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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the State presented sufficient evidence that defendant knowingly possessed the gun when it showed that the gun was on defendant's seat, within his immediate reach; that defendant was preoccupied with the gun as the suspect car was slowly driving with police in tow; and that, during the high-pressure stop, defendant was the only man out of the three who could have reasonably left the gun on his seat. (Appellant's Assignment of Error 1).

2. Whether the court's finding of fact that defendant knowingly had a firearm in his possession or control was supported by substantial evidence, when the gun was found where defendant had been sitting – in plain sight and within his reach. (Appellant's Assignment of Error 2)

B. STATEMENT OF THE CASE.

1. Procedure

The State charged Jermaine Gore, a juvenile, hereafter "defendant," with unlawful possession of a firearm in the first degree (Count I); making a false statement to a public servant (Count II); and unlawful possession of controlled substance, 40 grams or less of marijuana (Count III). 1RP 3; CP 1-2. Defendant pleaded not guilty on all three

counts, and the case proceeded to a bench trial in front of Judge Nelson.

1RP 3, 4; 2RP 9.

The court found defendant guilty beyond a reasonable doubt on all three counts and entered written findings of fact and conclusions of law. 3RP 112; CP 6-10. The court sentenced defendant to 15 to 36 weeks commitment to Department of Social and Health Services, Division of Juvenile Rehabilitation (JRA). 5RP 126.

Defendant filed a timely notice of appeal. CP 25.

## 2. Facts

On March 19, 2009, Officer Henry Betts was patrolling the streets of Tacoma when he heard a report about “a suspicious vehicle possibly involved in a burglary” or burglaries. 2RP 13, 14, 15. The report listed the vehicle’s Washington license plate number as 925 YXH and stated that it was a red or burgundy Pontiac. 2RP 15-16, 17.

The police found the Pontiac in question parked near an apartment complex at 3300 Asotin and kept it under surveillance for about 30 minutes. 2RP 17, 37. After the Pontiac started moving, Officer Betts caught up with it, positioned his car behind it, and turned on his lights, siren, and air horn to initiate the stop. 2RP 17, 38.

Despite having multiple opportunities to stop, the Pontiac continued to drive slowly for five blocks. 2RP 17-18, 18-19. By the time the Pontiac stopped, a few other patrol cars were behind it. 2RP 18.

Because it was dark out, and the Pontiac had tinted windows, Officer Betts could not see what was happening in the passenger compartment. 2RP 19, 39. Because the Pontiac was tied to a burglary and failed to yield “for such an extended time,” the police initiated a high-risk stop, where they ordered the occupants of the Pontiac to get out of the car one at a time, while the officers remained in a position of cover. 2RP 19.

The police had the driver, later identified as Byron Hebert, get out of the vehicle first. 2RP 21, 40. About five seconds later, the front-seat passenger, later identified as defendant Jermaine Gore, followed. 2RP 21-22, 41. The third and last man, later identified as Aliajuan Satterwhite, who had sat in the rear passenger seat, was ordered to come out of the driver’s side, but instead climbed over the seats and came out of the driver’s door. 2RP 22-23, 45.

Sergeant Barry Paris testified that he had detained defendant at the scene when defendant got out of the car. 3RP 76, 79. He asked defendant who he was, and defendant provided a name that turned out to be fictitious as well as telephone numbers that had been disconnected. 3RP 80, 81, 82. After Officer Paris arrested defendant, he searched his person and found a small baggy of marijuana in the pocket of his pants. 3RP 82.

When the police approached the Pontiac to do a protective sweep, they saw a gun on the front passenger seat. 2RP 23, 26.<sup>1</sup> Officer Timothy Caber specified that the gun “was on the left side of the passenger seat, barrel pointing towards the front of the car, hand grip toward the driver’s seat.” 3RP 87. According to Officer Betts, the gun was positioned in a way that made him believe it had been left there when the men were exiting the car, because otherwise defendant would have been sitting on top of it while riding the car. 2RP 27, 43.

The police subsequently determined that the gun had been stolen. 3RP 90. Officer Brian Vold tested the gun and determined that it was operable. 3RP 94.

