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Court of Appeals
Division II
State of Washington
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No. 52401-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICKY RAY SEXTON,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

1. **Disregarding the knock and announce rule, a SWAT team invaded Mr. Sexton's home. Exigent circumstances did not excuse the violation.**

Before the police enter a person's home without consent pursuant to a warrant, the police must comply with the knock and announce rule. Both the state and federal constitutions, along with statute, demand this. State v. Coyle, 95 Wn.2d 1, 6, 621 P.2d 1256 (1980); State v. Ortiz, 196 Wn. App. 301, 307, 383 P.3d 586 (2016). Exigent circumstances may excuse noncompliance. Ortiz, 196 Wn. App. at 308. The remedy for an unexcused violation of the knock and announce rule is suppression. Id. The prosecution agrees with the foregoing. Br. of Resp't at 20-21.

Mr. Sexton has assigned error to many of the trial court's findings of fact and has explained why they are erroneous or not supported by substantial evidence. Br. of App. at 2, 13-16. The prosecution does not contest *any* of these challenges and appears to only defend the trial court's ultimate conclusion that the knock and announce rule did not demand suppression. Br. of Resp't at 20-23. For example, the trial court erroneously found that the PA (public address) system announcement stated "open the door." CP 123 (disputed fact #6). As the prosecution appears to concede, the announcement actually stated, "get on the ground." Br. of App. at 15-16; Br. of Resp't at 7, 23.

After setting out three pages of boilerplate law related to the knock and announce rule,¹ the prosecution simply recites what it appears to believe are the key facts and cursorily concludes “[t]here is ample support for the trial court’s conclusion that the elapsed time between the announcements and the breach of the door was reasonable.” Br. of Resp’t at 20-23.

Besides failing to provide any analysis,² the problem for the prosecution is that this was *not* the trial court’s conclusion. The trial court’s conclusion was that exigent circumstances excused compliance with the knock and announce rule. CP 126 (reasons for admissibility # 10 & 11); 2/13/18 & 2/14/18 RP 177-181. Mr. Sexton argues this conclusion is erroneous. Br. of App. at 17-21. The prosecution’s recitation of particular facts fails to answer Mr. Sexton’s arguments or the precedent he cites. RAP 10.3(a)(6) & (b) (brief of respondent should answer appellant’s brief).

¹ The prosecution’s recitation appears to have been lifted largely verbatim from this Court’s unpublished opinion in State v. Potts, No. 49926-6-II, noted at 7 Wn. App. 2d 1002, 2019 WL 92668 (2019) (unpublished). Potts addressed an argument that the knock and announce requirements were not met. It did not address the issue presented in this case, which is whether exigent circumstances existed to excuse compliance with the knock and announce rule.

² This Court need not consider inadequately briefed arguments. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 486, 254 P.3d 835 (2011).

To reiterate, that officers saw an unidentified man on the porch of Mr. Sexton's home go inside as they approached did not provide exigent circumstances. Br of App. at 17-18; see State v. Edwards, 20 Wn. App. 648, 652, 581 P.2d 154 (1978); State v. Ellis, 21 Wn. App. 123, 128-29, 584 P.2d 428 (1978); State v. Johnson, 11 Wn. App. 311, 522 P.2d 1179 (1974). Had the SWAT team made it to the door without being seen, they would have had to alert those inside of their presence before entering anyways, as the knock and announce rule requires. They would have had to wait a reasonable time for an answer. See Ortiz, 196 Wn. App. at 312 (six seconds was not a reasonable time to wait following knock and announce because it was about 6:47 a.m., a time when people would likely be sleeping). This would have been longer than the five to 15 seconds which elapsed between being seen and battering in Mr. Sexton's door.

That the search warrant concerned drugs did not provide an exigency either because there was no articulable facts to conclude that evidence was being destroyed. Br. of App. at 18-19; see State v. Jeter, 30 Wn. App. 360, 362-63, 634 P.2d 312 (1981); State v. Dugger, 12 Wn. App. 74, 82, 528 P.2d 274 (1974). And that there was reason to believe Mr. Sexton had a gun in the residence did not supply an exigency because there was no basis to believe Mr. Sexton had a propensity for violence. Br.

at 19; Dugger, 12 Wn. App. at 83; State v. Jeter, 30 Wn. App. 360, 362-63, 634 P.2d 312 (1981).

