

FILED
Court of Appeals
Division II
State of Washington
7/1/2019 4:26 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
7/2/2019
BY SUSAN L. CARLSON
CLERK

Supreme Court No. 97377-6

Court of Appeals No. 50433-2-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

GERALD LAWRENCE COLE, JR.,

Petitioner.

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

PETITION FOR REVIEW

Kate Benward
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 1

B. ISSUE PRESENTED FOR REVIEW..... 1

C. STATEMENT OF THE CASE..... 2

 1. Five officers fight Mr. Cole to the ground, repeatedly tase him, and later claim their tasers had no effect..... 2

 2. Officers give varying accounts about the presence of a weapon during the altercation, and claim there was a gun present to justify their use of force against Mr. Cole. 6

 3. The jury acquits Mr. Cole of all assault charges against the officers, including assaulting Officer Welsh with a deadly weapon and attempting to disarm him, and the court arrests judgment on the remaining felony charge. 9

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED 10

The Court of Appeals’ decision reversing the trial court’s determination that the State failed to prove Mr. Cole knowingly possessed a firearm far too leniently construes the standard necessary to establish knowing possession, contrary to existing case law and the constitution. RAP 13.4(b)(1),(2),(3) and (4)..... 10

 a. The trial court viewed the evidence in the light most favorable to the prosecution when it granted Mr. Cole’s motion for arrest of judgment..... 10

 b. The State failed to prove either actual or constructive possession. 14

 c. There is no evidence Mr. Cole acted knowingly..... 18

E. CONCLUSION 20

TABLE OF AUTHORITIES

Washington State Supreme Court Cases

State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000)..... 19

State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969)..... 14

State v. Davis, 182 Wn.2d 222, 340 P.3d 820 (2014)..... 14, 17

State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002)..... 17, 18

State v. Longshore, 141 Wn.2d 414, 5 P.3d 1256 (2000)..... 13

State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977)..... 17

State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 14, 15, 17

Statutes

RCW 9A.08.010(1)(b)(i) 19

Rules

CrR 7.4.....10

CrR 7.5.....10

RAP 13.3..... 1

RAP 13.4(b)..... 1, 2, 10

Washington Court of Appeals Decisions

State v. Enlow, 143 Wn. App. 463, 178 P.3d 366 (2008)..... 17

State v. Jackson, 82 Wn. App. 594, 918 P.2d 945 (1996) 14

State v. Stearns, 61 Wn. App. 224, 810 P.2d 41 (1991)..... 19

State v. Summers, 107 Wn. App. 373, 28 P.3d 780 (2001) 17

State v. Warfield, 119 Wn. App. 871, 80 P.3d 625 (2003)..... 14, 19

United States Supreme Court Decisions

Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)
13

Federal Court Decisions

United States v. Landry, 257 F.2d 425 (7th Cir.1958)..... 15

A. IDENTITY OF PETITIONER

Gerald Cole Jr., petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision 50433-2-II, issued on May 30, 2019, pursuant to RAP 13.3 and RAP 13.4(b)(1),(2),(3) and (4). The opinion is attached.

B. ISSUE PRESENTED FOR REVIEW

After hearing extensive testimony about five officers' violent arrest of Mr. Cole, a black man suspected of DUI, the jury rejected the officers' claims that Mr. Cole assaulted them, acquitting him of all the assault charges stemming from the officer's arrest. The jury convicted Mr. Cole of the remaining felony, unlawful possession of a firearm.

After trial, Mr. Cole moved to arrest judgment on the charge of unlawful possession of a firearm due to insufficient evidence. The same judge who heard the evidence at trial granted Mr. Cole's motion to dismiss the remaining charge—the first time the judge had granted such a motion in his sixteen years on the bench.

The State appealed, and the Court of Appeals reversed the trial court, interpreting the officers' conflicting testimony, which the jury determined did not support the assault charges, was sufficient to establish Mr. Cole knowingly possessed a firearm, contrary to established case law

that requires more than mere proximity to a gun in order to establish knowing possession.

Mr. Cole seeks review by this Court of whether the trial court correctly determined the evidence was insufficient to support the charge of knowing possession of a firearm under RAP 13.4(b)(1), (2), (3) and (4).

C. STATEMENT OF THE CASE

Mary Graves was up late working in her home when she heard a bump and discovered a car had driven into her yard. RP 646, 648. She saw a black man trying to get help and move the crashed car. Ex. 35; RP 640. Thomas Graves, Mary's husband, called 911. RP 649.

Officers Ryan Bradley, Jimmy Welsh, and Gerald Bratcher were the first officers to respond to the Graves' 911 call about the crash, which reported a black man in his mid-30s, possibly intoxicated, stumbling around. RP 51-52, 183, 288, 641.

