

NØ. 36595-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

VINH QUANG LAM,

Appellant.

2007 DEC 20 PM 4:42

FILED  
COURT OF APPEALS DIVISION  
STATE OF WASHINGTON

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

The Honorable Brian Tollefson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erroneously instructed the jury in such a way as to relieve the state of its burden to prove the appellant knowingly possessed a firearm.

2. Defense counsel deprived the appellant of his constitutional rights to the effective assistance of counsel by failing to object to irrelevant, prejudicial evidence bullets found in the car from which Lam fled and in which a loaded gun was found were hollow-point bullets designed to cause greater damage when striking their target.

Issues Pertaining to Assignments of Error

1. Although knowledge is an essential element of unlawful possession of a firearm, the trial court's definitional and "to-convict" instructions did not plainly set forth the essential element. Did the court's instructions relieve the state of its burden of proving an essential element of the offense?

2. The appellant and three other men alighted from a car and fled after the driver of the car lost control and crashed into a curb and mailbox. Police found a loaded pistol under the driver's seat of the vehicle. Did trial counsel render ineffective assistance by failing to object to the admission of irrelevant, prejudicial evidence that police found

hollow-point bullets in the car and that the bullets were designed to cause great damage when striking their target?

B. STATEMENT OF THE CASE

1. Procedural history

The state charged the appellant, Vinh Quang Lam, with the following counts: (1) possession of a stolen firearm; (2) second degree unlawful possession of a firearm; (3) first degree possession of stolen property; (4) attempting to elude a pursuing police vehicle, and (5) second degree driving while license suspended. And the state alleged Lam committed the offenses charged in counts three and four while armed with a firearm. CP 21-24. A King County jury found Lam guilty of all but count one and found he was armed with a firearm while committing the offenses set forth in counts three and four. CP 73-81. The trial court imposed concurrent, standard range sentences that, with firearm enhancements, totaled 111 months. CP 119-130.

2. Substantive facts

While driving through an apartment complex parking lot in his marked patrol car, Lakewood Police Officer Mark Eakes checked the license plate of a 1990 Honda Civic parked in the lot. RP 112-13. He drove past the Honda and around a corner in the lot when he received

information the car had been reported stolen. RP 113. Eakes drove around to where he saw the Honda and observed it was leaving the lot. RP 113. Eakes caught up and followed directly behind the car. RP 114-15.

Eakes broadcast his activity over the police radio and soon saw another patrol car following behind him. RP 114-15. Officer Kristian Nordstrom was the passenger in the backup vehicle. RP 115, 155-57. Eakes and Nordstrom's partner activated the flashing lights on their cars in an effort to apprehend the driver of the Honda. RP 114-15, 157. The driver of the Honda accelerated. RP 115, 158-60. A high-speed chase followed on the freeway and through a residential area, where it ended when the driver of the Honda lost control and drove into a curb and mailbox. RP 118-24, 158-61, 184-86.

The doors of the Honda opened and three occupants ran off. RP 124-25. Officer Christopher Shipp arrived in time to see the car crash and individuals flee. RP 185-86. Shipp saw two occupants leave from the driver's side door. RP 186. Lam was the first of the two out that door. RP 186. Shipp caught up with and detained Lam. RP 126, 186-87.

After the foot chase ended, officers Eakes and Shipp looked into the Honda and saw part of a gun on the floorboard sticking out from under

the driver's seat. RP 126, 187. Shipp described the gun as a "rusty old 1911 pistol . . . ." RP 187.

Eakes then searched the interior of the car. RP 127. There was no damage to the ignition. RP 146-47. He discovered the gun was fully loaded with .45 caliber bullets. RP 127-30. Eakes also found Lam's wallet on the driver's seat and ammunition, including 16 live, .45 caliber, hollow-point bullets, in the rear of the car. RP 129-32. The officer explained hollow-point bullets "cause more damage" because they spread out when they strike their target. RP 130.

Eakes also spoke with Lam. RP 136. Lam did not tell him who drove the car. RP 136. Lam told Eakes he purchased the Honda for \$600 a few days earlier. RP 136-38, 185-86, 194. Lam had no registration, title or any other paperwork to support his assertion. RP 136-37. Lam said he knew nothing about the gun because, as a convicted felon, he could not be around firearms. RP 137.

Larry Miles owned the Honda. RP 194-95. On a cold morning Miles started the car and returned to his apartment to allow the car to warm. RP 195. When he returned, the Honda was gone. RP 195. Because of damage caused by the crash at the end of the chase with officers, Miles spent about \$1,600 for repairs. RP 197-98, 201, 208-09.

