71095-8

No. 71095-8-I
King County Superior Court No. 12-1-05650-8

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

STATE OF WASHINGTON,
Plaintiff-Respondent,
v.

MICHAEL WADE,
Defendant-Appellant.

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

The Honorable Jeffrey Ramsdell, Judge

APPELLANT'S REPLY BRIEF

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I.
REPLY ARGUMENT

A. THE TRIAL COURT ERRED IN ADMITTING CO-DEFENDANT PATTERSON'S PRIOR INCONSISTENT STATEMENT AS SUBSTANTIVE EVIDENCE REGARDING A CO-DEFENDANT'S PARTICIPATION IN THE CRIMES CHARGED. THIS IS A QUESTION OF FIRST IMPRESSION IN WASHINGTON.

This case presents a question of first impression. The State fails to cite any case where a Washington court has approved the use of ER 801(d)(1)(iii) to admit the post-arrest statement of a defendant identifying his *co-defendant in a crime* as substantive evidence.

The State cites to the federal legislative history regarding ER 801(d)(1)(iii), found in *United States v. Elemy*, 656 F.2d 507, 508 (9th Cir. 1981). In that case, four bank robberies were committed during the summer of 1979. The first bank and the fourth bank were each robbed by a single robber wearing a plastic mask. The other two banks were robbed by two bandits, one wearing a plastic mask and the other a stocking mask. The government alleged that Elemy committed the first and fourth without assistance, while in the other two he was assisted by Laszlo Komjathy. An eyewitness told an FBI agent Elemy was the plastic-masked robber and Komjathy was the stocking-masked robber. *Id.* at 507. But later, after a line-up procedure, that teller changed her statement. The FBI agent was

permitted to testify to the teller's hearsay statement that her original identification was incorrect.

Elemy contended that the rule refers only to testimony by a witness to previous identifications made by that witness. In his view, the rule did not permit a witness to testify regarding identifications made by another witness. *Id.* at 508. But the Ninth Circuit held that the rule did not contain such a limitation.

But that is not Wade's argument. Wade's argument is that there is no case where ER 801(d)(1)(iii) was used as a vehicle for admitting a co-defendant's statement in order to implicate someone else in the crime. The reason for that is clear. At the time of the arrest, the co-defendant has an enormous incentive to identify and blame others in order to mitigate his own responsibility or to curry favor with the police. "Civilian" witnesses do not have these same motivations.

B. EVEN IF PATTERSON'S STATEMENT OF IDENTIFICATION WAS ADMISSIBLE UNDER ER 801(D)(1)(C), DETECTIVE CHRISTIANSON'S STATEMENT THAT PATTERSON TOLD HIM THAT WADE HANDLED AND DISBURSED THE WEAPONS AFTER THE BURGLARIES WAS NOT

The only evidence in this case that Wade had actual or constructive possession of any firearm is the statement by Detective Christianson that Patterson told him that Wade handled and disbursed the weapons after the burglaries. Officer Christianson's recitation of Patterson's statement about

the weapons had nothing to do with identification. Rather – if true – it was a conclusive statement that "Wade committed the crime." At most, the non-hearsay portion of Patterson's statement was limited to the fact that Wade was with Patterson on October 9, 2012. Using Patterson's statement as the sole proof that Wade handled firearms or disposed of them, extends the rule beyond its plain terms and far, far beyond its proper interpretation and application.

The State argues that Detective Christianson's testimony is proper under *State v. Stratton*, 139 Wn. App. 511, 517, 161 P.3d 448 (2007), *review denied*, 163 Wn.2d 1054, 187 P.3d 753 (2008). But in *Stratton* the issue was whether, considering ER 801(d), the trial court erred in allowing hearsay evidence of a witness's identification of Stratton as the person wearing the yellow t-shirt. Stratton contended that a description of clothing worn by a person is not a statement made in identification of a person. *Id.* at 516. But in *Stratton*, the witnesses did not know Stratton's name. Thus, the court concluded that in that situation extrajudicial identifications would in that situation also relate to an extrajudicial description of clothing.

