

FILED
Court of Appeals
Division III
State of Washington
12/13/2017 11:29 AM

NO. 34730-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

GLEND A TUCKER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Salvatore F. Cozza, Judge
The Honorable Michael P. Price, Judge

SECOND AMENDED BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The evidence is insufficient to sustain appellant's conviction for first degree unlawful possession of a firearm.

Issue Pertaining to Assignment of Error

1. Where the State failed to present any evidence whatsoever that the rifle in appellant's purported possession or control was a real firearm capable of being fired, must appellant's conviction for first degree unlawful possession of a firearm be dismissed for insufficient evidence?

B. STATEMENT OF THE CASE

The State charged Glenda Tucker by amended information with one count of unlawful imprisonment and one count of first degree unlawful possession of a firearm. CP 37. The State alleged that on October 24, 2015, Tucker acted as an accomplice of Derek Williams in knowingly restraining Caryn Crandall. CP 37. The State further alleged Tucker knowingly possessed or controlled a firearm after being convicted of a serious offense, specifically conspiracy to deliver cocaine. CP 37. Tucker proceeded to a jury trial in July of 2016.

1. State's Evidence

The State's case-in-chief was relatively short, lasting only one day. CP 213. Crandall, also known as Mantese, testified she became acquainted with Williams on October of 2015 and they "just kind of hung out for a

week.” 5RP 106-09. Tucker knew Williams from church and called him her “god brother.” 6RP 272. Crandall testified that on October 23, 2015, she took Williams’s van without asking to find drugs. 5RP 106-09. She got in an accident on her way home and ran from the scene. 5RP 110.

The next day, Crandall was at a friend’s house when Williams and Tucker showed up, with Tucker driving her four-door Hyundai Sonata. 5RP 111, 162. Crandall testified Williams grabbed her and threw her in the backseat of Tucker’s car. 5RP 112. Williams threatened to “tie [Crandall] up in the basement and force [her] to work off the money that the van cost that [she] recked [sic].” 5RP 112. Crandall explained, however, that Tucker “was just driving the car. She didn’t say anything. She didn’t do anything. She was just the driver.” 5RP 113. Crandall further explained Tucker did not assist Williams in retraining her: “[Tucker] was just there, wrong place, wrong time.” 5RP 121-22.

When they were two or three blocks away from the house, Crandall jumped out of the moving car, which ran over her ankle. 5RP 114, 118. Williams got out of the car and strangled Crandall after Tucker came to a stop. 5RP 119. Tucker called 911. 5RP 119-20. Police arrived at the scene shortly thereafter. 5RP 120. Crandall thought the reason Tucker called 911 was to turn her in for stealing the van, but acknowledged, “I really didn’t know and I can’t say for sure what the reason was.” 5RP 125. Crandall

testified, however, “indirectly, I would say Ms. Tucker saved my life by calling 911.” 5RP 119.

Several officers responded, but only Officers Michael Huffman and Anthony Guzzo testified at trial. 5RP 123. When Huffman arrived, he saw Williams leaning over Crandall trying to strangle her, while Tucker stood “[s]ome distance” away. 5RP 150, 168. Guzzo spoke with Tucker, who explained Crandall stole Williams’s van the previous night and was involved in a hit and run. 6RP 228-31. Tucker explained to Guzzo that Williams and Crandall were arguing over money and the van when Crandall jumped out of the car. 6RP 230-31.

Looking through the windows of Tucker’s car with flashlights, the officers could see a tan case “consistent with what a case would be for a rifle” and “a possible rifle strap.” 5RP 158, 174-75. Tucker initially objected to the police searching her car because her purse was inside, but subsequently offered to let them search it. 5RP 153-54, 171; 6RP 232, 240-41. However, the police determined Tucker was a convicted felon, so they seized her vehicle and obtained a warrant to search it. 5RP 159. In the middle of the backseat floorboard, Huffman testified he found a tan rifle case with a rifle inside. 5RP 160-62; CP 216.

Huffman acknowledged “[t]here was quite a bit of stuff” in Tucker’s car. 5RP 175. He acknowledged the trunk was “completely full” and the

backseat was “quite full,” except for a space where a passenger could sit. 5RP 176. Crandall, too, testified there was “a bunch of crap stacked up” in the backseat. 5RP 123. Huffman explained there were “items on top of the center of the rifle but you could still see the butt end of the case.” 5RP 188. No photos were taken of the car’s interior before the police removed several items to find the rifle. 5RP 180-82. However, subsequent photos showed the backseat was still very full, with items including speakers and a large garbage bag. 5RP 180-82; Exs. D120, D138.

