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Court of Appeals
Division I
State of Washington

No. 91731-1

(Court of Appeals No. 71004-4-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DABALOS,

Petitioner.

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STATE OF WASHINGTON

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Christopher Dabalos, defendant and appellant below, seeks review of the Court of Appeals decision terminating review designated in Part B.

B. COURT OF APPEALS DECISION

Mr. Dabalos seeks review of the Court of Appeals decision affirming his King County Superior Court conviction for unlawful possession of a firearm in the first degree. State v. Christopher Robert Dabalos No. 71004-4-I. A copy of the Court of Appeals decision, dated April 20, 2015, is attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amend. VI, XIV. Mr. Dabalos was convicted of unlawful possession of a firearm in the first degree based upon evidence that items belonging to him were in the same room as a rifle that was inside a closed wooden chest. Did the State prove beyond a reasonable doubt that Mr. Dabalos was in constructive possession of the rifle?

2. The accused's Sixth Amendment right to counsel includes the right to effective assistance of counsel. Defense counsel is required

to investigate the facts of the case. Mr. Dabalos's trial attorney placed only two unsuccessful telephone calls to one of two potential defense witnesses and decided that the witnesses' testimony would not be helpful without talking to either of them. Both witnesses resided with Mr. Dabalos and would have testified that they never saw him in possession of the rifle that is the basis for his conviction. One witness saw a man put in rifle in Mr. Dabalos's bedroom without Mr. Dabalos's knowledge or permission. Was Mr. Dabalos's constitutional right to effective assistance of counsel was violated by his attorney's failure to conduct a reasonable investigation?

3. The accused has the constitutional right to a fair trial, and a prosecutor's improper arguments may violate that right. U.S. Const. amend. XIV; Const. art. I, § 22. In closing argument, the prosecutor twice told the jury it was illegal for Mr. Dabalos to be anywhere near a firearm, an incorrect statement of the elements of the crime. Did the prosecutor commit flagrant and ill-intentioned misconduct by misstating the critical element unlawful possession of a firearm and significantly reducing the State's burden of proof?

D. STATEMENT OF THE CASE

Auburn Police personnel executed a search warrant at a three-bedroom house in Renton and found a rifle and two inside a wooden chest in one of the bedrooms. 5/13/14 RP 118-19, 121-22, 124-25, 136-37. Christopher Dabalos was one of four people inside the residence at the time. 5/13/14 RP 122-23.

A detective found Mr. Dabalos's 2009 temporary driver's license and an undated bill in the chest underneath the rifle. 5/13/14 RP 144, 151-52. Both listed an address in Moses Lake. Id. at 151-52; Ex. 10. The chest was covered with items, including a globe. Ex. 4.

The detective found documents belonging to Mr. Dabalos and Sonya Gleason in the bedroom. 5/13/14 RP 146-47. Mr. Dabalos's wallet was on the floor, a driver's license was under the bed, and his Department of Corrections identification card was on top of the chest. Id. at 127, 131, 133-35; Ex. 6. These items also did not list the Renton address. Ex. 3, 6, 10.

The King County Prosecutor charged Mr. Dabalos with unlawful possession of a firearm in the first degree. RCW 9.41.010. CP 1-2. At his jury trial, Mr. Dabalos stipulated that he had previously convicted of a serious offense as defined by RCW 9.41.010. 5/13/14

RP 181-82. Mr. Dabalos did not testify or present any witnesses. He was convicted as charged. CP 54.

Prior to sentencing, Mr. Dabalos obtained new counsel and moved a new trial on the grounds of ineffective assistance of counsel because his attorney did not contact two witnesses who could have provided exculpatory evidence.¹ CP 93-95, 98-100, 103-22; 9/13/13 RP 34-37. The court denied the motion. 9/16/13 RP 100-10.

On appeal, Mr. Dabalos argued that (1) the State did not prove beyond a reasonable doubt that he knowingly possessed the rifle; (2) he was denied his constitutional right to effective assistance of counsel; and (3) the prosecutor committed misconduct in closing argument. Brief of Appellant. The Court of Appeals rejected Mr. Dabalos's arguments and affirmed his conviction. Slip Op. He seeks review.

