

NO. 44778-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

HENRY JORDAN BRADY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 11-1-00483-8

BRIEF OF RESPONDENT

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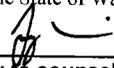
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Brady's claim of insufficient evidence must fail when, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the charged offense beyond a reasonable doubt?

2. Whether Brady's claim that his trial counsel was ineffective must fail when Brady has shown neither deficient performance nor prejudice?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Henry Jordan Brady was charged by an amended information filed in Kitsap County Superior Court with one count of unlawful possession of a firearm in the first degree. CP 20. A jury found Brady guilty of the charged offense, and the trial court subsequently imposed a standard range sentence. CP 156; 23. This appeal followed.

B. FACTS

The facts of this case that were before the trial court during the pre-trial motions and the facts that came out during the actual trial were essentially identical and are outlined below.

On February 8, 2011, police officers responded to a report of a fight in the area of 6th and Warren in Bremerton, Washington. RP (3/6) 49-50. A white automobile was reported to have been involved with the fight, and a license plate for that car was given to the police. RP (3/6) 50.

When Bremerton Police Officer Rodney Rauback arrived at the scene he found a white Oldsmobile Alero matching the description of the car that had been given to law enforcement. RP (3/6) 50-51. Officer Rauback spoke with Tiffany McCullough who was sitting in the driver's seat of the car. RP (3/6) 50. Officer Rauback also saw that there was a male, later identified as Brady, in the area approximately 50 feet from Ms. McCullough's car. RP (3/6) 51.

After speaking with Ms. McCullough and receiving additional information from the dispatcher, Officer Rauback moved towards Brady and told him that he needed to talk with him. RP (3/6) 51-52. Brady was standing in a small, fenced yard and began to walk away from Officer Rauback. RP (3/6) 53. Officer Rauback continued moving towards Brady and called out to him and told him to stop. RP (3/6) 53. Brady, however, did not comply. Rather, Brady hopped over a small fence and began running away from the officer. RP (3/6) 53. Officer Rauback continued to yell, "Stop. Police" and chased after Brady. RP (3/6) 54.

Another officer in a patrol car drove ahead of Brady and cut off his path, but Brady then turned back towards Officer Rauback. RP (3/6) 54. When Brady saw that Officer Rauback was still chasing him, Brady turned again and ran towards a residence where he jumped a fence and attempted to get away. RP (3/6) 54-55; 83. The officers, however, eventually caught up with Brady and arrested him. RP (3/6) 55; 83. Brady was then escorted to Officer Rauback's patrol car that was parked approximately 10 feet from Ms. McCullough's Oldsmobile. RP (3/6) 53-54.

Brady was advised of his Miranda warnings and he agreed to speak with Officer Rauback. RP (3/6) 56-7. Officer Rauback asked Brady if he was involved in the fight and Brady indicated that he had been the victim in the fight and that a person with the last name "Taylor" had attacked him and struck him in the face. RP (3/6) 58. Officer Rauback, however, noticed no evidence of injury on Brady's face. RP (3/6) 59. The officer then asked Brady if he had been in the Oldsmobile Alero and Brady said he had never been in the car. RP (3/6) 59-60.

At this point officers had learned that another individual, Aaron Williams, had also been in the Alero and Officer Rauback asked Brady if he knew Mr. Williams or Ms. McCullough. RP (3/6) 60. Brady said that he did not know either Mr. Williams or Ms. McCullough. RP (3/6) 60.

Officer Rauback then went to speak with other officers and closed the door of the patrol car, leaving Brady in the back seat. RP (3/6) 60-61.

Officer Joseph Boynton was at the scene and asked Ms. McCullough for her permission to search the Oldsmobile. RP (3/6) 74; 84-5. While Officer Boynton was asking Ms. McCullough for permission to search her car Brady began yelling out Ms. McCullough's name and shaking his head to indicate "no." RP (3/6) 85. Officer Rauback was surprised when Brady began calling to Ms. McCullough by name, since Brady had said he didn't know Ms. McCullough. RP (3/6) 61. Officer Rauback confronted Brady about this and Brady admitted that he did in fact know Ms. McCullough and Mr. Williams. RP (3/6) 61-2. Brady, however, continued to claim that he had never been in the Oldsmobile. RP (3/6) 62.