None of the three occupants of the Pontiac admitted ownership or knowledge of the gun, and no fingerprints were recovered. 2RP 34; 3RP 66-67; Exhibit 37. The Pontiac was registered to the driver’s mother. 2RP 32-33. Defendant did not testify at trial. 3RP 98.

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<sup>1</sup> The police also found baggies with a green leafy substance, later identified as marijuana, on the ground near the driver’s door and in the center console. 2RP 25, 29; 3RP 73.

C. ARGUMENT.

1. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT DEFENDANT KNOWINGLY HAD DOMINION AND CONTROL OVER THE GUN.

Evidence is sufficient to support an adjudication of guilt in a juvenile proceeding if any rational trier of fact, viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt. *State v. Fager*, 73 Wn. App. 617, 619, 870 P.2d 336 (1994). However, when this Court reviews the sufficiency of the evidence, it “does not need to be convinced of the defendant’s guilt beyond a reasonable doubt, but must only determine whether substantial evidence supports the State’s case.” *State v. Potts*, 93 Wn. App. 82, 86, 969 P.2d 494 (1998).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To convict defendant of unlawful possession of a firearm in the first degree, the State had to prove that, while in the State of Washington, defendant knowingly had a firearm in his possession or his control, and that he had previously been adjudicated guilty of a serious offense. RCW 9A.10.040(1); *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000). On

appeal, defendant only argues that the State failed to prove that he had knowingly possessed the firearm. *See* Appellant's Brief, p. 7.

Possession of the firearm may be actual or constructive. *See State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); *State v. Callahan*, 77 Wn.2d 27, 29-30, 459 P.2d 400 (1969). Constructive possession is established by proof that the defendant had dominion and control over the firearm or over the premises where the firearm was found. *Staley*, 123 Wn.2d 794, 798; *Callahan*, 77 Wn.2d 27, 29-30. "Premises" includes a vehicle for purposes of this inquiry. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971).

A showing of constructive possession depends on the totality of the circumstances. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). Although close proximity to the firearm is not enough by itself, when it is combined with other factors - *like defendant's ability to reduce the firearm to actual possession and/or defendant's knowledge that the firearm is on the premises* - the courts have found that defendant had dominion and control over the firearm. *See, e.g. Turner*, 103 Wn. App. 515, 521; *State v. Echeverria*, 85 Wn. App. 777, 934 P.2d 1214 (1997) (emphasis added).

Further, Washington courts have held that possession need not be exclusive - one can be in constructive possession jointly with another person. *See, e.g., State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004); *State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731, *review*

*denied*, 127 Wn.2d 1026, 904 P.2d 1158 (1995); *State v. Harris*, 14 Wn. App. 414, 417, 542 P.2d 122 (1975), *review denied*, 86 Wn.2d 1010 (1976).

In *State v. Echeverria*, on appeal, the court held that the State presented sufficient evidence of knowing gun possession, where the gun was in plain sight and within reach, at Echeverria's feet. 85 Wn. App. 777, 783. In that case, a police officer observed a car full of juveniles at four in the morning. 85 Wn. App. 777, 780. When it stopped, Echeverria, a juvenile the officer recognized, got out of the driver's seat and started walking away. *Echeverria*, 85 Wn. App. at 780. Two other people got out of the car as well, and two others were getting out, when the officer detained Echeverria. *Id.*

Shortly thereafter, the officer approached the juveniles' car and saw "the front of the gun, probably about three inches of the barrel[,] sticking out from directly under the seat..." *Id.* In affirming the count of unlawful possession of a firearm, the court reasoned that, because the gun was in plain sight, it was reasonable to infer that Echeverria knew it was there and "controlled the gun that was within his reach." *Id.* at 783.

This case is virtually indistinguishable from *Echeverria*. In both cases defendant was not the last person out of the car. *Echeverria*, 85 Wn. App. at 780; 2RP 20-23, 41. In both cases the gun was found in close proximity to where defendant had sat, in plain view, and within defendant's reach – right on top of defendant's seat in this case and

partially under defendant's seat in *Echeverria*. 85 Wn. App. at 780; 2RP 23, 26. The slight difference in gun placement is insignificant because in either case the gun was visible to defendant, and therefore, a fact finder could reasonably infer that defendant knew about the gun. *See id.* at 783.

