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Division III
State of Washington
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No. 34777-0-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

REESE GROVES,

Appellant

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

NO. 16-1-00197-5

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

- A. The State presented sufficient evidence at trial to convict the defendant of Unlawful Possession of a Firearm in the Second Degree.

II. STATEMENT OF FACTS

The State charged the defendant, Reese Groves, with Residential Burglary, Theft in the First Degree, six counts of Theft of a Firearm, and six counts of Unlawful Possession of a Firearm in the Second Degree for burglarizing Stephen Hall's residence and stealing multiple items, including six firearms. CP 5-9.

Mr. Hall resided north of Benton City, Washington, in a doublewide manufactured home. RP¹ at 25, 27. His residence was situated on four acres of land on a hill approximately three hundred to four hundred feet from the roadway. RP at 26-27. Mr. Hall owned All American Barns, a construction company with an office in West Richland, Washington. RP at 24-25. Mr. Hall's home, where he resided alone, was burglarized on January 5, 2016, sometime after 8:30 a.m. when he left for work. RP at 36, 49, 66. Mr. Hall frequently did not lock his front door and does not believe he locked it the day his home was burglarized. RP at 28, 41.

The defendant was employed by Mr. Hall at his business for approximately three years, ending in late 2011. RP at 31. When Mr. Hall did not have enough work for his employees but wanted to give them enough hours, he would occasionally send them to his home to do odd jobs. RP at 30-31. Mr. Hall advised those employees of a hidden house key on his front porch near his shutter just past the front door so they could access the bathroom or make lunch in the kitchen if the door was locked. RP at 29-31, 40. Mr. Hall stated that the defendant was one of the employees who had worked at his residence. RP at 31. Mr. Hall and the defendant did not maintain any sort of relationship after the defendant was no longer an employee. RP at 60.

When Mr. Hall returned home on January 5, 2016, at approximately 7:00 p.m., it was not immediately apparent that his home had been burglarized. RP at 37-39. He entered his home through the front door, which showed no signs of a forced entry, and nothing in his front room was out of place. RP at 37, 39, 68. Proceeding from the front room to the dining room, den, and kitchen, there was still no indication a burglary had occurred. RP at 39. Mr. Hall only discovered that his home had been burglarized when he went into his bedroom at the back of the residence. RP at 37.

¹ Unless otherwise indicated, RP refers to the verbatim report of proceedings in this

Mr. Hall kept multiple firearms in a display case and a separate gun safe in his bedroom. RP at 33-35. He stated that it was no secret that he had firearms in his home. RP at 32. The gun safe could be accessed by a key, which was kept in a nearby dresser drawer. RP at 35. The gun safe also contained a small, fireproof safe which held approximately \$15,000 in cash, all in one hundred dollar bills. RP at 35-36. When Mr. Hall walked into his bedroom the evening of January 5, 2016, most of the drawers in his bedroom and attached bathroom were open, as was his display case and gun safe. RP at 38-39. A total of six firearms, all long guns, were missing, as was the fireproof safe containing cash. RP at 33, 38-40, 42-43. Mr. Hall immediately called 911 and reported the burglary. RP at 40, 66-67.

After calling 911, Mr. Hall observed shoeprints in the snow on the porch outside his front door that did not belong to him. RP at 40. He observed one set of shoeprints on his porch that went past his front door and directly to the shutter on his residence where his house key had been hidden for the past twenty years. RP at 32, 40. The key was now gone. RP at 40. The deputy sheriff who responded to Mr. Hall's residence that evening photographed the shoeprints and tire tracks in the snow, noting that the shoeprints were similar in size to his own size 11 or 11.5 shoes.

matter, transcribed by Patricia Adams, comprised of volumes I and II, paginated 1-242.

RP at 69, 70, 72, 73. The deputy also collected documentation from Mr. Hall regarding the make, model, and serial number of some of the firearms that were stolen. RP at 75. The deputy noted that multiple items of value in the residence were not disturbed. RP at 73.

