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STATE OF WASHINGTON
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No. 99204-5
Court of Appeals No. 37348-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

**STATE OF WASHINGTON,
Respondent,**

vs.

**JOHN DIMITROS MILONAS,
Petitioner.**

ANSWER TO PETITION FOR REVIEW

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REPLY TO ISSUES PRESENTED

1. The court of appeals correctly applied the law regarding the sufficiency of the evidence in affirming the verdict of the jury and the petition should be denied.
2. The court of appeals correctly applied the law in determining that the testimony regarding a prior shooting incident was relevant and properly admitted and the petition should be denied.
3. The court of appeals correctly analyzed the prosecutor's closing statement, there is no conflict with *State v. Lee*, there was no prosecutorial misconduct and the petition should be denied.
4. Because there was no prosecutorial misconduct, the petition should be denied.

I. FACTS

The State generally accepts Petitioner's recitation of facts, except where noted within argument or where they conflict with the facts as presented by the court of appeals in the opinion.

II. ARGUMENT

a. THERE WAS SUFFICIENT EVIDENCE TO CONVICT PETITIONER, NO NOVEL RULE WAS ANNOUNCED TO CREATE A CONFLICT AND REVIEW IS UNWARRANTED

There was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Petitioner committed the crimes of unlawful possession of a firearm in the first degree for the weapons found in the safe. The standard of review for a challenge to 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 the essential elements of the crime beyond a reasonable doubt." *State v. Randhawa*, 133 Wn.2d 67, 74, 941 P.2d 661 (1997), citing *State v. Green*, 95 Wn.2d 216, 221, 616 P.2d 628 (1980). When the Petitioner challenges the sufficiency of the evidence, they admit "the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence." *State v. Gentry*, 125 Wn.2d

570, 597, 888 P.2d 1105 (1995). This is an intentionally generous standard, emphasizing that deference that should be shown to a jury verdict. There was sufficient evidence presented that a rational trier of fact could have found that the Petitioner possessed those firearms.

Petitioner had dominion and control over the firearms. It is undisputed that the Petitioner lived at the residence. It is undisputed that the Petitioner knew there were guns in the safe. It is undisputed that the keys to the safe were usually hanging from a hook in the entryway. Based on these undisputed facts, a reasonable trier of fact could have found constructive possession for the various firearms in the safe.

Petitioner's arguments amount to a request to consider different inferences, but, in a sufficiency claim, all facts and inferences are taken in the light most favorable to the State. It is undisputed that the Petitioner and Cassie Vincent lived together at the home where the firearms were located. RP 139. Cassie Vincent testified that when she was home she would leave her keys "hanging up by the door." RP 193. This means that any time that Cassie Vincent was home, Petitioner had access to the keys which were hanging by the doorway, and thus had access to the firearms. Taken in the light most favorable

to the State, a reasonable juror could conclude that because Petitioner had access to the keys any time Ms. Vincent was home, he could and did have dominion and control over the firearms. Ultimately it's no different than if the guns were stored in a closet and Petitioner had simply promised not to access them. Because the keys were kept in the open and not in the exclusive possession of Vincent, there was no actual barrier to Petitioner taking actual possession of the firearms. It is ultimately meaningless that the firearms were in a safe if Petitioner could simply access them by grabbing the safe keys from a hook by the door. Nor does such access make any sense given the very real policy implications of a law designed to keep felons from having access to firearms. There was sufficient evidence for a rational trier of fact to conclude that Petitioner had dominion and control over the firearms.

Petitioner claims over and over that the State only proved proximity to the firearms, and not dominion and control. This is incorrect. All three non-exclusive factors for determining whether an individual had constructive possession of an object were present in this case. Jurors were instructed to consider "whether the defendant had the immediate ability to take actual possession of the item, the

defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located.” WPIC 133.52, CP23. In this case, Petitioner had the ability to take immediate actual possession of the item any time Ms. Vincent was home and did not have possession of her keys on her immediate person. This was not disputed at trial. Petitioner had the ability to exclude others from possession of the item, because he was a resident with the ability to exclude others from the residence where the items were located. This was not disputed at trial. Finally, Petitioner had dominion and control over the premises where the item was located. This was also undisputed at trial. A reasonable trier of fact, given this evidence, could find beyond a reasonable doubt that Petitioner was in constructive possession of the firearms contained in the safe.

