenged finding XII further implied actual possession. Rachael's recanting testimony that she removed it from the closet was impeached by her discrepant account of wanting to give it to the police and wanting to put it on the porch beyond her children's reach before knowing police had been called. CP 24 (FF IX-X); RP(12/13) 88-91.

Defendant's reliance on *Davis* is misplaced. That case turned on the fact Davis put a gun into a bag handed to the gun's true possessor, who remained at the premises while that passing control occurred. *Davis*, 182 Wn.2d at 237. Defendant was in the process of vacating the residence he had shared with his wife when he carried a rifle toward the car he was using to transport his belongings away from their residence, apparently without

an intent to return on account of an affair. Johnson said his control of the rifle was interrupted when his wife forcefully took it from him. So he is like the actual possessors in *Werry* and *Bowman* whose control was terminated by third parties. He did not freely pass it to a true possessor as in *Davis*.

There is more proof of defendant's actual possession. Exhibit No. 7 is Rachael's written statement. It was admitted at defendant's unqualified request. RP(12/13) 66-67, 80-84. The court thought it could be considered for impeachment. *Id.* at 137-38; 2CP 23 (FF IV). That is an evidentiary ruling, making it a mislabeled conclusion of law. *Casterline v. Roberts*, 168 Wn.App. 376, 382, 284 P.3d 743 (2012). The judgment can be affirmed on any basis supported by the record and law. *State v. Kelley*, 64 Wn.App. 755, 764, 828 P.2d 1106 (1992).

There are two reasons the statement is substantive evidence. Absent an objection or limiting instruction, admitted evidence may be used for any relevant purpose. *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). The statement was executed under penalty of perjury, which also makes it the inconsistent statement of a testifying victim admissible as substantive evidence under ER 801(d)(1)(i). *State v. Smith*, 97 Wn.2d 856, 861-63, 651 P.2d 207 (1982); *State v. Dobbs*, 167 Wn.App. 905, 918, fn.5, 276 P.3d 324 (2012) ("*Smith* Affidavit"). That additional proof provides:

[Defendant] entered the house and started to gather some belongings. I followed him to make sure he wasn't taking any more of my belongings.... He went to the closet and came out with what appeared to be a rifle wrapped in a sheet. I asked him if that was a gun, he told me it was none of my business. He put the gun in the back seat of his car. As he entered the drivers side I removed the gun. He backed me up against my car and wrestled me for the gun. I refused to give him the gun. He told me he would trade me my car keys for the gun. I took my keys back and held onto the gun. He said 'fine the guns in your possession now' and sped off.

Ex.7; RP (12/13) 81-82 (Rachael said "he" meant defendant). Defendant's UPOF conviction is amply supported by evidence he actually possessed the rifle he tried to remove from his marital home with other belongings amid an argument with his wife over an affair.

- ii. Defendant's constructive possession of the rifle was established by proof it was stored in the bedroom closet he shared with his wife.

The trial court did not base its verdict on constructive possession; however, its judgment may be affirmed on any basis supported by the facts and law. *Kelley*, 64 Wn.App. at 764. Constructive possession occurs if one has dominion and control over an item. *State v. Reichert*, 158 Wn.App. 374, 390, 242 P.3d 44 (2010) (citing *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002)). When one has dominion and control over a premises it creates a rebuttable presumption the person has dominion and control over items thereon. *Id.* (citing *Summers*, 107 Wn.App. at 389); e.g., *Callahan*, 77 Wn.2d at 30 (husband and wife can have constructive possession over

items in a house they rented and maintained). Other relevant factors include immediate ability to take actual possession and capacity to exclude others from possession. *Id.* Although proximity is alone inadequate, dominion and control need not be exclusive to be constructive possession. *Id.*

Proof of constructive possession supports defendant's conviction. He shared the marital home where the rifle was stored; creating a rebuttable presumption of constructive possession. RP(12/13) 70-71; 93-97. The rifle was in a bedroom closet he shared with his wife. Ex.7; RP(12/13) 70-71. It was there until he gathered it with other belongings to vacate the premises. According to Rachael, he was the only person who could have logically put the rifle in their closet. RP(12/13) 70-71. It was loaded into a car he used to drive his property away from their residence. Ex.7. All of this is conviction supporting evidence of constructive possession when reasonable inferences it supports are drawn in favor of the State. Be it actual or constructive, the possession element was amply proved. So the UPOF conviction should be affirmed.

3. THIS COURT SHOULD REMAND THE CASE SO ADEQUATE PROOF OF OR A STIPULATION TO DEFENDANT'S OFFENDER SCORE CAN BE ADDUCED SINCE THAT DID NOT OCCUR AT THE TIME HIS SENTENCE WAS IMPOSED.

The Supreme Court has emphasized the need for an affirmative acknowledgement by "the defendant" of facts and information introduced

for the purposes of sentencing before the State is excused from its burden of proving criminal history. *State v. Ramirez*, 190 Wn.App. 731, 734, 359 P.3d 929 (2015) (citing *State v. Mendoza*, 165 Wn.2d 913, 928, 205 P.3d 113 (2009)) *disapproved on other grounds by State v. Jones*, 182 Wn.2d 1, 10, 338 P.3d 278 (2014) (state not prevented from presenting new evidence at resentencing contrary to statutorily abrogated common law "no second chance rule); *accord State v. Cobos*, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014). A defendant's silence or active disagreement triggers the need for an evidentiary hearing on prior convictions regardless of whether defense counsel agrees with an offender score proposed by the State. *State v. Bergstrom*, 162 Wn.2d 87, 95-97, 169 P.3d 816 (2007) *superseded by statute on other grounds, Cobos*, 162 Wn.2d at 15-16. The proper remedy for an improperly assumed offender score is remand for resentencing, so proof can be adduced. *Ramirez*, 190 Wn.App. at 735; *State v. Hunley*, 175 Wn.2d 901, 910-12, 287 P.3d 584 (2012) (also qualified by *Jones supra*).

Defendant did not sign the prior conviction stipulations. 1CP 66; 2CP 48.<sup>8</sup> He disagreed with defense counsel's calculation of the offender score. RP(1/13) 38. Precedent prevents counsel's concession from relieving the State of its burden to prove criminal history. Resentencing is the remedy.

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<sup>8</sup> Citations above 1CP 63 and 2CP 47 are estimates of supplemental designations.

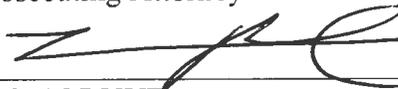
Comparability of his federal offense should be addressed at resentencing.  
*See State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007).

D. CONCLUSION.

The well-supported record of defendant's competency defeats his claim of incompetence to stand trial. The possession element of his firearm conviction was amply proved. And his case should be remanded so proof of his prior convictions can be adduced.

RESPECTFULLY SUBMITTED: November 21, 2017.

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\_\_\_\_\_  
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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.

11-21-17 Theresa Ko  
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

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