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IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CURTIS LEE MCKNIGHT, JR.,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 56250-2-II
Appeal from the Superior Court of Pierce County
Superior Court Cause Number 19-1-03392-6
The Honorable Garold Johnson, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is Curtis Lee McKnight, Jr., Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the part-published opinion of the Court of Appeals, Division 2, case number 56250-2-II, which was filed on January 10, 2023. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Did the trial court violate Curtis McKnight's Sixth Amendment right to a jury pulled from a representative cross-section of the community, and his right to a fair and impartial jury trial, when it refused to modify its jury voir dire and selection procedures in order to ensure that African American potential jurors would not automatically be

excluded?

2. Where Curtis McKnight was a passenger in a car where a firearm was found, and the State failed to present any evidence beyond mere proximity that connected him to the firearm, was the evidence insufficient to establish constructive possession and therefore insufficient to prove that he unlawfully possessed a firearm?

3. *Pro Se* issues: was Curtis McKnight's right to a speedy trial violated and did he receive ineffective assistance of counsel?

IV. Statement of The Case

The State accused Curtis McKnight, an African American man, of assaulting his ex-girlfriend and an acquaintance, and of harassing or threating individuals who witnessed the assault. The State also accused McKnight of possessing a firearm found under the seat of a vehicle in which he was a passenger. During jury

selection, the trial judge refused to adjust its procedures to ensure that the pool of potential jurors represented a fair cross-section of the community. At trial, the State did not present any evidence supporting a finding that McKnight knew the gun was in the vehicle, or that he exercised dominion and control over the gun.

A. PROCEDURAL HISTORY

The State charged Curtis L. McKnight, Jr. with one count of assault in the first degree while armed with a deadly weapon (a bat), one count of second degree assault while armed with a deadly weapon (a machete), two counts of felony harassment, two counts of witness tampering, and one count of unlawful possession of a firearm. (CP 63-67)

The jury acquitted McKnight of the tampering charges and one of the harassment charges, but found him guilty of the remaining charges and aggravators. (RP17 2001-03) The trial court imposed a standard range

sentence totaling 351 months of confinement. (CP 219-21, 226, 243; RP18 2043-44, 2046; RP19 2060)

McKnight filed a timely Notice of Appeal. (CP 122-25) The Court of Appeals affirmed McKnight's conviction and sentence.

B. SUBSTANTIVE FACTS

The charges in this case arise from two alleged assaults committed in August of 2019 in or near a homeless encampment in the Hilltop neighborhood of Tacoma. Curtis McKnight's ex-girlfriend, Michelle Curran, testified that McKnight pushed her against a fence and punched her in the face. (RP9 1060-61, 1063, 1075) Eugene Demapan, who had tried to help Curran, testified that McKnight struck him several times with a baseball bat a few days later. Additional facts relevant to these incidents are contained in the Opening Brief of Appellant.

Investigating officers located McKnight on September 2, 2019. (RP11 1427-28; RP13 1611) They

found him sitting in the front passenger seat of a parked car. (RP11 1395; RP13 1616) According to the officers, when they asked McKnight to get out of the vehicle he leaned forward and began to reach his hand towards the underside of the seat. (RP12 1468; RP13 1620) They removed McKnight from the vehicle, and saw the butt of a loaded handgun sticking out from under the seat. (RP11 1393; RP12 1471-72; RP13 1620)

V. ARGUMENT & AUTHORITIES

The issues raised by McKnight's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

The Court of Appeals failed to recognize the inadequacy of the current test for determining whether a defendant's constitutional right to a jury pulled from a representative cross-section of the community has been

violated. The Court of Appeals' decision to affirm the trial court's conduct during voir dire violated of McKnights constitutional right to a fair trial.

Additionally, this Court is currently considering whether article I, sections 21 and 22 of the Washington Constitution are more protective of a criminal defendant's right to a jury venire comprised of a fair cross section of the community than the Sixth Amendment. *See State v. Rivers*, No. 100922-4. If this Court finds that it does provide greater protection, then the broader protections would apply to McKnight and support his argument that the current federal cross-section violation test must be adjusted and expanded.

The State also failed to meet its constitutional burden to prove beyond a reasonable doubt that McKnight constructively possessed a firearm. The Court of Appeals decision upholding this conviction is contrary

to other cases interpreting the meaning of constructive possession.

A. THE TRIAL COURT VIOLATED MCKNIGHT'S SIXTH AMENDMENT RIGHT TO A JURY PULLED FROM A REPRESENTATIVE CROSS-SECTION OF THE COMMUNITY.

The trial court chose to use a jury voir dire and selection process that essentially guaranteed that no African Americans would have a chance of serving on McKnight's jury. The trial court thereby failed to protect McKnight's Sixth Amendment right to a jury that came from a representative cross-section of the community, and violated his right to a fair trial.

1. Additional Facts Relating to Jury Selection

All of the potential jurors in this case were given numbers from one to 70. (CP 249-52) For the final round of questioning, the remaining jurors were divided into three smaller groups in order to accommodate COVID distancing and capacity rules. (RP7 723-24; CP 254-56)

The first venire panel consisted of 10 potential jurors with numbers between 43 and 57. (CP 256) The second venire panel consisted of 10 potential jurors with numbers between 22 and 41. (RP 255) The third venire panel consisted of 16 potential jurors with numbers between 1 and 21. (CP 254)

Defense counsel drew the court's attention to the fact that all of the potential African American jurors were assigned higher numbers within the pool. (RP6 704-05; RP7 796) She noted that 40 percent of the first panel was African American, and that none of the potential jurors on the second and third panel were African American. (RP7 796) Therefore, because of the way the judge had decided to select the jury—starting with the lowest juror numbers from the third venire panel and ending once the 12 person plus three alternates panel was reached—none of the African American individuals were going to stand a realistic chance of sitting on the

final jury panel. (RP6 704-05, 706; RP7 796, 797)

