

FILED
10/30/2017 11:12 AM
Court of Appeals
Division II
State of Washington

No. 50345-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

RANCE MICHEL POINTEC,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 15-1-03895-0
The Honorable Karina Kirkendoll, Judge

AMENDED OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

I.	ASSIGNMENT OF ERROR	1
II.	ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR	1
III.	STATEMENT OF THE CASE	2
	A. PROCEDURAL HISTORY.....	2
	B. SUBSTANTIVE FACTS.....	3
IV.	ARGUMENT & AUTHORITIES	10
V.	CONCLUSION	14

TABLE OF AUTHORITIES

CASES

<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969).....	10, 12
<i>State v. Crane</i> , 116 Wn.2d 315, 804 P.2d 10 (1991)	11, 12
<i>State v. Holland</i> , 77 Wn. App. 420, 891 P.2d 49 (1995)	11
<i>State v. King</i> , 75 Wn. App. 899, 878 P.2d 466 (1994)	12
<i>State v. Kiser</i> , 87 Wn. App. 126, 940 P.2d 308 (1997)	11
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	11
<i>State v. Staley</i> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	12
<i>State v. Turner</i> , 103 Wn. App. 515, 13 P.3d 234 (2000)	13

OTHER AUTHORITIES

RAP 2.5(a)	11
------------------	----

I. ASSIGNMENT OF ERROR

1. Rance Pointec was denied his right to a unanimous jury verdict on the charges of unlawful possession of a firearm when the State failed to elect which alleged act of possession supported each charge, and when the trial court failed to instruct the jury that it must be unanimous as to which alleged act of possession was proved beyond a reasonable doubt.

II. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. Was Rance Pointec denied his right to a unanimous jury verdict on the charges of unlawful possession of a firearm where the State told the jury that Pointec actually possessed each firearm at one point in time and constructively possessed each firearm at a different point in time, and the trial court failed to instruct the jury that it must be unanimous as to which act of possession was proved beyond a reasonable doubt?
3. Where the evidence showed that Rance Pointec only momentarily handled an unpurchased 9 millimeter handgun while standing in a gun shop, and where a video that showed Pointec test-firing an AR-15 rifle did not establish

that this act occurred within the charging period, could a rational jury have a reasonable doubt that Pointec actually possessed either of these firearms?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Rance Michel Pointec with two counts of human trafficking in the second degree (RCW 9A.40.100), alleging in count one that he engaged in trafficking Nikita Allen, and in count five that he engaged in trafficking Ashley Wadsten. (CP 35-37) The State also charged Pointec with two counts of unlawful possession of a firearm in the first degree (RCW 9.41.040), and one count of promoting prostitution in the second degree (RCW 9A.88.080). (CP 35-37)

The jury found Pointec not guilty of the human trafficking charges, but guilty of the remaining firearm possession and promoting prostitution charges. (CP 81-86; 11RP 1135-36)¹ The trial court sentenced Pointec within his standard range to a total of 78 months of confinement. (CP 99, 102; 12RP 1174-75) Pointec filed a timely Notice of Appeal. (CP 118)

¹ The transcripts labeled volumes I through XII will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding contained therein.

B. SUBSTANTIVE FACTS

On the morning of August 14, 2017, Puyallup Police were called to the Cambridge Apartments after a woman was found half-naked and unconscious in a car parked oddly on the property. (4RP 329, 330, 337, 338, 339-40; 6RP 744) The woman appeared to be injured, and did not respond when the officers tried to wake her. (4RP 339-40) The woman was transported to the hospital, where she eventually regained consciousness. (4RP 341, 390-91, 424)

The woman, Ashley Wadsten, was treated for facial fractures and a broken jaw. (4RP 427-28) Wadsten came to the police station a few days later to talk to investigators and to get her property back. (4RP 396, 399) She told investigating officers that "Rance and Nikita did this to her." (4RP 392, 396-97) Investigators created photographic montages based on Wadsten's description of Rance and Nikita. (4RP 401-02, Exh. 58, 59) Wadsten positively identified Rance Pointec and Nikita Allen. (4RP 404, 406) Wadsten also led investigators to Pointec and Allen's apartment at the Cambridge Apartments. (5RP 554-55)

