

67407-2

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No. 67407-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN WATKINS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON, FOR KING COUNTY

BRIEF OF APPELLANT

GREGORY C. LINK
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A. ASSIGNMENT OF ERROR

The trial court deprived Justin Watkins of his right to a unanimous jury.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Article I, section 21 and Article I, section 22 together provide the right to a unanimous jury in all criminal trials. This right in turn requires that in cases in which the State alleges a single crime may have been committed by alternative means, the court must instruct the jury it must unanimously agree upon a single alternative means. Where the trial court does not provide the required unanimity instruction and there is insufficient evidence to support at least one of the alternatives means must this Court reverse Mr. Watkins's conviction?

C. STATEMENT OF THE CASE

The policy of the employees of Joe's Market is to confront persons on the public sidewalk in front of the store whom employees believe to be discouraging business and to compel the persons to move. 3/2/11 RP 55. Consistent with this policy store clerk Zolboo Lkhundev confronted Mr. Watkins on the sidewalk in front of the store. Id. Mr. Lkhundev's goal was force Mr. Watkins to move from in front of the store. 3/12/11 RP 58. Mr. Watkins and Mr. Lkhundev began arguing. Id. In response to Mr. Lkhundev's efforts, Mr. Watkins became angry and began challenging

Mr. Lkhundev to fight. 3/2/11 RP 58-59. As the confrontation escalated, witnesses testified, Mr. Watkins made claims that “I have a burner” and asked his companion Dominique Trice to “give me my burner.”¹ 3/2/11 RP 59-60, 3/3/11 RP 177. According to the witnesses Mr. Watkins attempted to reach into Ms. Trice’s purse, but she responded by pulling it away and saying “No.” 3/2/11 RP 110, 3/3/11 RP 177-78.

When Mr. Lkhundev went back into the store to call police, Mr. Watkins left. Police arrested Mr. Watkins a short distance away. 3/1/11 24-25. Ms. Trice was also stopped and police found a handgun in her purse. 3/1/11 R 27.

The State charged Mr. Watkins with one count of unlawful possession of a firearm and one count of felony harassment. CP 1-6. A jury convicted Mr. Watkins of the possession charge and the lesser offense of misdemeanor harassment. CP 49-51.

D. ARGUMENT

Mr. Watkins was denied his right to a unanimous jury.

1. Jury unanimity is required when the State charges a defendant with an offense consisting of alternative means.

The Washington Constitution requires a unanimous jury verdict in criminal matters. Const. Art. I, § 21. When the State alleges a defendant

¹ Several witnesses testified “burner” refers to a handgun. 3/3/11 RP 154.

has committed a crime by alternative means, the right to a unanimous jury is offended unless the State elects the means upon which it is relying or the jury is instructed that it must unanimously agree on a single means. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). Where neither of these options is met, reversal is required unless the evidence supporting each alternative is sufficient to support the conviction. State v. Ortega–Martinez, 124 Wn.2d 702, 707–08, 881 P.2d 231 (1994).

In this case, the State charged Mr. Watkins with each of the three alternative means of committing unlawful possession of a firearm but did not comply with the requirements of Kitchen.

2. The jury's verdict does not comply with constitutional requirement of unanimity.

Unlawful possession of a firearm consists of three alternative means. State v. Holt, 119 Wn.App. 712, 718, 82 P.3d 688 (2004), overruled on other grounds, State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007).² A person is guilty of the offense of unlawful possession of a firearm in either the first or second degree if he (1) possesses, (2) controls, or (3) owns a firearm and is disqualified from

² Eckenrode overruled that portion of Holt that required a jury instruction informing the jury that it must find a nexus between a firearm and the crime in order to find the defendant was armed with a firearm for purposes of a firearm enhancement. See, Holt, 119 Wn.App. at 726-28.

lawfully doing so by, for example, a prior felony conviction. RCW 9.41.040. Holt reversed a conviction where the information alleged the person had possessed or controlled a firearm but did not allege he had owned it. 119 Wn.App. at 718-19. The jury instructions, however, permitted the jury to convict Mr. Holt of all three alternatives. Id. at 719. Because the jury was permitted to convict the defendant of an uncharged alternative the conviction was reversed. Id.

