NO. 41689-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS DAVIS,

Appellant.

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

The Honorable Stephanie A. Arend, Judge

REPLY BRIEF OF APPELLANT

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A. ISSUES IN REPLY

1. Should this Court reverse the appellant's convictions for unlawful possession of a firearm (UPFA) and possessing a stolen firearm (PSF) where the State failed to prove the appellant actually or constructively possessed the firearm?

2. Alternatively, should this Court remand for resentencing within the standard range on the UPFA count where both aggravating factors are legally and factually inapposite?

3. For the reasons set forth in the co-appellant's brief and adopted by the appellant, should this court remand for resentencing within the standard range on the PSF count?

4. Where the trial court granted appellant's motion to dismiss three out of four original charges of rendering criminal assistance[1] but failed to indicate such dismissal on the judgment and sentence despite a blank space for such, should this Court remand for correction of the judgment and sentence or similar remedy?

[1] The appellant was acquitted of the sole remaining count. CP 737-39.

B. ARGUMENTS IN REPLY

1. THE STATE DID NOT PROVE THE APPELLANT ACTUALLY OR CONSTRUCTIVELY POSSESSED THE FIREARM.

Under RCW 9.41.040(1)(a),

> A person . . .is guilty of the crime of unlawful possession of a firearm in the first degree, if the person . . . has in his or her possession [or] control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter.

See CP 727 (Instruction 29). The State must prove knowing possession. State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000).

Under RCW 9A.56.310 (1), "A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a stolen firearm." See CP 728 (Instruction 30).

Actual possession occurs when an object is in the personal custody of the person charged. Constructive possession occurs when a person not in actual possession nonetheless demonstrates dominion and control over the object. State v. Chavez, 138 Wn. App. 29, 34, 156 P.3d 246 (2007).

At trial, the State acknowledged there was no evidence that the appellant actually possessed the gun in question; rather, the State argued he constructively possessed the stolen gun. 32RP 1888-89. In its 57-page brief, the State points to a grand total of three "facts" in support of its argument the convictions should be upheld. Each should be rejected.

First, the State notes that it could be inferred from the evidence that the appellant was at some point in the same car as Clemmons. Brief of Respondent (BOR) at 28. This factor does not support actual or constructive possession. Brief of Appellant (BOA) at 12-15 (discussing cases holding that while *ownership* of a premises, including an automobile, may be a factor relevant to constructive possession, mere presence in said premises is insufficient).

Second, the State argues -- for the first time -- that the appellant may have touched the gun while tending to Clemmons's wound. BOR at 29. This is pure speculation; the State does not and cannot cite to the record for this proposition. As the State acknowledged during closing argument, there was no evidence that the appellant ever actually possessed the gun or even handled it in passing. 32RP 1888-89.

Third, the State argues that when the gun was on the counter, "anyone" could have taken possession of it. BOR at 29. It is true that "[o]ne aspect of dominion and control is that the defendant may reduce the object to actual possession immediately." Chavez, 138 Wn. App. at 35. But in advancing this "fact" as a basis to affirm, the State is asking this Court to (1) speculate without factual basis that the appellant was at some point near enough to the gun to seize control of it, (2) disregard the axiom that proximity alone is insufficient to establish dominion or control, and

(3) disregard evidence suggesting another person maintained exclusive control of the weapon.

The State is asking too much. This Court should decline the State's argument as contrary to the law and facts. BOA at 15-17.

In addition, the State cites to Chavez for the proposition that "[d]ominion and control can be established by circumstantial evidence." BOR at 25 (citing Chavez, 138 Wn. App. at 34). Chavez is instructive, but not for the reasons the State suggests. As discussed above, the three "facts" advanced by the State are not circumstantial evidence of the appellant's guilt. They are at best, irrelevant, and at worst, pure speculation. Moreover, the factual circumstances present in Chavez actually support reversal of the appellant's convictions.

In Chavez, the issue was whether a police officer had probable cause to arrest Chavez for possession of cocaine. 138 Wn. App. at 31. The superior court's unchallenged findings established: (1) the police officer heard a snorting noise coming from a bathroom stall; (2) three men, including Chavez, were seen standing in the bathroom stall; (3) one of the men quickly left the restroom upon seeing the officer; (4) another man, Ramirez, was holding a dollar bill with a white powdery substance on it; (5) upon seeing the officer, Ramirez attempted to hand the bill to Mr. Chavez; and (6) Mr. Chavez refused to take it. Id. at 35.

The court found these facts insufficient to establish probable cause for possession. As the Chavez court summarized,

> [The police officer] did not know what occurred in the bathroom stall. He did not see Mr. Chavez holding the cocaine or using it. Nothing indicates that Mr. Chavez was involved in criminal activity other than his proximity to Mr. Ramirez; in fact, the evidence points to Mr. Ramirez as the sole owner of the cocaine. See State v. Callahan, 77 Wn.2d 27, 31-32, 459 P.2d 400 (1969) (defendant's proximity to the drugs and his admission that he had handled the drugs earlier in the day, was not sufficient to show constructive possession where there was evidence that another person had exclusive ownership of the drugs).

Chavez, 138 Wn. App. at 35.

As in Chavez, the State is attempting to argue possession based on proximity alone. That proposition has been rejected time and time again. BOA at 12-15. Chavez also reiterates a proposition discussed at length in the appellant's opening brief: Evidence of exclusive ownership by another is inconsistent with a finding of dominion and control by an accused. Chavez, 138 Wn. App. at 35; BOA at 16-19.

