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NO. 50646-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN JACOBS,

Appellant.

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

The Honorable John Hickman, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to sustain appellant's conviction for first degree unlawful possession of a firearm.

2. The trial court erred in excluding "other suspect" evidence, in violation of appellant's constitutional right to present a defense.

Issues Pertaining to Assignments of Error

1. Is there insufficient evidence to sustain appellant's conviction for first degree unlawful possession of the firearm, where the evidence established only that appellant momentarily handled the firearm, which is insufficient as a matter of law for actual or constructive possession, necessitating dismissal of appellant's conviction?

2. Did the court violate appellant's right to present a defense in excluding "other suspect" evidence where there was an adequate nexus between the alternative suspect and possession of the firearm, necessitating reversal of appellant's conviction?

B. STATEMENT OF THE CASE

On September 28, 2016, the State charged Adrian Jacobs with one count of first degree unlawful possession of a firearm. CP 1. The State alleged that on or about September 27, 2016, Jacobs knowingly owned, possessed, or controlled a firearm, and had previously been convicted of a serious offense, contrary to RCW 9.41.040(1)(a). CP 1.

Jacobs proceeded to a jury trial in March of 2017. CP 237-44. During deliberations, the jury asked, “Is it illegal for a felon to be in the same house where he/she is aware that weapons are present?” CP 22. The jury could not thereafter reach a verdict, so the trial court declared a mistrial. CP 235-36, 243-44. The State retried Jacobs in May of 2017. RP 52. The following evidence was introduced as Jacobs’s second trial.

Amanda Mullenix was Jacobs’s supervising community corrections officer (CCO) for the year leading up to the charged crime. RP 138-40, 151. Mullenix explained that individuals on supervision are required to report their current address to the Department of Corrections (DOC). RP 142-43, 149. In July of 2016, Jacobs reported that he moved into his mother’s house, who subsequently passed away. RP 152-54. Mullenix testified that on September 15, 2016, Jacobs called to say he was moving back into his girlfriend’s house on East 46th Street in Tacoma. RP 142-43, 154.

Mullenix attempted a home visit at the East 46th Street house on September 21. RP 155. Jacobs was not there, but Leslie Cabrerros, the father of Jacobs’s girlfriend, answered the door. RP 155. Cabrerros told Mullenix that he, along with his daughter, the children,¹ and Jacobs lived at the house. RP 160. Cabrerros did not testify at trial.

¹ The record does not specify whose children lived at the house. RP 160.

Jacobs reported to the DOC office as scheduled on the morning of September 27. RP 88-90, 141. Several CCOs and Tacoma police officers then went to the East 46th Street house to search it, while Jacobs remained outside in one of the CCO's vehicles. RP 89-92, 100, 144. Cabrerros answered the door and was the only one home. RP 92, 144-45.

Police found a .40 caliber Smith and Wesson handgun on the floor of the living room, tucked underneath a couch just inside the front door. RP 122-23, 145-47, 197. A magazine inside the gun contained eight rounds of ammunition. RP 99. Forensic investigator Loree Barnett later test fired the gun and found it to be operable. RP 195-200. Next to the gun were several items, including keys and a wallet with Cabrerros's identification inside. RP 103, 122-23, 135-36. Cabrerros's address on his identification was listed as the East 46th Street residence. RP 135-36.

Mullenix searched the rest of the East 46th Street house. RP 147-49. In the upstairs bedroom Jacobs supposedly shared with his girlfriend, Mullenix noted items that appeared to belong to a woman on one side of the room, but nothing on the other side of the room. RP 156. In a downstairs closet, Mullenix noticed a jacket and pair of boots she had seen Jacobs wearing before. RP 148-49. Otherwise, there was gender neutral clothing in the house that Mullenix could not say belonged to Jacobs, and nothing else that stood out to Mullenix as belonging to Jacobs. RP 148-49, 156-58.

