Supreme Court No. 93251-4
COA No. 73027-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VINCENT WILLIAM BARBEE,

Petitioner.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Cases

United States Supreme Court Cases

Statutes

A. IDENTITY OF PETITIONER/DECISION BELOW

Vincent William Barbee requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Barbee, No. 73027-4-I, filed March 7, 2016. A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

To prove the crime of unlawful possession of a firearm, the State must prove beyond a reasonable doubt that the accused knowingly possessed a firearm. Here, a firearm was found in a locked box in the trunk of a car that Vincent Barbee was driving, but Mr. Barbee did not own the car, and the State did not prove he ever handled the firearm or knew it was in the trunk. Nonetheless, the Court of Appeals held the evidence was sufficient to sustain the conviction. Should this Court grant review and reverse?

C. STATEMENT OF THE CASE

On July 28, 2014, at around noon, a group of law enforcement officers were searching in the Marysville area for Vincent Barbee in order to arrest him on outstanding warrants. 10/27/14RP 71. Officers spotted Mr. Barbee driving a green Pontiac Grand Am. His girlfriend, Jennifer Olson, was in the front passenger seat. 10/27/14RP 72.

Officers watched Mr. Barbee drive into the parking lot of an AM/PM convenience store, then exit the car and enter the store. 10/27/14RP 72.

Officers waited for Mr. Barbee to exit the store and walk back toward the car. Then they approached him and yelled, "Police." 10/27/14RP 74, 87-88. Mr. Barbee spun around, looked at them, yelled, "Oh, shit," and "took off running." 10/27/14RP 74, 87-88. Mr. Barbee was aware that he was wanted on warrants and would be arrested and go to jail if apprehended by law enforcement. 10/28/14(a.m.)RP 26-27. He ran across the street but was soon detained and handcuffed. Officers drove him back to where the Grand Am was parked. 10/27/14RP 74-75.

The Grand Am was "extremely cluttered," with numerous bags and loose items of clothing and other miscellaneous items strewn throughout the car. 10/27/14RP 108; 10/28/14(a.m.)RP 19, 49. Most of the couple's belongings were in the car because they had no permanent residence. They would stay with friends for a few nights, then move to someone else's house for a few nights. 10/27/14RP 97, 117. They used the car to transport their belongings from one house to the next. 10/27/14RP 97, 117.

The officers told Mr. Barbee they were going to search the car but he said it was not his car and he did not want them to search it. 10/28/14(a.m.)RP 11. The car was not registered to Mr. Barbee but to "Jacob Conyers." 10/28/14(a.m.)RP 38, 76. Mr. Barbee and Ms. Olson were in the process of purchasing the car from Mr. Conyers, paying him $100 per month. 10/27/14RP 107, 114. The couple had been using the car for about one month at that point. 10/27/14RP 115; 10/28/14(a.m.)RP 17. Both Mr. Barbee and Ms. Olson drove the car, and each had a set of keys. 10/27/14RP 115-16. Mr. Conyers also continued to use the car on occasion, and sometimes Ms. Olson let her sister-in-law drive it. 10/27/14RP 114-16.

Despite Mr. Barbee's refusal to consent to a search, the officers searched the car anyway. 10/28/14(a.m.)RP 28. The trunk was cluttered with clothing, shoes and other miscellaneous items, like the rest of the car. 10/28/14(a.m.)RP 32, 40. Inside the trunk among the clutter, the officers found a small locked box. 10/28/14(a.m.)RP 32. The box was not immediately visible on first glance but was tucked in the corner behind the wheel well and obscured by other items. 10/28/14(a.m.)RP 39-40. Lying next to the lockbox was a green file

folder containing various documents with Mr. Barbee's name on them. 10/28/14(a.m.)RP 32-33, 53-54.

The box was locked and the officers could not find a key to open it, although they tried several loose keys that were lying on the floor of the car. 10/28/14(a.m.)RP 41, 50-51. One of the officers grabbed a knife from the floor and used it to jimmy open the lock. 10/28/14(a.m.)RP 50. Inside the box the officer found a small handgun and one round of .22 caliber ammunition. 10/28/14(a.m.)RP 35, 52.

Mr. Barbee said the gun was not his. 10/28/14(a.m.)RP 11-12. Ms. Olson had never seen the lockbox before and did not know about the gun inside. 10/27/14RP 119-20.