The Court should hold that exigent circumstances did not exist and that the trial court erred in excusing noncompliance with the knock and announce rule. This Court should vacate Mr. Sexton's convictions, and remand with an order to suppress. State v. McKee, ___ Wn.2d ___, 438 P.3d 528, 530, 533 (2019).

2. Probable cause did not exist when the police executed the warrant.

The prosecution devotes four pages explaining that probable cause existed in support of the search warrant for Mr. Sexton's home. Br. of Resp't at 24-28. In this appeal, Mr. Sexton is not arguing probable did not exist when the search warrant was issued. Rather, he is arguing that this determination of probable cause was stale when the police executed the warrant. Br. of App. at 21-26. In ascribing an argument to Mr. Sexton that he does not make, the prosecution sets up a strawman to knock over.

As to Mr. Sexton's actual argument, the prosecution provides scant argument in support of its conclusion that the warrant was not stale when it was executed. Br. of Resp't at 28. The prosecution recounts that a confidential informant observed a drug transaction in Mr. Sexton's home and that the warrant was executed less than 10 days following the

informant's observations. Br. of Resp't at 28. Based on these facts, the prosecution asserts the warrant was not stale. Br. of Resp't at 28. The prosecution cites no authority in support of its conclusion. Br. of Resp't at 28.

Contrary to the prosecution's conclusion, the warrant was stale. The informant's observations were made as long as three days before the warrant was issued on March 3, 2017. Suppression Ex. 2, p.2. The prosecution incorrectly asserts that the warrant was served three days later. Br. of Resp't at 28. The warrant was executed six days later on March 9, 2018. CP 121. In total, there was a period of six to nine days between the informant's observations and execution of the warrant. In analyzing staleness, the court should use the outmost period of nine days because the lack of specificity is due to the prosecution. Br. of App. at 24. The prosecution does not argue otherwise. Br. of Resp't at 27-28.

As explained, this nine-day period between the informant's observations and the execution of the warrant rendered the determination of probable cause stale. Br. of App. at 25. Drugs are quickly consumed or sold. The informant's observations did not establish an on-going drug operation. The prosecution does not contest these arguments. Accordingly, probable cause did not exist when the warrant was executed. Br. of App. at 24-26; Huffines v. State, 739 N.E.2d 1093, 1097-98 (Ind. Ct. App. 2000).

This Court should so hold, vacate Mr. Sexton’s convictions, and remand with an order to suppress. McKee, 438 P.3d at 530, 533.

3. The trial court’s instructions commented on the evidence by listing particular factors that may prove “possession.”

The prosecution alleged that Mr. Sexton illegally possessed drugs and a firearm. Over Mr. Sexton’s objections, the trial court provided the jury two instructions defining “possession.” These instructions highlighted three factors for the jury to consider in deciding whether Mr. Sexton had “dominion and control” over the drugs and firearm. By doing so, these instructions misstated the law and commented on the evidence in violation of article VI, section 16 of the Washington Constitution. Br. of App. at 35-45. Because the record does affirmatively show that no prejudice could have resulted to Mr. Sexton, this Court should reverse the convictions and remand for a new trial.

The prosecution’s recitation of the record and its representation of jury instructions 10 and 25, both which defined “possession,” is incorrect. To set the record straight, the last sentence of instruction 10 states, “No single one of these factors necessarily controls your decision.” CP 61.³

³ The third paragraph of instruction 10, which contains the comment on the evidence, reads:

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among

Contrary to the prosecution's representation, it does not state that, "Dominion and control over the premises where drugs are found is insufficient as the sole factor to establish dominion and control over the drugs." Br. of Resp't at 39.⁴ Further, the record does not show that the trial court intended to add the language recounted by the prosecution based on State v. Shumaker, 142 Wn. App. 330, 174 P.3d 1214 (2007). Br. of Resp't at 40 (citing 2/28/18 RP 3). The prosecution appears to have a different record or has confused this case with a different one.⁵

Based its misunderstanding of the record, the prosecution addresses an argument that Mr. Sexton does not make. Compare Br. of App. at 37-45 with Br. of Resp't at 40-42. Mr. Sexton's argument is that it is improper to define the term "possession" based on factors extracted from sufficiency of the evidence caselaw and for a court to highlight three

others, include whether the defendant had the ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substances was located. No single one of these factors necessarily controls your decision.

