

62363-0

62363-0

NO. 62363-0

2009 SEP 18 PM 4:53  
COURT OF APPEALS OF THE STATE OF WASHINGTON  
FILED

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

ANDREW McGUIRE,

Appellant.

---

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

---

APPELLANT'S REPLY BRIEF

---

JAN TRASEN  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT ..... 1

    1. WHERE THERE WAS INSUFFICIENT EVIDENCE TO PROVE CONSTRUCTIVE POSSESSION OF A WEAPON BEYOND A REASONABLE DOUBT, REVERSAL IS REQUIRED..... 1

        a. The prosecution was required to show constructive possession. .... 1

        b. The prosecution failed to prove that Mr. McGuire had dominion or control over either the premises or the weapon; therefore, the evidence was insufficient to convict. .... 3

        c. The prosecution’s failure to prove all essential elements requires reversal..... 3

    2. WHERE THE TRIAL COURT REFUSED TO INSTRUCT THE JURY IN A MANNER SUCH THAT THE DEFENSE COULD ARGUE HIS THEORY OF THE CASE, REVERSAL IS REQUIRED. .... 4

        a. Mr. McGuire was entitled to his requested instruction on “close proximity” and “brief and passing control.” ..... 4

        b. The issue was properly preserved for appeal. .... 5

        c. Since this instructional error was not harmless beyond a reasonable doubt, reversal is required. .... 6

B. CONCLUSION ..... 9

TABLE OF AUTHORITIES

**Washington Supreme Court**

MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959)..... 7

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 482 P.2d 775 (1971) . 7

State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645  
(1941) ..... 7

State v. Callahan, 77 Wn.2d. 27, 459 P.2d 400 (1969) ..... 1

State v. Powell, 126 Wn.2d 244, P.2d 615 (1995)..... 6

State v. Williams, 158 Wn.2d 904, 148 P.3d 993 (2006) ..... 7

**Washington Court of Appeals**

State v. Brinkley, 66 Wn. App. 844, 837 P.2d 20 (1992) ..... 7

State v. Cantabrana, 83 Wn. App. 204, 921 P.2d 572 (1996) ..... 1

State v. Castle, 86 Wn. App. 48, 935 P.2d 656 (1997)..... 4, 5

State v. Cote, 123 Wn. App. 546, 96 P.3d 410 (2004) ..... 1, 2

State v. Lucca, 56 Wn. App. 597, 784 P.2d 572 (1990) ..... 2

State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003) ..... 2

State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990)..... 3

State v. Todd, 101 Wn. App. 945, 6 P.3d 86 (2000),..... 2

State v. Turner, 103 Wn. App. 515, 13 P.3d 234 (2000) ..... 1

**United States Supreme Court**

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35  
(1999) ..... 7

**Rules**

CrR 6.15(c)..... 6

A. ARGUMENT.

1. WHERE THERE WAS INSUFFICIENT EVIDENCE TO PROVE CONSTRUCTIVE POSSESSION OF A WEAPON BEYOND A REASONABLE DOUBT, REVERSAL IS REQUIRED.

- a. The prosecution was required to show constructive possession. Constructive possession is defined as the exercise of dominion and control over an item. State v. Callahan, 77 Wn.2d. 27, 29-30, 459 P.2d 400 (1969). Constructive possession is established by viewing the totality of the circumstances, including proximity to the property and ownership of the premises in which the contraband is found. State v. Turner, 103 Wn. App. 515, 523, 13 P.3d 234 (2000); State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). The circumstances must provide substantial evidence for the fact finder to reasonably infer the defendant had dominion and control. State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Close proximity alone is never enough to infer constructive possession. Id.

