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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE EVIDENCE FALLS SHORT OF THAT REQUIRED TO ESTABLISH DOMINION AND CONTROL OVER THE PREMISES, LET ALONE THE FIREARM.

In responding to Jacobs's sufficiency argument, the State overstates the record regarding dominion and control. For instance, the State contends "[t]here is no indication that [Jacobs] was a temporary visitor in the home." Br. of Resp't, 13. The State further refers to the space "known to be the defendant's bedroom." Br. of Resp't, 13. The State concludes from this evidence "that [Jacobs] had dominion and control over the premises and over the firearm contained therein." Br. of Resp't, 13.

A closer look at the facts is necessary. Jacobs reported to Officer Mullenix on September 15, 2016 that he moved back in with his girlfriend at the East 46th Street house. RP 142-43, 154. Cabrerros and his daughter, Jacobs's girlfriend, lived at the house. RP 160. Officers searched the house 12 days later, on September 27. RP 119, 141-42. In the bedroom Jacobs supposedly shared with his girlfriend, there were no items that appeared to belong to a man and half the room was empty. RP 156. The only items belonging to Jacobs found in the house were a jacket and pair of boots in the downstairs closet. RP 148-49. Jacobs's friend, Dolan, testified Jacobs moved in with him five to seven days before September 27. RP 271-72. Jacobs received mail at Dolan's house. RP 274-75.

This evidence established, at best, that Jacobs lived for a short period of time at the Cabrerros home in September of 2016. “Evidence of temporary residence or the mere presence of personal possessions on the premises is . . . not enough” to establish dominion and control over the premises. State v. Alvarez, 105 Wn. App. 215, 222, 19 P.3d 485 (2001). Rather, “[s]ome evidence of participation in paying rent is generally required.” Id. The State did not introduce any evidence that was even remotely comparable to rent paying. The evidence demonstrated only that Jacobs reported to his CCO 12 days prior that he lived at the residence, but hardly any of his belongings were there and there was evidence he recently moved out.

Case law provides a useful contrast. In State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997), the evidence was sufficient for dominion and control over the premises where the defendant “leased the apartment, shared the rent, and resided there.” In State v. Partin, 88 Wn.2d 899, 907-08, 567 P.2d 1136 (1977), the defendant gave the address as his own; received mail and phone calls there; acted as if he owned the place during a previous police visit; and there were photographs, paycheck stubs, and other items clearly belonging to the defendant inside.

The State relies on State v. Collins, 76 Wn. App. 496, 886 P.2d 243 (1995), to argue dominion and control over the premises. Br. of Resp’t, 9. But Collins actually supports Jacobs’s argument. In Collins, there was

evidence of “residence, personal possessions on the premises, and knowledge of the presence of drugs.” 76 Wn. App. at 501. In addition, several callers asked for the defendant while police searched the apartment and the defendant admitted to staying there 15 to 20 times in a single month. Id. The court further emphasized “there was no evidence that Collins had any other residence.” Id. (contrasting with State v. Davis, 16 Wn. App. 657, 558 P.2d 263 (1977), where the defendant was a temporary visitor and had another residence).

Collins is plainly distinguishable from the minimal facts presented in Jacobs’s case. There was evidence only that Jacobs said he resided at the house sometime between September 15 and September 27. There was no evidence that he paid rent, received mail or calls there, or even kept any of his belongings there, except for a single jacket and pair of shoes. Furthermore, unlike Collins, Jacobs presented evidence that he had moved in with his friend Dolan several days prior, establishing another residence. See also Alvarez, 105 Wn. App. at 223 (emphasizing there was “some evidence” the defendant resided elsewhere in finding insufficient evidence of dominion and control). The almost complete absence of Jacobs’s belongings at the Cabrerros home corroborated Dolan’s testimony that Jacobs had recently moved.

The State further relies State v. Summers, 107 Wn. App. 373, 28 P.3d 780 (2001). Br. of Resp't, 13-15. But, again, Summers supports the conclusion that there is insufficient evidence of dominion and control in Jacobs's case. There, the defendant admitted there was a firearm under his pillow in the basement where he lived. Summers, 107 Wn. App. at 378. Police, indeed, found a firearm under the pillow on the only bed in the basement. Id. Thus, the defendant admitted he lived in the basement, where no one else lived, and he both knew about the firearm and handled it. Id. at 389. This was sufficient for constructive possession. Id.

No such evidence exists in Jacobs's case. The firearm was found in the living room, a common room of the house, near Cabrerros's belongings. It was not in Jacobs's purported bedroom or any other room where one could assume Jacobs asserted dominion and control over it. No direct evidence suggested Jacobs's knowledge of the firearm—the fingerprint established only his previous momentarily handling of it. Jacobs reported he lived at the house, but this was undercut by his lack of belongings there, along with evidence of his recent move to Dolan's house. The evidence falls short of that required to prove dominion and control over the premises.