1. Five officers fight Mr. Cole to the ground, repeatedly tase him, and later claim their tasers had no effect.

When officers first arrived, they saw Mr. Cole climbing out of the car window feet first. RP 107, 117, 120. Officer Bratcher shined his spotlight inside Mr. Cole's car. RP 290. The area was well lit. RP 116. Mr. Cole's boxer underwear were visible to police because his pants were sagging. RP 108, 111, 120. The officers did not see a weapon on Mr. Cole even though his pants were down below his waist. RP 116-117.

Mr. Cole fled. RP 62-63. Officers Welsh and Bratcher tackled Mr. Cole. RP 63, 295. Officer Welsh tried to grab his left arm. RP 64. Officer Bratcher moved in behind and tried to grab his right arm but the officer stumbled to the ground. RP 63, 294-295. Officer Bratcher got back up and grabbed Mr. Cole's right arm. RP 295-296. They fell to the ground. RP 296. None of the officers saw a weapon fall when Mr. Cole landed on the ground. RP 120.

Officer Bratcher was partially under Mr. Cole's body while his other foot was trapped in a fence. RP 303. He kept trying to maintain control of Mr. Cole's right arm but he said that Mr. Cole exhibited great strength, pulling his arm away, tucking it under his body. RP 296-7, 303.

Officer Bradley was the third officer to arrive. RP 63. Officer Bradley attempted to take Mr. Cole's legs out from underneath him to get him down to the ground. RP 69. He was kicked in his lower extremities. RP 69. Officer Bradley described this as a "chaotic fight" with "lots of closed fists and elbows and things being swung at the officers." RP 64. Officer Bradley said that Mr. Cole's "feet were planted on the ground and hands were also planted on the ground, bent over, so the legs and the torso had not made contact with the ground at this point." RP 120. No weapon was observed when Mr. Cole hit the ground. RP 121.

Officers Matthew Riche and Kenneth Smith arrived soon after and saw the officers on the ground struggling with Mr. Cole. RP 183, 306. Mr. Cole was face down when Officer Riche ran up and jumped on Mr. Cole's leg. RP 186. Officer Welsh tried to control Mr. Cole's left arm, Officer Bradley held down his legs, and Officer Bratcher held Mr. Cole by his right arm. RP 187.

Officer Riche said he heard the subject may have had a firearm, and shot Mr. Cole with his taser. RP 189. Mr. Cole's hands and feet were on the ground when Officer Riche tased him. RP 121. Officer Riche tased Mr. Cole more than once, trying to create an electrical circuit between his back and thigh. RP 191. He also shot Mr. Cole with Officer Bradley's taser. RP 261.

Officer Riche reported the taser did not have the effect he wanted on Mr. Cole. RP 262-263. Mr. Cole did not exhibit the usual physical symptoms of muscles that freeze up and hands going in fists in front of the chest. RP 262-264. However, both Officers Riche and Smith described that Mr. Cole kept tucking his hands underneath his body. RP 195, 367.

Officer Bradley thought that Officer Riche's taser was working better than his, but still he did not believe that either taser had any effect. RP 92-93. He sprayed Mr. Cole directly in the face with pepper spray. RP

94. The officers then handcuffed Mr. Cole and called an ambulance. RP 397, 468.

Prior to driving that night, Mr. Cole smoked a marijuana cigarette with an old friend. RP 612, 618. Unbeknownst to Mr. Cole, it was laced with PCP, or angel dust. RP 593, 611.¹ He described that after he smoked it, his head was “thumping like it was just spinning and out of control.” RP 687. Mr. Cole did not remember losing control of his car. RP 688.

Mr. Cole was taken to the hospital and blood tests revealed that he had ingested PCP. RP 593. The treating doctor described the effects of the drug as:

very strong and difficult to control. It almost brings out aggression in people is the usual description of acute PCP intoxication and it also can cause hallucinations and behavioral, mental changes. But also in terms of muscular strength and contractions, it has been described as making one almost super human or like a charge of adrenaline.

RP 596-597.

Mr. Cole did not remember having contact with the police that night. RP 689. He only vaguely remembered being at the hospital. RP 689. But he does know that at that time, he did not own a firearm, nor could he have, because he was under community supervision, which prohibited him from owning or possessing a firearm. RP 693-694.

¹ The pharmacological name for PCP is phencyclidine.

2. Officers give varying accounts about the presence of a weapon during the altercation, and claim there was a gun present to justify their use of force against Mr. Cole.