Both the lockbox and the handgun were tested for fingerprints and DNA. One fingerprint was lifted from the top of the lockbox but it was determined not to be Mr. Barbee's. 10/28/14(p.m.)RP 15-16. No fingerprints suitable for comparison were found on the handgun. 10/28/14(p.m.)RP 16. A mixture of DNA from at least three individuals, both male and female, was found on the outside of the lockbox. 10/28/14(p.m.)RP 29, 36. The forensic examiner could not determine whether the mixture contained Mr. Barbee's DNA. 10/28/14(p.m.)RP 31. Likewise, a mixture of DNA from at least three

individuals, both male and female, was found on the handgun. 10/28/14(p.m.)RP 31, 36. Again, Mr. Barbee could be neither included nor excluded from the sample. 10/28/14(p.m.)RP 31.

Despite the equivocal evidence, Mr. Barbee was charged with one count of first degree unlawful possession of a firearm. CP 79. At trial, the parties stipulated he had a prior conviction for a "serious offense."[1] CP 55, 70, 72-73. The jury found Mr. Barbee guilty as charged. CP 20, 44.

Mr. Barbee appealed, arguing the evidence was insufficient to prove he knowingly possessed the gun in the lockbox. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review because the State did not prove beyond a reasonable doubt that Mr. Barbee knowingly possessed the gun in the lockbox.

To prove the crime of unlawful possession of a firearm in the first degree, the State was required to prove that Mr. Barbee "knowingly had a firearm in his possession or control." CP 56; RCW 9.41.040(1)(a).

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[1] As an element of the crime of unlawful possession of a firearm in the first degree, the State was required to prove that Mr. Barbee had a previous conviction for a "serious offense." RCW 9.41.040(1)(a); CP 56.

Constitutional due process required the State to prove these elements beyond a reasonable doubt.[2] See Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. To find the elements beyond a reasonable doubt, the trier of fact must "reach a subjective state of near certitude of the guilt of the accused." Jackson, 443 U.S. at 315.

On review, the Court presumes the truth of the State's evidence and draws all reasonable inferences from it. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

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[2] In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

1. The State did not prove Mr. Barbee had dominion and control over the gun because it was in a locked box for which he did not have a key; he never handled the gun and could not easily reduce it to actual possession; and he did not own or have exclusive control over the car in which the gun was found.

Possession can be actual or constructive. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession requires the item be in the actual, physical custody of the person charged with the crime. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Here, Mr. Barbee did not have actual physical custody of the gun. Thus, the State was required to prove he had constructive possession of it.

Constructive possession involves "dominion and control" over the item. Callahan, 77 Wn.2d at 29. Constructive possession is established by viewing the totality of the circumstances. State v. Turner, 103 Wn. App. 515, 522-23, 13 P.3d 234 (2000). The fact that a person has dominion and control over the premises where contraband is found is only one of the circumstances from which constructive possession can be inferred; it is not alone sufficient to prove constructive possession. State v. Shumaker, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007); State v. Olivarez, 63 Wn. App. 484, 486, 820 P.2d 66 (1991). "It is not a crime to have dominion and control over

the premises where the substance is found." Olivarez, 63 Wn. App. at 486. The State must present additional evidence to prove dominion and control of the contraband.

Although exclusive control of the contraband is not a prerequisite to establishing constructive possession, mere proximity of the contraband to the defendant is insufficient to show dominion and control. State v. Enlow, 143 Wn. App. 463, 469, 178 P.3d 366 (2008). If there is no evidence to show the defendant ever actually handled the contraband, this is a significant factor weighing against a finding of constructive possession. Id. Also relevant is whether the defendant had *the ability* to reduce the item to actual possession. Turner, 103 Wn. App. at 521. "Dominion and control means that the object may be reduced to actual possession immediately." State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

In Enlow, police officers found Enlow under a blanket in the canopy part of a truck. Enlow, 143 Wn. App. at 465. A search of the truck revealed methamphetamine and the materials used to make methamphetamine. Id. During the search, officers found identification cards bearing Mr. Enlow's name and property with his fingerprints on it. Id. But his fingerprints were not found on items containing

methamphetamine or items used to manufacture it. Id. Enlow did not own the truck or the house where it was parked. Id. at 469. Under the totality of the circumstances, the evidence was insufficient to prove Enlow had dominion and control over the contraband contained in the truck. Id. at 470.