Defense counsel asked the judge to reverse directions and start selection with the higher numbers, so that the venire from which the jury was drawn would potentially include an African American individual. (RP6 704-05; RP7 796-97) The trial court refused to make any changes to his pre-determined process, stating “this has nothing to do at all with excluding somebody based on race. Has nothing to do with it. I want to make that very clear. That is the process, it’s a random selection of jurors, and that's what we've done today.” (RP6 706-07)

As defense counsel predicted, the juror and alternate seats were filled by individuals in the second two panels with juror numbers between 1 and 40. (CP 249-51) None of the individuals from the first venire, which included the only African American potential jurors, were seated. (CP 251)

2. The trial court's decision about how to conduct jury voir dire and jury selection violated McKnight's right to a fair trial and his right to a jury pulled from a representative cross-section of the community.

A criminal defendant has a federal and state constitutional right to a fair trial and to a fair and impartial jury. U.S. Const. amend. VI; Wash. Const. art. I, § 22. In selecting a jury, trial courts have broad discretion to determine how best to conduct voir dire. *State v. Davis*, 141 Wn.2d 798, 826, 10 P.3d 977 (2000). The trial court's exercise of discretion is limited "only when the record reveals that the [trial] court abused its discretion and thus prejudiced the defendant's right to a fair trial by an impartial jury." *Davis*, 141 Wn.2d at 826. The standard of review for a Sixth Amendment challenge to the composition of the jury is de novo. *Duren v. Missouri*, 439 U.S. 357, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979).

Because of the risk that the factor of race may enter the criminal justice process, courts have engaged in

"unceasing efforts" to eradicate racial prejudice from our criminal justice system. *Batson v. Kentucky*, 476 U.S. 79, 85, 106 S. Ct. 1712, 90 L.Ed.2d 69 (1986). These efforts have been guided by the recognition that "the inestimable privilege of trial by jury ... is a vital principle, underlying the whole administration of criminal justice[.]" *McCleskey v. Kemp*, 481 U.S. 279, 309-10, 107 S. Ct. 1756, 95 L. Ed. 2d 262 (1987) (quoting *Ex parte Milligan*, 4 Wall. 2, 123, 18 L. Ed. 281 (1866) and citing *Duncan v. Louisiana*, 391 U.S. 145, 155, 88 S. Ct. 1444, 1450, 20 L. Ed. 2d 491 (1968)). "Thus, it is the jury that is a criminal defendant's fundamental 'protection of life and liberty against race or color prejudice.'" *McCleskey*, 481 U.S. at 310 (quoting *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 309, 25 L.Ed. 664 (1880)).

The Sixth Amendment to the United States Constitution states that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial,

by an impartial jury of the State and district wherein the crime shall have been committed…" The Supreme Court has interpreted this language as requiring prospective jurors to be drawn from a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975). It is "an essential component of the Sixth Amendment right to a jury trial" that juries must be drawn from venires that represent a fair cross-section of the community where the trial is heard. *Taylor*, 419 U.S. at 528, 529-30.

> The fair cross-section standard reflects the Court's recognition that—separate and independent from the harm of discrimination—the absence of any distinctive group in the community "deprives the jury of a perspective on human events" that may be critical to evaluating a criminal case. It is the community's judgment against which the government's claims are to be tested. When juries are not selected from a fair cross-section of the community and thus fail to fairly and reasonably represent distinctive groups in the community like African-Americans and Hispanics, the defendant's Sixth Amendment right to an impartial jury is violated.

> Representative juries, moreover, are critical to public confidence in the justice system.

Nina W. Chernoff, *Wrong About the Right: How Courts Undermine the Fair Cross-Section Guarantee by Confusing It with Equal Protection*, 64 Hastings L.J. 141, 144 (2012) (footnotes omitted) (citing *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972); *Taylor*, 419 U.S. at 530; Leslie Ellis & Shari Seidman Diamond, *Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy*, 78 Chi.-Kent L. Rev. 1033, 1049 (2003)).

The Supreme Court developed a three-prong test in *Duren v. Missouri*, to determine whether there has been a violation of the fair cross-section requirement in the selection of the jury venire. 439 U.S. at 364. Under *Duren*, a criminal defendant alleging a cross-section violation must show that (1) "the group alleged to be excluded [from the jury system] is a 'distinctive' group in the community," (2) "the representation of this group in

venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community," and (3) "this underrepresentation is due to systematic exclusion of the group in the jury-selection process." 439 U.S. at 364.

This test is applied when a defendant asserts that the process used to choose the larger pool of prospective jurors systematically results in a venire that is not representative of the community. But McKnight is not challenging the Pierce County Superior Court's process of selecting the jury venire, nor does he claim that the larger jury venire called in this case was not representative of the Pierce County community. Rather, McKnight contends that the trial court violated his Sixth Amendment right by choosing to question the venire and conduct jury selection in a manner that virtually guaranteed that his jurors would not be drawn from a representative cross-section of the community. Thus, the three prong *Duren*

test is inapplicable, as it does not address the constitutional violation asserted here.

McKnight would easily be able to meet the first two prongs. It is undisputed that African American residents are a distinctive group in the community. See *In re Yates*, 177 Wn.2d 1, 20, 296 P.3d 872 (2013). And African Americans made up approximately 7.7 percent of the population of Pierce County when this case was tried in 2021.[1] So a jury pool with zero percent African American individuals is clearly not a fair and reasonable representation.

