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No.89448-5

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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

EDDIE LEE DAVIS,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER EDDIE LEE DAVIS

Court of Appeals No. 41689-1-II,
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 09-1-05374-1
The Honorable Stephanie Arend, Judge

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I. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err, and demolish the well-established burden of proof in possession cases when it held that the State presented sufficient evidence that Eddie Davis actually and constructively possessed a stolen firearm, where the evidence showed at most a proximity to and momentary handling of the firearm?
2. Did the Court of Appeals err when it upheld Eddie Davis' exceptional sentence based on a finding of destructive and foreseeable impact on someone *other than the victim* where the victim of the crime of rendering criminal assistance is the general public?
3. Did the Court of Appeals err when it found that the fear felt by the victims' families for their own personal safety was a foreseeable and unusual impact caused by Eddie Davis' act of rendering criminal assistance?

II. STATEMENT OF THE CASE

A. SUBSTANTIVE FACTS¹

On Sunday, November 29, 2009, at about 8 o'clock in the morning, Maurice Clemons entered the Forza Coffee Shop in Parkland, Washington, armed with his two firearms. (TRP5 226-27, 230, 231)² He opened fire at four Lakewood Police Officers as they sat together at a table. (TRP5 230, 232) Three officers were

¹ Due to page limitations, the procedure and fact sections of this petition have been shortened considerably. Additional procedure and facts can be found in the Opening Brief of Appellant Eddie Davis.

² The consecutively paginated trial transcripts labeled Volumes 1-17 will be referred to as "TRP" followed by the volume number. The remaining pre- and post-trial transcripts will be referred to by the date of the proceeding.

immediately shot and killed but a fourth, Greg Richards, was able to discharge his service pistol and wound Maurice.³ (TRP5 232-33) Maurice and Richards struggled, but Maurice wrestled Richards' service pistol from him and used it to fatally shoot Richards. (TRP5 233) Maurice then fled the coffee shop with Richards' pistol. (TRP5 233)

Forza employees who fled the coffee shop saw a man run from the scene and then speed away in a white truck driven by a second man. (TRP5 251, 252-53) Registration records listed Maurice Clemmons as the owner of the truck, so law enforcement immediately focused on Maurice as the prime suspect. (TRP5 257, 258)

Cicely Clemmons testified that she was asleep in her mother's house on the morning of November 29, but was awakened by the sound of someone knocking on the door and window. (TRP6 304-06) She heard the sound of Maurice's voice, and heard him say that he had shot four police officers. (TRP6 307) Maurice said he had been shot too, and asked for a shirt and a plastic bag to tie over his wound. (TRP6 307, 308-09)

³ Several parties in this case share the same last name. To avoid confusion, those individuals will be referred to by their first name throughout this brief.

Cecily came out of her bedroom and saw Maurice with Eddie Davis, Douglas Davis, and her mother, Letrecia Nelson. (TRP6 308, 309) Maurice remarked that he had taken one of the officer's guns and shot him with it, then asked where the gun was. (TRP3 312, 316) According to Cicely, Eddie told Maurice it was in a bag on the counter then handed the bag to Maurice. (TRP6 216, 320) Letrecia told investigators that she had put the gun into the bag for Maurice. (TRP10 1175-76)

When interviewed by investigators, Eddie told detectives that Maurice came to his home and insisted that he drive him to Auburn. (TRP9 957-58; Exh. 66) While they were on the road, Maurice told Eddie that he had been shot by a police officer, but that he shot four officers himself. (TRP9 965, 968, 969; TRP10 995-96; Exh. 67) When they arrived at Letrecia and Cicely's house, Maurice's wound was cleaned with peroxide and he was given a change of clothes. (TRP9 967; Exh. 66) Then Eddie drove Maurice to meet a woman at the Super Mall. (TRP9 971-73, 998; TRP10 998, 1015; Exh. 66, 67)

Eddie told the detective that he did not see the officer's gun at Letrecia's house, but assumed Maurice was armed and that he took the gun with him when he left. (TRP10 1015, 1016; Exh. 67) Eddie

also said that he was not sure what Maurice would do next, but that he was afraid that Maurice would come looking for him if he cooperated with the police. (TRP10 1022)

A Seattle Police Officer shot and killed Maurice in the early morning hours of December 1, 2009. Maurice was carrying Officer Richards' gun at the time of his death. (TRP10 1132-33)

