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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON

2010 APR -9 AM 10: 35

NO. 64044-5-I

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

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STATE OF WASHINGTON,

Respondent,

v.

KEN CHARLES DAUSEY,

Appellant.

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

The Honorable Alan R. Hancock, Judge  
Superior Court Cause No. 09-1-00059-1

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BRIEF OF RESPONDENT

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## **I. STATEMENT OF THE ISSUES**

- A. There is sufficient evidence for the trial court to have found Mr. Dausey guilty of nine counts of unlawful possession of a firearm in the second degree.**
  
- B. The trial court has entered findings of fact and conclusions of law; therefore, there is no need to remand to the trial court.**

## **II. STATEMENT OF THE CASE**

### **A. Procedural History**

Mr. Dausey was found guilty of nine counts of unlawful possession of a firearm in the second degree, RCW 9.41.040(2)(a), after a trial to the bench on stipulated facts.<sup>1</sup> 2RP 10. The state conceded at sentencing that possession of the nine firearms was the same criminal conduct such that Mr. Dausey's offender score would be increased only by one point.<sup>2</sup> 2RP 11. The court imposed a standard range sentence (2RP 19) and stayed that sentence pending appeal. 2RP 25. Subsequent to the

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<sup>1</sup> There are two volumes of Report of Proceedings in this matter. The first is Verbatim Report of Proceedings (Motion to Suppress) dated July 1, 2009. The second is Verbatim report of Proceedings (Bench Trial and Sentencing), dated August 20, 2009. For clarity, the transcript of the bench trial and sentencing will be referred to as 2RP.

<sup>2</sup> Indeed, the court's decision in this appeal will not affect Mr. Dausey at all.

filing of this appeal, the trial court entered written findings of fact and conclusions of law. CP 51. The court's findings of fact and conclusions of law are attached for convenience as Appendix A.

**B. Facts of the case.**

Sgt. Mike Beech of the Island County Sheriff's office was asked by a Child Protective Services caseworker, Leona Wellman, to accompany her to the home of Ken Dausey and Kari Fisher-Dausey. After reviewing the referral from CPS, Sgt. Beech determined that no crime was committed in connection with the referral, except perhaps for the pornography being produced at the house. CP 53.

Detective Nieder accompanied the CPS worker and Sgt. Beech. They were invited into the home by Mr. Dausey. In addition to two young children of the Dauseys, there were two teenage boys staying at the home. Ms. Wellman asked Mr. Dausey to speak with the small children alone. Mr. Dausey agreed, and went to his office away from the living room so she could do so. *Id.*

Sgt. Beech subsequently called out to Mr. Dausey to speak with him. Mr. Dausey opened the door to his office and invited Sgt. Beech into the room. *Id.* It was Sgt. Beech's intent to discuss Mr. Dausey's making of pornography in the residence. CP 54. On his way to the office, Sgt. Beech passed a bedroom with a gun cabinet in it. *Id.*

Sgt. Beech and Mr. Dausey discussed the pornography that had been produced at the house, and the fact that one of the subjects in the pornography appeared underage. *Id.* From viewing the website where the pornography was published, it appeared to Sgt. Beech that pornographic photographs had been taken at this residence. *Id.* Mr. Dausey replied that he would provide information on the subject of the pornography, and that she was of legal age. Mr. Dausey also assured Sgt. Beech that the Dausey children were not present in the home when the pornography was created. *Id.*

Sgt. Beech then verified with Mr. Dausey that he was a convicted sex offender and that it was unlawful for him to have firearms, and then pointed out the guns in the gun cabinet in the bedroom. At first Mr. Dausey said that the firearms were inherited by him from his father, and then said that the firearms were left to Mrs. Dausey. CP 54.

Mr. Dausey told Sgt. Beech that there were “about” seven long guns and one handgun in the cabinet, which handgun had been purchased by Mrs. Dausey. Mr. Dausey invited Sgt. Beech into the bedroom, where this conversation took place. *Id.*

Sgt. Beech removed eight long guns and one handgun from the gun cabinet and placed them into evidence. CP 55.