¹ Mr. Dabalos also moved for arrest of judgment in light of the absence of evidence to prove possession beyond a reasonable doubt. CP 95-98, 106-07; 9/13/14 RP 31-33.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. **This Court should accept review because the State did not prove beyond a reasonable doubt that Mr. Dabalos possessed a firearm.**

The Due Process Clause protects the accused from conviction unless the State proves every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. To convict Mr. Dabalos of unlawful possession of a firearm in the first degree, RCW 9A.04.040, the State was required to establish beyond a reasonable doubt that he knowingly owned, possessed, or controlled a firearm.² CP 1-2; 46, 50; State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000) (addressing second degree possession of a firearm). This Court should accept review because the State's failure to prove the elements of the crime beyond a reasonable doubt is a constitutional issue, and an opinion discussing the knowledge requirement for possession of a

² RCW 9A.04.040(1) reads:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person, owns, has in his possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

firearm will aid the participants in the criminal justice system. RAP 13.4(b)(3), (4).

Constructive possession requires proof that the defendant had control over the item itself, not just the place where it was located. State v. Davis, 182 Wn.2d 222, 233, 234, 340 P.3d 820 (2014) (Wiggins, J. concurring in dissent), (Stephens, J., dissenting). “While the ability to immediately take actual possession of an item can establish dominion and control, mere proximity to the item by itself cannot.” Id.

Mr. Dabalos was in a home when the search warrant was executed, and his wallet, driver’s license, temporary driver’s license, DOC identification, and a bill were in the bedroom where the gun was found. The items did not include the address of the Renton home and thus do not prove dominion and control over the residence, although they tend to show that Mr. Dabalos was temporarily staying in the bedroom along with another person. Ex. 3, 6, 10.

The State, however, had no proof that Mr. Dabalos knew that the firearm was in the room. The rifle was found in a case inside a wooden trunk. 5/13/14 RP 136-37. The trunk was covered with numerous items, including a globe, so that it could not be easily

opened. Ex 4. And, while Mr. Dabalos's temporary driver's license was found in the chest, it was underneath the rifle case and thus would have been placed there before the rifle. 5/13/14 RP 133-45.

The Court of Appeals held that the State established constructive possession because Mr. Dabalos had dominion and control over the bedroom where the rifle was located and could have obtained physical possession by opening the trunk. Slip Op. at 5-7. The State, however, did not establish that Mr. Dabalos knew there was a rifle in the trunk or that he had constructive possession of the rifle. This Court should accept review. RAP 13.4(b)(3), (4).

2. **Mr. Dabalos's constitutional right to effective assistance of counsel was violated when his trial attorney did not contact two potential defense witnesses who would have provided exculpatory testimony. This Court should accept review because the Court of Appeals decision is in conflict with A.N.J. and because the case involves and important constitutional issue.**

Because of defense counsel's critical role in the adversarial process, the right to counsel necessarily includes the right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984); State v. A.N.J., 168 Wn.2d 91, 96-

98, 225 P.3d 956 (2010). The right to effective counsel is not fulfilled simply because an attorney is present in court; the attorney must actually assist the client and play a role in ensuring the proceedings are adversarial and fair. Strickland, 466 U.S. at 685; A.N.J., 168 Wn.2d at 98.

Mr. Dabalos's court-appointed attorney, Jennifer Cruz, did not call any witnesses at trial.³ Prior to sentencing, Mr. Dabalos hired Eric Lindell, who obtained statements from two potential witnesses and filed a motion for a new trial. CP 93-121.

The two witnesses, Michael Monroe and Paula Harper, lived in the Renton house with Mr. Dabalos at the time the search warrant was executed. CP 117, 119. They would have testified that Dennis Bertram came to the house and went to Mr. Dabalos's room. Mr. Monroe heard Mr. Dabalos say that he did not "mess with guns" and order Mr. Bertram to get a gun out of there. Mr. Dabalos then left.⁴ CP 119, 121. Mr. Monroe also saw Mr. Bertram put the gun in the chest in Mr. Dabalos's bedroom after Mr. Dabalos left the house. CP 119, 121.

³ Her defense was that the State did not prove Mr. Dabalos knowingly possessed the rifle. See 5/14/13 RP 32-35.

⁴ This was consistent with Mr. Dabalos's custodial statements to the police which were not admitted at trial. 5/13/14 RP 30-31; Post-Trial Ex. 1.

Both Mr. Monroe and Ms. Hopper would have testified that they never saw Mr. Dabalos with the rifle. CP 117, 120, 121.

In response to Mr. Dabalos's motion in arrest of judgement, the prosecutor obtained a declaration from Ms. Cruz revealing that Mr. Dabalos told her that the two witnesses heard him tell Mr. Bertram to get the gun out of the house. CP 68; 5/13/13 RP 14. According to Ms. Cruz, Mr. Dabalos asked her to contact Michael Monroe, but he did not suggest that she contact Ms. Hopper because Ms. Hopper might have a criminal history. CP 68.