B. PROCEDURAL HISTORY

The State tried Davis on one count of rendering criminal assistance, and one count each of unlawful possession of a firearm and possession of a stolen firearm relating to the gun Maurice took from one of the officers during the shooting.⁴ (CP 13-18) The jury found Eddie guilty of all three charges, and found that all three crimes were aggravated because (1) they involved a destructive and foreseeable impact on persons other than the victim, and (2) they were committed against a law enforcement officer who was performing official duties at the time of the crime. (TRP17 1918-21; CP 450-56) The trial court imposed an exceptional sentence totaling 125 months based on the jury's special verdicts. (CP 465-67, 471, 474; 01/14/11 RP 38)

⁴ Pursuant to RCW 9A.76.050, .070, RCW 9.41.040, and RCW 9A.56.140, .310.

Eddie appealed, arguing that the State failed to prove that he possessed the gun, and that the exceptional sentencing factors are both legally and factually inapplicable. (CP 485; Opening Brief of Appellant Eddie Lee Davis) In a published opinion, the Court of Appeals affirmed Eddie's firearm possession convictions, struck five of the six aggravators used to support Eddie's exceptional sentence, and ordered that Eddie's case be remanded for resentencing. (Opinion at 36-37)

III. ARGUMENT & AUTHORITIES

By finding sufficient evidence to support Davis' firearm convictions, the Court of Appeals ignored existing case law and lowered the burden of proof that the State must meet in order to convict a person who had only fleeting or momentary possession of another person's contraband. The Court of Appeals also misinterpreted and misapplied the statutory aggravating sentencing factor that requires proof of a destructive and foreseeable impact on persons other than the victim.

A. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT EDDIE'S FIREARM CONVICTIONS BECAUSE THE STATE DID NOT PROVE HE ACTUALLY OR CONSTRUCTIVELY POSSESSED THE FIREARM

"Due process requires that the State provide sufficient

evidence to prove each element of its criminal case beyond a reasonable doubt.” City of Tacoma v. Luvene, 118 Wn.2d 826, 849, 827 P.2d 1374 (1992) (citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)). Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

The State alleged that Eddie possessed Officer Richards’ firearm, which Maurice had taken from Richards during their struggle at the coffee shop. (CP 17-18; 10/12/10 RP 52-54) As a result, the State charged Eddie with unlawful possession of a firearm and possession of a stolen firearm. (CP 17-18) Under RCW 9A.56.310(1): “A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a stolen firearm.” Under RCW 9.41.040, a person is guilty of unlawful possession of a firearm “if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . in this state or elsewhere of any

serious offense[.]”

Possession of property may be either actual or constructive. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969); State v. Ibarra-Raya, 145 Wn. App. 516, 524, 187 P.3d 301 (2008). Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods. Callahan, 77 Wn.2d at 29 (citing State v. Walcott, 72 Wn.2d 959, 435 P.2d 994 (1967)).

In this case, the prosecution argued that Eddie had actual possession of the gun because: “When Maurice Clemmons asked where the gun was, it was Eddie Davis who retrieved the bag that contained the gun and brought it to him.” (TRP15 1710) This fact, even if true, is insufficient to establish actual possession. As stated in Callahan,

In order for the jury to find the defendant guilty of actual possession of the drugs, they must find that the drugs were in the personal custody of the defendant. There was no evidence introduced that the defendant was in physical possession of the drugs other than his close proximity to them at the time of his arrest and the fact that the defendant told one of the officers that he had handled the drugs earlier. 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.

77 Wn.2d at 29 (emphasis added) (citing United States v. Landry, 257 F.2d 425, 431 (7th Cir.1958)).⁵ Thus, passing control and momentary handling does not establish actual possession. Callahan, 77 Wn.2d at 29.

Like Callahan, Richards' gun was not found on Eddie's person at the time of his arrest. So the only basis on which the jury could find that Eddie had actual possession of the gun is that he may have briefly handled the bag containing the gun as he passed the bag to Maurice while at Letrecia's house on November 29. (TRP6 316, 320) The Court of Appeals, while acknowledging that Davis' handling of the firearm was "of short duration," found nevertheless that actual possession was proved. (Opinion at 13)

Until now, it has been well establish that "possession is an element of the offense and therefore the burden is on the State to establish a possession that is more than a 'passing control.'" State

⁵ The same definition of "possession" governs drug and firearm cases in Washington. See Comment, WPIC 133.52 ("WPIC 133.52 parallels the instruction used for drug offenses"); WPIC 50.03.

v. Staley, 123 Wn.2d 794, 802, 872 P.2d 502 (1994) (citing Callahan, 77 Wn.2d at 29). The Court of Appeals acknowledged this law, but ignored it. And by doing so, in a published opinion, the Court of Appeals has lowered the burden of proof that the State must now meet in order to prove actual possession.

