

NO. 44777-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL HARRIS EHAT, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable James Orlando

No. 12-1-03982-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to prove his counsel ineffective in pursuing a successful strategy that led to acquittal of defendant's most serious charge instead of deviating from that strategy to pursue potentially futile litigation of an unsettled area of law?
2. Is defendant incapable of proving the claimed due process violation when the jury was instructed on his factually unsupported theory of entrapment by estoppel and rejected it by convicting him for unlawfully possessing two firearms?

B. STATEMENT OF THE CASE.

1. Procedure

Appellant, MICHAEL EHAT ("defendant") was charged by amended information with firearm enhanced domestic violence ("DV") assault in the second degree and two counts of unlawful possession of a firearm in the second degree under Pierce County cause number 12-1-03982-0. CP 6-7. The Honorable James Orlando presided over trial. 1RP 1.¹ The jury acquitted defendant of assault, but found him guilty of the firearm offenses. 5RP 393-94; CP 44-6. Sentence was imposed on April

¹ Citations to VRP Volumes I-VI will appear as 1RP-6RP and page number, e.g., 1RP 1.

19, 2013. 6RP 400; CP 49. Defendant's offender score was 1 for each count, giving him a standard range sentence of 3-8 months. CP 52. He would have faced a potential sentence of 48-50 months in the department of corrections if acquittal had not been obtained for the firearm-enhanced assault. *See* RCW 91.36.021(2)(a); RCW 9.95A.525(8), .533(3). Counsel persuaded the court to impose credit for time served despite the State's high-end recommendation before filing a timely notice of appeal on defendant's behalf. 6RP 401-02; CP 61.

2. Facts

Deputies were dispatched to defendant's Roy² residence in response to a 911 report of domestic violence; wherein his roommate, Richard Young, claimed defendant aimed a shotgun at his face in the early afternoon hours of October 21, 2012. 2RP 61-4, 70, 79, 83-4, 119-21, 158-59, 164, 184-85. Such calls can be among the most dangerous for responding deputies. 2RP 78-80. Defendant was purportedly upset over an argument he had with Young the night before. 2RP 188.

Young testified defendant walked out of his bedroom with a loaded shotgun, put it in Young's face, pumped one shell out of the chamber, and said he would kick Young out of the residence the "the country boy way,

² Washington.

matter of fact he c[ould] blow [Young's] brains out and bury [him] in the woods and nobody would ever know." 2RP 189, 199, 218. Young allegedly disarmed defendant during a brief struggle before running out of the house to call 911. 2RP 189-90. Three deputies were dispatched due to defendant's reported use of the firearm. 2RP 121.

Deputies contacted Young in a neighbor's driveway just west of the single-wide trailer he shared with defendant. 2RP 62-3, 84-5, 130. Young reiterated his version of the firearm-related interaction with defendant, adding defendant unlawfully possessed firearms in their home. 2RP 63-6, 160. A search of defendant's criminal history confirmed his ineligibility to possess firearms. 2RP 160-61. Deputies called defendant out of the house to neutralize the threat associated with his access to firearms. 2RP 64-5, 124. Defendant was taken into custody when he stepped out onto the porch. 2RP 64, 81, 125-26, 161-62. He was advised of his rights and denied recollection of the reported incident. 2RP 65, 126, 162.

Defendant acknowledged he had firearms in the residence. 2RP 66. He agreed to take the deputies to them. 2RP 66, 162-63. Defendant led deputies to a .22 rifle on the floor of a room at the rear of the residence. 66, 70, 86, 126-27, 163. Defendant claimed a shotgun should also have been in the room. 2RP 67. The room appeared to serve as a

storage place for boxes and miscellaneous items. 2RP 71, 104. At trial Young testified he rented that room and slept there when he did not fall asleep on the living room couch or armchair. 2RP 188, 200, 215. Defendant's bedroom was located elsewhere in the house. 2RP 188. Defendant acknowledged it was unlawful for him to possess firearms due to his criminal record. 2RP 69. Deputies immediately secured the rifle in a patrol car so it was "out of play," due to the nature of the incident and because it could not lawfully remain with defendant. 2RP 66-9, 92-4.

Defendant claimed he brought several firearms into the residence that belonged to his recently deceased brother after Deputy Sanders advised he secure them. 2RP 66-9, 191. The brother's residence was situated on the same property as the trailer defendant shared with Young. 2RP 191. At trial Sanders testified he told defendant to "be sure to secure the [brother's] residence so that none of [the property] would be taken." 3RP 279, 281-82. Sanders never told defendant to take the firearms back to his house nor would he have opined about the legality of defendant possessing them since Sanders did not have occasion to run defendant's criminal history during his investigation of the brother's suicide. 3RP 282-83, 288. Defendant was transported to the Pierce County Jail. 2RP 69, 128-29, 163.

