

FILED
Court of Appeals
Division II
State of Washington
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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

IN RE PERSONAL RESTRAINT PETITION OF

WILLIAM HORTON, JR.,

PETITIONER.

PERSONAL RESTRAINT PETITION

Jeffrey E. Ellis #17139
Attorney for Mr. Horton
Law Office of Alsept & Ellis
621 SW Morrison St., Ste 1025
Portland, OR 97205
503.222.9830 (o)
JeffreyErwinEllis@gmail.com

A. IDENTITY AND STATUS OF PETITIONER

William Horton, Jr. (hereinafter “Horton”) was convicted of murder in Pierce County (Case No. 12-1-04021-6).

Mr. Horton (DOC #375822) is currently incarcerated at the Washington State Penitentiary in Walla Walla, Washington.

This is his first collateral attack on the current judgment.

B. FACTS

Procedural History

On October 25, 2012, the State charged Horton by information with murder in the first degree with a firearm enhancement and unlawful possession of a firearm in the first degree. The State also charged a gang aggravator for both crimes. Horton was tried by a jury and convicted.

His conviction and sentence were affirmed on appeal. *State v. Horton*, 195 Wash. App. 202, 206, 380 P.3d 608, 609 (2016), *review denied*, 187 Wash. 2d 1003, 386 P.3d 1083 (2017). The mandate was issued on February 3, 2017. As part of the factual basis for this petition, Horton relies on the trial court file and transcript from the direct appeal.

Facts

In the early morning of October 24, 2012, police responded to a dispatch call. Dispatch reported that shots were fired and that a witness saw a black male dragging another black male toward the street. When police

arrived, they observed what they later discovered to be the dead body of Charles Pitts in the middle of the parking lot. Before the officers could approach the body, a man, later identified as Horton, ran into the parking lot carrying a gun and yelling “I’m going to kill you,” and stood over the body. 4 Report of Proceedings (RP) at 209. The police announced their presence and ordered Horton to get on the ground. Horton obeyed, dropped the gun, and got down on the ground next to the body. The police placed him in handcuffs. Pitts's shirt was partially pulled over his head, and there was a bullet hole below his naval and a bullet hole in his chest.

Horton claimed self-defense.

The Unlawful Possession of a Firearm Charge

Horton was charged with unlawful possession of a firearm based on an alleged robbery conviction from Florida when Horton was a juvenile. The documents presented at trial established that Horton pled guilty to armed robbery and that the Florida court entered a withheld adjudication. On direct appeal, Horton argued that because Florida does not consider a “withheld adjudication” a conviction for the purposes of possession of a firearm, Washington courts should do the same. Br. of Appellant at 30. This Court rejected that claim *State v. Horton*, 195 Wash. App. 202, 221–22, 380 P.3d 608, 617 (2016), *review denied*, 187 Wash. 2d 1003, 386 P.3d 1083 (2017).

Additional facts appear in the arguments below.

C. ARGUMENT

- 1a. The “To Convict” Instruction Failed to Include All of the Elements of the Charged Crime.
- 1b. Trial Counsel was Ineffective for Failing to Object and Failing to Propose a “To Convict” Instruction Including All the Elements of the Charged Crime.
- 1c. Appellate Counsel was Ineffective for Failing to Assign Error to the Incomplete “To Convict” Instruction.

Introduction

The State did not charge Horton with murder *simpliciter*. The State charged Horton with murder committed with: 1. premeditation; 2. a firearm; and 3. with the intent to benefit a criminal street gang.

Only one of those elements was included in the “to convict” instruction. The “to convict” instruction asked jurors to decide if the State had proved murder plus premeditation. But, both the firearm and gang elements were the subject of separate instructions and verdict forms. Trial counsel did not object or propose a legally correct instruction. Appellate counsel did not assign error to the “to convict” instruction.

The “To Convict” Instruction Must Contain All Elements

Washington courts have long held that the failure of the “to convict” instruction to contain all the elements of the crime mandates reversal. When the “to convict” instruction fails to do so, reversal is required.

To convict a defendant, the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re*

Winship, 397 U.S. 358 (1970). Due process of law requires the State to prove each element of a crime beyond a reasonable doubt. *State v. Byrd*, 125 Wn.2d 713-14, 887 P.2d 396 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, §§ 3, 22.

Implicit in this principle is the requirement that jury instructions list all the elements of the crime, since failure to list all elements would permit the jury to convict without proof of the omitted element. *See State v. Linehan*, 147 Wn.2d 653-54, 56 P.3d 542 (2002).

