

**NO. 35099-8-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**DAVID W. RISLEY,**

**Appellant.**

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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**Appeal from the Superior Court of Skamania County  
The Honorable E. Thompson Reynolds  
No. 06-1-00019-4**

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**BRIEF OF RESPONDENT**

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**A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.**

1. Did the trial court commit reversible error by failing to instruct the jury that it must find that the defendant “knowingly” possessed a firearm in order to convict? (Appellant’s Assignment of Error 2)
2. Since the defendant proposed the erroneous jury instruction which was given by the trial court, does the “invited error” doctrine preclude reversal of the defendant’s conviction? (Appellant’s Assignments of Error 1 and 2)
3. Was the defendant denied effective assistance of counsel when trial counsel proposed jury instructions that omitted the requirement that defendant “knowingly” possessed a firearm? (Appellant’s Assignment of Error 1)
4. If the performance of defendant’s attorney in proposing an erroneous jury instruction fell below objective standards of reasonableness, was the error harmless? (Appellant’s Assignments of Error 1 and 2)

**B. STATEMENT OF THE CASE**

**1. FACTUAL HISTORY**

On March 4, 2006, defendant David Risley was a passenger in a 1980 Honda Civic hatchback driven by Lloyd DJ Hawkins. RP 38. Deputy David Garcia saw the vehicle speeding and initiated a traffic stop. RP 38. When he approached the vehicle, Deputy Garcia recognized Lloyd DJ Hawkins as the driver and defendant David Risley as the passenger. RP

38. As he walked up to the vehicle, he observed through the window a rifle between the bucket seats of the vehicle “where the e-brake or gear shift would be.” RP 38, 42. Deputy Garcia estimated that the weapon was “maybe half a foot, a foot” from defendant Risley. RP 49. Deputy Garcia asked if the weapon was loaded, and Mr. Hawkins stated that it was not and showed the weapon to Deputy Garcia. RP 39.

Deputy Garcia held the weapon for officer safety and went to his patrol car, where he checked the status of the driver and checked for outstanding warrants on both the driver and defendant Risley. RP 39. He also checked to see if the rifle was stolen. RP 39. Upon learning that all inquiries were negative, Deputy Garcia returned to the vehicle to return the rifle and to give a speed warning to the driver. RP 39. Deputy Garcia asked what they were doing with the rifle and was told that “they” had been target shooting earlier in the day in Willard. RP 39. Deputy Garcia testified that both Mr. Hawkins and defendant Risley told him that they were target shooting. RP 40. During that conversation dispatch informed Deputy Garcia that defendant Risley had previously been convicted of a felony. RP 39-40. Deputy Garcia went to the passenger side of the car and placed defendant Risley under arrest for unlawful possession of a firearm. RP 40.

Lloyd DJ Hawkins testified that he was out shooting by himself at approximately 1:30 or 2 p.m. on March 4, 2006, and that after he went shooting he went for a six-hour drive with defendant Risley around the Hemlock area in his 1980 Honda Civic until approximately 11 p.m. RP 58, 59, 62,63. He testified that he put the firearm "in the back seat" after he finished shooting, and that it was there when defendant Risley was in the vehicle. RP 59. He also testified that the barrel of the gun was on the floor and the butt of the gun was leaning up against the back seat. RP 65.

Defendant Risley testified that he did not participate in shooting the firearm with Mr. Hawkins. RP 74. He denied that the rifle was between the two bucket seats and testified that it was "in the back". RP 74, 75. He claimed that he told Deputy Garcia that Mr. Hawkins had said that he was out shooting, and that they had discussed his shooting that day. RP 74. On cross-examination defendant Risley testified as follows about his knowledge of the gun in the vehicle:

Q: And you had no idea there was a gun in the car?

A: (No response.)

Q: No clue?

THE COURT: You need to speak up, sir.

Mr. Risley: No

THE COURT: Thank you.

Q: All right. Not until the officer pointed it out and asked you to – asked Mr. Hawkins to give it to him for officer safety purposes?

A: Yeah, then I knew it was there.

Q: That was the first time you had any idea?

**A: Oh, I probably knew it was back there, but I didn't really, you know.**

**Q: What do you mean? I didn't understand that.**

**A: You know, I knew it was back there, but I didn't think I was, you know –**

**Q: You knew it was back there?**

**A: Yeah.**

**Q: Okay.**

**A: But I'm not, you know, I didn't know I was in the wrong.**

RP 78 (Emphasis added).