CP 61 (instruction 10). Instruction 25 was identical, except that it used the word "item" instead of the word "substance." CP 76. For the Court's convenience, copies of instructions 10 and 25 are attached in the appendix.

⁴ Instruction 10 also did not use the word "item." Compare Br. of Resp't at 39 with CP 61.

⁵ The court reporter did not transcribe the trial court's reading of the instructions to the jury. 2/28/18 RP 12.

of these factors to a jury. The prosecution fails to answer Mr. Sexton's argument. RAP 10.3(a)(6) & (b).

As both our Supreme Court and this Court have held, it is generally improper to craft legal definitions based on sufficiency of the evidence caselaw. State v. Brush, 183 Wn.2d 550, 558, 353 P.3d 213 (2015); State v. Sinrud, 200 Wn. App. 643, 650-51, 403 P.3d 96 (2017). This is because an appellate court, in a sufficiency of the evidence challenge, views the evidence in light most favorable to the prosecution. In contrast, a jury's role is decide guilt beyond a reasonable and is not required to view the evidence in light most favorable to the prosecution. Sinrud, 200 Wn. App. 650-51.

Here, it was improper for the court to highlight factors that "may" be found to establish "dominion and control," i.e., possession. It improperly extracts these factors from sufficiency of the evidence caselaw. And, by stating that "[n]o single one of these factors necessarily controls your decision," the instruction improperly implied that *a single* one of these factors may be sufficient to control the jury's decision. See Sinrud, 200 Wn. App. 651 ("While one additional factor could amount to substantial corroborating evidence, it does not necessarily establish that. But, that is what this instruction implied."). The jury, not the court, is

charged with deciding if the evidence is weighty enough prove an essential element beyond a reasonable doubt.

In addition to Brush and Sinrud, this Court’s recent opinion in State v. Sandoval, ___ Wn. App. 2d ___, 438 P.3d 165 (2019)⁶ supports Mr. Sexton’s argument. In Sandoval, a prosecution for possession of stolen property, specifically an “access device,” the defendant argued the trial court’s definition of “access device” constituted an improper comment on the evidence. Sandoval, 438 P.3d at 171. Although the trial court had defined the term in part based on an appellate court decision holding that the evidence was sufficient to prove the stolen property was an “access device,” this Court rejected the defendant’s argument. Id. at 170-172. Key to the decision was that the definition was derived from principles of statutory interpretation, not from whether particular facts were sufficient to meet the definition. Id. at 172. Consistent with Brush, this Court recognized that defining certain terms in jury instructions based on sufficiency of the evidence caselaw could improperly constrain juries or relieve the prosecution of its burden to prove guilt beyond a reasonable doubt. Id.

⁶ The Supreme Court is set to rule on the petition for review filed in Sandoval on August 6, 2019. No. 971439.

In sum, the instruction improperly implied that the presence of any one of the judicially identified factors could be sufficient to control the jury's decision. Sinrud, 200 Wn. App. 651. This was particularly problematic because one of the factors—whether the defendant had dominion and control over the premises where the thing was located—was legally insufficient by itself to establish possession. Shumaker, 142 Wn. App. 330, 334-35, 174 P.3d 1214 (2007). Yet, the instruction highlighted this factor and implied that Mr. Sexton's "dominion and control" over his home was enough to find that he possessed the drugs and firearm. This Court should hold that the trial court's instructions defining possession commented on the evidence in violation of our state constitution.

The prosecution does not argue harmless error. Accordingly, the prosecution has not met its burden to rebut the presumption of prejudice and prove that no prejudice could have resulted to Mr. Sexton. See State v. Lamar, 180 Wn.2d 576, 588, 327 P.3d 46 (2014) (presumption of prejudice stood because prosecution made no argument that constitutional error was harmless); Sinrud, 200 Wn. App. at 651-52. All the convictions must be reversed and the case remanded for a new trial.