Christieann Schuchman testified she used to live with Williams, who was “real good friends” with Tucker. 5RP 199-200. Schuchman said that, on October 24, she saw Williams and Tucker outside transferring clothes and luggage from the backseat of Tucker’s car to the trunk. 6RP 207, 214-16. Schuchman explained her boyfriend had given Williams a surround sound system to sell in exchange for methamphetamine, which Williams put in the backseat of Tucker’s car. 6RP 214-15.

Schuchman testified she later saw Tucker when they were both in jail. 6RP 209, 216. Regarding the incident with Crandall, Schuchman claimed Tucker told her “she put a gun to Ms. Caryn’s head and told her to get into the car.” 6RP 209. Schuchman also claimed Tucker told her “she had just came up on a brand new pretty gun. She said that the numbers of

the guns were a 30-30 or a 30-11.” 6RP 209. Schuchman testified this was a different gun than the one Tucker held to Crandall’s head. 6RP 219.

Schuchman admitted she looked at Tucker’s paperwork and knew Tucker was charged with unlawful possession of a firearm. 6RP 218-19. Schuchman further explained that she wrote a letter to the State offering to testify against Tucker because Schuchman was pregnant and wanted to get out of jail into a drug treatment program. 6RP 211-13. In exchange for her testimony, the State helped Schuchman get into drug court. 6RP 216-18.

Finally, the State introduced evidence that Tucker had been convicted of conspiracy to deliver cocaine, which is classified as a serious offense and prohibits her from possessing a firearm. 5RP 142-43; CP 206.

2. Tucker’s Testimony

Tucker elected to testify. 6RP 257. After some brief introductory questions, defense counsel asked Tucker, “All right. Let’s talk about your prior record. You have a prior record; is that correct?” 6RP 259. Tucker acknowledged she did. 6RP 259. Defense counsel then asked Tucker to “tell the jury about [her] difficulties over the last 15 years.” 6RP 259. Tucker explained she started using drugs when she moved to Washington. 6RP 259. Defense counsel inquired if Tucker “end[ed] up getting arrested and convicted,” to which Tucker acknowledged she had been convicted of conspiracy to deliver cocaine. 6RP 260.

Defense counsel then asked Tucker:

Q. Okay. So you've had -- do you know how many different convictions you've had?

A. Yes, I do.

Q. How many?

A. Seven.

6RP 260.

After this discussion, Tucker testified that on October 24, she loaded her car with her belongings and her ex-boyfriend's clothes because she was moving to another house. 6RP 263-64, 276-77. Williams arrived at her house and wanted her to drive him to find Crandall, who had stolen his van. 6RP 264. Williams moved most of Tucker's belongings to the trunk of her car and piled his own belongings in the backseat: "I don't know what all he had in there but he had a lot of stuff." 6RP 266, 276-77; Ex. D111.

When they found Crandall, Crandall got in the backseat of Tucker's car. 6RP 267-68, 298. Crandall and Williams began arguing inside the car, so Tucker "started screaming and telling them to be quiet." 6RP 269. Tucker recalled Williams threatened to lock Crandall in his basement, which prompted Tucker to call 911. 6RP 270-71. Crandall then told Tucker to let her out of the car, but Tucker explained "[t]here was nowhere to pull and park and I said hold on, let me find somewhere to park." 6RP 270. As

Tucker slowed around a corner, Crandall jumped out of the car. Tucker pulled over within half a block, as soon as it was safe to do so. 6RP 270.

Tucker testified Crandall then attempted to run away, but Williams grabbed and restrained her, while Tucker remained on the phone with the 911 dispatcher. 6RP 271-72. Tucker was concerned for Crandall because “Derek can be pretty violent.” 6RP 272. Tucker explained she did not try to assist Williams or restrain Crandall in any way. 6RP 273, 276.

With regards to the rifle, Tucker explained she had never seen it before and did not know it was in her car. 6RP 263, 285. Tucker testified she did not help Williams load his items into the backseat, and the photos demonstrated the rifle was mostly covered. 6RP 284-85, 307-08; Exs. D120, D138. She believed it would have been very difficult for her to reach the rifle behind her, given that she is a self-described “big woman” and the rifle was mostly covered with Williams’s belongings. 6RP 307-08. Finally, Tucker explained, “I don’t allow guns around me or my kids,” because her son was shot and killed by a firearm four years prior. 6RP 262.

