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COURT OF APPEALS
DIVISION II

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NO. 38439-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

SONJA STRYKER,

Appellant.

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

The Honorable Leila Mills, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. Procedural Facts.....	1
2. Substantive Facts.....	1
C. <u>ARGUMENT</u>	3
1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT'S TRANSITORY POSSESSION OF MET THE BURDEN OF PROOF FOR ESTABLISHING POSSESSION.	
2. APPELLANT'S TRANSITORY POSSESSION OF A FIREARM WAS NECESSARY TO PREVENT A GREATER HARM TO TWO YOUNG BOYS.	
D. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. Callahan</u> , 77 Wn.2d 27, 29, 459 P.2d 400 (1969).....	4-7
<u>State v. Charles</u> , 91 Wn. App. 35, 955 P.2d 805 (1998).....	8, 9
<u>State v. Jeffrey</u> , 77 Wn.2d 222, 889 P.2d 956 (1995).....	7, 8
<u>State v. Staley</u> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	4, 6
 <u>FEDERAL CASES</u>	
<u>United States v. Landry</u> , 257 F.2d 425 (7th Cir. 1958).....	4
<u>United States v. Lemon</u> , 824 F.2d 763 (9th Cir. 1987).....	8
 <u>RULES, STATUTES AND OTHERS</u>	
RCW 9.41.040.....	1, 3, 4

A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that appellant possessed firearms.
2. Appellant established that her transitory possession of firearms was necessary to prevent a greater harm to two young boys.
3. The trial court erred by entering Finding of Fact No. IV indicating that appellant possessed firearms.

Issues Pertaining to Assignment of Error

1. Did the state fail to prove beyond a reasonable doubt that appellant possessed firearms?
2. Did appellant establish that her transitory possession of firearms was necessary to prevent a greater harm to two young boys?

B. STATEMENT OF THE CASE

1. Procedural Facts

Sonja Stryker was charged with unlawful possession of a firearm under RCW 9.41.040(2)(a)(iii) and residential burglary. CP 1-3; 6-8. Following a bench trial Ms. Stryker was convicted as charged. RP 14-20. The trial court entered findings of fact and conclusions of law and an order of restitution. RP 25-28. This timely appeal follows. RP 21.

2. Substantive Facts

Sean Wiggins a 5th grader testified that he and his friend 12 year old Mikey and Mikey's big sister, 17 year old Sonja Stryker without permission entered David Michalski's house on three occasions and took change from the house to spend at the waterfront. RP 9, 10, 12, 13, 24. Sean thought that Ms. Stryker got the key to Michalski's house from her mother, but only saw Mikey take the key from Sonja's room. RP 24, 27-28. Mikey often slept in Sonja's room. RP 29.

Sean and Mikey re-entered Mr. Michalski's house on at least five other occasions and stole two firearms. Ms. Stryker was not present for any of these other takings or entries. RP 16. Both of the firearms were .22 caliber rifles. RP 17. One of the rifles was a single shot and the other an automatic. RP 78-79. The boys also took live ammunition for the rifles. RP 17. Mikey told Sean that he put the rifles under his sister's bed in a room Mikey sometimes shared with her, but Sean never saw the guns under the bed. RP 18, 28-29.

Sean and Mikey played with the guns by shooting live ammunition at trees. RP 17. Sonja heard the gun shots and came out and took the rifles from the boys and gave them to her mother. RP 17, 40-41.

On July 21, 2008 Mr. Michalski entered his house after he returned home from jail. RP 67. Mr. Michalski did not notice that anything was missing. Id. Michalski could not enter his home without a police officer

because of a sexual assault restraining order against him from the Stryker's who lived on the same property in an adjacent building. RP 64, 66. Mr. Michalski gave neighbor, Vartim. Mesropia who lived with the Stryker's the keys to his house while he was in jail beginning June 21, 2008. RP 68-69. Mr. Mesropia had the keys to the house in July and August. RP 70. Mr. Mesropia discovered vandalism in the house on August 18, 2008. Id. Sean testified that he and Mikey committed the vandalism; the boys painted their names on the walls in side the house. RP 26, 61 90-91. Ms. Stryker was not implicated in any vandalism or the taking of guns or ammunition.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT'S TRANSITORY POSSESSION OF MET THE BURDEN OF PROOF FOR ESTABLISHING POSSESSION.

As charged in Stryker's case, to establish guilt under RCW 9.41.040. "Unlawful possession of firearms", the state had to prove beyond a reasonable doubt:

(2) (a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her

possession, or has in his or her control any
firearm:

.....

(iii) If the person is under eighteen years
of age, except as provided in *RCW 9.41.042*;
and/or

Id. *RCW 9.41.040*.

Possession of property may be either actual or constructive. Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). "[T]o "possess" means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature". " State v. Staley, 123 Wn.2d 794, 801, 872 P.2d 502 (1994), quoting, United States v. Landry, 257 F.2d 425, 431 (7th Cir. 1958).

In Callahan, a case involving possession of narcotics, the Supreme Court held that the mere handling of the drugs without more was insufficient to establish actual possession because passing control and momentary handling do not establish actual control over the item in question. Callahan, 77 Wn.2d at 29.

Since the drugs were not found on the defendant, the only basis on which the jury could find that the defendant had actual possession would be **the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.**

Id. (Emphasis added). Callahan is controlling authority the instant case.

