NO. 29785-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

GARY MCCABE,

Appellant.

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

The Honorable Jerome J. Leveque, Linda G. Thompkins,
Ellen Kalama Clark, and Maryann C. Moreno, Judges

BRIEF OF APPELLANT

ERIC BROMAN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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RULES, STATUTES AND OTHER AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to instruct the jury on the lesser included offense of first degree criminal trespass. CP 90-91, 102; 5RP 25-26.

2. The trial court erred in entering judgment and imposing sentence on count II, possession of a controlled substance. CP 142, 146.

Issues Related to Assignments of Error

1. The state charged appellant with Residential Burglary. Viewing the evidence in a light most favorable to appellant, jurors could have concluded he did not enter a dwelling with the intent to commit a crime therein. Did the trial court err when it refused appellant's proposed instructions on first degree criminal trespass as a lesser included offense?

2. The instructions allowed a conviction if the state proved appellant possessed a controlled substance found in his car "on or about" August 24, 2012. CP 124. On that day, however, the car was in the police impound garage awaiting search, and appellant lacked dominion and control over any item in the car. The state was aware of its own error in the information's charging date and the "to-convict" instruction, but failed to amend the information. Was the evidence

insufficient to support the elements of the charge as set forth in the "to-convict" instruction?

B. STATEMENT OF THE CASE[1]

1. Procedural Facts

On August 24, 2010, the Spokane County prosecutor charged appellant Gary McCabe with one count of residential burglary, allegedly committed August 12, 2010. After several amendments, the state tried three counts allegedly committed on these dates:

I – residential burglary, August 12, 2010

II – possession of methamphetamine, August 24, 2010

III – possession of stolen property, August 24, 2010.

CP 85-86; 2RP 10, 15; 4RP 17.

Prior to trial, the defense moved under CrR 3.6 to suppress evidence seized when the police stopped and searched McCabe's car. CP 5-38; 1RP 6-20, 91-94. After a pretrial hearing, the trial court denied the motion and entered findings. CP 39-44; 1RP 98-105.

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[1] This Brief refers to the transcripts as follows: 1RP – motion hearing (12/2/10 and 12/9/10); 2RP – first trial (1/10 - 13/11, 1/18/11); 3RP – second trial (1/31/01, 2/1/01); 4RP – third trial (2/14 -18/11) and sentencing (3/8/11); 5RP – instructions and closing arguments (2/18/11, Rebecca Weeks, court reporter).

The first trial in January 2011 ended in a mistrial. 2RP 636-38. A second mistrial occurred as a result of difficulties during jury selection. 3RP 62. At the beginning of the third trial, the parties presented evidence on the reasons for the first mistrial. The defense initially theorized that juror or governmental misconduct may have led to the mistrial, but ultimately did not move to dismiss. 4RP 18-27, 39-52.

After the third trial, the jury acquitted McCabe of count III. CP 139. The jury found him guilty of counts I and II. CP 137-38.

At sentencing, McCabe maintained his innocence. 4RP 695-97. The court imposed a 63-month low-end sentence, to run consecutive to a sentence McCabe was serving on a different cause number. CP 145-46; 4RP 700-01.

2. Third Trial

The burglary occurred August 12, 2010. The main question was the burglar's identification, and a separate question was whether the person identified as McCabe entered the building. 5RP 38-78.

Dennis and Bette Miller lived at 5517 South Perry. On August 12, 2010, they left the house around 12:30 to go out for lunch. When they returned around 2:30, they saw signs their house had been burglarized. Entry was made through a broken basement egress

window on the back side of the house. Cupboards, drawers, shelves and jewelry boxes had been opened with items dumped on the beds. 4RP 538-41; 548-58. The Millers saw shoe prints in the carpet. 4RP 541-42, 583.

The main missing item was a coin collection. 4RP 540, 551-58. Miller[2] estimated its total value at $27,340. 4RP 557, 576-77. A few other items were also missing, such as watches, a ring, and a necklace. 4RP 540, 550, 557-58.

Miller had built seven wooden boxes to store the collection. The boxes were fairly large, requiring two hands to carry. Five were missing. 4RP 368-74, 509, 554-56, 582.

