

NO. 67947-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH VAUX,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD D. EADIE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	4
1. A CONVICTED FELON'S KNOWLEDGE THAT HE IS PROHIBITED FROM POSSESSING A FIREARM IS NOT AN ESSENTIAL ELEMENT AND THE EVIDENCE SHOWED THAT VAUX KNEW HE HAD LOST HIS RIGHT TO FIREARM POSSESSION	4
a. Facts	5
b. Notice Requirement	9
c. The State Need Not Prove That A Convicted Felon Knows He Is Prohibited From Possessing A Firearm.....	11
d. Vaux Had Actual Knowledge That He Could Not Possess A Firearm	12
2. THE TRIAL COURT PROPERLY DECLINED TO GIVE AN ERRONEOUS JURY INSTRUCTION	15
a. The Proposed Instructions Misstated The Law	16
b. Error, If Any, Was Harmless.....	22

3.	THE STATE PROVIDED OVERWHELMING EVIDENCE THAT VAUX "POSSESSED" THE FIREARM.....	23
D.	<u>CONCLUSION</u>	26

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

Edmonds Shopping Ctr. Assocs. v. City of Edmonds,
117 Wn. App. 344, 71 P.3d 233 (2003) 26

State v. Breitung, 155 Wn. App. 606,
230 P.3d 614 (2010), aff'd,
173 Wn.2d 393 (2011)..... 10, 13, 16, 19, 20

State v. Breitung, 173 Wn.2d 393,
267 P.3d 1012 (2011)..... 10, 11, 12, 16, 19

State v. Brown, 147 Wn.2d 330,
58 P.3d 889 (2002)..... 22

State v. Callahan, 77 Wn.2d 27,
459 P.2d 400 (1969)..... 24

State v. Carter, 127 Wn. App. 713,
112 P.3d 561 (2005)..... 18

State v. Cuble, 109 Wn. App. 362,
35 P.3d 404 (2001)..... 16

State v. Fiser, 99 Wn. App. 714,
995 P.2d 107 (2000)..... 24

State v. Gregory, 158 Wn.2d 759,
147 P.3d 1201 (2006)..... 21

State v. McCarty, 152 Wn. App. 351,
215 P.3d 1036 (2009)..... 20

State v. Minor, 162 Wn.2d 796,
174 P.3d 1162 (2008)..... 10, 11, 12, 17, 18, 19, 20

State v. Reed, 84 Wn. App. 379,
928 P.2d 469 (1997)..... 12

<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	23
<u>State v. Semakula</u> , 88 Wn. App. 719, 946 P.2d 795 (1997).....	12
<u>State v. Summers</u> , 107 Wn. App. 373, 28 P.3d 780 (2001).....	25
<u>State v. Williams</u> , 132 Wn.2d 248, 937 P.2d 1052 (1997).....	15
<u>Vogel v. Alaska S.S. Co.</u> , 69 Wn.2d 497, 419 P.2d 141 (1966).....	15, 22

Statutes

Washington State:

RCW 9.41.....	9
RCW 9.41.010.....	9
RCW 9.41.040.....	2, 9, 13, 21
RCW 9.41.047.....	1, 9, 10, 11, 16, 17, 18, 19
RCW 9.94A.660	2
RCW 69.50.....	9
RCW 69.50.440.....	9

A. ISSUES PRESENTED

1. Case law holds that a defendant's knowledge of his firearm prohibition is not an essential element of unlawful possession of a firearm. Should the Court reject Vaux's challenge to the sufficiency of the evidence because his claim is based on the State's failure to prove guilty knowledge?

2. When a defendant was not notified of his firearm prohibition as required under RCW 9.41.047(1) but otherwise had notice of the prohibition against possession of firearms, a subsequent conviction for unlawful possession of a firearm is valid. Here, Vaux received written (but not oral) notice and he had actual knowledge of the firearm prohibition. Is his conviction for unlawful possession of a firearm valid?

3. It is reversible error for a trial court to give an erroneous jury instruction. Vaux proposed three jury instructions that either misstated the law or were incomplete statements of the law. Did the trial court properly refuse to give the erroneous instructions?

