

62363-0

62363-0

NO. 62363-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDREW McGUIRE,

Appellant.

FILED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT.

Andrew McGuire's right to receive a fair trial was violated when the State failed to prove every element of first degree unlawful possession of a firearm beyond a reasonable doubt. Specifically, the State failed to meet its burden to prove that Mr. McGuire had constructive possession of the firearm seized from the room in which he was arrested. In addition, the trial court improperly refused a valid defense request to instruct the jury concerning "close proximity" and "brief and passing control," violating Mr. McGuire's due process rights.

B. ASSIGNMENTS OF ERROR.

1. The State presented insufficient evidence to convict Andrew McGuire of unlawful possession of a firearm in the first degree, in that the prosecutor failed to prove that Mr. McGuire had constructive possession of the firearm, as required by statute.

2. The court erred in refusing to instruct the jury that mere close proximity to, or brief and passing control of, a firearm are not sufficient to prove constructive possession of that firearm.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. To prove constructive possession, the State must prove beyond a reasonable doubt that the defendant exercised dominion

and control over an item. Must the conviction be reversed and dismissed where the State failed to prove beyond a reasonable doubt that Andrew McGuire exercised dominion and control over the firearm seized in this case? (Assignment of Error 1).

2. A trial court must give jury instructions that allow the defense to argue its theory of the case. Here, was the court's refusal to instruct the jury on "close proximity" and "brief and passing control," as properly requested by the defense, harmless beyond a reasonable doubt? (Assignment of Error 2).

D. STATEMENT OF THE CASE.

Andrew McGuire was charged, tried, and convicted of unlawful possession of a firearm and possession of cocaine, as a result of his arrest on September 10, 2007. CP 1; 91-92.¹

Evidence at trial showed that at approximately 11:00 that morning, King County Sheriff Department ("King County") officers, as well as officers with the Department of Corrections ("DOC"), converged on the home of Jennifer DeFierro in north Seatac. RP 108, 137-40. The trial testimony of the each of the officers was fairly consistent as to the events that unfolded that morning.

King County and DOC officers testified that pursuant to an active warrant for another individual named Christopher Smultz, DOC officers had requested the assistance of King County in order to execute a warrant for Mr. Smultz. RP 107, 138. After an initial planning meeting that morning, officers from both units convened to search for their target, Mr. Smultz, at his registered DOC residence -- the home of his mother, Mrs. DeFierro. RP 138.²

Once the DOC and King County officers arrived at the residence, they asked Mrs. DeFierro if her son Christopher was home. RP 109, 140, 168. She responded that he was not home, and she consented to a search of her house for Mr. Smultz, the target of the raid. RP 109, 140, 168, 301. At this time, five to six officers entered the home, searching from room to room. RP 109-10, 141, 168. Although the officers searched every room, they did not find Christopher Smultz at the house. Id.

When they entered one bedroom, they found Andrew McGuire apparently asleep on a bed shared with a then-unknown female. RP

¹ The verbatim report of proceedings consists of five volumes of transcripts from June 12, 2008, through August 20, 2008. The proceedings will be referred to herein as follows: "RP ___ ." References to the file will be referred to as "CP ___."

² The logic behind the involvement of King County Sheriff Department officers was to control "third parties," and to make arrests if there were "any new law violations." RP 138, 164. Mr. McGuire, not originally the subject of the arrest warrant here, ultimately became one of those third-party arrests.

110, 141, 171-72. While the female was permitted to walk past the officers and leave the residence, the officers attempted to awaken and question Mr. McGuire, in an attempt to determine whether he was the subject of their warrant. RP 110-12, 142, 171. Officers testified that although they were skeptical of whether Mr. McGuire was actually asleep when they had entered the room, once he was awake, he gave them a name and a year of birth, which they determined to be false. RP 110-12, 141-42, 171-72.³

At this moment, DOC Officer Leon Neal testified that he saw a semi-automatic pistol in a shoulder holster, slung over the closet door several feet from the bed in which Mr. McGuire was still reclining. RP 143. Officers secured the gun and detained Mr. McGuire, who had, at this time, given his true name and date of birth, and whom officers determined also had an active warrant.⁴ RP 143-44, 172. Upon his arrest, Mr. McGuire was found to have a small amount of cocaine in his pocket, which he stated was for his “personal use.” RP 145.

³ Andrew McGuire and Christopher Smultz are half-brothers, and Mrs. DelFierro is their mother. RP 151, 175. Mr. McGuire does not live in the house in which he was arrested, nor is that his bedroom. RP 297.

