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Division II
State of Washington
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NO. 50433-2-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Appellant,

v.

GERALD LAWRENCE COLE, JR.,

Respondent.

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

BRIEF OF RESPONDENT

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A. INTRODUCTION

After hearing extensive testimony about a physical altercation between Mr. Cole and five officers, the jury acquitted Mr. Cole of five of the six charged felonies that arose from this incident, including assault of an officer in the second degree with a deadly weapon, two assault three charges against two other officers, and attempting to disarm the officer who claimed Mr. Cole tried to grab his gun from him. The jury convicted Mr. Cole of the remaining felony, unlawful possession of a firearm, in addition to the misdemeanor offense of driving with a suspended license.

After trial, Mr. Cole moved to arrest judgment on the charge of unlawful possession of a firearm due to insufficient evidence. The same judge who heard the evidence at trial granted Mr. Cole's motion for arrest of judgment of the unlawful possession of a firearm—the first time the judge had granted such a motion in his sixteen years on the bench.

The State appeals the trial court's arrest of judgment.

B. ISSUES PRESENTED FOR REVIEW

1. Did the trial court correctly grant Mr. Cole's motion for arrest of judgment when there was legally insufficient evidence Mr.

Cole *knowingly possessed* a firearm?

2. When a person moves for arrest of judgement and a new trial under CrR 7.4(a) and 7.5, the trial court is required to rule on both motions. Mr. Cole moved for arrest of judgment and a new trial after he was acquitted of all but one felony, but the trial court only ruled on Mr. Cole's motion to arrest judgment. Was Mr. Cole entitled to a trial court ruling on his motion for a new trial under CrR 7.4(d) and CrR 7.5?

C. STATEMENT OF THE CASE

Mary Graves was up late working in her home when she heard a bump and discovered a car had driven into her yard. RP 646, 648. She saw a black man trying to get help and move the crashed car. Ex. 35; RP 640. Thomas Graves, Mary's husband, called 911. RP 649.

Officers Ryan Bradley, Jimmy Welsh, and Gerald Bratcher were the first officers to respond to the Graves' 911 call about the crash, which reported a black man in his mid-30s, possibly intoxicated, stumbling around. RP 51-52, 183, 288, 641.

1. Five officers fight Mr. Cole to the ground, repeatedly tase him, and later claim their tasers had no effect.

When officers first arrived, they saw Mr. Cole climbing out of the car window feet first. RP 107, 117, 120. Officer Bratcher shined his spotlight inside Mr. Cole's car. RP 290. The area was well lit. RP 116. Mr. Cole's boxer underwear were visible to police because his pants were sagging. RP 108, 111, 120. The officers did not see a weapon on Mr. Cole even though his pants were down below his waist. RP 116-117.

Mr. Cole fled. RP 62-63. Officers Welsh and Bratcher tackled Mr. Cole. RP 63, 295. Officer Welsh tried to grab his left arm. RP 64. Officer Bratcher moved in behind and tried to grab his right arm but the officer stumbled to the ground. RP 63, 294-295. Officer Bratcher got back up and grabbed Mr. Cole's right arm. RP 295-296. They fell to the ground. RP 296. None of the officers saw a weapon fall when Mr. Cole landed on the ground. RP 120.

Officer Bratcher was partially under Mr. Cole's body while his other foot was trapped in a fence. RP 303. He kept trying to maintain control of Mr. Cole's right arm but he said that Mr. Cole exhibited great strength, pulling his arm away, tucking it under his body. RP 296-7, 303.

Officer Bradley was the third officer to arrive. RP 63. Officer Bradley attempted to take Mr. Cole's legs out from underneath him to get him down to the ground. RP 69. He was kicked in his lower extremities. RP 69. Officer Bradley described this as a "chaotic fight" with "lots of closed fists and elbows and things being swung at the officers." RP 64. Officer Bradley said that Mr. Cole's "feet were planted on the ground and hands were also planted on the ground, bent over, so the legs and the torso had not made contact with the ground at this point." RP 120. No weapon was observed when Mr. Cole hit the ground. RP 121.