### **III. ARGUMENT**

#### **A. Standard of review**

In determining whether sufficient evidence supports a conviction, the standard of review is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). A claim of insufficient evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn therefrom. *State v. Wilson*, 71 Wn.App. 880, 891, 863 P.2d 116 (1993), *rev'd on other grounds*, 125 Wn.2d 212, 883 P.2d 320 (1994). The State may establish the elements of a crime either by direct or circumstantial evidence; one type of evidence is not less worthy than the other. *State v. Brooks*, 45 Wn.App. 824, 826, 727 P.2d 988 (1986).

#### **B. Possession of the firearms.**

To be guilty of unlawful possession of a firearm in the second degree, a person must have been convicted of a non-serious felony and the person owns, has in his or her possession, or has in his or her control any firearm. RCW 9.41.040(2).

Nine firearms were removed from the gun cabinet in the bedroom. Mr. Dausey admits to ownership of “about seven” of the guns. He contests sufficiency of proof of his dominion and control over one long gun and the handgun he says belongs to his wife. Brief of Appellant at 7.

“Factors which point to dominion and control include knowledge of the illegal item on the premises and evidence of residency or tenancy.” *State v. Jeffrey*, 77 Wn.App. 222, 227, 889 P.2d 956 (1999), citing *State v. Paine*, 69 Wn.App. 873, 878-79, 850 P.2d 1369, review denied 122 Wn.2d 1024, 866 P.2d 39 (1993). An aspect of dominion and control is that a person can “reduce the object to actual possession.” *State v. Echevarria*, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997).

In *Jeffrey*, there was sufficient evidence for a jury to conclude that the defendant had constructive possession over a firearm that the defendant knew was located under the couch in his home.

In this case, the guns were all in the same place, in a gun cabinet that Sgt. Beech could see into from the hallway. A perfectly reasonable inference from that fact is that the cabinet was open. Alternately, a perfectly reasonable inference from that fact is that the cabinet had a glass door. With either inference, it can be logically concluded that immediately, or nearly immediately, the guns in the cabinet could be

reduced to actual possession by Mr. Dausey. That includes the handgun, whether it “belonged” to Mr. Dausey or not.

Dominion or control over the premises where an object is found creates a rebuttable presumption that there is dominion and control over the object in question.

CPS went to that particular residence to interview Mr. Dausey’s children. Mr. Dausey invited Ms. Wellman, Sgt. Beech and Det. Nieder into the residence. Mr. Dausey gave permission for Ms. Wellman to speak with his children in private. He left to go to his “office” and closed the door to that room so that Ms. Wellman could speak with the children in private. A perfectly reasonable inference from these facts is that Mr. Dausey had dominion and control over the premises where the firearms were found because he lived there.

It was evident to Sgt. Beech that some of the photographs from the website he reviewed before coming to the Dausey residence were taken at that residence. Additionally, Sgt. Beech commented that the “living conditions inside were dirty and messy, but not as bad as I have seen in the past.” A perfectly reasonable inference from these facts is that this residence is Mr. Dausey’s residence, because Sgt. Beech had seen it before.

Finally, the “Property Received/Returned Form” which was part of the stipulated record lists Mr. Dausey as the person from whom nine firearms were received. His residence is listed as 1835 Ft. Nugent Rd, Oak Harbor, WA 98277. That address is the address that Sgt. Beech reported he accompanied CPS to on the date in question.

Mr. Dausey stipulated to the accuracy of the information contained in the stipulated record. He cannot now claim that his house is not his house.

**C. Remand to the Trial Court.**

A trial court has the authority to enter findings of fact and conclusions of law even after the notice of appeal has been filed. See *In re Marriage of Stern*, 68 Wn.App. 922, 926-28, 846 P.2d 1387 (1993).

In Mr. Dausey’s case, the trial court entered findings of fact and conclusions of law on March 3, 2010. CP 52. There is no need to remand for the trial court to enter findings that have been entered.

**IV. CONCLUSION**

For all the foregoing reasons, appellant's request should be denied.

Respectfully submitted this 7 day of April, 2010.

