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No. 51031-6-II
Pierce County No. 16-1-01409-9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMES E. HARRIS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Kathryn J. Nelson, trial judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting a gun and bullets when the state failed to establish a sufficient chain of custody under ER 901(a).
2. Appellant James Harris assigns error to the trial court's CrR 6.1 findings of fact and conclusions of law which provided as follows:

FINDINGS OF FACT

- L. Detective Brian Vold later examined and test-fired the revolver found by the defendant and found that this revolver was operational and capable of firing a bullet.

....

CONCLUSIONS OF LAW

....

- J. Because the revolver recovered in this case was fully capable of firing a bullet by an explosive such as gunpowder, it was a firearm.

- J.[sic] Given that the revolver at issue in this case was found within five feet of where Defendant was found hiding on April 5, 2016, that the revolver was found in the path of the Defendant's flight from Officer Campbell, that it was loaded with the same caliber of ammunition as the cartridge found in Defendant's pocket, that this caliber was inappropriate for use in the revolver, and that the tape wrapped around the revolver may have been used to compensate for the use that [sic] inappropriate ammunition, the defendant knowingly had a firearm in his possession and control on April 5, 2016.

CP 37-38.

B. QUESTIONS PRESENTED

1. Did the state fail to prove sufficient chain of custody to support admission of a firearm at trial where the officer who took the firearm into custody did not testify and the firearm was not in the same condition at the time

The judge convicted Harris as charged. CP 33-38; 6RP 151. After a continuance on June 2, 2017, sentencing was held on August 4, 2017. 7RP 1; SRP 1. Judge Nelson imposed a Drug Offender Sentencing Alternative (DOSA) sentence. SRP 4-6; CP 42-62. The judge also entered written findings of fact and conclusions of law in support of its decision. CP 33-38.

Mr. Harris appealed and this pleading follows. See CP 63.

2. Testimony at the bench trial

In the early morning hours of April 5, 2016, Tacoma Police Department (TPD) officer Scott Campbell was working “patrol” and decided to “run” the license plate of a white sedan driving nearby. 6RP 9-10, 28. The records check revealed that the car had been reported stolen. 6RP 10, 30.

Before Campbell could activate his lights or sirens, however, the white car pulled over to the curb. 6RP 10. The officer pulled his marked patrol car behind and turned on the overhead lights. 6RP 11. He got out of the police car and stood at its door, calling in on his radio to report where he was and that he was dealing with an “occupied” stolen car. 6RP 11. The passenger in the car started to get out but Campbell yelled, “police, get back in the car,” and the man sat back down. 6RP 11. The officer then ordered the people in the car to put their hands up and they both complied. 6RP 11.

March 27, 28 and 29, 2017, as “6RP;”
June 2, 2017, as “7RP;”
Sentencing of August 4, 2017, as “SRP.”

Officer Campbell maintained the same position with the stopped car until “backup” arrived, waiting just a minute or two. 6RP 12. Once help arrived, Campbell ordered the driver, “[k]eep your hands up in the air. Slowly exit the vehicle. Face away from us. Walk backwards towards us with your hands in the air.” 6RP 12. The woman, later identified as Rameika Hail, complied. 6RP 12, 33.

After she was “secured” and in the back of the patrol car, the officer started the process again with the passenger. 6RP 12-13. Initially, the passenger stepped out with his hands in the air, facing towards Campbell and the other officers. 6RP 12-13. Once he had closed the car door, however, the passenger took off running. 6RP 36-37. Officer Campbell gave chase, repeatedly yelling for the man ahead to stop. 6RP 13. After the man ran down an alley, the officer lost sight of him, but thought he had gone into a nearby backyard, from which the officer heard a crashing sound and a yell. 6RP 13-14, 37.

The officer peered around a corner into the dark backyard, seeing nothing. 6RP 13. He then called for more officers and waited the five minutes it took for them to arrive. 6RP 40. Officer Campbell and the others then all went into the backyard, which had a detached garage and a little parking area, as well as a three- or four-foot tall “picket” style fence. 6RP 14-15. They saw nothing until they were in the backyard, then saw a man lying down on his back, his arm over his face, on the residential side of the picket fence. 6RP 14-15, 40-41, 60.