Officers Matthew Riche and Kenneth Smith arrived soon after and saw the officers on the ground struggling with Mr. Cole. RP 183, 306. Mr. Cole was face down when Officer Riche ran up and jumped on Mr. Cole's leg. RP 186. Officer Welsh tried to control Mr. Cole's left arm, Officer Bradley held down his legs, and Officer Bratcher held Mr. Cole by his right arm. RP 187.

Officer Riche said he heard the subject may have had a firearm, and shot Mr. Cole with his taser. RP 189. Mr. Cole's hands and feet were on the ground when Officer Riche tased him. RP 121. Officer Riche tased Mr. Cole more than once, trying to create an electrical

circuit between his back and thigh. RP 191. He also shot Mr. Cole with Officer Bradley's taser. RP 261.

Officer Riche reported the taser did not have the effect he wanted on Mr. Cole. RP 262-263. Mr. Cole did not exhibit the usual physical symptoms of muscles that freeze up and hands going in fists in front of the chest. RP 262-264. However, both Officers Riche and Smith described that Mr. Cole kept tucking his hands underneath his body. RP 195, 367.

Officer Bradley thought that Officer Riche's taser was working better than his, but still he did not believe that either taser had any effect. RP 92-93. He sprayed Mr. Cole directly in the face with pepper spray. RP 94. The officers then handcuffed Mr. Cole and called an ambulance. RP 397, 468.

Prior to driving that night, Mr. Cole smoked a marijuana cigarette with an old friend. RP 612, 618. Unbeknownst to Mr. Cole, it was laced with PCP, or angel dust. RP 593, 611.¹ He described that after he smoked it, his head was "thumping like it was just spinning and out of control." RP 687. Mr. Cole did not remember losing control of his car. RP 688.

¹ The pharmacological name for PCP is phencyclidine.

Mr. Cole was taken to the hospital and blood tests revealed that he had ingested PCP. RP 593. The treating doctor described the effects of the drug as:

very strong and difficult to control. It almost brings out aggression in people is the usual description of acute PCP intoxication and it also can cause hallucinations and behavioral, mental changes. But also in terms of muscular strength and contractions, it has been described as making one almost super human or like a charge of adrenaline.

RP 596-597.

Mr. Cole did not remember having contact with the police that night. RP 689. He only vaguely remembered being at the hospital. RP 689. But he does know that at that time, he did not own a firearm, nor could he have, because he was under community supervision, which prohibited him from owning or possessing a firearm. RP 693-694.

2. Officers give varying accounts about the presence of a weapon during the altercation, and claim there was a gun present to justify their use of force against Mr. Cole.

Detective Katz sent an e-mail to Officer Welsh two days after Mr. Cole's arrest, saying he had "a few clarifying questions regarding the positioning of the suspect when the gun came out." The detective wanted to be "sure we have it right" and asked to meet with Officer Welsh that weekend. Supp. CP____, sub. no. 94. Despite this effort to

“clarify” various officer accounts of seeing a gun that night, the officers gave differing testimony of the appearance of a firearm during their altercation with Mr. Cole.

Officer Riche described that while trying to gain control of Mr. Cole’s legs, “I was advised that at some point he had a firearm potentially, and then, um, further down, he, I was told that he was trying to grab an officer’s gun.” RP 188. He said that this claimed presence of a firearm “ups the threat level,” and that was why he shot Mr. Cole with his taser. RP 203.

Officer Welsh described a gun was pushed into his hip and stomach area. RP 457. He said “it was literally pushed into my hip and my lower stomach area.” RP 458. He described, “at this point, it gets very challenging for us, having a gun directed at me and placed into my stomach, we’re at the level of deadly force now. I’m concerned that the gun may go off, that I may be shot.” RP 458. Officer Welsh said he ripped the firearm from Mr. Cole’s hand, and “the firearm kind of flies up in the air, then lands roughly -- it appears to land in front of us or right in the middle of us.” RP 461. He said that this firearm was unaccounted for until Officer Smith grabbed it. RP 466-67.