Detective Daniel Korten and Sergeant Carlos Trevino of the Benton County Sheriff's Office were assigned to investigate the burglary and theft of the firearms. RP at 141-42, 163. Det. Korten obtained descriptions and serial numbers for the rest of the stolen firearms. RP at 142-43. Sgt. Trevino spoke with a confidential informant, identified at trial as Heather Mortenson, about who committed the burglary. RP at 164-65. Ms. Mortenson identified the defendant and Benjamin Gregory as having gone to Mr. Hall's residence twice the day of the burglary: once with Sarah Reed, whom the two males returned to Ms. Mortenson's residence because she was ill from heroin withdrawal, and once with another female. RP at 173-74.

Ms. Mortenson owned a residence in Richland, Washington, and had been in an on-again, off-again dating relationship with the defendant for many years. RP at 79-80. Ms. Mortenson had a two-door white convertible. RP at 82-83. In January 2016, the defendant was temporarily staying at Ms. Mortenson's residence along with Sarah Reed, who was also in a dating relationship with the defendant. RP at 82-83, 93-94.

Benjamin Gregory and the other female who burglarized Mr. Hall's residence also sometimes stayed at Ms. Mortenson's residence. RP at 82, 95. Multiple people in the group were addicted to controlled substances. RP at 99, 123-24.

After speaking with Ms. Mortenson, investigators contacted Ms. Reed. RP at 166. Ms. Reed stated that on the date of the burglary, she left Ms. Mortenson's house with the defendant, who was driving Ms. Mortenson's white two-door car, and Mr. Gregory. RP at 98-99. Ms. Reed indicated that she was lying down in the back seat because she was ill from heroin withdrawal. RP at 98-99. She thought the group was going to purchase drugs, but they first went to the defendant's mother's residence near Benton City. RP at 100-01. The defendant briefly got out of the car and spoke to his mother outside, while Ms. Reed remained in the back seat. RP at 100-01.

Ms. Reed stated that the defendant next drove to a residence he identified as belonging to his mother's ex-husband. RP at 101. The defendant indicated he did not like the man and wanted to burglarize his residence. RP at 101-02. The defendant asked Ms. Reed to go knock on the door to see if anyone was home, but she refused. RP at 101. The defendant drove away from his mother's ex-husband's residence and drove on back roads in Benton City. RP at 102. The defendant stated that

he knew someone who would not be home because he would be at work at his business in West Richland. RP at 102.

Ms. Reed stated that the defendant drove to a double-wide mobile home with a porch. RP at 103. She remained in the car, but the defendant and Mr. Gregory got out and walked toward the house. RP at 103-04. Ms. Reed, who wears a size 6.5 shoe, could not see the front door from her vantage point in the back seat of the car. RP at 104, 112. The defendant and Mr. Gregory returned approximately five minutes later, carrying boxes and firearms. RP at 104-05, 112. Ms. Reed told them she did not want the firearms next to her in the back seat because she was a convicted felon, so the two placed the items they were carrying into the trunk of the car. RP at 105. Ms. Reed advised the defendant that she didn't want to be in the car anymore since she was ill, so the defendant drove her back to Ms. Mortenson's home in Richland. RP at 106.

Ms. Reed proceeded to sleep for much of the day at Ms. Mortenson's, waking up when it was dark outside. RP at 107. When she woke up, she saw the defendant with a stack of one hundred dollar bills, which he indicated were from that morning. RP at 108.

Ms. Reed testified that even though she has committed thefts previously, she primarily steals from stores. RP at 97, 109-10. She indicated that she answered questions about the burglary when officers

contacted her because she felt badly that the defendant and Mr. Gregory were stealing from someone who had worked for his possessions. RP at 109-10.

Officers corroborated details of Ms. Reed's statement through multiple witnesses, including Lorella Dutt and Daniel Dutt. Ms. Dutt is the defendant's mother and she recalled that the defendant had stopped by her Benton City residence sometime near the date of the burglary in a light-colored car with a male in the front seat and a female in the back seat. RP at 114-16, 168-70. Mr. Dutt testified that he had previously been married to the defendant's mother but had not seen the defendant for approximately five years. RP at 138-39. He and the defendant did not get along well. RP at 138-39. Mr. Dutt knows Mr. Hall and their residences are located approximately a mile and a half apart in Benton City. RP at 139. Mr. Dutt had introduced the defendant to Mr. Hall to help him find a job. RP at 139.

