

NO. 43681-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JICOREY BRADFORD,

Appellant.

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

The Honorable John A. McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to instruct the jury that self-defense applied to both the assault and the drive-by shooting charges. CP 44 (Instruction 16).

2. Appellant was denied his constitutional right to effective assistance of counsel when his attorney failed to propose self-defense instructions relating to count III, drive-by shooting.

3. The evidence was insufficient to prove appellant knowingly possessed a stolen firearm.

Issues Pertaining to Assignments of Error

1. Appellant was charged with two counts of first-degree assault and one count of drive-by shooting involving the same conduct. His defense was self-defense. Unfortunately, the self-defense instruction by its terms applied only to the assault charges. Is reversal required because the jury was not fully instructed on the defense theory of the case?

2. Alternatively, if this issue was not preserved, was trial counsel ineffective in failing to request jury instructions expressly applying self-defense to the drive-by shooting charges?

3. Possession of a stolen firearm requires proof beyond a reasonable doubt the defendant knew the firearm was stolen. Appellant purchased a firearm from an unknown person at a gas station. The serial

number had not been scratched off. Did the State fail to meet its burden to prove appellant's mental state beyond a reasonable doubt?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant JiCorey Bradford with two counts of first-degree assault, one count of drive-by shooting, one count of second-degree unlawful possession of a firearm, one count of possession of a stolen firearm, and one count of possession of cocaine. CP 1-3. The State also alleged a firearm sentencing enhancement for the assault and cocaine possession charges. CP 1-3.

The court dismissed the cocaine possession charge for insufficient evidence. 1RP 611.¹ The jury was unable to reach a verdict as to one count of first-degree assault. CP 70. Bradford was convicted of the other count of first-degree assault with a firearm enhancement and one count each of drive-by shooting, unlawful possession of a firearm, and possession of a stolen firearm. CP 72-76.

The court sentenced him to a standard range sentence of 190 months for the assault with a 60-month firearm sentencing enhancement for a total of

¹ There are seven physical volumes of Verbatim Report of Proceedings referenced as follows: 1RP – May 14-17, 21-24 2012 (six consecutively paginated volumes); 2RP – July 11, 2012.

250 months. CP 96. Standard range sentences for the other charges were to run concurrently. CP 96. Notice of appeal was timely filed. CP 104.

2. Substantive Facts

a. Bradford's Testimony and Statements

When a stranger in a car pulled up next to him and pointed a gun at him, Bradford admitted he responded instinctively by grabbing his own gun and firing several shots at the car in self-defense. 1RP 675, 681. He testified that on October 7, 2011, he picked up his friend, James Gray, to give him a ride, but then had to stop by his brother's apartment to pick up his work clothes. 1RP 668-69. Gray waited outside. 1RP 646. In the breezeway of his brother's apartment complex, Bradford noticed two men, but no words were exchanged. 1RP 671.

Just after they left the apartment, Bradford testified, he and Gray pulled over to change CDs in the stereo. 1RP 673-74. Another car stopped alongside them, and the driver's door flew open. 1RP 673-74. Bradford testified the driver was one of the two men he had seen in the apartment complex. 1RP 674. The driver of the other car was very aggressive and said to Bradford, "I feel a funny-ass vibe coming from over there, and you got me messed up." 1RP 674. When Bradford denied knowing what he was talking about, the passenger in the other car leaned forward and his hand came up. 1RP 675. In it was a gun, pointed at Bradford. 1RP 675.

Bradford reacted by reaching under his seat to grab his own gun; he fired two or three times. 1RP 675. He testified he fired from inside the car and did not get out. 1RP 675-76. After the other car sped away, Bradford got out to see if there was damage to his car. 1RP 676. Then he got back in the car, and headed back to his brother's via a side street. 1RP 677.

On the way, the other car came at them again out of nowhere, cutting them off. 1RP 677, 679. He again saw a gun pointed at him through the passenger window. 1RP 679. He testified that, when he saw the gun, he just reacted on instinct. 1RP 680. He fired once or twice from inside the car, but the hood of the other car was facing directly into his door and the armed occupants were still there. 1RP 680. Feeling he was in the direct line of fire, Bradford got out and ran towards the back of his own car for cover. 1RP 680. As he ran, he fired at the other car. 1RP 681. But then the other car drove away, so he jumped back in the car with Gray and together the pair fled. 1RP 681-82. He testified they crashed on a grassy knoll at a nearby fire station, and he threw the gun out the window. 1RP 683.

