

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

DERRICK DEMONE JOHNSON,

Appellant.

No. 41495-3-II

UNPUBLISHED OPINION

Hunt, J. —derrick Demone Johnson appeals his jury trial conviction for first degree unlawful possession of a firearm. He argues that the evidence was insufficient to prove that he possessed the firearm. We affirm.

FACTS

I. The Shooting

Shortly after 8:00 pm, on September 4, 2008, Billy-Ray Griffin, Jr. was walking to his van when a small, dark-colored car with four occupants pulled up four to five feet from him and someone inside the car asked, “Is that B.P.?” 2 Verbatim Report of Proceedings (VRP) at 203. Griffin, also known as “B.P.”, responded, “Yeah; Is that Top Dog?”¹ 2 VRP at 121. The people

¹ Defendant Derrick Johnson is also known as “Top Dog.” 2 VRP at 121.

in the car did not respond, which Griffin took as an acknowledgment. Griffin asked the driver to “[g]et out of the car” so they could talk. 2 VRP at 121. Recognizing Derrick Johnson as the driver, Griffin heard him say, “Smoke that nigga,” after which Johnson’s front seat passenger shot Griffin three times with a .45 caliber handgun. 2 VRP at 123. The car sped away.

Griffin survived. In a police interview a few weeks after the shooting, Griffin told the police that Johnson was the driver and then selected him in a photomontage. The car’s owner, the mother of one of the passengers, also identified Johnson as one of the people who had been in the car on the night of the shooting.

II. Procedure

The State charged Johnson with attempted first degree murder, with a firearm sentencing enhancement; drive-by shooting; and first degree unlawful possession of a firearm. At his jury trial, Griffin testified as described above. There was evidence that either the front seat passenger shot Griffin at Johnson’s direction or that one of the back seat passengers shot Griffin of his own accord; no evidence established that Johnson had physical control of the gun or that it was within his reach at the time of the shooting. Johnson stipulated that he had a prior conviction for a serious offense and that he was not permitted to possess firearms at the time of the shooting. The jury found Johnson guilty as charged. Johnson appeals his first degree unlawful possession of a firearm conviction.²

² Johnson does not appeal his convictions for attempted first degree murder and drive-by shooting.

ANALYSIS

Johnson argues that the evidence was insufficient to establish that he had actual or constructive possession of the firearm for purposes of his first degree unlawful possession of a firearm conviction. This argument fails.

I. Standard of Review

When reviewing a challenge to the sufficiency of the evidence, we consider the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). We draw all reasonable inferences from the evidence in the State's favor and interpret the evidence "most strongly against the defendant." *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). We consider circumstantial evidence to be as probative as direct evidence. *State v. Vermillion*, 66 Wn. App. 332, 342, 832 P.2d 95 (1992), *review denied*, 120 Wn.2d 1030 (1993). And we defer to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses. *State v. Boot*, 89 Wn. App. 780, 791, 950 P.2d 964, *review denied*, 135 Wn.2d 1015 (1998).

II. Sufficient Evidence

To prove first degree unlawful possession of a firearm, the State had to prove that Johnson owned or had in his possession or control any firearm. RCW 9.41.040(1)(a).³

³ The legislature amended RCW 9.41.040 in 2009 and 2011, but none of these amendments related to subsection (1). See Laws of 2009, ch. 293, § 1; Laws of 2011, ch. 193, § 1. Accordingly, we cite the current version of the statute.

Possession may be actual or constructive. *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211, review denied, 238 P.3d 1211 (2010). Because there was no evidence that Johnson had actual, physical possession of the gun, we address whether there was sufficient evidence of constructive possession.

The State may establish constructive possession by showing the defendant had dominion and control over a firearm; mere proximity to the firearm or knowledge of the firearm, however, without more, is not sufficient to establish dominion and control. *Raleigh*, 157 Wn. App. at 737. But dominion and control need not be exclusive. *Raleigh*, 157 Wn. App. at 737. Nor must a defendant be able to access a firearm immediately to be convicted of possessing it. *State v. Howell*, 119 Wn. App. 644, 650, 79 P.3d 451 (2003). Courts have found sufficient evidence of constructive possession, and dominion and control, where the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found.⁴ See *State v. Bowen*, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010); *State v. Turner*, 103 Wn. App. 515, 521-24, 13 P.3d 234 (2000); *State v. McFarland*, 73 Wn. App. 57, 70, 867 P.2d 660 (1994), *aff'd*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Reid*, 40 Wn. App. 319, 326, 698 P.2d 588 (1985).

McFarland and *Turner* are instructive here. In *McFarland*, we held that there was sufficient evidence of constructive possession because the defendant “knowingly transported [the guns] in his car.” 73 Wn. App. at 70 (citing *Reid*, 40 Wn. App. at 325-26)). Similarly, here, taken in the light most favorable to the State, the evidence showed that Johnson ordered another

⁴ A vehicle is considered a “premises” for purposes of determining constructive possession. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000).

individual in the car to shoot Griffin, demonstrating that he (Johnson) knowingly transported and exercised some degree of control over the firearm, even if not exclusive control.

In *Turner*, we also found sufficient evidence to support a conviction for unlawful constructive possession of a firearm. 103 Wn. App. at 524. Turner's friend claimed the rifle was his, not Turner's. *Turner*, 103 Wn. App. at 521. But evidence showed that the rifle was in Turner's truck, that he knew it was in the backseat, that he sat in close proximity to the rifle, that he was able to reduce it to his own possession, and that Turner not only owned but drove the truck in which the rifle was found. *Turner*, 103 Wn. App. at 521-22, 524. We stated:

[W]here there is control of a vehicle and knowledge of a firearm inside it, there is a reasonable basis for knowing constructive possession, and there is sufficient evidence to go to the jury. In this case, there was even more to convict Turner, the proximity of the firearm, the extended duration of the time the firearm was in the truck, and that Turner did nothing to reject the presence of the firearm in the truck.

Turner, 103 Wn. App. at 524.

Similarly, here, taken in the light most favorable to the State, the evidence established that (1) Johnson was in control of the vehicle; (2) Johnson directed his passenger to shoot Griffin, thereby demonstrating his knowledge that the firearm was in the car and his ability to direct another to use the firearm to commit a crime, thus, indicating a substantial degree of control over the firearm; and (3) Johnson, prohibited from possessing a firearm by virtue of his prior felony conviction, failed to "reject the presence of the firearm in the" car. *Turner*, 103 Wn. App. at 524. We hold that these facts are sufficient to support the jury's finding Johnson in

No. 41495-3-II

constructive possession of the firearm.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Johanson, J.

Van Deren, J.