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

STATE OF WASHINGTON,
Respondent,

v.

MARCUS A. CHOUINARD,
Appellant.

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

APPELLANT'S REPLY BRIEF

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PM 8-24-11

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ARGUMENT

Point I: The State Failed To Prove the Firearm Was Discovered Through a Lawful Exception to the Warrant Requirement and This Court Should Reverse the Trial Court's Holding and Require Suppression of the Recovered Evidence

In Appellant's Brief, Mr. Chouinard argues the search resulting in the discovery of the firearm in this case was unlawful because it was done pursuant to Officer Prater's explicit intent to search for a weapon. Appellant's Brief (App. Br.) at 22-29. The State does not deny Prater unlawfully intended to search for a gun, but argues that reading Officer Manos's testimony with Prater's testimony permits the conclusion that Manos found the weapon legally before Prater found it illegally. Brief of Respondent (State's Br.) at 17-23. When the State's view of events is not clearly supported by the evidence, the State failed to prove that the search resulting in discovery of the gun was lawful. See State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006) (State bears the burden of establishing a lawful exception to the warrant requirement).

The essential problem with the State's case is that Manos's testimony and Prater's testimony are irreconcilable. Prater was certain Manos discovered the gun only after he, Prater, entered the car and moved the seat cushion. RP 3.6 at 12. Manos, by contrast, was equally certain no one had entered the car before he saw the gun through the window. RP 3.6 at 52. When two such disparate versions of events cannot be reconciled, this Court should reverse.

Prater testified that he and Manos cleared the vehicle to ensure there were no other occupants. Manos was "right behind" him as they approached the vehicle. As he got close to the vehicle, Prater observed that there were no occupants. RP 3.6 at 10-11.

After determining the car was unoccupied, Prater performed a further, "cursory" check of the vehicle because he "assumed that it was a reasonable assumption that there may have been a weapon that was placed under or in that area." Id. at 11. Accordingly, Prater lifted the bottom cushion portion of the rear seat and the rear seat cushion fell forward. It was only at

that moment that Manos saw the gun and yelled the word "gun." Prater backed out of the car. Id. at 12.

Prater was very clear on what happened: Manos only saw the gun after the cushion was moved. He stated, "As soon as I backed out, Officer Manos indicated that there was a muzzle that he observed when the cushion fell forward." RP 3.6 at 12.

Manos, by contrast, could not remember who helped him clear the car. RP 3.6 at 52. Upon approaching the car, Manos noticed that the back seat looked ajar, as if it had been pulled away from the car. Id. at 53. After he and the other officer performed their security sweep, Manos "took my flashlight and looked down back . . . and I could see a flash suppressor for a rifle." Id. at 54. At that point, he verbally notified the other officers on the scene of the presence of a gun. Id. at 55.

In direct contradiction to Prater's testimony, Manos testified that no other person had entered the vehicle before he saw the gun. RP 3.6 at 55. He also

testified he had not shouted an alert about finding the gun. Id. at 66.

Manos's and Prater's testimony simply cannot be reconciled, notwithstanding the State's argument that the versions are consistent. Either Manos was right, and he discovered the gun in plain view, by shining his flashlight through the car window before anyone had entered the car; or Prater was right, and Manos discovered the gun only after Prater went into the car and lifted up the bottom seat cushion, causing the rear seat cushion to fall forward and the gun to be exposed. Because these versions of events cannot be reconciled, and Prater's version recounts an illegal search of the vehicle, the State did not meet its burden of proving a lawful exception to the warrant requirement.

For all of these reasons and the reasons set forth in Appellant's Brief, the challenged factual findings are not supported by substantial evidence, the court's legal conclusions are erroneous, the search of the vehicle was illegal and the evidence recovered pursuant to that search should have been suppressed.

Accordingly, Mr. Chouinard respectfully requests this Court to reverse and remand the superior court's order denying suppression and reverse Mr. Chouinard's conviction.

It should be noted that the trial court held exigent circumstances justified the initial sweep and subsequent recovery of the rifle from the trunk of the car. CP 136(7). Mr. Chouinard does not argue the police lacked authority to perform a safety sweep of the car for other occupants. See State's Br. at 22-26. His argument is, instead, that the contraband was not discovered pursuant to that lawful sweep, but pursuant to a separate search following that sweep, which the State failed to prove lawful. Evidence seized pursuant to an illegal search is suppressed under the exclusionary rule or the fruit of the poisonous tree doctrine. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

**Point II: When Jury Instruction No. 14 Allowed
Conviction for Mere Proximity to the Weapon,
It Removed the State's Burden of Proving
Actual or Constructive Possession, Creating
Constitutional Error Recognizable on Appeal**

The State argues Mr. Chouinard may not challenge Jury Instruction No. 14 on appeal because it is not an issue of constitutional magnitude and Mr. Chouinard did not argue prejudice. State's Br. at 35-36. But the Supreme Court has held that an instruction that relieves the State of its burden to prove every element of an offense is a constitutional error that may be raised for the first time on appeal. See, e.g., State v. Hanna, 123 Wn.2d 704, 709-10, 871 P.2d 135 (1994). Constitutional error occurred here because the instruction, in allowing conviction for mere proximity, did not hold the State to its burden of proving actual or constructive possession of the weapon.

Instead, the instruction directed jurors to consider "whether the defendant had the immediate ability to take actual possession of the item." CP 128 (Instruction No. 14). This factor evidently describes situations where the defendant was near the weapon. In effect, then, the jury was told that if the defendant

were near enough to the weapon, it could convict. Under these circumstances, this factor allowed for conviction based on proximity alone in violation of Washington law. See App. Br. at 36-42.

Instructional error of this sort is reviewed for harmlessness. State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002). "In order to hold that a jury instruction error was harmless, we must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error." State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) (internal quotation marks omitted), *quoting*, Brown, 147 Wn.2d at 341. When Mr. Chouinard was likely convicted based on his proximity to the weapon, see Appellant's Brief at 29-35, the Court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error and reversal is required.

By the same token, the error was manifest. Manifest error requires a showing of actual prejudice. Actual prejudice requires evidence that the asserted error "had practical and identifiable consequences in

the trial of the case.” State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quotations and internal quotation marks omitted). Convicting a defendant due to an incorrect statement of the law is clearly a practical and identifiable consequence.

For all of these reasons and the reasons set forth in Appellant’s Brief, Jury Instruction No. 14 relieved the State of the burden of proving actual or constructive possession and this issue may be heard by this Court. Accordingly, this Court should reverse and remand Mr. Chouinard’s conviction.

* * * * *

Mr. Chouinard relies on Appellant’s Brief for the remainder of his arguments.

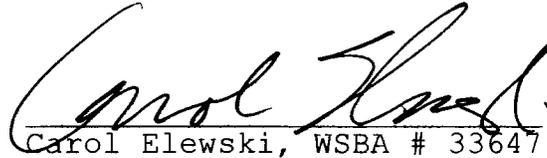
CONCLUSION

For all of these reasons and the reasons set forth in Appellant’s Brief, Marcus A. Chouinard respectfully requests this Court to reverse the superior court’s order denying suppression of the firearm and magazine and reverse his conviction.

Dated this 24th day of August 2011.

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STATE OF WASHINGTON
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DEPUTY

Respectfully submitted,



Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 24th day of August 2011, I caused a true and correct copy of Appellant's Brief to be served by U.S. mail on:

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