Finally, and perhaps most importantly, “it is not a crime to have dominion and control over the premises where controlled substances are found.” Tadeo-Mares, 86 Wn. App. at 816. “Dominion and control of the

premises is only one factor in determining whether a person had constructive possession of drugs.” Id. As discussed at length in the opening brief, Jacobs’s fingerprint on the firearm was insufficient as a matter of law to establish his dominion and control over it. Br. of Appellant, 9-12. The evidence was, at best, very weak regarding Jacobs’s dominion and control over the premises. The State simply did not meet its burden of proving possession. Dismissal of Jacobs’s conviction is necessary.

2. THE TRIAL COURT ERRONEOUSLY EXCLUDED KEY EVIDENCE SUPPORTING JACOBS’S OTHER SUSPECT THEORY.

In response to Jacobs’s other suspect argument, the State contends “the trial court properly excluded the introduction of irrelevant criminal history evidence to show Mr. Cabrerros’ motive to deny ownership or association with the firearm.” Br. of Resp’t, 22. The State claims such evidence would only become relevant if Cabrerros actually denied ownership of the firearm. Br. of Resp’t, 22-23. The State cites no authority whatsoever in its cursory treatment of Jacobs’s argument.

The State’s lack of citation is not surprising, given that the State’s assertions are contrary to the law. The Washington Supreme Court recently emphasized motive evidence may be admissible to support an other suspect argument. As Jacobs discussed in his opening brief, the court in State v. Franklin, 180 Wn.2d 371, 373, 325 P.3d 159 (2014), explained “[w]e have

never adopted a per se rule against admitting circumstantial evidence of another person's motive, ability, or opportunity." Br. of Appellant, 19-20. Rather, "if there is an adequate nexus between the alleged other suspect and the crime, such evidence should be admitted." Franklin, 180 Wn.2d at 373.

Jacobs established that nexus: Cabreros was alone in the house with the firearm, with his belongings in close proximity to it. Cabreros had the means and opportunity to possess the firearm. What Jacobs wanted to introduce was circumstantial evidence that could explain Cabreros's motive to not take ownership of the firearm. As the Washington Supreme Court held in Franklin, such motive evidence "should be admitted." Id. The trial court erred in excluding it.

The State further claims "it is unclear if Mr. Cabreros even lived at the residence." Br. of Resp't, 25. The State misrepresents the record. Officer Mullenix testified she visited the East 46th Street house on September 21, 2016. RP 155. Jacobs was not there, but Cabreros was. RP 155. Mullenix testified Cabreros said he, along with his daughter, the children, and Jacobs lived at the house. RP 160. No one objected to this testimony as hearsay, making it substantive evidence for the jury to consider. Cabreros's statements and presence at the house on both September 21 and September 27 established that he lived there.

Finally, the State attempts to recharacterize the error as an evidentiary rather than a constitutional one. Br. of Resp't, 24. Jacobs again points this Court to Franklin. The Franklin court emphasized that exclusion of other suspect evidence impacts the defendant's state and federal constitutional right "to present witnesses on his own behalf." Franklin, 180 Wn.2d at 382. "The error is therefore constitutional in nature," subject to the more stringent constitutional harmless error standard. Id.

Regardless, the error was prejudicial even under the evidentiary harmless error standard. The State relied heavily on Summers in its opposition to Jacobs's sufficiency argument. Br. of Resp't, 13-15. The Summers court recognized:

[W]hen another person claims ownership of the drugs, evidence that a defendant who did not have dominion and control over the premises, who had personal items at the premises, who had been at the premises for a few days, who was found in close proximity to the drugs, and who had handled the drugs earlier in the day was insufficient to prove that the defendant had constructive possession over the drugs.

107 Wn. App. at 385 (emphasis added) (citing State v. Callahan, 77 Wn.2d 27, 31, 459 P.2d 400 (1969)). This discussion demonstrates the fact that the gun may have belonged to Cabrerros—and, critically, that he had a potential motive to not take ownership of it—was critical to Jacobs's defense.

This was a close case. The State's evidence essentially came down to a tiny fingerprint that established only Jacobs's momentary handling of

the firearm at some point in the past, along with his report that he lived at the house, even though virtually none of his belongings were there, other than a jacket and shoes in the downstairs closet. Jacobs, of course, contends this is insufficient evidence to sustain the conviction. At most, the evidence was incredibly thin. Testimony regarding Cabreros's felon status and legal inability to possess the firearm could have tipped the scales.

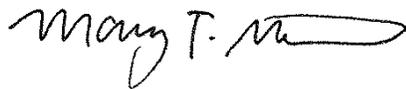
B. CONCLUSION

For the reasons discussed here and in the opening brief, this Court should reverse and dismiss Jacobs's conviction for insufficient evidence. Alternatively, this Court should reverse and remand for a new trial.

DATED this 18th day of May, 2018.

Respectfully submitted,

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