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A. Assignment of Error

Assignment of Error

Mr. Bowen's right to compel witnesses was violated when the trial court suppressed evidence of Mr. Ghianuly's prior possession of the firearm and the contents of his green backpack.

Issues Pertaining to Assignment of Error

1. Did the trial court err by suppressing evidence that Mr. Ghianuly possessed the firearm the night before and was showing it off to others?
2. Did the trial court err by suppressing evidence of the contents of Mr. Ghianuly's green backpack, which contained paperwork in his name and a large quantity of marijuana, when it was relevant as circumstantial evidence of possession of the firearm?

B. Statement of the Case

Kevin Bowen was charged by amended information with one count of unlawful possession of a firearm in the first degree. CP, 17. Mr. Bowen is a convicted felon. CP, 10. He was convicted by a jury and sentenced to 116 months in prison. CP, 40. He appeals.

The State's Case

The State called four police officers at trial. The officers received a call from the Department of Corrections asking for assistance in executing a warrant for Mr. Bowen's arrest. RP, 36. Mr. Bowen was believed to be in a mobile home park. RP, 37. As the officers entered the mobile home park, they observed Mr. Bowen standing in the bed of a pickup truck. RP, 37-38. It was approximately 9:50 a.m. CP, 4. The officers rushed up to the truck with guns drawn and ordered him out of the truck. RP, 39, 47. Mr. Bowen did not immediately respond, though he did not act furtively either. RP, 39, 85. Also present nearby was Michael Ghianuly. RP, 57.

When Mr. Bowen did not promptly get out of the truck, Deputy Zude fired his taser at him. RP, 39. This caused Mr. Bowen to fall down in the truck against the tailgate. RP, 40. Deputies Woodrum and Roessel grabbed hold of him and pulled him to the ground face down. RP, 40. Deputy Roessel testified on direct examination he heard the sound of a gun hitting the ground. RP, 77. He clarified on cross-examination that the sound was the sound of metal and plastic hitting the gravel. RP, 80. He also admitted that he did not include this audio observation in his report. RP, 79. Deputy Woodrum did not hear any such metallic sound. RP, 57. Deputy Zude thought he may have heard a metallic sound, but was not

certain and his report did not include that fact, though it was the type of fact he would normally have included. RP, 100.

Deputy Roessel commented to Deputy Woodrum, "There's a gun." RP, 40. Up to this point, none of the officers had seen a firearm. RP, 55. According to Deputy Woodrum, the firearm was on the ground directly below Mr. Bowen's mid-waist. RP, 41. According to Deputy Zude, the firearm was "right under his stomach." RP, 99. According to Deputy Roessel, the firearm was to the right of Mr. Bowen's waist area. RP, 80.

Deputy Woodrum picked up the firearm, a black H&K .45, and later entered it into evidence. RP, 41. It was entered into evidence at trial as Exhibit 1. RP, 41. The firearm was never fingerprinted. RP, 68.

The Defense Theory of the Case

The defense theory was that the firearm was the property of Mike Ghianuly. RP, 24. (The defense did not submit that Mr. Ghianuly was the legal owner, because the firearm was apparently stolen. RP, 7, 154.) According to the defense theory, Mr. Ghianuly threw both his green backpack and the firearm onto the ground as the officers approached. RP, 27, 159. Mr. Bowen described this as the "crux of his case." RP, 27.

The State moved in limine to preclude any discussion of firearm ownership on the theory that it was proceeding on the possession prong.

RP, 5. The State also objected to the proposed defense witnesses on relevance grounds. RP, 24.

Mr. Bowen testified that he did not have a firearm in his possession. RP, 152. When the police tased him and laid him on the ground, they laid him on top of the gun. RP, 159. Over the State's objection, he was allowed to testify that he had seen Mr. Ghianuly in possession of the firearm approximately a half hour before the police arrived. RP, 156. Mr. Ghianuly was also in possession of a green backpack. RP, 160. The backpack and gun were about a foot-and-a-half apart. RP, 161. Mr. Bowen attempted to testify that the reason Mr. Ghianuly was at the house was to trade for marijuana, but the court suppressed this information. RP, 144.