Jacobs's friend, Ryan Dolan, testified Jacobs moved in with him about five to seven days before September 27. RP 271-72. Dolan explained that, after Jacobs's mother passed away, he helped Jacobs clean out his mother's home, and then Jacobs came to live with him. RP 271-72. Mullenix acknowledged she spoke with Dolan about his address on the morning of September 27. RP 158-59, 272-74. Jacobs continued to receive mail at Dolan's house as of January 2017. RP 274-75.

Donovan Velez, a forensic specialist with the Tacoma Police Department, examined the gun for latent fingerprints using a process called superglue fuming. RP 165, 174-75. He recovered one partial latent print from the top of the slide. RP 176-77. Velez could not find any latent prints on the magazine or ammunition. RP 177-78.

Toni Martin, a latent print examiner with the Tacoma Police Department, compared the latent print to Jacobs's prints. RP 220-22. She identified the latent print recovered from the gun as a small, partial print from the inside of Jacobs's right little finger. RP 222, 229-33. Martin explained the print was about the size of a pencil eraser. RP 231. She could not say when the print was left on the gun. RP 235. Cabrerros was excluded as a possible contributor of the latent print. RP 222-23.

The parties stipulated that Jacobs had previously been convicted of a felony classified as a serious offense. RP 251-52. The parties further

stipulated that as of September 2005, Jacobs could no lawfully own, possess, or control a firearm. RP 251-52.

The jury found Jacobs guilty as charged. CP 59. The State calculated Jacobs's offender score to be eight, making the standard sentence range 77 to 102 months. CP 62-64. The trial court imposed 80 months of confinement and ordered Jacobs to register as a firearm offender. CP 69-72; RP 351-53. Jacobs filed a timely notice of appeal. CP 227.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUSTAIN JACOBS'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM.

In every criminal prosecution, due process requires the State prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

“[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” Id. at 16. Such inferences must “logically be derived from the facts proved, and should not be the subject of

mere surmise or arbitrary assumption.” Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911). When there is insufficient evidence to support a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

A person is guilty of first degree unlawful possession of a firearm “if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense as defined in this chapter.” RCW 9.41.040(1)(a); see also CP 53. In addition to these statutory elements, “[k]nowing possession” is an essential element of the crime of unlawful possession of a firearm.” State v. Hartzell, 156 Wn. App. 918, 944, 237 P.3d 928 (2010).

Possession may be actual or constructive. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). Actual possession requires physical custody. State v. George, 146 Wn. App. 906, 919-20, 193 P.3d 693 (2008). Constructive possession may be established by showing the accused had dominion and control over the firearm. Chouinard, 169 Wn. App. at 899. However, “[m]ere proximity to the firearm is insufficient to show dominion and control.” Id. Likewise, “knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession.” Id.

Jacobs's jury was given the following pattern instruction on actual and constructive possession:

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item[,] and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP 56; accord 11 WASH. PRACTICE: WASH. PATTERN INSTRUCTION: CRIMINAL 133.52 (4th ed. 2016) (WPIC).

Washington courts have long held that, to establish possession of an item—whether illegal drugs or weapons—the State must prove “actual control, not a passing control which is only a momentary handling.” State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); accord State v. Staley, 123 Wn.2d 794, 801, 872 P.2d 502 (1994) (“To establish possession the

prosecution must prove more than a passing control; it must prove actual control.”).

For instance, Callahan was temporarily residing on a houseboat, was in close proximity to illegal drugs, and admitted to handling the drugs earlier that day. Callahan, 77 Wn.2d at 31. The supreme court held Callahan’s previous “momentary handling” of the drugs was insufficient to establish actual possession:

Since the drugs were not found on the defendant, the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.

Id. at 29. The court further emphasized “[t]here must be substantial evidence to show that [Callahan] had dominion and control over the drugs.” Id. As such, the court found Callahan’s mere proximity to and momentary handling of the drugs also insufficient to establish the dominion and control necessary for constructive possession. Id. at 29-31.