But because of the unique nature of the facts in this case, the question of whether or not the underrepresentation is due to systematic exclusion cannot address the potential Sixth Amendment violation

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[1] *U.S. Census Bureau, Population Estimates Program*; https://www.census.gov/quickfacts/fact/table/piercecountywashington/RHI225219#RHI225219 (viewed 01/21/22).

present here. This Court must look beyond *Duren* to determine whether or not the jury selection process violated McKnight's Sixth Amendment right to a jury picked from a fair and representative cross-section of the community.

"'The Constitution does not guarantee a defendant a proportionate number of his racial group on the jury panel or the jury which tries him,'" but it does prohibit the "'deliberate exclusion of an identifiable racial group from the juror selection process.'" *United States v. Jones,* 687 F.2d 1265, 1269 (8th Cir.1982) (quoting *United States v. Turcotte,* 558 F.2d 893, 895 (8th Cir.1977)). And it does guarantee a defendant a "fair possibility for obtaining a representative cross-section of the community." *Williams v. Florida*, 399 U.S. 78, 100, 90 S. Ct. 1893, 26 L. Ed. 2d 446 (1970). A showing of purposeful discrimination is not required to make a fair-cross-section claim. *State v. Cienfuegos*, 144 Wn.2d 222, 232, 25 P.3d 1011 (2001)

(there is no need to prove intent to discriminate under the Sixth Amendment); *United States v. Perez-Hernandez*, 672 F.2d 1380, 1385 (11th Cir.1982); Chernoff, 64 Hastings L.J. at 152, 154.

Here, the judge deprived McKnight of a fair possibility of obtaining a jury that represented a cross-section of the community. Defense counsel pointed out to the judge that all of the potential African American jurors on the venire had higher juror numbers. (RP6 704-05; RP7 796) If the court were to seat jurors starting with the lower numbers, then, as defense counsel pointed out, the full jury panel would be seated long before any of the numbers of the African American jurors would be reached. (RP6 704-05; RP7 796) By refusing to start selection with the highest numbers and proceeding downward, as requested by defense counsel, the trial court guaranteed that McKnight's jurors would be chosen from a pool that contained zero African American

individuals. (RP6 706-07; RP 796-97)

The judge did not want to adjust his process because it was already a “random selection of jurors.” (RP6 707) That is not entirely correct. The assignment of numbers to each potential juror may be random, but the decision to start with juror number one and move up from there is a deliberate choice. And after the judge had been made aware of the fact that all potential African American jurors had high numbers, starting with the lowest number deliberately excluded them.

The Court of Appeals claimed that “McKnight’s proposal to reorder the prospective jurors would have disrupted the randomness inherent in the entire jury selection process” and would have “[a]llow[ed] the trial court to pick and choose which of the prospective jurors should be given priority for a seat on the jury based on the personal characteristics of those jurors[.]” (Opinion at 10)

This mischaracterized McKnight's proposal, and willfully disregards the many alternatives that the trial court could have used to conduct voir dire that would have kept the process random. Reversing the order, as suggested by the defense at trial, would not have resulted in the judge "picking and choosing" prospective jurors. But that was also not the judge's only option. If the judge felt that simply changing the order from highest to lowest would somehow make the process non-random, he could have, for example, randomly selected the jurors to be included in each venire panel, and selected the jury starting with the newly-configured third panel as originally planned.

Even though the judge did not appear to be excluding African Americans for discriminatory reasons, he did deliberately exclude them by refusing to alter his voir dire and selection process. The judge had inherent authority to alter his jury selection process (*Davis*, 141

Wn.2d at 826), which would have still preserved the randomness of the ultimate selection and seating of the jury. The court's refusal to take reasonable steps to ensure that African Americans were not underrepresented in the jury venire violated McKnight's Sixth Amendment right to a jury drawn from a representative cross-section of the community.

The Court of Appels declined to expand the scope of the Sixth Amendment in order to promote jury diversity and "decline[d] to apply the fair cross section right beyond its settled parameters." (Opinion at 8-9) However, this Court is currently considering whether article I, sections 21 and 22 of the Washington Constitution are more protective of a criminal defendant's right to a jury venire comprised of a fair cross section of the community than the Sixth Amendment. *See State v. Rivers*, No. 100922-4. If this Court finds that they are more protective, then the "parameters" of the fair cross-section right are not

settled and must be expanded to address circumstances such as those presented in this case.

Furthermore, this Court recently noted that "[e]very decision of this court makes new history, in which we are 'constantly striving for better.' Our recent history has made notable strides toward recognizing and rejecting racial injustices. In addition to disavowing the blatantly racist precedent above, we have created new standards and modified old ones, particularly in the criminal justice arena." *State v. Sum*, 199 Wn.2d 627, 640, 511 P.3d 92 (2022) (citations omitted). The *Duren*/fair cross-section test is one of these "old standards" that must be modified in order to advance the cause of racial equality in our criminal justice system.

Any modification that leads to more racially diverse juries would benefit not just the cause of racial equity, but would also benefit our justice system as a whole. Recent studies show the benefits of racially diverse juries: jurors

who deliberated in diverse juries engaged in more thorough cognitive processing than jurors deliberating in nondiverse juries; diverse juries discussed more case facts, deliberated longer, and made fewer errors than nondiverse juries; and jurors made higher-quality contributions to the discussion when deliberating in diverse juries, compared to when they only deliberated with members of their own racial group. Amanda Nicholson Bergold, *What Psychology Says About Jury Diversity*, 61 No. 2 Judges' Journal 6 (2022).

The trial court failed to insure that McKnight's jury was drawn from a fair cross-section of the community. Accordingly, McKnight's convictions must be reversed and his case remained for a new trial. *City of Bothell v. Barnhart*, 172 Wn.2d 223, 233-34, 257 P.3d 648 (2011) ("Departure from the constitutional jury selection requirements requires reversal and remand for a new trial").

B. THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM.

The Court of Appeals found sufficient evidence to support McKnight's first degree unlawful possession of a firearm. (Opinion at 13-14) The Court was wrong because the State's evidence was insufficient to establish unlawful possession of a firearm as it showed only McKnight's proximity to the gun.

"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)); U.S. Const. amend. XIV. 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.[2]

RCW 9.41.040 defines the crime of first degree unlawful possession of a firearm: "A person … is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted … of any serious offense[.]" Possession may be actual or constructive. *State v. Turner*, 103 Wn. App. 515, 520, 13 P.3d 234 (2000). To establish constructive possession, the State must prove the defendant had dominion and control over either the

[2] A challenge to the sufficiency of the evidence supporting a conviction may be raised for the first time on appeal as a due process violation. *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011); *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989); RAP 2.5(a)(3).

premises where the firearm was found or the firearm itself. *Turner*, 103 Wn. App. at 521. Where an individual does not have dominion and control of the premises, close proximity to the firearm, and even momentary handling, is insufficient to establish constructive possession. See *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). Constructive possession "entails actual control." *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Here, McKnight was not in actual possession of the weapon. Rather, the State claimed that McKnight's proximity to the firearm and his apparent movement of his arm towards the floor of the vehicle was sufficient evidence to prove he constructively possessed the weapon. Courts do not hesitate to reverse convictions for unlawful possession where, as here, the State fails to present evidence beyond mere proximity to the contraband.

For example, in *State v. Chouinard*, the court reversed the conviction for unlawful possession of a firearm, holding the State demonstrated proximity to and knowledge of the presence of a weapon, but failed to prove other facts necessary to show constructive possession, including dominion and control over the weapon. 169 Wn. App. 895, 900, 282, P.3d 117 (2012). There, Chouinard rode as a passenger in the backseat of a car. Police stopped the vehicle based on reports that shots had been fired out of a car matching its unique description. Officers cleared the car of its passengers and saw a rifle, with an attached flash suppressor, protruding up from the trunk of the car through a gap between the backrest and rear dash. Chouinard denied knowing anything about the gunshots, but acknowledged he had seen the gun in the backseat. Chouinard was convicted of unlawful possession of a firearm.

On review, the Court noted that Washington courts

"hesitate to find sufficient evidence of dominion or control where the State charges passengers with constructive possession." *Chouinard*, 169 Wn. App. at 900. In reviewing case history on unlawful possession of contraband based on constructive possession, the Court noted that in each case the convictions were upheld based on the defendant owning, driving, or solely occupying the vehicle or admitting to having the weapon and moving it so police could not see it. *Chouinard*, 169 Wn. App. at 900-02.[3]

Even with the proximity of the weapon, the report of shots having been fired from the vehicle, and Chouinard's acknowledgment that he knew the weapon was there, the Court reversed the conviction because there was

[3] Reviewing *State v. Bowen*, 157 Wn. App. 828, 239 P.3d 1114 (2010); *State v. Echeverria*, 85 Wn. App. 777, 934 P.2d 1214 (1997); *State v. Turner*, 103 Wn. App. 515, 13 P.3d 234 (2000); *State v. Reid*, 40 Wn. App.319, 698 P.2d 588 (1985); *State v. Cote,* 123 Wn. App. 546, 550, 96 P.3d 410 (2004).

insufficient evidence to establish dominion and control. *Chouinard*, 169 Wn. App. at 903.

In *State v. George*, the defendant was a passenger in the back seat; when ordered to exit the car, police discovered a pipe on the floorboard where the defendant was sitting, resulting in charges for possession of marijuana and drug paraphernalia. 146 Wn. App. at 912-13. Because the defendant was neither the owner nor the driver of the car, the court was presented only with the question of whether the State established dominion and control over the contraband itself. 146 Wn. App. at 920. The court found that the State had not done so. 146 Wn. App. at 923.

The court explicitly rejected the premise that the constructive possession was established simply by the defendant's ability to immediately reduce the pipe to his actual possession. *George*, 146 Wn. App. at 923. The court also explicitly rejected the argument that the

defendant's knowledge that the pipe was at his feet was sufficient to prove dominion and control ("The State cites no cases holding that proximity plus knowledge of a drug's presence establishes dominion and control over the drug."). 146 Wn. App. at 923.

Ultimately, the State failed to present fingerprint or other evidence linking George to the pipe or suggesting he used the pipe; he made no admissions of guilt; there was no testimony ruling out other occupants of the vehicle as owners of the pipe; and there was no evidence establishing when George got into the vehicle or how long he had been riding in it. *George*, 146 Wn. App. at 922. As such, the "State's evidence boil[ed] down to mere proximity." 146 Wn. App. at 922.

Similarly here, the State demonstrated McKnight's mere proximity to the weapon, and nothing more. McKnight was a passenger and not the owner of the vehicle. (RP11 1395; RP12 1473) McKnight did not

claim ownership of the gun or acknowledge its presence. No fingerprints or DNA linked McKnight to the gun. (RP12 1574, 1579-80)

There was no evidence McKnight knew the weapon was under the seat—even though the handle was sticking out from under the seat, it was dark when the officers confronted McKnight (RP12 1441) and there was no evidence establishing when McKnight got into the vehicle or how long he had been sitting in it.