Deputy Woodrum testified outside the presence of the jury that he searched the green backpack. RP, 58-59. The backpack was found near the truck by both Mr. Ghianuly and Mr. Bowen. RP, 58. Inside the backpack was a receipt that said, "Mike G." and an insurance card in Mr. Ghianuly's name. RP, 59. He also found marijuana that probably weighed 77 grams, although Deputy Woodrum thought it was less than 40 grams. RP, 59. Mr. Ghianuly denied the backpack was his. RP, 61. Based upon the fact that paperwork identifying Mr. Ghianuly was found in the

backpack, Deputy Woodrum assumed that Mr. Ghianuly had dominion and control of the backpack and its contents. RP, 61.

The court ruled that the fact that there was a backpack on the ground nearby was admissible as was the fact that it was searched. RP, 63. The Court suppressed, however, the fruits of the search and the drugs that were found in the backpack. RP, 63, 69. The Court also excluded any evidence that it is common for drug dealers to carry firearms. RP, 64-65, 69.

The defense also sought to present the testimony of Vicki Kropp. Ms. Kropp testified outside the presence of the jury in an offer of proof. RP, 132. According to Ms. Kropp, the night before Mr. Bowen's arrest, she was "running around" with her friend Mike Ghianuly. RP, 133. She observed Mr. Ghianuly selling "weed" in the community the entire night. RP, 133. He carries his "weed" in a green and tan backpack." RP, 134. He was also in possession of a black handgun, which he was showing off "everywhere [he] went." RP, 133, 135. Ms. Kropp was shown Exhibit 1 and testified that was the same gun she saw Mr. Ghianuly with the night before. RP, 136. The next morning, Mr. Ghianuly went to see Ms. Kropp's brother, Mr. Bowen. RP, 134. Mr. Bowen was arrested later that morning. RP, 134. Ms. Kropp was not present at the time of the arrest. RP, 136.

The trial court excluded the entirety of Ms. Kropp's testimony. RP, 136. The court ruled that because Ms. Kropp was not present at the time of Mr. Bowen's arrest, she could not testify about what happened at the house that day and how the gun ended up allegedly in Mr. Bowen's possession. RP, 138.

The next day, Mr. Bowen moved for reconsideration of the court's numerous rulings excluding evidence of the contents of the backpack and the observations of Ms. Kropp. RP, 167. The defense pointed out that the backpack and gun were found about a foot apart and the person who threw the backpack could just as easily have thrown the firearm. RP, 168. The court continued to rule that the evidence was not relevant. RP, 172. The jury convicted Mr. Bowen. CP, 37.

C. Argument

Mr. Bowen's right to compel witnesses was violated when the trial court suppressed evidence of Mr. Ghianuly's prior possession of the firearm and the contents of his green backpack.

The right to compel witnesses is guaranteed by the Sixth Amendment of the United States Constitution. In Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) the Court observed:

The right to offer the testimony of witnesses and compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lie. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington at 19. A witness must be material to the defense case. State v. Smith, 101 Wn. 2d 36, 677 P.2d 100 (1984). The proposed testimony need not totally exonerate the defendant in order to be material. State v. Maupin, 128 Wn.2d 918, 913 P.2d 808 (1996) (other suspect evidence, which would not have totally exonerated defendant, was admissible because it would have brought into question the State's version of events). Because a violation of the right to compel witnesses is of constitutional magnitude, reversal is required unless the error is harmless beyond a reasonable doubt. Maupin.

In this case, the defense sought to introduce two categories of evidence. First, and most importantly, the defense sought to introduce the evidence that Mr. Ghianuly had possessed the firearm the night before and was showing it off. While Mr. Bowen was permitted to testify that he had seen Mr. Ghianuly with the firearm thirty minutes prior to the arrest, Mr. Bowen was subjected to significant impeachment by the State, including his lengthy criminal record. It would have been

very helpful to have testimony from another witness who saw Mr. Ghianuly with a firearm. Ms. Kropp was that witness, but the court excluded her highly probative testimony.

Relevant evidence is evidence that tends to make a fact more or less probable. ER 401. Evidence of prior possession is always relevant in a prosecution for possession of contraband. Evidence of prior possession is relevant because it tends to make current possession more probable. See State v. Chavez, 38 Wn.App. 29, 156 P.3d 246 (2007). As the Washington Supreme Court has explained in an analogous situation:

While under the statute possession alone is sufficient to constitute the crime, yet, in a case such as this, where the evidence of possession is largely a matter of inference, the evidence of lack of ownership is an element which the jury had the right to take into consideration in determining whether the appellants had possession, for evidence of lack of ownership was admissible as tending to establish lack of possession; a jury being warranted in giving weight to the suggestion that possession is usually the result of ownership, thus substantiating the appellants' explanation of their presence at the place and time.