It is reversible error to instruct the jury in a manner that relieves the State of its burden to prove every essential element of an offense beyond a reasonable doubt. *State v. Eastmond*, 129 Wn.2d 497, 502, 919 P.2d 577 (1996); *State v. Smith*, 131 Wn.2d 258, 263, 930 P.2d 917 (1997) (instruction that purported to be a complete statement of the law yet stated the wrong crime as the underlying crime the conspirators agreed to carry out was constitutionally defective). Where a “to convict” instruction fails to state the elements of a crime completely and correctly, a conviction based upon it cannot stand. *State v. Smith*, 131 Wn.2d at 263; *State v. Williams*, 162 Wash. 2d 177, 187, 170 P.3d 30, 35 (2007) (to-convict instruction must include all of the elements of a crime because it is the touchstone that a jury must use to determine guilt or innocence).

Where a jury instruction, like the one given to Horton’s jury, purports to be a complete statement of the crime, it must contain every

element of the crime charged. *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). The jury is not required to supply the omitted element by searching the other instructions “to see if another element alleged in the information should have been added to those specified in [the] instruction.” *Id.* In addition, a defendant is denied a fair trial if “the jury must guess at the meaning of an essential element of the crime with which the defendant is charged, or if the jury might assume that an essential element need not be proven.” *Davis*, 27 Wash.App. at 506.

A trial court's failure to include the correct mental state element in the “to convict” instruction is not rendered harmless by subsequent definitional instructions. *State v. Aumick*, 126 Wn.2d 422, 432-33, 894 P.2d 1325 (1995) (trial court's failure to include intent in the elements of attempt instruction was not rendered harmless by other instructions referring to intent). Instead, a jury has a right to regard the “to convict” instruction as a complete statement of the law and should not be required to search other instructions to add elements necessary for conviction. *State v. Oster*, 147 Wash.2d 141, 52 P.3d 26 (2002).

The State will likely argue that intent to benefit a gang and use of a firearm are not elements but are sentencing enhancements. This argument is untenable. In *Apprendi v. New Jersey*, 530 U.S. 466, 494 (2000), the United States Supreme Court held that any fact that “expose[s] the defendant to a greater punishment than that authorized by the jury's guilty

verdict” is an “element” that must be submitted to a jury. See also *Hurst v. Florida*, 136 S. Ct. 616, 621, 193 L. Ed. 2d 504 (2016). The purported “distinction” elements “of an offense and sentencing factors,” has been “untenable” since *Ring v. Arizona*, 536 U.S. 584, 604 (2002).

If Horton’s “to convict” instruction omitted “premeditation” this Court would reverse without hesitation in an opinion that could be as short as one sentence. Premeditation is obviously an element, part of the mental state required to convict. But, so is the intent to advance gang interests. Both elements have the same effect. Both increase the punishment ceiling. In fact, the intent to further a gang element raises the top end of the punishment that can be imposed by the jury’s verdict in potentially a much more dramatic way than the element of premeditation by making a sentence up to life possible. Premeditation only raises the ranges.

The firearm has a similar effect. The firearm element requires a mandatory minimum. *Alleyne v. United States*, _ U.S. ___, 133 S. Ct. 2151 (2013) (any fact that increases a mandatory minimum sentence is an “element” of the offense). Like a finding of premeditation, which sets a twenty-year mandatory minimum, the firearm element establishes a five-year minimum.

There simply is no way to distinguish these elements from the elements included in the “to convict” instruction. An element is an element. There is no exception for elements which increase the sentence.

In fact, it is the increase in punishment which makes those facts elements of the crime.

Reversal is Required

Horton has raised several claims related to the failure of the “to convict” instruction to include every element of the crime. Petitioner respectfully suggests that this Court should first consider the claim of ineffective assistance of appellate counsel. *See generally In re PRP of Orange*, 152 Wn.2d 795, 100 P.3d 291 (2004). The failure to include all the elements of a crime in the “to convict” instruction is a plain error, which does not require an objection to preserve. *State v. Mills*, 154 Wash.2d 1, 6, 109 P.3d 415 (2005). Because the error could have been raised on direct appeal, there was no tactical reason to forego it.

This Court should reverse Horton’s conviction and remand for a new trial.

- 2a. Mr. Horton’s Florida Conviction is Unconstitutional and Can Be Attacked Because It Served as a Predicate for an Unlawful Firearm Possession Charge.
- 2b. Trial Counsel was Ineffective for Failing to Raise this Issue.
- 2c. Trial Counsel was Ineffective Because If He Had Successfully Attacked the Florida Conviction, the Jury Would Not Have Heard that Horton Had Been Previously Convicted of a Violent Crime.