But even if McKnight had been aware of the gun's presence, that is still not sufficient to prove that he had dominion and control over it. There was no testimony that he had ever owned or been seen with a gun. There was a woman sitting in the driver's seat, but there was no testimony ruling her out as the gun's owner. (RP12 1460; RP13 1638, 1639)

The only evidence the State relied upon, beyond mere proximity, was that McKnight appeared to reach

down with his arm when the officers ordered him to exit the vehicle. (RP12 1468; RP13 1620) However, there were several other items, including water bottles and hand lotion, on the floor where McKnight was reaching. (RP12 1471, 1475-76, 1477)

The State's evidence does not sustain a conviction for constructive possession of a firearm. The reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). McKnight respectfully asks this Court to reverse the conviction for unlawful possession of a firearm for insufficient evidence and remand to the trial court to dismiss the charge with prejudice.

C. *Pro Se* Issues

In his *pro se* Statement of Additional Grounds for Review (SAG), McKnight argued that his right to a speedy trial was violated and that he received ineffective assistance of counsel. The arguments and authorities pertaining to these issues are contained in his SAG, which is hereby incorporated by reference. The Court of Appeals rejected these claims. (Opinion at 14-15) This Court should review these *pro se* issues as well.

VI. Conclusion

This Court should accept review, reverse McKnight's convictions, and remand for a new trial based on the failure to provide a jury venire from a fair cross-section of the community. This Court should also reverse and dismiss McKnight's unlawful possession of a firearm conviction due to insufficient evidence of constructive possession.

I hereby certify that this document contains 4,859 words,

excluding the parts of the document exempted from the word count, and therefore complies with RAP 18.17.

DATED: February 3, 2023

STEPHANIE C. CUNNINGHAM
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APPENDIX

Court of Appeals Opinion in *State v. Curtis L. McKnight, Jr.*, No. 56250-2-II

Filed
Washington State
Court of Appeals
Division Two

January 10, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CURTIS LEE McKNIGHT, JR., Appellant.	No. 56250-2-II PART PUBLISHED OPINION

MAXA, J. – Curtis McKnight, an African American man, appeals his multiple convictions on the ground that the trial court's decision not to reorder the jury venire for his case during jury selection violated his right to a jury drawn from a fair cross section of the community under the Sixth Amendment to the United States Constitution.

Before jury selection started, the prospective jurors were randomly assigned numbers, and the trial court stated that the 12 lowest numbered jurors (after for cause and preemptory challenges) would be seated as jurors and the next three lowest numbered jurors would be alternates. After several prospective jurors were excused for hardship and for cause, the venire was reduced to 36 people. Because of COVID-19, the remaining prospective jurors were questioned in three groups. And because each party had a total of five peremptory challenges, it was unlikely that anyone in the third group would be seated on the jury.

McKnight noted that the group with the highest assigned numbers included four Black prospective jurors while the other two groups had no Black prospective jurors. McKnight asked the trial court to reorder the prospective jurors so that it would be more likely that a Black person would be seated on the jury, but the court declined. McKnight argues that the trial court's decision violated the Sixth Amendment.

We hold that the trial court did not violate McKnight's Sixth Amendment right to a jury drawn from a fair cross section of the community and that the court did not abuse its discretion in declining to reorder the prospective jurors. In the unpublished portion of this opinion, we reject McKnight's additional arguments. Accordingly, we affirm McKnight's convictions.

FACTS

McKnight was charged with first degree assault while armed with a deadly weapon, second degree assault while armed with a deadly weapon, two counts of felony harassment, two counts of witness tampering, and first degree unlawful possession of a firearm.

At the beginning of the trial, the trial court requested a venire of 70 prospective jurors. The prospective jurors were randomly assigned numbers from 1 to 70. The court determined that there would be three alternates in addition to the 12 jurors. Each party was allowed three peremptory challenges for the first 12 and two additional challenges for the alternates. The court stated that the 12 remaining prospective jurors with the lowest assigned numbers would constitute the jury, and the next three prospective jurors with the lowest assigned numbers would be the alternates.

The prospective jurors were given a questionnaire to complete. The parties and the trial court went through the questionnaires and determined who would be excused for hardship or for cause and who would be questioned individually. The parties then individually questioned many

of the remaining jurors, and some were excused for cause. The court also dismissed prospective jurors 59 through 70 without objection because there were a sufficient number of remaining prospective jurors with lower assigned numbers to seat a jury.

The trial court divided the remaining 36 jurors into three groups for general questioning. The court determined that the first group questioned should be the highest assigned numbers, followed by the group with the next highest assigned numbers, and then the group with the lowest assigned numbers who were most likely to be selected to serve on the jury. Group one consisted of 10 jurors with assigned numbers ranging from 43 to 57, group two consisted of 10 jurors with assigned numbers ranging from 22 to 41, and group three consisted of 16 jurors with assigned numbers ranging from 1 to 21. The understanding was that the 12 prospective jurors with the lowest assigned numbers would be the presumptive jury.

McKnight pointed out the fact that the Black prospective jurors had higher assigned numbers and therefore were unlikely to be seated on the jury. As a result, McKnight asked that the court "start from the high numbers and move to the low numbers." Report of Proceedings (RP) at 705.

The trial court confirmed that the 12 lowest numbered jurors would be the presumptive jury. The court stated, "The issue is to have a random selection of jurors. And the random selection of jurors is one through 15 that remain now." RP at 706. The court continued,

> I appreciate your motion. I understand the reasoning. But this has nothing to do at all with excluding somebody based on race. Has nothing to do with it. I want to make that very clear. That is the process, it's a random selection of jurors, and that's what we've done today.

RP at 706-07.

After general questioning of group one, McKnight's counsel stated that "40 percent of this panel was African American. Zero percent of the rest of the two panels will be African

American. . . . Mr. McKnight is entitled to be tried by a jury of his peers." RP at 796. Counsel stated that the trial court could remedy this situation by starting with group one when seating the jury. Counsel further stated that it was "concerning . . . that we have an opportunity to give [McKnight] at least a potentially closer jury to his peers than what we're going to get out of these other two panels." RP at 797.