Ms. Cruz did not reach Mr. Monroe, who she tried to contact only two times by telephone. CP 68-69. She did not try to contact Ms. Hopper on the telephone number Mr. Dabalos gave her, although she suspected that she talked to Ms. Hopper at Mr. Monroe's number. CP 69. Ms. Cruz the stopped her investigation, deciding the witnesses would not help before knowing what they would say. CP 70.

This Court utilizes the two-part test announced in Strickland when addressing ineffective assistance of counsel claims. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation,

and, if so, (2) was the defendant prejudiced by counsel's errors. Strickland, 466 U.S. at 688, 694; Thomas, 109 Wn.2d at 226. The Court of Appeals concluded that Ms. Cruz's investigation was reasonable because Mr. Dabalos told her not to contact Ms. Hopper and because the anticipated testimony of both Ms. Hopper and Mr. Monroe would not have helped his defense of "general denial." Slip Op. at 9-12. Ms. Cruz, however, did not know if either of the witnesses would have helped or hurt Mr. Dabalos's case because she never talked to them. She was thus unable to make a strategic decision not to call them.

Defense counsel "has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 691. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. (emphasis added).

Counsel's duty to investigate often extends beyond investigating the information her client has provided her. See Rompilla v. Beard,

545 U.S. 374, 381, 387-89, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (defense counsel had duty to investigate that would no doubt be sued by the government despite client's inability to assist in defense and his active obstruction of counsel's efforts); State v. Jury, 19 Wn. App. 256, 265, 576 P.2d 1302 (counsel deficient for not investigating facts leading to defendant's arrest), rev. denied, 90 Wn.2d 1006 (1978); Vega v. Ryan, 757 F.3d 960, 968 (9th Cir. 2014) ("counsel has a duty to investigate, even if his or her client does not divulge relevant information."). A reasonable investigation cannot be based solely on the police reports. State v. Visitacion, 55 Wn. App. 166, 174, 776 P.2d 986 (1989).

Defense counsel's investigation decisions based upon information provided by the defendant are entitled to deference on review. Strickland, 466 U.S. at 691. "However, counsel must consider all of the defendant's statements, not just those that make his job easier." Duncan v. Ornoski, 528 F.3d 1222, 1239 (9th Cir. 2008). Washington defense counsel are required to investigate and utilize investigators when needed. Washington Bar Association, Standards for Indigent Defense Services, Strd. 6 (2011).⁵ Ms. Cruz made two tepid

⁵ Available at www.wsba.org and www.defensenet.org.

attempts to interview Mr. Monroe, one after trial had begun, and spoke to someone who may or may not have been Ms. Hopper. Although Ms. Cruz claimed her decision not to call either as a witness was well-informed, she lacked the information necessary to make a reasoned decision. This Court should accept review of this important constitutional issue. RAP 13.4(b)(3).

In addition, review is appropriate because the Court of Appeals decision conflicts with A.N.J., *supra*. In A.N.J., this Court concluded that defense counsel was ineffective when he advised a juvenile client to plead guilty without performing a “meaningful investigation.” A.N.J., 168 Wn.2d at 109-12. Although A.N.J.’s parents provided the lawyer with the names of two potential witnesses who might have testified that the complainant had been sexually abused prior to making allegations against A.N.J., the lawyer made only one attempt to reach the witnesses. *Id.* at 109. Mr. Dabalos’s case conflicts with this portion of A.N.J. RAP 13.4(b)(1).

3. This Court should accept review because the prosecutor misstated the elements of the crime in closing argument in a manner that significantly reduced the State's burden of proof, thus violating Mr. Dabalos's constitutional right to a fair trial.

During closing argument, the deputy prosecuting attorney argued that, because Mr. Dabalos had a prior conviction for a serious offense, he could not be anywhere near a firearm. The prosecutor's argument misstated the elements of the crime in a manner reduced his burden of proof and constituted flagrant misconduct. This Court should accept review of this important constitutional issue. RAP 13.4(b)(3).

A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935); State v. Walker, 182 Wn.2d 463, 476-77, 341 P.3d 976 (2015); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). This Court has long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for professional conduct in closing argument. State v. Monday, 171 Wn.2d 667, 676,

257 P.3d 551 (2011); Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978).

When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. In re Personal Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); Monday, 171 Wn.2d at 676; Charlton, 90 Wn.2d at 664-65.

