IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Plaintiff/Respondent, v. KEVIN ROBERT BOWEN, Defendant/Appellant.	No. 40457-5-II UNPUBLISHED OPINION

Worswick, A.C.J. — Kevin R. Bowen appeals his conviction of first degree unlawful possession of a firearm, claiming trial court error in excluding evidence essential to his defense. Agreeing with Bowen, we reverse and remand for a new trial.

FACTS

On November 14, 2008, Kitsap County Sheriff Deputy Paul Woodrum received a call to assist a Department of Corrections officer in serving an arrest warrant on Bowen. When he and other officers arrived at the mobile home park in Bremerton, they saw Bowen standing in the bed of a pickup truck that was parked in a driveway. Deputy Woodrum ordered all those present to the ground. When Bowen remained standing in the pickup, Deputy Ronald Zude fired his taser at Bowen, which caused Bowen to fall into the truck bed. Deputy Woodrum and Bremerton police officer Dahle Roessel lifted Bowen from the truck onto the ground and when they rolled him onto his side to check for weapons, found a handgun, about mid-waist, lying on the ground. Deputy Woodrum did not see the firearm on the ground or on Bowen when he helped pull Bowen from

the truck.

Officer Roessel later testified that he saw the firearm fall from the front of Bowen's waistband and hit the ground when they were moving Bowen from the truck bed. Deputy Zude testified that the firearm was lying under Bowen when they rolled him over. Additionally, he testified to hearing the gun make a metallic sound when it hit the ground.

The State charged Bowen with first degree unlawful possession of a firearm.[1] Bowen's defense was that the gun and a green backpack belonged to Michael Ghianuly, who was present during the arrest. At an offer of proof hearing, Bowen offered testimony from Vicki Kropp that she spent the prior evening with Ghianuly selling marijuana and that he had the gun and a green backpack full of marijuana. The trial court rejected her testimony, reasoning:

> The testimony of Ms. Kropp will be rejected based on the offer of proof, and that she testified as to what Mike was doing the day before, and that she saw a gun in his presence the day before, that she has no information to give the court about what happened at the house that day, and how the gun that's here ended up at the house allegedly in Mr. Kropp's[2] possession, so she doesn't have foundational knowledge of what happened that day, and where the gun was on the day of the arrest, so I am going to reject her testimony.

Report of Proceedings (RP) at 138.

At trial Bowen testified that he did not possess the firearm when they arrested him; rather, when the police lifted him from the truck, they laid him on top of the firearm, which Ghianuly must have tossed to the ground when the police arrived. Bowen testified that he had seen Ghianuly with the gun one-half hour before the police arrived and that Ghianuly also owned the

[1] A violation of RCW 9.41.040(1)(a).

[2] Bowen also uses the name "Kevin Robert Kropp." Clerk's Papers at 10.

backpack. The backpack was about one-and-one-half feet from Bowen when the police had him on the ground.

The trial court excluded evidence that the backpack contained information identifying Ghianuly and some marijuana. Bowen's theory was that by showing that Ghianuly was a drug dealer, it was more likely that the gun belonged to him because drug dealers commonly carry firearms.

During an offer of proof, Deputy Woodrum testified that he searched the green backpack, found a receipt bearing the notation "Mike G", an insurance card bearing Ghianuly's name, and some marijuana. He also testified that Ghianuly denied owning the backpack, but he assumed, based on its contents, that it was Ghianuly's. The trial court ruled:

> [COURT]: The fact that a backpack was found on the ground nearby, I will allow that to come in. That the officers searched it, that can come in. Did he find a firearm in there, and I assume the answer is no. You weren't asked that question.
> [WITNESS]: No.
> [COURT]: The fact that there were drugs in there, or other items, is not relevant to Mr. Kropp's prosecution here or the defense. There's no argument that he was in possession of the drugs.
> . . . .
> The other items that he found are not relevant.
> . . . .
> I am ruling that what's relevant is there was a backpack there that was searched and there was no firearm in it. Your theory is that the firearm belonged to Mr. Ghianuly and was brought there by Mr. Ghianuly.

RP at 63-65.

A jury convicted Bowen as charged and the trial court imposed a standard range, 116-month sentence. Bowen appeals.

ANALYSIS

Bowen argues that the trial court improperly impeded his ability to present a defense by excluding Vicki Kropp's testimony and excluding evidence about the content of Ghianuly's backpack. We agree.

A defendant's right to compel witnesses is constitutionally guaranteed under the Sixth Amendment to the United States Constitution. As the Supreme Court explained:

> The right to offer the testimony of witnesses and compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lie. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967). This right is not unbridled, however, as "'a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.'" *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)).