4. Possession may be actual or constructive. The evidence demonstrates that Vaux held a firearm, loaded ammunition into the firearm and then shot the firearm. Should the Court reject Vaux's claim that the State only proved "fleeting" possession?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, Joseph Vaux, with one count of first degree unlawful possession of a firearm and one count of possession of a controlled substance - methamphetamine. CP 11-12. A jury convicted Vaux as charged. CP 57-58. The trial court imposed a prison-based special drug offender sentencing alternative.¹ CP 62-64. Vaux timely appeals. CP 69.

2. SUBSTANTIVE FACTS

On February 26, 2010, Vaux (a convicted felon²) and his friend, Michael Weimer (also a convicted felon), went to Wade's Eastside Guns (Wade's) and rented a firearm, which both men fired at the shooting range. 3RP 91,141, 151; 4RP 52, 60-62, 73, 94-96³; Exs. 1, 5. As a result of their felony convictions, neither Vaux nor Weimer may possess a firearm.⁴ 3RP 141-42; 4RP 23; Ex. 11.

¹ RCW 9.94A.660.

² Vaux has a 2000 conviction for unlawful possession of pseudoephedrine with intent to manufacture methamphetamine. Exs. 1, 11.

³ The State adopts the appellant's designation of the verbatim report of proceedings. See Br. of Appellant at 3 n. 1.

⁴ See RCW 9.41.040.

At Wade's, when Vaux pulled out his wallet to pay for the firearm rental, a baggie with white powder fell out. 3RP 60; 4RP 66; Ex. 5. Moments later, a customer saw the baggie on the floor, picked it up and turned it over to a range employee, Mr. McLamb. 3RP 40-42, 57. McLamb gave the baggie to the shift manager, Mr. Curtis. 3RP 59, 107. Curtis thought the baggie contained narcotics so he called 9-1-1. 3RP 60. Forensic tests determined that the white powder was methamphetamine. 4RP 9, 16-17.

Wade's has cameras that record the activities in the lobby and on the range. 3RP 108. Curtis rewound the video so that he could see who had dropped the baggie. 3RP 107. Two different camera angles showed the baggie dropped out of Vaux's back pocket as he pulled his wallet out. 3RP 109; Ex. 5.

At trial, Vaux admitted that the baggie fell out of his pocket, but he denied the baggie belonged to him. 4RP 66.

Additional procedural and substantive facts will be discussed in the argument section to which they pertain.

C. ARGUMENT⁵

1. **A CONVICTED FELON'S KNOWLEDGE THAT HE IS PROHIBITED FROM POSSESSING A FIREARM IS NOT AN ESSENTIAL ELEMENT AND THE EVIDENCE SHOWED THAT VAUX KNEW HE HAD LOST HIS RIGHT TO FIREARM POSSESSION.**

Vaux raises two related claims regarding the alleged failure of the convicting court for his predicate offense to provide oral or written notice of the prohibition against possessing a firearm, as statutorily required. Vaux contends that the alleged failure requires reversal of his conviction because the State failed to prove each essential element of the charged offense. Vaux also contends that insufficient evidence of notice requires reversal as a matter of law.

The Court should reject these arguments. The convicted felon's knowledge that he is prohibited from possessing a firearm is not an essential element of unlawful possession of a firearm. The State concedes that, because the record is silent as to oral notice, the presumption is that oral notice was not given. However, the convicting court provided written notice of the prohibition and Vaux had actual knowledge of the prohibition. His claims must fail.

⁵ The State has addressed appellant's assignments of error in a different order. The jury instruction issue (addressed in § C.2 of Br. of Respondent, *infra*) turns on whether Vaux had knowledge that he could not possess a firearm.

a. Facts.

Before Vaux and Weimer went to Wade's, Vaux expressed concern that his prior felony conviction might prohibit him from renting a firearm. 4RP 59-69, 87-91. Weimer assured Vaux that it would be okay – they were not going to buy a gun, just rent one. 4RP 62, 87. Vaux said that he believed Weimer because Weimer (also a convicted felon) had previously rented guns at Wade's. 4RP 61-62.

