

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

TERRELL S. BOOKER,

Appellant.

No. 40715-9-II

UNPUBLISHED OPINION

Johanson, J. — Terrell S. Booker appeals his jury trial conviction of first degree unlawful possession of a firearm. He argues that the evidence is insufficient to establish that he knowingly possessed the firearm. He also raises numerous issues in a Statement of Additional Grounds for Review (SAG).<sup>1</sup> We affirm.

**FACTS**

**I. Background**

On the morning of January 7, 2010, officers investigating another offense planned to execute a search warrant on an apartment in Port Orchard.<sup>2</sup> At about 7:30 am, Deputy Todd Byers, who was familiar with one of the people inside the apartment, telephoned someone inside

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<sup>1</sup> RAP 10.10.

<sup>2</sup> The jury did not hear any evidence related to the basis for the search warrant. The jury also did not hear any evidence about the apartment's address, who leased or rented the apartment, or whether any specific person was named in the search warrant.

the apartment, identified himself, talked to a woman, learned that there were four people in the apartment, and asked the woman to have all four occupants leave the apartment. About five to seven minutes after the call, the four occupants, including Booker, left the apartment.

Officers then executed the search warrant. On the floor in the center of a bedroom closet, they found a polka-dot duffel bag or diaper bag containing feminine products, a wallet containing Megan Hopkins's identification, and a loaded 9 mm semiautomatic handgun. The gun was not immediately visible when the officers first looked into the polka-dot bag. One side of the closet contained men's clothing and shoes and an open safe; the other side contained women's clothing. The open safe contained a holster and several types of ammunition, including 9 mm ammunition. The men's clothing appeared to be for a very large person.

The officers also found Booker's wallet on a computer desk in the same room. The wallet contained Booker's Washington identification card stating that he was 6 feet 2 inches tall and weighed 265 pounds. In addition, the officers found a second holster near the bed and documents belonging to Hopkins. One of the two holsters could accommodate the 9 mm gun.

After officers arrested him and advised him of his *Miranda*<sup>3</sup> rights, Booker told one of the detectives that he (Booker) and his girlfriend shared a room in the apartment. Officers attempted to obtain fingerprints from the gun, but they were not able to get any usable, identifiable prints.

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<sup>3</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

## II. Procedure

The State charged Booker by amended information with first degree unlawful possession of a firearm.<sup>4</sup>

The State's witnesses testified as described above. The trial court also read the jury the following stipulation:

The person before the court and who has been identified in the charging document as Terrell S. Booker, was convicted on April 21st, 1995 of a serious offense in the United States of America versus Terrell S. Booker, United States District Court for the Southern District of Illinois, cause number 3-943, CR109.

2 Verbatim Report of Proceedings (VRP) at 99. The State then rested.

Outside the jury's presence, Booker moved to dismiss, arguing that the evidence was insufficient to establish that he knowingly possessed the firearm. When the trial court asked the State to address the knowledge issue, the State argued that the people in the apartment had several minutes to hide things before they left the apartment; pointed out that Booker was a "convicted felon, not allowed to have handguns"; and asserted that because Booker was a convicted felon "several times over," that it was unlikely that he would not know his girlfriend had a gun in the bedroom. 2 VRP at 105-06. The trial court denied the motion to dismiss. Booker did not present any witnesses.

In its closing argument, the State noted that Booker had stipulated that he had been convicted of a "serious offense." 2 VRP at 124. After discussing some of the other jury instructions, the State tied the stipulation into the to-convict instruction's requirement that the

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<sup>4</sup> RCW 9.41.040(1)(a). The legislature amended RCW 9.41.040 in 2011. Laws of 2011, ch. 193, § 1. These amendments do not affect RCW 9.41.040(1)(a) or (2)(a).

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jury find that Booker had been previously convicted of a serious offense. 2 VRP at 126. Although the State invited the jury to “read between the lines” and to use its “common sense,” it never expressly asserted that Booker knew about or possessed the gun because he was a convicted felon. 2 VRP at 128-29.

In his closing argument, defense counsel described to the jury a situation in which a female housemate was in proximity of her roommate’s purse containing a borrowed lipstick and argued that mere proximity was not enough to show dominion and control of the borrowed lipstick. In rebuttal, the State argued:

[Defense counsel] would like you to stop at the bag and say the gun was in the bag, it’s the end of the story. That’s not the end of the story. You need to draw inferences from the evidence, not check your common sense at the door. We’re not talking about lipstick here. We’re talking about a handgun possessed by someone convicted of a serious offense. That’s what we’re talking about.