⁴ Mr. McGuire’s criminal history was ultimately responsible for the elevation of the instant offense to the first degree. CP 1, 91-92.

Mr. McGuire made no statements concerning the firearm, and despite a matching print lifted from the magazine, none of his prints were found on the gun itself, which was found in his brother's room, in a house in which he does not live. RP 260-61, 287, 297.

The court determined Mr. McGuire's offender score to be a "6," and imposed a sentence of 57 to 75 months on the firearm count and 12 to 24 months on the cocaine count, to run concurrently. CP 96-98.

E. ARGUMENT.

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. McGUIRE OF POSSESSION OF A WEAPON, AS CONSTRUCTIVE POSSESSION WAS NOT PROVED.

- a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article 1, section 3 of the Washington

Constitution⁵ and the 14th Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense 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).

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). However, when an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a

⁵ Art. 1, section 3 provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

b. In order to prove that Mr. McGuire was guilty of unlawful possession of a firearm, the prosecution was required to show constructive possession. Constructive possession is defined as the exercise of dominion and control over an item. State v. Callahan, 77 Wn.2d. 27, 29-30, 459 P.2d 400 (1969). Constructive possession is established by viewing the totality of the circumstances, including proximity to the property and ownership of the premises in which the contraband is found. State v. Turner, 103 Wn. App. 515, 523, 13 P.3d 234 (2000); State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). The circumstances must provide substantial evidence for the fact finder to reasonably infer the defendant had dominion and control. State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Close proximity alone is never enough to infer constructive possession. Id.

Ownership of a vehicle, or a residence, where contraband is discovered, is one factor to consider when assessing constructive possession. Turner, 103 Wn. App. at 521-24; see Cantabrana, 83

Wn. App. at 208. For example, in Turner, the police found a gun in plain view in the car Turner owned. 103 Wn. App. at 518. Since Turner owned the car, drove it that day, and the gun was in plain view, his dominion and control of the gun was reasonably inferred. Id. at 524.

On the other hand, in Callahan, the defendant was not the owner of the houseboat where drugs were found, but was seen in close proximity to drugs discovered in a cigar box and admitted handling the drugs that day. 77 Wn.2d at 28-31. Callahan was an overnight guest and owned two books, two guns, and broken scales for measuring drugs found at the houseboat. Id. at 31. Yet the Supreme Court found his close proximity, knowledge of the drugs, and his ownership of other incriminating items insufficient to consider him a constructive possessor of the drugs. Id. The Callahan Court stressed that the defendant was merely using the property, not paying rent or maintaining the houseboat as his residence. Id.

In State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990), the police observed the defendant standing up from a table as they entered the room; drugs and paraphernalia were found on the table. The court found the State failed to prove possession where

the only evidence was defendant's proximity to the drugs and his fingerprints on a plate containing cocaine residue. Id. at 387-89. The Spruell Court found that the fingerprints proved only fleeting possession at best, which was insufficient to prove actual possession or dominion and control. Id. at 387. Because the defendant in Spruell lacked dominion and control over the premises, mere proximity and momentary handling were insufficient to prove constructive possession. Id. at 389.

Likewise, in Cote, the defendant was a passenger in a vehicle where contraband was found, and his fingerprints were found on a jar containing some of the contraband. 123 Wn. App. at 548. The State proved that "Mr. Cote was at one point in proximity to the contraband and touched it," but this was "insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession." Id. at 550.

c. The prosecution failed to prove that Mr. McGuire had dominion or control over either the premises or the weapon; therefore, the evidence was insufficient to convict. Testimony was clear that Mr. McGuire, like the defendants in Callahan, Spruell, and Cote, neither owned, rented, nor resided in the home in which he was found. RP 297. The house was also full of visitors on the

morning of the arrest, according to testimony, following a day at the Puyallup State Fair, and that gun could as easily have belonged to any of the six or seven individuals staying in the house that night, as to Mr. McGuire. RP 295.

In addition, there was no testimony concerning the age of the fingerprint taken from the ammunition inside the gun, and it could as easily have been left on a previous date -- unrelated to the handling of the instant weapon -- as at any other time. RP 260-61, 287.

Regardless, fingerprint evidence alone does not provide sufficient evidence to support a conviction unless the fingerprints could only have been impressed at the time the crime was committed. State v. Todd, 101 Wn. App. 945, 952, 6 P.3d 86 (2000), overruled on other grounds, State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003); State v. Lucca, 56 Wn. App. 597, 599, 784 P.2d 572 (1990).