Detective Katz sent an e-mail to Officer Welsh two days after Mr. Cole's arrest, saying he had "a few clarifying questions regarding the positioning of the suspect when the gun came out." The detective wanted to be "sure we have it right" and asked to meet with Officer Welsh that weekend. Supp. CP ____, sub. no. 94. Despite this effort to "clarify" various officer accounts of seeing a gun that night, the officers gave differing testimony of the appearance of a firearm during their altercation with Mr. Cole.

Officer Riche described that while trying to gain control of Mr. Cole's legs, "I was advised that at some point he had a firearm potentially, and then, um, further down, he, I was told that he was trying to grab an officer's gun." RP 188. He said that this claimed presence of a firearm "ups the threat level," and that was why he shot Mr. Cole with his taser. RP 203.

Officer Welsh described a gun was pushed into his hip and stomach area. RP 457. He said "it was literally pushed into my hip and my lower stomach area." RP 458. He described, "at this point, it gets very challenging for us, having a gun directed at me and placed into my stomach, we're at the level of deadly force now. I'm concerned that the

gun may go off, that I may be shot.” RP 458. Officer Welsh said he ripped the firearm from Mr. Cole’s hand, and “the firearm kind of flies up in the air, then lands roughly— it appears to land in front of us or right in the middle of us.” RP 461. He said that this firearm was unaccounted for until Officer Smith grabbed it. RP 466-67.

Officer Welsh also said that after the gun flew from Mr. Cole’s hand, he felt Mr. Cole’s arms around his waist, and that Mr. Cole grabbed the heel of his firearm. RP 464. Officer Welsh claimed that Mr. Cole tried to remove his firearm from his duty belt during the struggle. RP 465.

Officer Welsh said that the gun pointed at him was consistent with the .22 Ruger that was introduced at trial. RP 458, 471. Mr. Cole was charged with assault in the second degree with a deadly weapon and attempting to disarm a police officer based on Officer Welsh’s description. CP 1, 3. The jury acquitted Mr. Cole of these charges. CP 44, 48.

No other officer saw a firearm fly through the air as described by Officer Welsh. RP 461. Officer Smith said he saw a gun located between Mr. Cole’s “stomach, waist, the lower stomach waist area and the ground and Officer Welsh’s knee.” RP 366. He said that during this time, he saw Mr. Cole’s left hand on Officer Welsh’s duty belt. RP 368. Officer Smith grabbed the gun by the barrel and took it towards himself in a swinging motion, ripped it out from underneath Mr. Cole and stood up with it. RP

365. He said he placed on a picnic table about 20 feet away. RP 371.

Officer Smith said he left it there and returned to the fight. RP 371.

By contrast, Officer Bradley claimed to see Mr. Cole with his hand on a gun under his body, then saw a firearm get swept away and land about two feet away from them in the grass while they were still actively fighting and rolling around on the ground. RP 97.

Officer Bratcher never saw a gun when he was down on the ground with Mr. Cole from the start of the incident. RP 310. He said that “Officer KP Smith showed me the gun that was supposedly pulled off the defendant.” RP 310. Officer Riche never saw a gun until after the altercation, when Officer Smith handed him a gun that he booked into evidence. RP 203, 206.

Despite two officers being present during booking, they neglected to put an evidence seal on the bag containing the gun. RP 272. No photographs were taken of the gun they claimed was found that night. RP 406. The gun was not sent to the crime lab for fingerprints. RP 274, 397, 505.

Mr. Cole represented himself. Pre-trial and at trial, he argued for exclusion of the firearm because the evidence bag containing the firearm was not sealed with evidence tape, and there was not a record of all the people who had handled the firearm. Ex. 29; RP 221-240, 322, 515. The

trial court noted “concern,” about the firearm’s chain of custody, finding it “unusual” for evidence to be unsealed with evidence tape, but admitted the gun at trial, noting the chain of custody problems went to weight, not the admissibility of the evidence. RP 236-237, 240, 363, 546, 566.

Mr. Cole maintained throughout the proceedings that police made up the allegation that he had a gun in his hand during the altercation to justify their use of force that night, arguing in closing:

And I believe I’m blessed, but I ain’t that blessed because we know that they would have killed me. There’s no, if one had killed me for allegedly pulling a gun, the other would have killed me. There’s no way that you can keep trying to go for weapons and pull a 10-inch weapon on somebody and nobody see it. That’s impossible. Because all this is lit up. It’s a makeshift story of what they’re saying.

RP 797.

3. The jury acquits Mr. Cole of all assault charges against the officers, including assaulting Officer Welsh with a deadly weapon and attempting to disarm him, and the court arrests judgment on the remaining felony charge.