Despite Brady's yelling and shaking his head "no," Ms. McCullough agreed to allow the officers to search her car. RP (3/6) 75; 85. Officers then searched the car and found a firearm under the front passenger seat. RP (3/6) 75; 85. The firearm was a Ruger 40-caliber semi-automatic handgun. RP (3/6) 94-8.¹

¹ At trial several officers explained that semi-automatic firearms are made in a number of differ calibers (such as .45 and 9mm) but that firearms of different calibers look the same and can only be distinguished by markings on them or by an examination of the ammunition in the weapon. RP (3/6) 96. Several officers, for instance, specifically testified that even with their firearm experience they would not be able to tell the caliber

During the search of the Oldsmobile the officers also found a wallet containing Brady's driver's license on the back seat. RP (3/6) 86-87. Officer Rauback asked Brady how the wallet got into the car. RP (3/6) 63. Brady changed his story again and told Officer Rauback that he had been in the car earlier when the fight broke out and that he had handed his personal belongings to Ms. McCullough. RP (3/6) 63. Brady also stated that it was Mr. Williams that had been attacked by Mr. Taylor. RP (3/6) 64. Officer Rauback then transported Brady the Bremerton Police Department so that he could be interviewed by a detective. RP (3/6) 64-5.

Detective Robert Davis interviewed Brady at the Bremerton Police Department. RP (3/7) 124. Brady told Detective Davis that he was with another individual when he saw Mr. Williams standing next to Ms. McCullough's car talking to her. RP (3/7) 129. Mr. Brady claimed he was in a different vehicle with a third party, but Brady refused to name this third party. RP (3/7) 129-30. Brady said that he then saw a man named Calvin Taylor assault Mr. Williams. RP (3/7) 130. Brady claimed that he then went to assist Mr. Williams, but that before doing so he first took his watch and wallet and put them in his hat and handed it to Ms. McCullough who was sitting in her car. RP (3/7) 131. Brady then pulled Mr. Taylor off of Mr. Williams. RP (3/7) 131.

of the firearm in the present case from a distance. RP (3/6) 96-7; 113; RP (3/7) 136.

Detective Davis asked Brady if he had ever been in Ms. McCullough's Oldsmobile, and Brady said that he had been in the car earlier but that he was not in the car at the time of the incident and that he had arrived in a different car. RP (3/7) 132. When asked about the firearm found in the car, Brady said he didn't know the firearm was in the car at that time, but Brady did admit that he knew the weapon was a .40-caliber and that he had seen that particular weapon in the past. RP (3/7) 133; 139. Detective Davis asked Brady how he knew it was a .40-caliber and Brady said that a few days earlier a subject by the name of "Dillon" had brought the gun to his [Brady's] residence and wanted to sell it to Brady for \$300.² RP (3/7) 133. Brady said that this occurred on February 4th at Brady's residence in Bremerton. RP (3/7) 137.

Detective Davis asked Brady if he had handled the firearm when "Dillon" had brought it to him and Brady said that he did not handle the firearm. RP (3/7) 134. Detective Davis then asked Brady if his fingerprints would be on the gun, and Brady said he wasn't sure. RP (3/7) 134. Brady then acknowledged that he had handled the firearm and that he had taken a rag and wiped his fingerprints off of the gun before allegedly handing it to "Dillon." RP (3/7) 134.

² No person named "Dillon" was present at the scene or otherwise involved with investigation on February 8th. RP (3/6) 65; 76; 100.

Prior to trial, Brady filed a *Knapstad*³ motion asking the trial court to dismiss the charged offense. CP 39. This motion was addressed in several pre-trial hearings. Brady's claim, in essence, was that the evidence of his possession of the firearm on February 8th was insufficient to prove a crime because the gun was found in a car where several people had access to it and there was insufficient evidence to prove that Brady was in possession of the gun. CP 41. Specifically, Brady cited *State v. Chouinard*, 169 Wn.App. 895, 282 P.3d 117 (2012) for the proposition that the fact that a defendant is in a car with a firearm may show knowledge and proximity, but these facts are insufficient to show possession. CP 41.