Although, unlike this defendant, Echeverria drove the suspect car, the *Echeverria* court gave no weight to that factor. *See id.* Finally, like the *Echeverria* court, the trial court below emphasized that defendant (as well as the other two men in the car) had the ability to reduce the firearm to actual possession. *See* 3RP 112.

Other evidence and reasonable inferences, in addition to proximity, ability to reduce the firearm to actual possession, and plain view, prove that defendant knowingly possessed the gun.

The trier of fact could reasonably infer from the two-minute five-block travel of the suspect Pontiac, after the police had activated their lights and sirens, that all three men, including defendant, had consciousness of guilt and knowledge of the gun and were likely deciding what to do with it. 2RP 17-19, 38. Moreover, it is reasonable to infer that specifically defendant had been preoccupied with the gun, rather than the drugs, because the baggy of marijuana was still on his person when the police searched him. 3RP 82. Defendant's consciousness of guilt can also be inferred from his attempt to hide his identity from the police. 3RP 80, 81, 82.

Finally, this case is not about which of the three men had left the gun on the front passenger seat, but about the totality of the circumstances and reasonable inferences therefrom viewed in the light most favorable to the prosecution - circumstances that indicate defendant knew about the gun and had dominion and control over it.

The evidence was sufficient to prove that defendant committed the crime of unlawful possession of a firearm in the first degree.

2. SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDING THAT DEFENDANT KNOWINGLY HAD A FIREARM IN HIS POSSESSION.

At the adjudication hearing, the court is required to state its findings of fact, including the evidence relied upon, and enter its decision, JuCR 7.11(c). If the case is appealed, the court is required to enter written findings and conclusions, indicating the ultimate facts and evidence upon which the court relied. JuCR 7.11(d); *State v. Roggenkamp*, 115 Wn. App. 927, 948, 64 P.3d 92 (2003). An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994).

An appellate court reviews the challenged findings to determine whether they are supported by substantial evidence, which is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth

of the allegation. *Hill*, 123 Wn.2d 641, 644; *State v. Halstien*, 122 Wn.2d 109, 128-29, 857 P.2d 270 (1993). If the challenged findings are supported by substantial evidence, then they are also binding upon the appellate court. *Id.*

An appellate court reviews the trial court's conclusions of law de novo. *State v. Vasquez*, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001).

An appellate court reviews findings of fact erroneously labeled conclusions of law as findings of fact, and conclusions of law labeled findings of fact as conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986); *State v. Robertson*, 88 Wn. App. 836, 842, 947 P.2d 765 (1997).

Defendant assigned error to the trial court's Conclusions of Law II(1), arguing that they were findings of fact, and that they were unsupported by substantial evidence. *See* Appellant's Opening Brief, p.7-8. Defendant's argument is largely misplaced. Although Conclusions of Law II(1) "knowingly had a firearm in his possession or control" are, indeed, findings of fact, substantial evidence supports those findings.

Conclusions of Law II state:

That Jermaine Gore is guilty beyond a reasonable doubt of the crime of Unlawful Possession of a Firearm in the First Degree in that, on 03/19/09, he:

1. Knowingly had a firearm in his possession or control;
2. Had previously been adjudicated guilty as a juvenile of Robbery in the Second Degree, a serious offense; and

3. The possession or control of the firearm occurred in the State of Washington.

CP 6-10, p. 4-5.

It should be noted that the trial court's Conclusions of Law II are a mixture of findings of fact and conclusion of law. A conclusion of law is defined as the product of legal reasoning, when the law is applied to the facts as found by the trial court. *State v. Niedergang*, 43 Wn. App. 656, 658-659, 719 P.2d 576 (1986) (“[I]f the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law”). A finding of fact is an “assertion that a phenomenon has happened, independent of any assertion as to its legal effect.” *Winans v. Ross*, 35 Wn. App. 238, 240, 666 P.2d 908 (1983). While in theory the definitions seem clear, in practice the line between conclusions of law and findings of fact is often blurry and confusing.