Despite the officers’ claims that Mr. Cole assaulted them, the jury acquitted him of each assault charge. CP 44, 46, 47. The jury also acquitted Mr. Cole of attempting to disarm Officer Welsh. CP 48. The jury convicted Mr. Cole of unlawful possession of a firearm and driving with license suspended. CP 1-3; 45, 49.

Mr. Cole moved to arrest judgment and receive a new trial under CrR 7.4 and 7.5 on the grounds that the State introduced insufficient evidence that he *knowingly possessed* a firearm. CP 56-62.

The trial court wrestled with the issue for days before the hearing on Mr. Cole's motion to arrest judgment. RP 870, 878. The court was "reticent" because of its confidence in the jurors, but recognized its duty to "equally apply the law and justice to everybody that comes before the Court." RP 878. The trial court determined that even when viewed in the light most favorable to the State, no reasonable juror could find Mr. Cole knowingly possessed a firearm. RP 878. The Court dismissed the unlawful possession charge² and the State appealed. CP 102; RP 878-879.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

The Court of Appeals' decision reversing the trial court's determination that the State failed to prove Mr. Cole knowingly possessed a firearm far too leniently construes the standard necessary to establish knowing possession, contrary to existing case law and the constitution. RAP 13.4(b)(1),(2),(3) and (4).

a. The trial court viewed the evidence in the light most favorable to the prosecution when it granted Mr. Cole's motion for arrest of judgment.

The trial court carefully considered Mr. Cole's motion and applied the correct legal standard. The court noted how unusual Mr. Cole's case

² The trial court did not consider Mr. Cole's CrR 7.5 motion because it granted Mr. Cole's requested relief under CrR 7.4.

was, remarking that in sixteen years as a trial court judge, he had never before entertained such a motion. RP 878.

Mr. Cole argued various grounds on which the Court could arrest judgment or grant a new trial, including an insufficient charging document, insufficiency of proof of a material element, and perjured officer testimony. CP 54-55.

Mr. Cole filed a detailed motion arguing that the State failed to prove that he knowingly possessed the firearm, either under a theory of actual or constructive possession.³ CP 56-62. The State provided a very limited response to Mr. Cole's argument about the evidence necessary to establish knowing possession, asserting generally that civilian and law enforcement witnesses testified, that the "the State introduced evidence regarding the defendant's actions that evening," and that the jury was properly instructed on the elements. CP 71, 72.

At the hearing on Mr. Cole's motion to arrest judgment, the court stated it had read Mr. Cole's pleadings. RP 870. Mr. Cole argued the State introduced insufficient evidence of either knowing or constructive possession at trial. RP 871-872.

³ Mr. Cole argued that the officers committed perjury in section B of his brief. CP 53.

The trial court noted it must not interfere with the jury's findings of witness credibility, stating the narrow grounds were whether a "reasonable jury could find that each element of the crime has been met beyond a reasonable doubt." RP 875. The trial court then stated the standard by which to assess whether the elements were met: "And, in assessing that, I have to look at those facts in the light most favorable to the non-moving party, which, in this case, is the State, and so I just want to put it in context what the inquiry is." RP 875.

After stating the correct standard by which to rule on Mr. Cole's motion to arrest judgment, the trial court concluded that the State failed to prove evidence sufficient to establish a material element of the crime.

THE COURT: I've been a judicial officer for 16 years. I have never entertained a motion for an arrest of judgment. I have maximum confidence in the jurors that come in here, including the jurors that were jurors in your case, Mr. Cole; however, I'm actually going to grant your motion and find that the element of knowing possession, a reasonable jury could not find knowing possession in this case, actual or constructive, and I'm viewing the facts in the light most favorable to the State. I have wrestled with this for several days, and I shouldn't say it this way, as much as I am reticent or hate to do it or admit it, but I have to equally apply the law and justice to everybody that comes before the Court, and I don't believe that that element could be met in this case.

RP 878.

The trial court specifically stated it could not supplant its own credibility determinations for those of the jury, telling Mr. Cole: "So I

understand your concern about the officers and how they may have, whatever the jurors felt about the evidence, but that really isn't before the Court." RP 875. The Court unequivocally ruled that the element of knowing possession was not met in this case, either as actual or constructive possession. RP 878.

Review of a trial court decision denying either a motion for directed verdict or a motion for arrest of judgment requires the appellate court to engage in the same inquiry the trial court applied in Mr. Cole's case, affirming the trial court's arrest of judgment when "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could not 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. Longshore*, 141 Wn.2d 414, 420-421, 5 P.3d 1256 (2000). This analysis includes all evidence presented at trial. *State v. Warfield*, 119 Wn. App. 871, 884, 80 P.3d 625 (2003) (citing *State v. Jackson*, 82 Wn. App. 594, 608, 918 P.2d 945 (1996)).

