

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34903-9-III

STATE OF WASHINGTON, Respondent,

v.

JUSTIN L. McDERMOTT, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

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I. INTRODUCTION

Justin McDermott, who was convicted of a felony in 2003, was accosted in his home with his sister and her children by an unknown man who threatened to kill them, flashed gang signs, and refused to leave when asked. When the intruder's behavior escalated, McDermott went to his brother's room and emerged holding a shotgun. The intruder immediately left, McDermott locked the door behind him, and he returned the shotgun to his brother's room. Subsequently, he was arrested and charged with unlawful possession of a firearm. At trial, he requested and was denied an instruction on the defense of necessity. He now appeals his conviction.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in declining to give McDermott's proposed instruction on the defense of necessity.

ASSIGNMENT OF ERROR 2: Insufficient evidence supports the element of possession.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Where the defendant and eyewitnesses testify that they were threatened in their home by unknown intruders who behaved aggressively, spoke and acted like they had weapons and would use them, and refused to

leave when asked, did the trial court err in declining to instruct the jury on the defense of necessity?

ISSUE 2: Where the evidence shows that the defendant temporarily handled a firearm belonging to his brother, which he retrieved from his brother's room and immediately returned when the threat was removed from his home, is the handling too brief and momentary to support the element of possession?

IV. STATEMENT OF THE CASE

On March 26, 2016, police responded to a call of a disturbance at a home in Spokane. RP 46-47, 52, 64-65. During the investigation, they learned that McDermott had a firearm during the altercation and that he was a felon. RP 65-66. Police executed a search warrant to recover the firearm, a .12 gauge shotgun, and McDermott was arrested and charged with unlawful possession of a firearm in the second degree. RP 48, 54, 66, 67; CP 3.

At trial, McDermott and his sister both testified that on the day in question, they were living in their mother's house with the sister's two young children. RP 72, 109. Their mother had not lived in the home for about six months, and their brother Daniel had a room in the house but

was attending Washington State University in Pullman at the time. RP 74, 81, 83, 103.

That day, their mother came to the home with two unknown men. RP 73, 110. One of the men, who initially stayed outside to smoke, commented that they were there “to keep an eye on these m-fers.” RP 111. When McDermott’s sister told the man he could not smoke inside, his companion became extremely aggressive, yelling and cursing at them. RP 73, 76, 112. He told them “you don’t know who I am” and flashed gang signs, saying he would kill them. RP 77, 112. The sister reported that the man pointed his finger at her like a gun and told her, “You don’t know what I carry on me.” RP 77. McDermott recalled that the man said “You don’t know what I’m packing” and patted his waistband. RP 112. Both reported that although they never saw the man display a weapon, they both felt extremely threatened for themselves and for the small children in the home and the men were refusing to leave peacefully. RP 80, 86, 113, 117, 122, 123.

When McDermott’s sister told them she was calling the police and began digging for a phone, the man charged at her. RP 78. She retreated to a back room with her daughter when he charged at her. RP 79. Attempting to retrieve her purse and cell phone, she came back into the

main living area and saw McDermott approaching the men while holding a gun and telling them to leave. RP 79. The men then left and McDermott closed and locked the door. RP 79, 88, 115.

McDermott's brother Daniel testified at trial that he had purchased the shotgun about three years before and kept it in his room. RP 104. McDermott acknowledged that his purpose in getting the gun from his brother's room was to intimidate the men into leaving. RP 114. After they left, he immediately returned the gun to his brother's room. RP 82, 116.

Based on this testimony, McDermott requested instructions on the defenses of defense of self and others, and necessity. CP 30-31, 35; RP 127. The trial court declined to give both instructions, stating that it would not find from the evidence that McDermott was in reasonable fear of death or serious bodily injury. RP 133. As to the self-defense instruction, the court stated the defense was not available because unlawful possession of a firearm is a strict liability offense. RP 133.

Thereafter, the jury returned a verdict of guilty. CP 52; RP 159. The court sentenced McDermott to an exceptional downward sentence of 4 days with credit for 4 days served based on McDermott's offender score

of “0.” CP 74-75, RP 165, 178. McDermott now appeals, and has been found indigent for that purpose. CP 4, 98-99.

V. ARGUMENT

Under the facts presented in this case, the trial court deprived McDermott of his ability to present a defense when it declined to give his proposed instruction on the defense of necessity. Furthermore, where the evidence establishing only a momentary and passing handling of the firearm, the evidence was insufficient to establish the element of possession. For both reasons, the conviction should be reversed.

- A. Because McDermott presented ample evidence from which a jury could conclude that he reasonably feared death or serious bodily injury and acted appropriately under the exigencies of the situation, declining to give his instruction on necessity deprived him of his right to present a defense.

Appellate courts review a trial court’s refusal to give a requested jury instruction de novo where the refusal is based on a ruling of law, and for abuse of discretion where the refusal is based on factual reasons. *State v. Ponce*, 166 Wn. App. 409, 412, 269 P.3d 408 (2012) (citing *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364 (2007)); *State v. Douglas*, 128 Wn. App. 555, 561, 116 P.3d 1012 (2005). Jury instructions are

sufficient if substantial evidence supports them, they allow the parties to argue their theories of the case, and when read as a whole, they properly inform the jury of the applicable law. *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). It is reversible error to refuse to give a proposed instruction if the instruction properly states the law and the evidence supports it. *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995).