It is misconduct for a prosecutor to argue to the jury in a manner that removes or reduces its high burden of proof of every element of the crime. State v. Lindsay, 180 Wn.2d 423, 434-37, 326 P.3d 125 (2014); State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009). Here, the State had the burden of proving beyond a reasonable doubt that Mr. Dabalos knowingly owned, possessed, or controlled a firearm. RCW 9.41.040(1)(a); CP 50, 54. The law does not forbid a person with a qualifying prior conviction from momentarily handling or being within reach of a firearm. Id. The prosecutor, however, told the jury that Mr. Dabalos was guilty if he was anywhere near a firearm, thus misstating the law and significantly reducing the State's burden of proof.

First, the prosecutor stated that Mr. Dabalos was prohibited from being in reach of a firearm:

The law says that we don't want the gun in your hands, period. We don't want the gun within your reach, period. And so the way the law is written, the way the instructions read, it's reflective of that.

5/14/13 RP 11. The prosecutor repeated this theme near the end of his rebuttal closing argument, telling the jury that Mr. Dabalos "was convicted of a serious offense that means he has no business being anywhere around a gun." 5/14/13 RP 40. This flagrant and ill-intentioned misconduct required the reversal of Mr. Dabalos's conviction.

Where the defendant does not object to the improper argument, the reviewing court may reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice could not have been cured with a limiting instruction. Glasmann, 175 Wn.2d at 704. The Court of Appeals did not decide if the prosecutor's argument was misconduct, but instead determined that the statements were not so flagrant and ill-intentioned that no instruction would have cured their prejudicial effect. Slip Op. at 17.

The prosecutor's statements, however, conflicted with the law and the court's instructions. The prosecutor's argument - that Mr.

Dabalos was violating the law if he was anywhere near a gun – was simple and memorable. While the Court of Appeals noted that the prosecutor recited the elements of the crime and referred the jurors to their instructions in other parts of his argument, Slip Op. at 17-18, the damage had already been done.

The prosecutor's improper argument struck a severe blow to Mr. Dabalos's right to a fair trial by misstating the elements of the crime and thus reducing the State's burden of proof. Given the limited evidenced produced by the State to prove constructive or actual possession, there is a substantial likelihood the jury verdict was affected by the prosecutor's misconduct. This Court should accept review of this important constitutional issue. RAP 13.4(b)(3).

F. CONCLUSION

Mr. Dabalos asks this Court to accept review of the Court of Appeals decision affirming his conviction for unlawful possession of a firearm in the first degree.

Respectfully submitted this 20th day of May 2015.



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APPENDIX

COURT OF APPEALS DECISION TERMINATING REIVEW

April 20, 2015

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 71004-4-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
CHRISTOPHER R. DABALOS,)	UNPUBLISHED
)	
Appellant.)	FILED: <u>April 20, 2015</u>
)	

Cox, J. – Christopher Dabalos appeals his judgment and sentence for his conviction of unlawful possession of a firearm in the first degree. The State presented sufficient evidence to prove that Dabalos constructively possessed the firearm. Dabalos fails in his burden to show that his trial counsel provided ineffective assistance. And the prosecutor’s arguments do not warrant reversal. We affirm.

The material facts are largely undisputed. In March 2011, Auburn police executed a search warrant at a house in Renton. The house was a two-story residence with at least three bedrooms. Four people, including Dabalos, were in the living room of the house at the time the warrant was served.

During their search of the master bedroom, officers found several items belonging to Dabalos. These items included his wallet and some identification cards.

In a closed wooden trunk in the master bedroom, officers found an AK-47 rifle and magazines. Also inside the trunk, officers found a temporary driver's license belonging to Dabalos and a bill addressed to Dabalos at a different address.

The State charged Dabalos with unlawful possession of a firearm in the first degree.

The case proceeded to a jury trial. Dabalos stipulated that he had previously been convicted of a serious offense, satisfying an element of this charged offense. He did not testify or present any evidence. The jury convicted Dabalos as charged.

Thereafter, Dabalos obtained new counsel and moved for a new trial on the ground of ineffective assistance of counsel. He asserted that substantial justice was not done in his case because "he was convicted when two eyewitnesses with exculpatory evidence were not interviewed and did not testify for the defense at trial." In support of this claim, he obtained declarations from two people, Michael Monroe and Paula Hopper, who lived at the house when authorities executed the search warrant.

Dabalos also moved for an arrest of judgment, arguing that there was insufficient evidence to prove two material elements of the crime charged—that Dabalos had possession of the gun, or, that he had knowledge he possessed someone else's gun.

The court orally denied both motions. It sentenced Dabalos to an 87-month standard-range sentence.

Dabalos appeals.