The Court of Appeals also found that the State's evidence is sufficient to show constructive possession of the gun. (Opinion at 12) But again, the Court ignored established case law and established burdens of proof in reaching its decision.

Constructive possession can be established by showing the defendant had dominion and control over the item or the premises where the item was found. See Ibarra-Raya, 145 Wn. App. at 524; State v. Portrey, 102 Wn. App. 898, 904, 10 P.3d 481 (2000). The Court of Appeals found that Eddie constructively possessed the gun because he had knowledge of its presence, was in proximity to it for a short time, and momentarily handled it. (Opinion at 12)

However, it is well established that, "where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession." State v. Spruell, 57 Wn. App. 383, 388, 788 P.2d 21 (1990); Callahan, 77

Wn.2d at 29; State v. Echeverria, 85 Wn. App. 777, 784, 934 P.2d 1214 (1997).

For example, in Callahan, the defendant was a guest on a houseboat where drugs were found, and he was seen near drugs and admitted handling the drugs earlier that day. 77 Wn.2d at 28-31. This Court found this was insufficient to establish that Callahan constructively possessed the illegal drugs because “possession entails actual control, not a passing control which is only a momentary handling.” Callahan, 77 Wn.2d at 29.

In Spruell, police raided the defendant’s home and observed Luther Hill, a guest, stand up from a table where there were drugs and drug paraphernalia. 57 Wn. App. at 384. The court found no constructive possession even though Hill’s fingerprints were on a plate containing cocaine residue. 57 Wn. App. at 388-89.

In State v. Cote, the evidence showed that the defendant arrived at a residence as a passenger in a stolen truck and his fingerprints were on mason jars containing precursor chemicals, found in the back of the truck. 123 Wn. App. 546, 550, 96 P.3d 410 (2004). Relying on Callahan and Spruell, the Cote court held: “The evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it . . . this is insufficient to establish

dominion and control. Accordingly, there was no evidence of constructive possession.” 123 Wn. App. at 550.

Other factors that may be considered in determining whether a defendant had dominion and control over contraband include: (1) whether the defendant had the immediate ability to take actual possession of the item; and (2) whether the defendant had the capacity to exclude others from possession of the item. See WPIC 133.52. No one factor is dispositive, and the totality of the circumstances must be considered. Portrey, 102 Wn. App. at 904.

Although Eddie was in proximity to the gun and may have had the ability, for a brief moment, to handle the gun, there is no evidence that he had the ability to maintain control of the gun. Similarly, there is no evidence that Eddie had the capacity to exclude others, especially Maurice, from possessing the gun. Maurice brought the gun with him to Letrecia’s home, demanded its return when he did not know where it was, took it with him when he left for the Super Mall, and had it on his person when he was killed in Seattle. (TRP6 316, 320; TRP10 1021, 1015, 1016, 1081, 1110, 1111, 1133-34)

Despite this, the Court of Appeals concludes that “no one claimed ownership or even exclusive possession of the gun, weighing in favor of at least shared dominion and control.” (Opinion

at 12-13) The Court's conclusion is unsupported by any evidence or reasonable inference from the evidence. Maurice Clemmons possessed and maintained control over the gun from the moment he wrestled it away from Officer Richards. Eddie was not exercising or asserting dominion and control over the weapon when he merely responded to Maurice's demand to give him the gun by picking up the bag and handing it to Maurice.

The State did not establish that Eddie had dominion and control over the premises where the gun was briefly located, or over the gun itself. The State's evidence showed nothing more than mere proximity to and a momentary handling of the gun. But it is well established that such evidence is not enough to support a finding of either actual or constructive possession. Spruell, 57 Wn. App. at 388; Callahan, 77 Wn.2d at 29; Cote, 123 Wn. App. at 550; Echeverria, 85 Wn. App. at 784.

