No. 43932-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

Mathew Aho,

Appellant.

STATEMENT OF ADDITIONAL GROUNDS (RAP 10.10)

I, Mathew Aho, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUND FOUR

Ineffective assistance of Counsel

A) Failure to properly cite or brief case law in motion to dismiss some of the Charges.

B) Failure to move for mistrial or ask for Corrective Jury instruction in regards to a witnesses repeated comments about death threats.

C) Failure to adequately investigate discovery.

D) Failure to call or interview Key witness that the State admitted was beneficial to defense.

E) Failure to ~~cross~~ interview States Witness before trial.

If there are any additional grounds, a brief summary is attached to this statement.

DATED this 2nd day of October, 2013

(Print) Mathew Aho

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ADDITIONAL GROUND ONE

I. Insufficiency of Evidence:

A. One of the essential elements of the crime of unlawful possession of a firearm is "knowingly" possessed. "Knowing possession is an essential element of the crime of unlawful possession of a firearm." State v. Hartzell, 156 Wash. App. 918, 237 P.3d 928 (2010). "For a conviction of unlawful possession of a firearm, the state need not prove that the defendant knew that that possession of a firearm was unlawful; but it **must** prove that he defendant **knew** he possess the firearm." State v. Marcum, 116 Wash.. App. 526, 66 P.3d 690 (2003) (**bold** emphasis added).

Here, with Aho, the state failed to prove that Mr. Aho knowingly had possession on the January 28, 2011 date. In fact, it was must the opposite.

The state's own witness, and ex-girlfriend of Mr. Aho, stated during her testimony that she had purchased the firearm for Aho, but she had not informed him of the purchase and he was not with her when she purchased it. (8/22/12 RP at 220).

Ms. Newkirk also stated that, at the time of their arrest on the January 28, 2011 date, she had not yet given the gift to Aho, and to her knowledge Mr. Aho himself had no knowledge of the firearm because she had not given it to him. (8/22/12 RP at 220-21).

The firearm was found in Ms. Newkirk's car, on the passenger side floorboard in a hard black plastic gun box. The firearm itself was not visible from outside of the car. The car was locked. Ms. Newkirk, the registered owner of the vehicle, was the only person with keys to the vehicle. No fingerprints were recovered from the firearm, the ammunition, the magazine, or the case that contained the gun. (VRP at 379). Both Ms. Newkirk and Mr. Aho were found sleeping inside a fifth wheel trailer located on the property, on the January 28, 2011 date. The date of arrest and the U.P.F.A. charge stemming from that arrest.

B. "Mere proximity to the firearm is insufficient to show dominion and control, as basis for constructive possession, in a prosecution for unlawful possession of a firearm." Staet v. Chouinard, 282 P.3d 117 (2012). Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in the actual possession, but that the person charged with possession has dominion and control over the goods. State v.Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Additionally, mere proximity to the items alleged to be constructively possessed without proof of dominion and control of the property or premises where the item was found, is not sufficient proof of possession. Callahan, 77 Wn.2d at 31. Passing control is also insufficient. Callahan, 77 Wn.2d at 29. Rather, there must be "other sufficient indication of control over the [item]..."

State v. Staley, 123 Wn.2d 794, 802, 879 P.2d 502 (1994). And the evidence in this regard must be substantial. Callahan, 77 Wn.2d at 29.

On the charging date of January 28, 2011 for U.P.F.A., Second Degree, Mr. Aho was asleep in the trailer. The gun was found in a car belonging to Ms. Newkirk. Here, actual possession was not established. Nor was domain and control established. The firearm was not in close proximity to Mr. Aho, nor could it be easily made accessible in this case. So, at no point was there sufficient evidence or proof that Mr. Aho possessed the firearm found in Ms. Newkirk's car, actually or constructively, on the January 28, 2011 date.

During Ms. Newkirk's testimony the prosecutor asked about an out of court, verbal statement given to the arresting officer in which Ms. Newkirk states that she had bought the gun as a gift for Mat. And when the officer asked what Aho was going to do with the firearm, she stated, "We go out shooting." (8/22/12 RP at 234).