While Holt addressed unlawful possession in the second degree and Mr. Watkins was convicted of possession in the first degree, the only distinction between the two degrees is the nature of the disqualifying event: first degree possession is predicated on a conviction for a serious offense. Compare RCW 9.41.040(1) and (2). Because the State charged Mr. Watkins with all three alternatives of unlawful possession, the error is not that the jury was permitted to convict him of an uncharged alternative means. CP 1-6. Rather, the error lies in the absence of a unanimity instruction. Kitchen, 110 Wn.2d at 409. The jury did not receive such an instruction, nor did the State elect upon which alternative the jury should rest its verdict. As discussed below, that error requires reversal.

3. The lack of jury unanimity requires this Court to reverse Mr. Watkins's conviction.

Consistent with the Information the “to convict” instruction listed each of the three alternatives of unlawful possession. CP 73(Instruction 18).

Instruction 20 provided a definition of possession, which included both actual and constructive possession. CP 75. There was no evidence that Mr. Watkins ever had actual possession of the gun. Both eye-witnesses who testified said they never saw a gun in Mr. Watkins's possession. 3/3/11 RP 110, 191. In a search following Mr. Watkins's arrest, minutes after the incident, the police did not find a gun. Instead, the only gun discovered was the one found in Ms. Trice's purse. 3/2/11 RP 27. Thus, there was no evidence Mr. Watkins actually possessed the gun.

To prove Mr. Watkins constructively possessed the gun, the State was required to prove Mr. Watkins exercised dominion and control over the gun. State v. Callahan, 77 Wn.2d 27, 29–30, 459 P.2d 400 (1969). The totality of the circumstances must provide substantial evidence for a fact finder to reasonably infer that the defendant had dominion and control. State v. Cote, 123 Wn.App. 546, 549, 96 P.3d 410 (2004). Instruction 20 outlined several factors the jury could consider in making

that determination. CP 75. But, Mr. Watkins does not satisfy any of the criteria set forth in the instruction. Mr. Watkins did not have the ability to take actual possession. Mr. Watkins never had possession nor dominion and control of the purse. When he tried to either grab the purse or reach into the purse, Ms. Trice pulled her purse away and said “No.” 3/3/11 RP 110. Plainly Mr. Watkins did not have the ability to exclude another’s possession as Ms. Trice had actual possession of the gun and excluded him.

In considering whether someone has dominion and control of an object, the absence of the person’s fingerprints on the object is significant. State v. Enlow, 143 Wn.App. 463, 469, 178 P.3d 366 (2008). Here, a fingerprint examiner, with 19 years of experience, was unable to find Mr. Watkins’s prints on the gun. 3/3/11 RP 111, 121. The evidence is clear that Ms. Trice alone exercised dominion and control over both her purse and the gun inside. Thus there is not sufficient evidence to support a jury’s verdict on the possession alternative.

Nor is there sufficient evidence to base the verdict on the “control” alternative. Because the word “control” is not defined in the statute and has an accepted ordinary meaning, this court should look to the dictionary definition of the term. Tingey v. Haisch, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007). The relevant dictionary definition of “control” is: “a : to

exercise restraining or directing influence over : regulate *b* : to have power over : rule” <http://www.merriam-webster.com/dictionary/control>.³

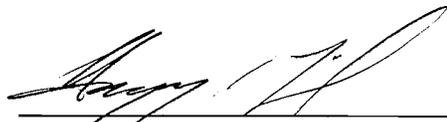
There is no evidence that Mr. Watkins exercised “restraining or directing influence over” the gun. When Mr. Watkins asked for the gun Ms. Trice refused to give it to him. 3/3/11 RP 110. When he reached for her purse Ms. Trice pulled it away. *Id.* There is no evidence that anyone other than Ms. Trice either possessed or controlled the gun. Thus, there insufficient evidence on the control alternative means.

Because the State did not offer sufficient evidence of at least two of the three alternative means of committing unlawful possession of a firearm, the failure to provide a unanimity instruction requires reversal. Ortega-Martinez, 124 Wn.2d at 707–08.

E. CONCLUSION

For the reasons above this Court must reverse Mr. Watkins’s conviction for possessing a firearm.

Respectfully submitted this 10th day of January, 2012.



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³ Last visited January 6, 2012.

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> JUSTIN WATKINS 810296 MONROE CORRECTIONAL COMPLEX- PO BOX 777 MONROE, WA 98272	(X) () ()	U.S. MAIL HAND DELIVERY _____

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SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF JANUARY, 2012.

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