

NO. 36724-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS PAGE,

Appellant,

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DIVISION II
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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable James B. Sawyer II, Judge
Cause No. 07-1-00228-6

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not dismissing the offense of unlawful possession of a firearm in the second degree because the State failed to establish the corpus delicti for the offense independent of Page's admissions to the police.
02. The trial court erred in permitting Page to be represented by counsel who provided ineffective assistance by failing to raise the issue regarding the lack of corpus delicti for the offense of unlawful possession of a firearm in the second degree.
03. The trial court erred in not taking the case from the jury for failure of the information to allege all of the elements of unlawful possession of a firearm in the second degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the State failed to establish the corpus delicti for the offense of unlawful possession of a firearm in the second degree? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting Page to be represented by counsel who provided ineffective assistance by failing to raise the issue regarding the lack of corpus delicti for the offense of unlawful possession of a firearm in the second degree? [Assignment of Error No. 2].
03. Whether a conviction for unlawful possession of a firearm in the second degree pursuant to an information that fails to allege all of the elements of the offense must be reversed and

dismissed? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Thomas Page (Page) was charged by information filed in Mason County Superior Court on May 16, 2007, with assault in the fourth (domestic violence), count I, and Unlawful possession of a firearm in the second degree, count II, contrary to RCWs 9A.36.041 and 9.41.040. [CP 49-50].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. On July 10, Page pleaded guilty to the assault charge [RP 1-8; CP 39-46], and trial to a jury on the remaining charge followed, the Honorable James B. Sawyer II presiding. The parties stipulated that Page had the requisite prior conviction for purposes of RCW 9.41.040. [RP 31; CP 38]. Neither exceptions nor objections were taken to the jury instructions. [RP 79].

The jury returned a verdict of guilty as charged, Page was sentenced within his standard range and timely notice of this appeal followed. [CP 3, 4-17, 19].

02. Substantive Facts

On May 11, 2007, at approximately 4:00 p.m., Page was arrested in a forested area behind his residence for an offense

unrelated to the firearm and taken to the police station, where he subsequently informed the police of his concern about a handgun inside his home. [RP 16-19, 34-35].

He stated that it was next to the bed that he sleeps in. There's a sewing machine; there's also a stack of blankets and this gun was underneath the blankets.

[RP 19].

Page was allowed to call his brother, Edward Page, on the telephone.

Mr. Page talked to someone else on the other end of the line, stated something similar to: You know that little black handgun that I have? Well, the police need it. They're going to charge me with another crime for having it, so they need you to bring it down here. You know, if you bring it down here, they're going to charge me with this crime, so, you do whatever you want to do, but that's where the gun is.

[RP 22].

The police then returned to Page's residence to find Edward, who lived in a trailer on the same property, exiting Page's house. [RP 39, 52].

"As far as where the – if the gun was inside the house, he was non-responsive." [RP 25]. Edward Page testified that he never retrieved a gun from inside his brother's house. [RP 54].

Around 10:00 p.m. that evening, the police accompanied Page's wife to the residence to retrieve the gun, which she could not find in the location given to her by the police. [RP 26-27, 42-43, 64, 72].

D. ARGUMENT

01. PAGE'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE MUST BE REVERSED AND DISMISSED BECAUSE THE STATE FAILED TO ESTABLISH THE CORPUS DELICTI FOR THE OFFENSE INDEPENDENT OF PAGE'S ADMISSIONS TO THE POLICE.

Under the corpus delecti rule, a jury may not convict sa defendant of a crime based on his or her confession alone. State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). The rule requires evidence, independent of a criminal defendant's statements, "that a crime was committed by someone." City of Bremerton v. Corbett, 106 Wn.2d 569, 574, 723 P.2d 1135 (1986). The basis for this is that a defendant's statements, standing alone, are insufficient to support an inference that the admitted crime was committed. State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). There must be prima facie evidence of the charged offense independent of the defendant's admissions. State v. Aten, 130 Wn.2d at 656. "'Prima facie' in this context means there is 'evidence of

sufficient circumstances which would support a logical and reasonable inference' of the facts sought to be proved." Id. (quoting State v. Vangerpen, 125 Wn.2d at 796). But if the independent evidence is consistent with an inference of either innocence or guilt, it does not sufficiently establish the corpus delicti of a crime. State v. Aten, 130 Wn.2d at 658-660. The State bears the burden of producing evidence sufficient to satisfy the corpus delicti rule. State v. Riley, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993). When reviewing the sufficiency of the evidence in considering whether the State has met this burden, a court must take the evidence in the light most favorable to the State. State v. Pineda, 99 Wn. App. 65, 77-78, 992 P.2d 525 (2000).

Page was charged and convicted of unlawful possession of a firearm in the second degree under RCW 9A.04.040, which, in part, required corroborating evidence of Page's admissions to the police that supports a reasonable and logical inference that Page knowingly owned, possessed or controlled a firearm on or about May 11, 2007.