Sheriff's Deputy Brandon Armstrong responded to the 911 call. After Deputy John Cook and a police dog cleared the residence, Armstrong investigated the burglary. He took photos of the remaining two coin boxes as well as the broken window. 4RP 368-72, 470-71, 543-46. He was unsuccessful in finding fingerprints on the broken window or other items in the house. 4RP 344-45, 479-81.

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[2] In this brief "Miller" refers to Dennis Miller.

They found two mismatched gloves between the Miller's garage and the south fence. The gloves were not turned inside out to look for fingerprints. 4RP 372, 477-78, 508.

Eric Rogers lived across Perry from the Millers. He was watching television when his dog started making noise. He looked out the window and said he saw the front of a red Dodge Neon backed up the Miller's driveway, with the tires pulled "catty-wampus" a foot or two onto the grass making tire tracks. He thought the front license plate was 531 UVB or 531 UBD. 4RP 277-81, 286-91, 473. Rogers said he paid attention to the Neon because his girlfriend drove a Neon. 4RP 300.

Rogers watched for between 90 seconds and two minutes. 4RP 294-95. He saw a man walk around the side of the house at two or three times. 4RP 281, 293. The man loaded one box into the trunk and one into the rear door. A female passenger moved to the driver's seat and then they drove away. 4RP 280-82, 292-95.

Rogers did not recall the man's facial type, hair color, facial hair, glasses, eye color, or whether he was barefoot or wearing shoes. 4RP 287-88, 294.

Rogers saw Armstrong and walked across the street. He described a red Dodge Neon with a front license plate of 531 UVB or

531 UBD, although he could have said 553 or UDB. 4RP 277-81, 288-91, 473-74. Without success, Armstrong and Cook tried to locate a Neon by checking various combinations of similar license numbers. 4RP 460, 476-79, 498-501.

The police investigation did not follow up on the footprints or tire tracks. 4RP 383, 478, 498, 508. Although a dog was used to clear the building, the officers made no effort to track any suspect. 4RP 543-46.

On August 20, Armstrong was investigating the case. He drove to a house on Latawah where he saw a red Dodge Neon. 4RP 461-62. The license plate was 531 UOB. 4RP 302-03, 377, 462, 507. The Neon had after-market taillights. 4RP 378, 462, 466. Armstrong thought it was a close match to the suspect Neon. 4RP 464-66. In a report written on August 20, Armstrong for the first time asserted that Rogers had previously described the man as "stocky, T-shirt, shorts, and a hat." 4RP 474-75, 502-03, 506-07. That report also for the first time described the Neon as "bright red." 4RP 480.

Armstrong watched the car for two to three hours. 4RP 463-63. McCabe got in the car and drove a short distance before Armstrong turned on his lights and stopped the Neon. He asked for McCabe's license and registration. 4RP 465.

On the seat of the car was McCabe's wallet and registration, not unusual for a traffic stop. 4RP 321, 326, 330, 343, 481-82. Also on the seat was a US Congressional coin box and a gold coin. 4RP 466, 482, 509-11. Armstrong put McCabe in the back seat of the unmarked patrol car, then took photographs of the car. 4RP 375, 466.

Armstrong said he called Corporal Mark Nygren during the surveillance and asked Nygren to show Rogers a montage. Nygren made the montage with six photos, putting McCabe's photo in the lower right position. Nygren then drove to Rogers' house. Rogers looked at the montage and excluded five photos. He pointed to McCabe's photo and said he was not 100 percent sure. 4RP 283-85, 297, 299, 464, 504, 524-27, 533-34.

Nygren then drove Rogers to the arrest scene. When they approached the Neon, Rogers said "[t]hat's it. That's the car. I am 100 percent sure." 4RP 528-29. Although photos of the scene showed the Neon with a police car behind it, Nygren said other police cars had been moved from their positions near the Neon, so as not to be too suggestive. 4RP 504-05, 529-30. But there were no other Neons seen during the ride from Rogers' house to the arrest scene. 4RP 300, 530.

