

NO. 35917-1-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

STEVEN A. MENCER,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
2009 MAR 13 10:52 AM
BY: [Signature]

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
MASON COUNTY

The Honorable James B. Sawyer II, Judge
Cause No. 06-1-00437-0

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	1
D. ARGUMENT	5
(1) MENCER’S CONVICTION IN COUNT I OF UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE SHOULD BE REVERSED WHERE THE COURT FAILED TO GIVE A UNANIMITY INSTRUCTION REGARDING THIS COUNT AND THE STATE FAILED TO ELICIT SUFFICIENT EVIDENCE TO SUPPORT EACH OF THE THREE ALTERNATIVE MEANS CHARGED.....	5
(2) MENCER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO THE COURT’S FAILURE TO GIVE A UNANIMITY INSTRUCTION ON COUNT I—UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE.....	7
(3) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT MENCER WAS GUILTY OF UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE AS CHARGED IN COUNT I.....	10
E. CONCLUSION	13

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Washington Cases</u>	
<u>State v. Bencivinga</u> , 137 Wn.2d 703, 974 P.2d 832 (1999).....	11
<u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10, <i>cert. denied</i> , 501 U.S. 1237 (1991).....	5
<u>State v. Craven</u> , 67 Wn. App. 921, 841 P.2d 774 (1992).....	10, 11
<u>State v. Deal</u> , 128 Wn.2d 693, 911 P.2d 996 (1996)	5
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	11
<u>State v. Early</u> , 70 Wn. App. 452, 853 P.2d 964 (1993), <i>review denied</i> , 123 Wn.2d 1004 (1994).....	8
<u>State v. Gilmore</u> , 76 Wn.2d 293, 456 P.2d 344 (1969).....	9
<u>State v. Gooden</u> , 51 Wn. App. 615, 754 P.2d 1000, <i>review denied</i> , 111 Wn.2d 1012 (1988).....	5
<u>State v. Graham</u> , 78 Wn. App. 44, 896 P.2d 704 (1995).....	8
<u>State v. Hursh</u> , 77 Wn. App. 242, 890 P.2d 1066 (1995)	5, 6
<u>State v. Leavitt</u> , 49 Wn. App. 348, 743 P.2d 270 (1987), <i>aff'd</i> , 111 Wn.2d 66, 758 P.2d 982 (1988).....	9
<u>State v. Ortega-Martinez</u> , 124 Wn.2d 702, 881 P.2d 231 (1994)	6
<u>State v. Peterson</u> , 73 Wn. App. 303, 438 P.2d 183 (1968).....	5
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	10, 11
<u>State v. Tarica</u> , 59 Wn. App. 368, 798 P.2d 296 (1990).....	9
<u>State v. Weaver</u> , 60 Wn.2d 87, 371 P.2d 1006 (1962)	11

<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972)	9
<u>Constitution</u>	
Article 1, sec. 22 of the Washington Constitution	5
<u>Court Rules</u>	
CrR 3.5	2
CrR 3.6	2
RAP 2.5(a)(3)	5

A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to give a unanimity instruction on Counts I where the State failed to elicit sufficient evidence of the all the alternatives of the crime of unlawful possession of a firearm in the second degree.
2. The trial court erred in allowing Mencer to be represented by counsel who provided ineffective assistance in failing to object to the court's failure to give a unanimity instruction.
3. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in failing to give a unanimity instruction on Counts I where the State failed to elicit sufficient evidence of the all the alternatives of the crime of unlawful possession of a firearm in the second degree? [Assignment of Error No. 1].
2. Whether the trial court erred in allowing Mencer to be represented by counsel who provided ineffective assistance in failing to object to the court's failure to give a unanimity instruction? [Assignment of Error No. 2].
3. Whether there was sufficient evidence to uphold Mencer's conviction for unlawful possession of a firearm in the second degree? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

1. Procedure

Steven A. Mencer (Mencer) was charged by information filed in Mason County Superior Court with four counts of unlawful possession of a firearm in the second degree (Counts I-IV). [CP 53-55]. The

information charged all three alternatives—own, or possess, or control—of unlawful possession of a firearm for each count. [CP 53-55].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. Mencer was tried by a jury, the Honorable James B. Sawyer II presiding. Mencer stipulated that the firearms at issue during the trial were in working order and that he had a prior conviction for the purposes of the four charges. [CP 47, 48; Vol. I RP 138-139]. During trial a juror and the alternate were unable to continue serving on the jury and Mencer agreed to have the matter decided by a jury of eleven. [Vol. II RP 178-179]. Mencer had no objections and took no exceptions to the court's instructions. [Vol. II RP 184]. The court did not give a unanimity instruction regarding the alternative means of committing unlawful possession of a firearm on any of the four counts, nor did the court submit special verdicts to the jury regarding the alternative means of committing unlawful possession of a firearm for any of the four counts. [CP 23-41]. The jury found Mencer guilty of Count I—a pistol, and not guilty of Counts II-IV—three rifles. [CP 19, 20, 21, 22; Vol. II RP 225-227].