Officer Welsh also said that after the gun flew from Mr. Cole's hand, he felt Mr. Cole's arms around his waist, and that Mr. Cole grabbed the heel of his firearm. RP 464. Officer Welsh claimed that Mr. Cole tried to remove his firearm from his duty belt during the struggle. RP 465.

Officer Welsh said that the gun pointed at him was consistent with the .22 Ruger that was introduced at trial. RP 458, 471. Mr. Cole was charged with assault in the second degree with a deadly weapon and attempting to disarm a police officer based on Officer Welsh's description. CP 1, 3. The jury acquitted Mr. Cole of these charges. CP 44, 48.

No other officer saw a firearm fly through the air as described by Officer Welsh. RP 461. Officer Smith said he saw a gun located between Mr. Cole's "stomach, waist, the lower stomach waist area and the ground and Officer Welsh's knee." RP 366. He said that during this time, he saw Mr. Cole's left hand on Officer Welsh's duty belt. RP 368. Officer Smith grabbed the gun by the barrel and took it towards himself in a swinging motion, ripped it out from underneath Mr. Cole and stood up with it. RP 365. He said he placed on a picnic table about 20 feet

away. RP 371. Officer Smith said he left it there and returned to the fight. RP 371.

By contrast, Officer Bradley claimed to see Mr. Cole with his hand on a gun under his body, then saw a firearm get swept away and land about two feet away from them in the grass while they were still actively fighting and rolling around on the ground. RP 97.

Officer Bratcher never saw a gun when he was down on the ground with Mr. Cole from the start of the incident. RP 310. He said that “Officer KP Smith showed me the gun that was supposedly pulled off the defendant.” RP 310. Officer Riche never saw a gun until after the altercation, when Officer Smith handed him a gun that he booked into evidence. RP 203, 206.

Despite two officers being present during booking, they neglected to put an evidence seal on the bag containing the gun. RP 272. No photographs were taken of the gun they claimed was found that night. RP 406. The gun was not sent to the crime lab for fingerprints. RP 274, 397, 505.

Mr. Cole represented himself. Pre-trial and at trial, he argued for exclusion of the firearm because the evidence bag containing the firearm was not sealed with evidence tape, and there was not a record

of all the people who had handled the firearm. Ex. 29; RP 221-240, 322, 515. The trial court noted “concern,” about the firearm’s chain of custody, finding it “unusual” for evidence to be unsealed with evidence tape, but admitted the gun at trial, noting the chain of custody problems went to weight, not the admissibility of the evidence. RP 236-237, 240, 363, 546, 566.

Mr. Cole maintained throughout the proceedings that police made up the allegation that he had a gun in his hand during the altercation to justify their use of force that night, arguing in closing:

And I believe I’m blessed, but I ain’t that blessed because we know that they would have killed me. There’s no, if one had killed me for allegedly pulling a gun, the other would have killed me. There’s no way that you can keep trying to go for weapons and pull a 10-inch weapon on somebody and nobody see it. That’s impossible. Because all this is lit up. It’s a makeshift story of what they’re saying.

RP 797.

3. The jury acquits Mr. Cole of all assault charges against the officers, including assaulting Officer Welsh with a deadly weapon and the charge of attempting to disarm him, and the court arrests judgment on the remaining felony charge.

Despite the officers’ claims that Mr. Cole assaulted them, the jury acquitted him of each assault charge. CP 44, 46, 47. The jury also acquitted Mr. Cole of attempting to disarm Officer Welsh. CP 48. The

jury convicted Mr. Cole of unlawful possession of a firearm and driving with license suspended. CP 1-3²; 45, 49.

Mr. Cole moved to arrest judgment and receive a new trial under CrR 7.4 and 7.5 on the grounds that the State introduced insufficient evidence that he *knowingly possessed* a firearm. CP 56-62.