The State failed to carry this burden. The corpus delicti of unlawful possession of a firearm requires proof connecting the defendant with the firearm possession. State v. Wright, 76 Wn. App. 811, 817-18, 888 P.2d 1214 (1995). Here the only evidence that Page possessed the firearm was his statement that he possessed it. No one testified to having

seen Page in possession of the firearm on May 11, and the police never recovered it. Thus, except for Page's admissions, there was no evidence that he possessed the firearm, with the result that his conviction for unlawful possession of a firearm in the second degree must be reversed and dismissed.

02. PAGE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AND WAS PREJUDICED BY HIS COUNSEL'S FAILURE TO ARGUE LACK OF CORPUS DELICTI FOR THE OFFENSE OF 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).

It has been held that the corpus delecti rule “is a judicially created rule of evidence, not a constitutional sufficiency of the evidence requirement, and a defendant must make a proper objection to the trial court to preserve the issue.” State v. Dodgen, 81 Wn. App. 487, 492, 915 P.2d 521 (1996); State v. C.D.W., 76 Wn. App. 761, 763-764, 887 P.2d 911 (1995). Should this court find that counsel waived the error claimed and argued in the preceding section of this brief by failing to raise the corpus delecti issue set forth therein, 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 raise the issue, which would have resulted in the dismissal of the charge for the reasons argued in the preceding section.

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 self-evident: but for counsel’s failure to raise the issue of corpus delicti, the offense would have been reversed and dismissed because, absent Page’s incriminating statements, the independent evidence was insufficient to support his conviction for unlawful possession of a firearm in the second degree.

03. A CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE PURSUANT TO AN INFORMATION THAT FAILS TO ALLEGE ALL OF THE ELEMENTS OF THE OFFENSE MUST BE REVERSED AND DISMISSED.

The constitutional right of a person to be informed of the nature and cause of the accusation against him or her requires that every material element of the offense be charged with definiteness and certainty. 2 C. Torcia, Wharton on Criminal Procedure Section 238, at 69 (13th ed. 1990). In Washington, the information must include the essential common law elements, as well as the statutory elements, of the crime charged in order to appraise the accused of the nature of the charge. Sixth Amendment; Const. art. 1, Section 22 (amend. 10); CrR 2.1(b); State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). Charging documents that fail to set forth the essential elements of a crime are constitutionally defective and require dismissal, regardless of whether the defendant has shown prejudice. State v. Hopper, 118 Wn.2d 151, 155, 822 P.2d 775 (1992). If, as here, the sufficiency of the information is not challenged

until after the verdict, the information “will be more liberally construed in favor of validity....” State v. Kjorsvik, 117 Wn.2d at 102. The test for the sufficiency of charging documents challenged for the first time on appeal is as follows:

(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?

State v. Kjorsvik, 117 Wn.2d at 105-06.

It is not fatal to an information that the exact words of the statute are not used; it is instead sufficient “to use words conveying the same meaning and import as the statutory language.” State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). The information must, however, “state the acts constituting the offense in ordinary and concise language....” State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965). The question “is whether the words would reasonably appraise an accused of the elements of the crime charged.” State v. Kjorsvik, 117 Wn.2d at 109.

The primary purpose (of a charging document) is to give notice to an accused so a defense can be prepared. (citation omitted) There are two aspects of this notice function involved in a charging document: (1) the description (elements) of the crime charged; and (2) a description of the specific

conduct of the defendant which allegedly constituted the crime.

Auburn v. Brooke, 119 Wn.2d 623, 629-30, 836 P.2d 212 (1992).

RCW 9.41.04(2)(i) provides, in relevant part:

(2) (a) A person ... is guilty of the crime of unlawful possession of a firearm in the second degree, if the person ... owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted ... of ... any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree.... (Emphasis added).

Here, the information charging Page with this offense did not alleged all of these elements.

In the County of Mason, State of Washington, on or about the 11th day of May, 2007, the above-named Defendant, THOMAS J. PAGE, did commit UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE ... in that said defendant, having previously been convicted in this state or elsewhere of the following crime committed against one family or household member: assault in the fourth degree (Shelton Municipal Court, Cause No. 37589C), did knowingly own or have in his possession or control a firearm

[CP 50].

This information failed to apprise Page of the nature of the charge.

It did not allege that the prior assault in the fourth degree conviction was “committed on or after July 1, 1993,” though this language did appear in

the court's to-convict instruction as elements of the offense, as well as the court's definitional instruction for the offense and the defendant's "Stipulation as to Prior Conviction." [Court's Instructions 7 and 12; CP 31, 36, 38]. " (S)ince both charging documents and jury instructions must identify the essential elements of the crime for which the defendant is charged [information] and tried [jury instructions](,)" State v. McCarty, 140 Wn.2d 420, 426 n.1, 998 P.2d 296 (2000), the information is defective, and the conviction obtained on this charge must be reversed and dismissed. State v. Kitchen, 61 Wn. App. 911, 812 P.2d 888 (1991). Page need not show prejudice, since Kjorsvik calls for a review of prejudice only if the "liberal interpretation" upholds the validity of the information. See State v. Kjorsvik, 117 Wn.2d at 105-06.

E. CONCLUSION

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

DATED this 11th day of February 2008.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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