SUFFICIENCY OF THE EVIDENCE

Dabalos first argues that the State did not prove beyond a reasonable doubt that he committed the crime of unlawful possession of a firearm in the first degree. Specifically, he contends that the State did not prove that he knowingly owned, possessed, or controlled the rifle found in the Renton house. We disagree.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged.¹ "The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt."² "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant."³ "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."⁴

Under RCW 9.41.040(1), 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

¹ State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

² State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

³ Id.

⁴ Id.

convicted of any serious offense. The State must prove that the defendant knowingly owned, possessed, or controlled the firearm.⁵

Dabalos stipulated at trial that he had previously been convicted of a serious offense. Thus, the issue is whether there was sufficient evidence to establish that he knowingly owned, possessed, or controlled the firearm.

Possession may be either actual or constructive.⁶ A person actually possesses something that is in his or her physical custody.⁷ A person constructively possesses something that is not in his or her physical custody but is still within his or her “dominion and control.”⁸

“Evidence of temporary residence, personal possessions on premises, or knowledge of presence of [contraband], without more, [are] insufficient to show dominion and control.”⁹ Dominion and control need not be exclusive to establish constructive possession, but a showing of more than mere proximity to the contraband is required.¹⁰

Constructive possession is established by examining the totality of the circumstances and determining if there is substantial evidence from which a jury

⁵ State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000).

⁶ State v. Raleigh, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010).

⁷ State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

⁸ Id. (quoting State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)).

⁹ State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (1995) (emphasis omitted).

¹⁰ State v. Hagen, 55 Wn. App. 494, 498-99, 781 P.2d 892 (1989).

can reasonably infer the defendant had dominion and control over the item.¹¹ “In determining dominion and control, no one factor is dispositive.”¹²

The ability to reduce an object to actual possession is one factor for determining dominion and control.¹³ Another factor is whether a person had dominion and control of the premises where the contraband was found.¹⁴

In State v. Cantabrana, this court stated that when the sufficiency of the evidence is challenged on the basis that the State has only shown dominion and control over the premises, and not over the contraband, “courts correctly say that the evidence is sufficient because dominion and control over [the] premises raises a rebuttable inference of dominion and control over the [contraband].”¹⁵

Here, Dabalos was in the house when the officers executed the warrant early one morning. During the search, officers found several of Dabalos’s personal possessions in the master bedroom of the house. On the floor of the master bedroom, officers found Dabalos’s wallet. It contained his Washington State driver’s license, various other documents, credit cards, and some cash. Under the bed in the master bedroom, officers found an expired Washington State driver’s license belonging to Dabalos. On top of the wooden chest where the firearm was found, officers found a Department of Corrections identification

¹¹ Collins, 76 Wn. App. at 501.

¹² Id.

¹³ State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012).

¹⁴ State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

¹⁵ 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

card belonging to Dabalos. And inside the trunk, underneath the rifle, officers found other items belonging to Dabalos. Specifically, they found a temporary driver's license from 2009 and a bill addressed to Dabalos at a different address.

This evidence shows that Dabalos had dominion and control over the master bedroom where police found the firearm. This proof of dominion and control over the master bedroom raises a rebuttable inference of dominion and control over the firearm found in this case.¹⁶ Noticeably absent from this record is any evidence that would support an argument that the presumption of dominion and control of the firearm that arises from dominion and control over the master bedroom has been rebutted. This is telling.

Dabalos properly admits that "the State proved that [he] was in the home when the search warrant was executed and that his wallet, driver's license, temporary driver's license, DOC identification, and a bill were in the bedroom where the gun was found."¹⁷ He argues, "At most, the State proved that [he] may have lived in the bedroom along with [another person]."¹⁸ However, these observations show much more. They establish a rebuttable presumption of constructive possession of the firearm.

The State also argues that Dabalos could have easily actually possessed the firearm "by simply opening the unlocked trunk."¹⁹ This observation is correct

¹⁶ Id.

¹⁷ Brief of Appellant at 7.

¹⁸ Id.

¹⁹ Brief of Respondent at 8.

and further supports the conclusion that the evidence supports constructive possession of the firearm by Dabalos.

Dabalos argues that constructive possession "requires proof that the defendant had control over the firearm itself, not just the place where it was located."²⁰ But in this case, the State proved that Dabalos had dominion and control over the master bedroom and that Dabalos could have easily reduced the firearm to actual possession by opening the unlocked trunk. This is sufficient to prove control over the firearm itself. Thus, this argument is not persuasive.

