

62363-0

62363-0

NO. 62363-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ANDREW McGUIRE,

Appellant.

2009 AUG 19 11:49 AM
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Here, there was evidence presented that the defendant was pretending to be asleep in his mother's house in close proximity to a loaded firearm and that his fingerprint was located on the magazine inside the firearm. Should this court find there is substantial evidence in the record to support appellant's Unlawful Possession of a Firearm in the First Degree conviction?

2. Jury instructions are sufficient if they accurately state the law, are not misleading, and provide a basis for the parties to argue their case theories to the jury. A trial court's rejection of a proposed instruction is reviewed for abuse of discretion. A trial court properly exercises its discretion in refusing to instruct the jury that "mere proximity" or "passing control" of a particular object is insufficient to establish constructive possession when the State's case does not rest solely on the defendant's proximity or passing control of the object. Where defense counsel did not object to the court's failure to give such instruction did the trial court properly exercise its discretion?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant in this case, Andrew McGuire, hereinafter “appellant,” was charged in King County Superior Court with the crimes of Unlawful Possession of a Firearm in the First Degree and Violation of the Uniform Controlled Substances Act. CP 1. Trial took place on June 12, 2008 and June 16-19, 2008, after which the jury found appellant guilty as charged. RP 358. On August 20, 2008, the trial court sentenced appellant on these charges as well as on a number of other charges. RP 367-85.

2. SUBSTANTIVE FACTS

On September 10, 2007, Detective Clayton Minshull and Deputy Lee Crawley of the King County Sheriff's Office were called to assist Department of Corrections (DOC) Community Corrections Officers Joe Kelley and Leon Neal in trying to locate a couple of individuals who were on DOC supervision and were suspected of being involved in robberies in Snohomish County. RP 107, 138. The deputies, who were assigned to the City of Seatac in King County, Washington, were asked to assist the DOC officers in making contact with 12860 24th Avenue in Seatac. RP 108, 138,

167, 193. The residence that the officers went to at approximately 11:00 am that day was the house of Jennifer Delfierro. RP 108, 137-40. This house is a two bedroom house that also has a mother-in-law style apartment that has a separate entrance. RP 108, 140-41, 296. The master bedroom is Ms. Delfierro's bedroom where she and her boyfriend sleep and the second bedroom is the "kid's bedroom" where appellant's son, appellant or his cousin Sarah sleep when they stay over. RP 296. Ms. Delfierro testified at trial that the appellant's son regularly stays in the second bedroom on the weekends and when the appellant wants a night apart from his wife he stays there as well. RP 296-97.

On September 10, 2007, the officers were looking for an individual named Christopher Smaltz and an associate of his named Joey Keeler. RP 107, 138. Smaltz was one of Ms. Delfierro's sons and had his mother's house listed as his residence with his Community Corrections Officer (CCO) Joe Kelley. RP 138. When the officers arrived at the residence they knocked on the back door and were given permission to enter the residence by Ms. Delfierro. RP 109, 140, 168, 301. The officers then entered the residence through the kitchen and were showed past the main bedroom to the second bedroom. RP 109, 140, 168,

301. At that time the officers saw appellant Andrew McGuire and a female lying in the bed. RP 110, 141, 171-72. The officers believed that the appellant was faking being asleep as he opened and closed his eyes when they came into the room and was unresponsive at first. RP 112, 141, 171-73. Upon contact the officers did not know who the appellant was so they asked for appellant's name. Id. Appellant responded with a false name. Id. At this time CCO Neal took a quick visual survey of the room and noticed that a firearm was slung over the closet door in a shoulder strap. RP 113, 173. The firearm was closest to the side of the bed where appellant had been lying and was within a lunge or stretch from appellant. RP 143, 150-51, 171, 177. The officers immediately secured the firearm and Detective Minshull removed the magazine and the round that was in the chamber. RP 116-17, 174. The appellant during this time was handcuffed and arrested because it was determined he had a warrant for his arrest and that he was a convicted felon. RP 143-44, 175. Search incident to his arrest a bag of crack cocaine was located in his pocket. RP 119, 145, 176.