Armstrong searched McCabe incident to his arrest. In the front breast pocket of McCabe's shirt was a certificate of authenticity for two United States congressional silver coins. It was not related to the gold coin on the car seat. 4RP 376, 469, 483-88, 520-11.

Detective Richard Gere applied for a search warrant and searched the car on August 25, 2010. 4RP 316. On the front passenger seat was McCabe's wallet and the registration in McCabe's name. 4RP 321, 326, 328-29. Also on that seat was a United States Congressional Coin box and a $5 gold coin. Gere surmised these items had been taken from the Millers. 4RP 321, 325-26.

On the floor behind the driver's seat was a Hewlett-Packard laptop computer.[3] The serial number linked the laptop to MacKenzie Adams, who had filed a report listing it as stolen in a burglary on August 19. 4RP 318-20, 350-51, 355-61. Adams' neighbors had told her they had seen two suspicious looking African American men around the time her residence was burglarized. 4RP 361.

On the back seat was a small black duffel bag. Inside that was a small black pouch. 4RP 317. Inside that was a baggie with less than a gram of a crystalline substance that later was tested and

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[3] The jury acquitted McCabe of count III, which alleged he possessed the laptop with knowledge it was stolen. CP 139.

determined to contain methamphetamine and dimethyl sulfone, a cutting agent. 4RP 317-18, 327, 409, 412, 447-48, 455.

There were significant chain of custody questions relating to the baggie's lengthy stay at the crime lab, as it became clear during trial that the baggie seized from the black pouch was not the same baggie returned to evidence from the crime lab. 4RP 449-52. The evidence showed the lab technician checked out 10 to 20 items at a time. Although it only took her about an hour to conduct the test, and two days to generate the report, she did not return the envelope containing the baggie until 18 days later. 4RP 393-96, 443-44, 449-53.

The state theorized the discrepancy was explained because the original baggie had been dusted for fingerprints and exchanged before the envelope was sent to the lab. 4RP 335-36, 338, 456-58, 511-21.

In the trunk was digital scale in a hard container. There was no indication the scale had been used to weigh a controlled substance, nor was it tested for residue. 4RP 324, 331, 333-34. The prosecutor and Gere nonetheless called it a "meth scale." 4RP 329.

No fingerprints were recovered from any of the items found in the Neon. 4RP 331, 335-36, 339-40, 343-44, 346. The officers found none of Miller's missing wood boxes in the car. 4RP 479.

Although the officers assumed the $5 gold coin, the congressional coin box, and the silver certificate were related to the Miller case, nothing conclusively identified the items as having been taken from Miller's residence. Numerous similar coins are sold on the retail market through catalogs and the internet. 4RP 321, 325-26, 339-40, 344, 368-70, 376, 584.

Miller testified at McCabe's first and third trials. 2RP 348; 4RP 548-58, 576-603. Armstrong had not shown Miller a montage, although the prosecutor did, before the first trial. 4RP 496-97, 585-89. During his testimony at the first trial, Miller for the first time claimed he had previously seen McCabe. Miller said McCabe had come to Miller's house a couple weeks before the burglary, asking if Miller wanted his landscaping trimmed. Miller said he declined, and said he thought it was odd, because the man did not have trimming equipment or a truck with him at the time. 2RP 378-79, 392; 4RP 496-97, 585-89, 597-602.

3. Relevant Jury Instructions

After the first trial the parties discussed the state's decision to charge McCabe with possession of methamphetamine on August 24. That was the day before Gere executed the warrant to search the Neon. McCabe had been stopped and arrested on August 20. The Neon was then impounded and held in police custody. 2RP 606-09.

At the first trial the prosecutor argued the instruction should be changed to August 20, the date of the arrest. Defense counsel pointed out that the information charged August 24. The prosecutor said "[i]t is a scrivener's error[.] The 24th, just leave it on 24th. If it is overturned I guess then that's fine." 2RP 607.

The issue was discussed again during the third trial. The state did not move to amend the information. The prosecutor thought the language "on or about" in the "to-convict" instruction was adequate to address this problem. 5RP 9-10.

The defense proposed lesser included instructions on first and second degree criminal trespass. CP 90-93, 102. The state opposed the instructions, arguing the evidence did not satisfy Workman's[4] factual prong. 5RP 13-18.