The trial court wrestled with the issue for days before the hearing on Mr. Cole's motion to arrest judgment. RP 870, 878. The court was "reticent" because of its confidence in the jurors, but recognized its duty to "equally apply the law and justice to everybody that comes before the Court." RP 878. The trial court determined that even when viewed in the light most favorable to the State, no reasonable juror could find Mr. Cole knowingly possessed a firearm. RP 878. The trial court did not rule on Mr. Cole's motion for a new trial. RP 878-879. The Court dismissed the unlawful possession charge with prejudice. RP 878-879. The State appealed the court's dismissal. CP 102.

² Mr. Cole moved to dismiss Count V, possession of a stolen firearm, pre-trial under *State v. Knapstad*. 107 Wn.2d 346, 729 P.2d 48 (1986). Supp. CP ____, Sub. no. 76. The State conceded and this charge was dismissed prior to trial. Supp. CP _____, Sub. no. 117.

D. ARGUMENT

1. The trial court correctly arrested judgement in Mr. Cole's case where the State failed to present evidence sufficient to establish that Mr. Cole knowingly possessed a firearm.

The trial court correctly arrested judgment of the jury's verdict because the State failed to present evidence sufficient to establish Mr. Cole knowingly possessed the firearm the police claimed to have recovered from him that night.

a. The trial court viewed the evidence in the light most favorable to the prosecution when it granted Mr. Cole's motion for arrest of judgement.

The trial court carefully considered Mr. Cole's motion and applied the correct legal standard. The court noted how unusual Mr. Cole's case was, remarking that in sixteen years as a trial court judge, he had never before entertained such a motion. RP 878.

Mr. Cole argued various grounds on which the Court could arrest judgment or grant a new trial, including an insufficient charging document, insufficiency of proof of a material element, and perjured officer testimony. CP 54-55.

Mr. Cole filed a detailed motion arguing that the State failed to prove that he knowingly possessed the firearm, either under a theory of

actual or constructive possession.³ CP 56-62. The State provided a very limited response to Mr. Cole’s argument about the evidence necessary to establish knowing possession, asserting generally that civilian and law enforcement witnesses testified, that the “the State introduced evidence regarding the defendant’s actions that evening,” and that the jury was properly instructed on the elements. CP 71, 72.

At the hearing on Mr. Cole’s motion to arrest judgment, the court stated it had read Mr. Cole’s pleadings. RP 870. Mr. Cole argued the State introduced insufficient evidence of either knowing or constructive possession at trial. RP 871-872.

The trial court informed Mr. Cole it would not interfere with the jury’s findings of witness credibility, stating the narrow grounds were whether a “reasonable jury could find that each element of the crime has been met beyond a reasonable doubt.” RP 875. The trial court then stated the standard by which to assess whether the elements were met: “And, in assessing that, I have to look at those facts in the light most favorable to the non-moving party, which, in this case, is the State, and so I just want to put it in context what the inquiry is.” RP 875.

³ Mr. Cole argued that the officers committed perjury in section B of his brief. CP 53.

After stating the correct standard by which to rule on Mr. Cole's motion to arrest judgment, the trial court concluded that the State failed to prove evidence sufficient to establish a material element of the crime.

THE COURT: I've been a judicial officer for 16 years. I have never entertained a motion for an arrest of judgment. I have maximum confidence in the jurors that come in here, including the jurors that were jurors in your case, Mr. Cole; however, I'm actually going to grant your motion and find that the element of knowing possession, a reasonable jury could not find knowing possession in this case, actual or constructive, and I'm viewing the facts in the light most favorable to the State. I have wrestled with this for several days, and I shouldn't say it this way, as much as I am reticent or hate to do it or admit it, but I have to equally apply the law and justice to everybody that comes before the Court, and I don't believe that that element could be met in this case.

RP 878.

The State's claim on appeal that the court drew "adverse inferences" is not in the court's ruling. Brief of Appellant at 10. And the record does not support the State's claim that the trial court "mistakenly focused on the defendant's own version of events, instead of viewing the evidence by the correct standard—in the light most favorable to the State." Brief of Appellant at 11.

