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Court of Appeals  
Division III  
State of Washington  
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NO. 36381-3-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent

v.

ZACHARY BERGSTROM,

Appellant.

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

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REPLY BRIEF OF APPELLANT

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MAYA RAMAKRISHNAN  
Rule 9 Intern for Appellant

GREGORY LINK  
DEVON KNOWLES  
Attorneys for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 610  
Seattle, WA 98101  
(206) 587-2711

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## A. ARGUMENT IN REPLY

### **1. The evidence was insufficient to establish either unlawful possession of a firearm or the firearm enhancement, because the State failed to show the alleged firearm was a gun in fact**

The prosecution failed to prove that the gun-like object found on the floor of Ms. Thibodeau's vehicle was an operable firearm. To satisfy due process, the prosecution must prove all elements of a crime beyond a reasonable doubt. U.S. Const amend XIV; Const. art. I §3. To prove unlawful possession of a firearm, the prosecution must establish that the firearm at issue was an actual firearm that is capable of being fired, a "gun in fact." *State v. Tasker*, 193 Wn. App. 575, 595, 373 P.3d 310 (2016). "A gun-like object that is incapable of being fired is not a 'firearm.'" *State v. Jussila*, 197 Wn. App. 908, 933, 392 P. 3d 1108 (1107).

Because toy guns can appear nearly identical to operable firearms, to prove that an object is a firearm, the prosecution cannot simply show that it resembles one. RCW 9.41.010 (11); See Leila Atassi, *Can you tell a real gun from a toy? It's tougher than you think.* CLEVELAND.COM, [https://www.cleveland.com/cityhall/2015/03/can\\_you\\_tell\\_a\\_real\\_gun\\_from\\_a.html](https://www.cleveland.com/cityhall/2015/03/can_you_tell_a_real_gun_from_a.html) (last visited Mar. 27, 2020). The problem of confusion arising from extremely realistic-looking toy guns

has become so significant that the New Jersey legislature recently banned the sale of realistic-looking toy guns. N.J.S.A. 56:17-1.

In this case, the prosecution simply did not present any testimony that the gun-like object found in Ms. Thibodeu's car was an operable firearm.

The prosecution argues that *State v. Bowman*, 36 Wn. App 789, 803, 678 P.2d 1273 (1984) controls and thus the prosecution did not need to provide the alleged firearm. Br. of Rp. 23. In *Bowman*, there was testimony from a witness to the crime, describing the weapon in detail and stating "there was no question" that "it was a real gun. *Id.* Additionally, the defendant had threatened to use the gun in question, which lent support to the jury's conclusion that it was an operable firearm. *Id. at 803.* Here by contrast, no "witness to the crime has testified to the presence of such a weapon," rendering unnecessary the production of the weapon. *Id.*

In this case, the prosecution did not offer any testimony suggesting that the alleged firearm involved in the incident was an operable firearm. The evidence about the alleged firearm consisted of photographs of a gun-like object lying on the floor, and Deputy Pfiefer's testimony that he saw the handle of a handgun near Mr.

Bergstrom's feet. RP 131<sup>1</sup>; Exs. 1-4. Pictures of what appears to be a gun are insufficient to show that the object photographed is an actual firearm without additional evidence. RCW 9.41.010(11).

The prosecution did not present any testimony about the alleged gun's physical attributes, such as whether it appeared real to officers or had the physical characteristics of a real gun. And unlike the scenario in *Bowman*, the prosecution did not offer evidence that Mr. Bergstrom acted in a manner suggesting that the gun was an actual firearm. Mr. Bergstrom did not threaten anyone with the alleged firearm, attempt to hide the alleged firearm. There is no evidence that Mr. Bergstrom even touched the alleged firearm.