By contrast, if the defendant owned or was driving the vehicle in which the contraband was found, knew of the presence of the contraband or admitted it was his, and could easily reduce the contraband to actual possession, the circumstances are likely sufficient to prove constructive possession. In Turner, for instance, Turner admitted the truck he was driving was his, and knew of the rifle's presence in an open case on the back seat. Turner, 103 Wn. App. at 521-22. The rifle was within arm's reach and he could easily reduce it to his actual possession. Id. These circumstances were sufficient to prove Turner possessed or controlled the rifle Id.

Likewise, in Jones, Jones was driving a car in which his girlfriend was a passenger. Jones, 146 Wn.2d at 331. Police found a firearm inside the girlfriend's purse. Id. The evidence was sufficient to prove that Jones had constructive possession of the firearm, but not simply because he exercised control over the car and its contents.

Jones also stored items in the purse and admitted the gun in the purse was his. Id. at 333. Under the totality of the circumstances, the evidence was sufficient to show Jones exercised control over the items he stored in the purse. Id.

In this case, ownership of the car that Mr. Barbee was driving is one factor to consider when assessing whether he had constructive possession of the gun found in the trunk. See Enlow, 143 Wn. App. at 469. It is undisputed that Mr. Barbee *did not* own the car. It was registered to someone else. 10/28/14(a.m.)RP 38, 76. Mr. Barbee and his girlfriend were in the process of purchasing the car from the owner, and had been using it for about one month at the time of Mr. Barbee's arrest. 10/27/14RP 107, 114-15; 10/28/14(a.m.)RP 17. The fact that Mr. Barbee did not own the car weighs against a finding that he had control over the gun found in the trunk. See Enlow, 143 Wn. App. at 469.

But even if the evidence is sufficient to show Mr. Barbee had dominion and control over the car, despite the fact he did not own it, that is still not sufficient to show he had dominion and control over an item contained in a locked box in the trunk. Shumaker, 142 Wn. App. at 334; Olivarez, 63 Wn. App. at 486. Mr. Barbee did not have

exclusive control of the car. His girlfriend also used the car regularly and had a set of keys to it. 10/27/14RP 97-98, 116. The owner of the car, as well as Ms. Olson's sister-in-law, drove the car on occasion. 10/27/14RP 114-17.

Other factors that must be considered to determine whether Mr. Barbee had control over the gun include whether he ever actually handled it, and whether he had the ability to take actual possession of it immediately. Jones, 146 Wn.2d at 333; Enlow, 143 Wn. App. at 469; Turner, 103 Wn. App. at 521. These factors weigh heavily against a finding that Mr. Barbee had control of the gun.

There is no evidence that Mr. Barbee ever handled the gun or the lockbox, although other people did. One fingerprint was lifted from the top of the lockbox but it was not Mr. Barbee's. 10/28/14(p.m.)RP 15-16. Likewise, Mr. Barbee's fingerprints were not found on the gun. 10/28/14(p.m.)RP 16. DNA from at least three individuals—both male and female—was found on both the gun and the lockbox. 10/28/14(p.m.)RP 29, 31, 36. But there is no evidence that Mr. Barbee's DNA was included in the mixture. 10/28/14(p.m.)RP 31, 36. It is pure speculation to say that Mr. Barbee ever handled the gun or the

lockbox. The State may not rely upon speculation or conjecture to prove this essential fact. Colquitt, 133 Wn. App. at 796.

Moreover, the evidence shows that Mr. Barbee *could not* easily reduce the gun to his immediate, actual possession. The gun was contained in a locked box in the trunk of the car. 10/28/14(a.m.)RP 32-33, 35-36. Mr. Barbee did not have a key to the box, and no key was found anywhere in the car. 10/27/14RP 76-77, 119; 10/28/14(a.m.)RP 41. Mr. Barbee could not have immediately accessed the gun.

The deputy prosecutor argued in closing argument that Mr. Barbee had control of the gun because a file folder containing documents bearing his name was sitting next to the lockbox in the car, and because he carried other personal belongings in the car. 10/28/14(p.m.)RP 62-63. But whether Mr. Barbee carried personal belongings in the car does not establish that he had control or possession of an item in the car that he never actually handled. See Enlow, 143 Wn. App. at 465, 469. Again, "mere proximity alone is not enough to infer constructive possession." Id. at 469.