2 VRP at 145-46.

The jury found Booker guilty of first degree unlawful possession of a firearm. Booker appeals.

## ANALYSIS

### I. Sufficient Evidence

Booker first argues that the evidence was insufficient to establish he possessed the gun. We disagree.

We review a claim of insufficient evidence to determine whether, after 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. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004),

*abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Thomas*, 150 Wn.2d at 874–75 (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)).

To convict Booker of first degree unlawful possession of a firearm, the State had to prove that he (1) knowingly owned or had in his possession or control a firearm; and (2) had a previous conviction for a serious offense. RCW 9.41.040(1)(a); *State v. Cuble*, 109 Wn. App. 362, 367, 35 P.3d 404 (2001) (citing *State v. Anderson*, 141 Wn.2d 357, 362, 5 P.3d 1247 (2000)). Booker contends that the evidence failed to prove that he knowingly possessed the firearm. We disagree.

Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). To establish constructive possession, the State had to show that Booker had dominion and control over the firearm or over the premises where the officers found the firearm. *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011); *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). “Dominion and control” means that the defendant may reduce the item to actual possession immediately. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Control need not be exclusive, but the State must show more than mere proximity to the firearm. *Raleigh*, 157 Wn. App. at 737.

Although the gun was not immediately in view when the officers opened the polka-dot

bag, it was still in close proximity to anyone in the bedroom and there was evidence that Booker shared this room with his girlfriend.<sup>5</sup> Additionally, the officers also found in the bedroom a holster that fit the gun and an open safe containing ammunition for the type of gun the officers discovered. The holster and ammunition were in plain view. Additionally, because Booker and the other occupants were in the apartment for several minutes before coming outside and the safe was open when the officers found it, a reasonable jury could conclude that the gun had been removed from the safe and placed in the polka-dot bag immediately before the officers entered the apartment. Taken as a whole and viewed in the light most favorable to the State, this evidence is sufficient to establish that Booker constructively possessed the gun and that he knew the gun was present. The fact someone else may also have had constructive possession of the gun is irrelevant. *See Raleigh*, 157 Wn. App. at 737 (exclusive possession is not required to prove constructive possession) (citing *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008)).

Booker attempts to distinguish *State v. Warfield*, 119 Wn. App. 871, 80 P.3d 625 (2003), arguing that unlike in *Warfield*, Booker did not have “dominion and control of the apartment or bedroom.” Br. of Appellant at 4. Booker mischaracterizes the facts in *Warfield*; in its summary of the facts, we clearly stated that at least two other people had been staying in Warfield’s

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<sup>5</sup> Booker asserts that there was no evidence that he lived in the apartment. But the record shows that: (1) Booker was in the apartment at 7:30 am; (2) his wallet and identification were in the bedroom where the officers found the gun; (3) the bedroom closet and surrounding area contained items belonging to a man and to a woman, including men’s clothing and shoes; (4) the men’s clothing was for a very large man, and Booker was 6 feet 2 inches tall and weighed 265 pounds; and (5) Booker told the officers that he and his girlfriend shared a room in the apartment. Taken in the light most favorable to the State, this evidence is clearly sufficient to allow a rational trier of fact to conclude that Booker shared the bedroom in question with his girlfriend.

apartment and that five or six people had been in the apartment a short time before the police discovered the firearms at issue. *Warfield*, 119 Wn. App. at 876-75. Instead, *Warfield* supports our conclusion above. In *Warfield*, we held that there was sufficient evidence to establish that Warfield had knowingly possessed a firearm when (1) the firearm was found in Warfield's closet; (2) the closet was in an apartment that Warfield leased; (3) Warfield was currently, "though sporadically," living in the apartment; and (4) "the bedroom and closet were filled with Warfield's personal effects." *Warfield*, 119 Wn. App. at 885. Similarly, here, although there was no evidence that Booker leased the apartment, he admitted to sharing a room with his girlfriend, the room contained Booker's wallet and identification and other evidence that Booker used this room, the safe and its contents were found on the side of the closet where the male clothing was stored, and the gun was found in the closet. Furthermore, as noted above, exclusive possession is not required. *Raleigh*, 157 Wn. App. at 737.