The State charged Horton with unlawful possession of a firearm, predicated on what jurors were told was a robbery conviction. Defense

counsel challenged whether a withheld adjudication was a conviction. However, trial counsel did not challenge the constitutionality of that conviction. Counsel's failure to do so was deficient. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). Horton was prejudiced in two ways: 1. he was convicted of the unlawful gun charge; and 2. his jury heard that he was convicted of a violent crime prejudicing him on the murder charge.

The law is clear. A challenge to the constitutional validity of a predicate conviction which serves as an essential element of a charge of an unlawful possession of a firearm is not a "collateral attack" on the prior conviction. *State v. Summers*, 120 Wash. 2d 801, 810, 846 P.2d 490, 495 (1993). A defendant may raise a defense to such a prosecution by alleging the constitutional invalidity of a predicate conviction. Upon doing so, the State must prove beyond a reasonable doubt that the predicate conviction is constitutionally sound. In raising this defense, the defendant bears the initial burden of offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction. *Summers*, 120 Wash. 2d at 812.

Here, Horton has made a prima facie showing that his guilty plea was the result of ineffective assistance of counsel, a Sixth and Fourteenth Amendment violation, because he was misinformed about the consequences of the "adjudication withheld." Horton was prejudiced

because he would not have pleaded guilty if given accurate advice.

Horton's sworn statement to those facts is attached to this petition.

The Sixth Amendment right to effective assistance of counsel encompasses the plea process. *In re Pers. Restraint of Riley*, 122 Wash.2d 772, 780, 863 P.2d 554 (1993); *McMann v. Richardson*, 397 U.S. 759, 771, (1970). Counsel's faulty advice can render the defendant's guilty plea involuntary or unintelligent. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985). Thus, to overturn the guilty plea, the defendant must show a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. Moreover, because this is not a "collateral attack," Horton does not need to meet that prejudice requirement.

If the State disputes Horton's facts, this Court should remand for an evidentiary hearing. If Horton establishes the unconstitutionality of the conviction, then the unlawful possession of a firearm charge should be dismissed. But, this Court should also reverse the murder conviction based on the harm from the admission of prejudicial evidence that would not have been heard, if counsel had performed competently. "By generally allowing admission of highly prejudicial evidence of prior bad acts to be admitted at trial, the jury has a much higher likelihood of convicting an innocent defendant because of other crimes or bad acts committed in the defendant's past." *State v. Magers*, 164 Wash. 2d 174, 198, 189 P.3d 126, 139 (2008).

- 3a. The Evidence of the Gang Element was Insufficient
- 3b. Admission of Horton’s Statements About Gang Affiliation Violated the Corpus Delicti Rule.
- 3c. Trial Counsel’s Failure to Object was Ineffective.

For the special verdict, the State was required to prove beyond a reasonable doubt that the defendant committed the crime with intent to directly or indirectly cause any “benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang, its reputation, influence, or membership.” A “criminal street gang” is defined as any “ongoing organization, association, or group of three person, whether formal or informal, having a common name or common identifying sign or symbol, having as one of its primary activities the commission of criminal acts, and whose members or associates individually or collectively engage in or have engaged in a pattern of criminal street gang activity.”

Aside from alleging that gangs exist, the State failed to prove that Horton possessed the requisite intent; that the homicide resulted in any benefit or other advantage from the crime; or that he was the member of a group with a primary goal of committing street criminal acts whose members engage in a pattern of criminal street gang activity. In fact, the state’s gang “expert” acknowledged there were no “issues” between GD members Crip members. RP 1218. The State presented no evidence from which a jury could conclude that, even if guilty, Horton had any intent to

benefit any gang. *State v. DeLeon*, 185 Wash. 2d 478, 491, 374 P.3d 95, 101 (2016).

To the extent that there was any evidence of Horton's association with a gang, it was entirely the result of Horton's statements in violation of the corpus delicti rule. *State v. Roswell*, 165 Wash. 2d 186, 193–94, 196 P.3d 705, 708 (2008).

The corpus delicti rule prevents the State from establishing that a crime occurred solely based on the defendant's incriminating statement. *State v. Green*, 182 Wash.App. 133, 143, 328 P.3d 988 (2014). The State must present corroborating evidence independent of the incriminating statement that the charged crime occurred. *Id.* Without such corroborating evidence, the defendant's statement alone is insufficient to support a conviction. *State v. Dow*, 168 Wash.2d 243, 249-51, 227 P.3d 1278 (2010).