The prosecutor began his cross-examination by impeaching Tucker’s testimony regarding her prior convictions:

Q. Ms. Tucker, thank you for being here today. You testified when [defense counsel] asked you how many convictions you had that you had seven?

A. Yes. According to my paperwork, yes.

Q. Would it be possible you've been convicted for so many things that you don't know how many actual convictions you have?

A. No, actually I have my conviction sheet in my paperwork that says seven felonies.

Q. Does the numbers 14 adult felonies and 18 adult misdemeanors sound more accurate to you?

A. No, that is not true at all.

Q. It's not?

A. No.

Q. And that you've been convicted of making a false statement?

A. Yes, I have.

Q. Theft?

A. Yes.

Q. Assault?

A. Those aren't felonies.

Q. Second degree theft?

A. Those aren't felonies.

....

Q. ... Also eluding a police vehicle?

A. Excuse me?

Q. Were you convicted of eluding?

A. Yes.

Q. So right there there's about five. So you're maintaining that you don't have 14 adult felonies?

A. According to my arrest history that I have in my papers right there, no.

Q. I'm not talking about your arrest history, Ms. Tucker, I'm asking you.

A. No, I don't have 15 felonies.

Q. I'm not asking about 15. Have you been convicted of 14 adult felonies?

A. No.

Q. Have you been convicted of 18 adult misdemeanors?

A. No.

6RP 289-90. The prosecutor then handed Tucker a list of her criminal history, which she admitted said 14 adult felonies and 18 adult misdemeanors, but Tucker asserted "that's not correct." 6RP 292.

Defense counsel's re-direct of Tucker focused exclusively on her prior convictions, including her most recent conviction for riot in 2012.¹ 6RP 309-16. The defense then rested its case and court recessed for the day. 6RP 316, 321.

¹ "Felony riot" has been redesignated "criminal mischief" as of January 1, 2014. State v. Sweat, 180 Wn.2d 156, 158 n.1, 322 P.3d 1213 (2014).

3. State's Rebuttal Case

The following morning, the State announced its intent to present a rebuttal witness regarding Tucker's prior convictions. 6RP 323-25. Defense counsel objected, but the State pointed out "[t]he door was opened to criminal history when [defense counsel] asked Ms. Tucker how many convictions she had." 6RP 324. The State argued its witness would "rebut the information that Ms. Tucker introduced herself voluntarily through [defense counsel] that she only has seven convictions." 6RP 324.

The trial court acknowledged "ordinarily . . . jurors never even hear about this. They would almost never heard about the defendant's criminal history. Even in a case such as this, they would ordinarily hear just a snippet." 6RP 328. But the court noted that, on direct, Tucker "discussed in great length her criminal history regarding seven convictions." 6RP 326. The court further noted the State went into "great detail about the accuracy of the seven convictions," pointing out "we spent just about 20 minutes on this issue alone in terms of trial time yesterday on what her criminal history was or was not." 6RP 325-26. The court therefore permitted the State to proceed with rebuttal. 6RP 329.

Rebecca Phifer, who works for the Spokane County Office of Pretrial Services, testified as the State's rebuttal witness. 6RP 332-33. She explained that when Tucker was booked into jail, she collected information

regarding Tucker's criminal history to aid the trial court in setting bail. 6RP 333-34. Based on her review of Tucker's record, Phifer determined Tucker had 14 adult felonies, including nine drug offenses, one second degree theft, another theft, one riot with a deadly weapon, one taking a motor vehicle without permission, and one attempting to elude. 6RP 334; CP 9-10 (pretrial report enumerating Tucker's felonies and misdemeanors). Phifer also determined Tucker had 18 adult misdemeanors, including six convictions for making a false statement. 6RP 335.

Defense counsel did not propose any limiting instruction that the jury should consider Tucker's prior convictions only for impeachment purposes.

4. Verdict and Sentencing

The jury found Tucker guilty of unlawful imprisonment and unlawful possession of a firearm, as charged. CP 210-11; 6RP 394-97.

At sentencing, defense counsel expressed dismay at the jury verdict on unlawful imprisonment, explaining, "it's my firm belief, your Honor, that basically what happened here is that the jury got carried away with that information having to do with prior record and not just focussing [sic] in from the standpoint of credibility." 7RP 409. Counsel likewise noted, with regard to the unlawful firearm possession conviction, "I think the prejudicial effect of the introduction of all that record, especially the misdemeanor

making false statements to the police, really caused the jury I think to get carried away with this thing.” 7RP 410.