Officers contacted Mr. Gregory, who advised them of his involvement in the burglary but stated that he would not tell them who else was present. RP at 125. Mr. Gregory told officers where five of the stolen firearms were located and officers subsequently recovered those firearms. RP at 127, 149-50. At trial, Mr. Hall identified each of those five

firearms as having been stolen from his residence. RP at 54-58. A sixth stolen firearm, a 1993 Remington 700 30.06, was not recovered. RP at 59.

Mr. Gregory subsequently pleaded guilty to Residential Burglary, three counts of Theft of a Firearm, and one count of Unlawful Possession of a Firearm in the Second Degree. RP at 122. Mr. Gregory testified at trial that there was no plea agreement in place requiring him to testify against the defendant. RP at 122. Mr. Gregory advised that it was against his own “law” or code of conduct to implicate others in a crime. RP at 130. He testified that he knew the defendant, Ms. Reed, and Ms. Mortenson. RP at 123-24. Mr. Gregory stated that he was in Richland prior to the burglary occurring. RP at 133. Mr. Gregory stated that he had never previously been inside Mr. Hall’s residence and did not know Mr. Hall. RP at 125-26. He also testified that it was not his idea to burglarize that residence and he was not alone when he went inside the house. RP at 130-31. Mr. Gregory stated that they netted approximately \$15,000 in cash from the burglary, which was split with others. RP at 131-32.

Mr. Gregory identified a photo of a pair of size 11 boots at trial, which he had been wearing in January of 2016 and last saw at Ms. Mortenson’s residence. RP at 133. Officers had recovered those boots when Nicolas Scully brought them back to Ms. Mortenson’s residence after Ms. Mortenson directed him to do so. RP at 167-68. Mr. Scully

indicated that he purchased the boots from the defendant, who sold them to him for whatever money Mr. Scully had in his pocket. RP at 176. An officer ink-rolled the size 12 boots and found the tread consistent in appearance with some of the shoeprints left in the snow at Mr. Hall's residence. RP at 146, 148-49.

The defendant stipulated at trial that he had previously been convicted of a felony. RP at 199-200.

A jury subsequently found the defendant guilty of all fourteen counts charged. RP at 231-34. The defendant now appeals his six convictions for Unlawful Possession of a Firearm in the Second Degree.

III. ARGUMENT

A. The State presented sufficient evidence to support the defendant's convictions for Unlawful Possession of a Firearm in the Second Degree.

The defendant challenges whether the State presented sufficient evidence to show that the defendant unlawfully possessed firearms.

"When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Ward*, 148 Wn.2d 803, 815, 64 P.3d 640 (2003) (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). "After viewing the evidence in the light most favorable to the State, the court determines whether any

rational trier of fact could have found guilt beyond a reasonable doubt.”
Ward, 148 Wn.2d at 815.

The State is required to 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). In the instant case, the defendant was convicted of multiple counts of Unlawful Possession of a Firearm in the Second Degree. The only element at issue is the element of possession. Possession of a firearm can be actual or constructive. *State v. Lee*, 158 Wn. App. 513, 517, 243 P.3d 929 (2010).

Actual possession means that the person charged with possession had “personal custody” or “actual, physical possession.” *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (quoting *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)); *State v. Spruell*, 57 Wn. App. 383, 385, 788 P.2d 21 (1990). Actual possession may be proved by circumstantial evidence. *State v. DuPont*, 14 Wn. App. 22, 25, 538 P.2d 823 (1975). Actual control is determined by the totality of the circumstances presented. *Staley*, 123 Wn.2d at 802.

“[C]onstructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found.” *Lee*, 158 Wn. App. at 517 (quoting *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997)). “Dominion

and control” means that the item “may be reduced to actual possession immediately.” *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). “Exclusive control is not necessary to establish constructive possession,” *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004), but mere presence and proximity to the contraband is insufficient, *Spruell*, 57 Wn. App. at 389. Physical proximity should be considered when evaluating whether dominion and control exist. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989).

