

No. 44778-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Henry Brady,

Appellant.

Kitsap County Superior Court Cause No. 11-1-00483-8

The Honorable Judge Steven Dixon

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Brady's UPF conviction violated his Fourteenth Amendment right to due process.
2. Mr. Brady's UPF conviction was based on insufficient evidence.
3. The prosecution failed to prove that Mr. Brady possessed a firearm.
4. The prosecution failed to prove more than fleeting possession or momentary handling

ISSUE 1: A conviction for unlawful possession of a firearm requires proof of possession that is more than fleeting. Here, the prosecution failed to present sufficient evidence to prove more than momentary handling. Was the evidence insufficient to prove that Mr. Brady possessed a firearm?

5. The prosecution failed to present sufficient independent evidence to establish the *corpus delicti* of unlawful possession of a firearm.
6. The trial court erred by allowing jurors to consider Mr. Brady's statements absent sufficient independent evidence proving the *corpus delicti* of assault.

ISSUE 2: The *corpus delicti* rule requires independent evidence of each element of a charged crime before the factfinder may consider the accused person's statements. Here, the prosecution failed to present independent evidence that Mr. Brady possessed a firearm. Did Mr. Brady's conviction violate his Fourteenth Amendment right to due process because the prosecution failed to prove the essential elements of the charged crime?

7. Mr. Brady was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
8. Defense counsel provided ineffective assistance by failing to propose instructions necessary to the defense.

9. Defense counsel provided ineffective assistance by failing to seek an instruction explaining that momentary handling or fleeting possession is insufficient to prove possession.
10. Defense counsel provided ineffective assistance by failing to seek an instruction outlining the state's obligation to produce evidence of the offense independent of Mr. Brady's statements.

ISSUE 3: An accused person is guaranteed the effective assistance of counsel. Here, defense counsel unreasonably failed to propose instructions necessary to the defense. Did counsel's deficient performance prejudice Mr. Brady in violation of his Sixth and Fourteenth Amendment right to counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On February 8, 2012, police received a call that a fight had broken out. RP (3/6/13) 50. A white Oldsmobile Alero was allegedly involved. RP (3/6/13) 50. When police arrived in the area, they saw Henry Brady. He was at least 50 feet from the Alero, running through a yard. RP (3/6/13) 52-56, 83. Police apprehended him. Once he was caught, Mr. Brady said he did not arrive in the area in the Alero. He told police that he had been in the car earlier. RP (3/6/13) 60, 63, 129, 132.

The driver of the car consented to a search. Officers found a gun wrapped in a towel under the passenger seat. RP (3/6/13) 62, 74-76. Police asked Mr. Brady about the gun. He told them that it was not his gun. He also said that he had seen it a few days earlier. RP (3/6/13) 133. On that occasion, a man named Dillon had asked him to buy the gun. He told the officer that he had handled the gun at that time. He did not buy the gun, and didn't know the gun was in the car on February 8th. RP (3/6/13) 133-135, 137.

The state charged Mr. Brady with Unlawful Possession of a Firearm.¹ CP 20. The Information alleged that the possession occurred

¹ Mr. Brady had a prior conviction for first-degree burglary. CP 20.

“on or a [sic] period of time to include February 4, 2011 to February 8, 2011.” CP 20.

Prior to trial, the defense brought a motion to dismiss. CP 1-19, 39-64. Defense counsel asked the court to find the evidence insufficient to prove that Mr. Brady possessed the gun on February 8th. He argued that Mr. Brady was arrested far from the car. No fingerprints were found on the gun, and the state did not perform DNA testing. Defense counsel also argued that Mr. Brady’s statement (that he’d handled the gun several days earlier) could not be admitted. Counsel pointed out that the *corpus delicti* rule barred consideration of the statement absent independent evidence of the offense. Mr. Brady also urged the court to find any evidence from February 8 irrelevant and inadmissible. CP 1-19; RP (11/2/12) 2-7; RP (11/16/12) 2-15; RP (3/4/13) 7, 49-55.

The trial court agreed that the evidence was insufficient to prove possession on February 8. CP 16. Based on this ruling, the court prohibited the state from proceeding on the theory that Mr. Brady possessed the gun on that date. RP (11/2/12) 2-8; RP (11/16/12) 2-18. The judge denied Mr. Brady’s *corpus delicti* objection, and ruled that the evidence obtained on February 8th was admissible. This included the gun itself, the fact that Mr. Brady’s driver’s license was found in the Alero, and Mr. Brady’s statements regarding his possession a few days earlier.

CP 18; RP (3/4/13) 53-55. Defense counsel took exception to the ruling.
RP (3/4/13) 56.

Despite the court's ruling, the prosecutor did not seek to amend the Information. At the start of trial, the judge read the charge to the jury, including the date range February 4th-8th as set forth in the Information. RP (11/16/12) 7, 10, 14. The court's instructions to the jury included only the February 4th date. CP 149.