A majority of the court in State v. Davis, 182 Wn.2d 222, 340 P.3d 820 (2014) (Stephens, J., dissenting), recently reaffirmed the rule of Callahan.² There, both defendants were convicted of firearm possession

² The four-justice concurrence agreed with the dissent that there was insufficient evidence to sustain the defendants’ unlawful possession of a firearm convictions. Davis, 182 Wn.2d at 232-33 (Wiggins, J., concurring in part, dissenting in part).

charges based on their actions following Maurice Clemmons's shooting of four Lakewood police officers. Davis, 182 Wn.2d at 224. After Clemmons was injured and stole a firearm from one of the officers, Davis drove Clemmons to Nelson's home. Id. at 225. While another person helped Clemmons with the wound, Nelson put clothes and the stolen firearm in a shopping bag. Id. at 227-28. Clemmons stayed at Nelson's home for approximately 15 minutes. Id. at 228. Just before leaving, Clemmons asked Davis, "Where's the gun?" Id. Davis responded that the gun was in the bag and handed the bag to Clemmons. Id.

A majority of the court held that neither Nelson nor Davis exercised actual or constructive possession over the firearm, because neither "asserted any interest" in the gun, only "briefly handl[ing] the item for Clemmons, the true possessor of the gun." Id. at 235-37 (Stephens, J., dissenting). No evidence demonstrated "sufficient control over the gun." Id. at 235. Nelson's and Davis's actions therefore amounted to "mere proximity to and momentary handling" of the firearm, like in Callahan, necessitating dismissal for insufficient evidence. Id. at 235-38.

Additional case law holds that fingerprints are insufficient to establish anything but momentary handling, which is not enough for actual or constructive possession. For instance, in State v. Spruell, 57 Wn. App. 383, 384, 788 P.2d 21 (1990), co-defendant Hill was present in a kitchen

with narcotics and his fingerprint was found on a plate that had been thrown against a door, where cocaine powder and residue were found. The court of appeals concluded “Hill’s fingerprint on the plate proves no more than that he touched the plate,” which is insufficient for actual possession under Callahan. Spruell, 57 Wn. App. at 386. With regard to constructive possession, there was no evidence of Hill’s dominion and control over the premises, and “presence and proximity to the drugs is not enough.” Id. at 388-89. The court reversed for insufficient evidence. Id. at 389.

Finally, State v. Cote, 123 Wn. App. 546, 96 P.3d 410 (2004), is perhaps most analogous to Jacobs’s case. There, police found a syringe and components of a methamphetamine lab, including two Mason jars containing various chemicals, inside a stolen truck. Id. at 548. Evidence established Cote had been a passenger in the truck and his fingerprints were found on the Mason jars. Id.

The court of appeals reversed Cote’s conviction for insufficient evidence. Id. at 550. Cote was not in actual possession of the contraband, and was not in or near the truck, at the time of his arrest. Id. at 549-50. Rather, the evidence established only that “Mr. Cote was at one point in proximity to the contraband and touched it,” which “is insufficient to establish dominion and control,” under Callahan and Spruell. Id. at 550.

The court of appeals accordingly held there was no evidence of actual or constructive possession. Id.

Like in Callahan, Spruell, and Cote, there is insufficient evidence to support an inference that Jacobs had actual or constructive possession of the firearm found at the East 46th Street house. The State contended below that there was evidence of “both actual possession of the firearm and constructive possession.” RP 306. Both arguments are addressed in turn.

First, the evidence does not establish actual possession of the firearm. The firearm was not in Jacobs’s physical custody when it was discovered. RP 145-47, 197. Nor was Jacobs even present at the house when the officers arrived and conducted the search. RP 89-92, 100, 144. Instead, all the evidence showed was Jacobs went to the DOC office on the morning of September 27 and remained outside the house in one of the CCO’s vehicles during the search. RP 88-92, 100, 144. No evidence was introduced as to when Jacobs was last at the East 46th Street house. See RP 88-90, 141.

Moreover, as the case law discussed above holds, Jacobs’s partial fingerprint on the firearm also does not prove actual possession. The fingerprint, at most, established Jacobs touched the gun at one point in time. Both forensic specialists acknowledged the latent print did not establish when or for how long Jacobs handled the gun. RP 191 (Velez), 235 (Martin). Jacobs’s fingerprint on the gun is akin to Callahan, where the

defendant admitted to previously handling the drugs, and Spruell and Cote, where the defendants' fingerprints were found on items containing the drugs. Such evidence shows only passing control or momentary handling, which is insufficient for actual possession.