Shaken and confused, Bradford mistakenly told police Gray was driving at the time of the shooting because Gray was driving when they crashed. 1RP 688-89. At trial he testified Gray never drove until after the shootings, never possessed a firearm, and was not aware that Bradford had

one in the car. 1RP 689, 714-15. But, he testified, there was no doubt in his mind that someone in the other car pointed a gun at him, twice. 1RP 690-91.

In both his trial testimony and his statements to police at the time, Bradford consistently maintained he acted in self-defense. Officer Holthaus, who responded to the fire station and found Bradford in the passenger seat, testified Bradford told him he and a friend noticed a car that was for sale and went to look. 1RP 333, 336-37. (It was undisputed there was a for sale sign in the window of the other car. 1RP 310-11.) He told Holthaus they pulled up next to the car, and the passenger, who had a gun, asked why they were there. 1RP 338. When he saw the gun, Bradford told Holthaus, he got out of the car quickly and fired several shots. 1RP 338. He then got back in the car and they drove away. 1RP 338. Holthaus said Bradford told him he had recently purchased the car, but was not driving because he had no license. 1RP 341. According to Holthaus' report, Bradford was "antsy" but cooperative and specifically told him he fired in self-defense after the passenger in the other car pointed a gun at him. 1RP 344-35, 350-51.

When Detective Conlon arrived, Bradford also told him the passenger of the other car had a gun. 1RP 521-22. Bradford told him Gray drove, while Bradford fired across the driver's seat and out the driver's side window in self-defense. 1RP 491-42, 550.

Officer Osness transported Bradford to the police station, and along the way Bradford identified a photograph of Gray as the friend who was with him during the shooting. 1RP 354-55. Once back at the station, Bradford gave a video recorded statement to police. 1RP 494-95. In that statement, he clarified he was driving the car, rather than firing from the passenger seat. 1RP 552.

Bradford stipulated he knew he was not permitted to possess a firearm because of his prior felonies. 1RP 275, 689-90. But a man had recently threatened to shoot him in an unrelated dispute about a woman. 1RP 689. So when a man he met at a gas station offered to sell him a gun, Bradford took him up on the offer. 1RP 690. He testified he checked the gun's serial number, and, because it was not scratched off, he assumed the gun was not stolen. 1RP 709.

John Reynolds testified his gun was stolen a couple of years earlier. 1RP 268. He identified the gun used in the shooting as his. 1RP 270-71. He could not say exactly when it was stolen; he knew only that when he went to retrieve it, it was gone. 1RP 272. He did not believe the house had been broken into. 1RP 272.

b. Gray's Testimony and Statements

James Gray was charged as a co-defendant, and his testimony corroborated Bradford's account of the other car pulling up next to them and

the passenger being verbally aggressive. 1RP 629-337. Gray testified he recognized the passenger in the other car as Dandre Long. 1RP 663. Before the shots were fired each time, Gray saw Bradford leaning down as if to duck or hide from someone with a gun. 1RP 639, 653, 664.

Gray testified the first shooting occurred when they stopped to change CDs. 1RP 633. He noticed Bradford ducking down like he was trying to hide. 1RP 637. Then Bradford pulled a gun from under his seat and fired two shots. 1RP 638. For the first shot, Bradford was leaning out of the car, by the second he had gotten out. 1RP 650.

Gray testified that, as they went around the block, the car appeared again and cut them off. 1RP 638-39. It spun around behind them, and he saw Bradford duck again. 1RP 638-39. At this point, Bradford's seat was right in front of the other car. 1RP 658. He saw Bradford get out of the car, heard shots, and assumed Bradford had run away. 1RP 639.

Gray moved to the driver's seat to try to leave. 1RP 639. Before he could actually drive away, Bradford tapped on the car and got back in on the passenger side. 1RP 640-41. Gray testified he turned left and then right at Bradford's direction. 1RP 641. In a panic, he turned into the fire station and lost control of the car. 1RP 642. He ran from the scene because he was frightened. 1RP 642.

c. Long's Testimony and Statements

Dandre Long testified that the day of the shooting he was running errands with his friend Kerry Edwards. 1RP 286. They smoked marijuana for 30 or 40 minutes while waiting for his girlfriend at her apartment complex. 1RP 287-88. He testified that, in the apartment complex, he encountered four men he had never seen before. 1RP 287-89. After he and Edwards started to drive away, Long saw the same four men in a gray car. 1RP 290-91. He claimed they were giving him a weird stare, so he asked if there was a problem. 1RP 291.