Officer Campbell walked the man back to the patrol car, read him his rights and placed him under arrest. 6RP 19-29. A search of the man turned up three white pills and a .32 caliber automatic bullet round. 6RP 21. A forensic scientist with the Washington State Patrol tested the pills and concluded they contained methadone. 6RP 118-19, 123-24.

After the man was taken into custody, the officers then noticed an object which looked like a firearm lying on the ground about five feet from where the man had been lying. 6RP 15, 16, 41-44, 83. The firearm was closer to the alley, on the other side of the picket fence. 6RP 15-16.

The man denied knowledge of the gun found on the ground. 6RP 21. He had found the round that officers took from his pocket earlier in the night on the ground and had just picked it up. 6RP 44-45. An officer conceded the bullet did not look new, looked like it had been “around,” and probably had been in “pockets” and guns. 6RP 45. The bullet was the same “caliber” as the gun but a different type of ammunition. 6RP 46.

Officer Campbell said that, when he asked for the man’s name, the man said he was “David Miles” and gave a birth date of 10/04/74. 6RP 22. The officer was later told that the man was actually James Harris, with the same birthdate. 6RP 22, 26. Mr. Harris was also reportedly a convicted felon who was not allowed to have possession of any guns. 6RP 26.

Officer Campbell admitted that the area where the gun was

found was a part of Tacoma known as the “Hilltop,” a neighborhood which was a “high crime area.” 6RP 27. The officer stated his belief, however, that guns are valuable and it would be “uncommon” to see one on the ground. 6RP 48-49. Another officer conceded that the area was “high crime” and gang activity was common. 6RP 77-81.

Officer Campbell conceded he did not see Harris throw the gun during the chase, nor did he see Harris holding any weapon at all. 6RP 47-48. Neither did other officers. 6RP 91-94. Several officers, however, speculated that the gun was in the path Harris would have taken from the alley, if that was the way he came. 6RP 57-60.

A patrol specialist, Eric Chell, testified that he rendered the weapon “safe” by taking out the two bullets he found inside, then put the gun back onto the ground and left it for “forensics” to process. 6RP 77. The gun was unfired and Chell said he just assumed it would function. 6RP 91. He admitted he was not an expert on the gun because it was not a “modern firearm.” 6RP 90-91. Campbell, Chell and another officer who saw the weapon testified that it was covered in large part with black electrical tape. 6RP 16, 62-63, 80-91.

An officer later testified that he fired ammunition from a gun which did not have electrical tape on it. 6RP 111-12. In the same box as the weapon was a “baggy” with what looked like black electric tape. 6RP 112.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING THE GUN AND BULLETS BECAUSE THE STATE FAILED TO ESTABLISH A SUFFICIENT CHAIN OF CUSTODY AND THE EVIDENCE WITHOUT IT WAS INSUFFICIENT

Mr. Harris was accused of unlawfully possessing the gun found in the alley, as well as obstructing the officers, making a false or misleading statement and possession of the drugs found in his pocket. CP 1-2. This Court should reverse and dismiss the conviction for first-degree unlawful possession of a firearm, however, because the prosecution failed to establish a sufficient chain of custody to prove that the altered firearm admitted at trial was the same firearm as the one officers found that night.

a. Relevant facts

At trial, Officer Campbell described the gun as a “small frame silver revolver” with black electrical tape on it. 6RP 16. An officer in training at the time, Peter Taing, testified that the handle and barrel of the object were wrapped in black electrical tape and that no one could find a serial number on it. 6RP 62-63. Specialist Chell testified that the gun was unusual in that it was wrapped with electrical tape, primarily on the grip and handle but also on portions of the frame as well as the barrel. 6RP 76-83.

None of the officers who testified, however, took the gun into evidence. 6RP 16. Campbell did not maintain custody of the firearm at the scene, instead dealing with Harris. 6RP 16. Officer Taing admitted that it was a “forensic specialist” named Lisa Rossi who no

longer worked for the police department. 6RP 64-65.