Second, the evidence is insufficient to establish the dominion and control necessary for constructive possession. Mullenix testified that in July of 2016, Jacobs moved into his mother's house. RP 152. On September 15, 2016, Mullenix testified Jacobs told her that he had moved back in with his girlfriend at the East 46th Street house. RP 149-54. Jacobs was not the sole occupant of the house—Jacobs's girlfriend, Cabrerros, and the children all lived there. RP 135-36, 160.

The record does not establish whether Jacobs was an owner, renter, or anything more than a temporary guest at the house. Mullenix found only a coat and shoes in the downstairs closet that appeared to belong to Jacobs, but nothing elsewhere in the house, even in the room Jacobs supposedly shared with his girlfriend. RP 148-49, 156-58. Consistent with this evidence, Jacobs's friend Dolan testified Jacobs had been living with him for several days before September 27. RP 271.

In Callahan, two books, two guns, and a scale belonging to the defendant, plus evidence he had been staying at the premises for several days, was not enough for dominion and control. 77 Wn.2d at 31. Likewise,

evidence that the defendant received some mail at a residence and lived there off and on was insufficient. State v. Hagen, 55 Wn. App. 494, 500, 781 P.2d 892 (1989). Instead, “[s]ome evidence of participation in paying rent is generally required.” State v. Alvarez, 105 Wn. App. 215, 222, 19 P.3d 485 (2001). Thus, no evidence established Jacobs had dominion and control over the premises. See id. (recognizing “evidence of temporary residence or the mere presence of personal possessions on the premises” is insufficient to establish dominion and control over the premises in question).

Nor did any evidence establish Jacobs had dominion and control over the weapon itself. The gun was found in the living room, tucked underneath a couch near the front door where Cabreros was standing. RP 145-47, 197. A living room is a shared space, and nothing in the record showed Jacobs had exclusive dominion and control over the living room. Moreover, Cabreros was the only one home when the officers arrived and his belongings were found near the firearm. RP 92, 135-36, 144-45.

No evidence demonstrated Jacobs knew of the weapon’s presence in the house. Even if one could infer Jacobs knew of the firearm because it was visible underneath the couch, “knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession.” Chouinard, 169 Wn. App. at 899; accord State v. George, 146 Wn. App. 906, 923, 193 P.3d 693 (2008) (“We have held that

knowledge of the presence of [contraband] is insufficient to prove dominion and control.”).

While exclusive possession is not required, this evidence at most established that Jacobs had lived for a short time at a house where a gun was present. Mere proximity to and potential knowledge of the firearm does not establish constructive possession. And, again, Jacobs’s fingerprint established only previous passing control, which is also insufficient for constructive possession.

The controlling case law discussed above makes clear the State failed to prove Jacobs had actual or constructive possession of the firearm, an essential element of the charged crime. CP 53 (to-convict instruction requiring the State to prove “the defendant knowingly had a firearm in his possession or control”). There is insufficient evidence to sustain Jacobs’s conviction for unlawful possession of a firearm. This Court should accordingly reverse Jacobs’s conviction and remand with instructions to dismiss the charge with prejudice. Hickman, 135 Wn.2d at 99.

2. THE TRIAL COURT VIOLATED JACOBS’S RIGHT TO PRESENT A DEFENSE IN REFUSING TO ALLOW HIM TO PRESENT EVIDENCE THAT ANOTHER PERSON MAY HAVE COMMITTED THE CRIME.

Jacobs proffered “other suspect” evidence tending to logically connect another person, Cabrerros, to possession of the firearm. Specifically,

Jacobs wanted to show Cabreros was a convicted felon who could not lawfully possess a firearm and therefore had motive to not take ownership of the gun. Because the evidence of Cabreros's felony history tended to create a reasonable doubt as to Jacobs's guilt, the trial court's exclusion of such evidence violated Jacobs's constitutional right to present a defense.

- a. The trial court denied the defense motion to admit other suspect evidence.