The only testimony the prosecution offered as to the operability of any firearm was that of Detective Knight regarding proposed Exhibit No. 29, an operational .45-caliber pistol. RP 177, 121-22, 124. Detective Knight was not involved in the incident or evidence collection, and he did not testify that that proposed Exhibit No. 29 was

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<sup>1</sup> The prosecution's briefing indicates that Deputy Pfeifer testified that he ran the serial number of the firearm. Br. of Rp, 23. Deputy Pfeifer's testimony was that he "could not say" whether he had personally removed the alleged firearm from the vehicle, and he did not specify which officer specifically ran the serial number. RP 135-136 ("We all remained on scene. We ran the serial number.") (emphasis added).

the same gun collected in Mr. Bergstrom's case, nor did he provide any identifying information suggesting that it was. RP 165-66.

The prosecution asserts that Mr. Hepting's identification of proposed Exhibit No. 29 as his stolen, operable firearm is sufficient. Br. of Ap. 24. But this testimony has the same deficiency as Detective Knight's; Mr. Hepting was not a witness to the incident and could not give testimony as to whether proposed Exhibit No. 29 was the object found in Ms. Thibodeu's vehicle. See RP 156-157. Mr. Hepting testified that the serial number on the gun proposed as Exhibit No. 29 matched his own firearm, but not whether that serial number was also present on the gun-like object involved in the incident. *Id.*

No testimony presented at trial connects the gun proposed as Exhibit No. 29 with the alleged gun at issue. As a result, the prosecution failed to show that the object was an operable firearm under RCW 9.41.010(11).

Where the prosecution fails to prove an element of an offense, reversal is required. *State v. Irby*, 187 Wn. App 183, 204, 347 P.3d. 1103 (2015). The jury was instructed on the statutory definition of "firearm" in both the general instructions and the special instruction regarding the firearm enhancement. CP 69-70, 73. Therefore, the

prosecution's failure to prove the existence of a firearm requires that conviction for unlawful possession and the enhancement be reversed.

**2. The State did not prove beyond a reasonable doubt that Mr. Bergstrom possessed the alleged firearm**

The evidence only shows that Mr. Bergstrom was near the alleged firearm, which is insufficient to prove unlawful *possession* of a firearm. Possession may be actual or constructive. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). To establish constructive possession of a firearm, the prosecution must prove the defendant had "dominion and control over it or over the premises where it was found." *Id.* A vehicle can be premises for the purpose of this inquiry; ownership and actual control of a vehicle where a firearm is found along with knowledge of the firearm establish constructive possession. *Id.* at 518. Proximity to a firearm is insufficient to show dominion and control. *State v. Choinard*, 169 Wn. App. 895, 899, 282 P. 3 117 (2012)

The prosecution correctly observes that constructive possession is a fact-intensive analysis. Br. of Rp. 15; *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). Factually, the evidence in Mr. Bergstrom's case is nearly identical to that in *George*.

Like the defendant in *George*, Mr. Bergstrom was neither the owner nor the driver of the vehicle in which the contraband was found,

but a backseat passenger. *See also State v. Choinard*, 169 Wn. App. 895, 900, 282 P. 3d 117 (2012) (“[C]ourts hesitate to find sufficient evidence of dominion or control where the State charges passengers with constructive possession.”); *State v. Cote*, 123 Wn.App. 546, 550, 96 P.3d 410 (2004).

And just as in *George*, the object in question was located at Mr Bergstrom’s feet. RP 131. In *George*, a marijuana pipe was found at the defendant’s feet. 146 Wn. App. at 912-13. The *George* court held proximity of the pipe was not sufficient to establish constructive possession, noting that there was no evidence that the defendant had used the pipe, no testimony ruling out other occupants of the vehicle as owners of the pipe, fingerprint evidence on the pipe, or statements made by the defendant suggesting that he owned the pipe. *Id.* at 922.

Similarly, the prosecution showed no evidence that Mr. Bergstrom had ever had control over the gun. Despite prosecution’s speculation that “Mr. Bergstrom had reason and opportunity to divest himself of the firearm...” Br. of Rp. 21, there is simply no evidence that Mr. Bergstrom made any attempt to hide the weapon, or that he was even aware its presence in the dark and cluttered car, where he was lethargic and appeared to be under the influence. RP 145; RP 150; RP

180. Other occupants were not ruled out as potential owners, including the driver, Ms. Thibodeau. None of Mr. Bergstrom's actions or words indicated that he was in control of the weapon.