4. Mr. Sexton was deprived of his right to self-representation.

Mr. Sexton unequivocally moved to represent himself. Br. of App. at 31-32. His motion was timely. Br. of App. at 32-33. He did not move to

represent himself in order to delay the proceedings. Br. of App. at 33. Still, the trial court denied Mr. Sexton his right to represent himself. In support, the court reasoned that Mr. Sexton's rationale for wanting to represent was equivocal and that Mr. Sexton was not competent to represent himself. 2/15/18 RP 33, 36; CP 134 (FF 9 & CL 6). As argued in the opening brief, the trial court's denial of Mr. Sexton's demand to represent himself was error, requiring reversal and a new trial. Br. of App. at 28-34.

In arguing otherwise, the prosecution contends that Mr. Sexton's demand to represent himself was (1) equivocal; (2) untimely; and (3) not knowing, voluntary, and intelligent. Br. of Resp't at 32-35.

In contending the demand was equivocal, the prosecution highlights that Mr. Sexton stated, "At this time, yes," in response to the Court's question if it was his intent to represent himself. Br. of Resp't at 31. But Mr. Sexton clarified, "I got to do it myself," meaning represent himself. 2/15/18 RP 15. That Mr. Sexton had tried to contact another attorney does make his request equivocal. Even if Mr. Sexton had said that he wanted to proceed pro se until he could hire other counsel, the court could have warned Mr. Sexton that this would not be an option given that trial was set to occur shortly. See State v. Modica, 136 Wn. App. 434, 443-44, 149 P.3d 446 (2006) (after permitting self-representation, court has a matter of discretion on whether to reappoint counsel if trial is set to

occur shortly), affirmed on other grounds, 164 Wn.2d 83, 186 P.3d 1062 (2008).

The prosecution highlights that Mr. Sexton was displeased with counsel and the court's ruling on his motion to suppress. Br. of Resp't at 31-33. The reasons for Mr. Sexton moving to represent himself do not matter. What matters is whether the choice was made freely and the timeliness of the demand. That Mr. Sexton may have been frustrated with his attorney's performance does not make a demand for self-representation equivocal. Id. at 442 (citing withdrawal State v. DeWeese, 117 Wn.2d 369, 378-79, 816 P.2d 1 (1991)).

The prosecution cites precedent concerning a demand for substitution of new counsel. Br. of Resp't at 32. But Mr. Sexton's demand was to proceed pro se, not for substitution of counsel.

Mr. Sexton made his demand for self-representation before the trial started. Br. of App. at 33. Thus, contrary to the prosecution's argument, Mr. Sexton's demand was not untimely.

The prosecution cites the rule that a trial court may deny a request to proceed pro se if granting the request would "obstruct the orderly administration of justice." Br. of Resp't at 34; State v. Breedlove, 79 Wn. App. 101, 108, 900 P.2d 586 (1995). Even where a request to proceed pro se is made shortly before trial and joined with a request to continue the

trial, the timing alone is generally insufficient to deny a request for self-representation. Breedlove, 79 Wn. App. at 109. Here, Mr. Sexton did not request a continuance. 2/15/18 RP 3-37. Accordingly, the orderly administration of justice would not have been impeded by permitting Mr. Sexton to represent himself. Breedlove, 79 Wn. App. at 109; see State v. Watkins, 25 Wn. App. 358, 362-63, 606 P.2d 1237 (1980).

Finally, the prosecution contends that Mr. Sexton's demand was not knowing, voluntary, and intelligent. Br. of Resp't 34-35. The prosecution incorrectly asserts that the trial court found Mr. Sexton's attempted waiver of his right to counsel was not knowing, intelligent, and involuntary. The findings of fact and conclusions of law do not state this. CP 132-35. Neither does the court's oral ruling. 2/15/18 RP 30-34. This is unsurprising because the trial court failed engage in the requisite colloquy with Mr. Sexton. See State v. DeWeese, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). Instead, the court quizzed Mr. Sexton on his knowledge of the law and his legal skill. 2/15/18 RP 9-18. For example, rather than informing Mr. Sexton what the maximum penalty was on the charges and ascertaining if he understood this, the court asked Mr. Sexton to tell the court what the maximum penalty was on the charges. 2/15/18 RP 10-12.