Long testified that was when someone got out and began shooting. 1RP 291. He believed the second shooting after they rounded the corner was by different people. 1RP 298-99. He also testified he was very high on marijuana, which affected his ability to perceive events. 1RP 299-300. He denied he or Edwards had a firearm in the car. 1RP 300, 311. He testified he did not talk to the police at the time because "Where I come from you don't talk to the police." 1RP 303.

Long testified he knows James Gray but did not see him the day of the incident. 1RP 305-06. He also denied seeing Bradford the day of the shooting. 1RP 310. Long testified that, during the shooting, he was focused on the other car and could not see what, if anything, his friend Edwards might have been doing. 1RP 312-13. He described Edwards as being

“jittery” and “goofy” when he uses marijuana and doing “stupid stuff” including engaging in altercations. 1RP 307.

The day of the shooting, Long talked to Detective Conlon because he wanted his car back. 1RP 509. Long told Conlon he exchanged words with someone in the other car, who then got out and began shooting at them. 1RP 513. He told Conlon after going around the block, they spun out, the other car stopped along side their car, and someone got out and began shooting at them again as they drove away. 1RP 513. Long did not identify anyone by name. 1RP 512.

d. Edwards’ Testimony and Statements

Kerry Edwards’ testimony was more specific than Long’s, but he gave conflicting accounts. He testified he was the passenger riding along with his friend Dandre Long that day. 1RP 51-52. He claimed he noticed James Gray² in the hallway of Long’s girlfriend’s apartment building but no words were exchanged. 1RP 51-53, 55, 173. He testified Gray gave him a funny look, which Edwards interpreted as Gray trying to figure out whether he (Edwards) was the owner of the car in the parking lot because he (Gray) wanted to steal it. 1RP 173-74.

After they left the apartment building, a car pulled up next to them, facing the opposite direction. 1RP 61. In the other car were Gray and a

² He did not know Gray at the time, but identified him in court as the man he saw in the hall of the apartment building. 1RP 53, 107-08.

person he did not recognize. 1RP 62. Edwards claimed Gray opened the car door, flagged them down, and asked if there was a problem. 1RP 61-62. Edwards claimed neither he nor Long said anything and neither of them had a gun. 1RP 61, 68-69. Gray then began shooting at them. 1RP 61-62.

As they drove away, Edwards heard the back window burst. 1RP 62, 64. Edwards claimed he could see Gray standing in the middle of the street shooting. 1RP 63. He saw four or five shots and as he ducked down inside the car he also heard other shots hit the car. 1RP 64.

Edwards testified that, in their attempt to get away, he and Long drove around the block and their car spun out as they rounded the corner. 1RP 62-64, 66. Gray's car went past them, stopped, and the shooting began again. 1RP 64, 67. Again Edwards identified Gray as the shooter. 1RP 67-68. He and Long ducked down in the car and heard six or seven more shots hit the car. 1RP 67. When the shooting stopped, they drove away. 1RP 67. Edwards denied pointing a gun at the other car or even having a gun. 1RP 185. He testified that if he had a gun, he would have returned fire. 1RP 185-86.

Edwards and Long had several opportunities to get rid of a weapon before any police investigation occurred. Although they had to go past the police station to get there, Edwards testified, he and Long drove to the parking lot of a store approximately two miles away. 1RP 70, 112, 313.

Edwards claimed they had no contact with anyone and only stopped to phone Long's uncle and clean the glass off the seats. 1RP 72. But surveillance photos show someone approaching their car and interacting with Edwards. 1RP 119-20, 178. The other car appeared to have been waiting for them in the parking lot. 1RP 181-83.

Edwards testified he did not call 911 because Long did not want him to. 1RP 73. Instead, Long called his uncle. 1RP 72. The pair proceeded to the uncle's home in Spanaway, about a 15-minute drive. 1RP 72-73. They parked the car behind the uncle's home where it could not be seen from the street. 1RP 73, 209. Gray's uncle then drove Edwards to a nearby gas station, where a friend picked him up and he called Detective Hall, with whom he had a pre-existing relationship. 1RP 73-74, 206-07.

