

FILED
Court of Appeals
Division II
State of Washington
3/1/2018 2:29 PM
NO. 50433-2

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

GERALD LAWRENCE COLE, JR., RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Frank Cuthbertson

No. 16-1-00195-7

Brief of Appellant

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A. ASSIGNMENTS OF ERROR

1. Did the trial court err in granting the defendant's motion to arrest judgment finding that there was insufficient evidence presented that the defendant knowingly possessed a firearm when witnesses testified that a firearm was in the defendant's hand at the time of the incident and had to be forcibly removed from his person?

B. STATEMENT OF THE CASE

1. PROCEDURE

On January 13, 2016, GERALD LAWRENCE COLE, JR., hereinafter "defendant" was charged with one count of assault in the second degree (with a firearm enhancement), two counts of assault in the third degree (with firearm enhancements), possession of a stolen firearm, attempting to disarm a law enforcement officer, unlawful possession of a firearm in the first degree, and driving with a license suspended in the second degree. CP 1-7. The stolen firearm count was dismissed prior to trial. RP 158.

The defendant proceeded to trial pro se. At the conclusion of the trial, the defendant was found guilty of unlawful possession of a firearm in the first degree and driving with a suspended license in the second degree.

CP 44-50. After the verdicts, the defendant filed a motion for arrest of judgment and new trial. CP 53-67. In his motion the defendant alleged that the declaration for probable cause failed to specify the model or caliber of the firearm, and that the State provided false or perjured testimony. *Id.* The defendant further alleged that the firearm had been planted as evidence by the officers involved in the case and that there was insufficient evidence presented that the defendant knowingly possessed a firearm. *Id.* The State filed a response, alleging that the jury's guilty verdict was supported by the evidence presented. CP 76-87. On June 5, 2017, the court heard argument, and granted the defendant's motion for arrest of judgement. CP 88-89. The court held:

I've been a judicial officer for 16 years. I have never entertained a motion for an arrest of judgment. I have maximum confidence in the jurors that come in here, including the jurors that were jurors in your case, Mr. Cole; however, I'm actually going to grant your motion and find that the element of knowing possession, a reasonable jury could not find knowing possession in this case, actual or constructive, and I'm viewing the facts in the light most favorable to the State.

I have wrestled with this for several days and I shouldn't say it this way, as much as I am reticent or hate to do it or admit it, but I have to equally apply the law and justice to everybody that comes before the Court, and I don't believe that that element could be met in this case.

RP 878.

The court dismissed the unlawful possession of a firearm in the first degree charge with prejudice. CP 88-89. The court sentenced the defendant on the sole remaining count of driving with a suspended license. CP 71-75. On June 14, 2018, the State filed a notice of appeal. CP 102-103.

2. FACTS

On January 12, 2016, Tacoma Police Department (TPD) Officer Ryan Bradley and Officer Jimmy Welsh were working the graveyard shift and responded to a report of a vehicle that had crashed through a fence at 9201 South Alaska Street in Pierce County. RP 50-52. The vehicle had come to rest on top of the fence itself. RP 292. TPD Officer Bratcher also responded to the call. RP 54, 287-288. Upon arrival, Officer Bradley was able to determine that there was a single occupant in the car. RP 56. Officer Bradley observed the occupant, later identified as the defendant, roll onto the passenger seat, kick his legs out of the vehicle's window and flee from the car heading eastbound on foot. RP 56, 64, 69. Officer Bratcher also observed the defendant climb out of the vehicle with a frantic look on his face. RP 291. Officer Bratcher believed that the defendant was attempting to flee the area and ordered the defendant to stop and get on the ground. RP 291. The defendant continued eastbound on foot. RP 292.

Officers placed the defendant's vehicle into park and began a foot pursuit. RP 62. Officers were all yelling "police, stop," but the defendant did not comply. RP 63. The officers continued to make verbal commands throughout the contact and the defendant did not comply. RP 67. Officer Welsh attempted to grab the defendant by the arm and Officer Bratcher moved to grab the defendant's other arm. RP 63. During the melee, Officer Welsh was on the defendant's left side and Officer Bratcher was on his right side. RP 64. The defendant grabbed Officer Bratcher's left arm or shoulder, causing Officer Bratcher to stumble and fall. RP 293-294. Officer Bratcher was pinned against the chain link fence where the struggle took place. RP 64, 296-297, 301. Officer Bratcher's right leg was positioned underneath the upper torso of the defendant as Officer Bratcher attempted to hold the defendant's arm. RP 64.

Officers attempted to get the defendant to put his hands behind his back, but the defendant refused. RP 68. During the struggle Officer Bradley was kicked by the defendant. RP 69-70. Officer Bradley attempted to deploy his taser on the defendant but it malfunctioned and failed to discharge. RP 73. Eventually Officer Bradley was able to get his taser to deploy but it did not appear to have any effect on the defendant. RP 78.

The defendant's hands were underneath his body so Officer Bradley could not see them. RP 85. Additional officers arrived to assist and a firearm was recovered and removed from the fight. RP 90, 365. Officers Smith and Riche responded to assist Officers Welsh and Bradley. RP 183, 353.