After the repairs were completed, Miles took his car to a Honda dealer, who estimated the value of the car at \$2,125. RP 199-200, 208-09.

C. ARGUMENT

1. THE TRIAL COURT'S DEFINITIONAL AND "TO-CONVICT" INSTRUCTIONS REGARDING UNLAWFUL POSSESSION OF A FIREARM ERRONEOUSLY RELIEVED THE STATE OF ITS BURDEN TO PROVE LAM KNOWINGLY POSSESSED A FIREARM.

Knowledge is a common-law element of second degree unlawful possession of a firearm. *State v. Anderson*, 141 Wn.2d 357, 367, 5 P.3d 1247 (2000). The State bears the burden of proving knowing possession, and the "to-convict" instruction must include the knowledge element. *State v. Shouse*, 119 Wn. App. 793, 796, 83 P.3d 453 (2004). The instructions in Lam's case invited the jury to convict him of unlawful possession of a firearm without finding he knowingly possessed the gun found in the Honda. This error was reversible because the instructions relieved the state of its burden of proving knowledge beyond a reasonable doubt.

The state charged Lam with second degree unlawful possession of a firearm. CP 21-22. RCW 9.41.040(2) criminalizes the possession of a firearm by an individual who has been convicted of a non-serious felony:

(a) A person . . . is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify . . . for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm:

(i) After having previously been convicted . . . of any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section . . . .

Court's instruction number 8 defined second degree unlawful possession of a firearm as follows:

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

CP 49 (emphasis added).

The corresponding "to-convict instruction," court's instruction number 9, read in pertinent part:

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 . . . . the defendant *knowingly* owned a firearm *or had* a firearm in his possession or control; [and]

(2) That the defendant had previously been convicted of a felony crime which is not a serious offense .

. . .

CP 50 (emphasis added).

The trial court defined “possession” as

having a firearm in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item, and such dominion and control may be immediately exercised.

CP 65 (Court’s instruction number 24). This instruction tracks the pattern possession instruction, WPIC 133.52 and is consistent with the legal definition of possession. Actual possession exists when a person personally possesses the item at issue. Constructive possession means the item is not in actual, physical possession, but instead that the accused has dominion and control over the goods. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

The state presented no evidence showing Lam had physical custody of the firearm, but only that he occupied and owned a car with a pistol under the driver’s seat. To convict Lam of the crime, the state thus had to prove he constructively possessed the gun. As applied to the facts and including the knowledge element, constructive possession required control of the car and knowledge of a firearm inside it. *State v. Turner*, 103 Wn. App. 515, 524, 13 P.3d 234 (2000).

But the trial court's definitional and "to-convict" instructions did not place the burden on the state to prove Lam *knew* the gun was in his car.<sup>1</sup> Instead, both instructions required the state to prove "the defendant *knowingly* owned a firearm *or had* a firearm in his possession or control . . . ." In other words, the knowledge requirement applied to ownership, not to "possession or control."

This is consistent with the rule "the word 'or' does not mean 'and'" and instead denotes separate phrases absent legislative intent to the contrary. *Riofta v. State*, 134 Wn. App. 669, 682, 142 P.3d 193 (2006).

Here there is no legislative intent to the contrary. Knowledge has been a required element of unlawful possession of a firearm since our Supreme Court decided *Anderson* more than seven years ago. The Legislature has nevertheless failed to amend the unlawful possession statute to reflect this interpretation of the law.

The pattern jury instructions also fail to recognize *Anderson*.

WPIC 133.02.01 provides:

A person commits the crime of unlawful possession of a firearm in the second degree when he or she owns a firearm or has a firearm in his or her possession or control and

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<sup>1</sup> Lam does not concede the state proved he drove the car. He did say, however, he owned the car.

(1) [he] . . . has previously been [convicted] . . . .  
of a felony [which is not a serious offense] . . . .

. . . .

WPIC 133.02.01. The “to-convict” instruction shares the same  
shortcoming:

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 defendant  
[owned a firearm] [or] [had a firearm in [his] [her]  
possession or control] [and];

(2) That the defendant had previously been  
[convicted] [adjudicated guilty as a juvenile] of  
\_\_\_\_\_ . . . .

WPIC 133.02.02.