Both Vaux and Weimer knew generally that convicted felons may not possess firearms, but neither man thought the prohibition applied to him. 4RP 62-69, 73, 95-97. Vaux said that he did not “explicitly” know that felons could not possess firearms. He stated, “Like I said, they change the laws all the time. I mean, now we can vote, but that was one you are not supposed to be able to do is vote or hold public office or have firearms.” 4RP 65. Vaux also suggested that the prohibition may have changed so that “nonviolent criminals don’t have to have the restriction now.”⁶ 4RP 69.

⁶ Because Weimer's prior felony conviction was as a juvenile, Weimer said that he did not believe the prohibition against possessing a firearm extended beyond his 18th birthday. 4RP 96-97.

Vaux had a faulty memory about his plea and sentencing hearings from his predicate offense. 4RP 55-57, 60, 70. Vaux stated that he did not recall any specific advisement regarding his inability to possess a firearm. 4RP 59, 70. Vaux acknowledged, however, that the statement of defendant on plea of guilty, which he signed, contained a paragraph that informed him he could no longer possess a firearm. 4RP 59, 72; Ex. 11 at 8, paragraph 6 (u):

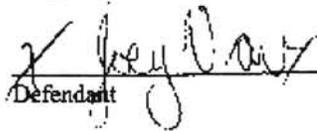
6. IN CONSIDERING THE CONSEQUENCES OF MY GUILTY PLEA, I UNDERSTAND THAT:

(u) I understand that I may not possess, own, or have under my control any firearm unless my right to do so is restored by a court of record and that I must immediately surrender any concealed pistol license. (PURSUANT TO RCW 9A.41.047(1), THE JUDGE SHALL READ THIS SECTION TO THE DEFENDANT IN OPEN COURT IF THE DEFENDANT IS PLEADING GUILTY TO A "SERIOUS OFFENSE" AS DEFINED UNDER RCW 9A.41.010(12), A CRIME OF DOMESTIC VIOLENCE, OR A CRIME OF "HARASSMENT" AS DEFINED UNDER RCW 9A.46.060. THE CLERK SHALL FORWARD A COPY OF THE DEFENDANT'S DRIVER'S LICENSE IDENTICARD OR COMPARABLE IDENTIFICATION TO THE DEPARTMENT OF LICENSING ALONG WITH THE DATE OF CONVICTION.)

Vaux conceded, "I kind of recall having Jay (Vaux's prior attorney) pull me aside and initialing stuff and whatever. He just told me which ones to do and – but didn't explain it in any way, so that was – that was it. ..." 4RP 59-60.

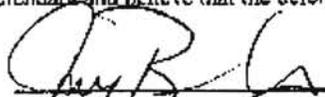
The statement of defendant on plea of guilty also contains Vaux's signature below a paragraph that reads: "My lawyer has explained to me, and we fully discussed, all of the above paragraphs. I understand them all." Ex. 11 at 9, paragraph 12:

12. My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all. I have been given a copy of this "Statement of Defendant on Plea of Guilty." I have no further questions to ask the judge.


Defendant

Vaux's attorney signed the plea form, underneath a statement that says: "I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement." Ex. 11 at 10.

I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement.


Defendant's Lawyer
WSBA # 27165

The judge at the guilty plea hearing also signed the statement of defendant on plea of guilty after determining that both Vaux and his attorney "had previously read the entire statement above and the defendant understood it in full." Ex. 11 at 10. The court accepted Vaux's guilty plea only after concluding that the plea was "knowingly, intelligently, and voluntarily made" and that Vaux

understood the charges and consequences of his plea. Ex. 11

at 10 (italics added).

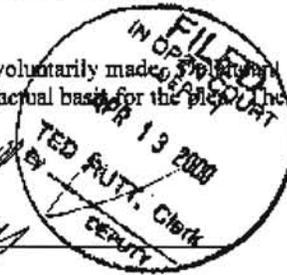
The foregoing statement was signed by the defendant in open court in the presence of the defendant's lawyer and the undersigned judge. The defendant asserted that [check the appropriate box]:

- (a) The defendant had previously read the entire statement above and the defendant understood it in full; or
- (b) the defendant's lawyer had previously read to him or her the entire statement above and that the defendant understood it in full; or
- * (c) An interpreter had previously read to the defendant the entire statement above and that the defendant understood it in full.

