

No. 44778-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Henry Brady,

Appellant.

Kitsap County Superior Court Cause No. 11-1-00483-8

The Honorable Judge Steven Dixon

Appellant's Reply Brief

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ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE THAT MR. BRADY POSSESSED THE GUN.

A. Evidence of Mr. Brady's passing control over the gun is insufficient to support his conviction.

Evidence of passing control or momentary handling is insufficient to prove possession. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).¹ The only evidence against Mr. Brady was his own statement that he briefly handled the gun, which belonged to someone else. RP 133-34.

That evidence was inadequate to prove that Mr. Brady possessed the gun. *George*, 146 Wn. App. at 920. Nonetheless, Respondent argues that "momentary handling" is enough to prove possession. Brief of Respondent, pp. 12-13 (*citing State v. Summers*, 107 Wn. App. 373, 384, 28 P.3d 780 (2001); *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994)). Those cases, however, do not support the state's position.

Mr. Brady's case is unlike *Summers*. That case dealt with a gun found under the defendant's pillow. *Summers*, 107 Wn. App. at 377.

¹ Respondent argues that Mr. Brady misstates the holding of *George*. Brief of Respondent, p. 17. But the portion of *George* upon which the state relies has since been repudiated. *See e.g. State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007); *State v. Cantabrana*, 83 Wn. App. 204, 209, 921 P.2d 572 (1996).

Here, the police did not find the gun in Mr. Brady's bed but in a car belonging to a third party. RP (trial) 62, 74-76. The prosecution did not call the other occupants of the car to testify. RP (trial) 45-140. The only evidence that Mr. Brady ever touched the gun was his admission to handling it in passing. RP (trial). The fact that the passing handling occurred in Mr. Brady's home does not make his case analogous to *Summers*.

The state's reliance on *Staley* is similarly misplaced. That case dealt with a person who claimed that the cocaine in his shirt pocket was not his. *Staley*, 123 Wn.2d at 796. Here, the police did not find any contraband on Mr. Brady's person.

Mr. Brady's case is more akin to *Callahan*, a case the *Staley* court distinguished. *Id.*, at 800-01 (citing *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 500 (1969)). In *Callahan*, police found the accused near some drugs, and he admitted to having briefly handled them earlier in the day. *Id.* at 800. The *Callahan* court found that evidence insufficient to demonstrate constructive possession. *Id.*

As in *Callahan*, the only evidence of possession was Mr. Brady's arrest in proximity to the gun and his admission to handling it a few days

earlier. That evidence was insufficient to establish either actual or constructive possession. *Id.*

Dominion and control over the premises is not enough to prove dominion and control over the gun. *Shumaker*, 142 Wn. App. at 334. Still, the state also argues that Mr. Brady's admission to handling the gun in his home establishes constructive possession. Brief of Respondent, p. 13. The prosecution did not rebut evidence that the gun belonged to someone else or that Mr. Brady handled it only briefly. The fact that the brief handling occurred in Mr. Brady's home does not change the analysis. *Id.*

Finally, Respondent argues that the jury could have inferred that Mr. Brady continually possessed the gun from February 4th through February 8th. Brief of Respondent, p. 13. But the prosecution did not argue that theory at trial, likely because no evidence supported it. RP (3/6/13) 151-79. Additionally, the state does not cite to any authority permitting such an inference. Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007).

No rational jury could have found beyond a reasonable doubt that Mr. Brady possessed the gun. *George*, 146 Wn. App. at 920; *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*,

176 Wn.2d 1003, 297 P.3d 67 (2013). His conviction must be reversed and the charge dismissed with prejudice. *George*, 146 Wn. App. at 920; *Chouinard*, 169 Wn. App. at 899.

B. Mr. Brady's statement was not corroborated by independent evidence, as required by the *corpus delicti* rule.

The *corpus delicti* rule precludes conviction based solely on the accused's confession. *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010). If the state fails to provide corroborating evidence for each element, the conviction must be reversed for insufficient evidence. *Id.* at 254.

The state failed to present independent evidence corroborating Mr. Brady's statement that he'd briefly handled the gun. *Dow*, 168 Wn.2d at 249.

The mere existence of a gun is not evidence of a crime. Mr. Brady's proximity to the gun on the day of his arrest was not evidence that he had ever possessed it. RP (10/8/12) 6; *Chouinard*, 169 Wn. App. at 899. Nonetheless, the state argues that Mr. Brady's proximity to the gun presents the independent evidence necessary for the admission of his statement. Brief of Respondent, p. 14, n. 4. Evidence that is irrelevant to the elements of the offense cannot establish *corpus delicti*. *Dow*, 168 Wn.2d at 254.

An accused's statement cannot corroborate itself. Nevertheless, Respondent argues that Mr. Brady's admission that he was in the car corroborates his statement that he handled the gun. Brief of Respondent, p. 14, n. 4. Mr. Brady's statement cannot provide the independent evidence necessary to admit the same statement.