The friend drove Edwards to the police station where he gave a video recorded statement to the police. 1RP 74-77. Edwards admitted he was high from smoking marijuana at the time of the shooting, but did not tell police that at the time. 1RP 146, 152. In a photomontage Edwards identified Bradford, not Gray, as the shooter. 1RP 79.

At trial Edwards claimed he only meant to say that the person he identified was in the car with the shooter. 1RP 79. He testified he saw Bradford in the passenger seat of Gray's car before the first shooting, but did not see him at all after they rounded the corner or during the second

shooting. 1RP 69. He claimed to never have seen either Bradford or Gray before the day of the shooting. 1RP 107-08. In his defense interview, Edwards claimed the person in the montage was the shooter, but claimed the picture was of Gray, not Bradford. 1RP 160-63. Detective Conlon testified that when he gave Edwards the photomontage, Edwards clearly and immediately identified Bradford as the shooter. 1RP 513-15.

Based on information from Edwards, Detective Hall retrieved the car from Long's uncle's home. 1RP 207-08. Long's uncle drove the car out of the carport for him. 1RP 210-11. Hall did not look inside the car to see if there was a firearm. 1RP 211. A forensic examination revealed a bullet lodged in the rear side of the driver's headrest. 1RP 329, 447. The analyst determined 13 shots hit the car. 1RP 481.

Edwards admitted he had a liking for firearms, but now has felony convictions which prevent him from possessing them. 1RP 169-71. He explained he recently pled guilty to 12 or 14 felonies. 1RP 172. There were 35 other co-defendants, among them many of his friends and an uncle. 1RP 192. Edwards and his co-defendants were all members of the Hilltop Crips street gang. 1RP 192. Edwards made a deal. He testified in one murder trial and gave information in a second case against ten other people. 1RP 195-96. He also gave police information on so-called "chop shops." 1RP 196-97. In exchange for his testimony against the other gang members all but two of the

felonies were dismissed. 1RP 193-94. He served roughly one year in prison. 1RP 197. However, if he were found to have violated his plea deal by possessing a firearm, he would face a 30-year sentence. 1RP 198.

e. Other Eye-Witnesses

There were several eye- and ear-witnesses to the shooting. Erik Bergren was working in his shop when he heard a shot. After he turned to look outside he heard two more. 1RP 425-26. He saw two cars, and one person standing in the street. One car sped away immediately, the other car left after the person in the street got into the driver's seat. 1RP 428. Howard Graves heard shooting near his home, and then went outside and marked the shell casings he found on the street. 1RP 359, 364.

Sean Lester heard two sets of gunfire with a pause in between. 1RP 393. He looked out to the street and saw a car spin out. Someone got out, began to walk down the street, and fired a few shots. The person then got back in the car and drove away. 1RP 393-94. He could not see what the person was shooting at. 1RP 395. He had also been smoking marijuana and drinking alcohol that day, which could have affected his perception. 1RP 396, 400.

Denise Delacruz saw the shooter, wearing a dark colored hooded jacket in the parking lot of the restaurant where she worked. 1RP 220. Wayne Nedley was having coffee in the restaurant when he saw one car

chase another into the intersection. He saw the first car spin out, and the second car stop, and the passenger get out and begin shooting at the first car. 1RP 241. He picked up several shell casings from the intersection. 1RP 250-53. Vincent-E Romo-Reyes was in the bar section of the restaurant and also heard three to five shots. 1RP 410-11.

Kyle Thissell saw one car speed by his home, followed shortly by another one. 1RP 371. He saw bullets hit the windows of one of the cars, but could not tell where they were coming from. 1RP 375. The first car spun out, ending in a position where it blocked the other car's path. 1RP 387. David Smalley saw a racing car and heard shots before flagging down a passing police officer. 1RP 404-07. He saw shattered windows toward the rear of the car. 1RP 407.

f. Other Defense Testimony

Shenae Humphrey also testified to impeach Edwards' testimony that he did not possess a firearm during the time of his plea deal. 1RP 727-28. Humphrey testified she ran into Edwards, who she has known since childhood at the apartment he shared with his girlfriend in the same complex as Humphrey's cousin. 1RP 729-30. She testified that when he saw her, he ducked into the apartment and came out with a gun. 1RP 729, 731. He began cursing, told her he was "strapped" and told her he used the firearm daily. 1RP 732. He backed her up to a wall and put the gun in her face.