This Court reviews de novo whether sufficient corroborating evidence exists to satisfy the corpus delicti rule. *Green*, 182 Wash.App. at 143. In making this determination, this Court considers the totality of the independent evidence. *See State v. Aten*, 130 Wash.2d 640, 661, 927 P.2d 210 (1996). The independent evidence by itself need not be sufficient to support a conviction or even show that the offense occurred by a preponderance of the evidence; it must only support a logical and reasonable inference that the charged crime has occurred. *Id.* at 656.

In addition, the Supreme Court has stated that to satisfy the corpus delicti rule, “the independent evidence ‘must be consistent with guilt and inconsistent with a [] hypothesis of innocence.’ ” *State v. Brockob*, 159 Wash.2d 311, 329, 150 P.3d 59 (2006) (quoting *Aten*, 130 Wash.2d at 660, 927 P.2d 210). The court stated that independent evidence is insufficient to corroborate a defendant's incriminating statement when it “supports ‘reasonable and logical inferences of both criminal agency and noncriminal cause.’ ” *Brockob*, 159 Wash.2d at 329, 150 P.3d 59 (quoting *Aten*, 130 Wash.2d at 660, 927 P.2d 210). “In other words, if the State's evidence supports the reasonable inference of a criminal explanation of what caused the event and one that does not involve criminal agency, the evidence is not sufficient to corroborate the defendant's statement.” *Brockob*, 159 Wash.2d at 330.

Here, the independent evidence fails on almost every element of the gang charge. And, there is an obvious inference arising from the evidence that is inconsistent with the gang charge: that Horton’s actions were the result of a physical confrontation with the deceased completely unrelated to any gang activity.

There was no possible tactical reason for trial counsel’s failure to raise the corpus delicti rule. The admission of Horton’s statements about his gang history were harmful and could have been excluded.

- 4a. The Court Gave a “Dynamite” Instruction Without any Need.
- 4b. Trial Counsel was Ineffective by Failing to Object.

INSTRUCTION NO. 19

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

The above-instruction, which was included in the packet of instructions given at the conclusion of the evidence, is what is commonly called a “dynamite” instruction, designed to avoid a hung jury when a jury announces a deadlock.

It should not have been given at the start of deliberations.

More than a century ago, in *Allen v. United States*, 164 U.S. 492 (1896), the Supreme Court declined to reverse a defendant's conviction based on the delivery of a jury instruction encouraging the jury to reach a verdict. Subsequent decisions have grappled with the inherent potential such instructions possess to coerce a jury's verdict. In *Jenkins v. United States*, 380 U.S. 445, 446 (1965), the Supreme Court held that a trial judge's instruction to the jury that “ ‘[y]ou have got to reach a decision in this case,’ ” was impermissibly coercive, reversed the defendant's conviction,

and remanded for a new trial. Following *Jenkins*, the Court did not revisit the propriety of *Allen*-type instructions until *Lowenfield v. Phelps*, 484 U.S. 231 (1988). There, the Court concluded that a jury instruction that directed jurors to “ ‘not hesitate to reexamine your own views and to change your opinion if you are convinced you are wrong,’ ” was permissible. *Id.* at 235, 241.

Recent research has demonstrated that delivery of an *Allen* charge can have a severe coercive effect that subverts the willingness of a holdout juror to stand firm against a majority of his or her colleagues. One study, published in 1990, reported the results of an experiment in which participants, led to believe that they were a part of a mock jury, passed and received notes with individuals they believed to be their fellow jurors with the goal of arriving at a verdict. See Saul M. Kassin, et al., *The Dynamite Charge: Effects on the Perceptions and Deliberation Behavior of Mock Jurors*, 14 Law & Hum. Behav. 537 (1990). At the outset of the experiment, each participant read a four-page summary of a criminal case and recorded his or her preliminary views with respect to the guilt or innocence of the hypothetical defendant. *Id.* at 540. The participants were then randomly classified as “majority” or “minority” jurors. *Id.* at 539-40. Jurors assigned to the “majority” received two notes in the early phase of deliberations that agreed with their position and one that did not. *Id.* at 540. Jurors assigned to the “minority” received three notes disagreeing with their

position. *Id.* After a set number of notes had been passed, some jurors were read the *Allen* instruction and a control group was not. *Id.* at 541. The jurors were then evaluated on the basis of whether they changed their votes and surveyed as to their perceptions of the process. *Id.* at 541-42. The jurors' explanations for their ultimate votes were also analyzed. *Id.* at 542. The study found that “[a]mong subjects who were subjected to the dynamite charge, ... those in the minority were more likely to capitulate than those in the majority.” *Id.* at 543. Ultimately, the study concluded that “the dynamite charge causes jurors in the minority to feel pressured and change their votes and that it encourages those in the majority to exert increasing amounts of normative influence.” *Id.* at 547.