The court sentenced Mencer to a standard range sentence of 10-months on Count I, the only count of which he was convicted. [CP 6-18; Vol. II RP 231].

A notice of appeal was timely filed on February 5, 2007. [CP 4].

This appeal follows.

2. Facts

On October 17, 2006, the Mason County Sheriff's SERT team executed a search warrant at the home of Richard York (York), 2720 W. Highland Road in Shelton, Washington. [Vol. I RP 17-22, 29-30, 39-40]. In a bedroom in the home the officers found Mencer apparently asleep wearing headphones. [Vol. I RP 30-32]. The officers woke Mencer, who would not cooperate resulting in the officers using a taser to gain his compliance. [Vol. I RP 32-34]. The officers saw a pistol sitting on the entertainment center in the bedroom where Mencer had been sleeping and found three rifles hidden in the closet of the bedroom. [Vol. I RP 41-48]. The officers also found documents/letters addressed to Mencer. [Vol. I RP 41-42]. Mencer admitted to the officers that a number of items in the bedroom belonged to him explaining that he was in the process of moving out, but denied any knowledge of the firearms found in the bedroom. [Vol. I RP 38-61, 72-73].

Debbie Marshall (Marshall) testified that she was moving into Mencer's bedroom in York's home, but hadn't fully moved in as Mencer was still moving out. [Vol. I RP 81-84, 95]. She admitted that she had placed three rifles and a pistol in Mencer's bedroom unbeknownst to him

because the bedroom door had a lock—she had gotten a key to the lock from York, who along with Mencer had a key. [Vol. I RP 87-90, 95]. When shown the three rifles found in the closet, Marshall identified the firearms as hers. [Vol. I RP 98-122]. However, when shown the pistol found on the entertainment center, she denied that it was the pistol she had put in the room; it was not hers. [Vol. I RP 102-103, 122].

Carrie Justus (Justus), Mencer's mother, testified that he did not live at York's home on October 17th as he had moved home with her. [Vol. II RP 154-159]. However, Mencer still had some personal items still at York's home that needed to be removed. [Vol. II RP 154-159].

Mencer testified in his own defense and denied any knowledge of any of the firearms found in the bedroom where the officers found him sleeping. [Vol. II RP 160-165]. Mencer explained that he had gone to York's home to finish moving out, but he was tired and it got too late to do so. [Vol. II RP 160-165]. Mencer went into the bedroom without turning on the lights, put on his headphones, and fell asleep only to be awakened by the officers the next morning. [Vol. II RP 160-165]. He never saw the pistol on the entertainment center let alone the rifles hidden in the closet, did not know they were in the bedroom, and did not own them. [Vol. II RP 160-165].

D. ARGUMENT

- (1) MENCER'S CONVICTION IN COUNT I OF UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE SHOULD BE REVERSED WHERE THE COURT FAILED TO GIVE A UNANIMITY INSTRUCTION REGARDING THIS COUNT AND THE STATE FAILED TO ELICIT SUFFICIENT EVIDENCE TO SUPPORT EACH OF THE THREE ALTERNATIVE MEANS CHARGED.

Art. 1, sec. 21 of the Washington Constitution guarantees a criminal defendant the right to a unanimous jury verdict. "The right to a unanimous verdict is derived from the fundamental constitutional right to a fair trial by a jury, it may be raised for the first time on appeal." State v. Gooden, 51 Wn. App. 615, 617, 754 P.2d 1000, *review denied*, 111 Wn.2d 1012 (1988); State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991); State v. Hursh, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995). Issues of constitutional magnitude may be raised for the first time on appeal. State v. Peterson, 73 Wn. App. 303, 306, 438 P.2d 183 (1968); State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *see also* RAP 2.5(a)(3).

In alternative means cases, a single offense that may be committed in more than one way, the jury must unanimously agree on guilt for the single crime charged but not on the means by which the crime was committed so long as there is sufficient evidence to support each

alternative. State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994); State v. Hursh, 77 Wn. App. at 248.

Here, the State charged Mencer in the information with unlawful possession of a firearm in the second degree in Count I based on “own[ership],” “possession” or “control” of the “Berretta .22 caliber pistol Serial No. 95021.” [CP 53]. The to-convict instruction on this charge, Instruction No. 12 [CP 37], the only charge for which Mencer was convicted, similarly sets forth the same three alternatives of committing the crime. Thus, the State bore the burden of eliciting sufficient evidence to prove beyond a reasonable doubt all of the alternative means of committing this offense as the court did not give a unanimity instruction regarding this charge nor did the court give the jury a special verdict form asking the jury to decide under which alternative means the crime was committed.