1RP 732. He told her to go ahead and call the cops because they knew he was “strapped.” 1RP 732. She testified “strapped” means he was carrying a firearm. 1RP 732-33. As he left, Edwards also pointed the gun at Humphrey’s father who was waiting in the car, and told him, “You can get it, too.” 1RP 733. Humphrey’s father corroborated this incident. 1RP 743-47. On cross-examination, Humphrey admitted her boyfriend pled guilty in the Hilltop Crips cases and word on the street was that Edwards was a police informant. 1RP 737-38.

g. Rebuttal Testimony

In rebuttal, the State called Detective Ringer. 1RP 751. He explained Edwards’ cooperation saved him 20-30 years in prison and led to charges against 28 other Hilltop Crips. 1RP 753, 756. He testified he was confident Edwards abided by the requirement that he not possess a firearm because Edwards’ protective strategy appeared to be calling Detective Ringer and talking loudly to him on the phone several times a day. 1RP 766.

Edwards testified he was aware of Humphrey’s accusation, but he had given Detective Ringer a receipt showing he was at a tire store and not even in the area that day. 1RP 774. Edwards’ former girlfriend testified he was not at the apartment the day Humphrey made her accusation because they had broken up three months earlier and, by the time of Humphrey’s

accusation, she had a restraining order against Edwards who no longer knew where she lived. 1RP 782.

h. Closing Argument, Jury Instructions, Verdicts

The defense theory of the case was that all the shots were fired in self-defense. 1RP 821-22. In closing argument, both sides agreed the only real issue was whether Edwards had a gun.³ 1RP 798, 809. Defense counsel argued the assault and drive-by shooting charges would rise or fall together on that question. 1RP 821-22.

The jury was instructed that lawful use of force was a defense to assault in the first degree. CP 44. Nothing in the jury instructions informed the jury that self-defense could be a defense to drive by shooting. Ultimately, the jury convicted Bradford on all the charges but one; it could not agree on count one, the count of first degree assault relating to Edwards, who Bradford claimed displayed a gun causing him to act in self-defense. CP 70-76.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT THE JURY THAT SELF-DEFENSE WAS AVAILABLE FOR BOTH THE ASSAULT AND THE DRIVE-BY SHOOTING CHARGES.

When self-defense is raised, the State must prove the absence of self-defense beyond a reasonable doubt. State v. Woods, 138 Wn. App. 191,

³ Bradford admitted he was guilty of unlawful possession of a firearm. 1RP 823.

199, 156 P.3d 309 (2007); State v. Dana, 84 Wn. App. 166, 176, 926 P.2d 344 (1996). This case is perhaps unusual in that the issue is not whether the evidence warranted instruction on self-defense. On the contrary, the State, apparently without prompting, proposed jury instructions on self-defense. 1RP 788. The sufficiency of the evidence supporting those instructions was never questioned at trial.

However, instruction 16, explaining lawful use of force, expressly stated that it applied to the assault charges: “It is a defense to a charge of assault in the first degree that the force used was lawful.” CP 44.⁴ Nothing in the instructions would have led the jury to believe the State had to disprove self-defense to convict Bradford of drive-by shooting. The question presented here is whether Bradford’s conviction for drive-by shooting must be reversed because the jury was never instructed it could

⁴ Instruction 16 reads in full:

It is a defense to a charge of assault in the first degree that the force used was lawful as defined in this instruction.

The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent an offense against the person, and when the force is not more than is necessary.

The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of the incident.

The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

CP 44.

apply the self-defense theory to that charge as well as to the assault charges. The answer is yes.

Self-defense is a defense to a charge of drive-by shooting because it negates the necessary element of recklessness. RCW 9A.36.045 (“A person is guilty of drive-by shooting when he or she recklessly discharges a firearm.”).⁵ A person acting in self-defense by definition cannot be acting recklessly. State v. Hanton, 94 Wn.2d 129, 134, 614 P.2d 1280 (1980); cf. State v. Dyson, 90 Wn. App. 433, 438, 952 P.2d 1097, 1099 (1997) (self-defense negates criminal negligence element of third-degree assault because “a person who acts in self-defense is not ‘fail[ing] to be aware of a substantial risk that a wrongful act’ may occur”) (quoting RCW 9A.08.010(1)(d)); Dana, 84 Wn. App. at 176 (“[S]elf-defense negates the intent elements of murder, assault, and manslaughter.”). When a defense negates an element of the crime, the state bears the burden of proving the absence of that defense. Id. The lawful use of force instruction should have been applied to the drive-by shooting charge as well because Bradford

⁵ The full statutory definition of drive-by shooting reads:

A person is guilty of drive-by shooting when he or she recklessly discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.