However, that statement is by no means proof of Mr. Aho ever actually having the forearm in his possession. Nor does Ms. Newkirk elaborate on when this would have taken place or even if Aho ever momentarily handled the firearm. According to Staley and Callahan, "passing control is insufficient to prove possession, rather there must be other sufficient indication of control over the item, and that evidence must be substantial."

Here there is no evidence of Mr. Aho having control of, or even passing temporary control of the firearm. Further, assuming arguendo that Ms. Newkirk's vague statement of 'taking it out shooting' is sufficient proof to establish constructive possession, then another key element of the crime has still gone unproven, the "on or about" date element.

The charging documents and jury instructions state on or about January 28, 2011. However, there was no indication from Ms. Newkirk that she and Aho 'went out shooting' on the charging date, or even if it was years before the charging date, or if it had yet to happen and she simply meant by her statement that the gun was not going to be used for illegal purposes.

Her statement leaves too much doubt for this to be considered substantial evidence for establishing constructive possession.

So, by actual possession not being established, nor constructive possession for lack of dominion and control, and for the proof of knowledge and on or about date elements not having been proven by the prosecution, there is by no means enough proof to support a guilty finding for unlawful possession of a firearm in the second degree on the January 28, 2011 date.

The conviction must be reversed and charges dismissed.

C. There was never any gun present on the November 07, 2010 date. The "gun" that the witness, Brandy Snow, described was a novelty cigarette lighter.

On January 28, 2011, Mr. Aho was charged as having unlawful possession of a firearm in the second degree, and also with theft of a firearm, the same firearm, stemming from an alleged burglary on November 07, 2010.

However, there was never a gun stolen or possessed by Mr. Aho on that date. A witness and co-defendant, Brandy Snow, testified that she observed a "gun" a the trailer after the alleged burglary, but could not personally verify if the "gun" was already on the table prior to the burglary or if it came out of the backpack a co-defendant had during the burglary, because when she entered the trailer, the "gun" she saw was already on the table. (VRP at 254).

Ms. Snow goes on to describe this "gun" as "small, old silver and black with engravings on it." (VRP at 270). "Maybe six inches long." (VRP at 301). This "gun" can only be a revolver. Mr. Gambill, the alleged victim in this case, testified the gun he was missing was a semi-automatic, 10mm pistol. A large-framed gun, completely different from the gun Ms. Snow claims to have seen.

Defense counsel asked Ms. Snow if this gun resembled a gun from an old western movie, or more like a gun from a modern cop-type movie. Ms Snow stated, "No. Like an old western type but small."(VRP at 270).

There was never a gun found that matches this description. And the gun alleged to be stolen does not fit this description, either. Also the guns Mr. Gambill claimed to have been stolen were never recovered.

Had there in fact been a gun present on that date, Aho's ex-girlfriend, co-defendant, and state's own witness, never mentions it. According to Ms. Newkirk's testimony the only items that she observed on that date at the trailer was a backpack and a laptop computer. She makes no mention of this alleged "gun" because it was in fact a cigarette lighter that had been on the table days prior to the burglary. (VRP at 205-06, 229).

The "gun" that Aho was found guilty of stealing and possessing was a "6-inch long western style" cigarette lighter, which was not even stolen. Aho received consecutive sentences of 90 months for theft of a firearm, and 60 months for unlawful possession of a firearm in the second degree. A total of 150 months for a mis-identified novelty cigarette lighter that resembled a gun, and did not even match the description of the gun alleged to have been stolen.

The charges should be reversed and dismissed.

Brandy Snow

8/22/12 RP at 264 (Ms. Hauger):

Q. Describe the handgun for us.
A. It was kind of old.
Q. What color was it?
A. Silver and black, maybe like engravings on it.

8/22/12 RP at 270 (Mr. Burgess):

Q. Now, if you can recall this gun in the trailer. Did it look like one of those old western type guns, or did it look like something you see in the most modern cop type shows?
A. No. Like an old western type but small.

8/22/12 RP at 300 (Mr. Burgess):

Q. Do you recall if it was a large or a small gun?
A. Smaller.
Q. Smaller than what?
A. Maybe like that. (indicating)
Q. Tiny little thing?
A. Yes.