I find the defendant's plea of guilty to be knowingly, intelligently, and voluntarily made. The defendant understands the charges and the consequences of the plea. There is a factual basis for the plea. The defendant is guilty as charged.

Dated this 13 day of April

[Signature]
Judge



Vaux also conceded that his community corrections officer "probably" told him that he could not possess a firearm.⁷ 4RP 73. Vaux stated, "I mean, I don't know if the guy told me explicitly, but yeah, probably. I am sure that's right." 4RP 73. Still, Vaux said that he was unsure about the rules that pertained to convicted felons, which was why he had asked Weimer. 4RP 68.

Vaux did not state that he had not received actual notice of his prohibition against possessing a firearm. Rather, he said that

⁷ As a condition of Vaux's sentence, he had to report to a community corrections officer post release from prison. Ex. 1 (Judgment and Sentence at 5; Special Drug Offender Sentencing Offender at 2).

he did not remember or could not recall having been advised that he could not have a firearm. 4RP 51-73.

b. Notice Requirement.

A person convicted of a serious offense loses his right to possess a firearm unless the right is restored by a court of competent jurisdiction.⁸ RCW 9.41.040(1)(a), (4). A convicting court must give the defendant notice of the prohibition of the right to possess firearms. The statute provides:

At the time a person is convicted ... of an offense making the person ineligible to possess a firearm ... the [convicting court] shall notify the person, orally and in writing, that the person ... may not possess a firearm unless his or her right to do so is restored by a court of record.

RCW 9.41.047(1)(a). For purposes of chapter 9.41 RCW, a person has been “‘convicted’, in an adult court ... at such time as a plea of guilty has been accepted ... notwithstanding the pendency of any future proceedings including but not limited to sentencing. ...”

RCW 9.41.040(3).

In a decision later affirmed by the Washington Supreme Court, the Court of Appeals held that the notice provision in

⁸ A “serious offense” includes a felony violation of the uniform controlled substances act, chapter 69.50 RCW, that is classified as a class B felony. RCW 9.41.010(16)(b). Unlawful possession of pseudoephedrine with intent to manufacture methamphetamine is a class B felony. RCW 69.50.440(1), (2).

RCW 9.41.047(1)(a) is mandatory and the failure to comply with the statute warrants reversal. State v. Breitung, 155 Wn. App. 606, 624, 230 P.3d 614 (2010), aff'd, 173 Wn.2d 393 (2011). The Court of Appeals stated,

[W]e hold that where a convicting court has failed to give the mandatory notice directed in RCW 9.41.047(1) *and there is no evidence that the defendant has otherwise acquired actual knowledge of the firearm possession prohibition* that RCW 9.41.047(1) is designed to impart, the defendant's subsequent conviction for unlawful possession of a firearm is invalid and must be reversed.

Breitung, 155 Wn. App. at 624 (italics added).

The Washington Supreme Court held that lack of notice under RCW 9.41.047(1) is an affirmative defense, which a defendant must establish by a preponderance of the evidence. State v. Breitung, 173 Wn.2d 393, 403, 267 P.3d 1012 (2011). Under the facts in Breitung, there was no evidence that the defendant received the required written or oral notice. Id. at 403-04. Where the record is silent on oral notification, the assumption is that no such notice was given. Id. at 403 (citing State v. Minor, 162 Wn.2d 796, 800, 174 P.3d 1162 (2008)). There also was no evidence in the record to demonstrate actual knowledge on Breitung's part. Breitung, 173 Wn.2d at 404. Thus,

because Breitung was not notified of his firearm prohibition as required under RCW 9.41.047(1) *and did not otherwise have notice* of the prohibition against possession of firearms, the court concluded that Breitung's conviction for unlawful possession of a firearm must be reversed. Id.

- c. The State Need Not Prove That A Convicted Felon Knows He Is Prohibited From Possessing A Firearm.