GREGORY M. BANKS  
ISLAND COUNTY PROSECUTING ATTORNEY

By:   
\_\_\_\_\_  
COLLEEN S. KENIMOND  
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WSBA # 24562

## APPENDIX A



- 1 2. On January 6, 2009, Det. Sgt. Beech received a faxed referral from  
2 Child Protective Services of the Department of Social and Health  
3 Services of the State of Washington regarding the children living  
4 with Dausey and Kari Fisher-Dausey at 1835 Fort Nugent Road in Island  
5 County, Washington.
- 6 3. Det. Sgt. Beech read the referral and saw that it appeared no crime  
7 was or had been committed, unless the children were somehow involved  
8 in the pornography allegedly being manufactured there. He also  
9 browsed the websites provided in the referral and was concerned over  
10 the age of one of the models.
- 11 4. Det. Sgt. Beech researched Dausey, and found that he is a convicted  
12 sex offender who no longer has to register as a sex offender.
- 13 5. Det. Sgt. Beech contacted CPS caseworker Leona Wellman and agreed to  
14 go with her to the house to investigate.
- 15 6. On January 7, 2009, Detective Nieder and Det. Sgt. Beech went to the  
16 Dausey residence at 1835 Fort Nugent Road with Ms. Wellman and stood  
17 by as she explained why they were there. Dausey invited them inside  
18 and Det. Sgt. Beech saw that there were two young children present as  
19 well as two teenage boys who were apparently living at the home.
- 20 7. The living conditions in the home were dirty and messy, but not as bad  
21 as Det. Sgt. Beech had seen in the past. Ms. Wellman asked Dausey if  
22 she could speak to the young children in private, and he agreed to go  
23 back to his office so she could do so.
- 24 8. Det. Sgt. Beech waited a few minutes and then called out to Dausey as  
25 Det. Sgt. Beech walked down the short hallway. Det. Sgt. Beech called  
out to ask if he could speak with Dausey, and Dausey opened the door

1 to his office and said to come in. As Det. Sgt. Beech walked down the  
2 hall, he could see through the partially opened door of the bedroom  
3 and saw a large wood and glass gun cabinet. He could clearly see  
4 several rifles in this cabinet.

5 9. Det. Sgt. Beech spoke with Dausey regarding the pornographic websites  
6 and the fact that it appeared to him that the photos he had seen on  
7 the internet had been taken in Dausey's home. Dausey said that some  
8 of them were, but added that the children were not present while this  
9 was happening. Det. Sgt. Beech asked about the ages of the girls, and  
10 especially about the one that appeared underage. Dausey replied that  
11 he had met this girl through a friend named "Johnny Nice Guy" who runs  
12 a film production company called "Fair Trade Pink Films" and that her  
13 age was confirmed. Dausey agreed to provide Det. Sgt. Beech with her  
14 identification via email as soon as possible so he could verify her  
15 age.

16 10. Det. Sgt. Beech then asked Dausey about his conviction and he stated  
17 that he was a convicted sex offender and felon. Det. Sgt. Beech then  
18 asked him about the guns that he had seen in his room. Dausey first  
19 replied that his father had left them to him. Det. Sgt. Beech  
20 commented that as a convicted felon he (Dausey) was not allowed to own  
21 firearms. Dausey then said that his father had left them to this  
22 wife. Det. Sgt. Beech then asked him how many guns were in the  
23 cabinet and Dausey invited him into the bedroom. Dausey then said  
24 that there were about seven long-guns and one handgun. He said that  
25 the handgun belonged to this wife and that the others all came from  
his father.

1 11. Det. Sgt. Beech then advised him that it was a violation for him to be  
2 in possession of the firearms and that he (Det. Sgt. Beech) would be  
3 taking them with him. Det. Sgt. Beech then formally advised him that  
4 he was under arrest for Unlawful Possession of Firearms and read him  
5 his Miranda rights.

6 12. Dausey replied that he understood his rights and then told Det. Sgt.  
7 Beech that all the guns were his, except the handgun that he said his  
8 wife had purchased.

9 13. Det. Sgt. Beech decided not to physically arrest Dausey at the scene  
10 because of the small children in the home and Dausey's health  
11 problems.

12 14. Det. Sgt. Beech recovered a total of eight long-guns and one handgun.

13 15. The long-guns recovered are accurately described in the Property  
14 Received/Returned Form and consisted of a .12 gauge auto-shotgun, a  
15 bolt action .22, a .270 Win bolt action with Bushnell scope, a .22  
16 rifle, a .22 bolt action "Series F," a .22 pump action rifle, a .22  
17 pump action rifle (broken stock), and a .12 gauge auto (no stock  
18 attached). The handgun recovered was a .45 cal handgun. The makes,  
19 models, and serial numbers of the guns are set forth in the Property  
20 Received/Returned Form.