Booker also attempts to distinguish *State v. Turner*, 103 Wn. App. 515, 13 P.3d 234 (2000), and *State v. Mathews*, 4 Wn. App. 653, 484 P.2d 942 (1971). In *Turner*, we held that knowledge that a firearm was present coupled with dominion and control over the vehicle in which the firearm was found was sufficient to establish constructive possession of the firearm. *Turner*, 103 Wn. App. at 518. Booker argues that *Turner* is not dispositive because he did not admit to knowing the gun was present or to dominion and control over the bedroom. Although we held in *Turner* that admitted knowledge of the gun and dominion and control over the vehicle in which the officers found the gun were sufficient to support the conviction, *Turner* does not establish that knowledge and dominion and control cannot be established by circumstantial

evidence, which is the case here. Booker attempts to distinguish *Mathews* by asserting that in *Mathews*, the dominion and control over the area containing the contraband was exclusive. Although exclusive dominion and control increases the chance that a defendant has constructive possession of contraband, exclusive possession is not required. *See Raleigh*, 157 Wn. App. at 737; *George*, 146 Wn. App. at 920.

Booker relies on *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969), asserting that it establishes that mere dominion and control of the premises is insufficient to prove constructive possession when there is evidence of shared control. We agree that *Callahan* establishes that mere proximity is not sufficient to establish constructive possession. *Callahan*, 77 Wn.2d at 29. But here there were additional items related to the gun on what appeared to be Booker's side of the closet and this provides more evidence than Booker's mere proximity to the gun—it provides evidence from which a jury could infer that Booker was aware that the gun was present and available to him. Furthermore, in *Callahan*, there was insufficient evidence to establish that the defendant had actually been staying on the premises where the officers discovered the contraband because he had only a few personal possessions on the premises. Here, in contrast, the officers found clothing that a jury could conclude belonged to Booker, and Booker admitted that he shared one of the rooms with his girlfriend. Additionally, unlike here, in *Callahan*, another person claimed ownership of the contraband. *Callahan*, 77 Wn.2d at 31.

Finally, Booker argues that *State v. Alvarez*, 105 Wn. App. 215, 19 P.3d 485 (2001), supports his argument. But here, unlike in *Alvarez*, Booker admitted that he shared a room with his girlfriend and other circumstantial evidence tied Booker to the room the officers searched.

Booker's sufficiency argument fails.<sup>6</sup>

## II. Statement of Additional Grounds

Booker also raises several issues in his pro se SAG. These issues, addressed more fully below, either have no merit or we cannot address them.

Booker argues that (1) RCW 13.40.0357 "has been violated," (2) the trial court somehow violated his due process rights in applying or considering RCW 9.94A.589(1)(a) or the "[h]abitual criminal statute," and (3) the trial court failed to comply with unspecified federal rules of civil procedure. SAG at 7-9. These arguments all fail. RCW 13.40.0357 relates to juvenile offender sentencing standards and is not relevant to this case. RCW 9.94A.589(1)(a) or any "[h]abitual criminal statute" (possibly RCW 9.94A.570) do not apply in this case because the jury convicted Booker of only one crime and he was not sentenced as a persistent offender. And as this is a criminal case in state court, the federal rules of civil procedure are inapplicable.

Booker also appears to argue that the State concealed fingerprint evidence. At trial, witnesses testified that although they attempted to find fingerprints on the gun, they were unable to obtain any useful, identifiable prints. Nothing in the record suggests that any other fingerprint evidence existed. To the extent Booker is referring to information that is outside the record, we cannot address matters outside the record in a direct appeal. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Booker next argues that he received ineffective assistance of counsel because his counsel

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<sup>6</sup> Booker also appears to raise sufficiency of the evidence arguments in his SAG. Booker's SAG arguments are sufficiently similar to his appellate counsel's arguments, and do not justify additional review.

failed to move to suppress the gun. He appears to assert that the gun should have been suppressed because there was evidence that it belonged to his roommate. Ownership of the gun is irrelevant to whether the gun was admissible at trial. Accordingly, this argument fails. In a related argument, Booker argues that no one presented evidence that the gun belonged to his roommate. Legal ownership of the weapon was irrelevant to whether Booker knowingly possessed the weapon. Accordingly, this argument also fails.