To the contrary, the trial court specifically stated it could not supplant its own credibility determinations for those of the jury, telling

Mr. Cole: “So I understand your concern about the officers and how they may have, whatever the jurors felt about the evidence, but that really isn’t before the Court.” RP 875. The Court unequivocally ruled that the element of knowing possession was not met in this case, either as actual or constructive possession. RP 878.

Review of a trial court decision denying either a motion for directed verdict or a motion for arrest of judgment requires the appellate court to engage in the same inquiry the trial court applied in Mr. Cole’s case, affirming the trial court’s arrest of judgment when “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could not have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Longshore*, 141 Wn.2d 414, 420-421, 5 P.3d 1256 (2000). This analysis includes all evidence presented at trial. *State v. Warfield*, 119 Wn. App. 871, 884, 80 P.3d 625 (2003) (citing *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996)).

The trial court correctly determined the State failed to establish sufficient evidence that Mr. Cole knowingly possessed a firearm as a matter of law. The trial court's decision should be affirmed.

b. The State failed to prove either actual or constructive possession of the firearm.

The officers' testimony that Mr. Cole fleetingly grasped a gun was not sufficient to establish either actual or constructive possession of a firearm.

A person actually possesses something that is in his or her physical custody, and constructively possesses something that is not in his or her physical custody but is still within his or her "dominion and control." *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

To establish actual possession the prosecution must prove more than a passing control; it must prove actual control. *Id.* (citing *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994)); *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969) ("Possession entails actual control, not a passing control which is only a momentary handling"). Actual possession is a close question when the evidence indicates the person physically handles the gun for no more than a brief moment. *Davis*, 182 Wn.2d at 228, footnote 4.

Actual possession requires the person “have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature.” *Staley*, 123 Wn.2d at 801(citing *United States v. Landry*, 257 F.2d 425, 431 (7th Cir.1958)) (internal quotation omitted).

The length of time is but a factor in determining whether the State proved actual, and not merely passing possession. *Id.* A defendant’s momentary handling of an item, unless there is other sufficient indicia of control, cannot support a finding of possession. *Id.* at 802.

The prosecutor’s citation to the existence of a gun at the scene is not sufficient to establish Mr. Cole’s possession of the gun:

- “A firearm was recovered and removed from the fight.” Brief of Appellant at 5 (citing RP 90, 365);
- Officer Smith heard Officer Welsh say, “I think he has a gun.” Brief of Appellant at 5 (citing RP 362);

The only other citations to the record on appeal establish nothing more than fleeting, brief touching of a gun during a fight:

- Officer Smith looked down and saw the barrel of a handgun pointed at Officer Welsh. Brief of Appellant at 5 (citing RP 363);

- Officer Welsh stated that he looked down during the fight and saw the barrel of a semiautomatic firearm wedged between his duty belt and body, pointed directly at him. Brief of Appellant at 5 (citing RP 457);
- Officer Welsh was able to feel the barrel of the gun literally pushed into his hip and stomach area. Brief of Appellant at 5-6, 10 (citing RP 457);
- Officer Welsh could tell the defendant's hand was around the gun. Brief of Appellant at 6 (citing RP 457-458);
- Officer Bradley observed the defendant physically holding the firearm under his body. Brief of Appellant at 6, 10 (citing RP 97).

Notably, the prosecutor on appeal relies primarily on Officer Welsh's description that Mr. Cole wedged a firearm between his belt and body to establish possession. The jury rejected these facts when they acquitted Mr. Cole of attempting to disarm and assault with a deadly weapon against Officer Welsh. CP 1, 23, 44, 46-48; RP 71, 85, 101, 120, 457, 467, 765, 860.

But even if this were not the case, Officer Welsh's testimony, and Officer Bradley's claim about Mr. Cole's hand momentarily

grasping a firearm does not establish knowing possession of a firearm. Even if it was fleetingly in his hand, this is not actual possession, but mere passing control that cannot constitute actual possession absent other indicia of control to support actual possession. *Staley*, 123 Wn.2d at 802.

