IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JEFFERY ANTONIO WILLIS, Appellant.	)	No. 72030-9-I DIVISION ONE UNPUBLISHED OPINION FILED: July 28, 2014

TRICKEY, J. — Jeffery Willis appeals his jury convictions for first degree unlawful possession of a firearm and unlawful display of a firearm. He asserts that the evidence was insufficient to support both convictions; that the trial court erred when it declined to give his proposed jury instruction concerning the element of "possession"; and that the trial court erred when it imposed legal financial obligations based upon a finding that he had the ability to pay. Finding no error, we affirm.

FACTS

During the late hours of October 21, 2011, Willis was patronizing a bar in Tacoma, Washington.[1] At around closing time, Willis engaged in a physical altercation with another bar patron.[2] The manager of the bar, Sesilia Thomas, and the security guard separated the two men.[3] Willis was escorted outside of the bar, while the man with whom he was fighting remained inside.[4] Thomas then asked Willis to leave.[5]

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[1] 1 Report of Proceedings (RP) (April 16, 2012) at 20, 24-26.
[2] 1 RP at 26-28, 33, 41.
[3] 1 RP at 28.
[4] 1 RP at 28, 32.
[5] 1 RP at 32.

Perry Griffin was sitting in his vehicle parked in a nearby parking lot, observing Willis while he exited the bar.[6] Thomas witnessed Griffin as he drove to the bar's parking lot and handed Willis a silver gun.[7] Thomas was standing approximately ten feet away from Willis.[8] The security guard, standing approximately five feet away from Willis, also noticed the gun.[9]

Willis then fell to the ground, causing the gun to slip out of his hand.[10] He stood up, retrieved the gun, and proceeded toward the front door of the bar.[11] Thomas stepped in front of him and asked him to leave.[12] Willis waved the gun in the air and attempted to pull the trigger.[13] Griffin then ran over to Willis, seized the gun, and departed in his vehicle.[14] Thomas called 911 and reported Griffin's license plate number.[15]

Police officers subsequently arrested Willis after stopping the vehicle in which he was riding.[16] No firearms were discovered inside the vehicle.[17] Police officers also soon located Griffin's vehicle.[18] While handcuffing Griffin, an officer observed a silver semiautomatic handgun lying on the pavement outside of the

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[6] 1 RP at 34, 44.
[7] 1 RP at 34-35, 44.
[8] 1 RP at 35.
[9] 2 RP (April 17, 2012) at 16.
[10] 1 RP at 35.
[11] 1 RP at 35-36.
[12] 1 RP at 36.
[13] 1 RP at 35, 53.
[14] 1 RP at 38, 40, 45.
[15] 1 RP at 38.
[16] 2 RP at 18, 29-30, 32.
[17] 2 RP at 34.
[18] 2 RP at 50, 52.

driver's door.[19]

The State charged Willis by amended information with first degree unlawful possession of a firearm, in violation of RCW 9.41.040(1)(a),[20] and unlawful carrying or handling, in violation of RCW 9.41.270(1) and (2)[21].[22]

Following trial, the jury found Willis guilty as charged.[23] The trial court imposed concurrent sentences of 102 months.[24] The trial court also imposed $800 in legal financial obligations.[25]

Willis appeals.

ANALYSIS

Willis first contends that the trial court erred in declining to give his proposed jury instruction. He argues that as a result of this alleged error, he is entitled to a reversal of his conviction for unlawful possession of a firearm. We disagree.

A defendant is "entitled to have the trial court instruct upon [his or her]

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[19] 2 RP at 53-54. The parties stipulated that the handgun was test fired by the police and found to be operational. 2 RP at 66.

[20] 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.

[21] RCW 9.41.270(1) provides, in relevant part:

> It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, . . . in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

RCW 9.41.270(2) provides that violation of RCW 9.41.270(1) is a gross misdemeanor.

[22] Clerk's Papers (CP) at 4-5.

[23] CP at 13-14.

[24] CP at 43.

[25] CP at 41.

theory of the case if there is evidence to support the theory." State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986) (citing State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980); State v. Dana, 73 Wn.2d 533, 536, 439 P.2d 403 (1968)). But a defendant is not entitled to a jury instruction that misstates the law or is not supported by evidence. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994) (citing State v. Hoffman, 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991)).

To convict Willis of unlawful possession of a firearm as charged, the State was required to prove that Willis knowingly owned a firearm or had one in his possession or control, and that he had been previously convicted of a serious offense.[26] See RCW 9.41.040(1)(a).