But the facts here are clearly distinguishable. Patterson knew who Wade was and the testimony given by Detective Christianson did not relate to a description of clothing. Instead, Detective Christianson's

testimony exceeded the permissible bounds of identification and recounted facts that were not necessary to make an identification of Wade.

Other courts have recognized this limitation on ER 801(d)(1)(c) evidence.

> Although prior identifications are admissible under an exception to the hearsay rule, an account of the complaining witness' description of the offense itself is admissible under this exception only to the extent necessary to make the identification understandable to the jury.

Porter v. United States, 826 A.2d 398, 410 (D.C. 2003), *as amended on denial of reh'g* (Sept. 26, 2006). And testimony recounting details of the complainant's descriptions of the offense would not be admissible under the prior identification exception. *Battle v. United States*, 630 A.2d 211, 215 (D.C. 1993).

Thus, anything other than Patterson's statement that Wade was with him was inadmissible. The evidence that Patterson told the police that Wade was with him was completely understandable to the judge who tried this case and, had there been a jury, it would have been understandable to a reasonable juror.

C. THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH COUNT 12 – UNLAWFUL POSSESSION OF A FIREARM

In a prosecution for unlawful possession, the State must prove knowing possession of the firearm. *State v. Anderson*, 141 Wn.2d 357, 359, 366, 5 P.3d 1247 (2000).

> Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found.

State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). But proximity alone cannot establish constructive possession. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). A defendant with prior felony convictions does not violate the law by being near a firearm if he or she has not exercised dominion or control over the weapon or premises where the weapon is found.

The State argues that even without Detective Christianson's improper testimony,[1] there was sufficient evidence that Wade possessed one or more of the firearms. The State appears to concede that the trial judge made no factual findings relating to when or where Wade had actual or constructive possession of any firearm in his written or oral findings.

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[1] The trial court stated in its oral ruling that if the only evidence before him were Patterson's post-arrest statement and the cell phone tower evidence, "I would find that evidence insufficient to convict." 7/26/13 RP 10-11.

In criminal cases tried to the court without a jury, the court is required to enter written findings of fact and conclusions of law. CrR 6.1(d). Those findings should address the elements of the crimes separately and indicate the factual basis for each. *State v. Russell*, 68 Wn.2d 748, 415 P.2d 503 (1966). The judge simply did not find any facts to support the possession of a firearm charge. On that basis alone, this count must be reversed and dismissed.

Nevertheless, the State relies upon speculation and a stacking of presumptions to conclude that there was sufficient evidence. For example, the trial judge made no finding that Reek's guns were ever in a vehicle operated by Wade. The trial judge made no finding that only one car was used during the Reek burglary. There was no evidence and no finding that Reek's guns were ever in the trunk of the Camry. Despite an absence of any of these findings, the State concludes that:

> Of all the goods stolen, no item would warrant this kind of reaction except a firearm because none of the goods stolen could reasonably be expected to elicit that kind of immediate concern from anyone, whether passerby or police, except a gun. The action itself strongly indicated that the guns were close enough at hand for him to work about being seen by a passing car.

ROB 28. But there is no citation to the record for any of this speculation. There was no testimony that only guns could elicit such a reaction.

The only findings the judge made were that Wade was acting in a suspicious way when near the Camry, there were gloves and broken glass in the Camry, that after his arrest Wade made calls to his brother in a "poorly disguised request to destroy or hide evidence," that he worried that Patterson would talk and that Wade gave a "semi-confession" by stating that he hurt no one. 7/26/13 RP 14-16. As argued in the opening brief, from this evidence, the Court concluded that Wade's behavior showed knowledge and complicity in criminal activity, but failed to enter any findings to support the conclusion that the crime was unlawful possession of a firearm.

II.
CONCLUSION

For the reasons stated above, this Court should reverse and remand Wade's convictions.

DATED this 18 day of November, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of this brief on the following:

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