The Court of Appeals far too broadly construed the standard for establishing knowing possession in overturning the trial court's well-reasoned decision that Mr. Cole did not knowingly possess a firearm as a matter of law. Slip op. at 6-7.

b. The State failed to prove either actual or constructive possession.

The officers' testimony that Mr. Cole fleetingly grasped a gun was not sufficient to establish either actual or constructive possession of a firearm.

A person actually possesses something that is in his or her physical custody, and constructively possesses something that is not in his or her physical custody but is still within his or her "dominion and control." *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

To establish actual possession the prosecution must prove more than a passing control; it must prove actual control. *Id.* (citing *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994)); *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969) ("Possession entails actual control, not a passing control which is only a momentary handling"). Actual possession is a close question when the evidence indicates the person physically handles the gun for no more than a brief moment. *Davis*, 182 Wn.2d at 228, n. 4.

Actual possession requires the person "have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature." *Staley*, 123 Wn.2d at 801(citing *United States v. Landry*, 257 F.2d 425, 431 (7th Cir.1958)) (internal quotation omitted).

The length of time is but a factor in determining whether the State proved actual, and not merely passing possession. *Id.* A defendant's momentary handling of an item, unless there is other sufficient indicia of control, cannot support a finding of possession. *Id.* at 802.

The prosecutor's citation to the existence of a gun at the scene is not sufficient to establish Mr. Cole's possession of the gun:

- "A firearm was recovered and removed from the fight." Brief of Appellant at 5 (citing RP 90, 365);
- Officer Smith heard Officer Welsh say, "I think he has a gun." Brief of Appellant at 5 (citing RP 362);

The only other citations to the record on appeal establish nothing more than fleeting, brief touching of a gun during a fight:

- Officer Smith looked down and saw the barrel of a handgun pointed at Officer Welsh. Brief of Appellant at 5 (citing RP 363);
- Officer Welsh stated that he looked down during the fight and saw the barrel of a semiautomatic firearm wedged between his duty belt and body, pointed directly at him. Brief of Appellant at 5 (citing RP 457);
- Officer Welsh was able to feel the barrel of the gun literally pushed into his hip and stomach area. Brief of Appellant at 5-6, 10 (citing RP 457);

- Officer Welsh could tell the defendant's hand was around the gun. Brief of Appellant at 6 (citing RP 457-458);
- Officer Bradley observed the defendant physically holding the firearm under his body. Brief of Appellant at 6, 10 (citing RP 97).

Notably, the prosecutor on appeal relies primarily on Officer Welsh's description that Mr. Cole wedged a firearm between his belt and body to establish possession. The jury rejected these facts when they acquitted Mr. Cole of attempting to disarm and assault with a deadly weapon against Officer Welsh. CP 1, 23, 44, 46-48; RP 71, 85, 101, 120, 457, 467, 765, 860.

But even if this were not the case, Officer Welsh's testimony, and Officer Bradley's claim about Mr. Cole's hand momentarily grasping a firearm does not establish knowing possession of a firearm. Even if it was fleetingly in Mr. Cole's hand, this is not actual possession, but mere passing control that cannot constitute actual possession absent other indicia of control to support actual possession. *Staley*, 123 Wn.2d at 802.

Nor do the officers' report of fleeting, passing possession establish constructive possession of the firearm. A person constructively possesses something that is not in his or her physical custody but still within his or her "dominion and control." *Davis*, 182 Wn.2d at 227. Courts determine whether a person has dominion and control over an item by considering

the totality of the circumstances. *State v. Summers*, 107 Wn. App. 373, 384, 28 P.3d 780 (2001) (citing *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)). 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). “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 *Davis*, the defendant was the decision maker about the gun’s location for about 15 minutes, when he placed the gun in a shopping bag. *Davis*, 182 Wn.2d at 228. The original owner did not know where the gun was while it was in Davis’s possession. And Davis relinquished control over the gun by handing it back to Clemmons. *Id.* This control over the gun for a period of 15 minutes was sufficient to establish constructive possession. *Id.*

Davis exercised constructive possession over a firearm because he had it for a period of time inside his house. By contrast, Mr. Cole was tackled to the ground in a public place. He could not have exercised dominion and control over the firearm, where he had no control over his surroundings, and at no time did he reduce a gun to his actual possession. *Jones*, 146 Wn.2d at 333.