Jury instructions must make complex legal concepts, such as  
constructive possession, “manifestly clear” because jurors lack the  
interpretive skills of trained judges. *State v. LeFaber*, 128 Wn.2d 896,  
902-903, 913 P.2d 369 (1996) (regarding self-defense). The *LeFaber* court  
reversed a first degree manslaughter conviction where the trial court gave  
jurors an erroneous self-defense instruction. *LeFaber*, 128 Wn.2d at 902-  
03. The court held, “Although a juror could read instruction 20 to arrive at  
the proper law, the offending sentence lacks any grammatical signal

compelling that interpretation over the alternative, conflicting, and erroneous reading.” *LeFaber*, 128 Wn.2d at 902-903.

The same reasoning applies here. It is possible the jury in Lam’s case could have correctly applied the modifier “knowingly” in Court’s instruction number 9 both to “had a firearm in his possession or control” and “owned a firearm[.]” Without a clear grammatical signal mandating such a reading, however, this Court should not assume jurors correctly interpreted this established concept of possession.<sup>2</sup> The trial court therefore erroneously instructed jurors with respect to unlawful possession of a firearm by relieving the state of proving the knowledge element beyond a reasonable doubt.

An instruction that omits an element of an offense is subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 340, 58 P.3d 889 (2002). A jury’s verdict must be reversed unless uncontroverted evidence supports the missing element. *Shouse*, 119 Wn. App. at 797.

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<sup>2</sup> A correct statement of the law is exemplified by the trial court’s “to-convict” instruction in *State v. Warfield*, which stated in pertinent part, “(1) That on or about the 22nd of September, 2001, the defendant did *knowingly* own, *knowingly* control or *knowingly* have in his possession a firearm . . . .” *Warfield*, 119 Wn. App. 871, 875 n.1, 80 P.3d 625 (2003).

The evidence proving knowing possession in Lam's case is not uncontroverted. None of the officers observed the pistol in Lam's personal possession. And despite admitting he owned the car, Lam was not its sole occupant. *Cf. State v. Potts*, 1 Wn. App. 614, 617-618, 464 P.2d 742 (1969) (defendant had dominion and control of car, and therefore of marijuana found therein, were defendant had keys to car, was driving it, and was sole occupant). Therefore, absent uncontroverted evidence of knowledge, the trial court's faulty instructions are not harmless.

Lam anticipates the state may argue the issue was waived because trial counsel did not object to the instruction. This Court should reject such a claim. The omission of an element from a "to-convict" instruction is an error of constitutional magnitude and warrants review when raised for the first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005).

This Court should reverse Lam's conviction for unlawful possession of a firearm.

2. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO IRRELEVANT EVIDENCE THAT POLICE FOUND HOLLOW-POINT BULLETS INSIDE THE CAR.

Trial counsel failed to object to Officer Eakes's testimony he found .45 caliber, hollow-point bullets inside the car from which Lam fled.

Eakes explained to the jury a hollow-point bullet “cause[s] more damage” because it are designed to “spread out once it hits its target . . . .” RP 130. Although the presence of bullets in the car may have been minimally relevant to show knowledge of the gun’s presence, the nature and type of bullets found in the car was not probative. And the evidence was highly prejudicial. Trial counsel was therefore ineffective for failing to object to the testimony and to move to strike it from the jury’s consideration.

Article I, section 22 of the Washington Constitution and the Sixth Amendment guarantee criminal defendants effective representation. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *In re Personal Restraint of Woods*, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). To establish ineffective assistance of counsel, the appellant must show (1) counsel's performance fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced him. *Strickland*, 466 U.S. at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

A defendant who claims ineffective assistance based on the failure to challenge the admission of evidence must show (1) there were no legitimate strategic or tactical reasons to support the failure; (2) an objection to the evidence would likely have been sustained, and (3) that

the admission of the evidence was prejudicial. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

To meet the prejudice prong, the appellant must show that, but for the deficient performance, there is a reasonable probability the verdict would have been different. *State v. West*, 139 Wn.2d 37, 42, 983 P.2d 617 (1999). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694.

*a. Counsel's performance was deficient.*

Failure to object to irrelevant and prejudicial evidence may be deficient performance. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 79, 917 P.2d 563 (1996) (counsel's failure to object to inadmissible prior conviction evidence could not be considered tactical and constituted deficient performance); *State v. Dawkins*, 71 Wn. App. 902, 910 & n.3, 863 P.2d 124 (1993) (counsel was ineffective and new trial ordered where counsel failed to object to evidence of other bad acts).