Wadsten testified that she has known Pointec since they were in middle school together. (5RP 581) She was 29 years old

and had a four-year old daughter at the time of trial. (5RP 565, 566) Wadsten had struggled with drug addiction for many years. In 2012, she worked at a strip club, but to earn extra money for drugs she became involved in prostitution. (5RP 567-69, 666) To get clients, she posted pictures online with information about her services and her telephone number. (5RP 570-72, 664) She would then meet the clients in a hotel where she would engage in sex acts for money. (5RP 572-73)

Wadsten eventually received treatment and stopped using drugs and engaging in prostitution. In 2013 she moved with her husband to Florida. (5RP 575) But they returned to Washington after about 10 months. (5RP 577-78) Wadsten moved in with her parents, and her daughter was born in January of 2013. (5RP 578) Sadly, she soon began abusing drugs again. (5RP 578) Around that same time, Wadsten reconnected with Pointec through Facebook. (5RP 580) She discussed with Pointec that she needed to earn money to buy drugs and wanted to begin prostituting again. (5RP 581-82)

Pointec told Wadsten that he and his girlfriend, Nikita Allen, had an arrangement whereby she would engage in sexual transactions for money, and he would provide security and manage

their income. (5RP 582-54) Pointec offered to do the same for Wadsten. Pointec and Allen came to Wadsten's home and took pictures, which Pointec posted online. (5RP 584-85, 590)

Wadsten testified that she and Allen would meet clients in a hotel room in Kent. They would alternate meetings, while Pointec waited outside in his car to make sure that the clients arrived and left without incident. (5RP 590-91) Wadsten gave Pointec a percentage of her earnings in exchange for his protection. (5RP 592-93) Pointec did not threaten Wadsten or force her to participate in this arrangement. (5RP 673, 710)

The arrangement lasted only about a week, however, because Wadsten decided she did not want to do it anymore. (5RP 594) Pointec did not object and did not try to force her to continue. (5RP 672-73)

By August of 2015, Wadsten's drug abuse had gotten worse and her marriage had ended. (5RP 594, 597, 597) She wanted money to buy drugs so she contacted Pointec about the possibility of prostituting with him again. (5RP 608-09, 618-19, 676-77, 682) They texted about taking and posting new pictures, about how they would split any of her earnings, and about what services he would provide her. (5RP 618-23; Exh. 41, 48)

Pointec and Allen met Wadsten and took new pictures, and agreed on the content of the new ads. (5RP 625-26, 627-28) Pointec also gave Wadsten \$20.00 to pay for posting the ads, but Wadsten never did it. (5RP 628-29)

On August 13, 2015, Wadsten's mother caught her and another man shooting heroin in Wadsten's bedroom. (5RP 599, 600-01) Her mother told Wadsten to leave, so she loaded her belongings into her car and drove away. (5RP 599, 604) She had nowhere to go and no money. (5RP 605-06) She contacted Pointec, who agreed to help her. (5RP 606, 628) Pointec drove to where Wadsten was waiting, paid for her to fill her car's tank with gas, and told her to follow him back to the Cambridge Apartments. (5RP 630-31, 685)

When they arrived, they parked in the apartment building garage and waited because Allen was in the middle of meeting a client. (5RP 631-32) When Allen finished, Wadsten and Pointec went into the apartment. (5RP 633) Either Pointec or Allen provided drugs for the three of them to do together while they discussed their new arrangement. (5RP 636, 638-39, 641-42, 687) Pointec left for a short time and brought back food from Taco Bell, which Wadsten ate. (5RP 641-43, 690)

Wadsten was high and feeling groggy from lack of sleep. (5RP 691-92) She also began to feel uncomfortable and paranoid that Pointec and Allen were laughing about her behind her back. (5RP 642-43, 644) She decided she did not want to participate in the prostitution arrangement anymore, and told Pointec and Allen that she had changed her mind. (5RP 644-45) Wadsten does not specifically remember what Pointec or Allen said in response, but she recalled that Pointec did not threaten or harm her. (5RP 644, 710)

Wadsten finished eating and left the apartment. (5RP 644) As she neared her car, she heard loud voices coming from the apartment. (5RP 646) She turned and saw Allen approaching her with her fist raised, and saw Pointec standing about five feet behind Allen. (5RP 643, 646-47) The next thing Wadsten remembers is waking up in the hospital. (5RP 646)

But a neighbor at the Cambridge Apartments saw Wadsten's car driving through the parking lot. (6RP 821-22) Wadsten's car was moving very slowly between the carport and garage. (6RP 821-22) The neighbor saw the brake lights go on and the car come to a stop, then no activity or movement. (6RP 821-23) She did not see anyone get into or out of the car. (6RP 824)