There was no evidence that Mr. Cole possessed a firearm prior to the chaotic fight that could have been inferred to establish control and dominion over the firearm. There was no report of a weapon in the 911 call. RP 62-63. As Mr. Cole fled Officer Bradley noted, it “didn’t appear he had a cell phone or keys or anything in his hands at all.” RP 63. Even though Mr. Cole’s waistband was visible, no witness saw a firearm in Mr. Cole’s waist area. RP 117. Officer Bradley saw no weapon, either when Mr. Cole first slipped or when his hands were on the ground. RP 120. Police found no holster at any time. RP 121, 271. Thus, there was no evidence of the gun’s origin beyond police claims of seeing a gun mid-way through wrestling Mr. Cole to the ground.

The officers’ description of events establish nothing more than Mr. Cole’s proximity to a gun that he fleetingly grabbed onto and that at some point was seen under his body. Even when viewed in the light most favorable to the prosecution, this is not sufficient to establish either actual or constructive possession of the firearm officers claimed to see during the chaotic struggle.

c. There is no evidence Mr. Cole acted knowingly.

Unlawful possession of a firearm is not a strict liability offense. *State v. Anderson*, 141 Wn.2d 357, 366-367, 5 P.3d 1247 (2000). The State has the burden to prove a “culpable mental state” for this offense. *Id.*

at 366. 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.” RCW 9A.08.010(1)(b)(i); CP 31.

Knowledge may be inferred when the defendant’s conduct indicates the requisite knowledge as “a matter of logical probability.” *Warfield*, 119 Wn. App. at 884 (citing *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991)). At no time prior to the chaotic fight was Mr. Cole seen with a gun, and his intoxicated state at the time of the offense would not allow a reasonable juror to infer he acted with knowledge when his hand briefly gripped the firearm as described by Officers Welsh and Bradley.

Mr. Cole made no statement about owning a gun or knowing about the gun the police found when he was arrested. He unequivocally stated he did not own or possess a gun previous to the altercation. RP 694. And there was no evidence he knew of a gun prior to the fight with police. Mr. Cole was visibly under the influence, and as described by a lay witness, did not appear to know what was going on. RP 641. The only other evidence of Mr. Cole’s mental state introduced at trial was his testimony that he had no recollection of the altercation due to intoxication. RP 694, 697.

The evidence of Mr. Cole's mental state was that he was intoxicated and unaware of his circumstances, which, even when viewed in the light most favorable to the State, simply cannot support *knowing* possession.

The State offered no evidence of either Mr. Cole's mental state or any form of possession that went beyond momentary touching of the firearm. The Court of Appeals overrode the trial court's correct determination that the State failed to meet its burden of proof by too broadly interpreting the officers' compromised testimony about their belief that there was a gun present when the violently arrested Mr. Cole. Slip op. at 6-7.

E. CONCLUSION

Based on the foregoing, Mr. Cole respectfully requests review by this Court.

Respectfully submitted this the 1st day of July 2019.

s/ Kate Benward
Washington State Bar Number 43651
Washington Appellate Project
1511 Third Ave, Ste 610
Seattle, WA 98101
Telephone: (206) 587-2711
Fax: (206) 587-2711
E-mail: katebenward@washapp.org

May 30, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

GERALD LAWRENCE COLE, JR.,

Respondent.

No. 50433-2-II

UNPUBLISHED OPINION

SUTTON, J. — The State appeals the trial court’s order granting defendant Gerald Lawrence Cole, Jr.’s motion to arrest judgment and dismissing his conviction for unlawful possession of a firearm conviction with prejudice. The State argues that sufficient evidence was presented that Cole knowingly possessed the firearm at the time of his arrest. Cole also argues that if we reverse, we should remand for the trial court to consider his motion for a new trial, which the State concedes.

We vacate the trial court’s order dismissing Cole’s firearm conviction with prejudice because the State provided sufficient evidence that Cole knowingly possessed a firearm and we remand for sentencing in accordance with this opinion. We accept the State’s concession and hold that on remand, the trial court must consider Cole’s motion for a new trial.

FACTS

On January 12, 2016, Cole was arrested following an extensive physical altercation with Tacoma police officers. A Ruger .22 caliber semiautomatic handgun was removed from the scene

following the arrest. Officers Kenneth Smith and Matthew Riche booked the firearm into evidence.

The State charged Cole with one count of second degree assault (with a firearm enhancement), two counts of third degree assault (with firearm enhancements), one count of first degree unlawful possession of a firearm, one count of possession of a stolen firearm,¹ one count of attempting to disarm a law enforcement officer or corrections officer,² and one count of second degree driving while license suspended.

As to the charge of unlawful possession of a firearm, the information charged, in relevant part:

That GERALD LAWRENCE COLE, JR, in the State of Washington, on or about the 12th day of January, 2016, did unlawfully, feloniously, and knowingly own, have in his possession, or under his control a firearm, he having been previously convicted in the State of Washington or elsewhere of a serious offense, as defined in RCW 9.41.010, contrary to RCW 9.941.040(1)(a), and against the peace and dignity of the State of Washington.