Specialist Chell, testified that he rendered the weapon “safe” by taking out the two bullets he found inside, then put the gun back onto the ground and left it for “forensics” to process. 6RP 77. While Chell assumed that Rossi had photographed the gun and put it into evidence, Chell stayed until Rossi came by and did not watch or participate in the process Rossi used. 6RP 74-78.

In fact, Chell admitted, he could not recall seeing Rossi even take the gun off the ground. 6RP 74-75.

The gun was unfired and Chell said he just assumed it would function. 6RP 91. He admitted he was not an expert on the gun because it was not a “modern firearm.” 6RP 90-91.

Taing, who was in training at the time, testified at trial that the object appeared to be the same even though there was no electrical tape on it, assuming that someone must have removed the tape. 6RP 66.

The rounds that were in a plastic bag physically fit in the cylinder of the weapon but they were but not designed for that type of firearm. 6RP 90-91.

Chell testified that, after he made the revolver “safe,” it was placed in a cardboard evidence box and, he assumed, “retained by Crime Scene Technician Rossi[.]” 6RP 88. At trial, the prosecutor handed the box to Chell as Plaintiff’s Exhibit 7, and Chell identified the incident number on the outside as the one assigned in this case. 6RP 88. When he looked inside, the officer asked if he could touch

and move things inside, then got permission from the court. 6RP 88. The officer then said that the contents was “consistent with the revolver that I was speaking about, which was observed and later recovered and entered into evidence.” 6RP 88-89.

A moment later, however, the following exchange occurred:

[PROSECUTOR]: This is a revolver that you rendered safe at the scene?

A: Yes.

Q: **Does it seem to be in the same condition as when you did so?**

A: **No, in that the electrical tape which I had spoken of, which I was examining, appears to have been - - all been removed from that.**

6RP 89 (emphasis added). The officer then declared his belief that the missing electrical tape was in the same box, “contained within a clear plastic Ziploc-type bag.” 6RP 89. Aside from that, the officer thought the weapon looked the same. 6RP 89.

Officer Chell admitted that he was not the officer who wrote the case number on the box and that, when he left, Rossi had the evidence. 6RP 94.

Officer Chell also testified about taking the two live rounds from the gun, after which he said they were placed in a small clear ziploc-type “baggy.” 6RP 84. He testified that Rossi kept that. 6RP 84. The officer was asked to identify Plaintiff’s Exhibit 6 and he said it was consistent with those he had taken from the revolver. 6RP 84. Chell recognized the “head stamp” on the rounds and said that, while

the caliber was correct, the bullets in the gun were not specifically designed to go into that firearm. 6RP 84-85. The “baggy” had the incident number for the case. 6RP 88.

Chell, however, was not the name on the “baggy.” 6RP 96. Instead, the initials appeared to be “L.R.” 6RP 96. The bullets in the baggy were “hollow point” but the bullet found in Harris’ pocket was not. 6RP 96-97.

Counsel objected to the admission of both the rounds and the gun. 6RP 99-100. The prosecution moved to admit the rounds (Exhibit 6) and counsel objected as to “foundation,” noting that the officer who entered the items into evidence was not present. 6RP 99. The prosecutor admitted there was a “chain of custody” argument but said that there had been proper “foundation” because there had been “relevance and identification.” 6RP 100. The court agreed with the state, saying, “he did identify Exhibit 6, so I’m going to admit.” 6RP 100.

Regarding the gun, Exhibit 7, the prosecution moved to admit it through the officer who took a firearm from the box marked with this case number later and fired rounds from it. 6RP 106-111. Counsel again objected as to foundation but the court again sided with the state, saying, “[y]ou may have chain of custody issues” but “the exhibit is admissible.” 6RP 111.

A TPD Detective, Brian Vold, testified that he took a gun and fired it with the appropriate caliber and type of ammunition, which was .32 caliber but not semiautomatic. 6RP 106-108. The gun he

fired did not have black electrical tape on it. 6RP 111.

b. The trial court abused its discretion in admitting Exhibits 6 and 7

Physical evidence of a crime is only admissible if it is sufficiently identified and demonstrated to be in substantially the same condition as when the crime was committed. See State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). Under ER 901(a), a proponent of evidence thus must authenticate it, “to support a finding that the matter in question is what its proponent claims.” If evidence is either not readily identifiable or is susceptible to alteration or contamination, the proponent usually must show a “chain of custody” from the time the evidence was seized until the time it is presented at trial. State v. Roche, 114 Wn. App. 424, 436, 59 P.3d 682 (2001).