Although the trial court could have made a better record of the specific evidence it had relied upon in reaching its findings of fact, the court properly followed the elements of the crime of unlawful possession when listing its findings. CP 6-10, p. 4-5. Upon finding all the elements of the crime, including that defendant knowingly possessed the firearm, the court properly concluded that defendant was guilty of the crime of unlawful possession of a firearm in the first degree. CP 6-10, p. 4-5. In other words, the legal conclusion of guilt is supported by the court's finding all of the elements of the crime, and the finding of knowing

possession is supported by substantial evidence. The evidentiary support of knowing possession comes from the record, from what the court referred to as Findings of Fact, and from the court's oral ruling.<sup>2</sup> CP 6-10; 3RP 112.

During its oral ruling, the trial court found that defendant had the ability to reduce the firearm to actual possession. *See* 3RP 112. That finding is a verity on appeal. *Hill*, 123 Wn.2d 641, 644. The court specifically reasoned:

...I do not think that the facts here in any way dissuade me from my basic understanding that a gun that can be placed within access of all three people and that all three people have immediate potential for actual possession, that that does satisfy, under these circumstances outlined by the State, constructive possession.

3RP 112.

It is undisputed that the gun was found on the seat where defendant had been sitting – within his reach and in plain view. 2RP 23, 26; CP 6-10 (Findings of Fact VI and VII). From that evidence, the judge could reasonably infer that defendant had placed the gun on the seat as he was getting out of the vehicle, or that defendant had been sitting on the gun or right next to it – either inference supporting a finding that defendant possessed the gun knowingly.

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<sup>2</sup> “Where written findings of fact are incomplete, we may rely on the trial court’s oral findings for purposes of review.” *State v. Robertson*, 88 Wn. App. 836, 842, 947 P.2d 765 (1997) (citing *State v. Bynum*, 76 Wn. App. 262, 884 P.2d 10 (1994)).

It is also undisputed that the Pontiac drove slowly for five blocks with the police in tow, declining several opportunities to stop. CP 6-10 (Findings of Fact V). From that evidence, the judge could reasonably infer that, during the five-block drive, defendant and the other two men were deciding what to do with the gun.

Defendant should not escape liability because two other men were inside the Pontiac. The driver could not have placed the gun on defendant's seat without defendant's knowledge because when the driver was getting out of the car defendant was still in his seat. 2RP 21, 40. Although the third man out of the car hypothetically could have placed the gun on defendant's seat after defendant had gotten out, the court could reason that such conduct was too attenuated and too thought-through under the circumstances of a fast, high-pressure police stop. 2RP 19, 21-22, 23, 41, 45.

During the stop, several police officers had their guns pointed at the car; only a few seconds elapsed between each man getting out of the car; and the last man out had closer and more easily accessible places to leave or hide the gun – in fact, there were a few large pockets in the back of the car and spaces underneath the front seats. 2RP 19-22, 45; Exhibit 24. Because of the exigency of the stop and the presence of more accessible and readily available places to hide the gun, the court could reason it was highly unlikely that the third man had the gun.

An appeal is not a new trial, and defendant does not get to reargue the facts of the case here. The court below found that defendant knowingly possessed a firearm. It is not the role of the Court of Appeals to decide whether it would find the elements of the crime beyond a reasonable doubt, but whether substantial evidence supported this trial court's finding.

As shown above, substantial evidence supported this trial court's ultimate finding of fact that defendant knowingly possessed a firearm, and therefore, defendant's argument fails.

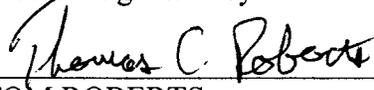
D. CONCLUSION.

Because the evidence, including circumstantial evidence and reasonable inferences therefrom, viewed in the light most favorable to the prosecution, supports a finding that defendant knowingly possessed a firearm, the State respectfully requests that this Court affirm defendant's conviction of unlawful possession of a firearm in the first degree. Should this Court hold that the trial court's findings of fact were inadequate or

incomplete, the State respectfully requests that the Court remand the case for entry of additional findings.<sup>3</sup>

DATED: November 18, 2009.

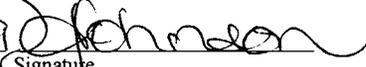
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Rule 9

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/18/09   
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STATE OF WASHINGTON  
BY   
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COURT OF APPEALS  
DIVISION II

<sup>3</sup> *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998); *State v. Avila*, 102 Wn. App. 882, 896, 10 P.3d 486 (2000); *State v. Bynum*, 76 Wn. App. 262, 265, 884 P.2d 10 (1994).