

No. 36724-6-II

COURT OF APPEALS, DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

THOMAS J. PAGE,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer, II
Cause No. 07-1-00228-6

BRIEF OF RESPONDENT

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A. ASSIGNMENTS OF ERROR

1. 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.
2. The trial court erred in permitting Page to be represented by counsel who provided ineffective assistance by failing to raise the issue regarding lack or (sic) corpus delicti for the offense of unlawful possession of a firearm in the second degree.
3. The trial court erred in not taking the case from the jury for failure of the information to allege all the elements of unlawful possession of a firearm in the second degree.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in not dismissing Page's case when the State satisfied corpus delicti by presenting evidence, independent of Page's statements, sufficient to support a finding that he unlawfully possessed a firearm in the second degree?
2. Did Page receive ineffective assistance of counsel after his attorney made a motion to dismiss on the sufficiency of the evidence after both the State and defense had rested?
3. Did the trial court err by not taking Page's case from the jury when: (a) prior to trial, the record shows that Page was aware of the nature of the firearm charge against him; and of (b) each element the State had to prove to establish his guilt beyond a reasonable doubt; and (c) all essential elements of the crime charged were included in the information?

C. EVIDENCE RELIED UPON

The official Report of Proceedings will be referred to as "RP." The Clerk's Papers shall be referred to as "CP."

D. STATEMENT OF THE CASE

1 & 2. Procedural History & Statement of Facts. Pursuant to RAP 10.3(b), the State accepts Page's recitation of the procedural history and facts and adds the following:

On July 11, 2007, Page stipulated that he had previously been convicted of assault fourth degree, domestic violence, after July 1, 1993. CP 23; RP 12: 12-25; 13: 1-7. Page entered into this written stipulation before testimony began. RP 13: 5-7. Page's stipulation was read to the jury prior to Officer Ohlson's testimony during the trial. RP 31: 8-18.

During Page's trial, Officer Patton testified that Page voiced concerns to him over a handgun that he (Page) left in his residence. RP 19: 2-9. Page told Officer Patton that this gun:

...[W]as 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. And his concern was that since he was down at the jail, there was kids that are in the residence and he didn't think it was a good thing for the kids to possibly be able to get access without an adult there for this firearm. RP 19: 13-19.

The firearm in question was either a .38 or .380 caliber weapon, which was also "the same caliber handgun that was unaccounted for." RP 19: 25; 20: 1.

Page told officers from the Shelton Police Department (SPD) that "if he could just call his brother [that] his brother could go inside the

house, retrieve the firearm and bring it down to the police department.”

RP 21: 16-19. Officer Patton testified that Page appeared to be “genuinely concerned” about children having access to this firearm. RP 21: 20-23.

When Officer Ohlson from SPD dialed a number for him, Page:

[T]alked 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: 7-14.

Immediately following this conversation, SPD officers went to Page’s residence and encountered Page’s brother Edward whom they knew from prior contact earlier that day. RP 23: 7-16; 24: 8-9. Officer Patton saw how Page’s brother:

[C]ame out the front door, immediately locked the front door, turned around and seemed a little surprised to see us. We asked him...what he was doing. He really didn’t answer us. He was-appeared to be kind of agitated, confrontational with us. RP 24: 11-15.

Because the officers did not have “anything to hold” Page’s brother on at that time, they let him leave the house. RP 24: 16-18. Officer Patton noted, however, that while the SPD officers did not “observe anything in his hands,” they did observe how “he left immediately [and] went back into his trailer, which is located in front of the house.” RP 24: 18-20.

Later in this investigation, Page's wife, Connie Page-Trapp, invited SPD officers into her residence. RP 42: 7. After describing where her husband said the firearm was located, Ms. Page-Trapp produced a "small handgun case" and said, "it's not here." RP 42: 10-12; 43: 7-8. Officer Ohlson could see what Ms. Page-Trapp was doing while searching for the gun and saw her pull the case out and "verbally indicat[e] that the weapon was not in the case and set the case on the bed." RP 43: 18-19.