The state failed to present independent evidence of the *corpus delicti*. Accordingly, the evidence was insufficient to convict Mr. Brady. *Dow*, 168 Wn.2d at 249. Mr. Brady's conviction must be reversed. *Id.*

II. MR. BRADY RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

The accused is denied a fair trial when defense counsel fails to identify the sole defense available and request the instructions necessary to present it to the jury. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009).

A. Defense counsel provided ineffective assistance by failing to propose a jury instruction regarding the *corpus delicti* rule.

Under the *corpus delicti* rule, an accused person's confession is insufficient evidence to convict absent corroborating evidence. *Dow*, 168 Wn.2d at 249. Mr. Brady's counsel argued lack of corroboration in closing but failed to request an instruction informing the jury of the legal rule. CP 125-30; RP (3/6/13) 163-73.

The exact wording of the instruction is not necessary for an appellate court's determination of whether such an instruction was necessary. *See e.g. Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.*, --- Wn. App. ---, 315 P.3d 1143, 1158 (Wash. Ct. App. 2013) (ordering lower court to instruct the jury "consistent with [the court's] opinion" without providing exact wording for the instruction). The state argues, however, that Mr. Brady fails to outline what a *corpus delicti* instruction would say. Brief of Respondent, p. 15. Such delineation is not necessary to support Mr. Brady's argument.

A court must instruct the jury on all relevant law, regardless of whether the issue has come up in a prior published case. *See e.g. Mut. of Enumclaw*, 315 P.3d at 1158 (ordering lower court to instruct the jury on a legal issue even though there were no prior cases on the issue). Still, Respondent points out that there are no published cases ordering lower courts to instruct the jury on the *corpus delicti* rule. Brief of Respondent, p. 16. By the same token, the state points to no authority holding that the jury need not be informed of the *corpus delicti* rule when that rule is vital to a determination of guilt.

Counsel's failure to propose a jury instruction prejudices the accused if the jury is left with no recognition of the legal significance of the evidence. *Powell*, 150 Wn. App. at 156-57. The state argues that Mr.

Brady cannot show prejudice because his defense attorney moved for dismissal based on the lack of corroborating evidence. Brief of Respondent, p. 16. But without an instruction on the corroboration rule, the jury believed that they could convict Mr. Brady based on his statement alone. There is a substantial likelihood that counsel's failure to propose the necessary jury instruction affected the verdict. *Id.*

Mr. Brady's counsel provided ineffective assistance by failing to propose an instruction informing the jury of the state's burden to present corroborating evidence. *Id.* Mr. Brady's conviction must be reversed. *Id.*

B. Defense counsel provided ineffective assistance by failing to propose an instruction making clear that momentary handling is insufficient to prove possession.

Momentary or passing handling of contraband is not sufficient to establish possession. *George*, 146 Wn. App. at 920. The only evidence that Mr. Brady possessed the gun was his own statement that he'd briefly handled it a few days before his arrest. RP (3/6/13) 133-34. Defense counsel failed to propose an instruction informing the jury that momentary handling is not sufficient to prove possession. CP 125-30.

Dominion and control over the premises is insufficient to show that Mr. Brady had dominion and control over the gun. *Shumaker*, 142 Wn. App. at 334. Respondent again argues that Mr. Brady's reliance on *George* is misplaced because he admitted to handling the gun in his home,

over which he presumably has dominion and control. Brief of Respondent, p. 17. But the portion of *George* upon which the state relies has since been repudiated. See e.g. *Shumaker*, 142 Wn. App. at 334; *Cantabrana*, 83 Wn. App. at 209.

Mr. Brady's admission to holding the gun in passing was not enough to prove that he possessed it. *George*, 146 Wn. App. at 920. The state again relies on *Summers* to argue that momentary possession, along with other evidence of possession, is sufficient for conviction. Brief of Respondent, p. 18. As outlined above, the facts of *Summers* – in which the police found a gun under the pillow on the accused's bed – completely differentiate it from Mr. Brady's case. *Summers*, 107 Wn. App. at 377. The state's reliance on *Summers* is misplaced.²

Mr. Brady's defense counsel provided ineffective assistance by failing to propose an instruction informing the jury that passing handling was insufficient to prove possession. *Powell*, 150 Wn. App. at 156-57; *George*, 146 Wn. App. at 920. Mr. Brady's conviction must be reversed. *Powell*, 150 Wn. App. at 156-57; *George*, 146 Wn. App. at 920.

² Because Respondent's recitation of the law is inaccurate, the state's argument that defense counsel strategically failed to propose a jury instruction adequately defining possession in order to avoid such a recitation to the jury is similarly misplaced.

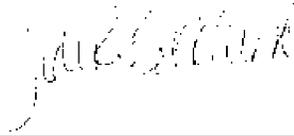
CONCLUSION

The state presented insufficient evidence to convict Mr. Brady.
The charge must be dismissed with prejudice.

In addition, Mr. Brady's defense counsel provided ineffective assistance by unreasonably failing to propose jury instructions necessary to the defense. Mr. Brady's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on February 26, 2014,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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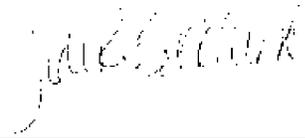
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 February 26, 2014.



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