8/22/12 RP at 301 (Mr. Burgess):

A. 6 inches, maybe.
Q. So you're guessing the gun is approximately 6 inches long?
A. Right.

Jillian Newkirk

8/22/12 RP at 205-06 (Ms. Hauger):

Q. When you got back to the trailer did you see any items that were taken from the residence?
A. All I seen was the back pack that Nate had and the lap-top.

8/22/12 RP at 206 (Ms. Hauger):

Q. When you got back to the trailer did you see any items that you had not previously seen before?
A. Just the lap-top.

8/22/12 RO at 205-06 (Mr. Burgess):

Q. Nate turns up with the property?
A. A lap-top
Q. Did you observe any other type of property...?
A. No.

ADDITIONAL GROUND TWO

II. Improper remarks from Prosecutor during closing argument:

In order to demonstrate prosecutorial misconduct, one must show that "the prosecuting attorney's conduct was both improper and prejudicial." *State V. Fisher. 165 Wash. 2d 727, 747, 202 P.3d 937 (2009).* In the context of closing arguments, misconduct includes making arguments that are unsupported by the admitted evidence. *see State V. Belgrade, 110 Wash. 2d 504, 505,508-509, 755 P. 2d 174 (1988).* However, "the prosecuting attorney has 'wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.'" *Fisher, 165 Wash. 2d at 747, 202 P.3d 937 (quoting State V. Gregory, 158 Wash. 2d 759, 860, 147 P.3d 1201 (2006).* The prosecutor's conduct is reviewed in its full context. *State V. Monday, 171 Wash. 2d 667, 675, 257 P.3d 551 (2011).*

A. Throughout the trial there was a lot of confusion in regards to Mr. Gambill's claims of firearm theft, which gun was stolen, or if in fact Mr. Gambill claimed one, the other, or both guns.

Mr. Gambill claims he was missing a 10mm handgun and he had mistakenly reported, originally, a .357 Ruger. He then assures Mr. Burgess that he, in fact, relayed that information on to Deputy Filing, an investigating officer in this case. (VRP 119-20).

Q. (Mr. Burgess) You ~~won~~ own a .357 revolver?
A. (Mr. Gambill) Yeah.

ADDITIONAL GROUND ONE

Insufficiency of Evidence

A) The KNOWING element of unlawful possession of a firearm was not met for Count VIII.

B) Dominion and Control was not established for Constructive possession on Count VIII.

C) The "gun" described by Brandy Snow on the Nov. 7, 2010 date was not a gun and did not match the description of the gun Alleged to be missing.

Additional Ground TWO

II) Prosecutor's improper remarks during closing arguments caused prejudice.

Additional Ground THREE

III) Prosecutorial misconduct, possible threats made to witness.

Q. Was that the firearm that was taken?
A. No. It was a 10 – I told – check with Tony Filing, Officer Tony Filing.
Q. Now—
A. I told Tony. I remember calling Tony and telling him that it was a 10mm.

(Burgess objects)

(Gambill): So you confirm with the deputy.

(Burgess objects)

(8/21/12 RP at 119-20)

However, while cross-examining Deputy Filing, Mr. Burgess asked if Gambill had in fact retracted his claim of a .357 to a 10mm. During the questioning, Deputy Filing stated that Mr. Gambill had not retracted that information but, in fact, he had claimed another gun was missing as well, a 10mm. (VRP 377).

Q. (Burgess) At any time after the initial contact did you receive any information from Mr. Gambill that he was incorrect about that handgun?
A. (Filing) No. But he then said something about missing another handgun. So I added that information in the report.
Q. But he never retracted and said, 'Oh, by the way, I did[n't], in fact [lose] a .357?
A. No, he never retracted the statement.

(8/23/12 RP at 377)

According to the Declaration for Determination of Probable Cause — 1, dated January 31, 2011:

"When Gambill returned home he discovered several items missing, including: **two firearms** ..."

(Dec. of P.C., ll. 16-17, **bold** emphasis added)

So, according to the Probable Cause Declaration and to the investigating officer, Deputy Tony Filing, Mr. Gambill reported that he was missing not one firearm but two, contrary to Mr. Gambill's testimony.