Dabalos distinguishes this case from State v. Echeverria.²¹ In that case, Division Three affirmed Jose Echeverria's conviction for unlawful possession of a firearm when he was found driving a car with a firearm sticking out from underneath the driver's seat.²² Dabalos asserts that, in contrast to Echeverria, the gun in this case was not visible. But this distinction is immaterial. The State presented sufficient evidence in this case to show constructive possession of the firearm for the reasons we have already discussed. Dabalos's reliance on Echeverria is misplaced.

In sum, the evidence was sufficient.

²⁰ Brief of Appellant at 7.

²¹ Id. at 8 (citing State v. Echeverria, 85 Wn. App. 777, 779-80, 934 P.2d 1214 (1997)).

²² Echeverria, 85 Wn. App. at 783.

INEFFECTIVE ASSISTANCE OF COUNSEL

Dabalos next argues that the trial court erred by denying his motion for a new trial based on ineffective assistance of counsel. He claims that his attorney was ineffective for failing to call two potential witnesses "who would have provided exculpatory testimony" and for failing to investigate these two witnesses. We disagree.

This court reviews a trial court's denial of a motion for a new trial for abuse of discretion.²³

The right to counsel includes the right to effective assistance of counsel.²⁴ In order to prevail on an ineffectiveness claim, the defendant must prove that (1) counsel's performance was deficient and (2) the defendant was prejudiced by the deficient performance.²⁵ Counsel's performance was deficient if it fell below "an objective standard of reasonableness."²⁶ The defendant was prejudiced if there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."²⁷ "A reasonable probability is a probability sufficient to undermine confidence in the outcome."²⁸

²³ State v. Holm, 91 Wn. App. 429, 435, 957 P.2d 1278 (1998).

²⁴ Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

²⁵ Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

²⁶ Strickland, 466 U.S. at 688.

²⁷ Id. at 694.

²⁸ Id.

"Deficient performance is not shown by matters that go to trial strategy or tactics."²⁹ Reviewing courts make "every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy."³⁰ "An attorney's action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices."³¹ In reviewing such claims, this court engages in a strong presumption that trial counsel was effective.³²

"Deciding whether to call a witness is a matter of legitimate trial tactics that presumptively does not support a claim of ineffective assistance of counsel."³³ A defendant can overcome this presumption by showing that counsel failed to adequately investigate or prepare for trial.³⁴

"[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."³⁵ "The reasonableness of counsel's actions may be determined or substantially

²⁹ State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

³⁰ In re Pers. Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992).

³¹ In re Pers. Restraint of Davis, 152 Wn.2d 647, 722, 101 P.3d 1 (2004) (quoting Hendricks v. Calderon, 70 F.3d 1032, 1036 (9th Cir. 1995)).

³² McFarland, 127 Wn.2d at 335.

³³ State v. Davis, 174 Wn. App. 623, 639, 300 P.3d 465, review denied, 178 Wn.2d 1012 (2013).

³⁴ Id.

³⁵ Strickland, 466 U.S. at 691.

influenced by the defendant's own statements or actions."³⁶ "[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether."³⁷ Further, "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."³⁸

Here, Dabalos fails in his burden to show his that trial counsel provided ineffective assistance to him.

Dabalos asked his trial counsel to contact Michael Monroe who was present in the home when Dabalos was arrested. He also told her "that Paula Hopper was present but that she may have criminal history **so he did not want [trial counsel] to contact her.**"³⁹ Dabalos told his trial counsel that both Monroe and Hopper would say that someone named Dennis Bertram was in the house with a gun and that they heard Dabalos say "get the gun out of here."⁴⁰

Monroe and Hopper's declarations, obtained after trial, generally confirm this anticipated testimony. In her declaration, Hopper testified that a few days prior to the search, Bertram came over to the house and said he had a gun to

³⁶ Id.

³⁷ Id.

³⁸ Id.

³⁹ CP at 68 (emphasis added).

⁴⁰ Id. (internal quotation marks omitted).

keep at the house for a short time. She further stated that she never saw Dabalos with the gun and that she was "pretty certain" that Dabalos did not know the gun was in the house or his bedroom.

Monroe, in his declaration, testified that a week before the search, Bertram brought something into Dabalos's room and a few minutes later, Dabalos "came down and said something like he didn't mess with guns and to get that out of here" and then Dabalos left. Monroe stated that Bertram told him that he needed to keep a gun at the house for a short time and that "[Bertram] sort of decided it was okay to keep it in a chest in [Dabalos's] room."⁴¹ Monroe further stated, "I went back up there to [Dabalos's] room and [Bertram] put the gun in a chest."⁴² He asserted, "[Dabalos] had no part in [Bertram] putting the gun in the chest and [Dabalos] was already gone when that happened."⁴³

Dabalos's trial counsel stated that the defense in this case was a general denial of the offense. Specifically, the defense strategy was to show that Dabalos "had no knowledge of the gun being present in his room and that he did not have dominion and control over the gun."⁴⁴ With respect to trial counsel's decision not to call Hopper as a witness, she stated in her declaration:

Strategically at this point, I thought it also best not to call Paula Hopper as a witness due to the fact that her testimony would place the gun and Mr. Dabalos in the bedroom of the house, which I

⁴¹ Id. at 119.