Before trial, Jacobs moved to admit other suspect evidence. CP 9-20. Specifically, Jacobs sought to introduce a statement on plea of guilty and felony judgment and sentence showing Cabreros was a convicted felon, who could not lawfully possess a firearm.³ CP 9-10; RP 26-34; Ex. 31 (Statement of Defendant on Plea of Guilty); Ex. 32 (Felony Judgment and Sentence); RCW 9.41.040(2)(a) (specifying a person is guilty of second degree unlawful possession of a firearm if he or she has previously been convicted of "any felony").

Jacobs asserted Cabreros's inability to possess a firearm established he had motive to deny or not take ownership of the gun in his living room. CP 10, 19. This suggested Cabreros was the true possessor of the gun rather than Jacobs. To support admission of this other suspect evidence, Jacobs pointed to the fact that Cabreros was alone in the house with the gun, was in

³ Defense counsel averred that no record existed regarding restoration of Cabreros's right to possess a firearm. CP 10.

close proximity to it when he answered the door, and his wallet was found next to the gun. RP 26-27.

The trial court denied the defense motion, essentially because the defense had not produced any other evidence of Cabrerros's motive beyond the fact of his prior conviction. RP 37-40. The court explained:

I'm denying it based on State v. Russell[, 125 Wn.2d 24, 882 P.2d 747 (1994)]. State v. Russell stands for the proposition that mere evidence of motive in another party or motive coupled with threats of such person is inadmissible unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.

The sole motive for a showing that this gentleman had a prior criminal history is to indicate that he's trying to deflect his own guilt onto somebody else because he would end up going to prison having been a felon who was not allowed to have any firearm in his possession.

And motive alone is not enough for me to open the door in terms of him being -- bringing in the fact that he was a convicted felon. His fingerprint wasn't found on the weapon. The gun wasn't registered to him, obviously. It was in his house, but I'm not going to forbid counsel from arguing that there were other people in the home that could have possessed it. But to bring up the fact that because this gentleman had a prior conviction and could not own another - - couldn't own a weapon, that's the only motive that's been suggested here as to why we should bring in this other gentleman as a potential suspect.

Again, motive alone is not enough, and there's no other way to connect him with this other than the motive that he would have to want to palm this off onto somebody else because he could go to prison, especially in light of the fact that I'm not closing the door on the defense from arguing that

there were other people in the home that could have had actual or constructive possession other than the defendant himself.

Based on that ruling, I'm not going to allow introduction of his prior criminal history or as to why he wasn't arrested.

RP 37-39. Defense counsel pointed out to the court that Cabreros's belongings were found near the gun, connecting him to it. RP 39.

The trial court reiterated, however, "there is no train of circumstances other than the one reason and the one reason only that [Cabreros] would not - - that he would try to blame this on somebody else is the fact that he was not allowed to own a gun having a prior conviction." RP 39. The court emphasized, "There's nothing else that would make him want to blame somebody else. His sole motive would be because he had a prior conviction," which the trial court believed was "not enough, according to the case law that I read." RP 40.

Given the trial court's ruling, the jury never learned Cabreros was a convicted felon, forbidden from possessing firearms.

- b. The trial court erred in excluding the other suspect evidence because there was an adequate nexus between another person, Cabreros, and the crime.

The Sixth Amendment and due process require an accused be given a meaningful opportunity to present a complete defense. U.S. CONST. amend. V, VI, XIV; CONST. art. 1, §§ 3, 22; State v. Cayetano-Jaimes, 190 Wn. App.

286, 295-98, 359 P.3d 919 (2015); Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986). “The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

Defendants have the right to present evidence that might influence the jury’s determination of guilt. Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987). Absent a compelling justification, excluding relevant defense evidence denies the right to present a defense because it “deprives a defendant of the basic right to have the prosecutor’s case encounter and ‘survive the crucible of meaningful adversarial testing.’” Crane, 476 U.S. at 690-91 (quoting United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984)).