RCW 9A.36.045(1).

cannot have been acting recklessly if he acted in self-defense. Hanton, 94 Wn.2d at 134.

The absence of instruction effectively deprived Bradford of his defense to the drive-by shooting charge. A defendant is entitled to have the jury fully instructed on the law as to his theory of defense. State v. Walker, 82 Wn.2d 851, 857, 514 P.2d 919 (1973). Defense counsel should not have to convince the jury what the law is. State v. Miller, 89 Wn. App. 364, 367, 949 P.2d 821 (1997) (citing State v. Acosta, 101 Wn.2d 612, 621-22, 683 P.2d 1069 (1984)). The sufficiency of jury instructions is a question of law reviewed de novo. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995). Here, Bradford's attorney argued the self-defense claim applied to both the assaults and the drive by shooting. 1RP 821-22. But that argument was left unsupported by any jury instruction. And the jury was instructed the lawyer's arguments are not the law.

Instruction 16 misstated the law by leading the jury to believe Bradford's self-defense claim applied only to the assault charges and not to the drive-by shooting charge. CP 44. This misstatement of the law relieved the State of its burden to disprove self-defense and is, therefore, manifest constitutional error that may be raised for the first time on appeal. RAP 2.5(a)(3); Woods, 138 Wn. App. at 199 (citing State v. Walden, 131 Wn.2d

469, 473, 932 P.2d 1237 (1997)); see also State v. Stein, 144 Wn.2d 236, 240-41, 27 P.3d 184 (2001) (finding manifest constitutional error reviewable for the first time on appeal because instructions relieved State of burden to prove essential element); accord State v. O'Hara, 167 Wn.2d 91, 95, 217 P.3d 756, 759 (2009) (no manifest constitutional error in self-defense instruction where State was not relieved of its burden to disprove self-defense).

A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial.” Woods, 138 Wn. App. at 197 (citing State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). In the face of constitutional error, the State bears the burden to prove “beyond a reasonable doubt that the error complained of did not contribute to the verdict.” Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

The error is far from harmless in this case. By failing to instruct the jury that self-defense applied to drive-by shooting, the court effectively deprived Bradford of his defense with respect to that charge. The jury’s verdicts show the prejudice of this omission. The jury could not reach a verdict on the assault charge relating to Edwards. 1RP 874; CP 70. Since Bradford admitted shooting at the car, this was presumably because at least

some jurors believed Bradford acted in self-defense. The State cannot prove beyond a reasonable doubt that Bradford would have been convicted of drive-by shooting if the jury had been properly instructed that self-defense could apply.

2. IF THIS ERROR WAS NOT PRESERVED, COUNSEL WAS INEFFECTIVE IN FAILING TO ENSURE THE JURY WAS PROPERLY INSTRUCTED ON THE DEFENSE THEORY OF THE CASE.

Bradford was entitled to constitutionally effective counsel. U.S. Const. amend. VI; Const. art. I, § 22. Even when error is invited or not preserved, reversal is required when counsel's objectively deficient performance undermines confidence in the outcome of the proceedings. Woods, 138 Wn. App. at 197; see also Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) (review of instructional error "is not precluded where invited error is the result of ineffectiveness of counsel").

An error constitutes deficient performance when it falls below an objective standard of reasonableness, considering all the circumstances. Woods, 138 Wn. App. at 197. Counsel is ineffective when counsel's conduct could not have been a legitimate strategic or tactical choice. Id. That is the case here. Bradford fully and completely admitted to the shooting at issue in this case. Self-defense was the only defense theory of

the case. 1RP 809, 821-22. The conduct underlying the drive-by shooting was identical to that underlying the assault charges. Under the law as discussed above, self-defense applies equally to the drive-by shooting charges. Yet counsel failed to propose an instruction applying self-defense to this charge and failed to object to the State's proposed instruction limiting self-defense to the assault charges.