Officer Riche observed a damaged fence and a "frantic fight" between officers and the defendant. RP 184, 254. Officer Riche jumped on the defendant's legs as the defendant was face down. RP 186. At that point, with Officer Riche on the defendant's legs, Officer Bradley was also down by the defendant's legs and Officer Bratcher was by the defendant's left arm. RP 187. The defendant was flailing his body and trying to kick the officers. RP 187. Officer Riche deployed his own taser. RP 90, 189-190. Pepper spray was also used to attempt to subdue the defendant. RP 206.

Officer Smith heard Officer Welsh say, "I think he has a gun." RP 362. Officer Smith looked down and saw the barrel of a handgun pointed at Officer Welsh. RP 363. Officer Welsh stated that he looked down during the fight and saw the barrel of a semiautomatic firearm wedged between his duty belt and body, pointed directly at him. RP 457. Officer Welsh described the barrel of the firearm as being shoved into his stomach. RP 457. Officer Welsh was able to feel the barrel of the gun

literally pushed into his hip and stomach area. *Id.* He could tell that the defendant's hand was around the gun. RP 457-458.

Officer Welsh was concerned about using deadly force on the defendant because Officer Bratcher was pinned underneath him and he was worried about a round going through the defendant and into Bratcher. RP 459. Officer Welsh applied a modified shoulder lock in an attempt to gain control of the defendant. RP 466. Once he had the defendant's arm in the controlled lock, Officer Welsh looked down and saw the defendant's firearm, still pointing toward him. RP 467. Officer Welsh directed Officer Smith to move the firearm. *Id.*

Officer Smith identified the recovered firearm as a Ruger .22 handgun. *Id.* Officer Bradley observed that the defendant had his hand on the grip of the firearm and that it was underneath his body. RP 97. The firearm was situated so that it was across his body. *Id.* Officer Riche saw the gun once the defendant had been removed. RP 203.

Officer Welsh indicated that the defendant had tried to grab his firearm. RP 262, 465. Officer Smith saw that the defendant's left hand was on Officer Welsh's duty belt. RP 366. Officer Welsh was able to feel the defendant around his duty belt area. RP 456. At some point all of the officers were struck by a foot, arm, or elbow. RP 358. Officer Welsh indicated that the elbow blows were directed at him. RP 441.

Officer Smith and Officer Riche booked the firearm into evidence. RP 207-208, 271. The firearm, later admitted as exhibit 22, 22A, and 22B, was in the same condition as it was when Officer Riche saw it at the time of the incident. RP 248. The firearm was a Ruger .22 caliber semiautomatic handgun. RP 249. Detective Vold test fired the gun recovered and found it to be fully operable. RP 341. At the time it was recovered it had seven rounds of ammunition in it. RP 369.

After being taken into custody, the defendant was taken to Tacoma General Hospital. RP 581. At that time the defendant was alert and speaking clearly to staff. RP 582. No injuries were noted but defendant did test positive for PCP or angel dust. RP 589, 593.

The defendant testified on his own behalf. RP 680. He stated that on the day of the incident, he smoked a marijuana cigarette that "tasted different." RP 685. He stated that after he smoked the cigarette his head was spinning and he drove off in his car. RP 687. The defendant called Clifford Collier in his defense. RP 610. Collier testified that on the night of the incident, he and the defendant smoked marijuana and "sherm." RP 611. According to Collier, "sherm" is embalming fluid. RP 612.

The defendant stated that he did not remember losing control of his vehicle or struggling with the police. RP 688-689. The defendant denied possessing a firearm. RP 694.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DISMISSING THE UNLAWFUL OF A FIREARM CONVICTION WHEN SUFFICIENT EVIDENCE WAS PRESENTED THAT THE DEFENDANT KNOWINGLY POSSESSED THE FIREARM THAT HE WAS HOLDING IN HIS HAND AT THE TIME HE WAS FIGHTING WITH THE OFFICERS.

Under CrR 7.4, a judgment may be arrested on motion of the defendant if there is insufficient proof of a material element of the crime. “A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Hoiser*, 157 Wn.2d 1, 133 P.3d 936 (2006). “All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant.” *State v. Gentry*, 125 Wn.2d 670, 597, 888 P.2d 1105 (1995). Circumstantial evidence and direct evidence are equally probative. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1990).

