NO. 30871-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

LARRY A. POWELL,

Appellant.

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

The Honorable Jerome Leveque, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Under the law of the case, the evidence was insufficient to convict appellant of first degree unlawful firearm possession.

Issue Pertaining to Assignment of Error

To convict appellant of first degree unlawful firearm possession, the State had to prove that appellant had previously been convicted of a "serious offense." The parties so stipulated. The jury was instructed, however, that it could "consider evidence that the defendant has been convicted of a crime in deciding what weight or credibility to give to the defendant's testimony and for no other purpose."

a. Under the law of the case doctrine, did the instruction preclude consideration of the stipulation as evidence of the "serious offense" element necessary to convict appellant of first degree unlawful firearm possession?

b. Because the instruction precluded consideration of the prior conviction as to appellant's guilt, was the evidence insufficient to convict?

B. STATEMENT OF THE CASE

The State charged Larry Powell with residential burglary, attempted first degree arson, two counts of second degree assault while armed with a firearm, and first degree unlawful possession of a firearm.

The charges were based on a burglary and its aftermath occurring on July 30, 2011.[1] CP 1-5. The arson charge was later dismissed for insufficient evidence. CP 14-15.

Witnesses testified Powell and another man, Trevor Frantz, broke into the home of Marcus Anzivino and took property. Anzivino's neighbor testified Powell threatened him with a gun when the neighbor attempted to prevent Frantz and Powell from leaving Anzivino's residence. RP 152-58. Anzivino testified he was shot at when he tried to follow a minivan he believed was being driven by the burglars. RP 186, 190-99.

Frantz testified against Powell pursuant to a plea agreement which, according to Frantz, would result in the dismissal of an attempted arson charge and a firearm enhancement. RP 275, 277-93. Finally, although police never found the license plates the witnesses identified, police arrested Powell in a white minivan matching the description of the one involved in the burglary. RP 259-61, 459, 465-67.

Powell questioned the reliability of the witness identifications, maintained Frantz was implicating him to take advantage of generous a

[1] The State also charged Powell with bail jumping occurring on July 27. Powell eventually pled guilty to that charge. CP 1-2, 19-27; RP 17.

plea agreement, and asserted another minivan was involved in the shooting. RP 136-41, 506-14.

For purposes of the firearm charge, Powell stipulated he had previously been convicted of a "serious offense as defined under chapter RCW 9.94."[2] CP 28; RP 460. The trial court gave the following limiting instruction as to the stipulation: "You may consider evidence that the defendant has been convicted of a crime in deciding what weight or credibility to give to the defendant's testimony *and for no other purpose*." CP 92 (Instruction 9) (emphasis added). Neither party objected to the instruction. RP 480.

A jury convicted Powell of the remaining charges and enhancements. CP 113-18. The court sentenced Powell to life without the possibility of parole under the Persistent Offender Accountability Act[3] on each of the assault convictions and the high end of the standard range on the remaining convictions.[4] CP 124-36; RP 539-40.

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[2] The pertinent statute, RCW 9.41.040(1)(a), instead requires conviction of a serious offense under chapter 9.41 RCW.

[3] RCW 9.94A.570.

[4] The court also sentenced Powell to consecutive six-year firearm enhancements on the second degree assault convictions. CP 129; RCW 9.94A.533(3)(b), (d).

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUPPORT POWELL'S CONVICTION FOR FIRST DEGREE UNLAWFUL FIREARM POSSESSION.

Absent objections, jury instructions become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); State v. Hames, 74 Wn.2d 173, 182, 721, 725, 446 P.2d 344 (1968). Since neither the State nor Powell objected to Instruction 9, it became the law of the case.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State, a rational trier of fact could find each element of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Under RCW 9.41.040(1)(a),

> A person . . .is guilty of the crime of unlawful possession of a firearm in the first degree, if the person . . . has in his or her possession [or] control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter.

See CP 104 (Instruction 21)

Under Instruction 9, the jury was precluded from considering any evidence that Powell had previously been convicted of a crime for any purpose other than determining his credibility. CP 92. Yet to prove Powell unlawfully possessed a firearm as charged in the information, the State had to prove beyond a reasonable doubt that Powell had been convicted of a serious offense. CP 104.

Although juries are presumed to follow the court's instructions, State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001), this presumption fails here. Had the jury properly followed Instruction 9, it would have necessarily reached a not guilty verdict. Unable to consider the evidence of Powell's prior conviction for anything other than credibility, the jury could not lawfully conclude the State had proven each element of the firearm charge beyond a reasonable doubt.

This Court should, therefore, reverse Powell's conviction and dismiss the charge. See Hickman, 135 Wn.2d at 103-06 (applying Green sufficiency analysis in context of additional element); see also State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (double jeopardy protects against a second prosecution for the same offense after acquittal, conviction, or a reversal for insufficient evidence).

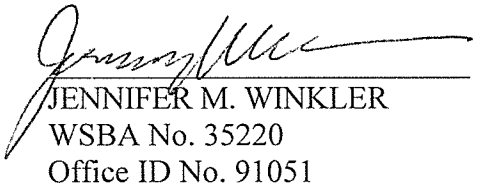
D. CONCLUSION

Under the law of the case, the evidence was insufficient to convict Powell of first degree unlawful firearm possession. His conviction must therefore be reversed and the charge dismissed.

DATED this 26TH day of November, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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State v. Larry Powell

No. 30871-5-III

Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 22nd day of November, 2012, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 22nd day of November, 2012.

X Patrick Mayovsky