The jury found the appellant guilty on both counts charged but the State will address the issues as they relate to the Unlawful

Possession of a Firearm in the First Degree as appellant has challenged only Count I on appeal. App. Br. 1-15.

C. ARGUMENT

1. SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS APPELLANT'S UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE CONVICTION.

Appellant argues that there is not sufficient evidence in the record to support a guilty finding on the charge of Unlawful Possession of a Firearm in the First Degree. As appellant bases its arguments on the issue of constructive possession, he implicitly concedes that all other elements of the crime were supported by the record. With regard to its sufficiency claim, appellant argues that the State failed to prove appellant's dominion and control over the firearm in this case. App. Br. 2.

The State must prove each element of the alleged offense beyond a reasonable doubt. State v. Ware, 111 Wn. App. 738, 741, 46 P.3d 280 (2002); JuCR 7.11(a). Evidence is sufficient to support an adjudication of guilt if any rational trier of fact, viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime beyond a reasonable

doubt. State v. Echeverria, 85 Wn. App. 777, 782, 934 P.2d 1214 (1997).

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 appellant. 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. Id. at 201. Circumstantial and direct evidence are equally reliable. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000). A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. Id. at 719.

a. Evidence Is Sufficient To Support The Jury's Finding Of Guilt.

Here, appellant's assignment of error one is at base a challenge to the jury's finding the appellant had constructive possession of the firearm in this case beyond a reasonable doubt. Appellant's challenges should be rejected because sufficient evidence in the record supports the court's finding of intent.

Where the jury found that the State proved all elements of the charged crime beyond a reasonable doubt this Court should affirm that holding where the record supports such a finding. When an appellant challenges the sufficiency of the evidence, the law requires the reviewing court to view the evidence in the most favorable light to the State and deny a claim where a rational trier of fact could have found the elements proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), citing Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781 (1979).

Constructive possession is defined by Washington Pattern Jury Instructions (WPIC) 50.03 and is “when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.” Constructive possession is established viewing the totality of the circumstances and must provide for the fact finder to reasonably infer dominion and control. State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Proximity alone is not sufficient to prove constructive possession. Id.

Here, the evidence was sufficient in a number of ways. The evidence presented proved that the defendant was not only in close proximity of between 2 and 8 feet of the firearm but that he was

pretending to be asleep at the time. RP 112, 141-43, 150-51, 171-77. The reasonable inference from this fact is that the defendant fully had dominion and control of the firearm but was purposefully pretending to be asleep to avoid criminal liability for such. Likewise, the evidence presented by Ms. Delfierro was that the defendant was not only familiar with both the house and bedroom he had been staying in but that he and his son slept in that bedroom when they visited Ms. Delfierro. RP 296-97. Unlike the evidence in State v. Callahan, 77 Wn.2d. 27, 459 P.2d 400 (1969), where the defendant was not the owner of the houseboat where drugs were found but was in close proximity to the drugs, appellant was a regular guest in his mother's home. This fact, along with the evidence of appellant's consciousness of guilt by feigning sleep and the firearm being in plain view, makes this case more akin to those found in State v. Turner, 103 Wn. App. 515, 13 P.3d 234 (2000), and suggests clear dominion and control over the firearm here.

Further, there was uncontroverted testimony that appellant's fingerprint was found on the magazine of the loaded firearm. As both Steve Everist and Sherry Mahar explained the difficulty with the preservation of fingerprints on a surface it would be reasonably

inferred by the jury that the defendant had recently been holding the magazine of the firearm. RP 252-55, 281-82. As Detective Minshull's and Steve Everist's testimony explained that the position of the fingerprint was consistent with a person loading a firearm, it would be further inferred that appellant had recently held and loaded the firearm. RP 123-26, 289. Unlike the evidence in State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990), where fingerprints on a plate containing cocaine residue only demonstrated fleeting possession, the recent loading of a firearm by appellant suggests more than momentary handling. Rather, the loading of a firearm itself suggests the intent to arm oneself with it.