A trial court’s decision to exclude evidence is typically reviewed for abuse of discretion. State v. Franklin, 180 Wn.2d 371, 377 n.2, 325 P.3d 159 (2014). However, an erroneous evidentiary ruling that violates the defendant’s constitutional rights is presumed prejudicial unless the State can show the error was harmless beyond a reasonable doubt. Id. A claimed violation of the Sixth Amendment right to present a defense is reviewed de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Courts must safeguard the right to present a defense “with meticulous care.” State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996) (quoting State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)). Defense evidence need only be relevant to be admissible. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. “All facts tending to establish a theory of a party, or to qualify or disprove the testimony of his adversary, are relevant.” State v. Perez-Valdez, 172 Wn.2d 808, 824-25, 265 P.3d 853 (2011) (quoting Fenimore v. Donald M. Drake Constr. Co., 87 Wn.2d 85, 89, 549 P.2d 483 (1976)).

If evidence is relevant, the burden is on the State to show the evidence is so prejudicial or inflammatory that its admission would disrupt the fairness of the fact-finding process. State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983). The State must demonstrate a compelling interest to exclude a defendant’s relevant evidence. Id. at 15-16. The State’s interest in excluding the prejudicial evidence must be balanced against the defendant’s need for the information sought. Darden, 145 Wn.2d at 622. “[E]vidence relevant to the defense of an accused will seldom be excluded, even in the

face of a compelling state interest.” State v. Reed, 101 Wn. App. 704, 715, 6 P.3d 43 (2000).

Courts must consider “other suspect” evidence against this backdrop of the defendant’s constitutional right to present a defense. Such evidence alleges that a specific person other than the accused committed the charged crime. State v. Ortuno-Perez, 196 Wn. App. 771, 778, 385 P.3d 218 (2016).

“The standard for relevance of other suspect evidence is whether there is evidence ‘tending to connect’ someone other than the defendant with the crime.” Franklin, 180 Wn.2d at 381 (quoting State v. Downs, 168 Wash. 664, 667, 13 P.2d 1 (1932)). “[S]ome combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime.” Id. As this Court recently summarized, “the threshold analysis for ‘other suspect’ evidence involves a straightforward, but focused, relevance inquiry, reviewing the evidence’s materiality and probative value for ‘whether the evidence has a logical connection to the crime.’” Ortuno-Perez, 196 Wn. App. at 790 (quoting Franklin, 180 Wn.2d at 381-82).

Courts must focus their inquiry on whether the proffered evidence tends to create a reasonable doubt as to the *defendant’s* guilt, not whether it establishes the other suspect’s guilt. Franklin, 180 Wn.2d at 381. There is no per se rule against admitting circumstantial evidence of another person’s motive, ability, or opportunity to commit the crime. Id. at 373. Rather, “if

there is an adequate nexus between the alleged other suspect and the crime, such evidence should be admitted.” Id.

In Franklin, the trial court excluded Franklin’s proffered evidence that someone else committed the cyberstalking crimes with which he was charged. Id. at 372. Specifically, the court excluded evidence that Franklin’s live-in girlfriend Hibbler had sent threatening e-mails to his other girlfriend Fuerte even though Hibbler had the motive (jealousy), the means (access to the computer and e-mail accounts at issue), and the prior history (sending threatening e-mails to Fuerte regarding her relationship with Franklin) to support Franklin’s theory of the case. Id. The supreme court reversed, holding evidence of Hibbler’s motive, ability, and opportunity to commit the crime created a chain of circumstances that tended to create a reasonable doubt as to Franklin’s guilt. Id. at 382.

Here, the admitted evidence tended to connect Cabrerros to possession of the firearm. Specifically, Cabrerros lived at the East 46th Street house and was the only one home when police searched it on September 27. RP 92, 135-36, 144-45. The gun was found near the front door where Cabrerros had been standing and Cabrerros’s wallet was found near the gun. RP 103, 135-36, 145-47, 197. This evidence alone established an adequate nexus between Cabrerros and the crime, because it suggested his possession or control of the firearm.

