IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. S.B., Appellant.	No. 39195-3-II UNPUBLISHED OPINION

Armstrong, J. — S.B. appeals her conviction for second degree unlawful possession of a firearm, arguing that the stipulated facts are insufficient to establish that she had constructive possession of a firearm. We agree and, therefore, reverse her conviction and remand for dismissal.

FACTS

Tacoma Police Officers Michael Clark and Bret Terwilliger stopped a stolen vehicle driven by Michael Anthony Romero. S.B., a juvenile, was seated in the front passenger seat of the vehicle. The officers saw a loaded 12-gauge shotgun with the serial number filed off between the driver and front passenger seats. The barrel of the firearm pointed downward, contacting the front passenger-side floorboard. The stock of the firearm was resting on the seat between Romero and S.B. The officers also found a shotgun shell on the front passenger-side floorboard.

The State charged S.B. with second degree unlawful possession of a firearm. At a bench trial on stipulated facts, the juvenile court found S.B. guilty of second degree unlawful possession of a firearm. The court reasoned that the firearm was in plain view and S.B. could have easily appropriated it for her use. The court also supported its decision by noting the shotgun shell on

the floorboard.

ANALYSIS

I. Standard of Review

S.B. contends that the State failed to prove she possessed the firearm. Evidence is sufficient to prove the crime charged if a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

II. Sufficiency of the Evidence

Under RCW 9.41.040,[1] it is illegal for a person under the age of 18 to own, possess, or control a firearm, with certain exceptions. The State can prove either actual or constructive possession. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Because S.B. did not have physical custody of the firearm, the question is whether the State proved she constructively possessed it. The State can prove S.B. constructively possessed the firearm by showing she had dominion and control over it or the premises where it was found. *See State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). An automobile can be considered a "premises." *State v. Potts*, 1 Wn. App. 614, 617, 464 P.2d 742 (1969).

"[M]ere proximity is insufficient to show dominion and control." *State v. Bradford*, 60 Wn. App. 857, 862, 808 P.2d 174 (1991); *see also State v. Duncan*, 146 Wn.2d 166, 182, 43

[1] RCW 9.41.040(2)(a) states in relevant part:

> A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm: . . . (iii) [and] [i]f the person is under eighteen years of age. . . .

P.3d 513 (2002). For example, in *State v. George*, 146 Wn. App. 906, 912-13, 193 P.3d 693 (2008), police stopped a vehicle occupied by George and three other passengers and found an eight-inch long water pipe with burnt marijuana next to where George was seated. The State produced no evidence that George had used the pipe or possessed or used marijuana with or without the pipe. *George*, 146 Wn. App. at 922. Nor did the State offer evidence to rule out that the other occupants of the vehicle had used or possessed it. In short, the State offered no evidence linking George to the pipe. *George*, 146 Wn. App. at 922. In reversing George's conviction for possession of marijuana and drug paraphernalia, the court rejected the State's argument that George's proximity to and knowledge of the pipe was sufficient to prove dominion and control. *George*, 146 Wn. App. at 923.

Similarly, in *State v. Spruell*, 57 Wn. App. 383, 384, 788 P.2d 21 (1990), police entered a home and found Hill and another individual near a table on which there was cocaine residue, a scale, vials, and a razor blade. Division One of our court reversed Hill's conviction for possession of cocaine, holding the evidence was insufficient:

> There is no evidence in this case involving Hill other than the testimony of his presence in the kitchen when the officers entered and the testimony of the conditions there described by Det. Greenbaum and Det. Sgt McClure. There is no evidence relating to why Hill was in the house, how long he had been there, or whether he had ever been there on days previous to his arrest. There is no evidence of any activity by Hill in the house. So far as the record shows, he had no connection with the house or the cocaine, other than being present and having a fingerprint on a dish which appeared to have contained cocaine immediately prior to the forced entry of the police. Neither of the police officers testified to anything that was inconsistent with Hill being a mere visitor in the house. There is no basis for finding that Hill had dominion and control over the drugs. Our case law makes it clear that presence and proximity to the drugs is not enough. There must be some evidence from which a trier of fact can infer dominion and control over the drugs themselves. That evidence being absent, Hill's conviction must be reversed and dismissed on double jeopardy grounds.