Young agreed to escort Deputy Brown into the residence to recover a shotgun under the living room couch where Young sometimes slept. 2RP 70, 164, 188. The living room was just on the other side of the front door. 2RP 85, 130. The shotgun was loaded with two shells, one of which was chambered. 2RP 71, 164-65. A subsequent examination confirmed the operability of both firearms. 2RP 71-2, 75-8; 176-82; CP 14, Ex. 9-10. Young testified the firearms belonged to defendant. 2RP 193-94. Defendant's status as a person legally ineligible to possess firearms was established through evidence of his predicate offense for DV assault in the fourth degree. CP 15, Ex. 13-14, 21-22; 2RP 61, 69; 3RP 257, 258-62, 264, 274-75.

C. ARGUMENT.

1. DEFENDANT FAILED TO PROVE HIS COUNSEL WAS INEFFECTIVE IN PURSUING A SUCCESSFUL STRATEGY THAT LED TO ACQUITTAL OF DEFENDANT'S MOST SERIOUS CHARGE INSTEAD OF DEVIATING FROM THAT STRATEGY TO PURSUE POTENTIALLY FUTILE LITIGATION OF AN UNSETTLED AREA OF LAW.

To prevail on an ineffective assistance of counsel claim a defendant must prove his counsel's performance was deficient and that deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518,

881 P.2d 185 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Counsel is constitutionally deficient only when his or her representation is demonstrated to fall below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 335, 880 P.2d 1251 (1995). “Strickland begins with a strong presumption that counsel’s performance was reasonable.” *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). “To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel’s performance.” *Id.* at 42 (citing *State v. Richenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); see also *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968). “In assessing performance, the court must make every effort to eliminate the distorting effects of hindsight.” *State v. Brown* 159 Wn. App. 336, 371, 245 P.3d 776 (2011) (citing *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007)).

- a. Defendant failed to prove his counsel was deficient in failing to seek suppression of the firearms underlying his convictions pursuant *Ferrier*³ because *Ferrier* did not apply to the police entry in his case.

"Defense counsel has a duty to investigate all reasonable lines of defense, but has no duty to pursue strategies that reasonably appear unlikely to succeed." *Brown* 159 Wn. App. at 371, (citing *In re Personal Restraint of Davis*, 152 Wn.2d 647, 744, 101 P.3d 1 (2004); *McFarland*, 127 Wn.2d at 334 n.2.); see also *Brown*, 159 Wn. App. at 372 (citing e.g., *Anderson v. United States*, 393 F.3d 749, 754 (8th Cir.) (counsel's failure to argue novel theories of law is similarly incapable of supporting an ineffective assistance of counsel claim) *cert. denied*, 546 U.S. 882 (2005)).

Counsel was not ineffective in failing to seek suppression of the firearms based on the absence of a *Ferrier* warning because that requirement is limited to "knock and talk" procedures where police obtain consent to conduct arbitrary searches for contraband. See *State v. Khounvichai*, 149 Wn.2d 557, 566-67, 69 P.2d 862 (2003); *State v. Williams*, 142 Wn.2d 17, 24-25, 11 P.3d 714 (2000). It does not apply when police respond to a 911 report of firearm-related domestic violence as the Supreme Court has "not f[ou]nd a constitutional requirement that a

³ *State v. Ferrier*, 136 Wn.2d 103, 118-19, 960 P.2d 927 (1998) ("knock and talk" procedure where police in "raid jackets" pressured consent to evidentiary search for marijuana-grow operation in a home.").

police officer read a warning each time the officer enters a home to exercise [an] investigatory duty." *See Id.* at 27. The Court recognizes "police officers are oftentimes invited into homes for investigative purposes" and that applying the *Ferrier* rule to such encounters "would unnecessarily hamper a police officer's ability to investigate complaints and assist the citizenry." *Id.* at 28; *see also State v. Hoggatt*, 108 Wn. App. 257, 30 P.3d 488 (2001) (co-occupants may allow officers into portions of a premises into which guests are customarily received without permission of other individuals who share control); *State v. Morse*, 156 Wn.2d 1, 14, n.4, 123 P.3d 832 (2005)).

Deputies were dispatched to investigate a 911 report of firearm-related domestic violence at defendant's residence. 2RP 61-4, 70, 79, 83-4, 119-21, 158-59, 164, 184-85. They were advised by the reporting victim defendant irrationally pumped a shotgun, pointed it in his face, and threatened to kill him. *Id.* Immediately removing firearms from that potentially explosive domestic dispute was paramount. 2RP 64-69, 78-80, 92-94, 124, 189, 199, 218. Both defendant and Young consented to the police entry for the purpose of securing firearms. 2RP 65-6; 70. The firearms were recovered from a shared living room and a shared storage room Young sometimes used as a bedroom—places where guests would be reasonably invited by either occupant. *See* 2RP 188, 200, 215. 2RP 70,

164, 188. The challenged entry was not the product of a "knock and talk" procedure where police arbitrarily contacted the residents to urge a consensual search, hoping they might stumble upon contraband to support an otherwise unlawful arrest. Counsel was not deficient for failing to challenge the recovery of the firearms pursuant to *Ferrier* as its requirement did not apply to the facts of defendant's case.