The additional proffered evidence then established a motive for Cabrerros's failure to take ownership of the gun when it was discovered: he was a convicted felon who could not lawfully possess the gun. CP 9-10; RP 26-34; Exs. 31-32. Cabrerros might not have come forward because he did not want to be convicted of second degree unlawful possession of a firearm. RCW 9.41.040(2)(a)(i). He therefore would stand to benefit from remaining silent and allowing Jacobs to be convicted of the offense. Given the other facts linking Cabrerros to the firearm, his motive to deflect ownership was relevant and admissible other suspect evidence.

To put it plainly, the trial court's ruling to the contrary makes no sense. The court essentially concluded the defense needed to produce additional evidence of Cabrerros's motive to deny ownership of the gun. But the defense had already produced facts and circumstances suggesting Cabrerros possessed or controlled the gun—he was in the house alone with the gun and it was near his personal belongings. Cabrerros's prior felony conviction established a reason for his failure to take ownership of the gun at the time of its discovery.

The trial court incorrectly excluded the motive evidence under Russell, which stands only for the proposition that motive, *without more*, is not enough for admission of other suspect evidence. Russell, 125 Wn.2d at 76-77; see also Franklin, 180 Wn.2d at 379-81 (discussing this principle). In

Russell, for instance, the proffered other suspect evidence showed only that another man had a previous romantic relationship with the victim and lacked a strong alibi. Russell, 125 Wn.2d at 76. This evidence was insufficient to connect the other suspect to the crime. Id. at 77.

Here, however, the trial court improperly refused to consider the other evidence that connected Cabrerros to the gun. See RP 39-40. By way of example, the supreme court in Maupin, 128 Wn.2d at 928, held eyewitness testimony that a kidnapping victim was seen after the kidnapping with a person other than the defendant was both relevant and admissible.

The Franklin court explained that evidence like in Maupin “links the other suspect to the specific crime charged, either as the true perpetrator or as an accomplice or associate of the defendant.” Franklin, 180 Wn.2d at 380. “Evidence of this sort differs from evidence of motive, ability, opportunity, or character in that the proffered evidence alone is sufficient under the circumstances to establish the necessary connection.” Id. at 380-81. In expressly condoning this direct evidence, the Franklin court also rejected the notion “that motive, ability, opportunity, and/or character evidence together can never establish such a connection.” Id. at 381.

Here, the admitted evidence alone was sufficient to establish the necessary connection between Cabrerros and the firearm—opportunity, means, and actual proximity to the gun. Jacobs then wanted to introduce

circumstantial evidence suggesting a motive for Cabreros's failure to take ownership of the gun. All this evidence, taken together, more than passed the other suspect test. Jacobs did not only present evidence of motive. Rather, Cabreros was alone in the house, standing near the gun, with his belongings in close proximity to it, with the additional motive to deny ownership of the gun, given his felony history. The excluded evidence was relevant to whether Jacobs knowingly possessed or controlled the firearm and could support a reasonable doubt as to his guilt.

The trial court also improperly weighed the evidence against Jacobs versus Cabreros, noting Cabreros's "fingerprint wasn't found on the weapon. The gun wasn't registered to him, obviously." RP 38. But whether Cabreros, rather than Jacobs, was actually guilty of unlawful possession of a firearm was not a relevant consideration. As discussed, the Franklin court emphasized the proper inquiry is "whether the evidence offered tends to create a reasonable doubt as to the defendant's guilt, not whether it establishes the guilt of the third party beyond a reasonable doubt." 180 Wn.2d at 381 (quoting Smithart v. State, 988 P.2d 583, 588 & n.21 (Alaska 1999)). Evidence of Cabreros's felony history met that standard.

In Franklin, our state supreme court expressly disavowed a "per se rule against admitting circumstantial evidence of another person's motive, ability, or opportunity." Id. at 373. The trial court's ruling excluding

evidence of Cabreros's possible motive conflicts with this clear rule, where the other evidence established an adequate nexus between Cabreros and the firearm. Because the evidence of motive could have created a reasonable doubt as to Jacobs's guilt, it was relevant and should have been admitted.

- c. Reversal is required because the State cannot show the error was harmless beyond a reasonable doubt.

