

64044-5

64044-5

NO. 64044-5-I

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

KEN CHARLES DAUSEY,

Appellant.

---

---

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

The Honorable Alan R. Hancock, Judge

RECEIVED  
JAN 12 PM 4:13  
CLERK OF COURT

---

---

REPLY BRIEF OF APPELLANT

---

---

KIRA T. FRANZ  
CHRISTOPHER H. GIBSON  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206)623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u> .....	1
B. <u>CONCLUSION</u> .....	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

<u>State v. Alvarez,</u> 105 Wn. App. 215, 19 P.3d 485 (2001).....	5
<u>State v. Callahan,</u> 77 Wn.2d 27, 459 P.2d 400 (1969).....	3, 5
<u>State v. Spruell,</u> 57 Wn. App. 383, 788 P.2d 21 (1990).....	3

A. ARGUMENT IN REPLY

In its response, the State acknowledges its burden of proof, but asserts the State met such burden by inferences from the evidence. Brief of Respondent (BOR) at 4-7. In so doing, however, the State makes many assumptions without appropriate support. The State's burden should not be held in such disregard.

For example, the State asserts that because the guns could be seen from the hallway by Detective Beech, therefore the door to the gun cabinet must have been open. BOR at 5. However, the police report indicates clearly that Det. Beech could see the guns in the gun cabinet because the cabinet was partially glass:

As I walked down the hall [to Dausey's office], I could see through the partially opened door of the bedroom and saw a large wood and glass gun cabinet. I could clearly see several rifles in this cabinet.

CP 54. The reason why the guns could be seen by Det. Beech is thus clearly explained by the report itself, not an indication that the cabinet was left hanging open.

Moreover, the assertion belies common sense. Obviously, people put guns in a cabinet for a reason. In a house with small children – such as Dausey's – there is no reason to assume the cabinet was open, given that someone had plainly taken the trouble to obtain a gun cabinet and had

placed all the guns inside it. Even more plainly, had Det. Beech seen a gun cabinet with its door hanging open with small children in the house, presumably the CPS visit would have gone differently than is noted by the report, which indicates the children remained in the home with Dausey. CP 55.

The State's next assertion is that if the gun cabinet was part glass,<sup>1</sup> then Dausey could have obtained the guns easily and thus maintained control over them, presumably by breaking the glass. BOR at 5-6. This assertion is fairly shocking.

A person walking down a street who views contraband through another's home or store window cannot be said to be in control of items therein, merely because the glass could be broken and the items removed. This would be an appalling extension of the concept of "dominion and control."

The next assertion by the State is that Dausey was shown to be in dominion and control of the premises because he invited Det. Beech into the premises and had previously taken photographs inside it. BOR at 7. This proof of dominion and control does not – as noted in the opening brief - compare favorably with Callahan and Spruell. State v. Callahan, 77

---

<sup>1</sup> As noted, the police report states clearly that the gun cabinet was "wood and glass," but the State seems to have overlooked this explicit statement and only postulates that the cabinet may have been glass.

Wn.2d 27, 28-31, 459 P.2d 400 (1969) (defendant's admission that he was staying on a houseboat and even that he briefly handled the drugs on which the charges were based did not establish dominion and control over premises or contraband); State v. Spruell, 57 Wn. App. 383, 384, 388-89, 788 P.2d 21 (1990) (insufficient evidence of dominion and control where defendant was arrested in another person's kitchen near a table covered with drugs and drug paraphernalia, even though defendant's fingerprint was found on a plate that appeared to contain drugs).

Dausey might have occupied the home on any sort of temporary basis, in which case he would still – as a houseguest – be able to invite Det. Beech around the home without being assumed to have dominion and control over every item therein. Det. Beech noticed teenage boys who apparently also lived in the house who were not relatives of Dausey – the presence of these boys indicates the likelihood of other adults living in the home who might have proper dominion and control over the premises. Moreover, Det. Beech had every opportunity to obtain items showing dominion and control when he was in the house obtaining the guns, and yet he failed to do so.

The State also asserts that because of a sentence in Det. Beech's report, it is clear Det. Beech was in the house previously. BOR at 76. The assumption is simply absurd. The section in the report reads:

Ken Dausey invited [Det. Beech and the CPS case worker] inside [the house] and I saw that there were two young children present as well as two teenage boys who were apparently living at the home. The living conditions inside were dirty and messy, but not as bad as I have seen in the past.

CP 53.

Contrary to the State's assertion, the second sentence is not a reference to Det. Beech having been in Dausey's alleged home before, but a reference to the fact that this is a CPS welfare check, and it is incumbent upon Det. Beech and the CPS case worker to inspect the premises and see if it is safe for young children to live in. Here, Det. Beech was merely saying that he had seen worse houses than this one, and any other interpretation of the sentence is strained at best. Moreover, earlier in the report, Det. Beech refers to "researching" Dausey and finding his prior felony, a project that would almost certainly be unnecessary if he were already familiar with Dausey as the State proposes.

Finally, the State asserts that because the "Property Received" form lists Dausey's address as the location in the report, it must prove that he lived there permanently and had dominion and control over the house. This is a fascinating assertion.

In any police report, of course, a witness or arrestee's address is listed, whether that address is temporary or permanent. If the police report

can be used as evidence of dominion and control over a premises, then the State is therefore permitted to manufacture its own dominion and control documents via the arrest. This bootstrapping cannot be reasonable under Washington law. Compare State v. Alvarez, 105 Wn. App. 215, 221-22, 19 P.3d 485 (2001) (ordinarily, evidence of permanent residence includes showing a defendant owned or leased the residence, paid rent, received bills, possessed keys, received phone calls, or the like at the residence; evidence of temporary residence or possessions at the location is insufficient) (internal citations omitted).

The State moreover never responds to the fact that Dausey – who made admissions to seven of the long-guns – always insisted that the handgun belonged to his wife, Kari. Exclusive possession by another precludes possession by a defendant. Certainly, Kari’s handgun cannot support Count 1. Compare Callahan 77 Wn.2d at 31-32 (where “undisputed direct proof places exclusive possession in some other person,” constructive possession not found). Moreover, the eighth long gun – the one to which Dausey made no explicit admission – must be dismissed because of lack of evidence of any dominion and control.

B. CONCLUSION

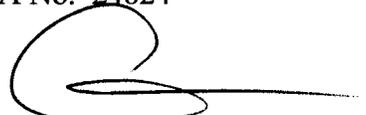
This Court should reverse and dismiss two of Dausey's nine convictions for second degree unlawful possession of a firearm because there is insufficient evidence to support those two convictions.

DATED this 12<sup>th</sup> day of May, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC

  
KIRA T. FRANZ  
WSBA No. 24824

  
CHRISTOPHER H. GIBSON,  
WSBA No. 25097  
Office ID No. 91051

Attorneys for Appellant