For the reasons stated above and in the appellant's opening brief, the appellant's convictions should be reversed for insufficient evidence.

2. BOTH OF THE AGGRAVATING FACTORS USED TO IMPOSE AN EXCEPTIONAL SENTENCE FOR UNLAWFUL POSSESION OF A FIREARM ARE LEGALLY AND FACTUALLY INAPPOSITE.

The State argues that this Court should uphold the appellant's sentence for UPFA because one of the two aggravators, RCW 9.94A.535 (3)(r), is valid. BOR at 31-50. The State is incorrect; both are invalid and/or supported by insufficient evidence.

For the .535 (3)(r) aggravator to apply, the jury had to find that the offense involved a destructive and foreseeable impact on persons *other than* the victim. CP 735 (Instruction 36). As discussed in the appellant's opening brief, the victim of UPFA is the general public, not any particular individual. State v. Haddock, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000).

The State argues that where, as here, the general public is deemed the victim of a crime, certain individuals may be considered "victims" if the crime has a special impact on those individuals. BOR at 36-37. But Haddock explicitly rejected this proposition. See 141 Wn.2d at 111 (Sentencing Reform Act victim definition[2] is consistent with holding that victim is the general public and "[a]ny injury Haddock's former girlfriend

[2] Under current RCW 9.94A.030(53), "victim" is defined as "any person who has sustained emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged." Given the facts of this case, however, it is hard to conceive of how the appellant's proximity to a firearm affected any single person in such a manner.

and her friends may have suffered was a direct result of Haddock's brandishing the guns, not his unlawful possession of them.").

To the extent that the State is suggesting that the language of .535(3)(r) is ambiguous, moreover, the rule of lenity requires that it be construed narrowly; in effect, against the State. State v. Hacheney, 160 Wn.2d 503, 518, 158 P.3d 1152 (2007).

The State concedes the .535(3)(v) factor is inapplicable. BOR at 44.

Because neither aggravator applies, this Court should remand for the entry of a standard range sentence on the UPFA count. State v. Webb, 162 Wn. App. 195, 211-12, 252 P.3d 424 (2011) (remedy is resentencing based on the standard range for the crime).

But even if this Court upholds one of the aggravators, remand for resentencing is still required because it is unclear whether the court would have imposed the same sentence based on one aggravator alone. CP 768-70 (written findings); 34RP 48 (oral ruling); see State v. Dunaway, 109 Wn.2d 207, 219-20, 743 P.2d 1237 (1987) (remand required where two of three aggravators found invalid and exceptional sentence imposed was twice the middle of the standard range). In the case of UPFA, the standard range was only 26-37 months, yet the appellant received a 45 month sentence to be served consecutively to the UPFA sentence, for a total of 90

months. A similar magnitude of disparity between the standard range and the exceptional sentence warranted remand in Dunaway. Id. at 220.

3. NEITHER AGGRAVATING FACTOR RELIED ON TO IMPOSE AN EXCEPTIONAL SENTENCE FOR POSSESSION OF A STOLEN FIREARM IS VALID.

For the reasons set forth in the co-defendant Eddie Davis's brief and adopted in the appellant's RAP 10.1(g)(2) "notice to adopt," this Court should also remand for resentencing on the appellant's PSF count because neither aggravator applies under the facts or the law. Webb, 162 Wn. App. at 211-12. Moreover, even if this Court upholds one of the aggravators, remand for resentencing is required, given that it is unclear whether the court would have imposed the same sentence based on a single aggravator.[3] Dunaway, 109 Wn.2d at 219-20.

4. THE JUDGMENT AND SENTENCE SHOULD BE CORRECTED TO REFLECT THE COURT'S DISMISSAL OF THREE COUNTS OF RENDERING CRIMINAL ASSISTANCE

Although the State argues the appellant may not raise this issue for the first time on appeal, it is unclear what the State hopes to gain through such argument. BOR 50-57. It is in the interest of everyone that the trial

[3] In the case of PSF, the standard range was only 13-17 months, yet the appellant received a 45-month sentence to be served consecutively to the UPFA sentence, for a total of 90 months.

court's rulings to dismiss the charges be clearly reflected in the judgment and sentence and not buried in the lengthy transcripts.

As argued in the appellant's opening brief, this Court should remand for amendment of the judgment and sentence to reflect the court's dismissal of three out of four of the rendering counts or, in the alternative, enter an order dismissing the counts. The judgment and sentence, which contains a blank space for the court to list dismissed charges, fails to list the dismissed charges. CP 775. Remand for correction of the judgment and sentence is the appropriate course. State v. Calhoun, 163 Wn. App. 153, 170, 257 P.3d 693 (2011) (citing State v. Moten, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999)), review denied, 173 Wn.2d 1018 (2012); see also State v. Ford, 137 Wn.2d 472, 973 P.2d 452 (1999) (illegal or erroneous sentences may be challenged for the first time on appeal).

C. CONCLUSION

For the reasons stated above and previously argued, this Court should vacate counts 5 and 7 and remand to the trial court with directions to dismiss the UPFA and PSF charges with prejudice.

Alternatively, because neither aggravator applies, this Court should remand for resentencing on the UPFA count based on the standard range for the crime. This Court should likewise remand for resentencing on the PSF count within the standard range because neither aggravator is valid.

Finally, this Court should remand for a written order dismissing three rendering counts consistent with the trial court's oral rulings dismissing the charges.

DATED this 4th day of May, 2012.

Respectfully submitted,

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	)	
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DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DOUGLAS DAVIS
NO. 326926
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER 2011.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

May 04, 2012 - 1:29 PM

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