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Washington State
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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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

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

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

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

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 In the unpublished portion of this opinion, we reject McKnight's additional arguments.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

FACTS

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

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

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

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

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

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

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

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

RP at 706-07.

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

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

The trial court responded,

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

RP at 797.

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

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

ANALYSIS

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

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

A. LEGAL PRINCIPLES

1. Constitutional Right

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

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

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

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

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

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

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

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

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

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

2. Statutory Provisions

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

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

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

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

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

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

B. ANALYSIS OF TRIAL COURT DECISION

1. No Constitutional Violation

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

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

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

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

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

2. No Abuse of Discretion

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

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

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

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

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

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

CONCLUSION

We affirm McKnight's convictions.

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

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

ADDITIONAL FACTS

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

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

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

A. SUFFICIENCY OF THE EVIDENCE – UNLAWFUL POSSESSION

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

1. Legal Principles

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

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

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

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

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

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

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

The trial court instructed the jury accordingly:

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

CP at 168.

2. Analysis

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

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

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

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

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

B. SAG CLAIMS

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

1. Right to a Speedy Trial

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

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

2. Ineffective Assistance of Counsel

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

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

CONCLUSION

We affirm McKnight's convictions.

Maxa, J.
MAXA, J.

We concur:

Glasgow, CJ
GLASGOW, C.J.

Veljacic, J.
VELJACIC, J.