In closing, defense counsel argued to the jury that a person cannot be convicted of a crime based on a confession alone. Counsel argued that corroboration is required. RP (3/7/13) 163-173. Defense counsel did not propose an instruction outlining the corroboration requirement. CP 125-130. In his rebuttal argument, the prosecutor responded by saying "I defy you to find the word corroboration" in the jury instructions. RP (3/7/13) 175. The defense objection was overruled. RP (32/7/13) 175.

Defense did not propose an instruction explaining that proof of momentary handling, fleeting possession, or passing control is insufficient to prove the offense. CP 125-130. Nor did counsel make this argument to the jury. RP (3/7/13) 163-173.

The jury convicted Mr. Brady. After sentencing, he timely appealed. CP 23-33, 34-35.

ARGUMENT

I. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. BRADY OF UNLAWFUL POSSESSION OF A FIREARM.

A. Standard of Review.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

The admissibility of the accused's statement under the *corpus delicti* rule is a mixed question of law and fact, reviewed *de novo*. *State v. Dow*, 168 Wn.2d 243, 249, 227 P.3d 1278 (2010).

B. No rational jury could have found beyond a reasonable doubt that Mr. Brady had more than passing control over the gun.

In order to establish possession, the state must prove that the accused had actual control over the item possessed. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). Evidence of passing control or momentary handling is insufficient to prove possession. *Id.*

The state presented insufficient evidence that Mr. Brady had actual control over the gun on February 4th. The only evidence against Mr. Brady was his own statement. He admitted only that he briefly handled

the gun when someone attempted to sell it to him. RP 133-34. The state did not present any evidence that Mr. Brady ever had control over the gun. RP 45-140. At most, the evidence proved fleeting possession or momentary handling. No rational jury could have found beyond a reasonable doubt that Mr. Brady possessed the gun. *George*, 146 Wn. App. at 920; *Chouinard*, 169 Wn. App. at 899.

The evidence was insufficient to convict Mr. Brady of unlawful possession of a firearm. *George*, 146 Wn. App. at 920; *Chouinard*, 169 Wn. App. at 899. His conviction must be reversed and the charge dismissed with prejudice. *George*, 146 Wn. App. at 920; *Chouinard*, 169 Wn. App. at 899.

C. The independent evidence was insufficient to permit the jury to consider Mr. Brady's statement under the *corpus delicti* rule, and insufficient to prove the offense beyond a reasonable doubt.

The *corpus delicti* rule precludes conviction based solely on the accused's confession. *Dow*, 168 Wn.2d at 249. The state must present *prima facie* evidence of each element of a charged offense with evidence independent of the confession. *Id.* at 254. If the state fails to provide corroborating evidence for each element, the conviction must be reversed for insufficient evidence. *Id.*

The court found that the state had presented insufficient evidence to proceed on the theory that Mr. Brady had possessed a firearm on the

day he was arrested (February 8th). RP (3/4/13) 53-55. This finding amounted to an acquittal, and precluded the state from proceeding on that theory. *State v. McReynolds*, 142 Wn. App. 941, 949-50, 176 P.3d 616 (2008).

The state failed to present independent evidence corroborating Mr. Brady's statement that he'd handled the gun several days earlier. *Dow*, 168 Wn.2d at 249. Likewise, the court erred by ruling that there was sufficient corroborating evidence to admit Mr. Brady's confession. *Id.*

The existence of a gun is not itself evidence of a crime. Additionally, as noted by the court, Mr. Brady's proximity to the gun on the day of his arrest was not evidence that he had ever possessed it. RP (10/8/12) 6; *Chouinard*, 169 Wn. App. at 899. The state did not present any evidence to corroborate Mr. Brady's statement that he had handled the gun. *See RP generally.*

The trial court should not have allowed the jury to consider Mr. Brady's statement to police. *Dow*, 168 Wn.2d at 249. The state failed to present independent evidence of the *corpus delicti*. Accordingly, the evidence was insufficient for conviction. *Dow*, 168 Wn.2d at 249. Mr. Brady's conviction must be reversed. *Id.*

II. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO PROPOSE JURY INSTRUCTIONS NECESSARY TO MR. BRADY’S DEFENSE.

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel’s deficient performance prejudices the accused person. *Kylo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Defense counsel was ineffective for failing to propose jury instructions defining momentary or fleeting possession, and informing the jury that they could not convict solely on the basis of Mr. Brady’s “confession” absent some independent evidence of the offense.

Counsel’s performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend VI; *Kylo*, 166 Wn.2d at 862. The accused is prejudiced by counsel’s deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *Id.*

To be minimally competent, an attorney must research the relevant law. *Kyllo*, 166 Wn.2d at 862. The accused is denied a fair trial when defense counsel fails to identify the sole defense available and present it to the jury. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009). Absent legitimate tactical justification, counsel's failure to propose a jury instruction necessary to the defense is ineffective assistance of counsel.² *Id.* at 155. The accused is prejudiced by counsel's failure to propose a necessary jury instruction when the jury is left with no way to recognize and weigh the legal significance of the evidence. *Id.* at 156-57. In such a situation, the jury is left believing it must convict even where the evidence supports acquittal. *Id.*

1. Defense counsel provided ineffective assistance by failing to propose a jury instruction informing the jury of the requirement that a conviction may not be based on the accused person's statements absent corroborating evidence.