Secondly, Brady argued that although he admitted possessing the gun on February 4th, this fact was insufficient under the corpus delicti rule to show possession because the State had no independent evidence of a criminal act. CP 42.

The State responded by noting that the present case was distinguishable from *Chouinard* because the present case did not involve a situation where the only evidence was a firearm found in a vehicle with multiple occupants. CP 90. Rather, the present case involved the

³ See, *State v. Knapstad*, 107 Wn.2d 346, 349, 729 P.2d 48 (1986) (setting out a procedure for the defense in a criminal case to challenge the sufficiency of the prosecution's evidence prior to trial when all of the material facts are not genuinely in

additional fact that Brady admitted handling the firearm on February 4th, and that a reasonable juror could conclude that Brady had obtained the gun on February 4th and maintained possession of it through February 8th. CP 90. The State explained that unlawful possession of a firearm over this 5 day period constituted one course of conduct. RP (10/8) 7-8.

The trial court, however, initially ruled that it was granting Brady's motion with respect to the possession on February 8th but was not granting the motion with respect to the evidence of possession on February 4th. RP (10/8) 16. The State then pointed out that a *Knapstad* motion was an all or nothing proposition: either the State had sufficient evidence of the charged offense or it did not. RP (10/8) 16. The trial court disagreed and stated that it believed it had the authority to "split the incidents up." RP (10/8) 17. The trial court, however, specifically stated that although it was granting the *Knapstad* motion in part, it was not ruling on the issue of whether the events of February 8th would be relevant and admissible on the issue of whether Brady had possessed the firearm on February 4th. RP (10/8) 17.

At a later hearing the trial court noted that the charging document alleged that the crime had been committed "on or between" February 4th and February 8th. RP (11/2) 2. The trial court explained that it could not

issue and could not support a judgment of guilt.

dismiss the Information, but that it was the court's intention to instruct the jury using only the date of February 4th. RP (11/2) 2. The State objected and argued that the court could either grant or deny the *Knapstad* motion, but that the court did not have the authority to amend the Information. RP (11/2) 3. The trial court again stated that it would not give a "to-convict" instruction with any date on it other than February 4th. RP (11/2) 4. The trial court also refused to sign Brady's proposed order regarding the *Knapstad* motion. RP (11/2) 6.

The issue was addressed again at the next hearing, and the State explained that it had looked diligently but could find no authority that authorized a trial court to give an instruction to the jury contrary to the charged time frame in the Information. RP (11/16) 7. The trial court, however, stated that it believed that its authority to do so derived from the court's "inherent authority." RP (11/16) 11.

With respect to the issue of the admissibility of the events of February 8th, the trial court ruled that the events of the 8th were relevant to prove that Brady had possessed the firearm on February 4th. RP (11/16) 6-7. During motions in limine the trial court reaffirmed that the events of February 8th were admissible as circumstantial evidence that Brady had possessed the firearm on February 4th. RP (3/4) 55. As the court had previously ruled, the "to convict" instruction used at trial instructed the

jury that the State had to prove that Brady possessed the firearm on February 4th. RP (3/7) 142, 144-45; CP 149.

III. ARGUMENT

A. BRADY'S CLAIM OF INSUFFICIENT EVIDENCE MUST FAIL BECAUSE, VIEWING THE EVIDENCE IN A LIGHT MOST FAVORABLE TO THE STATE, A RATIONAL TRIER OF FACT COULD HAVE FOUND THAT THE STATE PROVED THE ESSENTIAL ELEMENTS OF THE CHARGED OFFENSE BEYOND A REASONABLE DOUBT.

Brady argues that the evidence below was insufficient to support the jury's finding of guilt. App.'s Br. at 6. This claim is without merit because, viewing the evidence in a light most favorable to the State, a rational trier of fact could have found that the State proved the essential elements of the crimes beyond a reasonable doubt.