Clerk's Papers (CP) at 2. Cole stipulated that he had previously been convicted of a serious offense, one of the elements of this charge. The matter proceeded to a jury trial.

At trial, Officers Smith, Riche, Ryan Bradley, Gerald Bratcher, Jimmy Welsh, and Jeffrey Katz all testified regarding the events surrounding Cole's arrest, specifically whether he possessed a firearm at the time.

Officer Bradley described the lead up to the arrest as a "chaotic fight" involving "lots of closed fists and elbows and things being swung at the officers." 1 Verbatim Report of Proceedings

¹ The trial court dismissed the possession of a stolen firearm charge before trial.

² This charge relates to Officer Jimmy Welsh, one of the officers at the scene.

(VRP) at 64. He testified that Cole's "[f]eet were planted on the ground and hands were also planted on the ground, bent over, so the legs and the torso had not made contact with the ground at this point." 1 VRP at 120. He further testified that he "saw a black firearm held in [Cole's] hand, and it, and, essentially, the ripping motion of getting his arm away from his body caused it to – appeared to release his grip on the firearm, and the firearm landed about two feet away from me." 1 VRP at 85.

The firearm recovered at the scene of Cole's arrest was admitted as evidence. Officer Riche testified that he recovered the firearm at the scene of the arrest and that he and Officer Smith booked the firearm into evidence. Officer Riche testified that the gun was a Ruger .22 caliber semiautomatic handgun and that it was in the same condition as it was when he saw it at the scene. Detective Brian Vold testified that he test fired the recovered gun and found it to be fully operable.

Officer Bratcher testified that he did not see the firearm while he was attempting to physically subdue and arrest Cole. Officer Smith testified that he heard Officer Welsh say, while attempting to place Cole in custody, "I think he has a gun. I think there's a gun." 2 VRP at 362. Officer Smith testified that he "looked down and . . . could see the barrel of a handgun" pointed at Officer Welsh. 3 VRP at 363.

Officer Welsh testified that while involved in the physical altercation with Cole in an attempt to place him in custody, he "looked down and saw what looked like a cylindrical semiautomatic firearm," and that "a firearm . . . was shoved into my stomach and appeared to be trapped underneath my belt, held by the defendant." 3 VRP at 457. Officer Welsh testified that he "could . . . tell that [Cole's] hand was around it." 3 VRP at 457-58. Officer Katz testified that he was aware that a firearm was recovered in this case.

The trial court instructed the jury that “[a] person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted of a serious offense and knowingly owns or has in his possession or control any firearm.” CP at 27.

The jury acquitted Cole of all assault charges, including attempting to disarm a law enforcement officer. The jury found Cole guilty of first degree unlawful possession of a firearm and second degree driving while license suspended.

Cole then filed a motion for an arrest of judgment and requested either a new trial or a dismissal of the conviction for first degree unlawful possession of a firearm.

In his motion for arrest of judgment, Cole argued that no evidence was presented at trial, such as DNA³ or fingerprint evidence, to prove that he knowingly possessed the firearm. Cole also argued that the State provide false testimony because the firearm had been planted as evidence by the officers involved in the case.

The trial court granted Cole’s motion for arrest of judgment and entered an order of dismissal with prejudice for the first degree unlawful possession of a firearm conviction. Because it had dismissed the charge, the trial court declined to consider Cole’s motion for a new trial. The State appeals.

ANALYSIS

The State argues that the trial court erred in granting Cole’s motion for arrest of judgment and dismissing the unlawful possession of a firearm conviction with prejudice because sufficient evidence was presented that Cole knowingly possessed a firearm. We agree. Accordingly, we

³ Deoxyribonucleic acid.

vacate the trial court's order dismissing Cole's unlawful possession of a firearm conviction and remand for sentencing in accordance with this opinion. Cole also argues that he is entitled to have the court consider his motion for a new trial in the event of a remand, which the State concedes. On remand, the trial court must consider his motion for a new trial.

I. STANDARDS OF REVIEW

When reviewing a trial court's order to arrest judgment under CrR 7.4, we engage in the same inquiry as the trial court. *State v. Longshore*, 141 Wn.2d 414, 420, 5 P.3d 1256 (2000). We determine whether “[t]he evidence presented in a criminal trial is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the state, could find the essential elements of the charged crime beyond a reasonable doubt.” *Longshore*, 141 Wn.2d at 420-21. “When a defendant challenges the sufficiency of the evidence, he or she admits the truth of all of the State’s evidence.” *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). “In such cases, appellate courts view the evidence in the light most favorable to the State, drawing reasonable inferences in the State’s favor.” *Cardenas-Flores*, 189 Wn.2d at 265-66.

