

67947-3

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No. 67947-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JOSEPH VAUX,

Appellant.

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

The Honorable Richard D. Eadie

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT

**Vaux was denied his constitutional right to a defense when the trial court refused to instruct the jury on his affirmative defense to the crime of unlawful possession of a firearm.**

1. The State confuses Vaux's right to claim an affirmative defense based on lack of notice with a challenge to the sufficiency of the evidence.

Where a defendant was not advised orally and in writing of the loss of his right to bear arms, he is entitled to claim an affirmative defense to a charge of unlawful possession of a firearm. State v. Breitung, 173 Wn.2d 393, 403, 267 P.3d 1012 (2011). In its response brief, the State miscasts this issue, claiming the sole question is one of knowledge.

The State further claims that Vaux would not have been entitled to claim this defense under Breitung because “in Breitung, there was no evidence that the defendant received the required written or oral notice.” Br. Resp. at 10. The State is wrong on several counts. First, the State fundamentally misreads Breitung. As noted in Vaux's opening brief, Breitung involved a challenge to the

sufficiency of the evidence. See Br. App. at 14-15. In Breitung, the absence of evidence that Breitung had received the requisite notice required reversal of his conviction. 173 Wn.2d at 402.

Here, by contrast, the Court is faced with a different error, and different argument on appeal. The question is not whether the evidence was sufficient, but whether the trial court's refusal to instruct the jury on Vaux's defense denied him a fair trial. It is well-settled that the standard for whether to issue a defense-proposed jury instruction on a defense is whether, viewed in the light most favorable to the defendant, the evidence supports giving the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000),<sup>1</sup> which in effect is the opposite standard to that applied when assessing a sufficiency challenge.

2. The evidence supported the instruction.

The State concedes, as it must, that there is no evidence Vaux received oral notice of the loss of his right to

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<sup>1</sup> The State curiously does not reference this standard in its brief or even cite Fernandez-Medina, even though Vaux specifically addressed the incorrect standard employed by the trial court in his opening brief. See Br. App. at 14-15.

bear arms. The State relies heavily, however, on Vaux's statement of defendant on plea of guilty, in which the State claims Vaux was advised in writing of the loss of his right to bear arms. Yet, although the State goes to the considerable trouble of reproducing in its brief actual paragraphs from the guilty plea form, the State glosses over the fact that the plea form specifies the defendant should initial paragraphs that do not apply to him.

Vaux affixed his initials beside the paragraph stating that he would lose his right to possess a firearm, suggesting that he was led to believe the paragraph did not apply to him. The State asserts that "common sense dictates ... Vaux's attorney most likely had Vaux initial the paragraph to signify that he had read and understood the prohibition." Br. Resp. at 13. This is a jury question, and an argument that the State could have made to a properly-instructed jury. Given the ambiguity, however, and the want of proof of oral notice, in the light most favorable to Vaux, Vaux did not

receive the requisite notice. The jury should have been instructed on Vaux's affirmative defense.<sup>2</sup>

3. The State's claim that Vaux's proposed instructions misstated the law is a straw man argument that depends on a misreading of the record.

The State makes the alternative argument that Vaux's proposed instructions misstated the law because they did not allocate the burden of proof to the defendant, and thus Vaux was not entitled to the instructions. Br. Resp. at 10. This is a disingenuous claim that depends upon a misreading of the record.

As the State admits, Vaux's counsel offered to redraft the proposed instructions to conform with the State's objection that they should be phrased in the form of an affirmative defense. 4RP 42-43; see Br. Resp. at 16. The State remarks, however, "[a]though defense counsel said that he would re-word the instruction to reflect the defendant's

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<sup>2</sup> The State concedes in a footnote that whether an accused person received the required notice is an affirmative defense to a charge of unlawful possession of a firearm. Br. Resp. at 20 n. 12. However the State confuses the question of whether the defendant is entitled to claim the defense – a threshold determination to be made by the court – with the question whether, once established, the defense should be decided by the jury. See id. (erroneously citing State v. McCarty, 152 Wn. App. 351, 215 P.3d 1036 (2009) to argue that Breitung left undecided the question whether the defense is to be decided by the court or the jury).

burden, counsel never proposed an instruction that properly stated the law.” Br. Resp. at 16.

This assertion mischaracterizes the record by omission, because immediately after defense counsel made this offer, the prosecutor argued that Vaux had not met his burden to claim the defense. 4RP 43. Following the State’s argument, the trial court denied Vaux’s request for the instructions, thus making the question of whether the instructions accurately stated the law moot. 4RP 47-49.

As noted in argument 1, supra, the trial court did not refuse the instructions on the basis that they misstated the law (in fact, the court found they accurately stated the law) but denied the request based upon its misunderstanding of the required standard to be applied when instructing a jury. Id. Following the court’s ruling, there would have been no reason for defense counsel to submit amended instructions, and the State’s suggestion that Vaux should have had to do so in order to preserve the violation of his right to a defense for appeal is a straw man argument.

The question before this Court is whether Vaux was denied his right to a defense by the court's failure to instruct the jury on an affirmative defense which the State concedes is legitimate.<sup>3</sup> Br. Resp. at 20 n. 12. Because the evidence viewed in the light most favorable to Vaux suggests he did not receive the requisite notice, this Court should conclude the court's refusal to let the defense go to the jury was error.

4. The failure to instruct the jury on the affirmative defense approved in *Breitung* was prejudicial.

Vaux specifically requested the jury be instructed on the affirmative defense approved by *Breitung*. The trial court denied his motion, prompting Vaux's defense attorney to exclaim that the court had "gutted" Vaux's defense. 1RP 49. Because the State prevailed upon the court to exclude the instructions, the State was able to argue Vaux's defense was a "smokescreen," and that he was playing on the jurors' sympathy. 4RP 104. The court also sustained the State's

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<sup>3</sup> Given the State's concession, the State's assertion that "Vaux asks this Court to transform a statutory violation into an error of constitutional magnitude," Br. Resp. at 12, is puzzling. The denial of the right to a defense is, in fact, a constitutional error. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22; *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984), *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

objection to Vaux's argument that he did not know he was not permitted to possess firearms on the basis that the argument misstated the law. 4RP 109.

The evidence viewed in the light most favorable to Vaux supported the inference that he did not receive the notice required by law. This Court should conclude that the trial court's failure to instruct the jury consistent with Breitung prejudicially denied Vaux his right to a defense.

B. CONCLUSION

For the foregoing reasons, and for the reasons argued in Vaux's opening brief, this Court should reverse Vaux's conviction. As argued in Vaux's opening brief, the evidence is insufficient to prove Vaux had more than fleeting possession of a firearm, thus Vaux's conviction should be dismissed.

DATED this 11<sup>th</sup> day of September, 2012.

Respectfully submitted:

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Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 11<sup>TH</sup> DAY OF SEPTEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 11<sup>TH</sup> DAY OF SEPTEMBER, 2012.

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