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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ADRIAN OBRYANT JACOBS,

Appellant.

No. 79062-5-1

DIVISION ONE

UNPUBLISHED OPINION

FILED: January 22, 2019

CHUN, J. — The State charged Adrian Jacobs with one count of first degree unlawful possession of a firearm. Jacobs argued the firearm belonged to another suspect at the residence. A jury convicted Jacobs as charged. Jacobs contends the evidence does not suffice to support his conviction. Jacobs further asserts that the trial court violated his right to present a defense by denying his motion to introduce evidence of another suspect's criminal history. We affirm the conviction, but remand for the trial court to strike the criminal filing fee and the DNA fee it imposed against Jacobs.

BACKGROUND

Amanda Mullenix served as Jacobs's supervising community corrections officer (CCO). The terms of Jacobs's Department of Corrections (DOC) supervision required him to report a "valid and verifiable" current address. On September 24, 2015, Jacobs reported his address as 1723 East 46th Street in Tacoma, Washington. On July 12, 2016, Jacobs reported he had moved into his

mother's residence. She subsequently passed away. On September 15, 2016, Jacobs reported he had moved back to his girlfriend's residence at 1723 East 46th Street. On September 21, 2016, Mullenix conducted a routine home visit to that address. Leslie Cabreros, the father of Jacobs's girlfriend, answered the door. Cabreros confirmed that Jacobs had moved back into the home.¹

On September 27, 2016, Jacobs reported to the DOC office in Tacoma. Several CCOs went to 1723 East 46th Street to conduct a search. Jacobs remained outside in the transport vehicle with one of the officers. When they arrived, Cabreros answered the door. He was the only person home at that time. The CCOs entered the residence and Cabreros stepped outside. During the search, CCOs found a loaded semiautomatic handgun on the living room floor near the couch. Cabreros's keys and a wallet with Cabreros's identification inside were on the floor near the gun. Upon finding the firearm, the CCOs called for assistance from the Tacoma Police Department. A police forensic specialist subsequently recovered one partial latent fingerprint from the firearm. The print matched a known print of Jacobs's right little finger. Cabreros was excluded as a match.

While searching the bedroom that Jacobs shared with his girlfriend, Mullenix found "gender neutral" shirts and pants she thought "were bigger than what the girlfriend would wear." She observed "female items" on one side of the bed, but "there wasn't a whole lot of stuff" on the other side. In a downstairs

¹ Cabreros told Mullenix that his daughter and children also lived at the house. The record does not specify the children's parents.

closet near the rear door, Mullenix observed a jacket with a distinctive design and a pair of tan boots she had seen Jacobs wearing before. Mullenix observed some other men's clothing in the closet, but could not definitively say whose it was.

On September 28, 2016, the State charged Jacobs with one count of first degree unlawful possession of a firearm. After Jacobs's first trial resulted in a hung jury, the court declared a mistrial and reset the matter for a second trial. On May 10, 2017, the jury found Jacobs guilty as charged. Jacobs appeals.

ANALYSIS

Sufficiency of the Evidence

Jacobs challenges the sufficiency of the evidence to support his conviction. "Evidence is sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt." State v. Cardenas-Flores, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). Our review on a challenge to the sufficiency of the evidence in a criminal case remains highly deferential to the jury's decision. State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). "In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it." State v. Drum, 168 Wn.2d 23, 35, 225 P.3d 237 (2010).

A person is guilty of first degree unlawful possession of a firearm "if the person owns, has in his or her possession, or has in his or her control, any firearm after having previously been convicted ... of any serious offense as

defined in this chapter.” RCW 9.41.040(1)(a). The State must also prove knowing possession of the firearm. State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000).

The parties stipulated that Jacobs had previously been convicted of a felony classified as a serious offense and therefore could not lawfully own, or have in his possession, or under his control, any firearm. Therefore, the issue before us concerns whether sufficient evidence established his possession or control of the firearm.²

Possession may be actual or constructive. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Actual possession means personal custody or actual physical possession. State v. Manion, 173 Wn. App. 610, 634, 295 P.3d 270 (2013). “[C]onstructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found.” State v. Echevarria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). In determining dominion and control, the court considers the totality of the circumstances and does not view any single factor as dispositive. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). Evidence of temporary residence or the mere presence of personal possessions on the premises does not suffice to establish dominion and control. State v. Alvarez, 105 Wn. App. 215, 222, 19 P.3d 485 (2001).

Jacobs argues the evidence does not suffice to support an inference that

² The to-convict instruction in this case required knowing possession or control, not proof of ownership.

he had actual or constructive possession of the firearm found at the residence. He relies on State v. Callahan, 77 Wn.2d 27, 31-32, 459 P.2d 400 (1969), State v. Spruell, 57 Wn. App. 383, 387-88, 788 P.2d 21 (1990), and State v. Cote, 123 Wn. App. 546, 550, 96 P.3d 410 (2004), for the proposition that mere proximity and momentary handling of the firearm does not suffice to establish constructive possession. But in those cases, the State did not show defendant's dominion and control over the premises where the contraband was found. Here, in contrast, Mullenix testified that Jacobs reported the 1723 East 46th Street address to DOC as his residence on September 15, 2016, twelve days prior to his arrest. Mullenix had previously observed Jacobs at the residence, and Cabrerros told her that Jacobs had moved back in.³ Mullenix also observed clothing belonging to Jacobs in the closet. "[W]hen a person has dominion and control over a premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises." State v. Reichert, 158 Wn. App. 374, 390, 242 P.3d 44 (2010). Furthermore, the firearm recovered in the living room bore Jacobs's fingerprint, thereby indicating that he was aware of the presence of the firearm and had actually handled it. Viewed in the light most favorable to the State and drawing all inferences against Jacobs, this evidence suffices to establish that Jacobs had dominion and control over the premises and the firearm. See State v. Summers, 107 Wn. App. 373, 388-90, 28 P.3d 780

³ Apart from a two month period in 2016 when Jacobs reported living at his mother's residence, Jacobs had reported 1723 East 46th Street as his residence for almost a year prior to discovery of the firearm.