With this backdrop, we review a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Guloy*, 104 Wn.2d 412, 421, 705 P.2d 1182 (1985). A trial court abuses its discretion when it takes a position no reasonable person would adopt. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion. *Demery*, 144 Wn.2d at 758.

As we noted above, Bowen made an offer of proof by presenting Vicki Kropp's

testimony. She would have testified that she saw Ghianuly with a similar gun the night before when she was with him while he was selling marijuana. Bowen argues that the key to his defense was his own credibility and this testimony would have provided evidence that corroborated his claim that he never possessed the gun. In support, he cites *State v. Chavez*, 138 Wn. App. 29, 156 P.3d 246 (2007);[3] and *State v. Scamnzi*, 141 Wash. 367, 368, 251 P. 567 (1926) (lack of ownership is an element the jury can consider because lack of ownership suggests lack of possession).

The trial court excluded this testimony because Kropp was not present when the police arrested Bowen and she had no testimony about what happened that day. The trial court did not address the key question of whether Ghianuly's prior possession had any tendency to make it more likely that Ghianuly possessed the gun that morning rather than Bowen.

That Ghianuly possessed the firearm the evening before provided important corroboration to Bowen's testimony that Ghianuly brought the gun with him when he came over that morning, that Bowen told Ghianuly to make sure Christina Caskey did not see the gun as her children were present, and that they went outside partly for this reason. Evidence that Ghianuly possessed the firearm the evening before made Bowen's defense more credible. The trial court should have allowed the jury to consider this testimony.

The trial court also limited testimony about the backpack to the fact that a backpack was present, Ghianuly allegedly owned it, it was found near the firearm, and it did not contain a firearm. Bowen argues that this limitation excluding evidence that the backpack contained a large

[3] *Chavez* addressed whether proximity alone was sufficient to support probable cause. 138 Wn. App. at 34-35. We fail to see how it applies here.

quantity of marijuana was in error. He argues that it would have established that Ghianuly was a drug dealer and allowed Bowen to argue to the jury an inference of possession because drug dealers commonly carry firearms. Further, that the backpack contained drugs, he argues, would have explained why Ghianuly disclaimed ownership of it, thereby supporting Bowen's claim that Ghianuly may have tossed it and the firearm when the police arrived.

Bowen's defense rested primarily on his own credibility. The trial court's decisions to exclude Kropp's testimony and limit the testimony about the backpack's contents stripped Bowen of important corroborative evidence. After all, he testified that Ghianuly displayed the weapon 30 minutes before the police arrived and he told Ghianuly to take it outside. The jury should have heard the excluded evidence. The trial court's decisions on the admissibility of the evidence seriously curtailed Bowen's ability to present his defense to the jury. As such, we find an abuse of discretion, and Bowen is entitled to a new trial. *See State v. Brown*, 132 Wn.2d 529, 570-71, 940 P.2d 546 (1997) (evidence admissible in order to present a complete picture to the jury).

We reverse and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

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Worswick, A.C.J.

I concur:

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Armstrong, J.

Quinn-Brintnall, J. (concurring in the result) — Because I agree with the majority that the trial court improperly excluded evidence that Michael Ghianuly was in possession of the gun the night before November 14, 2008, although only if the offer of proof establishes that it is the same gun, I concur in the result. I write separately because I do not agree that the trial court erred by excluding evidence that Ghianuly was a drug dealer and that the backpack contained Ghianuly's marijuana. Majority at 5-6.

As the majority recognizes, "'a criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense.'" *State v. Maupin*, 128 Wn.2d 918, 924-25, 913 P.2d 808 (1996) (quoting *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983)). "Relevant evidence" means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Even relevant evidence, however, "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." ER 403.

Here, to convict Kevin R. Bowen of first degree unlawful possession of a firearm, the State must prove beyond a reasonable doubt that, on November 14, 2008, he (1) unlawfully (2) owned, possessed, or had in his control, (3) any firearm. RCW 9.41.040(1)(a). The State did not charge Bowen with possessing marijuana or anything else in Ghianuly's backpack. The facts that the backpack contained marijuana and Ghianuly is alleged to be a drug dealer are neither direct nor circumstantial evidence tending to prove or disprove any fact relevant to whether *Bowen* was in actual or constructive possession of the firearm at issue. ER 401.

Bowen's theory that Ghianuly must have "tossed" the firearm because "drug dealers commonly carry firearms" invites the jury to reach its verdict based on speculation or conjecture. Majority at 6. Many individuals carry firearms, lawfully and unlawfully, for both lawful and unlawful purposes. Even if relevant, the evidence is more prejudicial than probative, and, in my view, the trial court did not err in excluding any evidence that tempts the jury to return a verdict based on unreasonable assumptions of fact not presented at trial. ER 403. Accordingly, I concur only in the result.

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QUINN-BRINTNALL, J.