Mr. Bergstrom's proximity to the weapon alone cannot be used to infer dominion and control. At trial, the prosecution argued in closing that Mr. Bergstrom could have reached down and grabbed the weapon quickly. RP 293, RP 295. This argument is fundamentally mere proximity, because anytime a weapon is near an individual, they could hypothetically reach down and grab it quickly. The prosecution now argues that Mr. Bergstrom could have attempted to hide the weapon. Br. of Rp. 21-22. This argument is also flawed for several reasons. As a practical matter, the weapon was visible from outside the car. If Mr. Bergstrom had attempted to hide the weapon, he could have placed it under the blanket in the backseat. See RP 208. Additionally, since there is no evidence suggesting that such an attempt occurred beyond the weapon's location, this argument also essentially boils down to mere proximity. This court should reverse and dismiss Mr. Bergstrom's conviction.

**3. The state did not prove beyond a reasonable doubt that Mr. Bergstrom possessed the black zippered pouch**

Similarly, the prosecution failed to establish a relationship beyond proximity between Mr. Bergstrom and the controlled substances in the black zippered pouch. To prove constructive possession of a controlled substance, the prosecution had to demonstrate that Mr. Bergstrom had dominion and control over the pouch. See *State v. Cote*, 123 Wn. App 546, 549, 96 P.3d 410 (2004). Because Mr. Bergstrom was a passenger in the vehicle, his proximity to the pouch is not enough to demonstrate dominion and control. See *George*, 146 Wn. App at 920. No circumstances definitively linked Mr. Bergstrom to the pouch.

Even if the notebook in Mr. Bergstrom's backpack linked him to drug sales in general, it did not link him to the specific drugs in the pouch. The prosecution distinguishes from *State v. Gutierrez*, 50 Wn. App 583, 749 P. 2d 213 (1988) by focusing on the different circumstances in which law enforcement encountered the defendant in that case. To be sure, *Gutierrez* presents a different factual scenario. It's relevance to this case is that the *Gutierrez* court determined that some relationship to drug sales is insufficient to show that an individual has dominion and control over specific drugs. *Id.* at 594. Similarly, while Mr. Bergstrom may have been under the influence, there is no indication that the drugs he had used were those in the pouch.

Finally, the location of the pouch, wedged against the rear driver-side door is not sufficient to show dominion and control. Even if, as prosecution suggests, Mr. Bergstrom moved the pouch to that location after he entered the vehicle, possession requires “actual control, not a passing control which is only a momentary handling.” *George*, 146 Wn. App at 919-920 (quoting *State v. Callahan*, 77 Wash.2d 27, 29, 459 P.2d 400 (1969)).

The prosecution presented no evidence of Mr. Bergstrom’s fingerprints on the pouch. The prosecution presented no evidence ruling out the other occupants of the car as owners. The prosecution presented no evidence that Mr. Bergstrom acted in a way that suggested he owned or was even aware of the drugs. All this leaves is Mr. Bergstrom’s proximity to the pouch, which is insufficient to establish constructive possession. Because the prosecution failed to meet its burden to prove possession, this court should reverse and dismiss Mr. Bergstrom’s convictions for both possession of methamphetamine with intent to distribute and possession of heroin.

B. CONCLUSION

Because the prosecution failed to meet its burden, this Court should reverse Mr. Bergstrom's convictions as unsupported by the evidence.

DATED this 3<sup>rd</sup> day of April, 2020.



Maya Ramakrishnan - 9872939  
Rule 9 Intern for Appellant



Gregory C. Link -25228  
Devon Knowles - 39153  
Washington Appellate Project - 91052  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 36381-3-III
	)	
ZACHARY BERGSTROM,	)	
	)	
APPELLANT.	)	

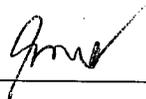
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