A follow-up study in 1993 reached similar conclusions. See Vicki L. Smith and Saul M. Kassin, *Effects of the Dynamite Charge on the Deliberations of Deadlocked Mock Juries*, 17 *Law & Hum. Behav.* 625 (1993). There, six- to twelve-person mock juries were asked to deliberate with respect to a hypothetical criminal law fact pattern. *Id.* at 629. Again, the participants' preliminary views as to guilt or innocence were solicited and the mock juries were structured based on those initial responses such that each mock jury was “stacked 4-to-2 in favor of conviction or acquittal.” *Id.* As with the note-passing experiment, certain groups of participants were read the *Allen* charge after deliberating for some time, while certain control groups received no such instruction. *Id.* *Deliberations*

then continued until a unanimous verdict was reached or until 50 minutes had elapsed. *Id.* at 630. Video of the deliberation sessions and questionnaires filled out by the participants were then analyzed by the researchers. *Id.* Observing that “[t]here was a sharp increase in vote changes among minority jurors who received the dynamite charge, but not among those in the majority,” the researchers concluded that “the dynamite charge moved deadlocked juries toward unanimity, selectively causing minority jurors to change their votes.” *Id.* at 640. The researchers also found some suggestion that a dynamite charge “may hasten the deliberation process in juries favoring conviction, but not in those favoring acquittal.” *Id.* at 634.

Others have weighed in with similar observations. *See, e.g.*, Monica K. Miller and Brian H. Bornstein, *Do Juror Pressures Lead to Unfair Verdicts?* *Monitor on Psychol.*, Mar. 2008, at 18, available at <http://www.apa.org/monitor/2008/03/jn.aspx> (noting that “[a] judge's dynamite charge could make jurors feel coerced into changing their votes” and “also leads those in the majority to exert more pressure on jurors in the minority”). Importantly, “this research suggests that minority jurors are not conforming based on informational influence (*i.e.*, because they are actually persuaded), but because of normative influence (*i.e.*, because of social pressure).” *Id.* The results of this research underscore the serious

constitutional questions implicating a criminal defendant's Fifth and Sixth Amendment rights.

In many cases, then, *Allen* charges presumably cause jurors to abandon good-faith, well-reasoned and well-supported positions that favor the acquittal of criminal defendants. In an article reporting on a recent comprehensive study of hung juries by the National Center for State Courts, a reporter noted that “the biggest surprise to researchers was that juries deadlock when they ought to deadlock - when the evidence is evenly split between both sides.” Kate Marquess, *Juries Hang Up on Close Calls, Study Says: Data Shows That Evidence, not Diversity, Is the Main Factor*, A.B.A. J. E-Report, Oct. 18, 2002, available at WL 1 No. 40 ABAJREP 3. As the study itself, a four-year effort funded by the National Institute of Justice, observed: “By far, the most frequent primary cause of hung juries was weak evidence.” Paula L. Hannaford-Agor, et al., *Are Hung Juries A Problem?* Nat'l Ctr. for St. Cts. 76 (Sept. 22, 2002), available at http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf.

This Court should reverse and remand for a new trial.

D. CONCLUSION AND PRAYER FOR RELIEF

Based on the above, this Court should either grant the PRP, remand for an evidentiary hearing, and/or order appropriate relief.

DATED this 4th day of February 2018.

Respectfully Submitted:

/s/Jeffrey E. Ellis

Jeffrey E. Ellis #17139

Attorney for Mr. Horton

Law Office of Alsept & Ellis

621 SW Morrison St., Ste 1025

Portland, OR 97205

JeffreyErwinEllis@gmail.com

Inbox (456)



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From: WILLIAM HORTON
Date: 2/1/2018 10:26:46 AM
To: jeffrey ellis
Attachments:

I William .C. Horton Jr. Declare:
I am the petitioner in this P.R.P,
When I pleaded guilty and received a withheld adjudication in Florida, I was told by my attorney that it would not count as a conviction for any purpose.
I understood this to mean that I would not lose my right to possess a firearm in Florida or anywhere.
If I had known that was not true, I would not have pleaded guilty.
I declare under the penalty of perjury of the laws of the state of Washington that the above is true and correct.
Date: Feb. 1, 2018 Signed: William .C. Horton Jr.

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VERIFICATION OF PRP

I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.

February 4, 2018//Portland, OR

/s/Jeffrey Erwin Ellis

ALSEPT & ELLIS

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Filing Personal Restraint Petition

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Address:
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