Edward Page stated that he "locked the house up" and was "shutting all the windows" after the telephone conversation with his brother Thomas, and "didn't touch the gun." RP 53: 18-25. Later in his testimony, Edward Page stated that he "never touched" a gun. RP 54: 13-14. The defendant's wife, however, stated that the room where Page said that gun was located had "stuff everywhere" and "should not have been" in that condition, but that "it was." RP 65: 1-5. Ms. Page-Trapp also stated that she had inherited a "pistol...or the handgun, the .380," after her parents died the preceding year. RP 66: 17-18.

After both the State and defense rested, "a sidebar in which the defense made a motion for dismissal of the case on insufficiency of the evidence" occurred. RP 78: 12-15. The trial court ruled that:

[A]lthough I thought the evidence was somewhat skinny, that if the jury believed that the brother had gone in and removed the firearm that...there would be sufficient

evidence for the matter to the jury. And I denied the defense motion. RP 78: 18-23.

The deputy prosecutor for the State confirmed that in making its decision, the trial court had employed “the standard of viewing the evidence in light most favorable to the non-moving party.” RP 78: 25; 79: 1-3. The jury was informed through Instruction No. 10 that possession may be either actual or constructive. RP 88: 1-9; CP 25.

The case went to the jury, and after deliberations unanimously found Page guilty of unlawful possession of a firearm in the second degree. RP 114: 19-25; 115: 1-2.

3. Summary of Argument

The trial court did not err by denying the defense motion to dismiss because the State satisfied corpus delicti by presenting evidence, independent of Page’s statements, sufficient to support a finding of guilt. This evidence included testimony as to how Page’s brother both secured the house and was seen leaving it by law enforcement immediately after the conversation he had with the defendant about how the police wanted this handgun. Testimony was also given by Page’s wife as to where the gun usually was, and how she produced an empty handgun case when she voluntarily allowed the police to enter Page’s residence. That the room where Page had the gun was disheveled indicates that Page’s brother tore

it apart in his search for the handgun once he learned that: (a) the police wanted it; and (b) Page could face a firearm charge for possessing the gun. Sufficient evidence was also presented to the jury that Page constructively possessed the handgun, especially as he told the police that he kept it next to the bed in which he slept.

Page also received effective assistance of counsel because his court-appointed attorney moved to dismiss the case on the sufficiency of the evidence. Although the trial court denied that motion, effective representation does not necessarily mean that it will ultimately be successful.

Lastly, the trial court did not err by not taking Page's case from the jury because: (a) prior to trial, the record shows that Page was made aware of the nature of the firearm charge against him; and of (b) each element the State had to prove to establish his guilt beyond a reasonable doubt; and (c) all essential elements of the crime were included in the information. Under Kjorsvik, the two-prong test was satisfied because: (1) the necessary facts appeared in any form, or by fair construction could be found in Page's charging document; and (2) Page did not sustain actual prejudice as a result of inartful, vague or ambiguous charging language. No error occurred, and the State respectfully requests that the Court affirm the trial court's judgement and sentence.

E. ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN DENYING A DEFENSE MOTION TO DISMISS BECAUSE THE STATE SATISFIED CORPUS DELICTI BY PRESENTING EVIDENCE, INDEPENDENT OF PAGE'S STATEMENTS, SUFFICIENT TO SUPPORT A FINDING OF GUILT.

The trial court did not err in denying a defense motion to dismiss because the State satisfied corpus delicti by presenting evidence, independent of Page's statements, sufficient to support a finding of guilt.

(a) Corpus Delicti

Corpus delicti means the "body of crime," and must be proved by evidence sufficient to support the inference that there has been a criminal act. State v. Hendrickson, 140 Wash.App. 913, 919, 168 P.3d 421 (Div. 2, September 25, 2007); see State v. Aten, 130 Wash.2d 640, 655, 927 P.2d 210 (1996). Washington's version of the corpus delicti rule requires that the State produce evidence, independent of the accused's statements, sufficient to support a finding that the charged crime was committed by someone. State v. Valdez, 137 Wash.App. 280, 290, 152 P.3d 1048 (2007); see State v. Bernal, 109 Wash.App. 150, 152, 33 P.3d 1106 (2001).

The corpus delicti rule is an evidentiary rule that establishes the foundational requirements for admitting a defendant's statements or

admissions. State v. Dow, 176 P.3d 597, 601 (Div. 2, February 5, 2008); see State v. Brockob, 159 Wash.2d 311, 327-328, 150 P.3d 59 (2006).

In determining whether there is sufficient independent evidence under the corpus delicti rule, the evidence is reviewed in the light most favorable to the State. Hendrickson, 140 Wash.App. at 919; see Aten, 130 Wash.2d at 658. The evidence must independently corroborate, or confirm, a defendant's incriminating statement. Hendrickson, 140 Wash.App. at 920; Aten, 130 Wash.2d at 663. In addition to corroborating a defendant's incriminating statement, the independent evidence "must be consistent with guilt and inconsistent with a hypothesis of innocence." Hendrickson, 140 Wash.App. at 920; Aten, 130 Wash.2d at 660. A confession or admission, standing alone, is insufficient to establish the corpus delicti of a crime. Valdez, 137 Wash.App. at 290-291; see State v. Vangerpen, 125 Wash.2d 782, 796, 888 P.2d 1177 (1995).

The State has the burden of producing evidence sufficient to satisfy the corpus delicti rule. State v. Whalen, 131 Wash.App. 58, 62, 126 P.3d 55 (2005); see State v. Riley, 121 Wash.2d 22, 32, 846 P.2d 1365 (1993). If sufficient corroborative evidence exists, the confession or admission of a defendant may be considered along with independent evidence to establish a defendant's guilt. Whalen, 131 Wash.App. at 62. To be

sufficient, independent corroborative evidence need not establish the corpus delicti, or ‘body of crime,’ beyond a reasonable doubt, or even by a preponderance of the evidence. Rather, independent corroborative evidence is sufficient if it prima facie establishes the corpus delicti.

Prima facie in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal activity. In determining whether the State has produced sufficient prima facie evidence, we must assume the truth of the State’s evidence and all reasonable inferences drawn therefrom. But the independent evidence must support a logical and reasonable inference of criminal activity only. Whalen, 131 Wash.App. at 63. If the independent evidence also supports logical and reasonable inferences of non-criminal activity, it is insufficient to establish the corpus delicti.

The facts of Hendrickson are partially analogous to Page’s case because they involve corpus delicti. In Hendrickson, the defendant darted across State Route 302 in front of a deputy at approximately 1:30 AM on January 13, 2005. Hendrickson, 140 Wash.App. at 916. After swerving to miss him, the deputy approached Hendrickson, who was on his knees crying. Hendrickson told the deputy that he had “crashed,” and that he was by himself. The deputy called both paramedics and the state patrol.

Hendrickson told the deputy and a state trooper that he had been following a friend home, lost control of his car and had driven off the road attempting to avoid an oncoming car that was passing improperly. Hendrickson also admitted to the trooper that he had been drinking, was intoxicated, and that he should not have been driving. Hendrickson, 140 Wash.App. at 916-917. The officers found the car Hendrickson had been driving at the bottom of a ravine. Hendrickson, 140 Wash.App. at 917. The keys to this car were still in the ignition. Using a Department of Licensing database at the scene of the crash, the trooper verified that Hendrickson was the owner of the car.

The State charged Hendrickson with one count of DUI, and he was found guilty at trial. Hendrickson appealed that conviction to superior court and argued that the district court erred when it allowed the State to present Hendrickson's admissions to law enforcement officers that he was intoxicated and driving before proving the corpus delicti of the crime of DUI. Hendrickson, 140 Wash.App. at 918. Superior court reversed the district court jury's verdict, dismissed the charge and ruled in part that the State had introduced sufficient evidence to establish corpus delicti independent of Hendrickson's statements/admissions.

That court reasoned, however, that such evidence should have been presented at trial before Hendrickson's statements were admitted.

That court also ruled that the error in allowing the introduction of the defendant's statements before all of the independent evidence was introduced was not harmless. The State moved for discretionary review to address three issues, one of which was whether the State established corpus delicti independent of Hendrickson's confession that he was driving while intoxicated.

The Court ultimately reversed superior court and remanded to district court for sentencing, ruling in part that the State established corpus delicti because the independent evidence clearly provided prima facie proof in respect to whether Hendrickson drove the car. Hendrickson, 140 Wash.App. at 920. Per the Court, the car that the officers found was registered to Hendrickson, and Hendrickson was the only person in the area.

Similarly, the evidence prima facie established that Hendrickson was intoxicated, in that the officers noted that Hendrickson smelled strongly of alcohol, that his eyes were bloodshot and watery, and that his face was flushed. In that respect, the Court held that both the district and superior courts were correct when they found that the State ultimately established corpus delicti.

Applying this rationale to Page's case, the facts demonstrate that the State presented more than a prima facie case on corpus delicti. In

addition to Page's specific statements about the location and appearance of his gun that he told Officer Patton was "next to the bed that he sleeps in," he had a telephone conversation with his brother about this weapon that included the statement:

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, but that's where the gun is. RP 19: 13; 22: 7-14.

When the police went Page's residence immediately after this conversation, one of the officers saw how Page's brother:

[C]ame out the front door, immediately locked the front door, turned around and seemed a little surprised to see us. We asked him...what he was doing. He really didn't answer us. He was-appeared to be kind of agitated, confrontational with us. RP 24: 11-15.

Page's brother then left "immediately [and] went back into his trailer, which is located in front of the house." RP 24: 18-20. When questioned, Page's brother said that after the telephone conversation with his brother that he "locked the house up," shut "all the windows," and "never touched" a gun. RP 53: 18-25. When Page's wife invited the police into her residence to look for this firearm, she produced a "small handgun case" that was empty and said, "it's not here." RP 42: 10-12; 43: 7-8.

Just as the superior and district court judges in Hendrickson considered whether that defendant's flushed face, bloodshot and watery eyes, and strong smell of alcohol about his person established a prima facie case on corpus delicti, the trial court in Page's case did the same with the testimony outlined above. The State met its prima facie case in Page's case because the phone call with his brother suggests that he told him to get rid of the handgun so that he (Page) would not be charged with a felony. When the officers went to Page's residence immediately after the call, Page's brother had shut all the windows, locked the front door, and went into a trailer nearby.

This shows that Page's brother had found the gun, was trying to remove it from Page's residence, and was also trying to lock-down that residence so that law enforcement would have a far more difficult time searching for and/or finding what they were after. Any reasonably prudent person would consider a criminal charge involving a firearm to be quite serious, and the actions of Page's brother show that he was trying to protect the defendant from getting into even more serious trouble than he already was in.

After Page's wife allowed the officers to enter her residence, she noted that the room where her husband said the gun was located uncharacteristically had "stuff everywhere" and "should not have been" in

that condition, but that “it was.” RP 65: 1-5. This indicates that after talking with Page and knowing that the police were likely on their way to collect the handgun, Page’s brother rushed into this room, tore it apart and then left Page’s residence with that weapon to secret it away when the police arrived. That Page’s wife found an empty handgun case and then said, “it’s not there” is significant, because it indicates: (a) she knew the gun that her husband mentioned had recently been there; and (b) that Page had stored the gun in that particular handgun case. The State made more than a prima facie case with regards to corpus delicti and the trial court did not err by not taking the case from the jury.

(b) Constructive Possession

The State presented sufficient evidence that Page constructively possessed the handgun that his wife noted was missing from the handgun case in their residence.

Possession of property may be either actual or constructive.

Actual possession means that the goods are in the personal custody of the person charged with possession. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); see State v. Partin, 88 Wash.2d 899, 905, 567 P.2d 1136 (1977). Constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has

dominion and control over them. Callahan, 77 Wn.2d at 29; see State v. Walcott, 72 Wn.2d 959, 967, 435 P.2d 994 (1967). Whether a person has dominion and control is determined by considering the totality of the situation. Partin, 88 Wash.2d at 906.

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993); see State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In a criminal case, the State must prove each element of the alleged offense beyond a reasonable doubt. State v. Ware, 111 Wash.App. 738, 741, 46 P. 3d.280 (2002); see State v. Alvarez, 128 Wash.2d 1, 13, 904 P.2d 754 (1995). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, 119 Wn.2d at 201. Direct evidence is not required to uphold a jury's verdict; circumstantial evidence can be sufficient. State v. O'Neal, 159 Wash.2d 500, 506, 150 P.3d 1121 (2007).

Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, deference is given to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and

generally weighs the persuasiveness of the evidence. State v. Walton, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992); see State v. Rooth, 129 Wash.App. 761, 773, 121 P.3d 755 (2005).

The facts of Callahan are partially analogous to Page's case because even though a handgun instead of narcotics is at issue, the concept of possession can be distinguished. In Callahan, officers executed a search warrant on Callahan, who lived on a houseboat. Callahan, 77 Wn.2d at 28. When the officers entered the living room of the houseboat, they found the defendant and a co-defendant sitting at a desk on which were various pills and hypodermic syringes. A cigar box filled with various drugs was on the floor between the two men. Other drugs were found in the kitchen and bedroom of the premises. The defendant admitted that he had handled the drugs that day, and that he had stayed on the houseboat for 2 or 3 days prior to his arrest.

The Court in Callahan found that in order for the jury to find the defendant guilty of actual possession of the drugs, they had to find that they were in his personal custody. No evidence was introduced at trial that the defendant was in physical possession of the drugs other than his close proximity to them at the time of his arrest and the fact that the defendant told one of the officers that she had handled the drugs earlier. The Callahan court did not find that the defendant could have

constructively possessed the drugs because possession entails actual control, and not a passing control that involves only a momentary handling.

In Page's case, he specifically said to his brother that the police wanted the handgun, and that although he could do what he wanted, that he was going to be charged with another crime for having it. RP 22: 7-14. Page specifically described the handgun and its location in his residence, and to law enforcement seemed to be "genuinely concerned" about children having access to it. RP 21: 20-23. As Page made these statements while he was in custody, there is no plausible reason why he would have lied. As he indicated in the call to his brother, Page knew that he faced another criminal charge by possessing the firearm and all but told his brother to get rid of the weapon before the police could obtain it.

Unlike the defendant in Callahan who never admitted to owning the drugs, Page's statements show that he had dominion and control over the firearm: Page knew that his gun: (a) presented a substantial threat to children who might harm themselves by playing with it; (b) told his brother about the "little black handgun that I have" and where he could find it in his residence; and (c) told Officer Patton that he kept the gun near his bed. RP 21: 20-23; 22: 9; 19: 13. Page's control over this gun was not of a passing nature as described in Callahan, because the

testimony shows that he had it secreted within his residence. In addition, the testimony of Page's wife indicates that she knew her husband kept the weapon in the gun case and that it had recently been there. The record shows that Page constructively possessed the handgun. No error occurred.

2. PAGE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COURT-APPOINTED ATTORNEY MOVED TO DISMISS THE CASE ON THE SUFFICIENCY OF THE EVIDENCE.

Page received effective assistance of counsel because his court-appointed attorney moved to dismiss the case on the sufficiency of the evidence.

We start with the strong presumption that counsel's representation was effective. State v. Rodriguez, 121 Wash.App. 180, 184, 87 P.3d 1201 (2004); see State v. Studd, 137 Wash.2d 533, 551, 973 P.2d 1049 (1999); State v. Schwab, 141 Wash.App. 85, 95, 167 P.3d 1225 (Div. 2, October 2, 2007). This requires the defendant to demonstrate the absence of legitimate strategic or tactical reasons for the challenged conduct. Rodriguez, 121 Wash.App. at 184; see State v. McFarland, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, a defendant must show that: (1) his counsel's performance was deficient; and (2) the

deficient performance resulted in prejudice. State v. Walker, ---P.3d---, ¶ 20-22, 2008 WL 933443 (Div. 2, April 8); see Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McFarland, 127 Wash.2d at 334-335; State v. Keend, 140 Wash.App. 858, 864-865, 166 P.3d 1268 (Div. 2, September 18, 2007).

Deficient performance is performance below an objective standard of reasonableness based on consideration of all the circumstances. Rodriguez, 121 Wash.App. at 184. Prejudice means that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. McFarland 127 Wash.2d at 334-335. Effective assistance of counsel does not mean successful assistance of counsel. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). Competency of counsel will be determined upon the entire record. State v. Gilmore, 76 Wn.2d 293, 297, 456 P.2d 344 (1969).