Nor do the officers' report of fleeting, passing possession establish constructive possession of the firearm. A person constructively possesses something that is not in his or her physical custody but still within his or her "dominion and control." *Davis*, 182 Wn.2d at 227. Courts determine whether a person has dominion and control over an item by considering the totality of the circumstances. *State v. Summers*, 107 Wn. App. 373, 384, 28 P.3d 780 (2001) (citing *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)). Mere proximity of the contraband to the defendant is insufficient to show dominion and control. *State v. Enlow*, 143 Wn. App. 463, 469, 178 P.3d 366 (2008). "Dominion and control means that the object may be reduced to actual possession immediately." *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

In *Davis*, Davis was the decision maker about the gun's location for about 15 minutes, when he placed the gun in a shopping bag. *Davis*,

182 Wn.2d at 228. The original owner, Clemmons, did not know where the gun was while it was in Davis's possession. And Davis relinquished control over the gun by handing it back to Clemmons. *Id.* This control over the gun for a period of 15 minutes was sufficient to establish constructive possession. *Id.*

Davis exercised constructive possession over a firearm because he had it for a period of time inside his house. Mr. Cole was tackled to the ground in a public place. He could not have exercised dominion and control over the firearm, where he had no control over his surroundings, and at no time did he reduce a gun to his actual possession. *Jones*, 146 Wn.2d at 333.

There was no evidence that Mr. Cole possessed a firearm prior to the chaotic fight that could have been inferred to establish control and dominion over the firearm. There was no report of a weapon in the 911 call. RP 62-63. As Mr. Cole fled Officer Bradley noted, it "didn't appear he had a cell phone or keys or anything in his hands at all." RP 63. Even though Mr. Cole's waistband was visible, no witness saw a firearm in Mr. Cole's waist area. RP 117. Officer Bradley saw no weapon, either when Mr. Cole first slipped or when his hands were on the ground. RP 120. Police found no holster at any time. RP 121, 271.

Thus, there was no evidence of the gun's origin beyond police claims of seeing a gun mid-way through wrestling Mr. Cole to the ground.

The officers' description of events establish nothing more than Mr. Cole's proximity to a gun that he fleetingly grabbed onto and that at some point was seen under his body. Even when viewed in the light most favorable to the prosecution, this is not sufficient to establish either actual or constructive possession of the firearm police claimed to see during the chaotic struggle.

c. There is no evidence Mr. Cole acted knowingly.

Unlawful possession of a firearm is not a strict liability offense. *State v. Anderson*, 141 Wn.2d 357, 366-367, 5 P.3d 1247 (2000). The State has the burden to prove a "culpable mental state" for this offense. *Id.* at 366. A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he is aware of that fact or circumstance." RCW 9A.08.010(1)(b)(i); CP 31.

Knowledge may be inferred when the defendant's conduct indicates the requisite knowledge as "a matter of logical probability." *Warfield*, 119 Wn. App. at 884 (citing *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991)). At no time prior to the chaotic fight was Mr. Cole seen with a gun, and his intoxicated state at the time of the

offense would not allow a reasonable juror to infer he acted with knowledge when his hand briefly gripped the firearm as described by Officers Welsh and Bradley.

Mr. Cole made no statement about owning a gun or knowing about the gun the police found when he was arrested. He unequivocally stated he did not own or possess a gun previous to the altercation. RP 694. And there was no evidence he knew of a gun prior to the fight with police. Mr. Cole was visibly under the influence, and as described by a lay witness, did not appear to know what was going on. RP 641. The only other evidence of Mr. Cole's mental state introduced at trial was his testimony that he had no recollection of the altercation due to intoxication. RP 694, 697.

The evidence of Mr. Cole's mental state was that he was intoxicated and unaware of his circumstances, which, even when viewed in the light most favorable to the State, simply cannot support *knowing* possession.