During closing argument, the state made improper and false remarks to the jury in regards to Mr. Gambill's testimony. While criticizing the anticipated impeachment of Mr. Gambill by the defense's closing arguments, she falsely assures the jury that Deputy Filing confirms what Mr. Gambill had claimed during his testimony. The Prosecutor states in closing:

> "You might hear some argument and I anticipate you will probably hear a lot of argument from the defense attorney, Mr. Burgess about what about this firearm? It's a .357 revolver? It's a 10mm? It's both? Is it neither? Was there even a firearm taken? Mr. Gambill was very candid with you about the fact that when he was filling out the theft inventory report he had made a mistake. He was very candid with you and he was very candid with Deputy Filing when he realized that what he intended to write down, the firearm had in fact been taken, was a 10mm handgun. He let Deputy Filing know and Deputy Filing told you that."

(VRP at 530)

But the Deputy did not confirm what Mr. Gambill claimed, it was the opposite. The sate prejudiced Mr. Aho by making these improper remarks to the jury when what she would have them believe was not the truth.

Mr. Gambill's shifting testimony was not verified by the Deputy, but that is what the Prosecutor led the jury to believe. By the state misleading the jury in this regard, it led them to believe Gambill was telling the truth, when according to the Deputy's testimony he was not truthful.

By the prosecutor's misleading remarks, it prejudiced Mr. Aho by the substantial likelihood that it affected the Jury's verdict, by suggesting that the officer had confirmed Gambill's testimony when in fact he did not confirm the testimony: it mislead the jury in deciding the credibility of the witness, Mr. Gambill.

"In the context of closing arguments, misconduct includes making arguments that are unsupported by the admitted evidence." see: *State V. Belgrade*, 110 Wash. 2d. 504, 505, 508-09, 755 P. 2d 174 (1988). Prosecutorial Misconduct requires reversal, however, only if there is substantial likelihood the misconduct affected the Jury's verdict." *State V. Padilla*, 69 Wash. App 295, 301, 846 P2d 564 (1993).

Here the record and evidence makes clear that the prosecutor's remarks about the officer confirming Gambill'[s claim was, in fact, falsified and unsupported. Furthermore, the prejudice I sustained was the prosecutor falsely informing the Jury that the witness's testimony was credible and not conflicting with the officer's testimony. This remark had the potential to affect the Jury's decision to believe Mr. Gambill's shifting claims and testimony.

Therefore I request reversal and a new trial.

ADDITIONAL GROUND THREE

III. Prosecutorial misconduct/improperness:

A. The Prosecutor was allowed time alone with a witness in the middle of her testimony. The time alone was utilized by the Prosecutor to mold or force the witness into giving answers to questions she obviously did not recall.

Ms. Snow was asked a series of questions regarding what she saw in the trailer on the night of November 07, 2010. Ms. Snow either could not honestly recall or could not answer with certainty. The answers to Ms. Hauger's questions were "I can't remember," "I don't know," "No – I do not." (VRP at 256).

Ms. Snow was then given a copy of her statement to refresh her memory. After several questions about the statement, she said that it did not fully refresh her memory. Some parts sounded familiar, yet other parts did not. (VRP at 260).

At this point Ms. Hauger said she was making an attempt to impeach Ms. Snow. Mr. Burgess objected to the impeachment and the use of the statement. (VRP at 260).

Ms. Hauger then asked the court for some time alone with the witness to "talk to her about what parts she recalls making and what parts she does not." (VRP at 262).

The time alone was granted. But when the witness returned to the stand, Ms. Hauger began with the same type of questions that before the

break Ms. Snow was not sure of, only this time the witness answered the questions without detail, with "Mat." (VRP at 265).

Clearly the time alone was not used to "figure out which parts she recalls," but was used to somehow force the witness into answering questions she did not know the answer to, with "Mat."

Further, by the Prosecutor suggesting that all she asks of a witness is to tell the truth, she is improperly vouching for that witness's credibility in telling the truth as if she had known that the witness was being truthful. That conclusion is for the jury to reach and shouldn't be re-assured by the prosecution.

For these reasons, I believe that the prosecutor was improper, and seemed to have gone out of her way to convict. She made it a personal issue to force answers from witnesses that clearly could not remember or simply did not know. And she also personally vouched for the witness by assuring the jury the witness was being truthful.

Defendant requests reversal and a new trial.