To meet its burden on the element of possession, the State must establish “actual control, not a passing control which is only a momentary handling.” *Callahan*, 77 Wn.2d at 29. The Washington Supreme Court later clarified that duration is a factor, not a bright-line rule, in determining possession:

The “momentary handling” referred to by the *Callahan* and *Landry* courts may define, in part, the level of control the prosecution must prove to establish possession. The duration of the handling, however, is only one factor to be considered in determining whether control, and therefore possession, has been established.

Staley, 123 Wn.2d at 801. *Callahan* did not stand for the proposition that possession is necessarily lawful if the possession is brief. *Id.* at 802.

Ms. Reed testified at trial that both the defendant and Mr. Gregory carried the stolen property out of the house, placed it in the car, and then

placed the stolen firearms in the trunk instead of the back seat at her direction. Her direct testimony suggests that the defendant had actual possession of at least some of the firearms, but it is unclear which ones. What is clear, however, is that the defendant had constructive possession of all six stolen firearms based on the totality of the circumstances.

The defendant had knowledge that firearms would be located inside the residence he burglarized based on his prior employment. The defendant drove to the residence where the firearms were located in a vehicle he borrowed from his on-again, off-again girlfriend. The defendant knew where the key was located to get inside the residence in the event it was locked. The defendant and Mr. Gregory both went inside the residence, removed stolen property including the six firearms from the residence, and placed the property in the vehicle. The defendant then drove from Benton City back to Richland with the stolen firearms in the vehicle. The defendant had the ability to exert control over all six of the stolen firearms from the moment he unlawfully entered Mr. Hall's residence until at least the time he returned to Ms. Mortenson's residence in Richland. The period of time that elapsed from the defendant entering Mr. Hall's residence until the defendant arrived back in Richland can in no way be characterized as "momentary."

The facts in the instant case dramatically differ from the facts in *Callahan* and *Davis*, cases which the defendant cites to suggest that any handling of the guns he was involved in was so brief that it cannot equate to possession. Neither case involved a burglary of firearms; defendants in those cases handled items in locations where they were legally permitted to be present. *Callahan*, 77 Wn.2d at 31 (defendant staying in a houseboat for several days handled drugs); *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014) (two co-defendants present in one of their homes when third party arrived with a firearm). The defendants in both cases touched the item in question only briefly or not at all: in *Callahan*, the defendant admitted he had “handled” the drugs earlier in the day, 77 Wn.2d at 31, while in *Davis*, one defendant placed the stolen firearm in a shopping bag while the other advised the person who had stolen the firearm of its location in the bag, 182 Wn.2d at 225. In *Callahan*, no evidence suggested that the defendant was the person who brought the drugs onto the houseboat. In *Davis*, the evidence was clear that neither person charged with crimes related to possessing the firearm had brought the stolen firearm into the residence. 182 Wn.2d at 225.

The facts in the instant case are quite different. The defendant purposefully went to Mr. Hall’s residence where the firearms were located to steal them. The defendant and Mr. Gregory exercised control over Mr.

Hall's residence during the time that they were burglarizing it. The defendant and Mr. Gregory removed the firearms from a display case and a locked gun safe and took them outside the residence, where they placed them into a vehicle. The defendant then drove with the stolen firearms in that vehicle from Benton City to Richland. Once the guns were placed in the trunk of the vehicle, the defendant as the driver had the ability to exclude all others from possessing the firearms, including Mr. Gregory who helped steal the firearms (although, as noted above, the ability to exclude all others is not even required for constructive possession). Sufficient evidence was presented at trial that the defendant constructively possessed all six of Mr. Hall's stolen firearms.

IV. CONCLUSION

The State of Washington respectfully requests that this Court deny the defendant's appeal and affirm his six convictions for Unlawful Possession of a Firearm in the Second Degree.

RESPECTFULLY SUBMITTED this 22nd day of November, 2017.

ANDY MILLER
Prosecutor



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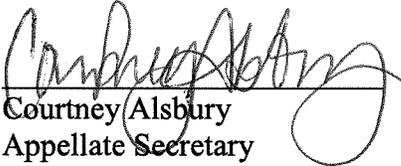
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BENTON COUNTY PROSECUTOR'S OFFICE

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