The State failed to present sufficient evidence to support Eddie's unlawful possession of a firearm and possession of a stolen firearm convictions. These two convictions must be reversed and dismissed. See State v. Smith, 155 Wn.2d 496, 504-05, 120 P.3d 559 (2005); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

B. THE "DESTRUCTIVE AND FORESEEABLE IMPACT ON PERSONS OTHER THAN THE VICTIM" AGGRAVATOR IS LEGALLY AND FACTUALLY INAPPLICABLE TO EDDIE'S RENDERING CONVICTION AND MUST BE STRICKEN

1. *Law regarding imposition and review of an exceptional sentence.*

Sentences must fall within the proper presumptive sentencing ranges set by the legislature. State v. Williams, 149 Wn.2d 143, 146, 65 P.3d 1214 (2003). However, a court may impose a sentence that exceeds that sentence range if a jury finds, beyond a reasonable doubt, one or more aggravating factors alleged by the State, and if the court determines that "the facts found are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.537(6); State v. Hyder, 159 Wn. App. 234, 259-60, 244 P.3d 454 (2011).

Appellate courts review an exceptional sentence to insure there is both a factual basis in the record and a legally justified reason. RCW 9.94A.585(4); State v. Law, 154 Wn.2d 85, 93, 110 P.3d 717 (2005). The appellate court reviews a jury's special verdict finding the existence of an aggravating circumstance using the sufficiency of the evidence standard to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. State v. Chanthabouly,

164 Wn. App. 104, 143, 262 P.3d 144 (2011) (citing State v. Yates, 161 Wn.2d 714, 752, 168 P.3d 359 (2007)).

In this case, the trial court imposed an exceptional sentence based in part on its reliance on the jury's finding, pursuant to RCW 9.94A.535(3)(r), that that Eddie's act of rendering criminal assistance had a "destructive and foreseeable impact on persons other than the victim". (CP 465)

2. *Eddie's act of rendering criminal assistance did not impact anyone other than the "victim" of the crimes because the "victim" was the public at large.*

Pursuant to RCW 9.94A.535(3)(r), a trial court may impose an exceptional sentence if the offense involves a "destructive and foreseeable impact on persons other than the victim." Eddie argued below that the "victim" of the crime of rendering criminal assistance is society as a whole, since the crime of rendering criminal assistance punishes the interference with society's effort to apprehend criminals and prosecute crimes rather than punishing an act aimed at a specific individual. (See Opening Brief of Appellant Eddie Davis at 23-26) The State and the Court of Appeals agreed. (Brief of Respondent at 45-46; Opinion at 22)

It follows, therefore, that Eddie's act of rendering criminal assistance did not impact anyone other than the "victim" of the crimes

because the “victim” was society or the public at large. But the Court of Appeals disagreed.

The Court first looks to the SRA’s definition of “victim” contained in RCW 9.94A.030(53): “any person who has sustained emotional, psychological, physical or financial injury to person or property as a direct result of the crime charged.” (Opinion at 22) The Court then looks to other sections of the Revised Code of Washington and to Webster’s Dictionary, and concludes that the term “person” refers to “a discrete, identifiable individual or group entity, as opposed to the inchoate mass of society as a whole.” (Opinion at 22-23) The Court still seems to acknowledge that the “victim” of certain crimes can still be society as a whole, but nevertheless concludes that the aggravator applies whenever there is an identifiable person or entity that is indirectly impacted by a crime. (Opinion at 22-23)

But there is nothing in the SRA that indicates this aggravator can be imposed when specifically identifiable persons or entities are also within the class of victims of the specific crime. The plain language of the statute specifically requires a destructive and foreseeable impact on persons *other than the victim*. RCW 9.94A.535(3)(r); Instruction 36 (CP 448). If the Legislature wanted

to allow greater punishment when a victim (whether an individual or entity) is impacted in a manner greater than the other victims, then it certainly could have done so. But the Legislature specifically limits the application of RCW 9.94A.535(3)(r) to address injury to persons or entities that are not “victims.”

Furthermore, this Court has rejected the logic used by the Court of Appeals to support its decision. In State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000), the Court held that “the victim of the offense of unlawful possession of a firearm is the general public.” This Court rejected the idea that specific individuals who are more directly impacted by this crime can be identified and considered differently, when the “victim” of the crime is society as a whole. See Haddock, 141 Wn.2d at 111.

As a matter of law, the “victim” of Eddie’s act of rendering criminal assistance was the general public, which necessarily includes the citizens of Pierce County, local law enforcement officers, and the officers’ family members. By its plain language, the aggravator cannot apply to Eddie’s rendering conviction.