A directed verdict or arrest of judgment is appropriate only if, when viewing the evidence in the light most favorable to the State, the court finds, as a matter of law, that there is no substantial evidence or reasonable inference to sustain a verdict for the State. *State v. Longshore*, 97 Wn. App. 144, 147, 982 P.2d 1191 (1999), *affirmed*, 141 Wn.2d 414, 5

P.3d 1256 (2000). The motion must be denied if there is *any* competent evidence from which a rational trier of fact, viewing the evidence in the light most favorable to the State, could have found that the essential elements of the charged crime had been proved beyond a reasonable doubt. *Id.* at 147 (emphasis in original); *see also, State v. Salinas*, 119 Wn.2d 192, 201, 829 P.3d 1068 (1992). Such inferences must not only be drawn in the light most favorable to the State, but most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. In ruling on a motion for arrest of judgment, the trial court may not weigh the evidence but rather it may only examine the sufficiency of the evidence. *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971); *State v. Hampton*, 100 Wn. App. 152, 157, 996 P.2d 1094 (2000), *rev'd on other grounds*, 143 Wn.2d 789, 24 P.3d 1035 (2001). Whether an element of a crime has been proven is “a matter best left to the unanimous, contemporaneous assessment of twelve jurors than to the retrospective guesswork of a single judge acting as a thirteenth juror.” *State v. Williams*, 96 Wn.2d 215, 227, 634 P.2d 868 (1981).

Review of a trial court decision denying or granting a motion for arrest of judgment requires the appellate court to engage in the same inquiry as the trial court. *Longshore*, 141 Wn.2d at 420. An appellate court defers to the finder of fact to resolve any credibility conflicts or

weighing of evidence. *State v. Gerber*, 28 Wn. App. 214, 216, 622 P.2d 888 (1981) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Because the trial court in this case never entered findings of fact and conclusions of law, its oral ruling must be examined.

The error in the trial court's ruling is evident from its mistaken focus on possible adverse inferences in disputed evidence instead of making inferences in favor of the State from the evidence admitted. The jury was instructed that they had to find (1) that on or about January 12, 2016, the defendant knowingly had a firearm in his possession or control; (2) the defendant had been previously convicted of a serious offense, and (3) that the possession or control of the firearm occurred in the State of Washington. CP 13-43, instruction #14. The only element articulated by the court as being lacking was the element that the defendant knowingly possessed a firearm.¹ As set forth in the fact section above, there can be little question that the defendant knowingly possessed a firearm on January 12, 2016. Officer Welsh was able to feel the barrel of the firearm being pushed into his body. RP 457. Officer Bradley observed the defendant physically holding the firearm under his body. RP 97. The

¹ The parties stipulated that defendant had a prior conviction for a most serious offense at trial, and that element does not appear to have been in dispute. RP 678.

firearm that was recovered from the defendant was admitted as evidence. RP 207-208, 248, 271.

While the defendant denied possessing a firearm during this incident, his testimony is in direct contradiction to that of the officers. In this case, the jurors clearly believed the officers' testimony. The trial court appears to have mistakenly focused on the defendant's own version of events, instead of viewing the evidence by the correct standard—in the light most favorable to the State. The facts presented at trial support that the defendant was in physical possession of the firearm at the time of the incident, thereby satisfying the “knowing” element. The trial court does not articulate why the officers' testimony about the gun in the defendant's hand should be discounted in its analysis. The jury in this case, while they did not find that the defendant committed assaults against the officers, clearly believed that the defendant was in possession of the gun that he was observed holding. Therefore, the trial court erred when it entered the non-specific order granting the defendant's motion for arrest of judgment. The order itself is silent as to why the State's evidence was inadequate.

This court addressed a similar issue in *State v. Reid*, 40 Wn. App. 319, 698 P.2d 588 (1985). In *Reid*, the defendant was convicted of unlawful possession of stolen property in the second degree and unlawful possession of a firearm. *Id.* at 320. The defendant was attempting to

break into a fast food restaurant and was apprehended by police a period of time after the attempted break in. *Id.* A firearm was recovered from the passenger floor of the defendant's vehicle. *Id.* This court affirmed the denial of the defendant's motion to arrest judgment, holding that "there was ample evidence from which a jury could conclude that the defendant had actual or constructive possession of a firearm." *Id.* at 324. Similarly, ample evidence exists in this case. Multiple officers testified to either seeing the defendant in physical custody of the firearm or seeing it shortly after it was removed from his person. A reasonable jury could have found that he was in possession of that firearm, and a reasonable jury in this case did find that he was in possession of that firearm.

The jury in this case was instructed on the correct law and was instructed on both actual and constructive possession. CP 13-43. In this case evidence was presented that the defendant was in actual possession of the firearm. It appears that the trial judge in this case merely substituted his own opinion regarding credibility for that of the jury. The jury in this case was clearly very thorough in its deliberations. They acquitted the defendant of four charges and sent out a question regarding the numbering of the verdict forms. CP 44-49, 106. There was no justification for the trial court to substitute its own credibility determination over that of this jury. Because there is no evidentiary support, when viewing the evidence

in the light most favorable to the State, for a finding that no reasonable jury could have found the defendant to be guilty of unlawful possession of a firearm in the first degree, the trial court erred in entering a motion dismissing that conviction and it should be reversed.

D. CONCLUSION

For the above stated reasons, the State respectfully requests that this court reverse the trial court below and remand for sentencing on the unlawful possession of a firearm conviction (count II).

DATED: March 1, 2018

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Certificate of Service:

The undersigned certifies that on this day she delivered by ^{efile} U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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PIERCE COUNTY PROSECUTING ATTORNEY

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Superior Court Case Number: 16-1-00195-7

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