The notice requirement is statutory. The Washington Supreme Court stated that RCW 9.41.047(1), which requires the convicting court to provide oral and written notice of the firearm prohibition, is "unequivocal in its mandate." Breitung, 173 Wn.2d at 403 (quoting Minor, 162 Wn.2d at 803). A statutory violation requires reversal absent evidence that the defendant did not otherwise have notice of the prohibition against firearm possession. Breitung, at 404.

The Court in Breitung reiterated that,

[I]gnorance of the law is generally not a defense, and a convicted felon's knowledge that his right to firearm ownership is prohibited is not an element of the crime of unlawful possession of a firearm.

Breitung, at 402; see also Minor, 162 Wn.2d at 802 ("Washington case law provides that knowledge of the illegality of firearm

possession is not an element of the crime”); State v. Semakula, 88 Wn. App. 719, 724, 946 P.2d 795 (1997) (agreeing with State v. Reed,⁹ which held knowledge that possession is unlawful is not an element of the crime of unlawful possession of a firearm, and declining to read a guilty knowledge element into the unlawful possession of a firearm statute).

Vaux has not provided any authority to support his claim that guilty knowledge is an essential element of the crime of unlawful possession of a firearm.¹⁰ Instead, Vaux asks this Court to transform a statutory violation into an error of constitutional magnitude. The Court should decline Vaux's invitation.

d. Vaux Had Actual Knowledge That He Could Not Possess A Firearm.

At the outset, the State concedes that because the record from the convicting court is silent, the assumption is that no oral notice was given. See Minor, 162 Wn.2d at 800. However, Vaux received written notice by the convicting court. Ex. 11. The

⁹ 84 Wn. App. 379, 383, 928 P.2d 469 (1997).

¹⁰ Vaux claims that Semakula is no longer good law. Br. of Appellant at 13. Semakula discussed the unwitting possession defense (an affirmative defense that a defendant must prove to the jury) and challenges to the constitutional validity of the predicate offense. Neither Breitung nor Minor overruled Semakula, which held that guilty knowledge is not an essential element of unlawful possession of a firearm.

convicting court is the court that accepted Vaux's guilty plea.

See RCW 9.41.040(3).

In this case, unlike in Breitung, there was evidence that the defendant received written notice. Paragraph 6(u) in the statement of defendant on plea of guilty for the predicate offense provided notice to Vaux that he is prohibited from possessing a firearm. Although Vaux's trial and appellate attorneys argued Vaux's initials next to paragraph 6(u) are ambiguous, common sense dictates otherwise. The paragraph is not crossed out like the inapplicable paragraphs. Ex. 11. Given the significance of the prohibition against possessing firearms, Vaux's attorney most likely had Vaux initial the paragraph to signify that he had read and understood the prohibition.

Vaux's statement of defendant on plea of guilty also provided Vaux with actual knowledge of the firearm prohibition. Although Vaux claimed at trial that his prior attorney had pulled him aside and had him initial paragraphs without any explanation, the plea form demonstrates otherwise. Vaux, his attorney and the judge all stated unequivocally that Vaux had gone through the document himself and with his attorney and that he understood

each paragraph in the statement and all of the consequences of his plea – which includes the firearm prohibition. Ex. 11 at 8, 10.

Moreover, Vaux never claimed that he did not receive notice; he merely said that he could not remember (or recall) explicitly being advised. 4RP 59, 70. Vaux's inability to recall being advised at the time of conviction – 10 years earlier – does not mean that he was not advised or that he did not have actual knowledge of the prohibition at that time.

Vaux's testimony demonstrated time and again that he knew he could not possess a firearm. Vaux said that he knew generally felons could not possess firearms. 4RP 69. He thought that perhaps the law had changed such that persons convicted of non-violent offenses could now possess firearms. 4RP 69. If the law had changed, then it stands to reason that when Vaux was convicted the prohibition against firearms was in full force. And, if the law had changed, then Vaux would not have conceded that he had yet to petition a court to restore his right to firearm possession. 4RP 69.