The trial court erred in admitted the gun and the bullets, state’s exhibits 6 and 7, because the state failed to prove a sufficient chain of custody for that evidence. While the proponent need not protect against *every* “possibility of alteration or substitution,” minor discrepancies or uncertainty on the part of a witness “will affect only the weight of the evidence, not its admissibility.” Campbell, 103 Wn.2d at 21. Further, the chain of custody is not broken if evidence is properly taken into custody, then stored in a locked and secured area. See State v. Wilson, 83 Wn. App. 546, 555, 922 P.2d 188 (1996), review denied, 130 Wn.2d 1034 (1997).

Here, however, the state failed to show that the evidence was

properly taken into custody in the first place. While officers described the gun they saw that night, they all described the black electrical tape as a distinctive feature of the weapon. 6RP 16, 62-63, 80-91. State's Exhibit 7, however, did not have black electrical tape on it. 6RP 111. Although there was electrical tape in a separate bag contained in the same box as the gun, there was no testimony or evidence - other than supposition - that the gun was the same.

The trial court abused its discretion in admitting Exhibits 6 and 7. For evidence to be in substantially the same condition as when the crime was committed, there are several factors which are considered: the nature of the article, the circumstances surrounding the preservation and custody of the evidence, and the likelihood that it had been tampered with. Campbell, 103 Wn.2d at 21.

Here, at the trial, the gun was certainly not in the same or substantially the same condition as it was when it was seen in the alley. The gun in the alley was covered with black electrical tape - the gun admitted at trial was not. There was more than a *likelihood* the questioned exhibit was not in the same or substantially the same condition - it actually happened.

Reversal and dismissal of the conviction for first-degree unlawful possession of a firearm is required. The prosecution has the burden of proving every essential element of a crime charged, beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On review, evidence is only sufficient to

support a conviction if, taken in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime, beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); see State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). Where, as here, there is a bench trial, in a straight sufficiency case, the Court asks if substantial evidence supports the findings of fact and, if so, whether those findings support the conclusions of law. See State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). “Substantial evidence” is evidence sufficient to persuade a rational, fair-minded person of the truth of the asserted premise. See id. But in this case, the trial court’s error in admitting the evidence then led to that evidence being considered as part of the court’s determination.

To prove Mr. Harris guilty of first-degree unlawful possession of a firearm, the prosecution had to show he had a prior conviction which rendered him ineligible to possess a gun and further, that he knowingly possessed a firearm. See In re the Personal Restraint of Canha, 189 Wn.2d 359, 375, 402 P.3d 266 (2017); see RCW 9.41.040(1)(a). But because the firearm Detective Vold examined and test-fired was not the same or substantially the same as the gun covered in electrical tape which was taken into custody at the scene, and because the state failed to present any explanation other than speculation, the trial court erred in admitting the gun. Further,

because the prosecution failed to present the testimony of the person who could verify that the bullets in Exhibit 6 were those taken from the gun, the bullets should have been excluded, too.

Because the evidence should not have been admitted, the trial court's findings that the gun that was test-fired was the same gun and in relying on that gun and the bullets in reaching its conclusions of guilt. Absent the gun, no fair-minded rational trier of fact would convict of unlawful possession. Reversal and dismissal of the conviction for first-degree unlawful possession of a firearm is required. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

E. CONCLUSION

The trial court abused its discretion in admitting Exhibits 6 and 7 despite the state's failure to prove a sufficient chain of custody. This Court should so hold and should reverse and dismiss with prejudice the conviction for first-degree unlawful possession of a firearm.

DATED this 6th day of April, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, and to appellant Mr. Harris DOC 832160, Airway Heights CC, P.O. Box 2049, Airway Heights, WA. 99001-2049.

DATED this 6th day of April, 2018,

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