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[4] State v. Workman, 90 Wn.2d 443, 451, 584 P.2d 382 (1978).

Defense counsel argued no evidence showed that McCabe was the person who actually entered the residence. Rogers saw the stocky man he thought was McCabe walking outside the house for 90 seconds to two minutes. In that amount of time it would not be possible for someone to enter the house through the basement window, retrieve a large box, carry it to the car, then go back and do it again. A woman with a smaller frame, however, could more easily enter that window. 5RP 21-24.

The court nonetheless denied the instruction, reasoning there was no evidence the boxes had been located anywhere but inside the house. The court also reasoned there was no evidence anyone else was on the "premises" other than the person Rogers saw carrying the boxes. 5RP 25-26.

4. Closing Argument

In closing, the state argued it proved its case by showing McCabe was driving a similar car to the one Rogers saw outside the Miller's around the time of the burglary. The state argued the jury should rely on Rogers' eyesight. 5RP 38-43. The prosecutor also asserted the gold coin and silver certificate were "fairly unique," and Miller claimed he had seen McCabe a few weeks before the burglary. 5RP 44-46.

Relating to the possession of methamphetamine, the prosecutor pointed out the meth was in the car and the digital scale was in the trunk.

> If you take it separately, maybe you could have an issue about, um, did he know it was in there? Let's see here. There has been no testimony about anyone else placing it there. There has been no testimony that I don't know how it got there. Remember all testimony.

5RP 47.

The court sustained defense counsel's objection. At sidebar, the court pointed out the allegedly missing testimony "could only have come from the defendant . . . [w]ho has a constitutional right not to speak." 5RP 48.

The court asked the prosecutor to explain this. The prosecutor tried, but failed. 5RP 48-49. Defense counsel moved for a mistrial. Barring that, counsel asked for a curative instruction. 5RP 49-50.

After the sidebar, the court stated:

> Ladies and gentlemen, I'm going to sustain an objection brought by the defendant and ask you disregard in its entirety. By that, I mean you cannot consider it at all, nor consider it even said "that there has been no testimony about anyone; there has been no testimony that I don't know how it got there." That is stricken from this record and you cannot consider that statement was ever made.
>
> I also want to remind you of the instructions previously given that included the fact that it's the State

> that has the burden of coming forward with the production of evidence, and further that the instruction previously given that a defendant has no obligation to speak and has a right not to provide any testimony and that you cannot infer any fact from that that would prejudice the defendant in any way. That's the defendant's right and you must understand that and that the defendant has that right. So, with that understanding, we are going to continue.

5RP 50-51.

The prosecutor then argued the state had proved McCabe's constructive possession of the methamphetamine on August 24. The prosecutor also erroneously argued that Detective Gere seized the package of methamphetamine from the back seat on "August 20." 5RP 52-53.

Just before concluding, the prosecutor summed up the state's evidence, then said

> [Prosecutor]: . . . I believe - -
>
> [Defense counsel]: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> [Prosecutor]: The State believes - - sorry.
>
> [Defense counsel]: Your Honor.
>
> THE COURT: Sustained.
>
> [Defense counsel]: That's improper. Your Honor, I would ask the court to - -

THE COURT: Sustained. Strike the "I believe" and the "State believes."

5RP 55. The prosecutor finished shortly after.

Defense counsel pointed out no fingerprints tied McCabe to the charged offenses. Rogers was not able to describe the suspect's identifying features and eyewitness identifications are routinely unreliable. McCabe's license plate was different than Rogers' description. Rogers identified the red Neon under suggestive circumstances at the arrest scene. No fingerprints of Miller's were on the $5 coin or the silver certificate, and similar items are sold in the retail market and the internet. The state presented no evidence that it found any other coins or boxes in McCabe's possession. 5RP 59-72.

C. ARGUMENT

1. THE COURT'S REFUSAL TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF CRIMINAL TRESPASS DENIED McCABE A FAIR TRIAL.