A comparison of the facts and procedure between Walker and Page's case shows that Page received effective assistance of counsel. In Walker, the defendant asserted that he received ineffective assistance when his attorney did not argue that Walker's convictions for first degree theft and first degree trafficking in stolen property involving cedar trees and wood were the same criminal conduct for purposes of calculating his offender score. Walker, 2008 WL 933443 at ¶ 7.

On appeal, the Court held that because Walker's offenses were not the same criminal conduct, his attorney had no need to argue that his convictions for first degree theft and first degree trafficking in stolen property were the same criminal conduct for purposes of calculating his offender score. Walker, 2008 WL 933443 at ¶ 29. Per the Court, Walker failed to show that his defense counsel was ineffective.

In comparison to Page's case, the facts show that argument on a motion to dismiss was probably warranted, especially as the handgun in question was neither presented or admitted into evidence at trial. After both the State and defense rested, "a sidebar" occurred "in which the defense made a motion for dismissal of the case on insufficiency of the evidence." RP 78: 12-15. The trial court ruled that:

A]lthough I thought the evidence was somewhat skinny, that if the jury believed that the brother had gone in and removed the firearm that...there would be sufficient evidence for the matter to the jury. And I denied the defense motion. RP 78: 18-23.

The deputy prosecutor for the State confirmed that in making its decision, the trial court had employed "the standard of viewing the evidence in light most favorable to the non-moving party." RP 78: 25; 79: 1-3.

Just as the defense attorney in Walker did not argue a meritless point, counsel for Page by contrast provided effective representation by moving to dismiss. That the trial court denied that motion does not mean

that the defense provided ineffective assistance, as “[e]ffective assistance of counsel does not mean successful assistance of counsel.” State v. White, 81 Wn.2d at 225; citing State v. Thomas, 71 Wash.2d 470, 472, 429 P.2d 231 (1967). Put another way, the “competency of counsel is not measured by the result.” Thomas, 71 Wash.2d at 472. Court-appointed counsel for Page provided adequate representation and no error occurred.

3. THE TRIAL COURT DID NOT ERR BY NOT TAKING PAGE’S CASE FROM THE JURY BECAUSE:
 - (a) PRIOR TO TRIAL, THE RECORD SHOWS THAT PAGE WAS MADE AWARE OF THE NATURE OF THE FIREARM CHARGE AGAINST HIM; AND OF
 - (b) EACH ELEMENT THE STATE HAD TO PROVE TO ESTABLISH HIS GUILT BEYOND A REASONABLE DOUBT; AND
 - (c) ALL ESSENTIAL ELEMENTS OF THE CRIME WERE INCLUDED IN THE INFORMATION

The trial court did not err by not taking Page’s case from the jury because: (a) prior to trial, the record shows that Page was made aware of the nature of the firearm charge against him; and of (b) each element the State had to prove to establish his guilt beyond a reasonable doubt; and (c) all essential elements of the crime were included in the information.

Under article 1, section 22 of the Washington Constitution, “the accused shall have the right...to demand the nature and cause of the accusation against him.” State v. Berrier, ---P.3d.---, 2008 WL 711748 ¶ 12 (Div. 2,

March 18). This requires that “[a] criminal defendant is to be provided with notice of all charged crimes.” Berrier, 2008 WL 711748 ¶ 12; see State v. Schaffer, 120 Wash.2d 616, 619, 845 P.2d 281 (1993).

Our state and federal constitutions require only that a criminal defendant be provided notice of the charges sufficient to allow the defendant to prepare a defense. Berrier, 2008 WL 711748 ¶ 16; see State v. Yates, 161 Wash.2d 714, 757-760, 168 P.3d 359 (2007); State v. Kjorsvik, 117 Wash.2d 93, 97, 812 P.2d 86 (1991).

