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NO. 35675-9-II

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

STATE OF WASHINGTON, RESPONDENT

v.

JORGE EDILBERTO GOMEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 05-1-01783-1

Kingman

BRIEF OF RESPONDENT

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

1. Did the trial court properly instruct the jury on the definition of 'firearm' where the instruction accurately informed the jury of the law? (Pertains to Appellant's Assignments of Error #1 and #2.)
2. Was trial counsel ineffective for failing to object to a proper jury instruction? (Pertains to Appellant's Assignment of Error #3.)
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B. STATEMENT OF THE CASE.

1. Procedure

On April 26, 2006, the State filed its Second Amended Information charging defendant with second degree possession of stolen property in count I, residential burglary in count II, first degree unlawful possession of a firearm in count III, and possession of a stolen firearm in count IV. CP 9-11.

The case proceeded to jury trial on October 12, 2006. RP 214. The jury returned a verdict of guilty on counts I, III, and IV, and acquitted defendant on count II.

The trial court sentenced defendant to total confinement of 165 months in prison. CP 109-121.

This timely appeal follows.

2. Facts

On April 13, 2005, Tacoma Police pulled over defendant for making an illegal right turn. RP 225. Officers noticed that defendant was driving a Toyota, but the license plates were registered to a Honda. RP 225. Defendant said he bought the car from a man named “Anthony.” RP 227. He then said he *borrowed* the car from Anthony. *Id.* Defendant said he did not know Anthony’s last name or any other information about him except that he lived in Lakewood. RP 227.

A records check on the Toyota showed that the Toyota had been stolen from Yet Sok. RP 228, 278. Defendant had a key on his key ring that started the car. RP 228-29. In fact, all the keys on defendant’s key ring started the car. *Id.* Officers arrested defendant and searched his car. They found a duffle bag behind the passenger’s seat. RP 232-251. Inside the duffle bag was a 9mm Steyr pistol that had been reported stolen by Brian Finch, a relative of defendant. RP 265-69. Officers found defendant’s wallet, numerous documents in defendant’s name, including

citizenship paperwork, all in the same duffle bag that contained the gun. RP 235-36. Officers found several dozen car keys in the car. RP 236. Under the driver's seat, officers discovered a loaded magazine, 9mm ammunition, and a shoulder holster for the gun they found. RP 232-34. Also found were stones, loose jewels, watches, knives, and coins that were stolen in a burglary of James Powell's residence. RP 240; 281-86.

Defendant told police that the items belonged to "Anthony." RP 251.

Defendant testified at trial, reciting a complicated story about Marshall Glabe giving him a ride and picking him up in the Toyota. RP 307. He claimed that Glabe brought the duffle bag containing the stolen property into the car. RP 305-08. According to defendant, Glabe pulled the 9mm on him and made him drive. RP 309. Defendant then made an intentional illegal turn to get the police officer's attention. RP 312. Defendant told the jury he thought that if he just got a ticket, that Glabe would just leave. RP 312. Defendant said that Glabe was the one who put defendant's license plates for the Honda on the Toyota, but did not explain how Glabe got the plates. RP 315.

Defendant admitted to 3 juvenile convictions for crimes of dishonesty and 3 felony convictions for crimes of dishonesty. RP 321-22. Defendant testified that he did not even know that the Finch residence in Lewis County had been burglarized. RP 328. But he later testified that he

had pleaded guilty to committing the Finch burglary with Glabe. RP 335-36. He claimed he never saw the firearm during the burglary. RP 335. However, defendant originally told police the gun was Anthony's. RP 251.

C. ARGUMENT.

1. THE TRIAL COURT CORRECTLY INSTRUCTED THE JURY REGARDING THE DEFINITION OF FIREARM AND THEREFORE, COUNSEL WAS NOT INEFFECTIVE FOR HIS FAILURE TO OBJECT THERETO.

Jury instructions are sufficient if they are not misleading, permit each party to argue its theory of the case, and properly inform the trier of fact of the applicable law. State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999); Brown v. Spokane County Fire Protection Dist. No. 1, 100 Wn.2d 188, 194, 668 P.2d 571 (1983). A challenged jury instruction's statement of the law is reviewed de novo, considering it in the context of the instructions as a whole. State v. Peterson, 94 Wn. App. 1, 4, 966 P.2d 391 (1998), *review denied*, 138 Wn.2d 1013, 989 P.2d 1142 (1999) (*citing State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995)).