Evidence is sufficient if, taken in the light most favorable to the State, it permits a rational jury to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. *State v. Moles*, 130 Wn.App. 461, 465, 123 P.3d 132 (2005), *citing State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Additionally, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Accordingly, a reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). The relevant inquiry, therefore, is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Soby*, 117 Wn.2d 55, 61, 810 P.2d 1358, 1362 (1991), *citing State v. Baeza*, 100 Wn.2d 487, 490, 670 P.2d 646 (1983).

In the present case, Brady was charged with unlawful possession of a firearm. RCW 9.41.040(1)(a) provides, “A person ... is guilty of the crime of unlawful possession of a firearm in the first degree if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted ... of any serious offense.” The State must therefore prove beyond a reasonable doubt that a defendant has a qualifying prior conviction; that the defendant knowingly owned, possessed, or controlled a firearm; and that the possession or control of the

firearm occurred in Washington state. *State v. Humphries*, 170 Wn.App. 777, 787, 285 P.3d 917 (2012).

Under this statute, possession may be either actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). The State may establish constructive possession by showing the defendant had dominion and control over the firearm. *State v. Chouinard*, 169 Wn.App. 895, 899, 282 P.3d 117 (2012), *review denied*, No. 87858–7 (Wash. Jan. 89, 2013). Dominion and control need not be exclusive to establish constructive possession of contraband. *State v. Summers*, 107 Wn.App. 373, 384, 28 P.3d 780, 43 P.3d 526 (2001).

Although it is true that the Washington Supreme Court has held that to establish possession the State “must prove more than a passing control,” the Supreme Court was careful to point out that “momentary handling” may define, in part the level of control the prosecution must prove to establish possession. *Staley*, 123 Wn.2d at 801. The Court however, also noted that “the duration of the handling, however, is only one factor to be considered in determining whether control, and therefore, possession, has been established. *Id.* The Court, therefore, found that the trial court in *Staley* did not err in rejecting a proposed instruction that said “Possession that is fleeting, momentary, temporary or unwitting is not

unlawful,” as this instruction was an incorrect statement of the law. *Id* at 799, 802.

Furthermore, this Court has explained that to determine whether a defendant had dominion and control, the focus is not on the length of the possession but on the quality and nature of that possession. *Summers*, 107 Wn.App. at 386. Passing control is not merely a temporal concept. *Summers*, 107 Wn.App. at 385. Rather, the “length of time is but a factor in determining whether it was actual or passing possession. *Id* at 386. Finally, “evidence of momentarily handling, when combined with other evidence, such as dominion and control or the premises, or a motive to hide the item from police, is sufficient to prove possession.” *Id* at 386-87.

As outlined above, the evidence at trial, viewed in a light most favorable to the State, showed that Brady handled the firearm on February 4th at his residence in Bremerton. RP (3/7) 133-34; 137. Furthermore, Brady did not merely pass the firearm from one person to another. Rather he handled the firearm for some time and even went so far as to wipe his fingerprints off the gun with a rag. RP (3/7) 134. Furthermore, as Brady admitted being in the Oldsmobile in which the gun was found (as was Brady’s wallet and ID), the jury could reasonable conclude that Brady did not in fact give the gun back to “Dillon” on February 4th. Rather, the jury could have concluded that the circumstantial evidence showed that Brady

kept the firearm, and that his possession of the firearm on February 4th constituted actual possession.⁴

In short, viewing the evidence in a light most favorable to the State and drawing all reasonable all reasonable inferences from that evidence, the evidence was sufficient to permit a rational jury to find each element of the crime of unlawful possession of a firearm beyond a reasonable doubt. Nothing more is required. The Defendant's claim regarding the sufficiency of the evidence, therefore, should be rejected.

B. BRADY'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE MUST FAIL BECAUSE BRADY HAS SHOWN NEITHER DEFICIENT PERFORMANCE NOR PREJUDICE.

