IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES BRADFORD, JR., Appellant.	No. 40449-4-II UNPUBLISHED OPINION

Armstrong, P.J. — The State charged James Bradford, Jr. with two counts of first degree unlawful possession of a firearm. A jury convicted him on both counts. On appeal, Bradford argues a number of issues, including that the State failed to prove he constructively possessed the firearms. We hold that there is insufficient evidence to prove Bradford constructively possessed the firearms. Accordingly, we reverse and remand for the trial court to dismiss.

FACTS

One evening in April 2009, James Bradford, Jr. was riding in a van that police suspected had been involved in an armed robbery that evening. When the van stopped at the home of one of the passengers, the police arrested all five occupants. Bradford was riding in the middle row, driver's side seat. His friend, Seth Williams, was driving the van, and James Briggs, Marces Sanders, and Larell Hartlett were in the back seats. The van contained numerous items taken in the robbery and the robbery victim identified Briggs, Sanders, and Hartlett as principals in the robbery.[1]

The police found four firearms in the van: a .32 caliber revolver and a .40 caliber Glock

[1] They all pleaded guilty to robbery.

on the floorboard between the two middle row captain's seats, a Ruger P85 protruding from the passenger side, middle row seat, and another .40 caliber Glock in a drawer under the back bench seat. The Ruger P85 was stolen in the robbery. Forensic experts found no useable fingerprints on any of the firearms. And the State had no other evidence linking Bradford to the firearms or the robbery.

Bradford testified that he was walking to a gas station that evening when his friend Williams stopped and offered him a ride. But Williams explained that he had to make another stop first. Williams drove to a nearby neighborhood where they picked up Sanders, Hartlett, and Briggs. Williams then agreed to take the three passengers to Sanders's mother's house. When the van stopped at Sanders's house, the police arrested all occupants in the van. Bradford testified that it was dark during the ride, and he saw no firearms or the other stolen goods in the van. He also testified that Sanders, Hartlett, and Briggs never discussed a robbery.

The State charged Bradford with two counts of first degree unlawful possession of a firearm. Seth Williams, a co-defendant, went to trial in a consolidated proceeding with Bradford. The jury convicted Bradford on both charges.

ANALYSIS

I. Sufficiency of the Evidence

Bradford challenges the sufficiency of the evidence supporting his convictions for two counts of unlawful possession of a firearm. The State argues that because the evidence showed that Bradford could have easily reduced the firearms in the van to actual possession, the evidence supports his convictions.

We test the sufficiency of the evidence by asking whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). When a defendant challenges the sufficiency of evidence in a criminal case, we draw all reasonable inferences from the evidence in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). And we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Raleigh*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010).

A convicted felon may not lawfully possess a firearm. RCW 9.41.040. Possession may be actual[2] or constructive. *Raleigh*, 157 Wn. App. at 737. Constructive possession is "'established by showing the defendant had dominion and control over the firearm.'" *State v. Murphy*, 98 Wn. App. 42, 46, 988 P.2d 1018 (1999) (quoting *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997)). The defendant's control over the firearm does not have to be exclusive. *Raleigh*, 157 Wn. App. at 737. But mere proximity to the firearm is insufficient to show control. *Raleigh*, 157 Wn. App. at 737. "[T]he ability to reduce an object to actual possession" is an aspect of dominion and control, but "other aspects such as physical proximity" should be considered as well. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989).

The State argues that because the firearms were on the floor, in plain sight, and Bradford could have easily reached them, he constructively possessed them. The State relies on *State v.*

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[2] Here, Bradford did not have physical custody of any of the guns when arrested, and the State does not contend that he did.

Nyegaard, 154 Wn. App. 641, 648, 226 P.3d 783 (2010), where a car passenger constantly moved his hands out of police sight and dropped a glass drug pipe in the area where police subsequently found drugs and a firearm; we found such evidence sufficient to prove constructive possession. But here, there is no evidence the police saw Bradford make furtive movements or drop anything near any of the firearms; *Nyegaard* is distinguishable.

The State also relies on *Echeverria*, 85 Wn. App. at 783, in which Division III of our court reasoned that because the firearm was in plain sight, the jury could infer that the defendant knew it was there and could reduce the firearm to actual possession. But the *Echeverria* court found constructive possession because the defendant was the driver of the car and thus had dominion and control over the *entire premises* (the car). Bradford was neither the driver nor the owner of the van, thus the *Echeverria* rationale does not apply.

Bradford was seated on the driver's side, middle row, captain's chair. Law enforcement discovered two of the firearms on the floor boards between the two middle row captain's chairs, and a third firearm was found protruding from a seat, apparently the passenger side, middle row, captain's chair (not Bradford's seat). Police also recovered a firearm from a drawer under the far back bench seat. Although some of the firearms may have been in plain sight, the State proved at most that Bradford was close to two of the weapons. This proves proximity only and is

insufficient to prove constructive possession. *Raleigh*, 157 Wn. App. at 737.

Accordingly, we must reverse Bradford's convictions and remand for the trial court to dismiss with prejudice.

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.

Armstrong, P.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.