The trial court acknowledged defense counsel was “falling on the sword.” 7RP 415. The court explained:

After 300-and-some criminal jury trials that I’ve done down here, this criminal history of Ms. Tucker wouldn’t even have come in, we wouldn’t even have talked about. The only thing the jurors would have ever heard is the fact that she had an underlying felony that prevented her from having a firearm and that’s all they would have heard. We wouldn’t have heard anything else but we spent a great amount of time when we go into great detail in advance in motions in limine to make sure this kind of stuff doesn’t happen, that jurors don’t inadvertently hear about the defendant’s criminal history.

7RP 421-22. The court believed defense counsel “sort of started to crack the door open” to Tucker’s criminal history, but it was really Tucker who “started going into, I would suggest in fairly great detail, [her] criminal history.” 7RP 422. The court claimed “[c]ounsel didn’t get into any criminal history.” 7RP 422.

The trial court sentenced Tucker to the low end of the standard range for both offenses: 51 months for unlawful imprisonment and 87 months for unlawful possession of a firearm, to run concurrently. 7RP 424; CP 240-42. The court imposed only mandatory legal financial obligations. 7RP 425; CP 244-45. Tucker timely appealed. CP 253.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN TUCKER'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM.

In every criminal prosecution, due process requires the State prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A reviewing court must reverse a conviction for insufficient evidence where no rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt, viewing the evidence in the light most favorable to the State. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

“[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” Id. at 16. Such inferences must “logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.” Bailey v. Alabama, 219 U.S. 219, 232, 31 S. Ct. 145, 55 L. Ed. 191 (1911). When there is insufficient evidence to support a conviction, the remedy is to reverse the conviction and dismiss the charge with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

A person is guilty of first degree unlawful possession of a firearm “if the person owns, has in his or her possession, or has in his or her control any

firearm after having previously been convicted . . . in this state or elsewhere of any serious offense as defined in this chapter.” RCW 9.41.040(1)(a); see also CP 208 (to-convict instruction). RCW 9.41.040(10) defines “firearm” as a “weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder.” Notably, the jury was not instructed on this definition. See CP 191-209; 11 WASH. PRACTICE: WASH. PATTERN INSTRUCTION: CRIMINAL 133.01 (4th ed. 2016) (WPIC) (specifying to define firearm for the jury); WPIC 2.10 (defining firearm).

RCW 9.41.040(10) requires that the device “may be fired” in order to constitute a firearm. State v. Padilla, 95 Wn. App. 531, 534-35, 978 P.2d 1113 (1999). As such, a gun-like object incapable of being fired is not a “firearm.” State v. Jussila, 197 Wn. App. 908, 933, 392 P.3d 1108 (2017). For example, a nondeadly toy gun is not a firearm per the statutory definition. Id. But an unloaded firearm that can be loaded or a malfunctioning firearm that can be fixed are both firearms under the statute. Id. Thus, while the firearm need not be immediately operable at the time of the offense, the State must prove the firearm is a “gun in fact” rather than a toy gun. State v. Raleigh, 157 Wn. App. 728, 734, 238 P.3d 1211 (2010).

Case law provides guidance as to when the State has sufficiently proved a firearm is a “gun in fact.”² In Padilla, the court held a gun rendered permanently inoperable is not a firearm under the statutory definition. 95 Wn. App. at 535. But a “disassembled firearm that can be rendered operational with reasonable effort and within a reasonable time period is a firearm within the meaning of [the statute].” Id. There was sufficient evidence that Padilla possessed a firearm where the pistol was disassembled but could be reassembled in a matter of seconds. Id. at 536.

In Raleigh, the State proved the firearm at issue was a gun in fact where the officer who executed the search warrant found two “toy” guns and one “real” gun. 157 Wn. App. at 734. The real gun held a magazine, was loaded with a round of ammunition in the chamber, and had a working safety and slide. Id. The gun’s firing pin needed some repair, but it could be made quickly operable with everyday tools. Id.