Violation of the right to present a defense is constitutional error. Jones, 168 Wn.2d at 724; Franklin, 180 Wn.2d at 382. Constitutional error is presumed prejudicial, and the State bears the burden of establishing the error was harmless beyond a reasonable doubt. State v. Olmedo, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). Constitutional error is harmless only when the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. Id. The State cannot meet its burden here.

This was a close case. At the first trial, the deliberating jury asked, "Is it illegal for a felon to be in the same house where he/she is aware that weapons are present?" CP 22. This suggested the first jury's doubt as to whether Jacobs or Cabreros possessed the firearm. The first jury could not reach a verdict and the trial court declared a mistrial. CP 235-36, 243-44.

The evidence introduced at the second trial suggesting Jacobs's possession or control of the firearm was scant. The gun was found in the living room—a shared space of the house—near Cabreros's wallet. RP 103,

135-47. Cabrerros was the sole person in the house at the time. RP 92, 144-45. The only possessions Mullenix found belonging to Jacobs were a jacket and shoes in the downstairs closet. RP 148-58. Dolan testified Jacobs had been living with him for several days. RP 271-72. A single, partial print the size of a pencil eraser from the inside of Jacobs's right pinky finger was found on the firearm, which established only that he handled the gun at some point, inadvertently or otherwise. RP 222, 229-33. Cabrerros's possible motive to not take ownership of the gun was highly probative circumstantial evidence that Cabrerros, not Jacobs, actually possessed the gun.

The State may argue the error was harmless because Jacobs was still able to make the other suspect argument. However, the defense was ultimately hamstrung by the lack of motive evidence, as demonstrated by defense counsel's closing argument. Without the evidence of Cabrerros's felon status, defense counsel was forced to argue:

And again, Mr. Cabrerros, we know nothing about him . . . We don't know if he's a felon. We don't know. We don't know if when they come in and they see that gun, that he's going to obviously jump back and not say a word. We don't know that.

RP 312. Defense counsel later reiterated, "We don't know about his background. We don't know anything about him because that has not been presented to you." RP 315. Thus, defense counsel tried, but could not

actually point to Cabreros's felony history as a reason for his failure to take ownership of the gun.

The State then exploited the exclusion of the other suspect evidence in rebuttal, contending, "If you want to talk about a lack of evidence, there is a lack of evidence that Mr. Cabreros ever handled that gun, much less that it was his." RP 318. The State continued, "Mr. Cabreros, contrary to defense counsel's argument, is not on trial because there is no evidence that he possessed that firearm." RP 318. Defense counsel objected to these arguments as burden shifting. RP 318-19.

The State even went so far as to say, over another defense objection,

You should not speculate about what Mr. Cabreros may or may not have said and whether it would benefit either side. The facts in this case should be decided based on the evidence presented to you, and those facts are as they are, not as you would want them to be.

RP 320. This is, of course, contrary to the pattern instruction that reasonable doubt "may arise from the evidence or lack of evidence." CP 48 (emphasis added); WPIC 4.01. The State capitalized on the fact that the trial court excluded evidence regarding Cabreros's motive—urging the jury to consider only the admitted evidence and ignore the lack of evidence. Without the evidence of Cabreros's felony history, defense counsel had no way to rebut the State's contentions.

The admitted evidence demonstrated Cabrerros may have been the true possessor of the gun. The excluded evidence demonstrated he may have had motive not to come forward. There was room for a reasonable juror to discount the probative value of a single, partial print on the firearm, which established nothing more than passing control. Given the weaknesses in the State's case, the exclusion of the other suspect evidence was not harmless beyond a reasonable doubt.

This Court should reverse Jacobs's conviction and remand for a new trial. Franklin, 180 Wn.2d at 383; Ortuno-Perez, 196 Wn. App. at 801-02.

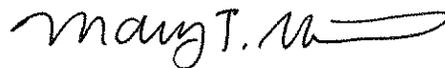
D. CONCLUSION

For the reasons stated above, this Court should reverse Jacobs's conviction and remand for the trial court to dismiss the charge with prejudice. Alternatively, this Court should remand for a new trial.

DATED this 13th day of December, 2017.

Respectfully submitted,

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