Brady next claims that his trial counsel's conduct constituted ineffective assistance of counsel. App.'s Br. at 9. This claim is without

⁴ Brady also argues that the trial erred in rejecting his corpus delecti argument and that the jury should not have been allowed to hear about his statement to the police. App.'s Br. at 7-8. The State acknowledges that the corpus rule requires that there be some independent evidence to corroborate a defendant's incriminating statement. *State v. Brockob*, 159 Wn.2d 311, 328, 150 P.3d 59 (2006). The independent evidence needed, however, is viewed in a light most favorable to the State and "the independent evidence need not be sufficient to support a conviction." *Id* at 328. In the present case the independent evidence was that the very same firearm that Brady admitted he possessed at his house on February 4th was later found in the Oldsmobile along with Brady's wallet and ID. In addition Brady admitted riding in the Oldsmobile. Viewing this evidence in a light most favorable to the State, this evidence corroborated Brady's admission that he possessed the handgun, and this evidence supported the reasonable conclusion that Brady had not returned the firearm to "Dillon" but that he had maintained possession of it. Whether the events of February 8th would independently be sufficient to support a conviction is irrelevant, because the Supreme Court has held that "independent evidence need not be sufficient to support a conviction." *Id* at 328.

merit because Brady can show neither deficient performance of counsel or prejudice.

To demonstrate ineffective assistance of counsel, a defendant must show: (1) that his counsel's performance was deficient, defined as falling below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984). Courts engage in a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Furthermore, if defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance. *Strickland*, 466 U.S. at 687; *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986).

In the present case, Brady's first claim is that his trial counsel should have proposed a jury instruction on the corpus delecti rule. App.'s Br. at 10. Brady, however, fails to offer any explanation of what such an instruction would have looked like. Brady similarly fails to cite any Washington case in which the court has held that a jury should be

instructed on the corpus delicti rule. Brady's failure to cite any such case is not surprising, as the State is unaware of any case that so holds. Given the utter lack of authority for a "corpus" instruction, Brady cannot show that his trial counsel's performance was deficient and fell below an objective standard of reasonableness, nor can Brady show that but for counsel's actions the result of the trial could have been different. In short, counsel can hardly be faulted for failing to propose a novel instruction for which there is no authority under Washington law.

Furthermore, Brady cannot show prejudice. Under Washington law a defendant who believes he has a valid motion under the corpus rule can move to have the case dismissed prior to trial or on appeal. Brady's counsel, of course, did this. As the trial court found, and as outlined above, the evidence was sufficient and Brady's corpus claim is without merit. Thus, Brady has suffered no prejudice based on the lack of a jury instruction on the corpus rule.⁵

Brady next argues that his trial counsel was ineffective for not requesting a jury instruction stating that "momentary handling is not sufficient to prove possession." App.'s Br. at 12.

⁵ In addition, as explained in footnote 4 above, the events of February 8th corroborated Brady's statement that he possessed the firearm.

Brady's claim is without merit because the instruction he now claims his counsel should have requested would have been contrary to Washington law. The Defendant specifically claims that "Momentary or passing handling of contraband is not sufficient to establish possession," and cites to *State v. George*, 146 Wn.App. 906, 920, 193 P.3d 693 (2008) for this proposition. App.'s Br. at 12. What the *George* opinion actually says, however, is that "where the evidence is insufficient to establish *dominion and control of the premises*, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession." *George*, 146 Wn.App. at 920 (emphasis added), citing *State v. Spruell*, 57 Wn.App. 383, 388, 788 P.2d 21 (1990); *State v. Cote*, 123 Wn.App. 546, 548–50, 96 P.3d 410 (2004).

Brady's quotation from *George* leaves off the operative language regarding "dominion and control of the premise," and this failure to mention the entire quotation misconstrues the true holding in *George*. This is particularly true because the undisputed evidence in the present case was that Brady handled the firearm in his own home, a place where he clearly did have dominion and control over the premises. RP (3/7) 133-37. Thus the quotation from *George* is inapplicable to the present case since the evidence was sufficient to establish dominion and control.