Failing to ensure the jury is correctly instructed on the defense theory of the case is constitutionally deficient performance. State v. Thomas, 109 Wn.2d 222, 227-29, 743 P.2d 816 (1987); Woods, 138 Wn. App. at 201. In Thomas, defense counsel failed to propose an instruction that was crucial to Thomas' defense of diminished capacity. 109 Wn.2d at 227. The so-called Sherman⁶ instruction would have informed the jury that the inference of willful and wanton disregard for the lives or property of others could be rebutted by evidence of voluntary intoxication. Id. at 226-27. In closing, defense counsel argued Thomas' intoxication negated the mental state required for the offense, but the jury was not instructed that the law supported that argument. Id. at 228. The court found counsel's performance deficient. Id.

The Thomas court also found the failure to request instructions crucial to the defense theory caused prejudice and required reversal. 109

⁶ State v. Sherman, 98 Wn.2d 53, 653 P.2d 612 (1982).

Wn.2d at 229. Although the evidence was close, the court reasoned there was evidence Thomas was extremely intoxicated, but without the Sherman instruction, the jury may have believed this was irrelevant given her conduct. Id. Therefore, the court declared, “our confidence in the outcome is undermined such that we cannot say Thomas received effective assistance of counsel.” Id. (citing Strickland, 466 U.S. at 694).

Bradford’s case directly parallels Thomas. It was essential to the defense theory of the case that the jury be instructed on self-defense. The failure to propose that instruction was deficient performance. Without that instruction, the jury could have disregarded the evidence of self-defense, believing it did not apply. Had the jury been properly instructed, a reasonable juror could have found Bradford not guilty, as at least one juror apparently did with regards to one of the assault charges. Bradford’s conviction for drive-by shooting should be reversed because he was prejudiced by his attorney’s failure to ensure the jury was properly instructed on the defense theory of the case. Thomas, 109 Wn.2d at 227-29.

3. THE EVIDENCE WAS INSUFFICIENT TO CONVICT BRADFORD OF POSSESSION OF A STOLEN FIREARM BECAUSE NO EVIDENCE SHOWED HE KNEW THE WEAPON WAS STOLEN.

“Bare possession of stolen property is insufficient to justify a conviction,” for possession of a stolen firearm. State v. McPhee, 156 Wn.

App. 44, 62, 230 P.3d 284, rev. denied 169 Wn.2d 1028 (2010). Knowledge that the firearm is stolen is an essential element of the offense. McPhee, 156 Wn. App. at 62 (citing State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967)); RCW 9A.56.310. Bradford's conviction for possession of a stolen firearm under RCW 9A.56.310⁷ should be reversed because the State failed to prove beyond a reasonable doubt whether he knew the weapon was stolen.

In every criminal prosecution, due process requires the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In a challenge to the sufficiency of the evidence, the court views the evidence in the light most favorable to the prosecution and inquires whether the evidence was sufficient for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) overruled on other grounds by Schlup v. Delo, 513 U.S. 298, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

⁷ RCW 9A.56.310 provides in relevant part, "A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a stolen firearm."

More than a mere scintilla of evidence is needed to meet the beyond-a-reasonable-doubt standard; “there must be that quantum of evidence necessary to establish circumstances from which the jury could reasonably infer the fact to be proved.” State v. Miller, 60 Wn. App. 767, 772, 807 P.2d 893 (1991). Although a conviction may be sustained on circumstantial evidence, the existence of a fact cannot rest on guess, speculation, or conjecture. “This rule is even more essential in criminal cases where the evidence is entirely circumstantial.” State v. Golladay, 78 Wn.2d 121, 130, 470 P.2d 191 (1970), overruled on other grounds by State v. Arndt, 87 Wn.2d 374, 553 P.2d 1328 (1976)). In State v. Liles, 11 Wn. App. 166, 521 P.2d 973 (1974), the court explained:

When substantial evidence is present, the drawing of reasonable inferences therefrom and the doing of some conjecturing on the basis of such evidence is permissible and acceptable. If, however, the necessity for conjecture results from the fact that the evidence is merely scintilla evidence, then the necessity for conjecture is fatal.

Id. at 171 (citation omitted); accord, State v. Harris, 14 Wn. App. 414, 417-18, 542 P.2d 122 (1975).

Knowledge is generally proved by circumstantial evidence, but in this case, there was simply no evidence at all that Bradford knew the gun was stolen. Knowledge may be proven if there is information from which a reasonable person would conclude the fact at issue. CP 57 (instruction 29

defining knowledge); State v. Shipp, 93 Wn.2d 510, 514, 516, 610 P.2d 1322 (1980). Bradford testified he bought the gun at a gas station and assumed it was legitimate after checking to see that the serial number was not scratched off. 1RP 690, 709. His explanation of buying a gun from a private person rather than going to a dealer is not improbable because, as he explained, he believed he needed a firearm for self-defense but knew he was not permitted to own one because of his criminal history. 1RP 689. His testimony was uncontradicted. This issue does not hinge on the credibility of Bradford's explanation. The jury was entitled to disbelieve him. It was not entitled to find he knew the gun was stolen without proof beyond a reasonable doubt.