On rebuttal, Deputy Shelley Flood testified that she was riding during field training with Deputy Garcia on March 4, 2006 when he contacted defendant Risley. RP 80. She testified that she approached the passenger side of the vehicle when Deputy Garcia approached the driver's side. RP 81. She immediately noticed a gun lying between the two front bucket seats. RP 81. She also testified that the gun was clearly visible and a person sitting in the seats could not have been unaware of the gun. RP 82. Deputy Flood testified that both Mr. Hawkins and defendant Risley indicated that they both had been target shooting in Willard. RP 84.

## **2. PROCEDURAL HISTORY**

The State charged David W. Risley on March 6, 2006 with one count of unlawful possession of a firearm in the second degree. CP 1. The information properly alleged that the defendant had been previously convicted of a felony which is not a serious offense and "did knowingly

own or have in his possession or under his control a firearm, to wit: .22 Ruger model 3 10/22 Serial # 24238404 . . .” CP 1.

A 3.5 hearing was held on May 24, 2006. The defendant’s statement that he was target shooting with Mr. Hawkins was ruled admissible because it was made before defendant Risley was in custody. His statement that he knew he was a convicted felon but thought he could be around firearms was made after he was in custody and was therefore suppressed because his Miranda rights had not been given. RP 25, 26.

The case was tried to a jury on June 13, 2006. RP 30. Defense counsel proposed a definitional instruction and a to-convict instruction which omitted the requirement that the defendant “knowingly possess” the firearm. CP 58, 59. The court gave the definitional and to-convict instruction proposed by defense counsel.<sup>1</sup> CP 15, 16, 58, 59. The plaintiff also proposed similar instructions which did not contain the requirement that the defendant “knowingly possess” the firearm. CP 45, 46.

The State called the arresting officer, Deputy David Garcia, in its case-in-chief. RP 36-54. The defense produced the testimony of Lloyd

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<sup>1</sup> Appellant’s counsel states that the court modified defense attorney’s jury instructions to correct the “ ‘second’ degree language to ‘first’ degree” (sic) and to delete reference to ownership of a firearm. Brief of Appellant, page 6. In fact, instructions proposed by defense counsel were used without change by the court. CP 15, 16, 58, 59. The prosecutor’s proposed instructions were the ones which erroneously referred to first degree unlawful possession of a firearm and which included a reference to ownership of the firearm. CP 46.

Hawkins and of the defendant, David Risley. RP 57-70, 72-79. The State's rebuttal witnesses were Deputy Shelley Flood and Deputy Garcia. RP 80-89. The jury began deliberating at 2:18 p.m on June 13, 2006, and a verdict was taken from the jury at 2:59 p.m. RP 116, 117. The defendant was convicted as charged. RP 117. He was sentenced within the standard range on June 15, 2006. CP 22-33. His timely notice of appeal followed. CP 34.

### **C. ARGUMENT**

#### **1. ALTHOUGH THE JURY INSTRUCTION WAS DEFECTIVE BECAUSE IT DID NOT CONTAIN THE REQUIREMENT OF "KNOWING POSSESSION" OF THE GUN, REVERSAL ON THIS BASIS IS NOT WARRANTED SINCE THE DEFENDANT'S TRIAL ATTORNEY INVITED THE ERROR BY PROPOSING THE JURY INSTRUCTION.**

RCW 9.41.040(2)(a) defines unlawful possession of a firearm in the second degree as follows:

A person . . . is guilty of the crime of unlawful possession of a firearm in the second degree, if the person . . . owns, has in his or her possession, or has in his or her control any firearm:

- (i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section . . .

The statute does not include as an element the requirement that the accused knowingly possess the firearm, but in 2000 the Washington Supreme Court held that "knowing possession" is an element of the crime. State v. Anderson, 141 Wn.2d 357, 359, 367, 5 P.3d 1247(2000).

When a trial court fails to include an essential element in a "to convict" instruction, this is usually a manifest constitutional error that requires automatic reversal. State v. Smith, 131 Wn.2d 258, 265, 930 P.2d 917(1997). However, when a defendant proposes an instruction that is identical to the instruction the trial court gives, the invited error doctrine bars an appellate court from reversing the conviction because of an error in that jury instruction. State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); State v. Summers, 107 Wn. App. 373, 381, 28 P.3d 780(2001). The "invited error" doctrine is a strict rule to be applied in every situation where the defendant's error at least in part caused the error, even where the error is one of constitutional magnitude. State v. Studd, 137 Wn.2d at 547.