In sum, the State did not prove Mr. Barbee had dominion and control of the gun. He did not own the car in which the gun was found; he did not have exclusive possession of the car; he never actually

handled either the gun or the lockbox, although at least two other people did; and he could not easily reduce the gun to his immediate, actual possession. Under the totality of the circumstances, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Barbee had constructive possession of the firearm. Jones, 146 Wn.2d at 333; Enlow, 143 Wn. App. at 469; Shumaker, 142 Wn. App. at 334; Turner, 103 Wn. App. at 521; Olivarez, 63 Wn. App. at 486.

2. The State did not prove Mr. Barbee knew the gun was in the trunk.

An essential element of the crime of unlawful possession of a firearm is that the defendant knew he possessed a firearm. State v. Anderson, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000); CP 56. "A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he is aware of that fact or circumstance." CP 58; RCW 9A.08.010(1)(b)(i). In addition, "[i]f a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact." CP 58; RCW 9A.08.010(1)(b)(ii).

Knowledge may be inferred when the defendant's conduct indicates the requisite knowledge "as a matter of logical probability." State v. Warfield, 119 Wn. App. 871, 884, 80 P.3d 625 (2003). But

although knowledge may be inferred from the surrounding facts and circumstances, it may *not* be inferred from evidence that is "patently equivocal." See State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013).

Here, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Barbee knew a firearm was present in the trunk of the car. The firearm was contained in a locked box in a cluttered trunk, placed among many other miscellaneous items. 10/28/14(a.m.)RP 32, 40. The box was not immediately visible on first glance but was tucked in the corner behind the wheel well and obscured by other items. 10/28/14(a.m.)RP 39-40. Even if Mr. Barbee was aware of the box, there is no evidence he knew what was inside of it.

In State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997), the Court concluded the evidence was sufficient to show Echeverria knew the gun was present under his car seat because it was "in plain sight at Mr. Echeverria's feet and the reasonable inference [was] that he therefore knew it was there."

Here, by contrast, the gun was not in "plain sight." It was contained in a locked box inside the trunk of the car. Mr. Barbee did not have a key to the box and there is no evidence he ever opened the

box or knew what was inside it. 10/28/14(p.m.)RP 15-16, 29, 31, 36. This evidence is insufficient to show he had actual knowledge of the presence of the gun. It is also insufficient to show that a reasonable person in the same situation would know that a gun was hidden inside the box. See CP 58; RCW 9A.08.010(1)(b)(ii).

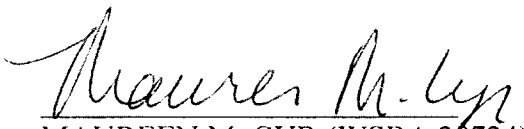
In closing argument, the prosecutor argued that Mr. Barbee's decision to run when confronted by police officers in the parking lot demonstrated "consciousness of guilt." 10/28/14(p.m.)RP 61. But that evidence is "patently equivocal." See Vasquez, 178 Wn.2d at 8. Mr. Barbee knew he was wanted on warrants and would be arrested and go to jail if apprehended by law enforcement. 10/28/14(a.m.)RP 26-27. That is a reasonable, and likely, explanation for his decision to run from the officers when they confronted him. It is purely speculation to conclude that he ran because he knew there was a firearm in the trunk, when there is no other evidence to show he had knowledge of the firearm.

The evidence was insufficient to prove beyond a reasonable doubt that Mr. Barbee knew a firearm was present in the trunk. The State failed to prove an essential element of the crime. See Anderson, 141 Wn.2d at 366.

E. CONCLUSION

Because the State did not prove beyond a reasonable doubt that Mr. Barbee knowingly possessed the firearm, this Court should grant review and reverse the Court of Appeals.

Respectfully submitted this 3rd day of May, 2016.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. VINCENT WILLIAM BARBEE, Appellant.	)	DIVISION ONE No. 73027-4-I UNPUBLISHED OPINION FILED: March 7, 2016

DWYER, J. — Vincent Barbee appeals from the judgment entered on a jury's verdict finding him guilty of one count of unlawful possession of a firearm in the first degree. Barbee contends that insufficient evidence was presented to prove either that he possessed a firearm or that he did so knowingly. Finding no error, we affirm.

I

On July 28, 2014, U.S. Marshalls were actively searching for Barbee in the Marysville area because he had active warrants for his arrest. Deputy U.S. Marshall John Westland was looking for a specific vehicle—a green Pontiac Grand Am—and learned over the radio that the vehicle he sought had been spotted pulling into the Arco gas station located at the intersection of Fourth and Beach streets. Westland saw Barbee park the green Grand Am. Jennifer Olson,

whom Westland recognized as Barbee's known girlfriend, was seated in the vehicle's passenger seat.