In any event, the prosecution's argument seems to that because Mr. Sexton could not accurately answer esoteric questions on the law that

generally only lawyers could answer, it follows that he could not knowingly, intelligently, and voluntarily waive his right to counsel. Br. of Resp't at 35. This is not the law. State v. Madsen, 168 Wn.2d 496, 509, 229 P.3d 714 (2010); State v. Vermillion, 112 Wn. App. 844, 851, 51 P.3d 188 (2002); State v. Fritz, 21 Wn. App. 354, 359, 585 P.2d 173 (1978). Mr. Sexton stated his decision to represent himself was voluntary. 2/15/18 RP 18. The trial court's focus on Mr. Sexton's lack of legal acumen was error. Br. of 30-31. This Court should reject the prosecution's argument that the court engaged in a proper colloquy and determined that Mr. Sexton did not knowingly, intelligently, and voluntary waive his right to counsel.

Mr. Sexton reiterates that the standard of review should be de novo. Br. of App. at 27-28. The prosecution has no rejoinder.

Under either a de novo or abuse of discretion standard, the trial court erred in denying Mr. Sexton's request to represent himself. This Court should reverse and remand for a new trial.

5. Remand is necessary to remedy several sentencing errors.

- a. The prosecution's concession that Mr. Sexton was incorrectly sentenced on count two should be accepted. The prosecution's request that the maximum sentence be doubled should be rejected because the prosecution did not cross-appeal.**

Mr. Sexton was convicted on count two, possession of a controlled substance, methylphenidate, with intent to deliver. RCW 69.50.401(2)(c); CP 106. This is a class C felony, carrying a maximum sentence of five years' (60 months') confinement. RCW 69.50.401(2)(c); RCW 9A.20.021(c). Still, the judgment and sentence lists the maximum term as 10 years, and Mr. Sexton was sentenced to 85 months' confinement. CP 108, 111. This is error. Br. of App. at 47.

The prosecution concedes error.⁷ Br. of Resp't at 42. The prosecution, however, contends the maximum term of ten years' was proper under the doubling provision of RCW 69.50.408(1). The prosecution asserts that Mr. Sexton has previously been convicted of a violation of RCW chapter 69.50 and that this doubles the maximum sentence of five years to 10 years. Br. of Resp't at 42-43. The prosecution

⁷ The prosecution states that the judgment and sentence incorrectly lists the offense as a class B offense rather a class C offense. The judgment and sentence, however, does not explicitly identify the class of the offense. CP 106-117.

asks this Court to reverse and remand with instruction to correct the error, and to apply doubling provision. Br of Resp't at 43-44.

Because the prosecution is seeking affirmative relief and did not cross-appeal, the prosecution's argument is not properly before this Court. Unless a respondent cross appeals, that party may not seek affirmative relief. State v. Sims, 171 Wn.2d 436, 442-43, 256 P.3d 285 (2011). Here, the prosecution concedes error, but also asks for partial reversal based on a claimed error related to the doubling provision of RCW 69.50.408(1). "Because the State is seeking partial reversal of a trial court order, not just advancing an alternative argument for affirming the trial court, it is seeking affirmative relief." Sims, 171 Wn.2d at 443. Accordingly, the prosecution's argument should be rejected.⁸

The Court should accept the concession and remand for resentencing.⁹

⁸ In Cyr, the primary case cited by the prosecution, the prosecution appealed the sentence. in State v. Cyr, No. 50912-1-II, 2019 WL 2096674, at *2 (Wash. Ct. App. May 14, 2019). Here, the prosecution did not appeal the sentence.

⁹ As argued in his statement of additional grounds, Mr. Sexton asserts his offender score is inaccurate. The Court should permit Mr. Sexton to present his claims to the trial court on remand. This will ensure an accurate offender score and sentence. See State v. McFarland, 189 Wn.2d 47, 57, 399 P.3d 1106 (2017) ("Proportionality and consistency in sentencing are central values of the SRA, and courts should afford relief when it serves these values"); RAP 12.2 (appellate court may "take any other action as the merits of the case and the interest of justice may require"). Thus, the Court should remand for a resentencing hearing.

b. As the prosecution concedes, the condition forbidding Mr. Sexton from contacting drug users or sellers should be modified.