In this case the defendant proposed the definitional and to-convict instructions given by the court. CP 15,16,58,59. The court gave the following instructions:

INSTRUCTION NO. 6

A person commits the crime of unlawful possession of a firearm in the second degree when he has a firearm in his possession or control and he has previously been convicted of a felony, which is not a serious offense.

CP 15, Instruction 6.

INSTRUCTION NO. 7

To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the 4<sup>th</sup> day of March, 2006, the defendant had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of theft in the second degree; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 16, Instruction 7.

These instructions are defective because of the omission of the “knowing possession” element. However, as discussed above, reversal of

the defendant's conviction cannot be based on this instructional error due to the "invited error" doctrine.

**2. EVEN THOUGH THE INVITED ERROR DOCTRINE PRECLUDES REVERSAL BASED ON ERRONEOUS INSTRUCTIONS PROPOSED BY THE DEFENSE, THE DEFENDANT CAN OBTAIN APPELLATE REVIEW OF THE ISSUE BY ALLEGING INEFFECTIVE ASSISTANCE OF COUNSEL.**

Although the invited error doctrine cannot be used to attack a conviction based upon an erroneous instruction proposed by the defendant's trial counsel, that defendant can reach the issue on appeal through an allegation of ineffective assistance of counsel. State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999); State v. Summers, 107 Wn. App. 373, 381, 28 P.3d 780(2001). In that context the invited error doctrine will not bar appellate review of the error.

Summers involved the omission of the element of "knowing possession" in a charge of unlawful possession of a firearm. The court held that since the defendant proposed the erroneous jury instruction given by the court, his appeal failed on that basis. However, anticipating that his claim would fail, Summers also alleged ineffective assistance of counsel for proposing the jury instruction, which properly reflected the law at the time of trial, before the decision in State v. Anderson, *supra*. The

appellate court considered the claim and held that the attorney's performance could not be found to fall below acceptable standards by requesting an instruction which appellate courts had repeatedly and unanimously approved. Summers, at 382. Because trial counsel's performance was not deficient, the court did not address whether Summers was prejudiced.

**3. ALTHOUGH THE DEFENSE ATTORNEY'S PERFORMANCE IN PROPOSING THE FLAWED INSTRUCTION WAS DEFICIENT, THE ERROR IS HARMLESS BECAUSE THE MISSING ELEMENT IS SUPPORTED BY UNCONTROVERTED EVIDENCE, THEREBY ESTABLISHING THAT THE OUTCOME WOULD NOT HAVE DIFFERED IF THE CORRECT INSTRUCTION HAD BEEN GIVEN.**

The standard of review for a claim of ineffective assistance of counsel is well settled. Representation is deemed constitutionally sufficient unless (1) considering all the circumstances, the attorney's performance was below objective standards of reasonableness, and (2) with reasonable probability, the outcome would have differed if the attorney had performed adequately. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 523 U.S. 1008 (1998). "A reasonable probability is a probability sufficient to undermine

confidence in the outcome." State v. Thomas, 109 Wash.2d 222, 226, 743 P.2d 816 (1987).

Given the unequivocal statements of the Washington Supreme Court in State v. Anderson in 2000 that "knowing possession" of a firearm is an element of the crime of unlawful possession of a firearm, the State must concede that the first prong of the standard of review for ineffective assistance has been met.<sup>2</sup> The performance of the trial attorney for defendant was "below objective standards of reasonableness." This does not, however, end the inquiry.

Constitutional errors may be so insignificant as to be harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." Guloy, at 425. The state bears the burden of proving that the error was harmless. Guloy, at 425.

A jury verdict based on the failure to instruct on the elements will not be reversed if the missing element is supported by uncontroverted evidence. State v. Brown, 147 Wn.2d 330, 344, 58 P.3d 889 (2001). If,

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<sup>2</sup> The Washington Pattern Jury Instructions available on the Washington Supreme Court website, which are "current through the 2005 update", omit any mention of the "knowing possession" requirement. See 11A Washington Practice, Washington Pattern Jury Instruction Crim. WPIC 133.02.02.

after thoroughly examining the record, the court is convinced beyond a reasonable doubt that the error did not contribute to the verdict, the conviction will be affirmed. Brown, 147 Wn.2d at 341, 342, citing Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999).