The State failed to elicit sufficient evidence of all the alternatives as required by the to-convict instruction. The sum of the State’s evidence to demonstrate that Mencer was guilty of unlawful possession of the firearm at issue in the second degree was the fact that he was found asleep in a bedroom, albeit a bedroom in which he was moving out of, where the firearm at issue was found. While it is true that Marshall testified that the pistol at issue was not the pistol she owned and had placed unbeknownst

to Mencer in the bedroom where Mencer was found asleep, the State presented no evidence of the actual “ownership” of the Beretta, which is particularly troubling given that the firearm carried a serial number, 95021, which could have been readily traced to the “owner.” Moreover, there was no evidence presented that Mencer “possessed” the firearm as it was not found on his person and in fact no fingerprints were recovered from the firearm that would indicate that Mencer had even handle it. Finally, and more importantly, contrary to the State’s position at trial on the alternative of constructive possession/control, the entirety of the evidence presented establishes that Mencer was merely asleep in a bedroom where the firearm was found, did not live at the residence and was in fact in the process of moving out, that others had access to the bedroom even given the lock on the bedroom (York and Marshall) either of whom could have placed the firearm in the bedroom unbeknownst to Mencer particularly given the court’s instruction that “mere proximity [to the firearm] is insufficient” Court’s Instruction No. 10 [CP 35]—the crime requires “knowing” control. The evidence presented does not constitute sufficient evidence to establish that Mencer “owned” the firearm at issue as the ownership of the firearm was never established, does not constitute sufficient evidence that he “possessed” the firearm at issue as it was not found on his person or that he had ever even handled the firearm, and does

not constitute sufficient evidence that he had “control” of the firearm at issue as the fact that he was asleep in a room where the firearm was found constitutes “mere proximity,” and it was the State’s burden to do so beyond a reasonable doubt as to each alternative. Having failed to elicit the requisite evidence to prove beyond a reasonable doubt all the alternatives given the court’s failure to give a unanimity instruction let alone a special verdict on the issue, this court should reverse Mencer’s conviction in Count I.

(2) MENCER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL’S FAILURE TO OBJECT TO THE COURT’S FAILURE TO GIVE A UNANIMITY INSTRUCTION ON COUNT I—UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is

determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Assuming, *arguendo*, this court finds that counsel waived the error claimed and argued in the preceding section of this brief, even though it has been asserted that this is a constitutional issue that can be raised for the first time on appeal in failing to object to the court's failure to give a unanimity instruction on Count I, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to act for the reasons set forth above when, if counsel had done so the trial court would have been given a unanimity instruction or submitted an appropriate special verdict.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is

apparent in that but for counsel’s failure for the reasons set forth herein, had counsel done so, the outcome of the trial court would have been different—Mencer would not have been convicted of unlawful possession of a firearm in the second degree as the State had failed to establish beyond a reasonable doubt any of the alternatives of the crime charged in Count I—the unanimity instruction/special verdict would have precisely set forth the jury’s duty and the focused the jury on the weakness of the State’s case. This court should reverse and dismiss Mencer’s conviction.

(3) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT MENCER WAS GUILTY OF UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE AS CHARGED IN COUNT I.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99

(1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928. In cases involving only circumstantial evidence and a series of inferences, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rational trier of fact to find guilt beyond a reasonable doubt. State v. Bencivinga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999) (citing State v. Weaver, 60 Wn.2d 87, 89, 371 P.2d 1006 (1962)).

Here, as argued above, even if this court does not reverse for the lack of a unanimity instruction, the State has failed to elicit sufficient evidence that Mencer was guilty of unlawful possession of a firearm in the second degree where the State cannot establish based on the evidence elicited at trial that Mencer had "knowing" control/constructive possession of the firearm charged in Count I.

The sum of the State's evidence to sustain this charge and conviction was the fact that Mencer was found asleep in a bedroom where the firearm at issue was found. However, the officers who found Mencer in the bedroom where the firearm was also discovered were executing a search warrant were targeting York, the owner of the residence who also had access to the bedroom (he had a key) and could have placed the

firearm there unbeknownst to Mencer, where the officers admitted they believed weapons could possibly be found at the residence hence the use of the SERT team. Moreover, Marshall while failing to identify the firearm/pistol as one she had placed in the bedroom unbeknownst to Mencer did testify that she had placed a pistol and three other rifles in the room—only four firearms were found in the room. The question, and one establishing reasonable doubt, becomes where is the pistol that Marshall placed in the room unbeknownst to Mencer if not the pistol for which he was convicted. Finally, given the court’s instruction that “mere proximity is insufficient,” Instruction No. 10 [CP 37], then there is absolutely no evidence presented by the State of Mencer’s “knowing” control/constructive possession of the firearm at issue. Given the totality of the evidence, this court should reverse and dismiss Mencer’s conviction for unlawful possession of a firearm in the second degree.

E. CONCLUSION

Based on the above, Mencer respectfully requests this court to reverse and dismiss his conviction for unlawful possession of a firearm in the second degree.

DATED this 10th day of August 2007.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 10th day of August 2007, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 10th day of August 2007.

Patricia A. Pethick
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