

NO. 34777-0-III

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

STATE OF WASHINGTON
v.
REESE GROVES

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

The Honorable Robert G. Swisher, Judge

APPELLANT'S OPENING BRIEF

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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RULES, STATUTES, AND OTHERS

RCW 9.41.0404

A. ASSIGNMENT OF ERROR

1. The state failed to prove unlawful possession of firearms.

Issue Presented on Appeal

Could the state prove unlawful possession of firearms where the testimony was limited to momentary, transitory possession?

B. STATEMENT OF THE CASE

Reese Groves was charged with residential burglary, six counts of theft of a firearm, and six counts of unlawful possession of a firearm. CP 35. Groves was convicted of all 14 charges. CP 68. The standard range sentence was 300 months but the court imposed a 150 month DOSA with 150 months of community supervision. CP 68. This timely appeal follows. CP 72.

Someone stole 12 guns and \$15, 0000 in cash from Stephen Hall's remote mountain residence. RP 24-60. Hall allowed employees to use his home and showed about 4-5 people, including Reese, a former employee, where he hid the hide-a-key. RP 30-32, 62. Hall usually did not lock the door to his residence. RP 28.

Sara Reed a heroin junkie who lived on the streets, testified

that she was “dope sick” and in a car with Reese and Benjamin Gregory the day of the alleged burglary. RP 93-94, 99. According to Reed, she was hoping to score heroin that day. RP 99. According to Reed, Groves stopped by his mother’s home to say hello, suggested they burgle his ex-father-in-law and then drove to Hall’s house. RP 98-104.

Reed never saw Groves and Gregory enter Hall’s home. RP 104. “Umm, I seen them go around the house. That’s it. I did not see them go up the porch or how they got in.” RP 104. Reed testified that she saw firearms and boxes, when “they” returned after 5 minutes, and that both Groves and Gregory carried a box. RP 105. Reed never testified that she saw Groves carry or touch a firearm. She just testified that she saw things “resembling firearms” (prosecutor’s words). RP 104.

C. ARGUMENT

THE STATE FAILED TO PROVE BEYOND A
REASONABLE DOUBT UNLAWFUL
POSSESSION OF FIREARMS.

The state failed to present sufficient evidence that Groves had more than mere momentary handling of the stolen firearms

which is insufficient to establish the multiple charges of unlawful possession of firearms.

To satisfy due process, the state must prove every element of a charged crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). When reviewing a challenge to the sufficiency of the evidence, this court considers the evidence in the light most favorable to the state to determine whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006).

The court draws all reasonable inferences from the evidence in the state's favor and interprets the evidence "most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The reviewing court considers both circumstantial and direct evidence as equally reliable and defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

As charged in Grove's case, to establish guilt under RCW

9.41.040(2)(a)(i). “Unlawful possession of firearms”, the state had to prove beyond a reasonable doubt:

(2) (a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:.....

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section....

Id. RCW 9.41.040.

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. Callahan*, 77 Wn.2d 277, 279, 459 P.2d 400 (1969). For either type, “[t]o establish possession the prosecution must prove more than a passing control; it must prove actual control.” *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994). The length of time does not determine whether control is

actual or passing; whether one has actual control over the item at issue depends on the totality of the circumstances presented. *Staley*, 123 Wn.2d at 794, 802.

In *Callahan*, a case involving possession of narcotics, the Supreme Court held that the mere handling of the drugs without more was insufficient to establish actual possession because passing control and momentary handling do not establish actual control over the item in question. *Callahan*, 77 Wn.2d at 29. The facts held insufficient to establish possession in *Callahan* were far more significant than in Groves's case:

1. Two books, two guns and a set of broken scales belonging to defendant were found on the houseboat.
 2. Defendant had been staying on the houseboat for the preceding 2 or 3 days, but was not a tenant, cotenant, or subtenant thereon.
 3. Most of the drugs were found near the defendant.
 4. Defendant admitted that he had handled the drugs earlier in the day.
- This is not sufficient evidence to establish dominion and control and thus make the issue of constructive possession a question for the jury.