VRP at 256:

Q. Did you see Mat handle the gun?
A. I can't remember.
Q. What kind of gun was it?
A. I don't know. I'm not familiar with guns.
Q. ... Who ended up with the gun ... where did the gun come from?
A. I don't know.
Q. Do you recall telling deputies the gun came out of the back pack?
A. No. I do not.

VRP at 262 (Ms. Hauger):

"... if I can have a moment and I can talk to her about what parts she recalls and what parts she does not."

VRP at 265:

Q. ... who did you see handle the gun inside the trailer?
A. Mat.
Q. ... who was the last person you saw handling it? [the gun]
A. Mat.

ADDITIONAL GROUND FOUR

IV. Ineffective assistance of counsel:

My attorney's performance fell below a reasonable standard by the following: He failed to properly cite case law or brief in motion to dismiss some of the charges; He failed to move for a mistrial or to ask the court for corrective jury instructions at a critical point in the trial; He failed to adequately investigate discover; He failed to call or interview potential key witnesses. which the state admitted would be beneficial to the defense; He failed to interview the state's witnesses.

Both the Sixth Amendment to the United States Constitution and Article I, Section 22 (Amendment 10) of the Washington State Constitution guarantee the right of effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Fredrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel is ineffective when [his/her] performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. Strickland, 466 U.S. at 668. Prejudice

is established when "there is a reasonable probability, but for counsel's errors, the result of the trial would have been different." Hendrickson, at 78.

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 669. To provide constitutionally adequate assistance, "counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." Sanders v. Ratell, 21 F.3d 1446, 1456 (9th Cir. 1994).

[A]n ineffective assistance of counsel claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable. Strickland, 466 U.S. at 694; In the matter of the Personal Restraint Petition of Hoyt W. Crace, 174 Wn.2d 835, 280 P.3d 1102 (2012). Thus, Strickland suggests that a petitioner who shows there is a reasonable probability that his trial lacked one of the critical assurances of fairness also necessarily shows actual and substantial prejudice. In re PRP of Crace, *supra*.

A. Failure to properly cite case law or brief in motion to dismiss some of the charges:

My Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution rights were violated when I received ineffective assistance of counsel, by trial

counsel's unprofessional errors in failing to cite proper case law when presenting a motion to dismiss to the court.

I received ineffective assistance of counsel when my trial attorney petitioned the court for a motion to dismiss for failing to prove prima facie evidence against me. Defense attorney Burgess moved the court to dismiss without filing any kind of briefing or citing any case law to support his motion.

In the case at bar, I was convicted of theft of a firearm, and two counts of unlawful possession of a firearm in the second degree, for a permanently disabled, inoperable rifle and a 9mm pistol found in a car belonging to someone else. According to the state, both firearms related to the second unlawful possession of a firearm charge, Count VIII. When in regards to Count VIII the state presented no evidence that I ever had dominion or control over either firearm, nor did I ever knowingly possess either firearm on the January 28, 2011 date. Had sufficient briefing been included and proper case law cited, the motion to dismiss would have been more likely than not successful and the charges against me would have been dismissed.

After the state rested its case-in-chief, Mr. Burgess moved to dismiss several charges including insufficiency of the evidence, specifically in regard to Count VIII for the state's failure to prove dominion and control over the firearm, in regards to unlawful possession

of Firearm second degree, stemming from the January 28, 2011 date. (8/27/12 RP at 481-93).

However, Mr. Burgess' motions were denied. But Mr. Burgess, in fact, failed to cite any case law that would support the reasons for the motion to dismiss. Mr. Burgess moved to dismiss Count III, residential burglary, because I was not charged as accomplice or accomplice liability, and there had been no testimony that anyone witnessed me enter or remain in the residence unlawfully or on the property. Additionally, there was no evidence to suggest that I stole a firearm for the same reasons. Burgess further argued that the firearm in Count IV is specified as a .357 revolver, and there was no evidence to establish that, because the victim stated he was missing a 10mm,so no .357 was taken, and those charges would overlap for the purposes of the dismissal. He also stated that the charging documents did not specify co-defendants on November 07, 2010, only on the January 28, 2011 date, so there was no notice of accomplice liability in the charging documents in regards to the burglary and firearm theft.