The trial court intended to order, as a condition of community custody, that Mr. Sexton not *knowingly* associate with drugs users or sellers. Br. of App. at 48. The judgment and sentence, however, simply states that Mr. Sexton have no contact with drug users or sellers. CP 112.

The prosecution concedes error and agrees that the condition should be modified. Br. of Resp't at 44-45. The prosecution asserts the condition is unconstitutionally vague. To be clear, this is not Mr. Sexton's argument. His position is that the trial court intended to forbid contact from persons known to Mr. Sexton to be drug users or sellers. Either way, the condition should be modified on remand.

c. The \$200 filing fee and \$100 DNA fee must be stricken.

Mr. Sexton argues this Court should strike the \$200 filing fee and the \$100 DNA fee. Br. of App. at 48-49. The prosecution agrees. The Court should accept the concession and order these fees stricken.

d. Because the trial court did not inquire whether Mr. Sexton had the ability to pay the costs of community custody, the condition should be stricken or reconsidered on remand.

A trial court may waive the costs of community custody. RCW 9.94A.703(2)(d). It is a discretionary condition and the court should only

impose the condition if the person has the ability to pay. State v. Lundstrom, 6 Wn. App.2d 388,396 n.3, 429 P.3d 1116 (2018).

Without explanation, the prosecution asserts that the cited portion of Lundstrom is dicta. Even if dicta, it is correct dicta. The plain language of RCW 9.94A.703(2)(d) permits the court to waive costs of community custody and it is therefore discretionary. As a discretionary cost, it should not be imposed on indigent persons. State v. Ramirez, 191 Wn.2d 732, 748-50, 426 P.3d 714 (2018). Even if it may be imposed on indigent persons, the court must find an ability to pay.

The prosecution contends the claimed error is waived. Br. of Resp't at 47-48. This Court has discretion to address arguments raised for the first time on appeal. RAP 2.5(a); State v. Blazina, 182 Wn.2d 827, 834-35, 344 P.3d 680 (2015). As in Blazina and the litany of cases following, the Court should exercise that discretion and reach the merits of the issue even if the claimed error was not raised below.

Further, the prosecution concedes that this case should be remanded on other sentencing issues. Given this concession, the burden imposed on the trial court in addressing this issue is minimal. If not stricken under Ramirez, the court should remand for reconsideration of imposition of this provision and instruct that the trial court find an ability to pay before imposing the condition.

B. CONCLUSION

Mr. Sexton's motion to suppress should have been granted. The trial court commented on the evidence. And Mr. Sexton was denied his right of self-representation. The Court should reverse the convictions and remand. Alternatively, the Court should remand for resentencing.

Respectfully submitted this 20th day of June, 2019.

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project - #91052
Attorney for Appellant

Appendix

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3/2/2018

INSTRUCTION NO. 10

Possession means having a substance 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 substance.

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 a substance, 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 substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

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3/2/2018

INSTRUCTION NO. 25

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.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 52401-5-II
v.)	
)	
RICKY SEXTON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JUNE, 2019, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE COURT OF APPEALS – DIVISION TWO AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> MAUREEN GOODMAN, DPA [PCpatcecf@co.pierce.wa.us] PIERCE COUNTY PROSECUTOR'S OFFICE 930 TACOMA AVENUE S, ROOM 946 TACOMA, WA 98402-2171	() () (X)	U.S. MAIL HAND DELIVERY E-SERVICE VIA PORTAL
<input checked="" type="checkbox"/> RICKY SEXTON 753204 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF JUNE, 2019.



X _____

Washington Appellate Project
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WASHINGTON APPELLATE PROJECT

June 20, 2019 - 3:44 PM

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Appellate Court Case Title: State of Washington, Respondent v. Ricky R. Sexton, Appellant
Superior Court Case Number: 17-1-00988-3

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