When the evidence supports an instruction in a criminal case, an accused is entitled to have the jury fully instructed on his theory of the case. State v. Fernandez-Medina, 141 Wn.2d 448, 453, 461, 6 P. 3d 1150 (2000); State v. Berlin, 133 Wn.2d 541, 546-48, 947 P.2d 700 (1997); State v. McClam, 69 Wn. App. 885, 890, 850 P.2d 1377, review denied, 122 Wn.2d 1021 (1993). Washington statutes entitle

instructions not only on the charged crime, but also on all lesser included offenses. RCW 10.61.006 provides:

> In all other cases [non-inferior degree cases] the defendant may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.

To determine whether a lesser included instruction is appropriate, Washington courts apply the two-prong test in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978):

> Under the Washington rule, a defendant is entitled to an instruction on a lesser-included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that the lesser crime was committed.

Workman, 90 Wn.2d at 447-48 (citations omitted).

This rule serves many purposes. First, it ensures constitutionally adequate notice of all possible charges at trial. Berlin, 133 Wn.2d at 545, 548. Second, it allows the jury to consider the defense theory of the case. Id., at 545, 548. Third, it allows the jury to avoid the "all or nothing" choice of conviction or acquittal on the charged offense, which "accord[s] the defendant the full benefit of the reasonable-doubt standard." Beck v. Alabama, 447 U.S. 625, 633-34, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). The Beck Court noted the

potential unfairness that arises "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." Beck, 447 U.S. at 634 (court's emphasis). A lesser included instruction tends to eliminate this problem.

Workman's legal prong is satisfied if it is impossible to commit the greater offense without also committing the lesser. State v. Porter, 150 Wn.2d 732, 736-737, 82 P.3d 234 (2004). First degree criminal trespass satisfies the legal prong. The elements of residential burglary are: (1) entering or remaining unlawfully in a dwelling other than a vehicle and (2) intent to commit a crime against a person or property therein. CP 116; RCW 9A.52.025.[5] The elements of first degree criminal trespass are knowingly entering or remaining unlawfully in a building.

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[5] RCW 9A.52.025 – Residential Burglary – provides:

> (1) A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.
>
> (2) Residential burglary is a class B felony. . . .

CP 90-91; RCW 9A.52.070.[6] The word "building" includes any dwelling. It also includes "fenced area[s]". RCW 9A.04.110(5).

Accordingly, the only significant difference between first degree criminal trespass and residential burglary is that the latter requires an additional element of intent to commit a crime against a person or property. Because first degree trespass is established every time an accused unlawfully enters or remains in a dwelling with criminal intent, it satisfies Workman legal prong as a lesser included offense of residential burglary. See State v. J.P., 130 Wn. App. 887, 895, 123 P.3d 215 (2005) (first degree trespass is a lesser included offense of residential burglary); State v. Pittman, 134 Wn. App. 376, 384, 166 P.3d 720 (2006) (same); see also State v. Southerland, 45 Wn. App. 885, 889, 728 P.2d 1079 (1986) (first degree is lesser of former version of first degree burglary requiring unlawful entry into dwelling), aff'd in part and reversed in part on other grounds, 109 Wn.2d 389,

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[6] RCW 9A.52.070 – Criminal Trespass in the First Degree – provides:

> (1) A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building.
>
> (2) Criminal trespass in the first degree is a gross misdemeanor.

745 P.2d 33 (1987).[7] The trial court correctly recognized the legal prong had been met. 5RP 15-16, 21.

Regarding Workman's "factual" prong, this Court views the supporting evidence in the light most favorable to the party requesting the instruction. Fernandez-Medina, 141 Wn.2d at 455-56 (although an inferior degree case, court notes that analysis of the factual prong is identical for both lesser included and inferior degree). The evidence therefore must be viewed in the light favorable to McCabe.

A lesser included instruction should be given whenever the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. It is not enough, however, that the jury might disbelieve the evidence pointing to guilt. Rather, the evidence must affirmatively establish the defendant's theory of the case. Fernandez-Medina, 141 Wn.2d at 456. "[W]hen substantial evidence in the record supports a rational inference that the defendant committed only the lesser included offense to the exclusion of the greater offense, the factual component of the test for entitlement to a [lesser included] offense instruction is satisfied."