In Stryker's case as in Callahan, Ms. Stryker had only transitory passing control over the firearms. Ms. Stryker heard gun shots, took the guns away from the boys and gave them to her mother. RP 40, 41. The police officer who investigated retrieved the guns from Ms. Stryker's mother who had secured them from behind a bookcase. RP 89, 94. Sean testified that Mikey told him that he put the guns under Ms. Stryker's bed and that Sean had seen the guns under the bed. RP 28. Mikey sometimes slept in Ms. Stryker's room and Sean too slept in Sonja's room at least four times during sleepovers. RP 29.

There was no testimony that Sonja knew the guns were under her bed and the only testimony indicating that Sonja ever touched the guns was when Ms. Stryker took the guns from the boys and gave them to her mother. RP 40-41. This evidence is far less than that presented and determined to be insufficient to establish control in Callahan. In Callahan:

1. Two books, two guns and a set of broken scales belonging to defendant were found on the houseboat.

2. Defendant had been staying on the houseboat for the preceding 2 or 3 days, but was not a tenant, cotenant, or subtenant thereon.

3. Most of the drugs were found near the defendant.

4. Defendant admitted that he had handled the drugs earlier in the day.

This is not sufficient evidence to establish dominion and control and thus make the issue of constructive possession a question for the jury.

Callahan, 77 Wn.2d at 31.

In Ms. Stryker's case, she handled the firearms to remove them from the boys, but the guns were not hers and there was no other evidence of possession other than this passing control. Even though Ms. Stryker did have momentary and passing control over the firearms, since this passing control does not satisfy the definition of "actual control", the burden of proof did not shift to her to establish unwitting control. Staley, 123 Wn.2d at 802; Callahan, 77 Wn.2d at 32.

In Sonja's case as in Staley, the trial judge mistakenly believed that fleeting control over the guns was sufficient to establish actual control. RP 106. This is incorrect as a matter of law. Staley, 123 Wn.2d at 802; Callahan, 77 Wn.2d at 32. The evidence of Sonja taking the guns from the boys and giving the guns to her mother was insufficient to establish that Ms.

Stryker had dominion and control over the firearms. *Id.* For this reason the state failed to carry its burden of proof and the charge of illegal possession of a firearm must be reversed and dismissed with prejudice. Callahan, 77 Wn.2d at 32.

2. APPELLANT'S TRANSITORY
POSSESSION OF A FIREARM WAS
NECESSARY TO PREVENT A
GREATER HARM TO TWO YOUNG
BOYS.

“It is a defense to the charge of unlawful possession of a short firearm or pistol that the unlawful possession was necessary under the circumstances.” State v. Jeffrey, 77 Wn.2d 222, 226, 889 P.2d 956 (1995). Unlawful possession of a short firearm or pistol is necessary when all of the following elements are present:

1. The Defendant reasonably believed he or another was under unlawful and present threat of death or serious bodily injury; and
2. The Defendant did not recklessly place himself in a situation where he would be forced to engage in criminal conduct; and
3. The Defendant had no reasonable legal alternative; and
4. There was a direct causal [**4] relationship between the criminal action and the avoidance of the threatened harm.

This defense must be established by a preponderance of the evidence. Preponderance of

the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

Jeffrey, 77 Wn.2d at 224, citing, United States v. Lemon, 824 F.2d 763 (9th Cir. 1987).

In Jeffrey, supra, the defendant thought there was a person lurking outside his home; a friend brought a gun over and put it under the couch and Jeffrey called the police. The Court held Jeffrey did not establish necessity because he had called the police and there was no evidence that the person outside could access the house. Jeffrey, 77 Wn.2d at 227.

More recently in State v. Charles, 91 Wn. App. 35, 44, 955 P.2d 805 (1998), the Court affirmed that the “*Jeffrey* court correctly concluded that necessity is a valid defense to unlawful possession of a firearm.” Charles, 91 Wn. App. at 44. In Charles, the defendant was attacked by a group of men and retrieved a fallen gun to protect himself. Charles, 91 Wn. App. at 43. The Court in Charles held that even though Charles was a felon, the possession was necessary to prevent harm to himself. Charles, 91 Wn. App. at 44.

In Sonja’s case, she took the guns from the boys to prevent a serious harm to the boys. She did not create the problem; she had to act immediately to prevent disaster and she turned the guns over to her

mother. RP 40-41, 89. The trial court clearly agreed that there was great potential for disaster with two boys shooting loaded guns. RP 107. As in Charles, Sonja acted out of necessity.

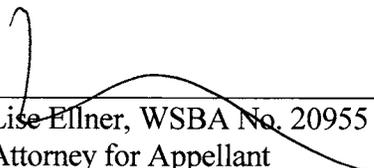
D. CONCLUSION

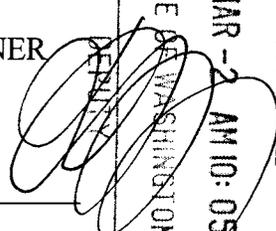
Sonja Stryker respectfully requests this Court reverse her conviction for unlawful possession of a firearm and dismiss with prejudice due to the state's failure to present evidence beyond a reasonable doubt that she unlawfully possessed firearms.

DATED this 26th day of February 2009.

Respectfully submitted

LAW OFFICES OF LISE ELLNER


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Attorney for Appellant

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BY 

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor 614 Division Street, MS-35 Port Orchard, WA 98366-4692 Appeals Department and Sonja Stryker 14050 Klahanie LN SE, Olalla, WA 98359 a true copy of the document to which this certificate is affixed, on February 27, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature