

FILED
FEB 01 2015
STATE OF WASHINGTON
BY 

No. 40447-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Bradford,

Appellant.

Pierce County Superior Court Cause No. 09-1-01944-6

The Honorable Judge Stephanie Arend

Appellant's Reply Brief

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CORRECTION TO STATEMENT OF FACTS

Appellant's Opening Brief included the following paragraph:

Police brought Peoples to view the five people pulled from the van. RP 162. Peoples identified Sanders, Briggs and Harttlet as involved in the robbery. RP 162-164, 260. He did not identify James Bradford. RP 180-182, 261-262.

Appellant's Opening Brief, p. 4.

This was incorrect. In fact, Peoples recognized Mr. Bradford, and told the police that he had *not* been present during the robbery.¹ RP 261.

ARGUMENT

I. MR. BRADFORD'S MERE PROXIMITY TO FIREARMS WAS INSUFFICIENT TO PROVE THAT HE POSSESSED THEM.

A conviction for Unlawful Possession of a Firearm requires proof of more than mere proximity to a gun. RCW 9A.04.040; *see, e.g., State v. George*, 146 Wash. App. 906, 920, 193 P.3d 693 (2008) (“a defendant’s mere proximity to drugs is insufficient to prove constructive possession.”) Here, the prosecution established nothing more than mere proximity. Indeed, Respondent is unable to point to anything in the record establishing more than mere proximity:

¹ Appellant Williams's Opening Brief noted that Peoples “was able to identify Mr. Bradford,” but failed to point out that Mr. Bradford was not present during the robbery. Williams Opening Brief, p. 8.

[T]he revolver and one of the semi-automatic pistols were between the chairs on the floor by Bradford. Another semi-automatic was protruding from the seat. All three guns were in plain sight... [and] within his reach.
Brief of Respondent, p. 22.

This evidence was insufficient to show constructive possession. *Id.*

Respondent's reliance on *Nyegaard* is misplaced because *Nyegaard* supports Mr. Bradford's position. Brief of Respondent, pp. 21-22 (citing *State v. Nyegaard*, 154 Wash.App. 641, 226 P.3d 783 (2010)). In *Nyegaard*, the Court of Appeals affirmed the conviction because the prosecution established more than mere proximity: the contraband was closer to the defendant than to other occupants of the car, the defendant dropped a glass pipe into the same area where the contraband was found, and the defendant was observed making furtive movements in the vicinity of the contraband shortly before it was discovered. *Nyegaard*, at 648.

Respondent also relies on *Echeverria*, a case that was wrongly decided. Brief of Respondent, pp. 21-22 (citing *State v. Echeverria*, 85 Wash.App. 777, 934 P.2d 1214 (1997)). In *Echeverria*, a gun and a throwing star were found under the driver's seat of a car occupied by several people. Because the gun was visibly protruding from under the

seat, Division III decided the evidence was sufficient to establish the driver's constructive possession.² *Id.*, at 783.

The Court should not follow *Echeverria*: the conviction in that case was clearly based on mere proximity. *Cf. George* (marijuana and pipe at the feet of back seat's only passenger insufficient to prove possession, even when combined with the odor of burnt marijuana); *State v. Callahan*, 77 Wash.2d 27, 28, 459 P.2d 400 (1969) (evidence of possession insufficient, despite proof that defendant was in close proximity to visible drugs, had handled drugs earlier in the day, and owned guns, scale, and drug-related literature found on premises); *State v. Spruell*, 57 Wash.App. 383, 384, 788 P.2d 21 (1990) (fingerprint evidence suggesting momentary handling of plate containing cocaine, combined with proximity to scale, baking soda, alcohol, vials, white powder residue, and razor blade held insufficient to establish possession).

Here, as in *George*, Mr. Bradford's conviction rested on proof of mere proximity. This evidence was insufficient to prove possession; accordingly, his conviction must be reversed and the case dismissed with prejudice. *George*, at 920.

² The throwing star was not visible, and the Court found the evidence insufficient for conviction on a dangerous weapon charge. *Id.*

II. RESPONDENT’S CONCESSION (THAT A UNANIMITY INSTRUCTION WAS REQUIRED) REQUIRES REVERSAL BECAUSE THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Respondent apparently agrees that a unanimity instruction was required under the facts in this case. Brief of Respondent, pp. 23-26; *see also In re Pullman*, 167 Wash.2d 205, 212 n.4, 218 P.3d 913 (2009) (failure to argue an issue may be treated as a concession). Accordingly, the sole issue in contention is whether or not the error was harmless.

Constitutional error is presumed to be prejudicial, and the state bears the burden of proving harmless error. *State v. Jasper*, 158 Wash.App. 518, 536, 245 P.3d 228 (2010). An appellate court will “not tolerate prejudicial constitutional error and will reverse unless the error was harmless beyond a reasonable doubt.” *State v. Fisher*, 165 Wash.2d 727, 755, 202 P.3d 937 (2009).

To overcome the presumption of prejudice, the state must establish beyond a reasonable doubt that the error was trivial, or formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *In re Detention of Pouncy*, 168 Wash.2d 382, 392, 229 P.3d 678 (2010). Where the error may have resulted in conviction by a jury that was not unanimous as to the act(s) committed, the presumption of prejudice is overcome only if no rational

juror could have a reasonable doubt about any of the alleged criminal acts.

State v. Coleman, 159 Wash.2d 509, 512, 150 P.3d 1126 (2007).

Here, the evidence that Mr. Bradford actually possessed each weapon was far from overwhelming. Although Mr. Bradford was seated in a van containing four guns,³ nothing beyond mere proximity tied him to any of the four guns. It is entirely possible that some jurors believed he was guilty of possessing the two closest guns, that others believed he was guilty of possessing the most clearly visible guns, and that still others believed he was guilty of possessing the two guns that were least clearly tied to the other occupants in the car. Without a unanimity instruction or an election by the prosecutor, there can be no assurance that all twelve jurors agreed on the particular gun possessed for each count.⁴

Accordingly, a rational juror could have had a reasonable doubt that Mr. Bradford possessed any of the four guns, and the error was not harmless beyond a reasonable doubt. *Coleman*, at 512. Respondent does

³ Respondent erroneously suggests that the case involved only two guns. Brief of Respondent, p. 24, 25. The evidence clearly established the presence of four guns, and neither the prosecutor nor the court's instructions limited the jury's consideration to only two of the four. *See* RP 981-985; CP 272.

⁴ Although the two verdict forms were captioned "revolver" and "semi-automatic pistol," the operative language of each verdict did not include such language. CP 286-287. Moreover, the evidence established the presence of three semi-automatic weapons in the van. RP 543-546, 548, 686.

not establish that the evidence was overwhelming, or that any rational juror would have voted to convict.

In fact, Respondent's arguments demonstrate a poor understanding of the record. First, Respondent argues that "evidence supports the jury finding, beyond a reasonable doubt, that Bradford possessed *either or both* of the semi-automatic pistols." Brief of Respondent, p. 25 (emphasis added). This makes no sense, given that there were three semi-automatics: the Ruger and the two Glocks. RP 543-545, 546, 548, 686. Respondent also contends that the jury "must have believed that Bradford possessed at least one of the semi-automatic pistols, *both of which were found in the same place.*" Brief of Respondent, p. 25 (emphasis added). In fact, the Ruger was located under a seat, one of the Glocks was found in a storage drawer, and the second Glock was found under a DVD case. RP 543-545, 546, 548, 686.

Mr. Bradford was entitled to a unanimity instruction. The court's failure to give one violated his constitutional right to a unanimous jury, and the Respondent has not shown that the error was harmless beyond a reasonable doubt. *Coleman*, at 512. Accordingly, the convictions must be reversed and the case remanded for a new trial. *Id.*

III. THE SECOND AMENDED INFORMATION VIOLATED MR. BRADFORD'S RIGHT TO NOTICE UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, AND UNDER WASH. CONST. ARTICLE I, SECTIONS 3 AND 22.

Mr. Bradford stands on the arguments set forth in his Opening Brief.

IV. MR. BRADFORD WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Bradford stands on the argument set forth in his Opening Brief.

CONCLUSION

Mr. Bradford's convictions must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on March 30, 2011.

BACKLUND AND MISTRY



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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

James Bradford, DOC #311033
Larch Corrections Center
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and to:

Wayne C. Fricke
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And to:

Pierce County Prosecutor
930 Tacoma Avenue, Room 946
Tacoma, WA 98402-2171

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 30, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 30, 2011.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

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BY: [Signature] DEPUTY