Under the *corpus delicti* rule, an accused person's confession alone is insufficient evidence to convict. *Dow*, 168 Wn.2d at 249. The state

² Jury instructions must accurately state the law and permit each side to argue its theory of the case. *Strange v. Spokane Cnty.*, 171 Wn. App. 585, 601, 287 P.3d 710 (2012), reconsideration denied (Jan. 16, 2013), review denied, 177 Wn.2d 1016, 304 P.3d 114 (2013).

must present independent evidence to corroborate each element of the offense. *Id.* at 254.

Defense counsel's performance in this case was deficient because counsel failed to propose an instruction supporting the defense theory. *Powell*, 150 Wn. App. at 156. Mr. Brady's defense attorney argued that conviction was improper absent independent evidence corroborating Mr. Brady's statement. RP (3/7/13) 163, 170. Defense counsel did not propose an instruction outlining the legal principle underlying this argument. CP 125-30. In rebuttal, the prosecutor took advantage of this error by defying the jury to find the word 'corroboration' in the jury instructions. RP (3/7/13) 175.

Counsel provided deficient performance by failing to propose an instruction informing the jury that Mr. Brady could not be convicted based solely on his confession. *Powell*, 150 Wn. App. at 156-57. Defense counsel's argument demonstrates that he was aware of the legal problem with the state's case. RP 163, 170. There was no valid tactical reason not to propose an instruction supporting the defense theory. *Powell*, 150 Wn. App. at 156-57.

Mr. Brady was prejudiced by counsel's deficient performance. Without a jury instruction on the corroboration rule, the jury believed that they could convict Mr. Brady based on his statement alone. The state did

not present evidence corroborating Mr. Brady's statement. There is a substantial likelihood that counsel's failure to propose the necessary jury instruction affected the verdict. *Id.*

Mr. Brady's counsel provided ineffective assistance by failing to propose an instruction informing the jury of the state's legal requirement to present corroborating evidence. *Id.* Mr. Brady's conviction must be reversed. *Id.*

2. Defense counsel provided ineffective assistance by failing to propose an instruction making clear that momentary handling or fleeting possession is insufficient to prove the elements of the offense.

Momentary or passing handling of contraband is not sufficient to establish possession. *George*, 146 Wn. App. at 920. Here, the only evidence of possession was Mr. Brady's statement that he'd briefly handled the gun a few days before his arrest. RP (3/6/13) 133-34. This admission was insufficient to prove beyond a reasonable doubt that he had possessed the gun. *Id.*

Nonetheless, Mr. Brady's defense counsel did not propose an instruction informing the jury that momentary handling is not sufficient to prove possession. CP 125-30. In fact, defense counsel appears not to have realized that such a legal principle supported his client's acquittal.

RP 163-73. Failure to recognize the defense available to Mr. Brady denied him a fair trial. *Powell*, 150 Wn. App. at 156.

Mr. Brady was prejudiced by his counsel's deficient performance. Without an instruction making clear the state's burden to prove more than passing control or momentary handling, jurors likely believed they were required to convict Mr. Brady based on his admission of fleeting possession. *Powell*, 150 Wn. App. at 156-57. There is a substantial likelihood that counsel's failure to propose the necessary jury instruction affected the verdict. *Id.*

Mr. Brady's defense counsel provided ineffective assistance by failing to propose an instruction informing the jury that passing handling was insufficient to prove possession. *Powell*, 150 Wn. App. at 156-57; *George*, 146 Wn. App. at 920. Mr. Brady's conviction must be reversed. *Powell*, 150 Wn. App. at 156-57; *George*, 146 Wn. App. at 920.

CONCLUSION

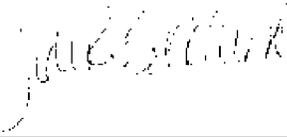
The state presented insufficient evidence to convict Mr. Brady. Mr. Brady's admission that he briefly handled the gun was not sufficient to prove that he had possessed it. The state did not present evidence corroborating Mr. Brady's admission. His statement should not have been admitted under the *corpus delicti* rule, and the case should not have been

submitted to the jury. Accordingly, the charge must be dismissed with prejudice.

In addition, Mr. Brady's defense counsel provided ineffective assistance. Counsel unreasonably failed to propose jury instructions necessary to the defense. Mr. Brady's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on October 30, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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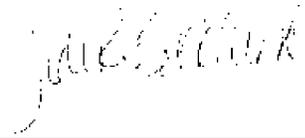
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on October 30, 2013.



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