- b. The prosecution failed to prove that Mr. McGuire had dominion or control over either the premises or the weapon; therefore, the evidence was insufficient to convict. Trial testimony was clear that Mr. McGuire -- like the defendants in Callahan, 77

Wn.2d. at 29-30; Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990); and Cote, 123 Wn. App. at 549 -- neither owned, rented, nor resided in the home in which he was found. RP 297.<sup>1</sup>

Regardless, fingerprint evidence alone does not provide sufficient evidence to support a conviction unless the fingerprints could only have been impressed at the time the crime was committed. State v. Todd, 101 Wn. App. 945, 952, 6 P.3d 86 (2000), overruled on other grounds, State v. Rangel-Reyes, 119 Wn. App. 494, 81 P.3d 157 (2003); State v. Lucca, 56 Wn. App. 597, 599, 784 P.2d 572 (1990).

Here, the fingerprint evidence offered no substantive evidence that Mr. McGuire was in possession of the firearm in question. After all, Mr. McGuire's fingerprint was on the magazine – a crime for which he was not charged – not the gun itself. RP 260-61, 287. In addition, there was no testimony concerning the age of the fingerprint taken from the ammunition inside the gun, and it could as easily have been left on a previous date -- unrelated

---

<sup>1</sup> The house was also full of visitors on the morning of the arrest, according to testimony, following a day at the Puyallup State Fair, and that gun could as easily have belonged to any of the six or seven individuals staying in the house that night, as to Mr. McGuire. RP 295.

to the handling of the instant weapon -- as at any other time. RP 260-61, 287.

The State strives to distinguish Mr. McGuire's situation from that of the defendant in State v. Spruell, where fingerprints on a plate containing cocaine residue demonstrated only fleeting and temporary possession. 57 Wn. App. at; Resp. Brief at 9. However, the State fails to show to differentiate the instant case from Spruell, since the fingerprints taken off the magazine of the gun in the instant case imply possession exactly as fleeting and as temporary as that found in Spruell. In addition, since Mr. McGuire's fingerprints were found only on the magazine and never on the weapon itself, the instant case is arguably stronger than Spruell, where the defendant's prints were found on the plate which contraband itself.

c. The prosecution's failure to prove all essential elements requires reversal. The prosecution failed to sufficiently connect Mr. McGuire to the weapon, by failing to prove that he had dominion or control over the firearm, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. WHERE THE TRIAL COURT REFUSED TO INSTRUCT THE JURY IN A MANNER SUCH THAT THE DEFENSE COULD ARGUE HIS THEORY OF THE CASE, REVERSAL IS REQUIRED.

a. Mr. McGuire was entitled to his requested instruction on “close proximity” and “brief and passing control.” A trial court’s refusal to give a proposed instruction is reviewed for abuse of discretion. State v. Castle, 86 Wn. App. 48, 62, 935 P.2d 656 (1997). Jury instructions are sufficient if they properly inform the jury of the applicable law without misleading the jury, and if they permit each party to argue its theory of the case. Id.

Here, trial counsel specifically requested that the jury instruction on constructive possession include language discussing “close proximity” and “brief and passing control.” CP 59. Mr. McGuire’s entire defense rested on the theory that he was only in mere proximity to this gun, and that a single print on the magazine established nothing more than perhaps momentary earlier handling of its ammunition. Yet, the trial court denied the request to charge and proceeded with its own general instruction instead. RP 307. This clearly deprived Mr. McGuire of his opportunity to argue his theory of the case, and was thus an abuse of discretion.

Unlike in Castle, where this Court held that the trial court properly refused to give a “mere proximity” instruction, Mr. McGuire did not admit to dominion and control over the premises in which the contraband was located. See Castle, 86 Wn. App. at 61-62.

b. The issue was properly preserved for appeal. The State argues that Mr. McGuire waived this issue by failing to object to the court’s jury instructions on the record at trial. Resp. Brief at 11. This argument is disingenuous at best, and should be disregarded.

On June 18, 2008, trial counsel for Mr. McGuire submitted his requested jury instructions, which included a specific instruction for constructive possession including language discussing “close proximity” and “brief and passing control.” CP 59. Specifically, trial counsel requested that the instruction read as follows:

In considering whether or not the defendant possessed an alleged controlled substance or object as alleged, it is not enough that the defendant might have been in close proximity to the alleged drugs/object or that he might have earlier handled them with a brief and passing control (citations omitted).