- b. A suppression motion based on *Ferrier* was also likely to fail because the challenged entry was potentially lawful under the evolving emergency exception to the warrant requirement as applied to domestic violence.

"There is no basis for [reviewing courts] to find ineffective assistance for defense counsel's failure to move to suppress evidence in anticipation of a change in the law." *State v. Pearsall*, 156 Wn. App. 357, 362, 231 P.3d 849 (2010), *rev. granted, remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1113 (2011) (*citing State v. Millan*, 151 Wn. App. 492, 502-03, 212 P.3d 603 (2009), *rev. granted, reversed on other grounds*, *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011)). And reasonable trial strategies need not adjust to advance claims that may become meritorious as the law evolves. *See State v. Slighte*, 157 Wn. App. 618, 624, 238 P.3d 83 (United State Supreme Court's grant of *certiorari* on a legal issue relevant to a defendant's case did not give

counsel a duty to augment trial strategy to take advantage of a potentially beneficial development in that area of law), *rev. granted, remanded on other grounds*, 172 Wn.2d 1003, 257 P.3d 1112 (2011) (citing ***Kornahrens v. Evatt***, 66 F.3d 1350, 1359 (4th Cir. 1995) (trial counsel's performance was not constitutionally deficient where he followed a rule under attack in the United States Supreme Court at the time of trial); ***Randolph v. Delo***, 952 F.2d 243, 246 (8th Cir. 1991) (counsel not ineffective for failing to raise ***Batson***⁴ challenge two days before that case was decided as reasonable conduct is viewed according to the law at the time of representation).

Defendant's counsel may have refrained from filing a ***Ferrier*** motion based on the challenged entry's probable legality under the emergency exception as recently applied to firearm-related reports of domestic violence. See ***State v. Schultz***, 170 Wn.2d 746, 755, 248 P.3d 484 (2011); ***Feis v. King County***, 165 Wn. App. 525, 546-49; 265 P.3d 1022 (2011) (post-arrest warrantless entry to seize firearms following domestic violence arrest did not violate clearly established federal law).⁵

⁴ ***Batson v. Kentucky***, 476 U.S. 79, 95, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

⁵ See also ***State v. Lowrimore***, 67 Wn. App. 949, 841 P.2d 799 (1993) (cause to believe juvenile suffering from mental disorder justified warrantless search of belongings); see also; ***State v. McAplin***, 36 Wn. App. 707, 677 P.2d 185 (1984); ***United States v. Bradley***, 321 F.3d 1212, 1214 (2003) (citing ***United States v. Cervantes***, 219 F.3d 882 (9th Cir. 2000)).

"Washington courts have held on many occasions that law enforcement may make a warrantless search of a residence if (1) it has a reasonable belief that assistance is immediately required to protect life or property, (2) the search is not primarily motivated by an intent to arrest and seize evidence, and (3) there is probable cause to associate the emergency with the place to be searched. *State v. Smith*, 177 Wn.2d 533, 541, 303 P.3d 1047 (2013)⁶ (citing *State v. Acrey*, 148 Wn.2d 738, 748, 64 P.3d 594 (2003));⁷ *Feis*, 165 Wn. App. 525, 546-49 (citing *Mincey v. Arizona*, 437 U.S. 385, 392 (1978); see also *Williams*, 142 Wn.2d at 11) (*Ferrier* warnings need not be given when officers enter a house for routine response).

The Washington Supreme Court allows courts to "consider that an entry is made into a home in the context of a domestic violence threat in considering the reasonableness of office[r] actions under the emergency aid exception." *Shultz*, 170 Wn.2d at 761. This is because "[d]omestic violence presents unique challenges for law enforcement[, which] can be

⁶ Notably absent from this standard is a requirement that the officer's initial presence be justified...."

⁷ See also *Martin v. City of Oceanside*, 360 F.3d 1078, 1081-82 (2004) (lawful emergency entry to conduct welfare check); see also *Bradley*, 321 F.3d at 1215 (warrantless search of home to ascertain child welfare); *Pryor v. City of Clearlake*, et al., 877 F.Supp.2d 929, 945-46 (2012) (lawful warrantless entry and taser application to subdue dangerous person with mental illness). "The appropriateness of the emergency doctrine is best understood in light of the particular facts of a case in which it is invoked." *Bradley*, 321 F.3d at 1214.

volatile and quickly escalate into significant injury." *Id.* at 755. The Court of Appeals has further recognized "police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants." *Id.* (citing *State v. Raines*, 55 Wn.App. 459, 464, 778 P.2d 538 (1989)). And the Ninth Circuit rightly recognizes "[t]he volatility of situations involving domestic violence make them particularly well suited for an application of the emergency doctrine. When officers respond to a domestic abuse call, they understand that violence may be lurking and explode with little warning. Indeed, more officers are killed or injured on domestic violence calls than on any other type of call." *United States v. Martinez*, 406 F.3d 1160, 1164 (2005) (internal citations omitted) (officers responding to 911 call justifiably entered the home and seized firearms to manage potential scene of domestic violence).