The trial court responded,

> What the court does not do is go back and randomly select somebody because of their ethnicity, their race or any other reason that is not in the initial jury panel, the first 12, and the first in this case additional three that happen to be the alternates.
>
> We don't go up and find someone who happens to be Number 69 and say okay, because you are a particular race we're going to put you on this panel. We will not do that.

RP at 797.

The trial court and the parties then continued to select the jury in the court's prescribed manner until the jury was empaneled. None of the prospective jurors on group one, including the Black prospective jurors, were seated as a juror or as an alternate. As a result, there were no Black jurors on McKnight's jury.

At trial, the jury found McKnight guilty of first degree assault with a deadly weapon enhancement, second degree assault with a deadly weapon enhancement, one count of felony harassment, and first degree unlawful possession of a firearm. The jury acquitted on the witness tampering charges and one of the harassment charges. McKnight appeals his convictions.

ANALYSIS

McKnight argues that the trial court violated his Sixth Amendment right to a jury drawn from a fair cross section of the community when it declined to reorder the prospective jurors

during jury selection so that a Black juror would have a chance to be seated on the jury. We disagree.

A. LEGAL PRINCIPLES

1. Constitutional Right

Both the Sixth Amendment and article I, sections 21 and 22 of the Washington Constitution guarantee a defendant's right to a jury trial.[1] This guarantee includes "the right to have a jury drawn from a fair cross section of the community." *State v. Meza*, 22 Wn. App. 2d 514, 533, 512 P.3d 608 (citing *Taylor v. Louisiana*, 419 U.S. 522, 530–31, 95 S. Ct. 692, 42 L. Ed. 2d 690 (1975)), *review denied,* 520 P.3d 978 (2022).

However, "a defendant is not entitled to exact cross-representation in the jury pool, nor need the jury selected for his trial be of any particular composition." *State v. Hilliard*, 89 Wn.2d 430, 442, 573 P.2d 22 (1977). "We have never invoked the fair-cross-section principle . . . to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." *Lockhart v. McCree*, 476 U.S. 162, 173, 106 S. Ct. 1758, 90 L. Ed. 2d 137 (1986). "The Sixth Amendment requirement of a fair cross section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does)." *Holland v. Illinois*, 493 U.S. 474, 480, 110 S. Ct. 803, 107 L. Ed. 2d 905 (1990).

These principles are consistent with the well-recognized concept that a party has no right to be tried by a particular juror or by a particular jury. *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 816-17, 425 P.3d 807 (2018) (plurality); *State v. Gentry*, 125 Wn.2d 570, 615, 888 P.2d

[1] McKnight does not argue that the Washington Constitution provides greater protection than the United States Constitution.

1105 (1995). More specifically, there is "no constitutional right to a jury comprised in whole, or in part, of persons of his or her own race." *State v. Barajas*, 143 Wn. App. 24, 34, 177 P.3d 106 (2007).

The Court in *Taylor* emphasized this concept in holding that juries must be drawn from a pool that is fairly representative of the community, stating that "we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition." 419 U.S. at 538.

To show a prima facie violation of the requirement that the jury must be drawn from a fair cross section, the defendant must prove

> "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process."

Meza, 22 Wn. App. 2d at 533 (quoting *Duren v. Missouri*, 439 U.S. 357, 364, 99 S. Ct. 664, 58 L. Ed. 2d 579 (1979)).

Significantly, the fair cross section analysis applies only "to the selection of the venire, not to the dismissal of individual jurors at the jury panel stage." *Meza*, 22 Wn. App. 2d at 533; *see also Holland*, 493 U.S. at 480, 487 (holding that the Sixth Amendment fair cross section right does not apply to the exercise of peremptory challenges). At the jury panel stage, jurors must be selected " 'in a fair way that does not exclude qualified jurors on inappropriate grounds.' " *Meza* at 534 (citing *State v. Pierce*, 195 Wn.2d 230, 231-32, 455 P.3d 647 (2020) (plurality). An inappropriate ground includes race. *Pierce*, 195 Wn.2d at 232.

2. Statutory Provisions

RCW 2.36.055 requires superior courts to compile a "jury source list" from a list of all registered voters, licensed drivers, and identicard holders in the county. *See also* GR 18. The superior court then compiles a "master jury list." RCW 2.36.055. The term "master jury list" means "the list of prospective jurors from which jurors summoned to serve will be randomly selected." RCW 2.36.010(12). The people selected for jury service must be "selected at random from a fair cross section of the population of the area served by the court." RCW 2.36.080(1).

Under RCW 2.36.065, the judges of the superior court have the duty to "ensure the continued random selection of the master jury list and jury panels." RCW 2.36.065 further states, "Nothing in this chapter shall be construed as requiring uniform equipment or method throughout the state, so long as fair and random selection of the master jury list and jury panels is achieved." The term "jury panel" means "those persons randomly selected for jury service for a particular jury term." RCW 2.36.010(9).

When a case is ready for trial, "a panel of potential jurors shall be selected at random from the citizens summoned for jury service who have appeared and have not been excused." RCW 4.44.120. No statute addresses what happens next, but the general practice – and the one used here – is that the prospective jurors are randomly assigned numbers before voir dire begins.

The trial court and the parties then engage in a voir dire examination of the prospective jurors for that case. RCW 4.44.120. During voir dire, either party may make peremptory or for cause challenges of prospective jurors. RCW 4.44.130. In addition, the trial court has authority to dismiss a prospective juror without a challenge. RCW 2.36.110; CrR 6.4 (c)(1).