Additionally, if Vaux did not have actual knowledge of the prohibition, he would have had no reason to ask Weimer whether it was okay for them to rent a firearm. 4RP 61-63, 87-88. Notably,

Weimer did not assuage Vaux's concern about being a felon in possession of a firearm by stating the prohibition did not apply to them; rather, Weimer split hairs between *owning* a firearm and *renting* a firearm. 4RP 87.

The evidence demonstrates that Vaux received written notice and otherwise had knowledge of the law prohibiting him from possessing a firearm. The Court should reject Vaux's claim.

2. THE TRIAL COURT PROPERLY DECLINED TO GIVE AN ERRONEOUS JURY INSTRUCTION.

Vaux claims that the trial court's refusal to give his proposed jury instructions violated his constitutional right to present a defense. Vaux is mistaken. The trial court declined to give the instructions because they did not accurately set forth the law. The claim must fail.

Due process requires that each party is entitled to have the jury instructed on its theory of the case if there is sufficient evidence to support that theory. State v. Williams, 132 Wn.2d 248, 259, 937 P.2d 1052 (1997). However, a "trial court need never give a requested instruction that is erroneous in any respect." Vogel v. Alaska S.S. Co., 69 Wn.2d 497, 503, 419 P.2d 141 (1966). Whether a jury instruction correctly states the applicable law is a

question of law that the Court reviews *de novo*. State v. Cuble, 109 Wn. App. 362, 368, 35 P.3d 404 (2001).

a. The Proposed Instructions Misstated The Law.

In this case, defense counsel proposed three instructions that the trial court declined to give. The first instruction stated,

Where a convicting court has failed to give the statutorily required notice of firearm possession prohibition and there is no evidence that the defendant has otherwise acquired actual knowledge of the firearm possession prohibition that statute is designed to impart, the defendant cannot be convicted of this offense.

CP 87 (citing RCW 9.41.047; State v. Breitung, 155 Wn. App. 606 (2010)).¹¹ This instruction is not a correct statement of the law.

The instruction fails to properly allocate the burden of proof – preponderance of the evidence – to the defendant. See Breitung, 173 Wn.2d at 403 (stating lack of statutory notice is an affirmative defense that a defendant must establish by a preponderance of the evidence). Although defense counsel said that he would re-word the instruction to reflect the defendant's burden, counsel never proposed an instruction that properly stated the law.

¹¹ In Breitung, the defendant made a motion to dismiss his conviction for unlawful possession of a firearm based on the convicting court's failure to provide statutorily required notice. The issue did not arise in the context of jury instructions. Breitung, 155 Wn. App. at 619.

The proposed instruction further misstates the law because whether a defendant received notice or had actual knowledge that he was prohibited from possessing a firearm is not an essential element of the crime. See § 1.c of Br. of Respondent, *infra*. The State need only prove that the defendant knowingly possessed the firearm, not that he understood that such possession was illegal. Minor, 162 Wn.2d at 802. For this additional reason the proposed instruction misstated the law and it was properly refused.

Defense counsel proposed another instruction that misstated the law:

A Court affirmatively misleads a defendant when the written order of the Court does not give notice of the prohibition against firearm possession and when the record is silent as to oral notification. If you find that the Pierce County Court affirmatively misled the defendant, the defendant cannot be convicted of this offense.

CP 90 (citing RCW 9.41.047; State v. Minor, 162 Wn.2d 796 (2008)). In Minor, it was not the convicting court's omission of the firearm prohibition that misled the defendant. Rather, the order contained the following paragraph, unchecked:

4.18 [] FELONY FIREARM PROHIBITION:
Respondent shall not use or possess a firearm, ammunition or other dangerous weapon until his or her right to do so is restored by a court of record. The court clerk is directed to immediately forward a copy

of the respondent's driver's license or identicard, or comparable information, along with the date of conviction, to the Department of Licensing. RCW 9.41.047.

Minor, 162 Wn.2d at 798. The issue was whether the failure to check the box affirmatively misled the defendant into believing that he could own firearms. Id. at 800-01. The court in Minor said that by failing to check the appropriate paragraph in the order, the predicate offense court not only failed to give written notice as required, it affirmatively represented to Minor that the paragraph did not apply to him. Id. at 803.