Counsel would not have been deficient in interpreting prevailing applications of the emergency exception to firearm-related reports of domestic violence as supporting the legality of the police entry defendant claims counsel ineffectively failed to challenge. *See Smith*, 177 Wn.2d at 541; *Shultz*, 170 Wn.2d at 761; *Williams*, 142 Wn.2d at 24-25; *Feis*, 165 Wn. App. at 546-49. Deputies recovered the relevant firearms from the residence in which the defendant reportedly pointed a loaded shotgun at

his roommate's face. 2RP 61-4, 70, 79, 83-4, 119-21, 158-59, 184-84.⁸

Whatever the outcome of litigating the search might have been, counsel cannot be proven deficient for failing to pursue it given the unsettled quality of the relevant law. See *Pearsall*, 156 Wn. App. at 362; *Millan*, 151 Wn. App. at 502-03; *Slighte*, 157 Wn. App. 624.

- c. Defendant failed to demonstrate his counsel was deficient in strategically presenting defendant's cooperation with the firearm seizure to refute the alleged assault and prove entrapment by estoppel while attacking the firearm charges through other means.

A claim that trial counsel was ineffective does not survive if counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). The defendant bears the burden of establishing the absence of any "conceivable" legitimate strategy or tactic explaining

⁸ The fact defendant had cleared the scene by the time the shotgun was recovered did not minimize the threat posed by the firearm in a way that would necessarily undermine law enforcement's claim to the exception as there was the potential defendant might secure early release and return home —enraged by his arrest—to reengage the reported victim with that gun. See *Shultz*, 170 Wn.2d at 761 (citing *Raines*, 55 Wn. App. at 465); *State v. Angelos*, 86 Wn. App. 253, 936 P.2d 52 (1997) (emergency exception applied to apartment search to ensure drugs responsible for overdose would not be accessible to children remaining in the home); *Feis*, 165 Wn. App. at 546-49.

counsel's performance to rebut the strong presumption that counsel's performance was effective. *Grier*, 171 Wn.2d at 42.

- i. **Counsel strategically used defendant's cooperation with the firearm seizure to refute the alleged assault as well as to prove the entrapment by estoppel defense.**

In closing counsel argued Young was "a disgruntled roommate" who falsely claimed defendant assaulted him and unlawfully possessed firearms to secure defendant's absence from the residence through arrest. 3RP 326-28, 332-39. To refute Young's disparate account of the incident counsel heavily relied upon officer testimony that tended to depict defendant as a calm person who cooperatively "invited [the deputies] in" to assist their recovery of the firearms. 3RP 227, 344-46. Depicting defendant in that manner set up a stark contrast from the gun-wielding maniac Young claimed him to be just before police arrived. 2RP 61-4, 70, 79, 83-4, 119-21, 158-59, 164, 184-85, 189, 199, 218. Counsel argued entrapment by estoppel from the same evidence, rhetorically submitting defendant "d[id]n't act like a guy who is trying to conceal firearms" or believed he possessed them unlawfully. 3RP 344-47. The acquittal won on the firearm enhanced assault count is powerful evidence counsel's strategy was substantially successful.

- ii. **Counsel attacked the firearm counts by challenging the admissibility, then weight, of the evidence proving his predicate offense while maintaining the position that possession had never been proved.**

Counsel initiated this strategy by first refusing to stipulate to the State's proof of the predicate offense that made defendant's firearm possession unlawful. 1RP 6. He then almost successfully opposed the State's efforts to admit exhibits necessary to prove the predicate offense. 2RP 68, 137-156; 3RP 251-54, 262-64, 268-73.⁹ Once evidence of the predicate offense was admitted, counsel argued it was insufficient to support the charges in a half-time motion to dismiss. 3RP 288-90. Counsel also challenged submitting the firearm counts to the jury on a theory of inadequate notice. 3RP 291-93. If counsel had proved successful, he could have made use of the persuasive value of defendant's cooperation with the firearm seizure to refute the assault while securing dismissal of the firearm counts for a failure of proof. Counsel continued

⁹ Defendant's predicate offense was proved through three certified court records for case 7YC010874 and testimony connecting defendant to that case. The records consisted of: (1) redacted Statement of Defendant on Plea of Guilty; (2) court order entering judgment; and (3) notice of ineligibility to possess firearms. CP 14 Ex. 1-3. The testimony consisted of Pierce County Sheriff Forensic Technician Oberg, who confirmed photographic and fingerprint evidence contained in defendant's booking records positively linked him to the predicate offense documents. 3RP 257, 258-62, 264, 274-75; CP 15, Ex. 13-14, 21-22. Oberg testified Ex. 21 and Ex. 22 depicted booking photographs of defendant associated with the predicate offense. The State refrained from admitting the booking photographs as exhibits. 3RP 274-75.

to argue against the State's proof of the predicate offense in closing argument. 3RP 349-50. Counsel alternatively argued possession had not been proven; or if proved, excused as reasonable due to defendant's purported reliance on Deputy Sanders' advice to secure them. 3RP 340-47. Counsel's strategy is manifest and sound even though it was not completely successful in the end.