In the present case the court must analyze the evidence in the context of the omitted “knowing possession” element and determine if there was uncontroverted evidence at trial that the defendant knew the gun was in the vehicle. If there is undisputed evidence of “knowing possession”, under Brown the court can find beyond a reasonable doubt that the error did not affect the verdict and can affirm the conviction.

a. To affirm the conviction, there must be undisputed evidence establishing the missing element of “knowing possession” of the firearm.

The only uncontroverted evidence which is relevant to the missing element of “knowing possession” of a firearm is the testimony of defendant Risley about whether he knew the gun was in the vehicle<sup>3</sup>. Defendant Risley was not asked on direct examination if he knew the gun was in the vehicle, and he did not give any indication of his knowledge.

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<sup>3</sup> The circumstantial evidence that defendant Risley knew or must have known that the gun was in the vehicle due to his proximity to it and its clear visibility to police officers was contested by defendant and his witness, albeit less than credibly. Therefore the evidence is not “uncontroverted” and cannot be the basis for a claim that the error was harmless.

On cross-examination defendant Risley testified as follows about his knowledge of the gun in the vehicle:

Q: And you had no idea there was a gun in the car?

A: (No response.)

Q: No clue?

THE COURT: You need to speak up, sir.

Mr. Risley: No

THE COURT: Thank you.

Q: All right. Not until the officer pointed it out and asked you to – asked Mr. Hawkins to give it to him for officer safety purposes?

A: Yeah, then I knew it was there.

Q: That was the first time you had any idea?

A: **Oh, I probably knew it was back there, but I didn't really, you know.**

Q: What do you mean? I didn't understand that.

A: **You know, I knew it was back there, but I didn't think I was, you know –**

Q: **You knew it was back there?**

A: **Yeah.**

Q: Okay.

A: But I'm not, you know, I didn't know I was in the wrong.

RP 78 (Emphasis added).

It is noteworthy that after an initial, nearly inaudible denial, defendant Risley stated once in his testimony that he “probably” knew the gun was in the car, and twice admitted that he *did* know the gun was in the car. No other evidence disputed this knowledge. The totality of the exchange about the extent of defendant’s knowledge that the gun was in the vehicle establishes unquestionably that the missing element in the instruction did not contribute to the verdict. The evidence should not be considered ambiguous and therefore “controverted”.

b. State v. Shouse is factually distinguishable.

Defendant argues on appeal that State v. Shouse, 119 Wn. App. 793, 83 P.3d 453 (2004)<sup>4</sup> requires reversal in the present case due to similarity of facts and controverted evidence of knowledge of the presence of the firearm in both cases. However, because there is uncontroverted evidence in defendant Risley's testimony that he knew the gun was in the car, Shouse is distinguishable. Shouse involved a speeding stop in which a firearm was found on the floor of the front passenger side of the car. No one was sitting in the front passenger seat. Defendant Shouse was in the back seat sitting behind the driver and beside another back seat passenger.

The most important distinguishing fact is that defendant Shouse did not testify or indicate at any time that he knew the gun was in the car. When the trooper picked up the gun and asked whose it was, defendant Shouse told him the gun belonged to his girlfriend, who was also the owner of the car in which it was found.

The other two occupants of the car also had felony criminal history and gave inconsistent statements. The driver said at the scene that he had never seen the gun before, but at trial admitted that he had lied and then testified that defendant Shouse held the weapon earlier. The other back-seat passenger testified that he did not see defendant Shouse at a house

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<sup>4</sup> Shouse is a Division III case which has not been previously cited as legal authority.

with the gun earlier. His testimony was impeached with a prior sworn statement that he did see Shouse with the gun earlier. He also admitted that he had previously told the police that Shouse had thrown the gun on the floor of the car before jumping into the back seat when they saw the trooper.

Defendant Shouse's girlfriend told the trooper that she had purchased the gun the day before and left it in the car. She said she did not show it to Shouse. But when she was reached by cell phone at the scene of the arrest, she said she did not know about any gun in her car.

The Shouse court held that it could not consider the instructional error harmless beyond a reasonable doubt. It emphasized three factors in the decision. The court indicated that the most important factor was that evidence of the defendant's knowledge was disputed. The driver testified that the defendant armed himself with the gun at a house prior to the stop, and the other passenger said that he did not. Both controverted their own statements. The owner of the gun said she shoved it under the passenger seat and did not show it to the defendant. All witnesses had criminal convictions which were used to impeach them.