Viewing the facts in the most favorable light to the State, as required, the jury did clearly infer from the totality of the circumstances that appellant did in fact have dominion and control over the firearm. When considering direct evidence presented at trial as well as the reasonable inferences from the evidence, it is certain that a rational trier of fact could have found the elements proven beyond a reasonable doubt. Consequently, this court must deny appellant's claim because the record supports the jury's finding of constructive possession in this case.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FAILING TO GIVE APPELLANT'S PROPOSED INSTRUCTION.

McGuire next argues that the trial court erred in refusing his proposed jury instruction on "close proximity" and "brief and passing control." Brief of Appellant, at 12. This argument should be rejected for two reasons. First, appellant raises this issue for the first time on appeal although appellant's counsel proposed a jury instruction on this issue, when the court specifically inquired, counsel indicated that McGuire took no exception to either the court's instructions to the jury or the court's failure to give any instruction proposed by the defense. RP 306-07. Thus appellant waived a challenge to the court's instructions by abandoning argument on alternative ones initially proposed but not included in the court's packet. Second, the trial court's instructions in this case accurately stated the law, were not misleading, and were sufficient to allow both parties to argue their case theories to the jury. The trial court exercised its discretion appropriately in instructing the jury in this case, and therefore, this Court should affirm.

a. Appellant Waived A Challenge To The Failure To Give A Proposed Instruction By Not Stating An Objection On The Record.

Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be “manifest” and truly of constitutional dimension. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125, 130 (2007); State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). With respect to claimed errors in jury instructions in criminal cases, this general rule has a specific applicability. CrR 6.15(c) requires that timely and well stated objections be made to instructions given or refused “in order that the trial court may have the opportunity to correct any error.” Seattle v. Rainwater, 86 Wn.2d 567, 571, 546 P.2d 450 (1976); cf. Henderson v. Kibbe, 431 U.S. 145, 154, 97 S. Ct. 1730, 1736-37, 52 L. Ed. 2d 203 (1977) (describing analogous federal rule). Citing this rule or its principles, the Washington State Supreme Court on many occasions has refused to review asserted instructional errors to which no meaningful exceptions were taken at trial. State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492, 494 (1988).

At trial on June 18, 2008, the parties had an informal discussion regarding instructions before addressing the court's

proposed packet. RP 269, 304-05. As no record was preserved with regard to that informal discussion, the parties cannot speculate what was going on in the minds of the attorneys during that discussion. However, upon returning to court, the court provided a copy of the instructions it intended to read to the jury. RP 304-05. This packet subsequently became the Court's Instructions to the Jury. CP 67. At that time, the court inquired if the State took any exception to the Court's proposed instructions. RP 306. The prosecutor, Ms. Kanner, indicated that the State took no exceptions to the proposed packet. Id. The court then inquired if the defense (McGuire) took any exception to the Court's proposed instructions. RP 307. McGuire's attorney, Mr. Green, indicated that appellant took no exceptions to the proposed packet. Id. As the court obviously wanted to make a clear record, the court further inquired if the defense took any exception to the court's failure to give any proposed instruction to which Mr. Green replied they did not. Id.

Appellant, by not objecting to the court's failure to give its proposed "close proximity" and "brief and passing control," abandoned its proposed instruction and implicitly conceded that the court's proposed instructions were sufficient for the defense to argue their case theory. As appellant fails to articulate an error of

constitutional dimension on this proposed instruction, appellant's further argument on this issue fails on all grounds.

b. The State's Theory Of Constructive Possession Did Not Rest Solely On The Appellant's Proximity Or Mere Passing Control Of The Firearm And Trial Court's Instructions Accurately State The Law, Were Not Misleading, And Allowed McGuire To Argue His Theory Of The Case.