d. Defendant failed to prove his counsel's overall performance was ineffective.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 89 L. Ed. 2d 657 (1984); *Garrett*, 124 Wn.2d at 520. Proof defense counsel made demonstrable errors in judgments or tactics will not support dismissal for ineffective assistance when the adversarial testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* As “[t]he essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

Defense counsel subjected the State's case to adversarial testing from preliminary motions to sentencing. During pretrial hearings counsel successfully moved for the exclusion of a letter purportedly authored by defendant and a threat defendant allegedly made to Young from jail. 1RP 5. Counsel safeguarded the limitation on the use of defendant's ER 609¹⁰ offense. 1RP 6. He made the State prove defendant's predicate offense for the firearm charges instead of stipulating to its existence. 1RP 6. He actively assisted defendant in jury selection. 1RP 11; CP 67.¹¹ And he cross-examined each of the State's three witnesses during a hearing held pursuant to CrR 3.5. 2RP 34-37, 44-46, 55.

At trial counsel actively interposed objections during the State's direct examinations. 2RP 68, 138-149, 155; 3RP 262, 264. He persuaded the court to require the State to produce additional foundation before admitting proof of defendant's predicate offense. 2RP 149, 154. He extensively cross-examined the State's witnesses. 2RP 78-102, 106-10,

¹⁰ ER 609 "For the purpose of attacking the credibility of a witness in a criminal case... evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment. ... Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date"

¹¹ CP "67" reflects the State's assumption of how the Clerk will number this document.

131-35, 167-75, 183, 199-220, 229-239; 3RP 263-64, 267-273, 284-87. He made a half time motion to dismiss. 3RP 288-293. He proposed jury instructions. CP 9-12; 3RP 276. Then he successfully advocated for the inclusion of an instruction on entrapment by estoppel, which advanced one of his several strategies for defending the case. 3RP 298-302; CP 12. Counsel argued for modification of an instruction proposed by the State and objected to language the State included in another. 3RP 304, 306. He interposed an objection during the State's closing remarks. 3RP 322. He was also called upon to reassess the ability of several jurors to impartially decide the case when post-empanelment juror issues arose. 2RP 113-115, 138, 240-46; 4RP 369, 382. An alternate juror was eventually seated. 4RP 387. Counsel then participated in the response to a jury question. 5RP 392.

At sentencing counsel urged the court to reject the State's request for a high end sentence while advocating a sentence of credit for the time defendant already served based on mitigating circumstances he identified in defendant's case. 6RP 401-02. Defendant declined his opportunity to allocute, stating his counsel: "covered everything eloquently." 6RP 402. The court sentenced defendant in accordance with counsel's recommendation. 6RP 403; CP 55.

d. Defendant failed to prove any prejudice.

"The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id. Garrett*, 124 Wn.2d at 520(citing *Cf. United States v. Morrison*, 449 U.S. 361, 364-365, 66 L. Ed. 2d 564, 101 S. Ct. 665, 667-668 (1981)); *Strickland*, 466 U.S. at 691-92. Deficient performance is prejudicial when there is a reasonable probability that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland, supra*, at 687-88.

It is not reasonably probable the outcome of the firearm convictions would have been different had counsel challenged the firearm seizure pursuant to *Ferrier* as that motion was unlikely to succeed for the reasons provided above. See *McFarland*, 127 Wn.2d at 333-34 (to prove prejudice defendant has to prove the suppression motion would have been successful if sought). Defendant also cannot establish counsel would have achieved the same success at defendant's trial and sentencing if counsel deviated from his strategy in the manner defendant suggests on appeal.

2. DEFENDANT IS INCAPABLE OF PROVING THE CLAIMED DUE PROCESS VIOLATION BECAUSE THE JURY WAS INSTRUCTED ON HIS FACTUALLY UNSUPPORTED THEORY OF ENTRAPMENT BY ESTOPPEL AND REJECTED IT BY CONVICTING HIM OF UNLAWFULLY POSSESSING TWO FIREARMS.

To convict defendant of each count of unlawful possession of a firearm in the second degree the jury was required to find beyond a reasonable doubt defendant: “knowingly... ha[d] a firearm in his... possession or control... and he... ha[d] previously been convicted of assault in the fourth degree against a family or household member, which crime occurred on or after July 1, 1993.” CP 29 (Instruction No. 11); CP 31(Instruction No. 13; Count II, to wit: shotgun); CP 32 (Instruction No. 14; Count III, to wit: rifle); *see also* 9.41.040(2)(a)(1)(i). “Knowledge that possession is unlawful is not an element of the crime ... nor does good faith belief that a certain activity does not violate the law provide a defense in a criminal prosecution.” *State v. Locati*, 111 Wn. App. 222, 225, 227, 43 P.3d 1288 (2002); *State v. Semakula*, 88 Wn. App. 719, 721, 946 P.2d 795 (1997).