(2001) (defendant's admission that he lived in the basement where firearm was found established dominion and control over the premises sufficient to allow jury to infer constructive possession, even though he shared the space with others and was not present when police discovered the firearm).

Jacobs seeks to rebut the presumption of dominion and control over the premises by presenting his friend Ryan Dolan as a witness. Dolan testified that Jacobs started staying with him approximately five to seven days before the firearm was discovered on September 27, 2016. But Jacobs's address on file with DOC was the 1723 East 46th Street residence. Jacobs argues the lack of personal items at that residence corroborates Dolan's testimony that Jacobs had been staying with him. However, "[t]his court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of evidence." State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). The evidence sufficiently supported the conviction.

Other Suspect Evidence

Jacobs argues the trial court violated his constitutional right to present a defense by rejecting his motion to present evidence that Cabrerros had a motive to deny possessing the firearm. A trial court's decision to admit or exclude other suspect evidence is reviewed for abuse of discretion. State v. Wade, 186 Wn. App. 749, 765, 346 P.3d 838 (2015).

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant's right to present a defense. State v. Strizheus, 163 Wn. App. 820, 829-30, 262 P.3d

100 (2011). But criminal defendants do not have a constitutional right to present irrelevant evidence. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). ER 401 defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” “The standard for relevance of other suspect evidence is whether there is evidence ‘tending to connect’ someone other than the defendant with the crime.” State v. Franklin, 180 Wn.2d 371, 381, 325 P.3d 159 (2014) (quoting State v. Downs, 168 Wn.2d 664, 667, 13 P.2d 1 (1932)). “[S]ome combination of facts or circumstances must point to a nonspeculative link between the other suspect and the charged crime.” Franklin, 180 Wn.2d at 381. The court must focus the trial “by excluding evidence that has only a very weak logical connection to the central issues.” Wade, 186 Wn. App. at 765 (quoting Franklin, 180 Wn.2d at 378).

At a pretrial hearing, Jacobs sought to introduce evidence of Cabreros’s criminal history to show that Cabreros was a convicted felon who could not lawfully possess a firearm and had a motive not to claim ownership of it. Jacobs noted that Cabreros was alone at the house with the firearm, in close proximity to it when he answered the door, and that his wallet and keys were found on the floor near the firearm. The trial court denied the motion on the ground that mere evidence of motive to deny ownership was not enough to connect Cabreros with the firearm. The court specified that its ruling did not prevent the defense from arguing that there were other people in the home who could have actual or

constructive possession of the firearm.

Jacobs contends that evidence of Cabreros's criminal history was relevant because it established a reason for his failure to take ownership of the firearm at the time of discovery. The felon status might have bore relevance had Cabreros denied ownership. But neither side called Cabreros as a witness at trial. The record does not indicate whether Cabreros denied ownership or possession of the firearm. Evidence regarding Cabreros's motive to deny ownership of the firearm was therefore not relevant. Moreover, such evidence would not make it more or less likely that Cabreros possessed the firearm to the exclusion of Jacobs. Dominion and control need not be exclusive to support a finding of constructive possession. Summers, 107 Wn. App. at 384.

"The defendant has the burden of showing that the 'other suspect' evidence is admissible." State v. Howard, 127 Wn. App. 862, 866, 113 P.3d 511 (2005). Jacobs did not meet this burden. The trial court did not abuse its discretion in excluding irrelevant evidence of Cabreros's criminal history.⁴ The court allowed Jacobs to present evidence in support of his argument that Cabreros had dominion and control over the firearm. Exclusion of irrelevant criminal history evidence did not undermine Jacobs's constitutional right to present a defense.

Motion to Strike Fees

After the parties completed their briefing for this case, the Washington

⁴ The trial court did not exclude the evidence on this basis. We acknowledge Jacobs's argument that the trial court erred in refusing to consider other evidence connecting Cabreros to the gun. However, we may affirm a lower court's ruling on any grounds adequately supported in the record. State v. Costich, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Supreme Court issued its decision in State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018). In Ramirez, the Court held that ENGROSSED SUBSTITUTE H.B. 1783, 65th Leg., Reg. Sess. (Wash 2018) (HB 1783) applies prospectively to cases on appeal. Id. at 747. HB 1783, which became effective on June 7, 2018, amends RCW 36.18.020(2)(h) and prohibits courts from assessing a criminal filing fee for defendants who are indigent at the time of sentencing. HB 1783 also amends RCW 43.43.7541 to provide that the \$100 DNA collection fee is no longer mandatory where the State “has previously collected the offender’s DNA as a result of a prior conviction.”

Jacobs moves to strike the \$200 criminal filing fee and \$100 DNA fee from his judgment and sentence pursuant to HB 1783 and Ramirez. The State acknowledges that Jacobs was found indigent at the time of sentencing. The State further acknowledges that its records show Jacobs’s DNA was previously collected and is on file with the Washington State Patrol Crime Lab. We therefore direct the trial court to strike the \$200 criminal filing fee and \$100 DNA collection fee from his judgment and sentence.

Affirmed and remanded.

Chen, J.

WE CONCUR:

Andrews, J.

Mann, ACT