Booker also appears to argue that he received ineffective assistance of counsel because his counsel failed to present certain, unnamed witnesses. To the extent Booker is referring to witnesses who would have provided evidence that his roommate owned the gun, ownership of the gun was irrelevant to whether Booker had knowingly possessed the gun. To the extent he is referring to other, unspecified witnesses, this argument is either too vague to address or relates to matters outside the record. RAP 10.10(c); *McFarland*, 127 Wn.2d at 335.

Booker further appears to argue that the prosecutor committed misconduct by arguing to the jury that it should convict Booker because he was “big” “and “has done ten years.” SAG at 21. He also appears to assert that the prosecutor stated, “Mr. Booker has a long history of crime. I find him guilty.”<sup>7</sup> SAG at 31. Booker mischaracterizes the prosecutor’s closing argument. Although the prosecutor mentioned Booker’s size, he did so in an attempt to prove to the jury that the clothing in the closet belonged to Booker. Additionally, at no point did the prosecutor tell the jury that Booker had served 10 years for another offense or state, “Mr. Booker has a long

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<sup>7</sup> Although it is not entirely clear, some of these arguments may also relate to Booker’s apparent assertion that he was convicted because he was a “habitual offender.”

history of crime. I find him guilty.”<sup>8</sup> SAG at 31.

At most, the record shows that the prosecutor may have implied that the jury should consider that this was a serious offense when evaluating the evidence when he argued:

[Defense counsel] would like you to stop at the bag and say the gun was in the bag, it’s the end of the story. That’s not the end of the story. You need to draw inferences from the evidence, not check your common sense at the door. We’re not talking about lipstick here. *We’re talking about a handgun possessed by someone convicted of a serious offense.* That’s what we’re talking about.

2 VRP at 145-46 (emphasis added). Although this comment is arguably inappropriate, taken in context and considering the entire argument and the jury instructions, this brief comment was not prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (in a prosecutorial misconduct claim, the appellant has the burden of establishing both improper conduct and prejudice), *cert. denied*, 523 U.S. 1008 (1998).

Booker next appears to argue that the charging information was inadequate because it “did not contain the fingerprint analysis on Mr. Booker.” SAG at 24. To the extent Booker is asserting that the charging information must allege there was fingerprint evidence establishing possession, that argument is clearly without merit.

Citing ER 609, Booker next appears to argue the trial court improperly allowed him to be impeached by evidence of his prior crimes. Booker’s prior conviction for a serious offense was relevant to the charged crime, and the trial court agreed to allow Booker to stipulate to the

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<sup>8</sup> It also appears that Booker may be referring to some of the prosecutor’s argument before the trial court when addressing Booker’s half-time motion to dismiss. The jury was not present during this argument. Thus, to the extent the argument was improper, it could not have possibly affected the verdict and Booker is not entitled to relief on this ground.

existence of a qualifying prior offense. The stipulation allowed the State to present the necessary evidence without giving the jury any additional evidence that could potentially cause undue prejudice. Accordingly, this argument fails. Furthermore, to the extent Booker is asserting that the jury saw evidence of his other prior convictions, there is nothing in the record demonstrating that this occurred.

Booker next appears to argue that he was entitled to a unanimity instruction. This argument is also clearly without merit as this was not a multiple acts or alternative means case. Booker also appears to argue that he was entitled to an instruction on a lesser or inferior degree offense. Because Booker stipulated to the existence of a prior conviction for a serious offense, there was no evidence that he committed only the inferior offense of second degree unlawful possession of a firearm,<sup>9</sup> and he was not entitled to a lesser degree instruction. *State v. Fernandez-Medina*, 141 Wn.2d 448, 454, 6 P.3d 1150 (2000) (a criminal defendant is entitled to an instruction on an inferior degree offense only if, among other things, there is evidence that the defendant committed *only* the inferior offense).

Booker may also be asserting that the jury considered his “silence” in reaching its verdict. SAG at 27. The trial court instructed the jury that it could not consider Booker’s failure to testify “to infer guilt or prejudice him . . . in any way.” Clerk’s Papers at 61. Accordingly, this argument fails.

Booker also seems to assert that his conviction was racially motivated. There is nothing in the record supporting this assertion. To the extent Booker raises other arguments in his SAG,

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<sup>9</sup> RCW 9A1.040(2)(a).

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they are too vague to justify review. RAP 10.10(c) (defendant must inform the court of the nature and occurrence of the alleged errors).

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 pursuant to RCW 2.06.040, it is so ordered.

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Johanson, J.

We concur:

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Hunt, P.J.

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Van Deren, J.