Here, the fingerprint evidence offered no substantive evidence that Mr. McGuire was in possession of the firearm in question. After all, Mr. McGuire's fingerprint was on the magazine -- a crime for which he was not charged -- not the gun itself. RP 260-61, 287.

In sum, the prosecution did not offer evidence based on anything other than sheer speculation that Mr. McGuire's presence in close proximity to the seized weapon demonstrated that he exercised dominion and control over the weapon.

d. The prosecution's failure to prove all essential elements requires reversal. The prosecution failed to sufficiently connect Mr. McGuire to the weapon, by failing to prove that he had dominion or control over the firearm, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. THE TRIAL COURT ERRED WHEN IT REFUSED TO INSTRUCT THE JURY THAT PROXIMITY TO A FIREARM IS NOT SUFFICIENT TO PROVE CONSTRUCTIVE POSSESSION.

a. A trial court must give instructions that permit the defense to argue its side of the case. A trial court's refusal to give a proposed instruction is reviewed for abuse of discretion. State v. Castle, 86 Wn. App. 48, 62, 935 P.2d 656 (1997). Jury instructions are sufficient if they properly inform the jury of the applicable law without misleading the jury, and if they permit each party to argue its theory of the case. Id. (citing State v. LeFaber,

128 Wn.2d 896, 903, 913 P.2d 369 (1996)). It is not error, however, for a trial court to refuse to give a specific requested instruction when a more general instruction adequately explains the law and allows each party to argue its theory of the case. Castle, 86 Wn. App. at 62 (citing State v. Schulze, 116 Wn.2d 154, 168, 804 P.2d 566 (1991)).

b. Mr. McGuire was entitled to his requested instruction on “close proximity” and “brief and passing control.” Here, trial counsel specifically requested that the jury instruction on constructive possession include language discussing “close proximity” and “brief and passing control.” CP 59. Specifically, trial counsel requested that the instruction read as follows:

In considering whether or not the defendant possessed an alleged controlled substance or object as alleged, it is not enough that the defendant might have been in close proximity to the alleged drugs/object or that he might have earlier handled them with a brief and passing control (citations omitted).

CP 59.

Mr. McGuire’s entire defense rested on the theory that he was only in mere proximity to this gun, and that a single print on the magazine established nothing more than perhaps momentary earlier handling of its ammunition. Yet, the trial court denied the

request to charge and proceeded with its own general instruction instead. RP 307. This clearly deprived Mr. McGuire of his opportunity to argue his theory of the case, and was thus an abuse of discretion.

Unlike in Castle, where this Court held that the trial court properly refused to give a “mere proximity” instruction, Mr. McGuire did not admit to dominion and control over the premises in which the contraband was located. See Castle, 86 Wn. App. at 61-62.

c. Since this instructional error was not harmless beyond a reasonable doubt, reversal is required. When a jury instruction is deficient, a reviewing court must reverse the conviction unless the State can show that the instructional error was harmless beyond a reasonable doubt. State v. Williams, 158 Wn.2d 904, 917, 148 P.3d 993 (2006) (citing Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

The failure of the trial court to instruct the jury in such a way that defense counsel could argue his theory of the case was an abuse of discretion, and as such, must be reversed. An abuse of discretion is discretion exercised on untenable grounds for untenable reasons. State v. Brinkley, 66 Wn. App. 844, 848, 837 P.2d 20 (1992). Where the decision or order of the trial court is a

matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941). Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other. Ex rel Carroll, 79 Wn.2d at 26. Here, the court exercised its discretion on untenable grounds and for untenable reasons.

The conviction here rested on the evidence that the weapon was found within “arm’s length” of Mr. McGuire, and that his fingerprint was found on the magazine. RP 143, 177, 287. The trial court’s refusal to give the instruction on “close proximity” and “brief and passing control” deprived defense counsel of the opportunity to argue his theory of the case. Since the prosecution’s case rested on constructive possession of the firearm, Mr.

McGuire's proximity to the gun and the importance of any brief and passing contact with it were crucial for the jury to properly evaluate. The trial court's refusal to give the specified instruction requested by counsel deprived the jury of an adequate explanation of the law, and deprived Mr. McGuire of a fair opportunity to argue his theory of the case.

F. CONCLUSION.

For the foregoing reasons, Mr. McGuire respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 22nd day of June, 2009.

Respectfully submitted,



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NO. 62363-0-I

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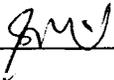
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I, MARIA ARRANZA RILEY, STATE THAT ON THE 22ND AY OF JUNE, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 22ND DAY OF JUNE, 2009.

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