Petitioner contends that there was insufficient evidence to prove dominion and control on the date in question, but as “on or about” extends a reasonable amount of time related to the date in question, this argument fails. The Petitioner was charged by second amended information as having committed the various charges “on or about” February 23rd, 2018. CP20. As Justice Gordon-McCloud

pointed out in her concurring opinion in *State v. Brooks*, “As other jurisdictions that have considered this question have said, the State must prove that the defendant’s conduct occurred on a date that is ‘reasonably near’ the date range listed in the charging document.” *State v. Brooks*, 195 Wn.2d 91, 105 (2020), *citing United States v. Ross*, 412 F.3d 771, 774-75 (7th Cir. 2005) (“The canonical formula is that ‘when “on or about” language is used in an indictment, proof of the exact date of an offense is not required as long as a date reasonably near that named in the indictment is established.’”) (*quoting United States v. Ford*, 872 F.2d 1231, 1236-37 (6th Cir. 1989) and *citing United States v. Castillo*, 140 F.3d 874, 885 (10th Cir. 1998); *United States v. Nersesian*, 824 F.2d 1294, 1323 (2d Cir. 1987)); *United States v. Hinton*, 222 F.3d 664, 672-73 (9th Cir. 2000) (“It is well-settled that the government need prove only that Hinton shipped the package ‘reasonably near’ the date specified in the indictment.” (*citing United States v. Tsinhnahjinnie*, 112 F.3d 988, 991 (9th Cir. 1997))); *United States v. Grapp*, 653 F.2d 189, 195 (5th Cir. 1981) (“The prosecution, as a consequence of the use of the ‘on or about’ designation, was not required to prove the exact date; it suffices if a date reasonably near is established.”). Even if the Petitioner is correct and in the light most

favorable to the State a reasonable jury could not have found that Petitioner had the ability to reduce the firearms to his possession on the morning in question, it certainly could have the day before, or the day before that, etc., because Petitioner lived in the house with his partner, who kept her keys on a hook by the door, and had the ability to go unlock the safe and access the firearms essentially any time his partner was home.

The petition for review should be denied.

b. THE EVIDENCE OF PRIOR POSSESSION WAS
ADMISSIBLE, RELEVANT, AND NOT OVERLY
PREJUDICIAL

The Court of Appeals correctly held that the evidence regarding the Petitioner's prior handling of the guns was relevant and not overly prejudicial. Evidence is relevant if it has "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. "The threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *State v. Darden*, 145 Wash.2d 612, 621, 41 P.3d 1189 (2002). If the entire trial is about whether or not the "safe" with the key in the possession of his partner is an effective enough barrier to

prevent a convicted felon from having dominion and control of the firearms, it is relevant and fair to inquire exactly how effective the safe was in excluding him from reducing the guns to his possession. The answer was that it was not at all effective and this is the argument that underlies the entire position of the State, i.e. that Petitioner could have grabbed the guns anytime he wanted and that the fact that Vincent had the key to the safe was not a sufficient barrier to access to keep him from having constructive possession of the firearms. His past handling of the firearms showed that the barrier that was erected to keep him from those firearms was ineffective, ineffective enough that it could not be considered a barrier and that he should be considered to be in constructive possession of the firearms. It is precisely because it showed her permissiveness, that the evidence was relevant. Again, the bar to relevance is very low and this evidence was sufficiently relevant. The petition should be denied.

c. THERE WAS NO PROSECUTORIAL MISCONDUCT AND
THE CASE DOES NOT CONFLICT WITH LEE

There was no prosecutorial misconduct. The claim made by the Petitioner regarding prosecutorial misconduct relies on conflating “mere proximity” with “dominion and control of the premises.” At no point did the State argue that “mere proximity” to the firearms made

Petitioner guilty, but rather the State repeatedly claimed “you can’t ‘live’ in a house with firearms,” RP 277, RP 297. This is exactly what *Lee* held, because by living at the premises with access to the key to the safe, Petitioner exercised dominion and control over the weapon or premises where the weapon is found. *State v. Lee*, 158 Wn.App. 513, 517, 243 P.3d 929 (2010). Living in a home with firearms is fundamentally different than being in “mere proximity” to firearms. The prosecutor’s statement was taken almost directly from the pattern jury instruction which indicated that a factor in considering whether an item has been constructively possessed is “whether the defendant had dominion and control over the premises where the item was located.” WPIC 133.52. Living in a house means that you exercise dominion and control over the house. It also means that the person has dominion and control over the things in the house. The safe was in the house. The keys to the safe were in the house. He then had dominion and control over the safe and dominion and control over the keys. This was an accurate statement of the law and not misconduct. Nor does it conflict with *Lee*. There is a dramatic difference between being “in the same house or the same car with a firearm” and living in the same house and owning the car that had a

firearm. It is an incorrect statement of the law to say a person could not go visit their friend who had a firearm in the house, even though they exercised no dominion and control over the residence. That is, of course, not what happened in the instant case.

There is no conflict with *Lee*, there was no misconduct, and because there was no misconduct, Petitioner's trial counsel was not ineffective for failing to object. The petition should be denied.

III. CONCLUSION

This Court should deny the Petition for Review. There was sufficient evidence to support the convictions and the Court of Appeals decision which so held does not conflict with any other caselaw. Petitioner had dominion and control over the residence where the guns were located. Petitioner had access to the keys to the safe where the guns were located. For years, any time his partner was home, he had the ability to reduce those guns to his possession. He was in constructive possession of those firearms and the State committed no misconduct in so arguing to the jury. The Respondent respectfully requests that this Court deny the petition for review.

Respectfully submitted this 11th day of January, 2021.

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