The Prosecutor argued that accomplice liability need not be specific and that the fact there was a co-defendant listed is adequate notice. She later stated case law to support her arguments. The state then moved to amend Count IV, theft of a firearm to specifically a 10mm, instead of a .357.

Over defense's arguments of prejudice from late amendments and charging documents only stating a co-defendant on the January date and not the November date, the state was allowed to amend the information and the motion to dismiss Counts III and IV was denied. (8/27/12 RP at 481-88).

Next Burgess moved to dismiss Count VIII, unlawful possession of a firearm in the second degree, stemming from January 28, 2011. His argument was that the state failed to present any evidence, even circumstantial evidence, of dominion and control that I possessed any firearms. He urged that there was no evidence I had dominion and control of the pistol found in someone else's car. Also there is no evidence that I had knowledge of the firearm, or had dominion and control over a residence and a vehicle that were not mine.

The state argued that because there were 9mm rounds found in the trailer that Mr. Aho and Ms. Newkirk shared, and because Ms. Newkirk's statement and testimony were conflicting, in that when police asked Ms. Newkirk what was planned for the gun she stated, "We go shooting," but in trial she stated that she had bought the gun as a gift for ME, but had not given it to me, and she believed that I had no knowledge of the gun being there, that was sufficient to establish constructive possession.

Burgess again argued that the gun was not found in the trailer but in a car belonging to Ms. Newkirk, who testified that I had no knowledge of the gun. She had bought it as a gift for me, but did not give it to me yet. The gun could not be seen from outside the car, the car did not belong to me, I was never seen driving the car previously, and therefore dominion and control were never established. The court however ruled to allow the charge to go to the jury to decide. (VRP 488-93).

A trial court cannot make an informed decision if it does not know the parameters of its decision making authority. "Counsel has an obligation to cite appropriate case law when presenting motions to trial court." State v. McGill, 112 Wn.App. 95, 47 P.3d 173 (2002). In State v. McGill, the court noted an attorney is unreasonable when bringing a motion before the court without briefing or case law. McGill, 112 Wn.App. at 266.

Was I prejudiced when my attorney petitioned the court without briefing or case law?

The lack of evidence did not establish even prima facie evidence against me. The .357 revolver was amended to a 10mm automatic after the state's case-in-chief had rested. The rifle was deemed permanently disabled and inoperable, according to expert testimony. And the 9mm was found in Ms. Newkirk's vehicle, over which I never had dominion and

control, nor did I have knowledge of the gun being in the car or on the property.

Yet the charges were allowed to proceed to the jury to decide. We can assume that the trial court's decision to deny the motion to dismiss may have been different had defense counsel, in fact, provided the proper briefing and cited some appropriate case law in support of the motion, establishing the parameters for the court's decision making authority.

Had counsel presented case law, such as State v. Chouinard, 169 Wash. App. 895, 282 P.3d 117 (2012); State v. Embry, 171 Wash. App. 714 (2012); State v. Alvarez, 105 Wn.App. 215, 19 P.3d 485 (2001); State v. Callahan, *supra*, which all suggest close proximity is insufficient to establish dominion and control for constructive possession; And also, State v. Marcum, 116 Wash. App. 526, 66 P.3d 690 (2003); State v. Hartzell, 156 Wash. App. 918, 237 P.3d 928 (2010), both of which pertain to "knowing" being an essential element of the crime of unlawful possession of a firearm, the court would have deliberated on the issue and more than likely would have ruled to grant the motion to dismiss.

Because trial court was not presented with relevant case law it was unable to make an informed decision. This error made by Mr. Burgess caused prejudice to me in that the charges were allowed to go to the jury, when they should have been dismissed with proper argument and case law in support.

The charges should be reversed and remanded for a new trial.

B. Counsel failed to move for mistrial or ask for corrective jury instruction at a critical point in the trial:

During trial, while the alleged victim, Mr: Gambill, was testifying, he went outside the line of questions by elaborating his answers and making repeated comments about death threats. This happened several times over defense attorney's objections, and despite the court's several warnings to stop. During the questioning of the state witness, the following comments were made by Mr. Gambill:

> "It was on more than one occasion. They came over and checked my phone, and they said they were tapping phones or something --"
>
> (Mr. Burgess objects) VRP 120
>
> "... they told me officer Filing had death threats put on him."
>
> (Mr. Burgess objects) VRP 121
>
> "No. They already knew they just wanted to know if I got any death threats.
>
> (Mr. Burgess objects) VRP 122

The threats mentioned by the witness had nothing to do with me and therefore prejudiced me. Any average person hearing about death threats to a person, and especially to law enforcement officers, would not be able to disregard such comments. and would most likely take the threats as a sign of guilt by the person who they believe made the threats.