"Possession of property may be either actual or constructive." State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person has actual possession when he or she has personal custody of the property. Callahan, 77 Wn.2d at 29. A person has constructive possession when he or she has dominion and control over the property. Callahan, 77 Wn.2d at 29. "[P]ossession entails actual control, not a passing control which is only a momentary handling." Callahan, 77 Wn.2d at 29. "[W]e focus not on the length of the possession but on the quality and nature of that possession." State v. Summers, 107 Wn. App. 373, 386, 28 P.3d 780 (2001) (citing Staley, 123 Wn.2d at 801). "The length of time is but a factor in determining whether it was actual or passing possession." Summers, 107 Wn. App. at 386 (citing Staley, 123 Wn.2d

[26] CP at 23, 27.

at 801). Thus, even a momentary handling can be sufficient to establish possession if there are "other sufficient indicia of control." Summers, 107 Wn. App. at 386 (citing Staley, 123 Wn.2d at 802).

Here, Willis proposed the following jury instruction on the theory of passing control:

> Possession is not established if, at most, there is passing control. Passing control is momentarily handling.
> It is not enough that the defendant . . . *might have* momentarily handled [the firearm] with a brief and passing control.[27]

As the State correctly points out, this instruction is an inaccurate statement of the law. It does not convey to the jury that momentary control *can* amount to actual possession when other indicia of control are present. See Summers, 107 Wn. App. at 387. Under this proposed instruction, a jury would have been required to find Willis not guilty of unlawful possession if it found that he had momentary control of the firearm, even if the totality of the circumstances showed that he had control of the firearm. This is not the law. Additionally problematic is the proposed instruction's unclear and misleading language. The inclusion of the phrase "might have" skews the focus of the inquiry, improperly suggesting to the jury that the question is whether there was a *likelihood* of momentarily handling. We hold that the trial court did not abuse its discretion when it declined to give Willis's proposed instruction.[28]

Nevertheless, Willis argues that the State presented insufficient evidence

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[27] CP at 8 (emphasis added).
[28] See CP at 15-33; 3 RP (April 18, 2012) at 82-83.

to support his convictions. He contends that the State failed to prove that he had actual or constructive possession of the firearm.[29] He further claims that the evidence was insufficient to convict him of unlawful possession of a firearm and unlawful display of a firearm because, he claims, no gun was found on him when he was arrested. We disagree.

As set forth above, to convict Willis of unlawful possession of a firearm, the State was required to prove, among other elements, that Willis was in possession of a firearm. To convict Willis of unlawful display of a firearm, the State needed to establish that he carried, exhibited, displayed, or drew a firearm, in a manner, under circumstances, and at a time and place that manifested an intent to intimidate another or that warranted alarm for the safety of other persons.[30] See RCW 9.41.270(1).

The State must prove every element of the crime charged beyond a reasonable doubt. State v. Williams, 136 Wn. App. 486, 492–93, 150 P.3d 111 (2007). When reviewing a claim for sufficiency of the evidence, we view the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Williams, 144 Wn.2d 197, 212, 26 P.3d 890 (2001). "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). "Deference must be given to the trier of

[29] Willis raises this argument in a Statement of Additional Grounds.
[30] CP at 28.

fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence." State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308 (1989).

Here, the evidence was sufficient for a reasonable fact finder to find that Willis had actual possession of a firearm. At trial, the State presented the testimony of the bar manager and the security guard, both of whom were eyewitnesses to the events that had transpired that night. They testified that Willis received, carried, brandished, and pointed a silver gun in the air.[31] They estimated that they were approximately five to ten feet away from Willis.[32] The State also displayed photographs and video footage of the incident, captured by surveillance cameras.[33] Testimony presented at trial showed that the gun the police recovered from Griffin matched the description provided by the witnesses.[34] From this evidence, a rational trier of fact could infer that Willis had actual possession of the gun and that the object he possessed was a firearm. Accordingly, the State presented sufficient evidence to support both of Willis's convictions.

Willis next contends that the trial court erred when it admitted evidence of his prior convictions. We disagree.

At trial, Willis testified that on October 21, he had drunk four or five double

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[31] 1 RP at 35, 45-46; 2 RP at 15-17.
[32] 1 RP at 35; 2 RP at 16.
[33] 1 RP at 29; 2 RP at 9.
[34] 2 RP at 56.

shots of liquor and became intoxicated.[35] He also testified that he was not a "typical drinker."[36] When asked on direct examination how often he drank alcohol, Willis responded that he had not had a drink "since [he] got a DUI [(driving while under the influence)] years ago."[37] He then stated that he had imbibed alcohol a few months before the incident and that he drank "every few months."[38] With regard to the firearm, Willis testified that because of his previous conviction of a serious offense, which prohibited him from possessing a firearm, he would not possess or own a firearm in light of his concerns for the law and his children.[39] Willis admitted that he had "some prior recent convictions for dishonesty."[40]

After direct examination, the State moved to question Willis's credibility based on his prior convictions and his testimony on direct examination.[41] The trial court considered Willis's testimony before granting the State's request.[42] Prior to cross-examination of Willis, the trial court instructed the jury that it could consider the evidence of Willis's prior convictions for the sole purpose of assessing his credibility.[43] The following exchange then took place during the State's cross-examination of Willis:

Q. Mr. Willis, on direct examination, you indicated that you don't

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[35] 3 RP at 10-12.
[36] 3 RP at 11.
[37] 3 RP at 11.
[38] 3 RP at 12.
[39] 3 RP at 17-18.
[40] 3 RP at 18.
[41] 3 RP at 24-25.
[42] 3 RP at 28-30, 32-33, 39.
[43] 3 RP at 40.

drink a lot. That's not true, is it, Mr. Willis?
A. Yes, sir.
Q. In fact, you were convicted of DUI in 1999, correct?
A. Yes, sir.
Q. And you were convicted of DUI again in 2004, isn't that right?
A. Yes, sir.
Q. And, again, you were convicted of DUI in 2006, right?
A. Yes, sir.
Q. And, again, on direct examination, you testified that you were convicted of a serious offense, and, therefore, you would not possess a firearm. That's not true, is it, Mr. Willis?
A. Yes, sir.
Q. In fact, your serious offense conviction was from December 20th of 1996, correct?
A. Yes, sir.
Q. As part of that, you also plead to Unlawful Possession of a Firearm, correct?
A. Yes, sir.
Q. And, again, you were convicted of Unlawful Possession of a Firearm on December 8th of 2000, correct?
A. Yes, sir.
Q. And, again, convicted of Unlawful Possession of a Firearm on January 9th, 2004, correct?
A. Yes, sir.[44]

Willis asserts that the admission of evidence of his prior convictions violated ER 404(b). But the State did not seek admission of the evidence based on this evidentiary rule.[45] Rather, the State correctly argued, as it does on appeal, that Willis opened the door to questioning about his prior convictions when he testified to his drinking habits and past experience with drinking, and when defense counsel asked him about whether he would possess a firearm in light of his previous conviction of a serious offense.[46]

"A party's introduction of evidence that would be admissible if offered by

[44] 3 RP at 40-41.
[45] 3 RP at 25-27.
[46] 3 RP at 23-24.

the opposing party 'opens the door' to explanation or contradiction of that evidence." State v. Ortega, 134 Wn. App. 617, 626, 142 P.3d 175 (2006) (citing State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995)). When a witness "opens the door," the trial court has the discretion to admit otherwise inadmissible evidence. See State v. Berg, 147 Wn. App. 923, 939, 198 P.3d 529 (2008); State v. Brush, 32 Wn. App. 450, 451, 648 P.2d 897 (1982). The "open door" doctrine promotes fairness by preventing one party from raising a subject to gain an advantage and then barring the other party from further inquiry. Avendano–Lopez, 79 Wn. App. at 714 (quoting State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969)). We review for abuse of discretion a trial court's decision to allow cross-examination under the open-door rule. Ortega, 134 Wn. App. at 626 (citing State v. Wilson, 20 Wn. App. 592, 594, 581 P.2d 592 (1978).

Here, Willis's testimony on direct examination created the impression that he was not a frequent drinker, that he was heavily intoxicated on the night in question, and that drinking was out of his character. His testimony similarly implied that possessing a gun was out of his character. Therefore, Willis opened the door to the State's questions regarding his prior convictions. Furthermore, the jury is presumed to have followed the trial court's instructions to consider the evidence of Willis's prior convictions solely for the purpose of assessing his credibility. See State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). The trial court did not abuse its discretion by allowing the State to introduce evidence of Willis's prior convictions.

Willis contends, finally, that the trial court impermissibly imposed legal

financial obligations based on a finding of his ability to pay that was not supported by the record. Again, we disagree.

Following his sentencing hearing, the trial court entered a finding that after considering his past, present, and future ability to pay legal financial obligations, Willis "has the ability or likely future ability to pay the legal financial obligations imposed herein."[47] Willis now challenges the trial court's imposition of a $200 criminal filing fee.[48] But he did not object to the imposition of this obligation at his sentencing hearing.[49] Therefore, Willis has waived his ability to challenge the fee obligation on appeal. RAP 2.5(a); State v. Blazina, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), review granted, 178 Wn.2d 1010, 311 P.3d 27 (2013).

Moreover, a criminal filing fee is required by RCW 36.18.020(h) and, thus, is a mandatory legal financial obligation. The courts are not required to consider a defendant's ability to pay when imposing mandatory fees. State v. Lundy, 176 Wn. App. 96, 102, 308 P.3d 755 (2013). Accordingly, "the trial court's 'finding' of a defendant's current or likely future ability to pay them is surplusage." Lundy, 176 Wn. App. at 103.

Affirmed.

Tiddy, J

WE CONCUR:

Schindler, J

[47] CP at 41.
[48] CP at 41.
[49] See 5 RP (May 4, 2012) at 13-14.