Entrapment by estoppel is an affirmative defense that provides a limited excuse for unlawful conduct resulting from an affirmative misrepresentation of the law by a government official that was reasonably

relied upon by the accused.¹² *Locati*, 111 Wn. App. at 227-28; *State v. Krzeszowski*, 106 Wn. App. 638, 646, 638, 24 P.3d 485 (2001); *see also State v. Leavitt*, 107 Wn. App. 361, 372-73, 27 P.3d 622 (2001); *State v. Chapin*, 75 Wn. App. 460, 471 n.20, 879 P.2d 300 (1994), *review denied*, 125 Wn.2d 1024, 890 P.2d 465 (1995).¹³ It is a "long-standing rule" that defendants "be held responsible for proving their affirmative defenses."

¹² Entrapment by estoppel does not yet appear to be recognized by Washington's Supreme Court. Its availability was assumed *arguendo* in *Locati*, 111 Wn. App. at 227-28, analogized to the due process holding in *Leavitt*, 107 Wn. App. at 372, and apparently recognized without challenge in *Krzeszowski*, 106 Wn. App. at 646. The Court need not decide the defense's theoretical availability in this case since it was allowed and properly rejected by the jury. CP 38 (Instruction No. 20); CP 45-46. If the Court elects to consider the scope of the defense's availability in this case it should disallow it in analogous cases, as a matter of law, due to its insidious potential to destabilize uniform enforcement of law by undermining the time-honored principal that "ignorance of the law is not a defense." *See e.g., Leavitt*, 107 Wn. App. at 368-69; *Locati*, 111 Wn. App. at 227-28; *Tallmadge*, 829 F.2d at 776 (Konzinski Dissenting).

Recognition of the defense in analogous cases would also encourage defendants to challenge firearm charges with self-serving accounts of police contacts that may have never occurred, or occurred many years before the charged offense under circumstances that did not result in documentation. *See Tallmadge*, 829 F.2d at 779 ("The government will seldom if ever be able to contradict a defendant's self-serving account of who said what to whom."). This case is instructive of that problem because it was only coincidental Sanders was capable of responding to the defense as the relevant contact was incidental to his investigation. *See* 3RP 283-88. Defendants should not be allowed predicate entrapment by estoppel on fleeting encounters with officers who are not authorities on an individual's obligations under the UPOF statute. Any opinions expressed by officers in those situations should be deemed, as a matter of law, only sufficient to put individuals on notice to further inquire about the status of their rights.

Disallowing the defense in analogous cases would not work any injustice since erroneous police statements about the legality of one's ability to possess firearms could be readily corrected through a minimally burdensome inquiry into the applicable law or one's court records, which is consistent with a public policy that "encourage[s] people to learn and know the law." *See Leavitt*, 107 Wn. App. at 369 (*citing* Oliver W. Holmes, *The Common Law* 48 (1881)). *See e.g.,* RCW 9.41.040. Any recognition of the defense should be confined to circumstances similar to *Leavitt*, where misinformation came from the government authority empowered to interpret the law and direct conduct according to its precepts. *See e.g.,* 107 Wn. App. at 368-69 (sentencing court); *Krzeszowski*, 106 Wn. App. 638, 646-47 (court that restored civil rights).

¹³ *Abrogated on other grounds, State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999).

State v. Lively, 130 Wn.2d 1, 13, 921 P.2d 1035 (1996). A defendant bears the burden of proving entrapment by estoppel by a preponderance of the evidence. See *Locati*, 111 Wn. App. at 227-28; *Krzeszowski*, 106 Wn. App. at 646; see also *Lively*, 130 Wn.2d at 12 (citing *State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994); *Chapin*, 75 Wn. App. at 472; *State v. Trujillo*, 75 Wn. App. 913, 917, 883 P.2d 329 (1994), *review denied*, 126 Wn.2d 1008, 892 P.2d 1088 (1995)).

Counsel persuaded the trial court to instruct on entrapment by estoppel over the State's objection that the defense was not supported by the evidence adduced at trial. CP 12; 3RP 276-77, 298-99. The court modified defendant's proposed instruction with counsel's agreement so that it would accurately reflect defendant's burden of proof on the affirmative defense. 3RP 298-99, 300-02; CP 38 (Instruction No. 20).

The jury was thereafter instructed:

It is a defense to the charge of Unlawful Possession of a Firearm Second Degree, as charged in Counts II and III, if you find that the defendant believed he was acting out of a good faith reliance on the apparent authority of another to authorize his actions as long as his reliance was objectively reasonable. The defendant has the burden of proving this defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true. If you find from the evidence that the defendant has established this defense, it

will be your duty to return a verdict of not guilty as to these charges.

CP 38 (Instruction No. 20).

- a. A due process violation cannot be predicated on the jury's rejection of defendant's entrapment by estoppel defense since he was not entitled to present that defense at trial.