Necessity is available as a defense “when circumstances cause the accused to take unlawful action in order to avoid a greater injury.” *State v. Jeffrey*, 77 Wn. App. 222, 224, 889 P.2d 956 (1995) (citing *State v. Diana*, 24 Wn. App. 908, 913, 604 P.2d 1312 (1979)). The defense is available in the context of possessing a firearm after a felony conviction because the legislature did not intend that a person threatened with imminent harm must succumb to an assailant rather than act in self-defense. *Id.* at 227. However, if the circumstances have been brought about by the defendant, or if a legal alternative is available, the defense is not warranted. *Id.* at 225.

To establish the defense of necessity, it must be shown that (1) the defendant believed committing the crime was necessary to avoid or minimize a harm, (2) the harm sought to be avoided was greater than the harm resulting from violating the law, and (3) no legal alternative existed.

Id. (citing *State v. Gallegos*, 73 Wn. App. 644, 651, 871 P.2d 621 (1994)).

In the specific context of possessing a firearm unlawfully, the elements to prove the defendant acted by necessity are (1) the defendant reasonably believed he or another was under unlawful and present threat of death or serious physical injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. *State v. Parker*, 127 Wn. App. 352, 355, 110 P.3d 1152 (2005).

In the present case, the evidence showed that McDermott, his sister, and her small children were threatened with violence in their home by a strange man who behaved erratically, charged aggressively, made statements and gestures suggestive of possessing a weapon, and claimed to be a gang member who was willing to kill them. The man did not leave when asked, but continued to escalate his behavior. McDermott was already in his own home and had no further place of safety to which he could retreat, and attempting to fight the man inside his home would have been dangerous. His sister had attempted to call 911 for help but the man chased her away from her phone.

Under these circumstances, the necessity instruction was justified and should have been given. The jury certainly could have found that McDermott reasonably feared that he, his sister, or the children were at risk of serious injury from a threatening and aggressive intruder. They are not required to wait until injury is inflicted to determine that the threat is imminent and an immediate response is required. Moreover, the jury could have found that McDermott had no reasonable alternative but to force the man to leave before somebody was hurt, when the man prevented them from contacting emergency assistance and plainly wanted them to believe he was armed and dangerous.

In *State v. Stockton*, 91 Wn. App. 35, 38, 955 P.2d 805 (1998), the Court of Appeals approved giving the necessity instruction when the defendant was involved in a fight with multiple strangers and was able to grab a gun from one of them and point it at them before running away. Here, McDermott briefly took possession of the firearm to defend himself and his family from an aggressive and unwanted person in his home. The instruction was necessary for McDermott to be able to argue his defense, when he did not contest the basic facts that he retrieved and held the gun and had been convicted of a prior felony, but argued that his actions were justified under the circumstances. Because a reasonable jury could have

B. Where the evidence establishes that the defendant briefly retrieved a firearm belonging to his brother from his brother's room to defend himself and his family from aggressive intruders, and returned the firearm to his brother's room immediately after the threat was no longer present, the handling is of such a momentary and passing nature that it does not constitute possession as a matter of law.

In reviewing a challenge to the sufficiency of the evidence, the court considers the evidence in the light most favorable to the State. *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). The verdict should be reversed if, after reviewing the evidence, the court cannot conclude that any rational trier of fact could have found the essential elements of the charge beyond a reasonable doubt. *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997).

Possession requires proof of dominion and control over the item, which may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Exclusive control need not be shown to establish possession, but proximity is insufficient. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). While dominion and control over the premises where a controlled substance is found is one factor in determining whether the defendant has dominion and control over the substance, it is not a

where a controlled substance is found is one factor in determining whether the defendant has dominion and control over the substance, it is not a crime to have dominion and control over premises where contraband is found. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997) (citing *State v. Olivarez*, 63 Wn. App. 484, 486, 820 P.2d 66 (1991)). In evaluating the sufficiency of the evidence to show constructive possession, the court considers the totality of the circumstances. *State v. Chavez*, 138 Wn. App. 29, 35, 156 P.3d 246 (2007) (citing *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002)).

In *Callahan*, the defendant's admission to handling drugs earlier was found insufficient to support a conviction for actual possession of them, when his handling of them was momentary and passing. 77 Wn.2d at 29. The *Callahan* Court noted that ownership of the contraband must be considered, as dominion and control may follow ownership. *Id.* at 31. There, the Court found that the defendant's presence on a houseboat for a few days and brief handling of drugs that were found on it were insufficient to establish possession of the drugs as a matter of law. *Id.* at 32; *see also Cote*, 123 Wn. App. at 550 (evidence establishing proximity and mere handling of contraband insufficient to show possession as a matter of law); *State v. Spruell*, 57 Wn. App. 383, 385-86, 788 P.2d 21 (1990) (same).

Here, the evidence established that the shotgun belonged to McDermott's brother and was kept in the brother's bedroom. Before the incident, McDermott was not even sure the gun was there. He briefly handled the gun to respond to an unforeseen exigent situation in the home and immediately returned it to his brother's room when the situation had been resolved. Under *Callahan*, *Spruell*, and *Cote*, brief and momentary handling of a prohibited item is insufficient to establish either actual or constructive possession as a matter of law. Accordingly, even viewing the evidence here in the light most favorable to the State, it fails to show that McDermott committed the crime of possessing the firearm unlawfully.

VI. CONCLUSION

For the foregoing reasons, McDermott respectfully requests that the court REVERSE his conviction for unlawful possession of a firearm.

RESPECTFULLY SUBMITTED this 15 day of May, 2017.


ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Justin L. McDermott
47 E. Rockwell
Spokane, WA 99207

And, pursuant to prior agreement of the parties, by e-mailing a copy to:

Brian O'Brien
Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 15th day of May, 2017 in Walla Walla, Washington.


Breanna Eng

BURKHART & BURKHART, PLLC

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