Spruell, 57 Wn. App. at 388-89.

Similar to *George* and *Spruell*, there was no evidence connecting S.B. to the firearm: there was no evidence regarding S.B.'s past use or ownership of the firearm; the officers found no ammunition on her; there was no testimony to show that Romero did not have possession of the firearm; there was no fingerprint evidence linking S.B. to the firearm; and S.B. made no incriminating statements or admissions. Thus, the State failed to connect S.B. to the vehicle or firearm, other than her proximity to the firearm and the shell. In fact, the State proved less here than it did in *Spruell*, where the defendant's fingerprints were found on a dish covered with cocaine residue. *Spruell*, 57 Wn. App. at 388-89.

Citing *Echeverria* and *Mathews*, the State argues that S.B. constructively possessed the firearm because it was in plain view and she had the ability to reduce it to her actual possession. Both cases are distinguishable. In *Echeverria*, officers found a firearm sticking out from under the driver's seat of a vehicle driven by Echeverria, a juvenile. *Echeverria*, 85 Wn. App. at 780-81. Division Three of our court upheld Echeverria's conviction for unlawful possession of a firearm, reasoning that the firearm was in plain view, Echeverria knew it was there, and he could reduce it to actual possession. *Echeverria*, 85 Wn. App. at 783. But courts have routinely held that the driver or owner of a vehicle exercises dominion and control over that vehicle. *See*, *e.g.*, *State v. Turner*, 103 Wn. App. 515, 524, 13 P.3d 234 (2000) ("Ownership and actual control of a vehicle establish dominion and control."); *cf. State v. Plank*, 46 Wn. App. 728, 733, 731 P.2d 1170 (1987) (finding the fact that defendant was a passenger in a stolen vehicle did not establish his dominion and control over the vehicle). Thus, Echeverria exercised dominion and control

over the premises where the firearm was located because he was driving the car. In contrast, S.B. was a passenger in a stolen vehicle driven by Romero.

In *Mathews*, evidence of proximity coupled with "other circumstances linking [Mathews] to the heroin" was held sufficient to justify a finding that Mathews had constructive possession of drugs found near his seat. *State v. Mathews*, 4 Wn. App. 653, 658, 484 P.2d 942 (1971). After searching a vehicle occupied by Mathews and three other individuals, officers found a small package of heroin underneath the carpet near the right back seat where Mathews had been sitting. *Mathews*, 4 Wn. App. at 655-56. The court recognized that Mathews's proximity to the heroin was insufficient to prove constructive possession alone, but upheld his conviction because of evidence that: (1) Mathews was a known heroin user; (2) Mathews had purchased and used heroin the same day as his arrest; (3) paraphernalia typically used by heroin addicts was found on Mathews's person and underneath the right back seat where he was sitting; and (4) the other occupants of the vehicle, also heroin addicts, testified that the heroin did not belong to them and they were unaware it was there. *Mathews*, 4 Wn. App. at 656-57. In contrast, the State offered no additional evidence linking S.B. to the firearm, S.B. had no criminal history, and the only other occupant of the vehicle, Romero, did not deny that the firearm belonged to him.

Finally, the State contends that the ammunition on the front passenger-side floorboard is circumstantial evidence that supports S.B.'s constructive possession of the firearm. But there is no evidence establishing when the ammunition was placed in the vehicle or whether S.B. ever handled it. Nor did the officers report any furtive gestures or other conduct by S.B. suggesting she knew the ammunition was on the floorboard. Accordingly, the presence of ammunition does

not support that S.B. constructively possessed the firearm.

Considered in the light most favorable to the State, the evidence is insufficient to prove that S.B. had constructive possession of the firearm. We reverse the conviction and remand for the trial court to dismiss the charge.

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 pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Bridgewater, J.

Worswick, A.C.J.