

FILED
COURT OF APPEALS
DIVISION II

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NO. 37389-1-II

STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

GORDON HAMMOCK,

Appellant.

FILED
COURT OF APPEALS DIVISION II
STATE OF WASHINGTON
2009 APR 30 PM 4:18

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

The Honorable Nelson Hunt, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
1. THE BICYCLE BOLT IS NOT A FIREARM	1
2. THIS COURT MUST ALSO VACATE THE DEADLY WEAPON FINDING	3
3. EVIDENCE THAT HAMMOCK HAD PREVIOUSLY SERVED PRISON TIME, WAS ONLY RECENTLY RELEASED, WAS UNDER DEPARTMENT OF CORRECTIONS SUPERVISION, AND WAS WELL KNOWN TO POLICE DENIED HIM A FAIR TRIAL.....	5
B. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>State v. DeRyke</u> , 110 Wn. App. 815, 41 P.3d 1225 (2002), <u>aff'd on other grounds</u> , 149 Wn.2d 906 (2003)	1
<u>State v. Jackson</u> , 82 Wn. App. 594, 918 P.2d 945 (1996), <u>review denied</u> , 131 Wn.2d 1006 (1997)	5-6
<u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008)	4
<u>State v. Knapstad</u> , 107 Wn.2d 346, 729 P.2d 48 (1986)	5-6
<u>State v. Padilla</u> , 95 Wn. App. 531, 978 P.2d 1113, <u>review denied</u> , 139 Wn.2d 1003 (1999)	2
 <u>OTHER JURISDICTIONS</u>	
<u>State v. Cates</u> , 223 Kan. 724, 576 P.2d 657 (1978)	1
<u>State v. Martins</u> , 106 Hawaii 62, 101 P.3d 671, <u>reversed on other grounds</u> , 102 P.3d 1034 (2004)	2
<u>State v. Surette</u> , 137 N.H. 20, 622 A.2d 1254 (1993)	1

A. ARGUMENT IN REPLY

1. THE BICYCLE BOLT IS NOT A FIREARM.

The State contends that the bicycle bolt and ball peen hammer were the disassembled parts of a “zip gun” and because, under Washington law, a disassembled firearm is still considered a firearm, Hammock was properly convicted. See Brief of Respondent, at 2-11. The State is mistaken.

A “zip gun” is “a homemade gun that is constructed from a toy pistol or length of pipe, has a firing pin usu. powered by a rubber band, and fires a .22 caliber bullet.” Webster’s Third New Int’l Dictionary 2659 (1993). Although there are no Washington cases discussing zip guns, this definition is substantially consistent with devices identified as zip guns in other jurisdictions. See State v. Surette, 137 N.H. 20, 622 A.2d 1254, 1255 (1993) (zip gun “fashioned by running a piece of wire through a plastic tube, and then connecting the wire to a rubber band. The wire functions as a firing pin, and the rubber band serves as a firing mechanism to propel the wire into a bullet attached to the top of the tube.”); State v. Cates, 223 Kan. 724, 576 P.2d 657, 659 (1978) (“homemade ‘zip gun’ was fashioned by the defendant and a friend from a short piece of pipe, a piece of wood, two springs and a nail.”). There are no cases in any jurisdiction

holding that a bicycle bolt and unattached hammer constitute a firearm.

Nor did any expert at Hammock's trial testify that the bolt and hammer qualified as a zip gun. This is because they do not. By definition, zip guns are unified devices consisting of every component necessary to fire a projectile, including a firing pin.¹ Both experts at Hammock's trial agreed there was no firing pin (or other firearm components) associated with the bolt. See 11RP 158-59; 15RP 68.

Under Washington law, a disassembled firearm that can be rendered operational in relatively short order is still a firearm. See State v. Padilla, 95 Wn. App. 531, 535, 978 P.2d 1113, review denied, 139 Wn.2d 1003 (1999). And one can presume this also would be true for an actual zip gun. See State v. Martins, 106 Hawaii 62, 101 P.3d 671, 680 (disassembled zip gun still a firearm because defendant had "firing mechanism, chamber, and barrel" together in bag), reversed on other grounds, 102 P.3d 1034 (2004). But the bolt and hammer in Hammock's bedroom cannot be assembled and

¹ Even the State's definition of "gun" requires a unified device. See Brief of Respondent, at 5-6 (defining "gun" as "a weapon consisting of a metal tube, with mechanical attachments, from which projectiles are shot by the force of an explosive.")(emphasis added).

disassembled as an actual firearm can and are insufficient, by themselves, to constitute a zip gun or any other firearm.