The mere fact that Bradford had to purchase a gun in an illegal manner because he could not lawfully possess one is not proof that he knew the gun was stolen. In United States v. Howard, 214 F.3d 361, 364 (2d Cir. 2000), the Second Circuit explained the fallacy of this reasoning:

[T]he fact that appellant may have known that as a convicted felon he could not lawfully obtain a firearm does not tend to prove that he had reason to know that the gun in question was stolen. We have no basis on this record or on the arguments made to us to opine that such a significant portion of guns sold on the "black market" are stolen that a purchaser would likely share such knowledge and believe that any particular gun sold on that market was even highly likely to have been stolen.

Id. at 364. Merely buying a gun from an unknown person is also not proof he knew it was stolen. Thomas v. State, 270 Ga. App. 181, 182, 606 S.E.2d

275, 277 (2004) (conviction for possession of stolen firearm reversed because only evidence of knowledge was that appellant had purchased the pistol for \$120 from someone he did not know).

The record is devoid of the types of evidence that have permitted a jury to infer knowledge in other cases. For example, only slight additional evidence may be required when the firearm in question was recently stolen. State v. Withers, 8 Wn. App. 123, 128, 504 P.2d 1151, 1155 (1972) (citing State v. Portee, 25 Wn.2d 246, 170 P.2d 326 (1946)). In the case of a recently stolen firearm, inconsistent statements about the firearm, attempts to sell it, or false or improbable explanations alone may be sufficient. State v. Pisauero, 14 Wn. App. 217, 220-21, 540 P.2d 447, 449-50 (1975). But this firearm was not recently stolen. The owner testified he found it missing a couple of years ago. 1RP 268. He could not be certain how long it had been gone at that point. 1RP 272. Because the gun was not recently stolen, even if Bradford's account of how he acquired it appears improbable, that alone is not sufficient evidence he knew it was stolen.

Familiarity with the location of the theft when combined with a dubious explanation has also been held sufficient to show knowledge that property was stolen. State v. Smyth, 7 Wn. App. 50, 499 P.2d 63 (1972). For example, Smyth admitted he had visited the home the property was stolen from on several occasions. Id. at 51-52. There was also evidence he

attempted to obtain a fictitious bill of sale while he was in jail awaiting trial. Id. at 52-54. On appeal, the court held that these facts, taken together, were sufficient to submit the question of guilt to the jury. Id. at 53-54. But here, no evidence was presented that Bradford was familiar with the location of the theft. The owner testified it must have been someone who had access to his home, but there was no evidence Bradford had any connection with anyone who had access to the home. 1RP 272.

Bradford's conduct and testimony did not prove whether he knew the gun was stolen. The evidence was entirely consistent with the fact that he knew he was not permitted to possess a firearm and was involved in a shooting. There was no improbable or contradictory explanation. No familiarity with the locale of the theft. No demonstrated opportunity. No recent theft. No Washington case has upheld a conviction for knowingly possessing stolen property based on such thin evidence. The jury's conclusion could only have been based on speculation and guilt by association based on the other charged offenses. No reasonable factfinder could conclude beyond a reasonable doubt that Bradford knew the firearm was stolen. His conviction for possession of a stolen firearm should be reversed.

D. CONCLUSION

The court erred in failing to give a jury instruction applying self-defense to the drive-by shooting charge and in entering judgment on possession of a stolen firearm in the face of insufficient evidence. Bradford requests this Court reverse his convictions for drive-by shooting and possession of a stolen firearm and remand for resentencing.

DATED this 9th day of October, 2012.

Respectfully submitted,

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Attorney for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 43681-7-1
)	
JICOREY BRADFORD,)	
)	
Appellant.)	

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 8TH DAY OF OCTOBER 2012, 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] JICOREY BRADFORD
DOC NO. 850561
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 8TH DAY OF OCTOBER 2012.

x *Patrick Mayovsky*

NIELSEN, BROMAN & KOCH, PLLC

October 08, 2012 - 2:29 PM

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