In addition, in *Summers* this court specifically held that a trial court did not err by refusing to give two jury instructions that said: (1) “Possession entails actual control, not a passing control which is only a momentary handling” and (2) “Fleeting, momentary or temporary possession of a firearm by a felon is not unlawful.” *Summers*, 107 Wn.App. at 383. This Court explained that passing control is not merely a temporal concept. *Summers*, 107 Wn.App. at 385. Furthermore, a defendant's momentary handling of an item, along with other sufficient indicia of control, can support a finding of possession. *Id.* The totality of the circumstances determines possession. *Id.* This Court thus held that the defendant's proposed instruction in *Summers* were improper because,

[The proposed instructions were] an inaccurate statement of the law because *Staley*, *Bowman*, and *Werry* hold that momentary control can amount to actual possession in some circumstances. Based upon [the defendant's proposed] instruction, however, the jury would have been required to conclude that if *Summers* had only momentary control of the firearm it had to find him not guilty. This is not the law.

Summers, 107 Wn.App. at 387.

Given the law outlined above, the instruction that Brady proposes in the present appeal would have been contrary to Washington law. In addition, Brady has failed to cite any cases where the court has approved of or required a jury instruction that states that “Momentary or passing

handling of contraband is not sufficient to establish possession.”

Given all of these factors, Brady has failed to overcome the strong presumption that his trial counsel was effective.⁶ It is well settled that in order to show ineffective assistance of counsel based on the failure of trial counsel to request a jury instruction a defendant must first demonstrate he or she was entitled to the instruction, that counsel's performance was deficient in failing to request the instruction, and that the failure to request the instruction prejudiced the defendant. *See, e.g., State v. Johnston*, 143 Wn.App. 1, 21, 177 P.3d 1127 (2007), citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001). As Brady has failed to

⁶ In addition, even if trial counsel could have proposed an instruction that complied with Washington law, trial counsel may have legitimately decided that such an instruction would not have been in Brady's best interests. For instance, counsel may have concluded that requesting a further instruction on possession would have inevitably led to an instruction (either at the defense or State's request) that was consistent with Washington Law (such as *Staley*, *George*, and *Summers*). Such an instruction would have noted that possession is viewed based on “totality of the circumstance,” which could have highlighted to jury that it could consider the events of February the 8th. This would have been contrary to defense counsel's trial strategy, which was to try and separate the events of February 4th and February 8th. *See* RP (3/7) 163-74. Furthermore a more detailed instruction could also have outlined that momentary handling of an item, along with other sufficient indicia of control such as dominion and control over a residence, can support a finding of possession. Since the undisputed evidence was that Brady possessed the firearm in his own residence, defense counsel may have legitimately decided that requesting a further definitional instruction on possession might have dramatically hurt Brady's case by highlighting the evidence that the State was relying upon. In short, defense counsel may have legitimately decided that any benefit that may have come from an additional instruction discussing “fleeting” or “passing” control would have been outweighed by the legitimate danger that court or the State would have insisted that the instruction be a more complete and accurate statement of Washington law, which holds, among other things, that the duration of the possession is only one factor, that possession is to be determined based on the totality of the circumstances, and that a jury may legitimately find possession when a defendant had dominion and control over the residence, even when the possession was momentary. Conduct that can be characterized as legitimate trial strategy or tactics, of course, cannot constitute ineffective assistance.

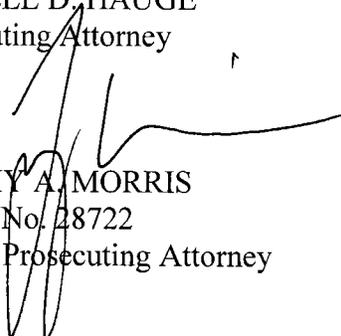
demonstrate: (1) that he was entitled to either a “corpus” instruction or his proposed “momentary possession” instruction; (2) that counsel’s performance was deficient; or (3) prejudice, his claim of ineffective assistance of counsel must fail.

IV. CONCLUSION

For the foregoing reasons, Brady’s conviction and sentence should be affirmed.

DATED January 29, 2014.

Respectfully submitted,
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Strickland, 466 U.S. at 687; *Mak*, 105 Wn.2d at, 731. Brady’s claim, therefore, must fail.

KITSAP COUNTY PROSECUTOR

January 29, 2014 - 1:09 PM

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