The State offered no evidence of either Mr. Cole's mental state or any form of possession that went beyond momentary touching of the firearm. The trial court correctly ruled that even when viewed in the light most favorable to the prosecution, the evidence presented in Mr.

Cole's case was insufficient to establish knowing possession. *Jackson*, 443 U.S. at 319.

2. Mr. Cole is entitled to have the court rule on his motion for a new trial should this Court reverse the trial court's arrest of judgment.

Should this Court reverse the trial court's order arresting judgment, this court should remand for the trial court to rule on Mr. Cole's motion for a new trial. RAP 2.4(e); CrR 7.4(d); CrR 7.5.

A trial court abuses its discretion when the ruling it makes is based on an erroneous view of the law. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990). The trial court here erroneously determined it was not required to rule on Mr. Cole's motion for a new trial because it granted his motion to arrest judgment.

CrR 7.4(d) requires the trial court rule on Mr. Cole's motion for a new trial under CrR 7.5(a)⁴ even though the trial court granted Mr. Cole's motion for arrest of judgment:

⁴ CrR 7.5(a) Grounds for New Trial provides in full: The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected: (1) Receipt by the jury of any evidence, paper, document or book not allowed by the court; (2) Misconduct of the prosecution or jury; (3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable

Whenever a motion in arrest of a judgment and, in the alternative for a new trial is filed and submitted in any criminal cause tried before a jury, and the court enters an order granting the motion in arrest of judgment, the court shall, at the same time, in the alternative, pass upon and decide in the same order the motion for a new trial. The ruling upon the motion for a new trial shall not become effective unless and until the order granting the motion in arrest of judgment is reversed, vacated, or set aside in the manner provided by law

In addition to moving for arrest of judgement under CrR 7.4(a), Mr. Cole argued he was entitled to a new trial under CrR 7.5(5), (6), (7), and (8). CP 53-55. The trial court granted Mr. Cole's arrest of judgement and ruled it did not therefore need to consider Mr. Cole's motion for a new trial. RP 878-879. This was an erroneous ruling that requires remand for the trial court to rule on Mr. Cole's motion for a new trial as required by CrR 7.4(d).

Whether to grant a new trial "is a matter primarily within the discretion of the trial court and [that the reviewing court] will not disturb its ruling unless there is a clear abuse of discretion." *State v.*

diligence and produced at the trial; (4) Accident or surprise; (5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial; (6) Error of law occurring at the trial and objected to at the time by the defendant; (7) That the verdict or decision is contrary to law and the evidence; (8) That substantial justice has not been done. When the motion is based on matters outside the record, the facts shall be shown by affidavit.

McKenzie, 157 Wn.2d 44, 51, 134 P.3d 221 (2006). It is the trial judge alone who can make this ruling, because as in Mr. Cole's case, the trial court has "seen and heard" the proceedings and "is in a better position to evaluate and adjudge" what occurred at trial than a reviewing court.

McKenzie, 157 Wn.2d at 52.

By failing to rule on Mr. Cole's motion for a new trial, the trial court abused its discretion. Mr. Cole alleged various grounds which would support the trial court ordering a new trial in the alternative to granting his motion to arrest judgment. He is entitled to a ruling on his motion for a new trial, should this court reverse the trial court's arrest of judgment. RAP 2.4(e), CrR 7.4(d) and CrR 7.5.

E. CONCLUSION

This Court should affirm the trial court's grant of Mr. Cole's motion to arrest judgment where there the State failed to produce evidence of Mr. Cole's mental state or evidence sufficient to establish either actual or constructive possession of a firearm as was required for conviction of unlawful possession of a firearm. In the alternative, should this court reverse the trial court's arrest of Mr. Cole's judgment, Mr. Cole is entitled to a ruling on his motion for a new trial under CrR 7.4(d) and 7.5.

DATED this 14th day of June 2018.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Appellant,)	
)	
v.)	NO. 50433-2-II
)	
GERALD COLE, JR.,)	
)	
Respondent.)	

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