The prejudice to me could not have been easily fixed by such a vague instruction to the jury to disregard a portion of the witness's testimony, rather it would require addressing the issue directly, and informing the jury that the death threats did not pertain to me directly and that I had no knowledge of the threats.

This, however, did not happen, and Mr. Burgess should have moved for a mistrial. The risk of a tainted or biased jury was too great to continue the trial with the same jury members.

Mr. Burgess knew that the testimony was highly prejudicial; he made repeated comments about the fact throughout his argument regarding this issues. (VRP 121-33).

Even the court made reference or suggestion as to the seriousness of the situation; "...he will be entitled to ask for a mistrial," (VRP at 129). The court also knew that this issue was a problem that would not easily be corrected; "I don't know if it will get any better." (VRP at 133).

Mr. Burgess had every right to move for a mistrial on these grounds. However, he failed to do so and the potentially biased jury was allowed to remain throughout the trial. The comments about death threats to law enforcement officers had the potential to bias jurors against me.

Because this occurred so early in the trial, there was no tactical decision made by not moving for a mistrial.

According to State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996), prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, at 78.

Here we can assume the probability that the result of trial would have been different is more than reasonable, absent counsel's errors, of not properly instructing the jury and failing to move for mistrial.

Charges should be reversed and remanded for a new trial.

C. Failure to adequately investigate discovery:

Mr. Burgess claimed to have no knowledge of death threats even though the information was provided with discovery.

The record reflects Burgess' lack of familiarity with the discovery provided to him by his comments of having no knowledge of death threats, when in fact he was provided the information with discovery. In reference to the death threats, Mr. Burgess states:

> "Your honor, this causes me concern mainly because this is the first time I ever heard of this."
>
> "I'm just not aware of being informed of these threats."
>
> VRP at 26.

However, according to the Prosecutor, Mr. Burgess was in fact provided with the police reports on that incident with discovery. The threats related to a co-defendant's boyfriend and did not involve me. The Prosecutor, Ms, Hauger, states:

"Your honor actually Mr. Burgess was provided with po,lice reports on that incident..."

"All those reports were provided with the discovery."

VRP at 27.

Again, on a later date, Mr. Burgess states:

"I have no basis, no knowledge of threats stemming or associated with my client..."

VRP at 124.

Contrary to this, the Prosecutor states:

"[Mr. Burgess] ... may simply have not recalled the discovery that was provided to him because he has not focused on it."

"That was provided... to Mr. Burgess back in January of 2011."

VRP at 125.

The record clearly reflects Mr. Burgess' lack of familiarity with the discovery.

According to Harris by and through Ramsayer v. Wood, 64 F.3d 1432 (9th Cir. 1995), "trial counsel's failure to investigate and prepare for trial amounted to ineffective assistance."

Here, by counsel's admitted lack of familiarity with the discovery, and the state's repeated comments about counsel not focusing on discovery, there is more than enough reason to believe that defense counsel's performance was less than reasonably effective and thereby

showed me prejudice, and must constitute ineffective assistance of counsel.

For one, Mr. Burgess admits to having no knowledge of the death threats, yet the Prosecutor assures the court that Mr. Burgess received police reports regarding the incident "back in January of 2011."

The dates Burgess denies knowledge of the threats is 8/06/2012 and 8/27/2012; roughly 19 months had passed since Mr. Burgess received the discovery and the reports regarding the threats.

It is safe to say that had Mr. Burgess read through the discovery, he would have had some knowledge of the threats.

The prejudice to me here was Mr. Burgess' failing to investigate the discovery for the upcoming trial.

D. Failure to call or interview potential key witness that the state admitted was beneficial to defense:

At the end of trial there was a discussion with the trial court about a key witness, Nathan Rolfe, a co-defendant in this case. My attorney was requesting a jury instruction regarding that witness. During the discussion the state admitted that it would not have been in their best interests to produce that witness. VRP at 507.