A defendant is entitled to have a legal theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence. *Locati*, 111 Wn. App. at 225; see also *Trujillo*, 75 Wn. App. at 917 (citing *State v. Davis*, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992)). An instruction on entrapment by estoppel is improper when there is insufficient evidence for a reasonable juror to conclude it has been proved by a preponderance of the evidence. See *Trujillo*, 75 Wn. App. at 917. "A scintilla of evidence is not sufficient to justify an entrapment instruction." See *Id.* (citing *State v. Gray*, 69 Wn.2d 432, 435, 418 P.2d 725 (1966); *Locati*, 111 Wn. App. at 229 (citing *State v. Ager*, 128 Wn.2d 85, 93, 904 P.2d 715 (1995)). "[T]he trial court will not give the requested instruction" "[w]hen evidence of any element of a defense is lacking[.]" *Id.*

"To persuade a trial court to allow [an entrapment by estoppel defense] more is required than a simple showing that the defendant was as

a subjective matter misled, and the crime resulted from his mistaken belief." *Locati*, 111 Wn. App. at 227. Society's interest in the uniform enforcement of law requires, at the very least, the defense only be allowed where a defendant demonstrates a charged offense resulted from his or her objectively reasonable reliance on a government agent's affirmative misrepresentation of the law. *Krzeszowski*, 106 Wn. App. at 646-47; *Locati*, 111 Wn. App. at 227-28 (citing e.g., *State v. Leavitt*, 107 Wn. App. 361, 372-73, 27 P.3d 622 (2001)).

i. There was no evidence a government agent expressly told defendant it was lawful for him to possess firearms.

The governmental misconduct element requires "an express, active representation by a government agent that the proscribed activity was in fact legal. Where the government agent has not expressly represented the activity as legal, the defense does not apply." *Krzeszowski*, 106 Wn. App. at 646 (citing *United States v. Brebner*, 951 F.2d 1017, 1026 (1991); *United States v. Clegg*, 846 F.2d 1221 (9th Cir. 1988); *United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir. 1987); see also *Cox v. State of Louisiana*, 379 U.S. 559, 85 S. Ct. 476, 13 L. Ed. 2d 487 (1965); *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir. 1970)).

The Court of Appeals found the trial court in *Locati* could have, as a matter of law, prevented Locati from arguing entrapment by estoppel to the jury. 111 Wn. App. at 228. *Locati* presented a more persuasive case for allowing the defense than the facts at bar as it was adduced that a CCO¹⁴ told Locati he could own a firearm. *Id.* at 224-25, 228. At least that fact could be characterized as satisfying the minimal requirement of "an express... representation by a government agent that the proscribed activity was in fact legal." See *Krzeszowski*, 106 Wn. App. at 646. The evidence in defendant's case was that Deputy Sanders advised he secure the unattended firearms in his recently deceased brother's home to avoid theft. 2RP 66-69, 191, 216; 3RP 279, 281-82.¹⁵ Sanders testified that secure meant lock the front and back door. 3RP 383. He would not have instructed defendant to take possession of the firearms due to the possibility of disputed ownership. *Id.* Sanders did not run a records check on defendant or express any opinion as to whether it would be lawful for defendant to possess firearms. 3RP 283.

At best defendant alleged a subjective misunderstanding of Sanders' remark about securing the firearms, which is inadequate to

¹⁴ Community Corrections Officer: a state agent with limited authority to dictate the conditions of Locati's sentence. See e.g., RCW 9.94A.703.

¹⁵ Sanders was not certain of the exact language used as he was there to investigate the brother's suicide not sort out the disposition of the firearms. 3RP 288.

establish the first element of entrapment by estoppel. *Locati*, 111 Wn. App. at 227; *see also Krzeszowski*, 106 Wn. App. at 647 (no entrapment by estoppel absent court's express representation that civil rights restoration included the right to possess firearms). However, one cannot even infer a subjective misunderstanding on defendant's part as he acknowledged his inability to possess firearms to an arresting officer. *See e.g.*, 2RP 69. The government misconduct element is consequently without support.

ii. There was no evidence defendant possessed the firearms based on an objectively reasonable belief that it was lawful.

"In order to show reliance to be reasonable, the defendant must establish that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries." *Krzeszowski*, 106 Wn. App. at 646 (*citing United States v. Trevino-Martinez*, 86 F.3d 65, 69 (5th Cir.) (*quoting United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir. 1991))). This is because the defense addresses the due process concerns inherent in imposing the legal consequences of a violation of the criminal law upon an individual who was misadvised by the government while taking measures to learn what conduct the government has proscribed. *Locati*, 111 Wn. App. at

227. "Factors to consider in the reasonableness determination include the authority of the source providing the [allegedly] misleading information and whether the defendant received inconsistent information from the same or a different source." *Id.* at 228.¹⁶

It was not objectively reasonable for defendant to believe Sanders' afterthought about the prudence of securing unattended firearms altered defendant's status as a person who could not lawfully possess them. Defendant's subsequently expressed awareness of his inability to legally possess firearms established he remained at least unsure of the license he purportedly inferred from Sanders' comment, making defendant's failure to make further inquiries patently unreasonable. 2RP 69; *See Krzeszowski*, 106 Wn. App. at 646; *Locati*, 11 Wn. App. at 229 (Locati's claim of reliance undermined by conduct demonstrating his awareness of the law). Reasonable reliance cannot be established by combining a self-serving interpretation of an officer's statement about the need to secure unattended firearms with willful ignorance of what the law requires. Defendant was not free to ignore the possibility that any permission to possess firearms