Callahan, 77 Wn.2d at 31. The Court held that:

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. (Emphasis added). *Callahan* is controlling authority in the instant case.

In Groves's case as in *Callahan*, Groves had only transitory passing control over the firearms. Testimony revealed that Groves and Gregory left the car and returned five minutes later with a box and firearms. RP 105-05, 122. Thereafter, the firearms were in the exclusive possession of Gregory. RP 127.

There was no testimony that Groves ever handled the guns again or ever took any sort of possession - actual or constructive. There was also no testimony that Groves knew anything about the disposition of the firearms, or that he actually handled the firearms for more than a passing moment. This evidence is far less than that presented and determined to be insufficient to establish possession in *Callahan*.

In Groves's case, if anything, he handled the firearms for a passing moment, but this is insufficient to establish actual or constructive possession under *Callahan*.

More recently in *State v. Davis*, 182 Wn.2d 222, 235, 340 P.3d 820 (2014) the state Supreme Court held that neither defendant exercised dominion and control over the firearm under the following facts.

Maurice Clemmons the notorious Lakewood police killer sought refuge with Davis and Nelson after sustaining a gunshot injury and after stealing a firearm from one of the officers he shot and killed. *Davis*, 182 Wn.2d at 224-25. After the shooting, Davis drove Clemmons to Nelson's home. *Davis*, 182 Wn.2d at 225. After Nelson let the two men inside, Clemmons told Nelson about the shooting and the stolen firearm and requested clean clothes and assistance in treating his wound. *Id.*

While another person helped Clemmons with the wound, Nelson put clothes and the stolen firearm in a shopping bag. *Davis*, 182 Wn.2d. at 227-28. Clemmons stayed at Nelson's home for approximately 15 minutes. *Davis*, 182 Wn.2d. at 228. Just before

leaving, Clemmons asked Davis, “Where’s the gun?” *Id.* Davis responded that the gun was in a bag and handed the bag to Clemmons. *Id.*

The Court held that neither Nelson nor Davis exercised dominion and control over the firearm because neither “asserted any interest” in the gun, but merely “briefly handled the item for Clemmons, the true possessor of the gun.” *Davis*, 182 Wn.2d at 235. (Stephens, J. dissenting).

The Court’s analysis was based in large part on the fact that there was no evidence that Clemmons intended to transfer control to Nelson or Davis and there was no evidence that Nelson’s and Davis’s actions amounted to more than “mere proximity to and momentary handling” of the contraband. *Davis*, 182 Wn.2d at 235.

Davis too is on point. For the sake of this argument alone, assuming, without admitting participation, if Groves participated in the residential burglary, he like Nelson and Davis, assisted Gregory and might have briefly touched the guns. However, also like Davis and Nelson, there was no evidence that Gregory intended to transfer control of the guns to Groves, and in fact Gregory’s

testimony indicated that he alone maintained possession of the guns. RP 122-31. Also, as in *Davis*, Groves only had the similar “momentary handling” of the firearms, that the Supreme Court held was insufficient to establish possession. *Davis*, 182 Wn.2d at 235.

Under the totality of the circumstances, the state failed to prove beyond a reasonable doubt that Groves had actual or constructive possession of the firearms. *Davis*, 182 Wn.2d at 235; *Callahan*, 77 Wn.2d at 32. This Court must reverse the unlawful possession of the firearm charges and remand for dismissal with prejudice and resentencing.

D. CONCLUSION

Reese Groves respectfully requests this Court reverse his firearm charges and remand for dismissal with prejudice.

DATED this 4th day of August 2017.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Petitioner

I, Lise Ellner, a person over the age of 18 years of age, served the Benton County Prosecutor at prosecuting@co.benton.wa.us and Reese Groves/DOC#393783, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed, on August 4, 2017. Service was made electronically to the prosecutor and via U.S. Mail to Reese Groves.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

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