21 16. Before Dausey was advised of his Miranda rights, he was not under  
22 arrest.

23 17. All of Dausey's statements to Det. Sgt. Beech were knowingly,  
24 intelligently and voluntarily made. Det. Sgt. Beech made no threats  
25 or promises to Dausey and Det. Sgt. Beech did not engage in any kind  
of coercion against Dausey.

1 18. Any finding of fact herein that should more properly have been  
2 designated as a conclusion of law shall be considered a conclusion of  
3 law.

4 On the basis of the foregoing findings of fact, the court hereby enters  
5 the following:

6  
7 CONCLUSIONS OF LAW

- 8 1. The court has jurisdiction over the subject matter and the person of  
9 the defendant.
- 10 2. Defendant Ken Charles Dausey is charged with nine counts of the crime  
11 of Unlawful Possession of a Firearm in the Second Degree. The State  
12 bears the burden of proving each and every element of each crime  
13 beyond a reasonable doubt.
- 14 3. The elements of the crime of Unlawful Possession of a Firearm in the  
15 Second Degree, as they relate to the case at bar, are that the  
16 defendant, having previously been convicted in the State of Washington  
17 or elsewhere of a felony that does not qualify as a serious offense as  
18 defined in RCW 9.41.010(12)(a), did knowingly own or have in his  
19 possession or under his control a firearm.
- 20 4. The State has proven each and every element of each crime charged  
21 against defendant Dausey in this case beyond a reasonable doubt.
- 22 5. Dausey was convicted on November 30, 1993, of the crime of Rape of a  
23 Child in the Third Degree, a felony.
- 24 6. On January 7, 2009, in the State of Washington, Dausey knowingly owned  
25 or had in his possession or under this control all of the firearms  
described in the Findings of Fact set forth above.

1 7. On January 7, 2009, Dausey owned all of the firearms described in the  
2 Findings of Fact above with the possible exception of the .45 caliber  
3 handgun, which may have been owned by his wife. However, Dausey was  
4 in possession of this handgun or had this handgun under his control on  
5 January 7, 2009.

6 8. On January 7, 2009, Dausey had in his possession or under his control  
7 all of the firearms described in the Findings of Fact above.

8 9. Dausey's ownership and possession and control of these firearms is  
9 proven by the following: His oral statements to Det. Sgt. Beech that  
10 (1) his father had left the firearms to him, and later that (2) all  
11 firearms were his except for the handgun which he said belonged to his  
12 wife; his knowledge of the firearms as stated to Det. Sgt. Beech; and  
13 his possession and control of the home in which the firearms were  
14 located, which proves his constructive possession of the firearms.

15 10. Det. Sgt. Beech made a lawful entry into Dausey's home on the date in  
16 question. He was legitimately investigating a CPS complaint with  
17 caseworker Leona Wellman and Dausey voluntarily invited him and Ms.  
18 Wellman into the residence. Dausey invited Det. Sgt. Beech into his  
19 office in the residence. Det. Sgt. Beech was in a position that he  
20 had the right to be in when he saw the rifles in the cabinet in the  
21 bedroom. Dausey invited Det. Sgt. Beech into the bedroom where the  
22 firearms were located. The firearms were lawfully seized by Det. Sgt.  
23 Beech.

24 11. All of Dausey's statements to Det. Sgt. Beech are admissible in  
25 evidence. They were knowingly, intelligently, and voluntarily made  
without any threats of promises having been made by Det. Sgt. Beech.

1 Det. Sgt. Beech did not engage in any coercion against Dausey. Det.  
2 Sgt. Beech properly advised Dausey of his Miranda rights, and Dausey  
3 understood his rights and agreed to talk with Det. Sgt. Beech.

4 12. Any conclusion of law herein that should more properly have been  
5 designated as a finding of fact shall be considered a finding of fact.

6 Dated this 2<sup>nd</sup> day of March, 2010.

7  
8 *Alan R. Hancock*  
9 \_\_\_\_\_  
10 Judge  
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