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[7] First degree trespass is also a lesser-included offense of first and second degree burglary. See State v. Soto, 45 Wn. App. 839, 841, 727 P.2d 999 (1986); State v. Mouncey, 31 Wn. App. 511, 517-518, 643 P.2d 892, review denied, 97 Wn.2d 1028 (1982).

Id. at 461.

The evidence of McCabe's potential entry into the dwelling[8] was inferential. No one saw him enter. His fingerprints were not found inside. Rogers at most established that someone he thought looked like McCabe carried boxes from around the back of the house inside the fenced area. As defense counsel persuasively pointed out, the person Rogers described as "stocky" would not be able to get in and out of the broken window, two or three times, carry the coin boxes through the fenced area to the car, load them in the car, and return again. The amount of time Rogers watched was too short. The evidence supports the inference that McCabe was only outside the dwelling in the fenced area.

In short, the jury could rationally find this evidence did not support a residential burglary conviction beyond a reasonable doubt and that McCabe was only guilty of first degree trespass.

A trial court's failure to give a lesser included instruction that should have been given can never be harmless. State v. Parker, 102

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[8] A "dwelling" is defined as "any building or structure, though moveable or temporary, or a portion thereof, which is used or ordinarily used by a person for lodging." RCW 9A.04.110(7).

Wn.2d 161, 163-64, 683 P.2d 189 (1984). The Parker Court relied upon State v. Young, 22 Wash. 273, 60 P. 650 (1900):

> Inasmuch, then, as the law gives the defendant the unqualified right to have the inferior degree passed upon the jury, it is not within the province of the court to say that the defendant was not prejudiced by the refusal of the court to submit that phase of the case to the jury, or to speculate upon probable results in the absence of such instructions. If there is even the slightest evidence that the defendant may have committed the degree of the offense inferior to and included in the one charged, the law of such inferior degree ought to be given.

Young, 22 Wash. at 276-77 (quoted in Parker, 102 Wn.2d at 163-64).

The Parker Court then said, "This court has adhered to this test and has never held that, where there is evidence to support a lesser-included-offense instruction, failure to give such an instruction may be harmless." Parker, 102 Wn.2d at 164 (citing Workman). Thus, well-established law precludes harmless error analysis.

This Court should vacate the count I conviction and remand for a new trial.

2. THE EVIDENCE DID NOT SHOW POSSESSION OF A CONTROLLED SUBSTANCE ON AUGUST 24, 2010.

The state charged McCabe with possession of a controlled substance on August 24, 2010. CP 85-86. The jury was instructed it could not convict unless it found McCabe possessed the substance "on or about August 24, 2010." CP 124. The date stated in the "to-

convict" instruction is the law of this case. State v. Hickman, 135 Wn.2d 97, 101–02, 954 P.2d 900 (1998); State v. Jensen, 125 Wn. App. 319, 326, 104 P.3d 717 (2005).

The evidence showed several undisputed facts. McCabe was driving the red Neon on August 20 when he was arrested and taken into custody. The car was impounded and kept in police custody. Detective Gere applied for a search warrant then searched the car at the impound lot on August 25. The state presented no evidence to suggest McCabe was present for the search or in control of the car on August 25.[9]

A reasonable inference may support a finding that a driver exercises dominion and control over items found in a car. State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). But McCabe was not driving or in possession of the car on August 24, the date in the to-convict instruction. The car was in the police impound lot, no longer subject to McCabe's dominion and control. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002) ("Dominion and control means that the object may be reduced to actual possession immediately"); CP 123 ("Constructive possession occurs when there is no actual

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[9] The superior court file provides ample contrary proof that McCabe remained in custody well past August 25.

physical possession but there is dominion and control over the substance").[10]

In response, the state may argue the instruction's "on or about" language provides enough temporal wiggle room to uphold the conviction. Division Two rejected a similar state claim in State v. Mills, 80 Wn. App. 231, 907 P.2d 316 (1995). The state charged Mills with possessing methamphetamine with intent to deliver while armed with a deadly weapon. An officer arrested Mills near Mills' car. Inside the car was a small baggie of methamphetamine. After the officer watched Mills squirm around in the patrol car's back seat, the officer found a motel key between the seat cushions. The officer then secured a warrant to search the motel room, several miles away. The search turned up 118 grams of meth next to a pistol. Mills, 80 Wn. App. at 232-33.