Westland coordinated the arrest plan via radio while Barbee made a purchase inside the convenience store attached to the Arco. When Barbee exited the convenience store, he walked toward the green Grand Am but, upon seeing law enforcement officers approaching, he turned around and ran north. Ultimately, Barbee ran only 40 to 50 yards across Beach Street to a Chevron gas station across the street. Finding his escape routes blocked, Barbee turned to a deputy and said, "Okay. I give up," then threw his cell phone and "proned himself out on the ground."

Deputies searched the green Grand Am that Barbee had been driving. Deputy U.S. Marshall Justin Strock observed that "the trunk and the entire of the backseat, even up to the front seat, was kind of strewn with men's and women's clothes. A lot of things piled up." Deputy U.S. Marshall Robert Gerg opened the glove compartment and found a credit card bearing Barbee's name as well as a change of address form in Olson's name. Inside the trunk, Gerg located a small, black metal lockbox. It was located "as you face the trunk, on the left side behind the wheel well, against the fender." He handed this locked box to Washington State Department of Corrections probation officer Michael Woodruff. Immediately adjacent to the lockbox in the trunk was a green envelope folder containing "a bunch of documents with [Barbee's] name on [them]." These documents included blank checks with Barbee's name on them, pay stubs issued to Barbee, and a Cash Express loan application in Barbee's name. The folder

also contained an address book with business cards and contact information inside, with the front page bearing the name "Vince Barbee."

Woodruff searched the vehicle as well and noticed the extremely cluttered contents. He located a Tulalip Players card in Barbee's name at the very bottom of the vehicle's full center console. He found another players card in Barbee's name inside a backpack in the backseat.

Woodruff attempted to open the lockbox that Gerg had located in the trunk. He tried all of the keys he could find, including the keys on the same key ring as the vehicle's ignition key and multiple loose keys found on the vehicle's floorboard. None of them opened the lockbox. Woodruff then located a small knife on the vehicle's floorboard and was able to "gently" pry the lockbox open with the knife. Inside the lockbox he found a small handgun and one round of .22 caliber ammunition. He subsequently tested the firearm and confirmed that it was functional.

Deputy Marcus Dill confronted Barbee at the scene of his arrest about the handgun that was found in the trunk of his vehicle. Barbee claimed that the car was not his and that he had never accessed the trunk.

On August 13, 2014, the State charged Barbee by information with one count of unlawful possession of a firearm in the first degree and further alleged that Barbee was under community custody when the crime occurred. RCW 9.41.040(1); RCW 9.94A.525(19). The information was amended on October 17, 2014 in order to identify with specificity Barbee's prior second degree burglary

conviction as the "serious offense" that elevated the charge to first degree status. RCW 9.41.010(3)(a), (21)(a). Barbee exercised his right to a jury trial.

At trial, the State called as witnesses the law enforcement officers who were involved in Barbee's arrest and the subsequent search of the green Grand Am. The State also called Olson as a witness. She testified that, at the time of Barbee's arrest, the two were dating and living together at a mutual friend's house. She denied that they were living out of their car, instead claiming that the car was so full of personal items because they were "transporting [their] stuff from one place to the other." On the day of Barbee's arrest, Olson had told the officers that she was in the process of purchasing the vehicle but did not yet consider it hers because she was still making payments toward it. At trial, however, she acknowledged that she and Barbee were in the process of buying the car *together.*

When asked to describe the contents of the vehicle on the day of the arrest, Olson acknowledged that the contents belonged both to her and to Barbee. She specifically recalled that the vehicle's trunk contained her own speakers and Barbee's "bank information." When asked if she had participated in loading property into the vehicle's trunk, Olson answered that she had "helped load the whole car," implying that she and Barbee had combined their efforts to load it. The prosecutor then asked whether it was true that Barbee had been the only one who loaded the trunk. Olson answered, "No, because I helped load the car."

The prosecutor then presented Olson her handwritten statement, signed under penalty of perjury, which she had given to the officers on the day of Barbee's arrest. Olson admitted that she had written, "Only Vince has been in the trunk." However, Olson asserted that her written statement was false and that Dill had threatened to throw her in jail if she did not write what he told her to write. She also claimed that she did not know "what perjury really mean[t]."