We review a trial court's decisions regarding voir dire for an abuse of discretion. *State v. Davis*, 141 Wn.2d 798, 826, 10 P.3d 977 (2000). "It is well settled that trial courts have

discretion in determining how best to conduct *voir dire*. *Voir dire* 'is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion.' " *Id.* at 825 (quoting *Ristaino v. Ross*, 424 U.S. 589, 594-95, 96 S. Ct. 1017, 47 L. Ed. 2d 258 (1976)). As a result, a trial court's ruling regarding voir dire rarely will be disturbed on appeal. *Davis*, 141 Wn.2d at 826.

B. ANALYSIS OF TRIAL COURT DECISION

1. No Constitutional Violation

McKnight frames his challenge to the trial court's refusal to reorder the prospective jurors in terms of the constitutional right to have the jury drawn from a fair cross section of the community. But he concedes that he is not challenging Pierce County's process for selecting the jury venire for his case. And he agrees that the jury venire was representative of the Pierce County community.

However, as stated above, the fair cross section right applies only to the selection of the broader jury panel or the jury venire, not to the selection of individual jurors during voir dire. *See Meza*, 22 Wn. App. 2d at 533. In addition, as stated above, the United States Supreme Court has emphasized that the fair cross section right does not entitle a defendant to a jury of any particular composition. *Holland*, 493 U.S. at 480; *Lockhart*, 476 U.S. at 173; *Taylor*, 419 U.S. at 538. These cases establish that the fair cross section right does not apply to the jury selection process for a particular case. McKnight cites no authority for the proposition that the Sixth Amendment fair cross section right applies to the selection of a jury once the jury venire has been properly selected. And as McKnight admits, the *Duren* test is inapplicable to his claim.

McKnight suggests that we should expand the scope of the Sixth Amendment in order to promote jury diversity. Attempting to ensure jury diversity certainly is a laudable goal. But in

the absence of any authority supporting McKnight's suggestion, we decline to apply the fair cross section right beyond its settled parameters.

We conclude that the trial court's jury selection procedure did not violate the Sixth Amendment right to have the jury drawn from a fair cross section of the community because that right does not apply to the selection of a particular jury from a properly selected venire.

2. No Abuse of Discretion

Because there was no constitutional violation, the next question is whether the trial court erred in deciding how to conduct the jury selection process and specifically in declining to reorder the prospective jurors to give Black prospective jurors the chance to be seated on the jury. As noted above, we must review for abuse of discretion the trial court's handling of the jury selection process. *Davis*, 141 Wn.2d at 826.

There is no basis for concluding that the trial court's decision to seat the lower numbered prospective jurors on the jury first was an abuse of discretion. We can take judicial notice that trial courts throughout the state use the method used here of randomly numbering the venire and seating the lowest numbered prospective jurors on the jury. *See State v. Clark*, 143 Wn.2d 731, 762-63 n.3, 24 P.3d 1006 (2001) (describing struck method of voir dire). And there is no indication that the prospective jurors' race had anything to do with how the trial court determined the jury selection procedure. The fact that four Black prospective jurors had high assigned numbers and no Black prospective jurors had low assigned numbers simply resulted from the random selection and numbering of jurors from the broader jury pool.

Further, randomness is an essential feature of the jury selection process. Statutes expressly require that the people selected for jury service from the jury master list must be selected at random and that superior court judges have a duty to ensure that randomness. RCW

2.36.080(1); RCW 2.36.065. And the potential jurors for a particular case must be selected at random from the people summoned for jury service. RCW 4.44.120. "A randomly selected jury is a right provided by statute and is based on the Legislature's policy of providing an impartial jury." *State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

McKnight's proposal to reorder the prospective jurors would have disrupted the randomness inherent in the entire jury selection process. Allowing the trial court to pick and choose which of the prospective jurors should be given priority for a seat on the jury based on the personal characteristics of those jurors would improperly inject trial court decisions into the random jury selection process. And such a procedure would require the trial court to subjectively determine which prospective jurors should be seated on the jury and call into question the impartiality of that jury.

We hold that the trial court did not abuse its discretion in implementing its jury selection procedure and in not reordering the prospective jurors.

CONCLUSION

We affirm McKnight's convictions.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

In the unpublished portion of this opinion McKnight also challenges the sufficiency of the evidence for his unlawful possession of a firearm conviction and asserts additional claims in a statement of additional grounds (SAG). We hold that (1) sufficient evidence supported McKnight's unlawful possession of a firearm conviction, and (2) McKnight's assertions in his SAG cannot be considered.

ADDITIONAL FACTS

In the summer of 2019, McKnight assaulted two people and threatened a third person. Tacoma Police Officers Joshua Avalos and Grant McCrea later encountered McKnight in the passenger seat of a parked car and arrested him.

Avalos testified that as he first approached the car in which McKnight was sitting, he saw McKnight quickly hunch over. Avalos said that McKnight "appeared to be shoving some sort of item underneath the seat." RP at 1467. McCrea testified that when he first approached the car, McKnight saw him and "kind of ducked away, kind of turning forward, turned himself away." RP at 1613. McCrea thought this was suspicious because McKnight "moved in a manner where he was trying not to show himself." RP at 1616.

Avalos testified that as he started to remove McKnight from the car, McKnight "began to lower himself forward again and placed his hand palm down towards underneath the seat." RP at 1468. Avalos stated that he associated this kind of movement with someone trying to grab something. He believed McKnight's fingers were going for something under the seat, not just reaching to the floorboard. McCrea also saw McKnight reach under the seat. Avalos quickly took McKnight to the ground in order to prevent him from grabbing anything. The officers then saw the handle of a gun underneath the passenger seat.

A. Sufficiency of the Evidence – Unlawful Possession

McKnight argues that there was insufficient evidence to establish unlawful possession of a firearm because he did not constructively possess the firearm. We disagree.