The court in Minor contrasted the defendant's circumstances with those present in State v. Carter, 127 Wn. App. 713, 720-21, 112 P.3d 561 (2005). There, the predicate offense court failed to inform Carter according to statute; however, Carter was not "affirmatively misled." Id. The Minor court drew a distinction between the omission of any language regarding the firearms prohibition as in Carter and the predicate offense court affirmatively misleading Minor. Minor, 162 Wn.2d at 803-04.

This case is precisely the same as Carter. Here, the judgment and sentence omits any language regarding the firearm prohibition. Ex. 1. The omission is not equivalent to an affirmative

misrepresentation. See Minor, 162 Wn.2d at 803-04. And, as discussed above, the statement of defendant on plea of guilty provided Vaux with written notice of the firearm prohibition. The trial court properly rejected the proposed instruction because there is no evidence that Vaux was affirmatively misled.

Lastly, defense counsel proposed the following jury instruction:

At the time a person is convicted of an offense making the person ineligible to possess a firearm, the convicting court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record.

CP 88 (citing RCW 9.41.047). Although the trial court found that the instruction's language comported with the law, it questioned whether the issue should be addressed by a jury instruction or if it would be a matter for the court on a motion to dismiss, as in Breitung. 4RP 36, 41.

The court in Breitung stated that lack of notice is an affirmative defense that a defendant must prove by a preponderance of the evidence. Breitung, 173 Wn.2d at 403. However, the court did not say that the affirmative defense was

necessarily an issue for the jury.¹² There, the court found Breitung had affirmatively established the defense in his motion to dismiss.¹³ Id.

The trial court in this case said that whether Vaux had been given proper notice is “to some extent” a “matter for the court on a motion to dismiss.” 4RP 36. Indeed, Vaux first challenged the State’s proof of notice in his motion to dismiss after the State rested. 4RP 35-37. The court denied the motion because the statement of defendant on plea of guilty provided Vaux notice of his firearm prohibition. 4RP 36.

The trial court also found the proposed instruction irrelevant. 4RP 46. The court rejected defense counsel’s claim that, “[W]hatever’s in that plea form is irrelevant ... What’s relevant is what was Mr. Vaux informed of at the time of his sentencing, which

¹² Vaux correctly states in his brief that the requisite notice is an affirmative defense at trial. Br. of Appellant at 11. The court in Breitung did not, however, decide whether the defense is a question for the court or the jury. See, e.g., State v. McCarty, 152 Wn. App. 351, 215 P.3d 1036 (2009) (holding as a matter of law that a defendant, who was never designated as a primary caregiver, could not assert primary-caregiver affirmative defense pursuant to Medical Use of Marijuana Act).

¹³ In Minor, the defendant raised the lack of notice defense on direct appeal. Minor, 162 Wn.2d at 799.

is when the conviction becomes final.”¹⁴ 4RP 47-48. Instead, the court ruled that the written order controls only when the judgment and sentence provides notice. If, however, the judgment and sentence contains no language regarding the firearm prohibition, then the question of notice turns on the defendant’s actual knowledge. 4RP 44-47.

Vaux had actual knowledge of the firearm prohibition. 4RP 46-48. The court said, “[H]ere there is some evidence of [Vaux’s] knowledge, and that evidence of his knowledge is in the plea form.” 4RP 44. Since the proposed jury instruction omitted any language regarding a defendant’s “actual knowledge,” it was an incomplete statement of the law. The court properly rejected it.

Vaux claims that the trial court violated his due process right to present a defense when it denied his proposed jury instructions. However, defendants have a right to present only relevant evidence, with no constitutional right to present irrelevant evidence. State v. Gregory, 158 Wn.2d 759, 786 n.6, 147 P.3d 1201 (2006).

¹⁴ As stated above, the law unequivocally states that a person has been “convicted”, in an adult court ... at such time as a plea of guilty has been accepted ... *notwithstanding the pendency of any future proceedings including but not limited to sentencing.* ...” RCW 9.41.040(3) (emphasis added).