The Shouse court at 797 also noted that it could not tell which instance of possessing the gun, either at a house before the stop or in the car, and which type of possession, actual or constructive, was used by the

jury to convict the defendant. And the closing arguments highlighted the “knowledge” element. The prosecutor argued that the fact the defendant recognized the gun and told the trooper it belonged to his girlfriend showed that he knew the gun was in the car, and the clear visibility showed he was in constructive possession of the gun. The defendant’s attorney argued that maybe the car’s occupants did not know the gun was in the car under the seat.

The testimony of defendant Risley that he knew the gun was in the car distinguishes the present case from Shouse. In Shouse there were two distinct locations for the jury to find that the defendant possessed the gun and both were proven with the same degree of certainty. Here, while defendant Risley may or may not have possessed the gun during the target shooting activity, he admitted that he knew that the gun was in the car, which should eliminate any confusion about when the jury must have found he possessed the gun. The jury may or may not have concluded from the testimony that the defendant participated in the target shooting, but the court need not speculate on that because the defendant’s admitted knowledge of the gun in the car was basically an admission of constructive possession, given other persuasive evidence of possession and control.

Defendant Risley argues on appeal that there were four different acts of possession of the gun – (1) target shooting, (2) next to Risley in the

vehicle during the stop, (3) in the backseat of the vehicle, and (4) when it was being passed by Mr. Hawkins to Deputy Garcia. Brief of Appellant, page 10. This analysis is faulty because it confuses evidence of the defendant's possession and control of the gun with evidence of the defendant's "*knowing* possession" of the gun, which must be proven by uncontroverted evidence in order to sustain the conviction. It is important for the court to keep in mind that the only pertinent issue on appeal is whether the defendant "knowingly" possessed the gun. This issue is answered by Mr. Risley's statements. The remaining issue for the jury-- whether the gun was located close enough to Mr. Risley for him to exercise control over it -- was not the subject of instructional error and is proven by direct testimony of Deputies Garcia and Flood and to some extent by testimony of Mr. Hawkins and Mr. Risley. Contrary to the assertions by defendant Risley, there is no need for the court to find that this issue was proven by uncontroverted evidence in order to affirm the conviction.

The Shouse court's discussion of statements made during closing arguments indicates that a similar analysis would be helpful in the present case. The closing arguments here show that only the unlawful possession of the firearm in the car was argued to the jury as the basis for the charge. The prosecutor referred to the target shooting testimony only in the

context of determining the credibility of witnesses, and the defense attorney did not mention target shooting in his closing argument. Both attorneys assumed in their arguments that the defendant admitted that he knew the gun was in the car. The prosecutor in closing stated:

So I'll give you an example of that. This gun is in my actual physical custody, right? But when I put it here, it's no longer in my actual physical custody, right? It's not in my hands, I'm not touching it, right? However, you know, two feet from me, any time I could reach out and grab it right here. That means I have dominion and control over it and it can be immediately exercised. It's right here. This is why it's so important for them to tell you a story, right, about it's in the back seat, right? *He either didn't know it was there or, like he said later in his testimony, did know it was there, but it was in the back seat.*

RP 106-107 (Emphasis added).

The prosecutor concluded:

Unfortunately, Mr. Risley, a convicted felon, was in possession, constructive possession of a firearm, had a firearm within his custody or control and he could immediately exercise that, or dominion and control and could immediately exercise the dominion and control by reaching out and grabbing it, six inches away from it.

RP 109-110.

Defense counsel agreed in closing that the critical question was constructive possession of the gun in the car.

. . . ownership's not at issue here. It's whether the limited facts as to where it was laying next to Mr. Risley as he was a passenger in a car, not that he was toting this

across the mountain on his back, actual possession, but whether there was constructive possession here. And you've heard two deputies say that it was between the seats. You've heard Mr. Risley and Mr. Hawkins say it was somewhere behind the seat. It's a small car. *But knowing something to be there doesn't actually mean you possess or control it.*

That possession, that control, that dominion and control, as the instruction tells you, as Instruction Number 8 tells you, must be immediately exercised. Be able to reach out and grab it. . . .

