

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 JOSEPH FRASQUILLO JR.)
 (your name))
)
 Appellant.)

No. 39128-7-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, JOSEPH FRASQUILLO JR., have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING OF GUILT FOR THE CHARGE OF UNLAWFUL POSSESSION OF A FIREARM CONTAINED IN COUNT VIII.

Additional Ground 2

THE STATE WAS RELIEVED OF ITS BURDEN TO PROVE EVERY ESSENTIAL ELEMENT FOR THE CRIMES OF ASSAULT IN THE SECOND DEGREE WHEN THE TRIAL COURT OMITTED THE INTENT ELEMENT FROM THE "TO-CONVICT" INSTRUCTIONS FOR COUNTS II AND IV.

If there are additional grounds, a brief summary is attached to this statement.

Date: 1/25/10

Signature: Joseph A. Frasquillo

ADDITIONAL GROUND 1

THE COURT HELD THAT THE DRIVER OF A MOTOR VEHICLE IS NOT IN "POSSESSION" OF A FIREARM FOR THE PURPOSES OF A CHARGE OF UNLAWFUL POSSESSION OF A FIREARM WHERE THE FIREARM IS IN A BAG, WELL BEHIND THE DRIVER, IMMERSSED IN CLUTTER, IN THE CASE OF STATE V. ROUTH, 129 W.N.App. 761, 121 P.3D 755 (2005). THE REASONING BEHIND THAT IS, CLOSE PROXIMITY ALONE IS NOT ENOUGH TO ESTABLISH CONSTRUCTIVE POSSESSION; OTHER FACTS MUST ENABLE THE TRIER OF FACT TO INFER DOMINION AND CONTROL. STATE V. SPRUELL, 57 W.N.App. 383, 388-89, 788 P.2D 21 (1990). THE ABILITY TO REDUCE AN OBJECT TO ACTUAL POSSESSION IS AN ASPECT OF DOMINION AND CONTROL. STATE V. ECHEVERRIA, 85 W.N.App. 777, 783, 934 P.2D 1214 (1997).

IN THE PRESENT CASE, A VEHICLE OCCUPIED BY JOSEPH AND DAVID FRASQUILLO WAS STOPPED, THE VEHICLE WAS OWNED BY AND REGISTERED TO JOSEPH FRASQUILLO. RP AT 1051-53. HOWEVER, DAVID IS A KNOWN DRIVER OF THE VEHICLE. RP AT 1493-94. AND HE OFTEN USES THE VEHICLE FOR HIS OWN PURPOSES BECAUSE HE DOES NOT HAVE A VEHICLE OF HIS OWN. RP AT 1567.

DURING A SEARCH, OFFICERS FOUND A LOCKED GUN CASE LOCATED IN THE TRUNK OF THE VEHICLE. RP AT 1078-79. IT WAS NEVER ASKED WHO HAD THE ABILITY TO OPEN THE LOCK ON THE GUN CASE. RP AT 1118. HOWEVER DAVID DID INDICATE TO A DETECTIVE BIRKENFELD THAT THE GUN IN THE TRUNK BELONGED TO HIM, THAT HE NEVER LETS ANYBODY BORROW HIS GUNS, AND THAT JOSEPH HAD NOTHING TO DO WITH THE GUN IN THE TRUNK. RP AT 1086.

BECAUSE THE FIREARM WAS IN A LOCKED GUN CASE LOCATED IN THE TRUNK OF THE VEHICLE, DOMINION AND CONTROL COULD NOT BE IMMEDIATELY EXERCISED. ALSO THE STATE DID NOT PROVIDE PROOF THAT JOSEPH HAD THE ABILITY TO OPEN THE LOCKED CASE TO EXERCISE DOMINION AND CONTROL OVER THE FIREARM ITSELF. IN LOOKING AT THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, THE ELEMENTS NECESSARY TO INFER CONSTRUCTIVE POSSESSION COULD NOT BE PROVEN BEYOND A REASONABLE DOUBT.

MR. FRASQUILLO RESPECTFULLY REQUESTS THAT THE CHARGE OF UNLAWFUL POSSESSION OF A FIREARM BE DISMISSED FOR REASONS STATED ABOVE.

ADDITIONAL GROUND 2

DUE PROCESS REQUIRES THAT A CRIMINAL DEFENDANT BE CONVICTED ONLY WHERE EVERY ELEMENT OF THE CHARGED CRIME IS PROVED BEYOND A REASONABLE DOUBT. U.S. CONST. AMEND. XIV; WASH. CONST. ARTICLE 1, SECTION 22; JACKSON V. VIRGINIA, 443 U.S. 307, 311, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); IN RE WINSHIP, 397 U.S. 358, 365-66, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). THEREFORE, "TO-CONVICT" INSTRUCTIONS MUST CONTAIN ALL THE ELEMENTS OF THE CRIME, LEST THE STATE BE RELIEVED OF ITS BURDEN TO PROVE EVERY ESSENTIAL ELEMENT BEYOND A REASONABLE DOUBT. STATE V. SMITH, 131 Wn.2d 258, 265, 930 P.2d 917 (1997).

"MOREOVER, A REVIEWING COURT MAY NOT RELY ON OTHER INSTRUCTIONS TO SUPPLY THE ELEMENT MISSING FROM THE 'TO-CONVICT' INSTRUCTION." STATE V. DERUYKE, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). "THE JURY HAS A RIGHT TO REGARD THE 'TO-CONVICT' INSTRUCTION AS A COMPLETE STATEMENT OF THE LAW AND SHOULD NOT BE REQUIRED TO SEARCH OTHER INSTRUCTIONS IN ORDER TO ADD ELEMENTS NECESSARY FOR CONVICTION." STATE V. OSTER, 147 Wn.2d 141, 147, 52 P.3d 26 (2002).

IN THE PRESENT CASE, THE "TO-CONVICT" INSTRUCTIONS FOR ASSAULT IN THE SECOND DEGREE AGAINST SHAELYN KAY LUZIK, AND ASSAULT IN THE SECOND DEGREE AGAINST MATTHEW GARY KNOWLTON CONTAINED NO ELEMENT OF INTENT AT ALL. THE TRIAL COURT INSTRUCTED THE JURY THAT THE ELEMENTS TO BE PROVEN ARE:

- 1) THAT ON OR ABOUT JUNE 24, 2008, THE DEFENDANT ASSAULTED (THE VICTIM) WITH A DEADLY WEAPON; AND
- 2) THAT THIS ACT OCCURRED IN THE STATE OF WASHINGTON.

BY INSTRUCTING THE JURY IN THIS MANNER THE STATE WAS RELIEVED OF ITS BURDEN TO PROVE THE SPECIFIC INTENT ELEMENT OF ASSAULT IN THE SECOND DEGREE. AS WAS SETTLED IN BYRD, SPECIFIC INTENT REPRESENTS AN "ESSENTIAL ELEMENT" AND ITS OMISSION RESULTS IN MANIFEST ERROR. STATE V. BYRD, 125 Wn.2d 707, 713-14, 887 P.2d 396 (1995).

THE SAME ERROR OCCURRED IN CO-DEFENDANT DAVID FRASQUILLO'S INSTRUCTIONS.

FOR REASONS STATED ABOVE, THE FRASQUILLOS RESPECTFULLY REQUEST THE COURT TO REVERSE THE CONVICTIONS.