Dill denied making any threats or telling Olson what to write in her statement. Furthermore, Woodruff testified that he recalled Olson stating on the date of the arrest that Barbee was the only one who had loaded anything into the trunk for about a week or more.

The State also presented testimony about extensive—but, ultimately, inconclusive—forensic testing that was performed on the lockbox and the handgun that it contained. A Washington State Patrol latent print examiner, James Luthy, located one fingerprint on the top of the lockbox and excluded Barbee as the person who left the print. There was no way to determine how many other people had touched the lockbox or how long the lone fingerprint had been on the lockbox. The handgun did not have any prints on it, which was of no surprise to Luthy, as it is "pretty rare" for an impression to be left on a brushed metal surface.

Another State Patrol forensic scientist, Mariah Low, discussed DNA (deoxyribonucleic acid) testing performed on the lockbox and the handgun. She swabbed the sides, top, and handle of the lockbox in an effort to collect "touch

DNA,"[1] and determined that the collected sample contained a mixture of at least three people's DNA. However, the quantity of DNA was too small to include or exclude Barbee (who voluntarily provided a known DNA reference sample) as a contributor to the lockbox touch DNA mixture. Likewise, Low swabbed the handgun to collect potential touch DNA and identified a mixture of DNA contributed by at least three people. But, just as the touch DNA on the lockbox had been, the handgun touch DNA sample was insufficient to include or exclude Barbee as a contributor.

Just before the State rested, the court instructed the jury pursuant to the parties' stipulation that "the defendant has previously been convicted of a serious offense for purposes of proving that element of the charge of unlawful possession of a firearm in the first degree." The jury returned a verdict of guilt. The court imposed a DOSA sentence[2] of 50.75 months in prison, followed by 50.75 months on community custody.

II

Barbee contends that insufficient evidence supports his conviction. This is so, he asserts, because the evidence adduced at trial does not support the jury's finding that he knowingly possessed a firearm. We disagree.

In determining the sufficiency of the evidence, the standard of review is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime

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[1] This is also known as "cellular DNA." Low testified that it is DNA that comes from skin cells.

[2] Drug Offender Sentencing Alternative, or DOSA, is an alternative to traditional incarceration that is designed to provide chemical dependency treatment and supervision for addicted offenders.

beyond a reasonable doubt." State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The pertinent statute provides that

> [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 . . . in this state or elsewhere of any serious offense as defined in this chapter.

RCW 9.41.040(1)(a).

Hence, as the court's instructions to the jury provided, in order for the jury to convict Barbee as charged, it was required to find, in pertinent part, that, "on or about July 28, 2014, the defendant knowingly had a firearm in his possession or control." Jury Instruction 8.

Barbee contends that the State failed to prove either knowledge or possession.

A

Barbee first asserts that the State failed to prove that he possessed the gun that was located in the trunk of the green Grand Am.

"Possession may be actual or constructive." State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Actual possession requires the item be in the actual physical custody of the person charged with the crime. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Herein, Barbee did not have

actual physical custody of the gun. Thus, the State was required to prove that he had constructive possession of it.

"[C]onstructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found." Echeverria, 85 Wn. App. at 783. No single factor is dispositive in determining dominion and control; the totality of the circumstances must be considered. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). The ability to reduce an object to actual possession is an aspect of dominion and control. Echeverria, 85 Wn. App. at 783. Dominion and control does not have to be exclusive to establish constructive possession, State v. Porter, 58 Wn. App. 57, 63 n.3, 791 P.2d 905 (1990), but close proximity alone is not enough to establish constructive possession. State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990). "Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found." State v. Chouinard, 169 Wn. App. 895, 899-900, 282 P.3d 117 (2012); see, e.g., State v. Bowen, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010); State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000); Echeverria, 85 Wn. App. at 783; State v. McFarland, 73 Wn. App. 57, 70, 867 P.2d 660 (1994), aff'd, 127 Wn.2d 322, 899 P.2d 1251 (1995); State v. Reid, 40 Wn. App. 319, 326, 698 P.2d 588 (1985).