Relevant evidence is admissible unless otherwise rendered inadmissible. ER 402. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. For evidence to be relevant, it must

tend to prove or disprove a fact of consequence in the context of the other facts and the substantive law at issue. *State v. Stenson*, 132 Wn.2d 668, 701-02, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998); *State v. Rice*, 48 Wn. App. 7, 12, 737 P.2d 726 (1987). "There must be a logical nexus between the evidence and the fact to be established." *State v. Cochran*, 102 Wn. App. 480, 486, 8 P.3d 313 (2000), *review denied*, 143 Wn.2d 1004 (2001).

The evidence regarding the hollow-point bullets in Lam's case does not satisfy these relevancy requirements. The fact of possession of a gun by Lam was of consequence to the charges of possession of a stolen firearm and unlawful possession of a firearm. On the other hand, the type of bullets in the gun was of no consequence. Nor, especially, was the fact the bullets are designed to cause great damage. The trial court would have granted defense counsel's objections based on relevance had they been lodged.

Further, counsel's defense theories were (1) the evidence was insufficient to prove Lam drove the car; (2) Lam did not know the gun was in the car and therefore did not constructively possess the weapon; (3) the state failed to prove the car was worth \$1,500; and, (4) the evidence failed to establish Lam knew the car was stolen. RP 316-20, 325-29. Evidence

the gun contained dangerous hollow-point bullets supported none of these theories. Counsel thus could have had no legitimate tactical or strategic reason for permitting jurors to consider the evidence. For these reasons counsel's failure to object to irrelevant evidence supporting the inference Lam was connected to an unusually dangerous weapon was deficient performance.

The same result obtains even if this Court concludes the "hollow-point bullet" evidence is minimally relevant. Relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403; *State v. Cheatam*, 150 Wn.2d 626, 645, 81 P.3d 830 (2003). Evidence is unfairly prejudicial when it tends to evoke an emotional response rather than produce a rational decision. *State v. Powell*, 126 Wn.2d 244, 264, 893 P.2d 615 (1995).

Evidence the gun was loaded with particularly destructive bullets implies one or more of the car's occupants were especially dangerous. And because Lam owned the car, a reasonable juror could infer Lam knew of and owned the gun. Such a juror would likely then conclude because Lam possessed a particularly dangerous weapon, he was more likely to be the driver of a car operated in a dangerous fashion.

The evidence also suggests a callous disregard for the safety of others. A bullet designed to do more damage when it hits a target, such as a human body, appeals to the passions and emotions of the jury and encourages an irrational decision. And because both the bullets already loaded into the pistol and the hollow-point bullets were .45 caliber, it was obvious the more dangerous ammunition was intended to be used with the gun in the car.

For these reasons, the evidence would have been found inadmissible under ER 403 had counsel timely objected to its admission. Counsel's performance fell below an objective standard of competence.

*b. Counsel's deficient performance caused reversible prejudice.*

For the aforesaid reasons, it is reasonably probable the verdict would have been different absent evidence of the hollow-point bullets and their dangerousness. Evidence tending to show Lam drove the car was thin; it consisted of Officer Shipp's testimony Lam was the first of the two occupants to alight from the driver's door of the car. Further, although the state proved the Honda was stolen, there was no evidence tending to show Lam took the car. Although Lam could not produce ownership papers for the car, there was no physical damage, such as a "punched" ignition, to hint it was stolen. The presence of particularly dangerous bullets in Lam's

car invited jurors to conclude Lam was someone who did not belong on the streets.

Lam has therefore shown (1) counsel's failure to object to the evidence of the bullets and their dangerous qualities was deficient performance and (2) the subpar performance resulted in prejudice. This Court should reverse Lam's convictions and remand for a new trial.

D. CONCLUSION

The trial court's instructions regarding unlawful possession of a firearm impermissibly relieved the state of its burden of proving knowledge beyond a reasonable doubt. In addition, trial counsel was ineffective for failing to object to prejudicial evidence that bullets found in the car were of the hollow-point" type and that such bullets were particularly dangerous. Lam therefore respectfully requests this Court reverse his convictions and remand for a new trial.

DATED this 20 day of December, 2007.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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Attorneys for Appellant

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

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 36595-2-II
	)	
VINH QUANG LAM,	)	
	)	
Appellant.	)	

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COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2007 DEC 20 PM 4:42

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**DECLARATION OF SERVICE**

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 20<sup>TH</sup> DAY OF DECEMBER, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] KATHLEEN PROCTOR  
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STATE OF WASHINGTON  
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*Chuan*

**SIGNED** IN SEATTLE WASHINGTON, THIS 20<sup>TH</sup> DAY OF DECEMBER, 2007.

x *Patrick Mayovsky*