¹⁶ *Citing e.g., Leavitt*, 107 Wn. App. at 371-73 (sentencing court failed to inform defendant of firearm prohibition); *Cox*, 379 U.S. at 570-71 (police chief, in presence of sheriff and mayor, misleading defendant as to a permitted area of demonstration); *Tallmage*, 829 F.2d at 774 (reasonable reliance on misinformation from federally licensed gun dealer and attorney); *United States v. Barker*, 546 F.2d 940, 949 (D.C. Cir. 1976) (White House operative acting under apparent presidential authority); *Lansing*, 424 F.2d at 226-27 (correspondence and forms from draft board).

ostensibly implied by Sanders' remark was either given in error or communicated without full appreciation of the disabilities attending defendant's prior conviction as it was not made during an encounter purposed to sort out the scope of defendant's firearm rights. 3RP 382-88. The requirement of an objectively reasonable reliance is also without support in the record. Reversal of defendant's convictions cannot be predicated upon the failure of a defense he was not entitled to present.

- b. The jury properly rejected defendant's estoppel defense as a rational trier of fact could find defendant failed to prove reasonable reliance on a government authority's express statement it was lawful for him to possess firearms.

The test for defendant's claim of juror error is whether a rational trier of fact could have found he failed to prove entrapment by a preponderance of the evidence. See *State v. Matthews*, 132 Wn. App. 936, 940-41, 135 P.3d 495 (2006) (citing *Lively*, 130 Wn.2d at 17). "It is a difficult standard to meet." *Id.* Defendant's challenge must admit the truth of the State's evidence and all inferences that can be reasonably drawn from it in support of the conviction and against his failed affirmative defense. See *State v. Hermann*, 138 Wn. App. 596, 602, 158 P.3d 96 (2007) (citing *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280 (2002)). "Circumstantial and direct evidence have equal weight." *Id.*

(citing *State v. Varga*, 151 Wn.2d 179, 201, 86 P.3d 139 (2004)). "It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence[,"and such determinations are not reviewable on appeal. See *State v. Wilson*, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011(1992); *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A rational jury could find defendant failed to prove an express misstatement of the law regarding the legality of his firearm possession by a preponderance of the evidence. See *Krzeszowski*, 106 Wn. App at 647 (no entrapment by estoppel absent express government assertion it was lawful for previously convicted felon to possess firearms); see also *Brebner*, 951 F.2d at 1024-26 (express permission to possess firearms cannot be found in convicted felon's receipt of a firearm from an officer who neglected to conduct a criminal history check).

The jury was free to reject defendant's self-serving interpretation of what Sanders meant by "secure" as that word commonly means to "relieve from exposure to danger... make safe: Guard..." Webster's Third New International Dictionary, unabridged, (2002) at 2053. A jury could have reasonably interpreted the statement as encouraging defendant to reinforce

the door disabled during the police entry¹⁷ with a mechanical brace or to arrange for a bailment with a person who could lawfully possess the guns. Personal possession was not necessarily implicit in Sanders' remark; moreover, it was defendant's burden to prove an *express misstatement* of law, not one *debatably implied*.

A rational jury could find defendant failed to prove reasonable reliance by a preponderance of the evidence. *See Locati*, 111 Wn. App. at 228-29 (awareness of conflicting government information about right to possess firearms rendered defendant's claim of reliance untenable) *see also Brebner*, 951 F.2d at 1024-26 (government conduct implicitly at odds with known firearm prohibition puts a defendant on notice that further inquiry is required). Evidence adduced at trial showed defendant continued to believe it was not lawful for him to possess guns despite Sanders' remark about securing them. Defendant told an arresting officer he was not allowed to have them and Young testified defendant instructed him to claim ownership of the guns if anyone asked about them. 2RP 69, 216-17. The claim that the firearm convictions violate defendant's right to due process is meritless.

¹⁷ 3RP 287.

D. CONCLUSION.

Defendant's convictions should be affirmed because he has failed to prove ineffective assistance of counsel or that the jury violated his due process right when it rejected his unfounded claim of entrapment by estoppel.

DATED: NOVEMBER 7, 2013

MARK LINDQUIST
Pierce County Prosecuting Attorney

JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

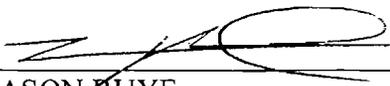
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DATED: NOVEMBER 7, 2013

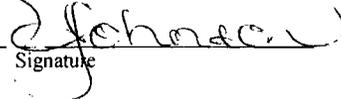
MARK LINDQUIST
Pierce County Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by ^{file} U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11/8/13 
Date Signature

PIERCE COUNTY PROSECUTOR

November 08, 2013 - 7:53 AM

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