The State makes much of the fact that a .22 round was fired with the bolt and hammer. But the only thing necessary to fire a round is detonation of the primer. See 11RP 134-35. This can be accomplished in many ways. For example, a round could be put in a vice and the primer struck with an object. It could be dropped or thrown against a hard surface, such as a rock or metal object. It could be placed in a metal pipe and heated until the round is discharged. Regardless whether a round is successfully fired, Washington has a specific, technical definition for “firearm,” which was not met in this case because the bicycle bolt and hammer (together or alone) do not qualify under RCW 9.41.010(1) as “a weapon or device” under accepted definitions of those terms. See Brief of Appellant, at 28-30.

2. THIS COURT MUST ALSO VACATE THE DEADLY WEAPON FINDING.

Once jurors found Hammock guilty of murder, they had to determine whether he was armed with a deadly weapon at the time. See CP 143-44. “Deadly weapon” means “an implement or instrument that has the capacity to inflict death and from the manner

in which it is used, is likely to produce or may easily and readily produce death” and, as a matter of law, includes any “pistol, revolver or any other firearm.” CP 144. The trial deputy encouraged jurors to find that Hammock possessed a deadly weapon based on the bolt’s status as a firearm. See 17RP 9. As argued above, however, the bolt is not a firearm.

There is no way to determine from the jury verdicts whether jurors did as the prosecutor requested – erroneously found that Hammock was armed with a deadly weapon as a matter of law because the bolt was a firearm – or found that Hammock was armed with a deadly weapon based on something else (for example, the large iron tool he used to strike Ford). See 13RP 100-106. Ambiguous jury verdicts must be resolved in the defendant’s favor. State v. Kier, 164 Wn.2d 798, 811-814, 194 P.3d 212 (2008); State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), aff’d on other grounds, 149 Wn.2d 906 (2003).

The State’s argument that jurors concluded the manner in which McKee used the bolt and hammer made it a deadly weapon supposes information that is simply not available. See Brief of Respondent, at 12-14.

3. EVIDENCE THAT HAMMOCK HAD PREVIOUSLY SERVED PRISON TIME, WAS ONLY RECENTLY RELEASED, WAS UNDER DEPARTMENT OF CORRECTIONS SUPERVISION, AND WAS WELL KNOWN TO POLICE DENIED HIM A FAIR TRIAL.

Like the trial judge, the State argues the improper evidence of Hammock's time in prison, recent release, probation, and law enforcement's familiarity with him was harmless because jurors were told he had a prior felony for the charge of Unlawful Possession of a Firearm. See Brief of Respondent, at 17.

But this evidence went well beyond the fact of the prior felony conviction. It imparted the additional evidence that Hammock had only recently been released from prison (and already found himself prosecuted again), he was deemed sufficiently dangerous that he was on probation and required to check in with the Department of Corrections, and he was so familiar to law enforcement, officers knew him by sight. See 12RP 48; 14RP 43. The fact of the prior felony conviction imparted none of this prejudicial information.

Citing State v. Jackson, 82 Wn. App. 594, 608, 918 P.2d 945 (1996), review denied, 131 Wn.2d 1006 (1997), the State points out that denial of a Knapstad2 motion is not appealable if the defense puts on a case at trial. See Brief of Respondent, at 17. Brief of

Respondent, at 17. But Hammock does not seek affirmative relief based on the pretrial Knapstad ruling. Rather, he seeks affirmative relief based on insufficiency of the evidence at trial proving the bolt is a firearm, which is fully consistent with Jackson. See Jackson, 82 Wn. App. at 608 (“At the end of all the evidence, after verdict, or on appeal, a court examines sufficiency based on all the evidence admitted at trial.”). The only purpose in pointing out the trial court’s error on the Knapstad motion is to demonstrate that the improper evidence of Hammock’s past criminal conduct was not cumulative of any other evidence properly admitted at trial. See Brief of Appellant, at 39-40.

Because the improper evidence of Hammock’s criminal history and evidence of his propensity to commit crime made it more likely jurors would reject his defense that he did not have the requisite intent for murder, the trial court erred when it denied his motion for mistrial.

One final comment. In the State’s brief, the appellate deputy indicates that Hammock’s challenge to sufficiency of the evidence on the firearm issue is made “with an apparent straight face.” Brief of Respondent, at 5. Later, the appellate deputy refers to another argument as “odd” and “inexplicable.” Brief of Respondent, at 12.

2 State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

The issues in this case are quite serious. So are the consequences to Mr. Hammock. These rhetorical flourishes are unnecessary and unprofessional. They do nothing to advance the relevant arguments.

B. CONCLUSION

For the foregoing reasons, and those contained in Hammock's opening brief, his convictions should be reversed.

DATED this 30th day of April, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", written over a horizontal line.

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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 30TH DAY OF APRIL 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF APRIL 2009.

x Patrick Mayovsky

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