3. *Eddie’s actions did not impact others in a distinctive manner not usually associated with the commission of the offense or in a way that was foreseeable.*

To establish this aggravator, the State must show “that [the]

defendant's actions impact[ed] others in a distinctive manner not usually associated with the commission of the offense in question, and that this impact [was] foreseeable to the defendant.” State v. Way, 88 Wn. App. 830, 834, 946 P.2d 1209 (1997); State v. Johnson, 124 Wn.2d 57, 63–64, 873 P.2d 514 (1994); State v. Mulligan, 87 Wn. App. 261, 263, 941 P.2d 694 (1997). The usual and predictable impact of the crime of first degree rendering criminal assistance is that the capture of a murder suspect is delayed, which necessarily results in additional stress on law enforcement, the community and the victim’s family as they await capture.⁶ So these impacts alone do not distinguish this case from other rendering cases.

In fact, the Court agreed with most of Eddie’s arguments against, and rejected most of the State’s justifications in favor, of the application of this aggravator under the facts of this case. (Opening Brief of Appellant Eddie Davis at 26-31; Opinion at 24-26) However, the Court ultimately upheld the aggravator by finding that “the slain officers’ families particularly feared that they might also be Clemmons’ targets, since he had specifically murdered four police officers.” The Court concluded that Eddie “prolonged this fear by

⁶ The crime of rendering criminal assistance is elevated to first degree if the person assisted is wanted for murder or for a class A felony. RCW 9A.76.070(1).

rendering criminal assistance to Clemons. Accordingly, [Eddie's] actions caused a destructive impact on the slain officers' family not normally associated with the underlying crime." (Opinion at 27-28)

Family members of the officers did testify that they were afraid for their safety while Maurice was at large because they did not know if the choice of victims was random or whether Maurice had specifically targeted those officers. (TRP5 241-42, 246) However, this fear was not "foreseeable" by Eddie. Prior to the shootings, Maurice expressed hatred towards the police in general, and described how he would kill any police officer who came to his house. (TRP6 297-98) He did not express anger toward any one specific officer. Maurice later walked into the coffee shop and shot the four police officers as they sat together in a booth. (TRP5 230, 231, 232) He did not turn his gun on anyone else at or around the coffee shop. (TRP5 233) There was no reason for the public, the officers' families, or Eddie to believe that Maurice wanted to target anyone other than random police officers. The evidence does not support the imposition of a 125 month exceptional sentence on the grounds that Eddie could or should have foreseen that the family members might feel personally in peril.

Furthermore, though the State can punish Eddie for helping

Maurice after the shootings, it cannot punish Eddie for the impact of the two-day manhunt without proof that he caused or prolonged that impact. But the State did not establish that Maurice would have been captured sooner if Eddie had simply closed the door and ignored Maurice's demands for help, or if Eddie had told them sooner that Maurice was left at the Super Mall. We cannot know, beyond a reasonable doubt, that the police would have definitely located Maurice sooner than the morning of December 1 if Eddie had acted differently.

The State cannot attribute the impact of Maurice Clemmons' actions to Eddie, because Eddie was merely an accessory after the fact, not an accomplice.⁷ The State cannot punish Eddie for Maurice's terrible acts, it can only punish Eddie for his own acts and for the impact that his acts, and his alone, had on the community and the families. But the State failed to present sufficient evidence to prove that Eddie's actions in assisting Maurice "impact[ed] others in a distinctive manner not usually associated with the commission of" those offenses. Way, 88 Wn. App. at 834; Johnson, 124 Wn.2d at

⁷ An accessory after the fact has no causal role in the principal offense. Cathron v. Jones, 190 F. Supp. 2d 990, 1000 (E.D. Mich. 2002); see also State v. Anderson, 63 Wn. App. 257, 261, 818 P.2d 40 (1991) (rendering criminal assistance is an offense that can only occur after the fact because otherwise it constitutes accomplice liability).

63-64; Mulligan, 87 Wn. App. at 263.

This aggravator therefore fails both legally and factually, and should be stricken.

VI. CONCLUSION

Because Eddie only momentarily handled the firearm as he passed it to Maurice Clemons, and because Eddie never exercised or indicated an intent to exercise dominion and control over the firearm, the State did not establish that he possessed the firearm. Eddie respectfully requests that this Court vacate both of his firearm convictions, and remand to the trial court with instructions to dismiss the charges with prejudice. Additionally, because the “destructive and foreseeable impact on persons other than the victim” aggravator is both legally and factually inapplicable, Eddie respectfully requests that this Court remand for resentencing on any remaining offenses based on the standard range for the crime.

DATED: April 3, 2014



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Attached for filing is the Supplemental Brief of Petitioner Eddie Davis, for case number 89448-5. Thank you.

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