State v. Scamnzi, 141 Wn. 367, 368, 251 P. 567 (1926).

The trial court found that Ms. Kropp's testimony was irrelevant and suppressed it. The court's theory was that Ms. Kropp was not present at the time of the arrest and, as such, could not testify whether Mr. Bowen or Mr. Ghianuly possessed the firearm at that time. But that information went to the weight of the testimony, not the admissibility.

The State's theory in this case was constructive possession. Mere presence is insufficient to establish constructive possession. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969). Mr. Bowen was entitled to rebut the State's evidence that he was found lying on top of a firearm after being tased and dragged to the ground with the fact that Mr. Ghianuly had possessed the firearm the night before and immediately prior to the tasing. The fact that Ms. Kropp was not present at the time of the tasing goes to weight of her testimony, not its admissibility.

But assuming arguendo that Ms. Kropp's testimony was of marginal relevance, it is difficult to imagine how the State was prejudiced by the testimony. The State had three police officers who each testified that they observed Mr. Bowen lying on top of a firearm. Two of the officers testified they heard a metallic sound as Mr. Bowen hit the ground.¹ There was little to no prejudice to the State from Ms. Kropp's testimony and the trial court erred by suppressing it.

The second category of evidence sought to be introduced by the defense was that Mr. Ghianuly sold marijuana and carried large quantities

¹ The State argued that the metallic sound was the sound of the gun hitting the ground. But there is an equally plausible inference that the sound was created by Mr. Bowen's body being dragged across the gravel as he fell from the truck. Regardless, this was an issue to be decided by the jury, not the court, after considering both the incriminating and the exculpatory evidence.

of it in his green backpack. This was relevant for several reasons. First, it is common for drug dealers to possess firearms for protection along with their product. Mr. Bowen tried to introduce this fact through testimony from the officers, but the court sustained the State's objection before the officer could answer the question.

Second, marijuana is contraband, as are firearms. While firearm possession is not illegal per se, it is illegal if done by convicted felons or in conjunction with drug dealing. There is strong evidence in this record that the green backpack and its contents belonged to Mr. Ghianuly. Along with the marijuana, there was paperwork in his name, indicating dominion and control. Despite this strong evidence, he denied that the backpack was his when questioned by Deputy Woodrum. Assuming that the backpack was his, the circumstantial evidence was that Mr. Ghianuly threw the backpack down when he saw the police arrive. Nearby to the backpack, approximately one to one-and-a-half feet away, was the firearm. Mr. Bowen should have been allowed to argue circumstantially that Mr. Ghianuly threw the backpack and firearm down at the same time, and then disavowed any connection to either. If believed, this would have made less probable the allegation that Mr. Bowen had any dominion or control of the firearm. The contents of the green backpack were admissible and the trial court erred in ruling otherwise.

In addition, a defendant has the right to present a complete picture of the facts and circumstances surrounding the crime. The res gestae rule, cited by defense counsel in this case, permits a party to present all facts surrounding a case.

Under this exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurrence. Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible "in order that a complete picture be depicted for the jury."

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998) (citations omitted). In addition to being relevant evidence, Ms. Kropp's observations and the contents of the green backpack were also relevant to the res gestae of the offense and admissible as such.

D. Conclusion

This case should be reversed and remanded for new trial.

DATED this 30th day of August, 2010.

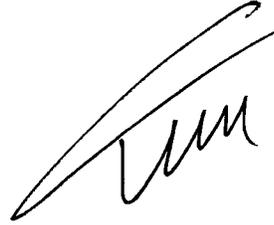


Thomas E. Weaver, WSBA #22488
Attorney for Defendant

1 On August 31, 2010, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to
2 the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-
3 4683.

4 On August 31, 2010, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to
5 Mr. Kevin R. Bowen, DOC #914948, Stafford Creek Corrections Center, 191 Constantine Way,
6 Aberdeen, WA 98520.

7
8 Dated this 31ST day of August, 2010.



9
10 Thomas E. Weaver
11 WSBA #22488
12 Attorney for Defendant

13
14 SUBSCRIBED AND SWORN to before me this 31st day of August, 2010.



15 Christy A. McAdoo
16 NOTARY PUBLIC in and for
17 the State of Washington.
18 My commission expires: 07/31/2014