⁴² Id.

⁴³ Id. at 68.

⁴⁴ Id.

thought would not be helpful to proving that Mr. Dabalos had no knowledge of the gun.^[45]

Given Dabalos's direction to trial counsel not to contact Hopper because of the possibility she had a criminal record, it is at least inconsistent for him to now criticize defense counsel for not doing so. More importantly, trial counsel's decision not to contact Hopper was objectively reasonable given the testimony that would have come from her would have strengthened the State's case and been inconsistent with the general denial defense. Because he fails to establish the first prong of the test, we need not address the second prong, prejudice.

As for the testimony of Monroe, we reach the same conclusion. It, too, would have been inconsistent with the general denial defense and would also have strengthened the State's case. The choice to not pursue investigation and not call to trial this witness is well within the bounds of objectively reasonable decisions by defense counsel at trial.

In sum, after looking to all the circumstances and applying "a heavy measure of deference to counsel's judgments," Dabalos fails to show that trial counsel's performance was deficient. The trial court properly concluded that Dabalos's trial counsel made reasonable, strategic decisions not to investigate, or call as witnesses, Monroe and Hopper. The trial court properly denied Dabalos's motion for a new trial.

Dabalos argues that the trial court used the wrong legal standard when it ruled that trial counsel's performance was reasonable based upon the

⁴⁵ Id. at 70.

information that Dabalos provided to her. He cites Strickland for the proposition that "[a] strategic choice cannot reasonably be made in the absence of a thorough investigation" and he argues that counsel's duty to investigate extends beyond investigating the information her client has provided her.⁴⁶ But Strickland also expressly recognized that "[c]ounsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."⁴⁷ Dabalos gave trial counsel reasons to believe that pursuing this investigation would be fruitless. Accordingly, this argument is not persuasive.

Dabalos cites Lord v. Wood, a Ninth Circuit case, to argue that trial counsel could not make a reasonable decision to call Monroe and Hopper as witnesses without speaking to them personally.⁴⁸ But even the Lord court acknowledged that counsel "is not obligated to interview every witness personally in order to be adjudged to have performed effectively."⁴⁹ Instead, where an attorney does not put a witness on the stand, his or her decision is entitled to less deference than if he or she interviews the witness.⁵⁰ Accordingly, while Lord

⁴⁶ Brief of Appellant at 16 (quoting Strickland, 466 U.S. at 691) (citing Rompilla v. Beard, 545 U.S. 374, 387-89, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005)).

⁴⁷ Strickland, 466 U.S. at 691.

⁴⁸ Brief of Appellant at 17 (citing Lord v. Wood, 184 F.3d 1083, 1095 (9th Cir. 1999)).

⁴⁹ Lord, 184 F.3d at 1095 n.8.

⁵⁰ Id.

indicates that Dabalos's trial counsel's decision is entitled to less deference based on her failure to interview Monroe and Hopper, Lord does not stand for the proposition that this failure is per se deficient.

Dabalos compares this case to State v. A.N.J.⁵¹ But that case is distinguishable. In A.N.J., the defense attorney did little to no investigation or research into the case, did not follow up with witnesses who could have provided an alternative explanation for the victim's report, never spoke to the investigating officer, made no requests for discovery, filed no motions, spent as little as 55 minutes with A.N.J. prior to the plea hearing, did not carefully review the plea agreement, and did not consult with experts.⁵² In contrast, Dabalos's trial counsel was well-informed of the factual and legal issues, interviewed the lead detective, successfully excluded other evidence found at the house, and pursued a sound trial strategy. In short, Dabalos's reliance on A.N.J. is not persuasive.

PROSECUTORIAL MISCONDUCT

Dabalos argues that prosecutorial misconduct in closing argument and in rebuttal denied him his constitutional right to a fair trial. We disagree.

To prevail on a claim of prosecutorial misconduct, the defense bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial.⁵³

⁵¹ Brief of Appellant at 17-18 (citing State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010)).

⁵² A.N.J., 168 Wn.2d at 100-02.

⁵³ State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012).

