

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

PO CHHUOY,

Appellants

No. 37348-3-II / 37378-5-II

STATE OF WASHINGTON,

Respondent,

v.

ANDY OEUNG,

Appellants.

UNPUBLISHED OPINION

Penoyar, A.C.J. — Andy Oeung and Po Chhuoy appeal their convictions for unlawful possession of a firearm with sentencing enhancements for committing the crime in order to obtain or maintain gang membership. Because the State presented insufficient evidence, we reverse the convictions and remand to the trial court to dismiss the charges with prejudice.

FACTS

Po Chhuoy, Andy Oeung, Srouch Chhuoy, Toni Oeung, and Pao Chhuoy are brothers.¹ All five brothers lived at the same real property in Tacoma (Tacoma property). The property has a house and a mobile home on it. Srouch, Toni, and Pao lived with their parents in the house, and Po and Andy lived together in the mobile home. Po's partner, Chanthorn Soeurng, and their

¹ For clarity, we identify the parties by their first names. We intend no disrespect.

child, also lived in the mobile home.

The house and mobile home face onto different side streets and have separate mailing addresses. The house has an attached garage that may be accessed through the house or through a retractable garage door that opens onto a driveway. The record does not indicate the precise distance between the house and mobile home, but photographs in the record suggest that a substantial distance separates the house and the mobile home.

Tacoma Police detectives believed that all five brothers were members of a street gang known as the Loco Boyz (LBs). The LBs hang out around 44th Street and 38th Street in East Tacoma. Members of the gang show their affiliation by wearing red clothing and displaying gang signs, including holding up four fingers on each hand to represent 44th Street. According to the detectives, LBs have engaged in various criminal activities, including robberies, assaults, car thefts, and drug dealing.

In May 2007, Lakewood Police conducted a controlled drug buy involving Pao. During that operation, police surveilled the Tacoma property. Police observed Pao walk from the main house to the mobile home, and then to the controlled buy location where he sold crack cocaine to a confidential informant. After the buy, Pao returned to the mobile home and then to the main house.

The police obtained warrants to search the house and mobile home. In preparation for the search, police surveilled the property several times. Each time they observed a number of young, Cambodian males in red clothing walking between the main house and the mobile home. Andy and Po were in the mobile home when police executed the warrant.

During the search of the main house, police found numerous items of red clothing, an

electronic scale, baggies of cocaine, \$1,436 in cash, notes listing credit card numbers, many photographs of the brothers with known gang members,² and various documents listing the names of Pao, Toni, and Srouch. Police also discovered Po's expired Washington State identification card in one of the main house's bedrooms.

In addition, police found three rifles and one shotgun in the main house: one in a closet near the front door, one under bedding, and two behind an entertainment center in the garage.³

In the mobile home, police seized a wallet containing Po's driver's license and \$1,621 in cash, various documents listing Po's and Andy's names, multiple items of red clothing, a digital scale, a baggie containing unidentified white powder, a notebook containing gang writing and letters written to Andy from known gang members currently incarcerated.

Police arrested the brothers and charged them with various crimes. Po and Andy were both charged by amended information with one count of unlawful possession of a controlled substance with intent to deliver⁴ and one count of first degree unlawful possession of stolen property.⁵ The State also charged Po with four counts of first degree unlawful possession of a firearm and charged Andy with four counts of second degree unlawful possession of a firearm.⁶

At trial, Detective Tom Davidson testified about the LBs and Po and Andy's activities

² The photographs were generally of large groups of men, all wearing red (including the brothers), and often displaying gang signs.

³ Police discovered an "Army flak vest" with the shotgun.

⁴ RCW 69.50.401(1) and (2)(a).

⁵ RCW 9A.56.140(1) and .150(1).

⁶ RCW 9A.41.040(1)(a) and (2)(a), respectively.

with that gang. The State moved to dismiss the possession of stolen property charges because a relevant witness failed to appear for trial. Po and Andy moved to dismiss the remaining counts, arguing that the State failed to show constructive possession or any connection to the drugs or firearms. The trial court denied the motion.