1. Legal Principles

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt

beyond a reasonable doubt. *State v. Bergstrom*, 199 Wn.2d 23, 40-41, 502 P.3d 837 (2022). In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all reasonable inferences drawn from that evidence. *Id.* at 41. Circumstantial and direct evidence are equally reliable. *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017). We defer to the trier of fact regarding evaluation of the evidence and credibility determinations. *Bergstrom*, 199 Wn.2d at 41.

Under RCW 9.41.040(l)(a)[2], a person is guilty of first degree 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 previously having been convicted of any serious offense. The State must prove that the defendant knowingly owned, possessed, or controlled the firearm. *State v. Williams*, 158 Wn.2d 904, 909-10, 148 P.3d 993 (2006).

A person can have actual possession or constructive possession of an item. *State v. Ibarra-Erives*, 23 Wn. App. 2d 596, 602, 516 P.3d 1246 (2022). Actual possession requires physical custody of the item. *Id.* Constructive possession occurs when a person has dominion and control over an item. *Id.* Although the defendant's ability to immediately take actual possession of an item can show dominion and control, mere proximity to the item by itself is insufficient. *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014). A person can have possession without exclusive control; more than one person can be in possession of the same item. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

Whether sufficient evidence establishes that a defendant had dominion and control over an item depends on the totality of the circumstances. *Ibarra-Erives*, 23 Wn. App. 2d at 602.

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[2] RCW 9.41.040 has been amended since the events of this case transpired. Because these amendments do not impact the statutory language relied on by this court, we refer to the current statute.

Aspects of dominion and control include whether the defendant could immediately convert the item to his or her actual possession, *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002); the defendant's physical proximity to the item, *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012); and whether the defendant had dominion and control over the premises where the item was located. *Ibarra-Erives*, 23 Wn. App. 2d at 602.

The trial court instructed the jury accordingly:

> Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item 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.
>
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP at 168.

2. Analysis

McKnight stipulated that he previously was convicted of a serious crime. The only issue is whether McKnight possessed the firearm.

Here, there was sufficient evidence that McKnight had actual possession of the gun. Avalos testified that as he approached the car he saw McKnight quickly hunch over and McKnight "appeared to be shoving some sort of item underneath the seat." RP at 1467. Viewed in the light most favorable to the State, this evidence supports a reasonable inference that

McKnight had the gun in his hand and placed the gun under the seat as officers approached. If McKnight had the gun in his hand, he had actual possession.

There also is sufficient evidence that McKnight had constructive possession of the gun. One factor the jury could consider is whether McKnight had the immediate ability to convert the item into his actual possession. *Jones*, 146 Wn.2d at 333. Here, the gun was directly underneath where McKnight was sitting. McKnight twice reached down in the proximity of the firearm. Avalos testified that he associated this kind of movement with someone trying to grab something. And when the officers removed McKnight from the vehicle, the end of a firearm was visible. A jury could find that McKnight had the ability to take actual possession of the gun and could infer that he was grabbing for the gun, and therefore the jury could find that he had dominion and control over the gun.

We hold that there was sufficient evidence to support McKnight's first degree unlawful possession of a firearm.

B. SAG CLAIMS

McKnight asserts two claims in his SAG challenging his convictions. We decline to consider his assertions.

1. Right to a Speedy Trial

McKnight asserts that his right to a speedy trial was violated because he was declined all trial continuances from September 2019 to July 2020 and he was given no legal reason why he could not go to trial. However, the transcripts of all pretrial proceedings are not in our record. We can consider only facts contained in the appellate record, making us unable to evaluate the trial court's decisions. Because McKnight's speedy trial claim relies on matters outside the

record, we cannot consider the claim on direct appeal. *State v. Alvarado*, 164 Wn.2d 556, 569, 192 P.3d 345 (2008).

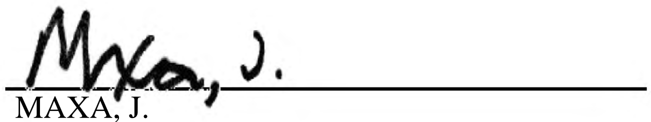
2. Ineffective Assistance of Counsel

McKnight asserts that he received ineffective assistance of counsel because his defense counsel never filed any speedy trial motions or asked to preclude a witness from testifying because the witness went to jail two to three times. He also asserts that defense counsel was never informed about the witness being in jail so she could have interviewed them.

For the same reasons stated above, we are unable to consider McKnight's ineffective assistance of counsel claim regarding the right to a speedy trial. Regarding the witness, McKnight does identify the witness and therefore we are unable to determine the nature of the alleged error. RAP 10.10(c). And whether defense counsel was or was not informed about the witness being in jail is outside the appellate record and cannot be considered. *Alvarado*, 164 Wn.2d at 569.

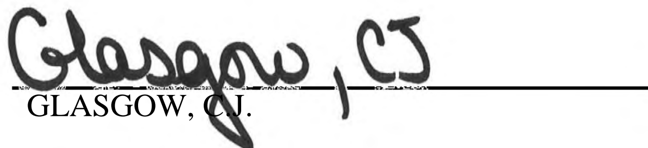
CONCLUSION

We affirm McKnight's convictions.

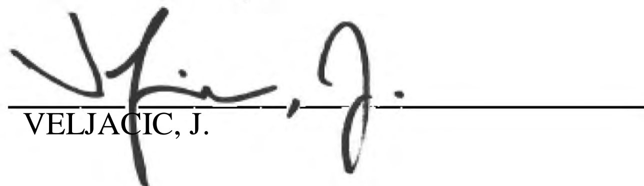


MAXA, J.

We concur:



GLASGOW, C.J.



VELJACIC, J.

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