A prosecutor's closing argument may only address the law as stated in the trial court's instructions.⁵⁴ It is misconduct for a prosecutor to argue to the jury in a manner that removes or reduces its burden of proof of every element of the crime.⁵⁵

When defense counsel fails to object to alleged improper conduct, it constitutes a waiver of any prosecutorial misconduct unless the remark was "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice."⁵⁶ Under this "heightened standard," the defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on the jury' and (2) the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the jury verdict.'"⁵⁷ "[T]he absence of an objection by defense counsel 'strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.'"⁵⁸

"Instead of examining improper conduct in isolation, [a reviewing court] determine[s] the effect of the prosecutor's improper conduct by examining that conduct in the full trial context, including the evidence presented, 'the context of

⁵⁴ State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984).

⁵⁵ State v. Warren, 165 Wn.2d 17, 27, 195 P.3d 940 (2008).

⁵⁶ Emery, 174 Wn.2d at 760-61.

⁵⁷ Id. at 761 (quoting State v. Thorgerson, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)).

⁵⁸ State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis omitted) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.”⁵⁹

Here, Dabalos contends that the prosecutor committed misconduct “by misstating the elements of the crime, thus reducing the State’s burden of proof.”⁶⁰

He first contends that the following statement from closing argument was improper:

You may have heard the word ownership. The Defendant owned a firearm.

If you read the instructions carefully, you will see that actually we don’t have to prove that. We don’t have to prove the gun belonged to him. And if you step back and think about it, that makes sense. Because if you’re going to say in the law that if you have been convicted of a serious offense in your past, you’re not allowed to have a firearm, what kind of law would that be if you could say, well, yeah, I had it, but I didn’t own it.

The law says we don’t want the gun in your hands, period. We don’t want the gun within your reach, period. And so the way the law is written, the way the instructions read, it’s reflective of that.^[61]

He next contends that the following statement from rebuttal was improper.

It is [the] fact, not that he made a simple mistake, but that he was convicted of a serious offense, ***that means he has no business being anywhere around a gun, much less having a gun in a chest in his bedroom.***^[62]

⁵⁹ State v. Monday, 171 Wn.2d 667, 675, 257 P.3d 551 (2011) (quoting McKenzie, 157 Wn.2d at 52).

⁶⁰ Brief of Appellant at 24.

⁶¹ Report of Proceedings (May 14, 2013) at 10-11 (emphasis added).

⁶² Id. at 40 (emphasis added).

Dabalos's trial counsel did not object to either statement. Thus, Dabalos must meet the heightened standard to show prosecutorial misconduct. He fails to do so.

Assuming, without deciding, that these statements were improper, Dabalos fails to show that the statements were so flagrant or ill-intentioned that no curative instruction would have obviated any prejudicial effect on the jury and that the misconduct had a "substantial likelihood" of affecting the jury verdict.

After each of the statements identified by Dabalos, the prosecutor properly stated the law and elements in subsequent comments.

Not long after the first statement, the prosecutor stated that the State had the burden of proving that Dabalos "knowingly had a firearm in his possession or control."⁶³ Thus, a proper statement of the law and of the burden of proof quickly followed the first identified statement. Additionally, the prosecutor then continued on to discuss this element in detail when he summarized the evidence that proved that Dabalos knowingly had possession or control of the firearm. The extended discussion of this element also properly reflected the law.

Likewise, not long after the second statement, the prosecutor asked the jury to find that Dabalos "knowingly had in his possession or control a firearm."⁶⁴ Thus, a proper statement of the law quickly followed the second identified statement.

⁶³ Id. at 12.

⁶⁴ Id. at 41.

Moreover, on more than one occasion, the prosecutor indicated to the jury that the instructions in the packet contained the correct statements of the law. And the prosecutor expressly stated that the written instructions are what “actually controls.”

In sum, Dabalos fails to meet the heightened standard to show prosecutorial misconduct.

Dabalos compares this case to State v. Gotcher.⁶⁵ But in that case, the defense attorney objected to the prosecutor’s misstatement and thus, the heightened standard did not apply.⁶⁶ In short, that case is distinguishable, and Dabalos’s reliance on it is not persuasive.

Finally, Dabalos argues that a curative instruction would not have guaranteed that the prejudice caused by the prosecutor’s error would be cured. But for the reasons already discussed, we disagree.

We affirm the judgment and sentence.

COX, J.

WE CONCUR:

Trickey, J.

Speerman, C.J.

⁶⁵ 52 Wn. App. 350, 759 P.2d 1216 (1988).

⁶⁶ Id. at 352.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 71004-4-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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