The jury found Po guilty of two first degree unlawful possession of firearms counts and Andy guilty of two second degree unlawful possession of firearms counts. The jury could not reach agreement on the other counts, the trial court declared a mistrial on those counts. The jury also returned special verdicts on each of the guilty counts, finding that Po and Andy each committed the offenses “in order to obtain or maintain his membership or to advance his position in the hierarchy of an organization, association or identifiable group[.]” Clerk’s Papers (CP) at 102, 103, 238, 239.

Both Po and Andy appeal. We consolidated their cases for review.

ANALYSIS

I. Sufficiency of the Evidence

Po and Andy argue that the State’s evidence was insufficient to prove that they had constructive possession of two of the firearms. They claim that the State failed to present sufficient evidence that they knew the firearms were in the main house, or that they had dominion and control over the main house and over the firearms. We agree.

When facing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence and all reasonable inferences therefrom in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Brockob*, 159 Wn.2d 311, 336, 150 P.3d 59 (2006). Because

credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

To convict Po of first degree unlawful possession of a firearm, the State had to prove the following elements for each count:

- (1) That on or about the 30th day of May, 2007, the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a serious offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

CP at 81-82; Instrs. 19 and 20. To convict Andy of second degree unlawful possession of a firearm, the State had to prove the first and third elements noted above and had to prove that Andy “had previously been adjudicated guilty as a juvenile of a felony[.]” CP at 86-87; Instr. 24 and 25.⁷ Further, the trial court instructed the jury that:

Possession means having a firearm in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.

CP at 79; Instr. 17.

As noted, possession may be actual or constructive and constructive possession need not be exclusive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002); *State v. Turner*, 103 Wn. App. 515, 522, 13 P.3d 234 (2000). A person has constructive possession of an item if he or

⁷ The parties stipulated that both Po previously committed a prior “serious offense” and that Andy had been adjudicated guilty as a juvenile of a felony. Exs. 1 and 2.

she has dominion or control over the item such that the item may be reduced to actual possession immediately. *Jones*, 146 Wn.2d at 333. When a defendant has dominion and control over premises, there is a rebuttable presumption that he or she has dominion and control over items in the premises. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). Temporary residence, personal possessions on the premises, or knowledge of the presence of contraband, without more, are insufficient to show dominion and control. *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983). We review the totality of the circumstances to determine whether dominion and control exist. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

The jury heard testimony about the free movement of people between the two homes on the Tacoma property. Tacoma gang unit officers testified that Po, Andy and their three brothers were “hardcore” LB members. Report of Proceedings (RP) (Jan. 28, 2008) at 122-23. Police discovered Po’s expired identification card in the main house where they found the guns. Police seized letters from the mobile home that were addressed to Andy at the main house address. Even if this is enough evidence for the jury to reasonably infer that Andy and Po had unfettered access to the main house, it is not enough to prove dominion and control over the firearms in the main house and the garage. As noted above, a defendant does not have dominion and control of contraband where he is a temporary resident at the home, has personal possessions on the premises, or knows about the contraband. *Hystad*, 36 Wn. App. at 49. There is even less evidence of dominion and control in this case.

There was no evidence that Andy or Po lived in the main house or that they knew about the guns there. Instead, they lived in the mobile home, and the police discovered no firearms there. The only personal item of either defendant found in the main house was Po’s expired

identification card. None of the firearms was kept where it would likely be visible to casual visitors to the house. The two residences are located on the same property and people may move freely between them, but without more evidence of Andy and Po's connection to the main house—and therefore, dominion and control over its contents—the evidence is insufficient to prove their constructive possession of the firearms found there.⁸

Because the State's evidence was insufficient to prove to any rational trier of fact beyond a reasonable doubt that Andy or Po had constructive possession of any of the four firearms, we reverse their convictions and remand to the trial court to dismiss the charges with prejudice. We need not address Andy and Po's other contentions on appeal.

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.

Penoyar, A.C.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.

⁸ In addition to failing to prove Andy and Po's dominion and control over the main house in which police found the firearms, the State did not present any evidence that Andy and Po knew about the weapons or their location. The weapons were not in plain view and the State did not present fingerprint evidence or other evidence that Andy and Po had handled the weapons.