CP 59.

Following this request, the trial court denied Mr. McGuire’s counsel’s request, and gave its own set of instructions. RP 307. It

is this ruling from which Mr. McGuire seeks relief on appeal. For the State now to argue that “the parties cannot speculate what was going on in the minds of the attorneys during that discussion” is more than disingenuous – it is frivolous. Resp. Brief at 12.

The attorney for Mr. McGuire had stated his clear objection to the court’s instructions by proposing his own instruction on “close proximity.” Trial counsel had effectively been overruled on this issue when the court declined his proposed instruction. RP 307. See, e.g., State v. Powell, 126 Wn.2d 244, 893 P.2d 615 (1995). (a party at trial need not renew a standing objection in order to preserve an issue for review, unless the court indicates that a further objection is required).

Pursuant to CrR 6.15(c), Mr. McGuire, through his trial attorney, took meaningful exception to the instructional error, by requesting a specific instruction on constructive possession. The issue was properly preserved, and must be reviewed by this Court.

c. Since this instructional error was not harmless beyond a reasonable doubt, reversal is required. When a jury instruction is deficient, a reviewing court must reverse the conviction unless the State can show that the instructional error was harmless beyond a reasonable doubt. State v. Williams, 158

Wn.2d 904, 917, 148 P.3d 993 (2006) (citing Neder v. United States, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

The failure of the trial court to instruct the jury in such a way that defense counsel could argue his theory of the case was an abuse of discretion, and as such, must be reversed. An abuse of discretion is discretion exercised on untenable grounds for untenable reasons. State v. Brinkley, 66 Wn. App. 844, 848, 837 P.2d 20 (1992). Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971); MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959); State ex rel. Nielsen v. Superior Court, 7 Wn.2d 562, 110 P.2d 645, 115 P.2d 142 (1941). Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other. Ex rel Carroll, 79 Wn.2d at 26.

Here, the court exercised its discretion on untenable grounds and for untenable reasons.

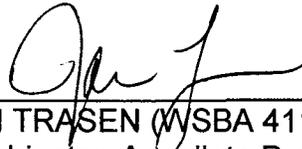
The conviction here rested on the evidence that the weapon was found within “arm’s length” of Mr. McGuire, and that his fingerprint was found on the magazine. RP 143, 177, 287. The trial court’s refusal to give the instruction on “close proximity” and “brief and passing control” deprived defense counsel of the opportunity to argue his theory of the case. Since the prosecution’s case rested on constructive possession of the firearm, Mr. McGuire’s proximity to the gun and the importance of any brief and passing contact with it were crucial for the jury to properly evaluate. The trial court’s refusal to give the specified instruction requested by counsel deprived the jury of an adequate explanation of the law, and deprived Mr. McGuire of a fair opportunity to argue his theory of the case.

B. CONCLUSION.

For the foregoing reasons and those discussed in Appellant's Opening Brief, Andrew McGuire respectfully requests this Court reverse his convictions and remand the case for further proceedings.

DATED this 18<sup>th</sup> day of September, 2009.

Respectfully submitted,



---

JAN TRASEN (WSBA 41177)  
Washington Appellate Project (91052)  
Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 62363-0-I
v.	)	
	)	
ANDREW MCGUIRE,	)	
	)	
Appellant.	)	

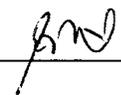
**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18<sup>TH</sup> DAY OF SEPTEMBER, 2009, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] SAMANTHA KANNER, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>
<p>[X] ANDREW MCGUIRE 867221 WASHINGTON CORRECTIONS CENTER PO BOX 900 SHELTON, WA 98584</p>	<p>(X) ( ) ( )</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

2009 SEP 18 PM 4:53  
COURT OF APPEALS  
STATE OF WASHINGTON  
FILED

**SIGNED** IN SEATTLE, WASHINGTON THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2009.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710