My attorney stated that the witness was of fundamental importance to my defense. VRP at 508.

The state responded "it would be more in the interest of the defense to call that particular witness than the state." VRP at 510.

The state further argued that my attorney could have requested an order for transport to have the witness come and testify. VRP at 510.

My attorney then admitted that he could have in fact secured the witness for trial. VRP at 512.

Mr. Rolfe's testimony would have been critical to the defense because he could have testified to my lack of involvement in the crimes I was charged with.

The fact that Rolfe pled guilty to the charged crimes and that the state did not call him demonstrates the value of his testimony.

As defense counsel argued, there was no evidence to put me on the property where the burglary allegedly took place.

Yet Mr. Burgess failed to call this witness or to even interview him as a potential witness. According to Mr. Burgess, Rolfe could have changed the outcome of the trial, and that is why the state did not call Mr. Rolfe. The state clearly felt that Mr. Rolfe's testimony would have been favorable to the defense. VRP at 510.

Mr. Burgess' failure to do these things caused me prejudice by the above reasons.

There is no tactical or logical reason for myattorney to have not interviewed the most critical witness in the case. The record clearly shows that Mr. Burgess made no effort to contact the witness.

"Trial counsel's failure to interview potential witnesses, whose names had been produced to counsel by defendant, amounted to ineffective assistance of counsel." U.S. v. Gray, 878 F.2d 702 (3rd Cir. 1989). "Trial counsel's failure to investigate and prepare for trial amounted to ineffective assistance." Harris by and through Ramsayer v. Wood, 64 F.3d 1432 (9th Cir. 1995)

E. Failure to ~~call or~~ interview state's witness:

Mr. Burgess failed to interview one of the state's witnesses, Brandy Snow. The record reflects and supports this claim. When at trial, Mr. Burgess attempts to interview, Brandy, but she refuses to speak with him. Mr. Burgess states to the court, "She [Ms. Snow] refused to speak to me, informed me now I have to go through her attorney, Michael Stewart. So now she is putting up a wall for me to talk to her but apparently she is cooperating with the state." VRP at 37. When asked by the court why Mr. Burgess had not spoken with Ms. Snow before trial, the Prosecutor answered that Mr. Burgess never made an attempt. Q: (the court) "Let me ask you this, why wasn't she talked to before now?" A: (the state) "Well, there was never a request, your honor." VRP at 37.

According to State v. Jury, 19 Wash. App. 256, 263, 576 P.2d 1302 (1978), "the presumption of counsel's competence can be overcome by showing, among other things, that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense

were available or failed to allow himself enough time for reflection or preparation for trial."

Here the record more than once makes clear that Mr. Burgess failed to conduct appropriate investigations and by him waiting until trial started to interview a state's witness, he failed to allow himself enough time to reflect and prepare for trial. This must constitute ineffective assistance of counsel. The charges must be reversed and remanded for a new trial.

CONCLUSION

Mr. Burgess' performance was less than adequate, and fell below a reasonable standard in several instances. All of which caused me severe prejudice in that the very least he could have done was read the discovery, which the record shows he failed to do. VRP at 27, 125.

Not only did Burgess fail to familiarize himself with the case by not reading the discovery, which he had for approximately 19 months before the trial, he also failed to interview a state's witness until his attempt on the day of trial, and made not attempt at all to interview a potential key witness, who was also a co-defendant., that Burgess himself admits had the potential to make the outcome of the trial different. VRP at 508.

I expected at least an attempt by my attorney to put forth some effort in this trial. I feel it was very unfair for these reasons.

The charges should be reversed and remanded for a new trial. I, Mathew [redacted] Aho, respectfully request so.

REQUEST FOR ADDITIONAL BRIEFING

I am requesting additional briefing for the issues that I have raised in this statement of additional grounds. I have very limited access to resources and I am inexperienced in this legal field.

Respectfully Submitted,

Dear Court Clerk,

I have finished the pro se Statement of additional grounds.

The S.A.G. you find enclosed should replace the previous S.A.G. I sent on Sept. 25, 2013.

I Appologize for the inconvenience and thank you for your time.

Respectfully,

Matthew Aho

October 2nd, 2013

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