Investigators obtained and executed a search warrant for the apartment. (4RP 444) The officers waited until they saw Pointec leave, then they approached and knocked on the door. (4RP 444-45) Allen answered wearing only a bathrobe. (4RP 447) Investigators found used and unused condoms, multiple bottles of sexual lubricants, various sex toys, lingerie and fishnet stockings, a 9 millimeter handgun, an AR-15 rifle, a Kindle tablet, a laptop computer, and a Samsung Galaxy cellular telephone. (4RP 449-56) They did not find any men's clothing or toiletries. (4RP 549-50)

Investigators located advertisements offering sexual services that had been posted on several websites known for prostitution and escort service listings. The ads contained pictures of Allen and Wadsten dressed in lingerie or other clothing found in the apartment. (4RP 438-39, 440-41, 453, 457; 5RP 531; 6RP 864-65, 866; Exhs. 28, 34, 49, 50, 51, 52, 69) Investigators found similar photographs of Allen and Wadsten on the laptop computer and the cellular telephones. (6RP 781-82, 789; Exh 47, 49, 50)

Investigators extracted texts from Wadsten's, Pointec's and Allen's cellular telephones. (4RP 408-09; 6RP 751, 774-77; Exhs. 41, 48, 68) In addition to texts about the business of prostitution, the texts show that Pointec and Allen occasionally fought about the

arrangement and the status of their relationship. (Exh. 68)

Investigators located an undated video of Pointec test firing the AR-15 rifle.² (6RP 853-57; Exh. 8) They found a gun store receipt and a pistol transfer application showing that Allen purchased a 9 millimeter handgun on September 25, 2015. (6RP 757, 764-65; Exh 7, 20) Surveillance video from the gun store shows Allen and Pointec together, and Pointec can be seen holding and inspecting the gun. (6RP 767-68, Exh. 5, 9)

Investigators also found hundreds of pictures of male genitalia texted to Allen's phone. (6RP 862-63) It is common for a prostitute to request this type of photograph from a potential client to insure that the client is not actually a law enforcement officer. (6RP 862-63)

Investigators also obtained and executed a search warrant for Wadsten's car. (4RP 380, 384) They found bags of clothing and papers, lingerie, a child's car seat and a cellular telephone, as well as hypodermic needles, a used methamphetamine pipe, and several prescription medication bottles. (4RP 385, 386-88, 471; 5RP 696; Exh. 4) One of the bottles found in Wadsten's purse contained medication prescribed to Nikita Allen. (5RP 697-98, 736;

Exh. 4, 27) Wadsten acknowledged that she probably stole this bottle from Allen's bathroom before she left the apartment. (5RP 698, 703)

IV. ARGUMENT & AUTHORITIES

The State charged Pointec with one count of unlawful possession of a firearm for the 9 millimeter handgun, and one count of unlawful possession of a firearm for the AR-15 rifle. (CP 36) The State alleged that he possessed these firearms between May 14, 2015 and September 28, 2015. (CP 36, 76, 77) The jury was instructed that possession could be actual or constructive.³ (CP 74)

During closing statements, the prosecutor told the jury that it could convict Pointec of possessing the 9 millimeter handgun either because he actually possessed it in the gun store on September 25, or because he constructively possessed it when it was in the apartment. (7RP 962) Similarly, the prosecutor told the jury it could convict Pointec of possessing the AR-15 rifle either because he actually possessed it when he is seen in the video test firing it,

² The video was uploaded to Pointec's Snapchat account on August 26, 2015, but it is not clear when the video was actually taken. (6RP 853)

³ A person has actual possession when he or she has physical custody of the item. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person has constructive possession when he or she has dominion and control over the item. *Callahan*, 77 Wn.2d at 29.

or because he constructively possessed it when it was in the apartment. (7RP 962)

A criminal defendant may be convicted only if a unanimous jury concludes he or she committed the criminal act charged in the information. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)). And if the State presents evidence of multiple acts that could form the basis of a particular charged count, the State must elect which of the acts it is relying on, or the court must instruct the jury to agree on a specific act. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (citing *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)).