In Jussila, “[n]o one explicitly declared that a gun was real or operable.” 197 Wn. App. at 934. However, a police officer testified he found soft rifle cases with rifles inside, and the owner of the stolen guns identified them as his. Id. at 933. Witnesses repeatedly referred to the stolen items as guns, shotguns, firearms, weapons, and rifles. Id. at 934. The State

² The definition of a firearm in RCW 9.41.010(10) applies to several other statutes, including the firearm sentencing enhancement authorized in RCW 9.94A.533(3). The discussed case law is therefore relevant, even though not all specifically addresses unlawful possession of a firearm.

also presented evidence that some of the guns were loaded with ammunition. Id. at 933-34.

Evidence that a device appears to be a real gun and is wielded during the commission of a crime may also be sufficient circumstantial proof that the device is a firearm. State v. Crowder, 196 Wn. App. 861, 872-73, 385 P.3d 275 (2016). For instance, Crowder threatened the complainant with a gun and placed it to her head; the complainant described the gun as having a “spinning barrel,” and later identified the gun as a revolver seized from Crowder’s house. Id. at 873.

Similarly, in State v. Tasker, 193 Wn. App. 575, 595, 373 P.3d 310 (2016), Tasker pointed the gun at the complainant and demanded her purse. The complainant testified it was a gun and she heard a “clicking noise,” which “was consistent with Mr. Tasker’s use of a real gun.” Id.

No similar evidence exists in Tucker’s case. Crandall did not say Tucker used a gun in the commission of the unlawful imprisonment. See SRP 106-27. Schuchman testified Tucker said she put a gun to Crandall’s head and told Crandall to get in the car. 6RP 209. But Schuchman testified this was a different gun than the “pretty shotgun” she claimed Tucker had just acquired. 6RP 219. Thus, there was no circumstantial evidence that Tucker wielded the rifle during the unlawful imprisonment that would suggest it was a real gun.

No other evidence established the rifle found in Tucker's backseat was a gun in fact. The rifle was found in a soft, tan case and was admitted as an exhibit. CP 216 (stating "Rifle .30/.30"); 5RP 159-62; 5RP 162-63. Photographs of the rifle in evidence show it has a serial number. Exs. D116-D119. Schuchman testified Tucker told her "she had just come up on a brand new pretty gun," and believed the "numbers" of the gun were "30-30 or a 30-11." 6RP 209, 219.

However, no witnesses actually testified to the make, model, or caliber of the rifle. Officer Huffman testified only that he found a rifle and rifle case in the backseat of Tucker's vehicle. 5RP 159-64. Huffman did not testify the rifle was "real," nor did any other witness. Huffman also did not testify to his familiarity with firearms, which might suggest his ability to identify the rifle as a real gun. See 5RP 146-50 (briefly discussing his training and experience).

There was no evidence the rifle was ever test-fired. Nor did any witness testify the rifle could be fired, was in working order, or could be made operable with relative ease. None of the rifle's component parts were tested or examined. Unlike Raleigh and Jussila, the State did not introduce any evidence of ammunition inside the rifle, or even that there was ammunition found near the rifle, in the rifle case, or in the car. See State v. Anderson, 94 Wn. App. 151, 163, 971 P.2d 585 (1999), rev'd on other

grounds, 141 Wn.2d 357, 5 P.3d 1247 (2000) (“That the weapon was loaded leads to an inference that it was either operable or could be made operable within a reasonable period of time—why else would it have been loaded?”). Nor was there any discussion among the parties about securing the rifle before sending it back to the jury room, suggesting it was not capable of being fired and presented no danger to the jury.

Put simply, the State produced a rifle-like object but did not prove it was, in fact, a real rifle. Unlike the case law discussed above, there was no evidence establishing the gun was capable of being fired, at the time or within a reasonable amount of time. Simply introducing the gun into evidence, without more, is not enough. It would be speculation to say the jury examined the gun and determined it was capable of being fired. The gun could have been a replica, a toy, or permanently inoperable, which does not meet the statutory definition of a firearm.

The State failed to prove Tucker possessed or controlled a firearm, as defined by RCW 9.41.040(10). This Court should reverse Tucker’s conviction for unlawful possession of a firearm and remand with instructions to dismiss the charge with prejudice. Hickman, 135 Wn.2d at 99.

D. CONCLUSION

For the aforementioned reasons, this Court should dismiss Tucker's unlawful possession of a firearm conviction for insufficient evidence.

DATED this 13th day of December, 2017.

Respectfully submitted,

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December 13, 2017 - 11:29 AM

Transmittal Information

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Superior Court Case Number: 15-1-04072-4

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