In sum, the trial court properly declined Vaux's proposed instructions because they misstated the law or were incomplete statements of the law. It would have been reversible error for the court to give these defective instructions. See Vogel, supra, 69 Wn.2d at 503. Further, the court properly concluded that the proposed instructions were irrelevant because Vaux had actual knowledge of the firearm prohibition. The Court should affirm the trial court's ruling.

b. Error, If Any, Was Harmless.

Even if this Court found error or an abuse of discretion, any error was harmless. "In order to hold that a jury instruction error was harmless, the reviewing court 'must conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). In arriving at that conclusion, the Court must thoroughly examine the record. Brown, 147 Wn.2d at 341.

Here, the most significant fact is that Vaux never denied that he had received written notice or that he had actual notice of the firearm prohibition. Rather, as discussed above, Vaux merely claimed that he did not remember or did not recall whether the

convicting court told him that he was prohibited from possessing a firearm.

Given the statement of defendant on plea of guilty and Vaux's testimony, this Court should be convinced beyond a reasonable doubt that Vaux's requested instruction would not have made a difference in this case.

3. THE STATE PROVIDED OVERWHELMING EVIDENCE THAT VAUX "POSSESSED" THE FIREARM.

Vaux asserts that he exercised only "fleeting control" over the firearm. He thus contends that insufficient evidence supports his conviction for unlawful possession of a firearm. The Court should dismiss the claim; it is meritless. The evidence demonstrated that Vaux loaded ammunition into the firearm and then shot it. As such, his control was more than "fleeting."

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining whether the necessary quantum of proof exists, the Court need not be convinced of the defendant's guilt beyond a reasonable doubt but only that substantial evidence

supports the State's case. State v. Fiser, 99 Wn. App. 714, 718, 995 P.2d 107 (2000).

Possession may be actual or construction. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person has actual custody when he has physical custody of the item; whereas a person has constructive possession when he has dominion and control over the item. Id.

In this case, Vaux had actual custody of the gun. Ex 5. McLamb (the person who the customer contacted after he found the baggie) said that Vaux was shooting the firearm when the police arrived. 3RP 76-77. A maintenance worker at Wade's saw Vaux shoot the firearm. 3RP 91. The night manager, Curtis, reviewed the video tape (exhibit 5) and in the segment titled "Chad Final," Vaux is seen loading ammunition into the firearm and then shooting it. 3RP 119-20. Vaux admitted that he fired the gun at Wade's. 4RP 73. The evidence overwhelmingly demonstrates that Vaux possessed the firearm.

Vaux contends that he had only passing or fleeting control. As support for this argument, Vaux claims that: (1) Wade's controls the premises and the gun; (2) a renter only has the gun for a limited time period; (3) he exercised minimal control over the gun;

and (4) Weimer shot the firearm more frequently. These claims fail.

First, Wade's employees stated that renters have the firearm in their possession, but Wade's maintains ownership. 3RP 104-05, 126. A conviction for unlawful possession of a firearm requires only proof of possession, not ownership.

Second, Vaux's actual possession of the gun may have been limited, but it was enough time for Vaux to load ammunition into the gun and fire it. That is not fleeting or momentary control. See State v. Summers, 107 Wn. App. 373, 384-87, 28 P.3d 780 (2001) (examining the cases that define fleeting or momentary control and concluding that the focus is not on the length of the possession but on the quality and nature of that possession).

Third, Vaux exercised more than minimal control over the gun. Vaux has not explained how his control over the firearm was minimal, when the video admitted at trial showed Vaux load and then shoot the firearm.

Finally, Vaux cites no authority to support his argument that, because Weimer fired the gun more than he did, it somehow negated his possession or physical custody of the firearm. Where a party fails to cite to relevant authority, appellate courts generally

presume that the party found none. Edmonds Shopping Ctr. Assocs. v. City of Edmonds, 117 Wn. App. 344, 353, 71 P.3d 233 (2003).

The Court should hold that there was sufficient evidence to support Vaux's conviction for unlawful possession of a firearm.

D. CONCLUSION

For the reasons stated above, the State respectfully asks the Court to affirm Vaux's judgment and sentence.

DATED this 18 day of June, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Susan Wilk, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of Brief of Respondent, in STATE V. JOSEPH VAUX, Cause No. 67947-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

6/18/12
Date