The test for determining sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In evaluating a sufficiency of the evidence claim, we assume the truth of the evidence offered by the state and all reasonable inferences drawn from that evidence. *Homan*, 181 Wn.2d at 106. We defer to the trier of fact's resolution of conflicting testimony and evaluation of the

persuasiveness of the evidence. *Homan*, 181 Wn.2d at 106. Circumstantial evidence and direct evidence are equally weighted. *State v. Miller*, 179 Wn. App. 91, 105, 316 P.3d 1143 (2014).

II. SUFFICIENCY OF THE EVIDENCE

A. MOTION TO ARREST JUDGMENT

To convict Cole of first degree unlawful possession of a firearm, the State had to prove that he (1) knowingly owned or had in his possession or control a firearm; and (2) had a previous conviction for a serious offense.⁴ RCW 9.41.040(1)(a); *State v. Hartzell*, 156 Wn. App. 918, 944, 237 P.3d 928 (2010) (citing *State v. Anderson*, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000)).

“Possession may be actual or constructive.” *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010). “A person actually possesses something that is in his or her physical custody and constructively possesses something that is not in his or her physical custody but is still within his or her ‘dominion and control.’” *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014) (quoting *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)).

Here, the State presented sufficient evidence that Cole possessed the firearm that the police recovered from the scene following his arrest on January 12, 2016. Officers Welsh and Smith both testified about Cole having control over a firearm at the time of the incident. Officer Smith heard Officer Welsh say, “I think he has a gun.” 3 VRP at 362. Officer Smith testified that he “looked down and . . . could see the barrel of a handgun” pointed at Officer Welsh. 3 VRP at 363. Officer Welsh testified that as he looked down during the altercation, he saw the barrel of a semiautomatic firearm pointed directly at him and wedged between his duty belt and body. Officer Welsh testified

⁴ Cole only challenges the first prong and stipulated as to the second prong, that he had previously been convicted of a serious offense. CP at 8.

that he was able to feel the barrel of the firearm pushed into his hip and stomach area. Officer Welsh also testified that he “could . . . tell that [Cole’s] hand was around it.” 3 VRP at 457-58.

The State also presented sufficient evidence to prove that Cole was in possession of the firearm recovered at the scene of his arrest. Officer Riche testified that he recovered the firearm at the scene of the arrest and that he and Officer Smith booked the firearm into evidence. Officer Riche testified that the firearm was a Ruger .22 caliber semiautomatic handgun and that it was in the same condition as it was when he recovered it at the scene. Detective Vold testified that he test fired the gun recovered and found it to be fully operable.

Here, although Cole denied possessing the firearm, the jury found the officers’ testimony that Cole knowingly possessed a firearm to be credible and that the firearm admitted into evidence was the firearm recovered at the scene that Cole had possessed when arrested. Cole’s motion to arrest judgment admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Moreover, we defer to the trier of fact’s evaluation of the persuasiveness of the evidence. Consequently, we hold that the State produced sufficient evidence to convict Cole of first degree unlawful possession of a firearm. Thus, we vacate the trial court’s order dismissing Cole’s conviction for unlawful possession of a firearm with prejudice and remand for resentencing.

B. MOTION FOR A NEW TRIAL

Cole argues that if this case is remanded, he is entitled to have the trial court consider his motion for a new trial. The State agrees. We accept the State’s concession and hold that on remand the trial court must consider Cole’s motion for a new trial.

CONCLUSION

We vacate the trial court's order dismissing Cole's firearm conviction with prejudice because the State provided sufficient evidence that Cole knowingly possessed a firearm and we remand for sentencing in accordance with this opinion. On remand, the trial court must consider Cole's motion for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.


SUTTON, J.

We concur:


WORSWICK, P.J.


MELNICK, J.

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. 50433-2-II**, 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 / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent Kristie Barham, DPA
[PCpatcecf@co.pierce.wa.us]
Pierce County Prosecutor's Office
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: July 1, 2019

WASHINGTON APPELLATE PROJECT

July 01, 2019 - 4:26 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50433-2
Appellate Court Case Title: State of Washington, Appellant v. Gerald Lawrence Cole, Jr., Respondent
Superior Court Case Number: 16-1-00195-7

The following documents have been uploaded:

- 504332_Petition_for_Review_20190701162539D2879022_9632.pdf
This File Contains:
Petition for Review
The Original File Name was washapp.070119-08.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- kristie.barham@piercecountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Kate Benward - Email: katebenward@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190701162539D2879022