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A. ISSUES IN REPLY TO STATE’S BRIEF

1. Whether harmless error analysis overcomes the failure to include the essential element of “knowledge” in Instruction No. 23, the to-convict instruction for unlawful possession of a firearm in the first degree (Count III)?
2. Whether the trial court erred in allowing the State to present irrelevant evidence of a subsequent shooting where the evidence was inadmissible propensity evidence?
3. Whether Tieskotter received effective assistance of counsel where his counsel acquiesced to the admission of evidence of a subsequent shooting as ER 404(b) identity evidence when this “modus operandi” exception did not apply?

B. STATEMENT OF THE CASE

For the purposes of this reply brief, Jeremy R. Tieskotter (Tieskotter) adopts and incorporates the statement of the case as set forth in his opening brief of appellant.

C. ARGUMENT

- (1) CONTRARY TO THE STATE’S BRIEF, HARMLESS ERROR ANALYSIS DOES NOT OVERCOME THE FAILURE TO INCLUDE THE ESSENTIAL ELEMENT OF “KNOWLEDGE” IN INSTRUCTION NO. 23, THE TO-CONVICT INSTRUCTION FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE (COUNT III).

The State in its brief, pp. 46-48, acknowledges that the essential element of “knowledge” was omitted from Instruction No. 23 [CP 103], the to-convict instruction for Count III, unlawful possession of a firearm in the first degree, but urges this court to nevertheless affirm this conviction

by applying a harmless error analysis. Contrary to the States position, harmless error analysis does not overcome this error.

Each element of a charged crime must be proved by competent evidence beyond a reasonable doubt; and an instruction that relieves the State of its burden to prove every element of the crime requires automatic reversal. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). As acknowledged by the State, “knowledge” is an essential element of unlawful possession of a firearm in the first degree. *See State v. Anderson*, 141 Wn.2d 357, 365-66, 5 P.3d 1247 (2000). The State then has the burden of proving knowing possession, and the elements instruction must then contain an instruction to that effect. *Id.* at 366. Also as acknowledged by the State, Instruction No. 23, the to-convict instruction for Count III omitted the “knowledge” element and thus the State was relieved from proving an essential element of the crime.

When such a constitutional shortcoming is presented, an appellate court may engage in a harmless error analysis. State v. Brown, 147 Wn.2d at 344. Reversal is required where the error affected the outcome. In other words, reversal is not required based on the failure to instruct on the elements if the missing element is supported by uncontroverted evidence. *Id.*, 147 Wn.2d at 341, *citing Neder v. United States*, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

The evidence is controverted here. The State's position at trial was that Tieskotter was one of the unidentified persons who shot into Hoage's home and drove off in a red car thus Tieskotter was in possession of a firearm. Tieskotter's position at trial was that he was not one of the persons—there was no evidence presented that conclusively established that Tieskotter was in Thurston County on the day in question let alone that he was in fact one of the unidentified persons who shot into Hoage's home. Given these opposing positions based on controverted evidence it cannot be concluded the error was harmless. This court should reverse Tieskotter's conviction in Count III.

- (2) CONTRARY TO THE STATE'S BRIEF, THE TRIAL COURT DID ERR IN ALLOWING THE STATE TO PRESENT IRRELEVANT EVIDENCE OF A SUBSEQUENT SHOOTING IN PIERCE COUNTY UNDER THE IDENTITY EXCEPTION TO ER 404(b) AND TIESKOTTER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS COUNSEL ACQUIESCED TO ITS ADMISSION.

Tieskotter has argued and maintains that evidence of his involvement in a shooting in Pierce County four days after the incident at issue herein is irrelevant to whether he committed the current crimes. ER 402. Despite the fact that the same firearm was involved in both incidents, the subsequent Pierce County shooting has no bearing on whether Tieskotter had the firearm four days earlier and was involved in the

current crimes. While the fact that the same firearm was involved in both incidents may have been useful to investigate whether Tieskotter was involved in the current crimes, its admission sans any other evidence linking Tieskotter to the current crimes was nothing more than improper propensity evidence—since he was involved in a subsequent shooting in Pierce County he must have been involved in the earlier shooting in Thurston County. Tieskotter does not contest that the current crimes occurred; he contests the fact that he was involved in these crimes. Without the improper (irrelevant) evidence of the subsequent Pierce County shooting, there was no proof that Tieskotter was involved in the current crimes—the sum of the evidence being that Tieskotter and Hartzell were friends, that two unidentified men were seen shooting at Hoage’s home then driving off in a red car, and that Tieskotter’s former girlfriend has a red car she let him drive on occasion.

The State argues in its brief at pp. 17-25 that this evidence was properly admitted to show “identity” and that Tieskotter did not receive ineffective assistance of counsel by his counsel acquiescing to the admission of this evidence on that basis.

The “identity” exception to ER 404(b), also known as *modus operandi*, involves situations where the method employed in committing an act is so unique that mere proof that an accused acted in a certain way

at a certain time creates a high probability that he also committed the act charged. State v. Coe, 101 Wn.2d 772, 777, 684 P.2d 668 (1984). Such is not the case here. The Pierce County shooting involved a face to face confrontation while the current crimes involved a surprise shooting into Hoage's home. The only connection between the two incidents was the same firearm was used in both. This does not satisfy the "identity" exception to ER 404(b) as a matter of law and Tieskotter's counsel provided ineffective assistance in acquiescing to the admission of the Pierce County incident on this basis.

D. CONCLUSION

Based on the above, Tieskotter respectfully requests this court to reverse and dismiss his convictions and/or remand for resentencing.

DATED this 18<sup>th</sup> day of March 2009.

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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 18<sup>th</sup> day of March 2009, 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 18<sup>th</sup> day of March 2009.

Patricia A. Pethick  
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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY  
COURT OF APPEALS  
DIVISION II