On appeal, the state argued that Mills actually possessed the gun "on or about" the date charged, attempting to construe that language broadly. Division Two rejected the state's claim:

> First, we find no evidence proving that Mills, the gun and drugs were in the motel room together on May 26. Due process requires that the charging document

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[10] The state conceded there was no proof of actual possession. 5RP 51.

> contain specific allegations, including dates. State v. Theroff, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980).

Mills, at 234.

As was the case in Mills, there is no evidence that McCabe and the drugs were in the car together on August 24, four days after his arrest and the day before Gere searched the car and seized the methamphetamine. McCabe had no ability to reduce any item in the car to his actual possession on August 24. The state's proof fails.

In response, the state may assert the "on or about" language should be broadly construed. But Hickman and Jenson make it clear that the state must prove the elements in the to-convict instruction. The rule allowing broad construction of "on or about" language does not apply where the defense presents an alibi. See generally, Jensen, 125 Wn. App. at 721. The evidence establishes McCabe was not present or able to exert dominion and control over the car at the charged date. This is the very definition of "alibi."[11]

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[11] Black's Law Dict. 72 (7th Ed. 1999) ("**alibi** (**al**-ə-bI), *n.* [Latin 'elsewhere'] **1.** A defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time. Fed. R. Crim. P. 12.1. **2.** The fact or state of having been elsewhere when an offense was committed.")

The state also may suggest this argument is the type of "technicality" that can raise questions about the "just"-ness of our justice system. If so, it is a technicality of the state's own making. The state knew about this problem during the first trial. 2RP 606-08. The state could have moved to amend the information before the second or third trial, but did not.[12] The prosecutor instead said "If it is overturned I guess then that's fine." 2RP 607. In the final analysis, "[w]hether motivated by obstinacy or advocacy, the State failed to take advantage of CrR 2.1(e)[.]" Johnson, 119 Wn.2d at 150. The state's failure to follow our system's established "technicalities" is not McCabe's fault.

The count II conviction should be reversed and the charge dismissed. Hickman, 135 Wn.2d at 106.

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[12] Such motions are liberally considered, and granted. CrR 2.1(d); State v. Johnson, 119 Wn.2d 143, 150, 829 P.2d 1078 (1992) (citing State v. Pelkey, 109 Wn.2d 484, 490-91, 745 P.2d 854 (1987)). As was the case in Johnson, why the state did not move to amend "is a mystery." 119 Wn.2d at 150; cf. State v. Gassman, __ Wn.2d __, __ P.3d __, slip op. at 5 (No. 85801-2, 8/23/12) (referencing the trial court's finding that the state was "careless" in its initial charging date, but permitting the state to amend the date).

D. CONCLUSION

For the reasons stated in argument 1, the count 1 conviction should be vacated and remanded for a new trial. For the reasons stated in argument 2, the count 2 conviction should be vacated and the charge dismissed.

DATED this 23rd day of August, 2012.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

ERIC BROMAN, WSBA 18487
OID No. 91051
Attorney for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON
DANA M. NELSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

JENNIFER M. WINKLER
ANDREW P. ZINNER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED

OF COUNSEL
K. CAROLYN RAMAMURTI
REBECCA WOLD BOUCHEY

State v. Gary McCabe
No. 29785-3-III

Certificate of Service of Brief of Appellant

Today I E-Filed and E-Served (Per Agreement):

Mark Lindsey
Spokane County Prosecuting Attorneys
1100 W Mallon Ave
Spokane WA 99260-2043
mlindsey@spokanecounty.org, kowens@spokanecounty.org

Deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to:

Gary McCabe, 902662
Coyote Ridge Corrections Center
PO Box769
Connell, WA 99326

Containing the Brief of Appellant in State v. Gray McCabe, Cause No. 29785-3-III, for the Court of Appeals, Division III, 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.

Jamila Baker
Done in Seattle, Washington

8/23/12
Date