Defendant neither objected to nor took exception to the jury instruction he now challenges on appeal. And he proposed no alternative jury instructions. Generally, failure to object precludes appellate review of jury instructions. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685-86, 757 P.2d 492 (1988).

However, failure to object would not preclude review, if the claimed error is of constitutional magnitude. State v. Rosul, 95 Wn. App. 175, 179-80, 974 P.2d 916 (1999). Here, the definition of firearm is not an element of the crime and, thus, even assuming error, it is not of constitutional magnitude. See State v. Daniels, 87 Wn. App. 149, 155-56, 940 P.2d 690 (1997), *review denied*, 133 Wn.2d 1031, 950 P.2d 476 (1998). Nevertheless, because defendant also argues that his counsel was ineffective in failing to object, this Court may properly review the assigned error.

To obtain a conviction on the charge of first degree unlawful possession of a firearm, the State must prove the following elements:

- (1) That defendant knowingly had a firearm in his possession or control;
- (2) That defendant had previously been adjudicated guilty as a juvenile of a serious offense; and
- (3) That the possession on control of the firearm occurred in the State of Washington.

RCW 9.41.040(1)(a); CP 77-104 (Court's Instructions to the Jury, Instr. #18).

To obtain a conviction on the charge of possession of a stolen firearm, the State must prove the following elements:

- (1) That defendant possessed, carried, delivered, or sold or was in control of a stolen firearm;
- (2) That defendant acted with knowledge that the firearm had been stolen; and

(3) That the defendant withheld or appropriated the firearm to the use of someone other than the true owner or person entitled thereto;

(4) That the acts occurred in the State of Washington.

RCW 9A.56.140(1); 9A.56.310(1); CP 77-104 (Court's Instructions to the Jury, Instr. #22).

In the present case, defendant claims that the State failed to prove that the gun in question met the statutory definition of "firearm." Brief of Appellant (BOA) at 11. The trial court instructed the jury as follows:

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

The State is not required to prove that firearm was operable at the time the defendant possessed it.

CP 77-104 (Instr. #20). Defendant assigns error to the second paragraph of this instruction. BOA at 1. He argues that the State failed to prove the firearm was operable. BOA at 13. A firearm is "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW 9.41.010(1).

It is well settled in Washington that "an unloaded or even inoperable firearm is still a firearm under RCW 9.41.010(1), and thus, a trial court may rely on possession of such a firearm to impose a firearm sentence enhancement under former RCW 9.94A.310(3)(2000)." State v. Berrier, 110 Wn. App. 639, 645, 41 P.3d 1198 (2002); *see* State v. Faust,

93 Wn. App. 373, 380-81, 967 P.2d 1284 (1998); State v. Sullivan, 47 Wn. App. 81, 84, 733 P.2d 598 (1987).

Even if a weapon is inoperable, it is nonetheless a firearm within the meaning of RCW 9.41.010(1) as long as it is a real gun as opposed to a toy gun. State v. Faust, 93 Wn. App. 373, 380, 967 P.2d 1284 (1998). Test firing is not required. State v. Anderson, 94 Wn. App. 151, 162-63, 971 P.2d 585 (1999), *rev'd on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (trier of fact could find gun was a firearm where two experienced officers testified the gun was loaded, appeared to be a real gun, the gun displayed a serial number and was admitted as an exhibit at trial).

Defendant's reliance on State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983), *overruled in part and on other grounds by State v. Brown*, 113 Wn.2d 520, 782 P.2d at 1013 (1989), is misplaced. The Faust court pointed out that the decision in Pam "did not limit the definition of a firearm to one capable of being fired *during the crime*. Rather, the distinction was between a toy gun and a 'gun in fact.'" Faust at 380 [italics added]. "If an unloaded gun can be loaded, a malfunctioning gun can be fixed." Id. at 381. Therefore, the trial court's instruction to the jury was correct.