In this case, the prosecutor told the jury that there were two possible acts to rely on for each charge. The prosecutor did not elect which possessory act it was relying on for conviction, and the trial court did not give the jury a unanimity instruction.⁴

If there is no election and no instruction, the resulting constitutional error is harmless only if no rational trier of fact could

⁴ This issue may be raised for the first time on appeal because failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error. RAP 2.5(a); *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

have had a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Crane*, 116 Wn.2d at 325. The rationale for this protection in multiple acts cases stems from possible confusion as to which of the acts a jury has used to determine a defendant's guilt. *State v. King*, 75 Wn. App. 899, 902, 878 P.2d 466 (1994). In this case, a rational juror could have had a reasonable doubt as to at least one act for each count.

First, the jury could have had a reasonable doubt that Pointec actually possessed the 9 millimeter handgun at the gun store. A person has actual possession when he or she has physical custody of the item. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). But, “[t]o establish possession the prosecution must prove more than a passing control; it must prove actual control.” *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994). A momentarily handling, without more, is insufficient to prove that that person had actual possession because to “possess” means “to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature.” *Staley*, 123 Wn.2d at 801 (internal quotation omitted).

When Pointec held the 9 millimeter handgun at the gun store, neither he nor Allen had “control, care and management” of

the gun. The gun belonged to the gun store. Pointec's momentary handling of a gun still owned and controlled by the gun store cannot establish that Pointec actually possessed the gun for the purposes of the unlawful possession of a firearm statute.⁵

Second, the jury could have had a reasonable doubt that Pointec constructively possessed the 9 millimeter handgun when it was at the apartment. A jury can find a defendant constructively possessed a firearm if the defendant had dominion and control over it or over the premises where the firearm was found. *State v. Turner*, 103 Wn. App. 515, 520-21, 13 P.3d 234 (2000) (citing *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997)). Here, the handgun was purchased by and registered to Allen, and kept in the apartment that she rented and lived in. (6RP 765; Exh. P20) No men's clothing or other personal items were found in the apartment. (5RP 549-50) A rational jury could have a reasonable doubt that Pointec exercised dominion and control over the apartment and the 9 millimeter handgun kept there.

Finally, the jury could have a reasonable doubt that Pointec

⁵ The jury seemed unsure that this act established the elements of the crime as well. During deliberations, the jury sent a note asking, "is a felon holding a gun in a gun store legally considered possession or control?" (CP 38; 8RP 142) The jury was told to re-read their instructions. (CP 38; RP 1042-43)

actually possessed the AR-15 rifle. The State relied on a video uploaded to the mobile messaging application Snapchat, which showed Pointec test firing the rifle. (6RP 804, 853-57; Exh. 8) But the State did not establish when that video was taken. So no rational jury could have found beyond a reasonable doubt that Pointec actually possessed the rifle during the charging period.⁶

Because any rational trier of fact could have had a reasonable doubt that Pointec actually or constructively possessed the firearms, the lack of either prosecutorial election or a unanimity instruction was not harmless. Furthermore, the trial court did give a unanimity instruction for the promoting prostitution charge. (CP 71) The lack of a similar instruction for the unlawful possession of a firearm charges would have led the jury to infer that unanimity was not required. Pointec's convictions for unlawful possession of a firearm should therefore be reversed.

V. CONCLUSION

Pointec's two unlawful possession of a firearm convictions must be reversed because the State's failure to elect which act it was relying on, and the court's failure to provide a unanimity

⁶ Investigators located some electronic communications between Pointec and another man indicating that Pointec had purchased or received the rifle from that man. (6RP 803-5; Exh. 6)

instruction, was not harmless.

DATED: October 30, 2017



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Rance Michel Pointec

CERTIFICATE OF MAILING

I certify that on 10/30/2017, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Rance M. Pointec #316303, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



STEPHANIE C. CUNNINGHAM, WSBA #26436

October 30, 2017 - 11:12 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50345-0
Appellate Court Case Title: State of Washington, Respondent v. Rance Pointec, Appellant
Superior Court Case Number: 15-1-03895-0

The following documents have been uploaded:

- 3-503450_Briefs_20171030111149D2147756_7015.pdf
This File Contains:
Briefs - Appellants - Modifier: Amended
The Original File Name was Pointec Amd Brief.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us
- jruyf@co.pierce.wa.us

Comments:

Sender Name: Stephanie Cunningham - Email: sccattorney@yahoo.com
Address:
4616 25TH AVE NE # 552
SEATTLE, WA, 98105-4183
Phone: 206-526-5001

Note: The Filing Id is 20171030111149D2147756