I want you to go back and think about, is that immediately exercised. Can that control, can that possession by Mr. Risley, not by Mr. Hawkins, granted, but by Mr. Risley who the State says, oh, he has equal access to it - - could that be immediately exercised? *That's what this case is really all about.*

RP 111-112 (Emphasis added).

The prosecutor responded:

Mr. Lanz, you know, I can't argue with him. He's right, what the case is about. The case is about whether you could reach out and grab this gun or not if you wanted to. And if you find that Mr. Risley could reach out and grab this gun, then you have to find him guilty. . . .

So really, the only question is at that point, do you believe that the gun was between the two or them or do you believe that it was someplace where Mr. Risley had no ability to grab it? . . .

RP 113.

c. In contemplating reversal, the appellate court must examine whether the omitted element, when applied to the available evidence, would alter the verdict in a retrial of the case.

In 2002 the Washington Supreme Court ruled in State v. Brown, 147 Wn.2d 330, 58 P.3d 889 (2002) that an erroneous jury instruction on accomplice liability is subject to harmless error analysis, following the United States Supreme Court case of Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). In a subsequent case which was stayed pending a decision in Brown, the court in State v. Jones, 117 Wn. App. 221, 70 P.3d 171 (2003) held that the instructional error omitting the element of knowledge in a unlawful possession of firearm case was harmless. The court quoted Neder:

[W]e are entitled to stand back and see what would be accomplished by [reversal] in this case. The omitted element was materiality. Petitioner underreported \$5 million on his tax returns, and did not contest the element of materiality at trial. Petitioner does not suggest that he would introduce any evidence bearing upon the issue of materiality if so allowed. Reversal without any consideration of the effect of the error upon the verdict would send the case back for retrial - a retrial not focused at all on the issue of materiality, but on contested issues on which the jury was properly instructed. We do not think the Sixth Amendment requires us to veer away from settled [federal] precedent to reach such a result.

State v. Jones, at 230, quoting Neder, 527 U.S. at 15.

The Jones court then analyzed the effect of the omitted element, “knowing possession”, on the verdict. The evidence showed that a security guard at a restaurant saw defendant Jones run into a men’s restroom and, as the guard followed, run out again. The guard went into the restroom and found a gun in the wastebasket, which he gave to the manager. The guard then saw defendant Jones come in and out of the restaurant and men’s room several times, appearing upset, and several times asked the guard and others if they had his “piece”. Jones went to the manager’s door and pounded on it, demanding return of his gun. A videotape showed Jones’ actions corresponded to the guard’s description.

The Jones court noted that the jury could not have convicted unless it found that defendant Jones was the person who put the gun into the wastebasket, because that was the only evidence of possession of the firearm. The court stated that whoever put the gun into the wastebasket could not have done so unwittingly or without knowledge that it was a gun.

Jones does not suggest that he would introduce any evidence bearing upon the element of knowledge if so allowed. Nor could he. His best defense was the one he used at trial - the videotape showed that several other men went into the restroom between the time of Spragg's last inspection and Jones' entry into the restroom, and any one of them could have put the gun into the wastebasket. If a new trial were held, Jones would still have to cope with Spragg's testimony and the evidence on the videotape -

showing that only Jones, and not any of those other men, returned to the men's restroom within minutes, came back out, spoke to Spragg in an agitated manner, and pounded on the manager's office door, all the while demanding the return of his "piece." This is damning and uncontroverted evidence of knowledge. We conclude beyond a reasonable doubt that the erroneous omission of the element of knowledge from the to-convict jury instruction had no effect on the verdict in Jones' trial.

State v. Jones, at 231.

A similar analysis of evidence in the present case indicates that the erroneous omission of the element of knowledge had no effect on the verdict. Defendant Risley has not indicated that he would present different evidence of knowledge, nor could he. His testimony settled the question of knowledge. In the terms of the Neder court, a retrial could only focus on the location of the firearm in the car and the issue of whether it was close enough to the defendant to be in his constructive possession – which was exactly the issue which was the subject of testimony and argument in the original trial. The verdict in a second trial should not differ if the jury is given a proper knowledge instruction since the defendant has already testified that he knew the gun was in the car. Thus, beyond a reasonable doubt, the error did not influence the verdict.

**D. CONCLUSION**

The State respectfully requests that the court determine that the instructional error was harmless beyond a reasonable doubt and affirm the defendant's conviction.

Respectfully submitted this 30<sup>TH</sup> day of April, 2008.

  
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