

FILED

MAY 14 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 28393-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ERIC ALLEN HAGGIN,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to support the conviction for first degree unlawful possession of a firearm.

Issue Pertaining to Assignment of Error

Was Mr. Haggin's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove the essential element of possession for the crime of first degree unlawful possession of a firearm?

B. STATEMENT OF THE CASE

In the course of investigating a possible shooting incident, police obtained a search warrant for a house belonging to Mr. and Mrs. Freddie Krueger, presently occupied by their son, Freddie Krueger, Jr. Vol I RP 1-19, Vol II RP 142¹. Freddie Krueger, Jr. had lived in the house for about two years. He had allowed Eric Haggin to stay there with him off and on for about 3-4 weeks. Vol I RP 64-65, Vol II RP 6.

When the police executed the search warrant they entered and searched a crawl space under the house. The crawl space is accessed through the floor of the closet in the bedroom where Mr. Haggin was

¹ Each citation to the record will include the volume number since the court reporter renumbered each volume.

staying. Vol I RP 65, Vol II RP 148. Inside the crawl space, the police found tubs containing tools, a cutting torch, brad-nailer, hard hats, and ammunition for a 9 mm pistol. Vol II RP 148-51. They also found a shotgun in the crawl space that had a palm print matching Freddie Krueger, Jr. Mr. Krueger testified on direct examination that he was unaware of any guns in the house. Vol I RP 77. He later admitted on cross examination that the shotgun belonged to his Dad. He also stated he had given Mr. Haggin permission to store his tools in the crawl space. Vol II RP 4-5, 7.

Mr. Haggin was convicted by a jury of, among other things, first degree unlawful possession of a firearm, based on the shotgun found in the crawl space. CP 71, Vol IV RP 146-48. Mr. Haggin was also charged with first degree assault for allegedly firing a pistol at his ex-girlfriend on the same day as the discovery of the shotgun. CP 10-12. The jury did not convict Mr. Haggin of that charge, despite testimony from several witnesses that he fired a pistol at the alleged victim. Other witnesses who lived in the area also heard shots fired. Vol I RP 6, 42, Vol II RP 16, Vol III RP 8-9, Vol IV RP 17-18. The police found a 9 mm shell casing found in the vicinity of the alleged incident but never found the pistol. Vol I RP 60, Vol II RP 177.

The jury was given a unanimity instruction as follows:

The State alleges that the defendant committed the act of Unlawful Possession of a Firearm 1st degree with multiple firearms. To convict the defendant, one particular act of knowing possession of firearm first degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Unlawful Possession of [a] Firearm.

CP 36.

This appeal followed. CP 97.

C. ARGUMENT

Mr. Haggin's right to due process under Washington

Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove the essential element of possession for the crime of first degree unlawful possession of a firearm.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in Winship: “[T]he use of the reasonable-doubt standard is

indispensable to command the respect and confidence of the community in applications of the criminal law.” In re Winship, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.”

Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." State v. Zamora, 63 Wn. App. 220, 223, 817 P.2d 880 (1991).

RCW 9.41.040(1)(a) provides:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

A person possesses a gun if it is in his custody or control. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (citing State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994)). "Possession may be

actual or constructive"; constructive possession means the person has "dominion or control over [the firearm] or over the premises where the firearm [is] found." State v. Turner, 103 Wn. App. 515, 520-21, 13 P.3d 234 (2000) (citing Echeverria, 85 Wn. App. at 783, 934 P.2d 1214).

Here, the evidence is uncontested that Mr. Haggin did not have actual possession of the shotgun, since it was not found on his person or in the room in which he was staying. The remaining issue then is whether there was sufficient evidence to show Mr. Haggin had dominion or control over the firearm or over the premises where the firearm was found to establish constructive possession. Clearly, there was insufficient evidence to show constructive possession.

Mr. Haggin did not own the house and was not a permanent resident. Freddie Krueger, Jr. had lived in the house for about two years and the house was owned by his parents. He had allowed Eric Haggin to stay there with him off and on for only about 3-4 weeks. Thus, Mr. Haggin's status was that of a house guest rather than a resident.

The fact that the crawl space is accessed through the floor of the closet in the bedroom where Mr. Haggin was staying does not establish dominion and control over the shotgun. The police testified there was a lot of "stuff" stored in the crawl space. Vol II RP 148. Since the house

did not have a basement for storage, the crawl space was the natural choice for a storage area. The fact that Freddie Krueger, Jr. had given Mr. Haggin permission to store his tools in the crawl space does not equate to Mr. Haggin having constructive possession of the shotgun.

The palm print found on the shotgun matched Freddie Krueger, Jr. not Mr. Haggin. Mr. Krueger testified the shotgun belonged to his Dad. This evidence shows that, contrary to his earlier testimony that he was unaware of any guns in the house, Mr. Krueger most likely put the shotgun in the storage area before Mr. Haggin had even started staying in the house. Based on all these facts, there was insufficient evidence that Mr. Haggin had dominion and control of either the shotgun or the premises.

The State may argue that even if Mr. Haggin did not have constructive possession of the shotgun, there was sufficient evidence that he had possession of the 9mm pistol he allegedly fired earlier that day. The jury was given a unanimity instruction that required the jurors to agree on which weapon they were using as a basis for the firearm conviction. However, since the jury acquitted Mr. Haggin of first degree assault for allegedly firing a pistol at his ex-girlfriend, it seems clear that the jury used the shotgun and not the pistol as the basis for the firearm conviction.

There was testimony from several witnesses that Mr. Haggin fired a pistol at the alleged victim. Other witnesses who lived in the area also heard shots fired. The police later found a 9 mm shell casing in the vicinity of the alleged incident, but did not find the pistol. By acquitting Mr. Haggin in the face of all this evidence of shots being fired, the jury must have believed that Mr. Haggin was not the person who fired the pistol and, therefore, not the person who possessed the pistol.

In summation, based on the evidence presented and the verdicts rendered, the jury elected to use the shotgun and not the 9mm pistol as the basis for the conviction for first degree unlawful possession of a firearm. The evidence was insufficient to establish the essential element of either actual or constructive possession of the shotgun.

D. CONCLUSION

For the reasons stated the conviction for first degree unlawful possession of a firearm should be reversed and the case remanded for resentencing using a lower offender score.

Respectfully submitted May 14, 2010.



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