Although a defendant may challenge the sufficiency of the information for the first time on appeal, the document is liberally construed in favor of its validity. State v. Laramie, 141 Wash.App. 332, 337, 169 P.3d 859 (Div. 3, October 23, 2007). In determining the validity of an information, a two-prong test is applied: (1) whether the necessary facts appear in any form, or by fair construction can be found in the charging document; and if so, (2) whether the defendant nonetheless suffered actual prejudice as a result of the inartful, vague or ambiguous charging language. Laramie, 141 Wash.App. at 338; see State v. McCarty, 140 Wash.2d 420, 425, 998 P.2d 296 (2006); Kjorsvik, 117 Wash.2d at 105-106.

If the necessary elements, however, are not found or fairly implied, prejudice is presumed and reversal occurs. McCarty, 140 Wash.2d at 425.

Such liberal construction prevents what has been described as “sandbagging,” insofar as it removes any incentive to refrain from challenging a defective information before or during trial, when a successful objection would result only in an amendment to the information. Laramie, 141 Wash.App. at 338; see Kjorsvik, 117 Wash.2d at 103.

Moreover, it reinforces the “primary goal” of the essential elements rule, which is to provide constitutionally mandated notice to the defendant of the charges against which he or she must be prepared to defend. Laramie, 141 Wash.App. at 338; see State v. Davis, 119 Wash.2d 657, 661, 835 P.2d 1039 (1992). The goal of notice is met where a fair, commonsense construction of the charging document “would reasonably apprise an accused of the elements of the crime charged.” Laramie, 141 Wash.App. at 338; see Kjorsvik, 117 Wash.2d at 109. It has never been necessary to use the exact words of a statute in a charging document, as it is sufficient if words conveying the same meaning and import are used. Kjorsvik, 117 Wash.2d at 108. This same rule applies to nonstatutory elements.

In Page’s case, the first prong of the Kjorsvik test was satisfied because his information specifically referred to an assault fourth degree, domestic violence conviction out of “Shelton Municipal Court, Cause No.

37589C” as the predicate offense for the charge of unlawful possession of a firearm in the second degree. CP 6. While RCW 9.41.04(2)(a)(i) contains the phrase, “committed on or after July 1, 1993,” a fair construction of his information shows that Page was put on notice of this element through reference to his 1995 Shelton Municipal Court case. CP: 6.

As his information was filed on May 16, 2007, and the case went to trial July 10 through 11, 2007, he had nearly two months notice of how the State would utilize his municipal court conviction. In addition to the information, Page was made doubly aware of this particular element through the stipulation that he entered into on July 11, 2007. CP 23. If Page had any concerns about what the State had to prove on the firearm charge, the record is devoid of his objection(s) and/or any request for continuance.

Applying the rationale of Laramie and Kjorsvik, notice was met in Page’s case because a fair, commonsense construction of his information standing on its own reasonably apprised him of the elements of the crime charged. The information was neither vague or inartful, because it specifically referenced a municipal court charge by case number; a conviction that Page was put on notice to remember in preparing his defense. As a result of the specific phrasing of his information, Page did

not sustain prejudice under the second prong of the Kjorsvik test. The trial court did not err by not taking his case from the jury.

F. CONCLUSION

The State respectfully requests that the judgment and sentence of the trial court be affirmed.

Dated this 14TH day of April, 2008

Respectfully submitted by:


Edward P. Lombardo, WSBA #54591
Deputy Prosecuting Attorney for Respondent
Gary P. Bufleson, Prosecuting Attorney
Mason County, WA

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	
)	No. 36724-6-II
Respondent,)	
)	DECLARATION OF
vs.)	FILING/MAILING
)	PROOF OF SERVICE
THOMAS J. PAGE,)	
)	
Appellant,)	
_____)	

I, EDWARD P. LOMBARDO, declare and state as follows:

On MONDAY, APRIL 14, 2008, I deposited in the U.S. Mail,
postage properly prepaid, the documents related to the above cause number
and to which this declaration is attached, BRIEF OF RESPONDENT, to:

Thomas Edward Doyle
Attorney at Law
P.O. Box 510
Hansville, WA 98340-0510

I, EDWARD P. LOMBARDO, declare under penalty of perjury of
the laws of the State of Washington that the foregoing information is true
and correct.

Dated this 14TH day of APRIL, 2008, at Shelton, Washington.


Edward P. Lombardo WSBA #34591

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