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Court of Appeals  
Division III  
State of Washington

33791-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

JANETTE RAE JOHNSON, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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## **I. APPELLANT’S ASSIGNMENT OF ERROR**

Insufficient evidence supports the conviction for possessing a controlled substance.

## **II. ISSUE PRESENTED**

Whether the evidence presented at trial established that the defendant had dominion and control over a syringe containing heroin located in the basement of her residence where defendant was the sole occupant?

## **III. STATEMENT OF THE CASE**

The Defendant was charged in Spokane County Superior Court by amended information with one count of possession of a controlled substance – heroin, occurring on or about April 9, 2015. CP 15.

Officer Traci Ponto of the Spokane Police Department testified that on April 9, 2015, she and other law enforcement officers, fire department personnel, and a mental health professional went to the defendant’s residence in Spokane to enforce a stipulated order to abate and close a home. RP 16. The residence was “owner-occupied” by Janette Johnson. RP 16. The officers were present to ensure that the residence was vacated and to board it up and secure it. RP 17.

Ms. Johnson's home had previously been over-run by drug users. RP 51. The order of abatement and closure ordered that all "tenants"<sup>1</sup> of the residence were to be out of the home by April 3, 2015, and that Ms. Johnson was to vacate the home no later than April 9, 2015. RP 18. When the officers arrived at the residence, the defendant answered the door and permitted the officers to enter. RP 20-22. Once officers determined that no one else was in the home, they permitted the defendant to re-enter her home and continue to pack up her belongings. RP 23. Code enforcement officials and fire personnel entered the home to go room by room to view the condition of the residence. RP 23. Officer Ponto and at least three other individuals went to the basement of the house. RP 23-24. The stairwell was partially blocked by a cart or a metal frame that was approximately three feet by three feet and "seemed to take up the stairwell." RP 24. Officer Ponto testified that she believed it took two officers to move the metal frame to the basement. RP 55. She testified that she might have been able to get around the frame or through it, but that it was moved to allow easier access to the basement for the multiple officials at the scene. RP 56, 62.

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<sup>1</sup> The order declared that Ms. Johnson's previous tenants had to vacate the home by April 3, 2015. RP 21. However, the term "tenants" was also used by the attorneys at trial in order to delicately refer to the individuals who came and went from Ms. Johnson's home to use drugs there. *See, e.g.*, RP 50. No testimony was adduced at trial that established whether any of the "tenants" were more than temporary visitors to Ms. Johnson's home. RP at *passim*.

The basement was an open room with a mattress and some bedding, and another “small cubbyhole area” to the right of the main area that was a “makeshift room” with a couch or futon. RP 24-25, 49. The stairwell was the main access point for the basement area, other than some windows. RP 25. The officer described the basement as a “common area” and was unsure if there was a securable door at the top of the stairwell.<sup>2</sup> RP 49. The front door to the residence was also secured by a knife that was stuck in the doorjamb. RP 65.

Officer Ponto located an uncapped syringe containing a brownish liquid on the floor of the basement near the mattress. RP 25-27. The substance in the syringe field tested positive for heroin, which was later confirmed by laboratory testing. RP 35, 86. Officer Ponto also located a panoply of other drug paraphernalia in the basement, including syringes, latex tubing, and tin foil. RP 28-31. The officer also noted that there was graffiti on the walls, and specifically mentioned that “There is no I in team, but there is me in meth” was written next to the stairwell in the basement. RP 28.

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<sup>2</sup> The presence of a bed and a couch in the basement does not establish that the basement was meant to be a “makeshift bedroom” (Appellant’s Br. at 2) or that this common area was anything more than a drug den.

The jury subsequently convicted the defendant of possession of a controlled substance, heroin. CP 33. The court sentenced Ms. Johnson to four days jail with four days credit for time served, as well as \$800 in mandatory legal financial obligations. CP 47, 50. The defendant timely appealed.

#### **IV. ARGUMENT**

**THE EVIDENCE PRESENTED AT TRIAL WAS SUFFICIENT TO PROVE THAT THE DEFENDANT COMMITTED THE FELONY OF POSSESSION OF A CONTROLLED SUBSTANCE.**

Ms. Johnson challenges the sufficiency of the evidence supporting her conviction for possession of heroin. The purpose for sufficiency of the evidence review is “to guarantee the fundamental protection of due process of law.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the state, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). 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. *Id.* A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of

the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Possession of a controlled substance is unlawful under RCW 69.60.4013. Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession of a controlled substance is established by showing the person charged has dominion and control over the substance. *State v. Shumaker*, 142 Wn. App. 330, 174 P.3d 1214 (2007); *State v. Olivarez*, 63 Wn. App. 484, 820 P.2d 66 (1991). Dominion and control need not be exclusive in order to sustain a conviction for a crime requiring possession of a contraband item. *State v. Weiss*, 73 Wn.2d 372, 438 P.2d 610 (1968).