Even if the court decides sua sponte that appellant's challenge merits review, this Court reviews the trial court's decisions for abuse of discretion as the trial court has considerable discretion regarding the wording of jury instructions. State v. Rehak, 67 Wn. App. 157, 165, 834 P.2d 651 (1992), rev. denied, 120 Wn.2d 1022 (1993). Jury instructions are sufficient if they are supported by the evidence, if they permit each party to argue its theory of the case, if they are not misleading, and, when read as a whole, they properly inform the jury of the applicable law. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1231 (2005).

The trial court's refusal to give a proposed instruction is also reviewed for abuse of discretion. State v. Pesta, 87 Wn. App. 515, 524, 942 P.2d 1013 (1997), rev. denied, 135 Wn.2d 1002 (1998). A trial court abuses its discretion only when its decision is

manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Furthermore, as this Court has held regarding a similar "mere proximity" instruction, it is not error to refuse to give a specific instruction when a more general instruction adequately explains the law and allows each party to argue its theory of the case. State v. Castle, 86 Wn. App. 48, 62, 935 P.2d 656, rev. denied, 135 Wn.2d 1002 (1998), overruled on other grounds, State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007). The standard WPIC on actual and constructive possession is a general instruction that accurately states the law. See id. Accordingly, particularly in cases where "the State's case did not rest solely on the appellant's proximity" to a controlled substance as proof of constructive possession, it is not an abuse of discretion to refuse a "mere proximity" instruction. State v. Portrey, 102 Wn. App. 898, 903, 10 P.3d 481 (2000).

In this case, the trial court gave the standard instruction defining possession, which states as follows:

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Dominion and control need not be exclusive to establish constructive possession. CP 67; WPIC 50.03.

In addition, McGuire proposed a supplemental instruction stating that "it is not enough that the appellant might have been in close proximity to the alleged drugs/object or that he might have earlier handled them with a brief and passing control." CP 65; App. Br. 12. The trial court did not use McGuire's proposed instruction gave the more general WPIC defining possession. By not taking exception to the trial court's failure to give such instruction, counsel conceded that the defense could argue its case without the proposed instruction. RP 306-07.

During the State's closing argument, the prosecutor made it clear to the jury that the State's theory of the case was that McGuire's constructive possession of the firearm did not rest solely on his proximity to the firearm or his passing control of it. Rather, the prosecutor argued in her closing argument that the defendant exhibited consciousness of guilt based on the firearm being in plain view and the defendant's pretending to be asleep by stating, "the testimony you have is that the officers really thought [McGuire] was pretending to be asleep. And why does that make sense? Because he doesn't want to be found with a firearm." RP 336.

Further, the prosecutor argued that the defendant was aware of the firearm's presence because he himself had loaded it. RP 337.

Based on this record, the trial court properly exercised its discretion in rejecting McGuire's proposed instruction. First, as in Castle and Portrey, "the State's case did not rest solely on the defendant's proximity" to the firearm or his mere passing control over it. Portrey, 102 Wn. App. at 903. Rather, the State's case rested on multiple pieces of evidence: the fact that the defendant was an at least six feet tall person (RP 177) within lunging distance of a loaded firearm, the fact that he and his cousin were the only two people in the room, the fact that the defendant appeared to be feigning sleep, the fact that the room was one that the defendant stayed in on a regular basis, and the fact that McGuire was recently in actual possession of the firearm when he loaded it thereby leaving his fingerprint on the magazine. Second, McGuire does not contend that the standard instruction misstated the law or was misleading or that counsel could not argue its theory absent his proposed instruction. App. Br. 1-15. In sum, McGuire cannot demonstrate an abuse of discretion, and therefore, this Court should affirm.

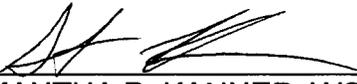
D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm McGuire's conviction for Unlawful Possession of a Firearm in the First Degree.

DATED this 19 day of August, 2009.

Respectfully submitted,

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Certification of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney of record for the appellant, at the following address: Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101-3635, containing a copy of the Brief of Respondent, in STATE V. ANDREW McGUIRE, Cause No. 62363-0-I, in the Court of Appeals, Division I, of the State of Washington.

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

Eileen Miyashiro
Done in Seattle, Washington

8/19/09
Date

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