Herein, the evidence adduced at trial was replete with indications that Barbee exercised dominion and control over the premises in which the firearm

was found, the green Grand Am. For example, it was uncontroverted that Barbee drove the vehicle and possessed keys to it. The evidence also established that Barbee and Olson utilized the vehicle as a storage space for their possessions, if not also as a de facto residence. Moreover, Olson told police that, although both she and Barbee had used the vehicle, only Barbee had accessed the trunk.[3] As set forth above, this evidence is sufficient to support an inference—upon which the jury was entitled to rely—that Barbee had dominion and control over not only the vehicle, but also the firearm located within it.[4]

Moreover, Barbee's ability to take actual possession of the handgun was demonstrated through the testimony of Woodruff, who was able to open the lockbox and access the gun using a knife that he found on the floorboard of Barbee's vehicle. Barbee had access to the same knife. Barbee also had possession of the key to the trunk that contained the lockbox. Therefore, Barbee, too, could have used the knife to gently "pop" open the lockbox.[5]

The record contains sufficient evidence to support the jury's determination that Barbee had "dominion and control" over the gun and, thus, had constructive possession of the firearm.

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[3] Hearsay statements admitted without objection are competent evidence sufficient to support a finding that the statement is true. See State v. Rochelle, 11 Wn. App. 887, 889, 527 P.2d 87 (1974).

[4] Barbee's argument to the contrary relies upon the fact that he possessed the vehicle in common with Olson. While this is true, at least as regards the use of the vehicle in general (but not as regards access to the vehicle's trunk), it is of no moment to our analysis. As set forth above, exclusive ownership or possession is not required to establish constructive possession.

[5] Barbee's further argument to the contrary relies on the absence of DNA evidence affirmatively linking him to the firearm. He cites no authority for the proposition that such evidence is required to sustain his conviction.

B

Barbee next asserts that the State failed to prove that he *knowingly* possessed the gun found in the trunk of the green Grand Am.

As the jury was instructed,

> A person knows or acts knowingly or with knowledge with respect to a fact or circumstance when he is aware of that fact or circumstance. It is not necessary that the person know that the fact or circumstance is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact.

Jury Instruction 10; accord RCW 9A.08.010(1)(b).

"Knowledge may be inferred when the defendant's conduct indicates the requisite knowledge as 'a matter of logical probability.'" State v. Warfield, 119 Wn. App. 871, 884, 80 P.3d 625 (2003) (quoting State v. Stearns, 61 Wn. App. 224, 228, 810 P.2d 41 (1991)). Although knowledge may be inferred from the surrounding facts and circumstances, it may not be inferred from evidence that is "'patently equivocal.'" State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013) (quoting State v. Woods, 63 Wn. App. 588, 592, 821 P.2d 1235 (1991)). "A reasonable inference of knowledge of the item possessed can come from an extended period of control of the premises." State v. Gerke, 6 Wn. App. 137, 142, 491 P.2d 1316 (1971); see, e.g., State v. Weiss, 73 Wn.2d 372, 438 P.2d 610 (1968); State v. Emerson, 5 Wn. App. 630, 489 P.2d 1138 (1971).

Herein, the evidence adduced at trial indicated that Barbee knew of the gun that was located within the trunk of the Grand Am. Testimony established that Barbee and Olson, who were purchasing the vehicle together, had enjoyed possession of the Grand Am for approximately one month at the time of Barbee's arrest. Moreover, they had used the vehicle not only for travel, but also as a storage space. Barbee's and Olson's possessions were "piled up" inside the vehicle—in both the passenger compartment and the trunk. In the trunk, immediately adjacent to the lockbox in which the gun was found, was a green envelope folder containing documents with Barbee's name on them. These documents included blank checks with Barbee's name on them, pay stubs issued to Barbee, and a Cash Express loan application in Barbee's name. Furthermore, evidence was presented that, on the date of Barbee's arrest, Olson told police that "only" Barbee had accessed the vehicle's trunk. From this evidence of Barbee's control over the vehicle, particularly the trunk, for an extended period of time, there is a reasonable inference—upon which the jury was free to rely—that Barbee knew of the presence of the firearm in the vehicle.

Additionally, the State presented evidence that Barbee tried to minimize his connection to the vehicle, and the trunk in particular, when speaking to officers on the day of his arrest. Specifically, Barbee claimed that day that the vehicle was not his and that he had never accessed its trunk. The jury reasonably could have perceived Barbee's efforts in this

regard as evidence of his consciousness of guilt and, thus, as evidence of his knowledge of the presence of the gun in the vehicle's trunk.

The record contains sufficient evidence to support the jury's determination that Barbee knew that a firearm was located in the trunk of his vehicle. Therefore, sufficient evidence was presented to support Barbee's conviction.

Affirmed.

We concur:

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 73027-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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Date: May 3, 2016