Here, Finch's stolen gun was a Steyr with a serial number. RP 230-35. It was found in a duffle bag with a loaded magazine and 9mm ammunition close by under the driver's seat. Id. The gun was admitted in evidence and Finch testified the gun was his. RP 267-70. Further, Finch,

a former Army Ranger with extensive firearms training, testified that the gun was in perfect condition and operable at the time it was stolen. Id. This shows that the gun was capable of being fired at some point. Finch examined the exhibit and indicated the firearm was still in good condition and still operable as far as he could tell. Id. This evidence was sufficient to prove the firearm finding.¹

Defendant acknowledges that Faust is controlling authority, but argues that the decision is “simply wrong.” BOA at 15-16. However, it cannot be ineffective assistance of counsel for defendant’s trial counsel to rely on the law as it exists at the time of trial, whether he agrees with the law or not. *See State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)(to establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him). Defendant cannot show ineffective assistance of counsel where any objection to the jury instruction or argument against the instruction would have been without merit and therefore unsuccessful. Defendant’s claim fails.

¹ Because defendant’s sufficiency of the evidence claim is based solely on lack of test firing the gun, which is not required, the sufficiency of the evidence claim fails along with the claim that the jury was not properly instructed.

2. THE TRIAL COURT ABUSED ITS DISCRETION BY BASING ITS DECISION ON AN ERRONEOUS INTERPRETATION OF THE LAW, WHICH REQUIRES REMANDING FOR RESENTENCING.

RCW 9.94A.589(3) applies when (1) a person who is "not under sentence of a felony" (2) commits a felony, and (3) before sentencing (4) is sentenced for a different felony. The statute provides:

Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

RCW 9.94A.589(3). Defendant committed his present crimes on April 13, 2005. CP 9-11; CP 109. He was sentenced on his Lewis County felonies on October 27, 2005. CP 110. As such, he was not under a sentence for conviction of a felony at the time he committed his present crimes. *See In re Caley*, 56 Wn. App. 853, 858, 785 P.2d 1151 (1990). Therefore, RCW 9.94A.589(3) is applicable to the sentencing in the present case. The trial court had total discretion under RCW 9.94A.589(3) to make defendant's present sentence consecutive to the sentence imposed in Lewis County. *State v. Shilling*, 77 Wn. App. 166, 175, 889 P.2d 948 (1995), *In re Long*, 117 Wn.2d 292, 302, 815 P.2d 257 (1991). Each successive sentencing court has the ability to control the relationship of its

sentence to previously imposed sentences. Long, at 303. Only an express order of consecutive sentences is required to overcome the SRA's presumption of concurrent sentences. RCW 9.94A.589(3); State v. Linderman, 54 Wn.App. 137, 139, 772 P.2d 1025, *review denied*, 113 Wn.2d 1004, 777 P.2d 1051 (1989).

Here, the trial court mistakenly believed that the present sentence “must run consecutive to any other Judgment and Sentence that has previously been entered.” RP 418. As such, the trial court ordered that the present sentence be served consecutively to the Lewis County sentences. CP 113.

A trial court’s failure to exercise discretion is an abuse of discretion. State v. Miles, 77 Wn.2d 593, 597-98, 464 P.2d 723 (1970) (an abuse of discretion can be found upon a showing that the trial court either failed to exercise its discretion or manifestly abused its discretion); State v. Jackman, 113 Wn.2d 772, 777, 783 P.2d 580 (1989) (an abuse of discretion can be found if the trial court's decision is based on an erroneous interpretation of the law).

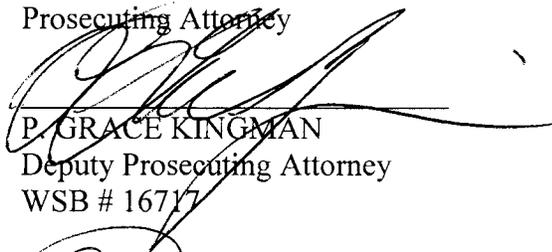
Therefore, the State concedes that the trial court erred by failing to exercise its discretion with regard to this sentencing issue. This matter must be remanded to the trial court for re-sentencing.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests that this Court affirm defendant's convictions, but remand the case to the trial court for re-sentencing.

DATED: November 27, 2007.

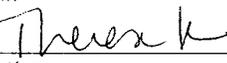
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/27/07 
Date Signature