To determine whether a defendant was in constructive possession of an object, the court looks to the totality of the circumstances. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). One of the indicia of constructive possession is evidence that the defendant resides at the premises and is not merely visiting. *State v. Amezola*, 49 Wn. App. 78, 87, 741 P.2d 1024 (1987). It is not a crime to have dominion and control over the premises where the controlled substance is found, however, that fact is one of the circumstances from which constructive possession may be inferred. *See, Callahan*, 77 Wn.2d 27. Other factors that may be considered in determining whether a defendant is in constructive

possession of an item are the capacity to exclude others from the premises, *State v. Wilson*, 20 Wn. App. 592, 581 P.2d 592 (1978), and the ability to immediately reduce an object to actual possession, *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). In *State v. Cantabrana*, 83 Wn. App. 204, 921 P.2d 572 (1996) Division One of this court noted:

When the sufficiency of the evidence is challenged on the basis that the State has only shown dominion and control over premises and not over drugs, courts correctly say that the evidence is sufficient because dominion and control over premises raises a rebuttable inference of dominion and control over the drugs.

*Id.*, at 208.

Here, the defendant has not claimed that the jury was improperly instructed as to the law, and has only raised a claim that the jury lacked sufficient evidence to convict the defendant on a theory of constructive possession. The jury instruction on constructive possession read:

Possession means having a substance in one's custody or control. It may either be actual or constructive. Actual possession occurs when the item is in the physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the controlled substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP 30; *see also*, WPIC 50.03.

The jury was properly instructed with WPIC 50.03. The jurors were given the non-exclusive list of factors in WPIC 50.03 that have been taken from case law discussed, *supra*, and the jury made the determination that Ms. Johnson was in possession of heroin.

This court should defer to the jury's finding. The totality of the circumstances supports the jury's conclusion that the defendant had dominion and control over the heroin that was located in her basement. She owned a residence that she had agreed to vacate and stipulated to the order of abatement. RP 16. Ms. Johnson knew that her home had been overrun by drug users and had previously called law enforcement to have people removed from her residence. RP 51, 64. When law enforcement came to ensure that Ms. Johnson and the others had complied with the court's order, Ms. Johnson was the only person still living in the house, and at that time, she was the only person who had the right to be there.

RP 18, 23. No evidence was presented that anyone else had recently been in the home as all other “tenants” vacated the residence at least six days before officers arrived to enforce the order. RP 18. At the time officers came to the residence, the defendant had a knife wedged in the front door as a type of lock, presumably to exclude others from the residence. RP 65. Despite the fact that a metal frame partially blocked the stairwell to the basement where the drugs were located, Officer Ponto testified that the basement could be accessed by going around or through the frame. RP 56.

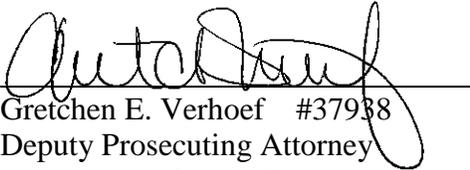
From these facts, the jury certainly could have concluded that Ms. Johnson had constructive possession of the drug. Ms. Johnson was not a mere visitor to her own residence. She knew her home was frequented by drug users, and therefore the jury could infer that she had knowledge of the presence of drugs in her residence. She had the ability to exclude others from her residence, and although a metal frame partially blocked the stairwell to the basement, the frame was maneuverable, and it was also possible to go around or through it. Therefore, the defendant had the ability to reduce the drugs to actual possession almost immediately. Substantial evidence supports the jury’s conclusion that Ms. Johnson was in constructive possession of the drugs in her basement.

## V. CONCLUSION

The State respectfully requests the Court affirm the lower court and jury verdict. The defendant was the only person to have any dominion and control over the heroin located in the basement of her residence a week after the other “tenants” of the home were ordered to leave. Therefore, sufficient evidence existed to prove that the defendant possessed the heroin located in her home; therefore, the jury’s verdict should remain undisturbed.

Dated this 11 day of February, 2016.

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CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on February 11, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart  
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2/11/2016

(Date)

Spokane, WA

(Place)

Kim Cornelius

(Signature)