

NO. 34591-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,
Respondent,
v.
ERIC VAN TRENT,
Appellant.

2007 NOV 09 PM 4:59
COURT OF APPEALS
STATE OF WASHINGTON

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

APPELLANT'S OPENING BRIEF

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FILED
COURT APPELLATE
STATE OF WASHINGTON
06/17/07 AM 9:40
PACIFIC COUNTY

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A. SUMMARY OF ARGUMENT.

The prosecution did not present sufficient evidence to convict Eric Van Trent of unlawfully possessing a firearm when he momentarily handled a rifle and exercised only passing control. Additionally, the prosecution relied on unduly prejudicial allegations of uncharged conduct, including evidence that Mr. Trent stole several firearms, burglarized a home, abused his girlfriend, and had outstanding arrest warrants.

Further prejudicial error occurred due to defense counsel's unreasonable failure to seek a jury instruction explaining that unlawful possession requires more than passing control and failure to object to the prosecution's argument that passing control was sufficient to establish unlawful possession. In addition, the prosecutor made improper arguments in closing that further deprived Mr. Trent of a fair trial.

B. ASSIGNMENTS OF ERROR.

1. There was insufficient evidence to support the charged crime, contrary to the due process clauses of the Fourteenth Amendment and Washington Constitution, Article I, section 3.

2. The prosecution impermissibly relied upon uncharged wrongful conduct that unduly prejudiced Mr. Trent and thus deprived him of due process of law.

3. Mr. Trent was denied effective assistance of counsel in violation of the Sixth Amendment and Article I, section 22 of the Washington Constitution.

4. The prosecution committed flagrant misconduct in closing argument that violated Mr. Trent's right to a fair trial under the due process clauses of the state and federal constitutions.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. To prove unlawful possession, the prosecution must establish that the accused had more than momentary or fleeting control of the property. In the case at bar, the evidence indicated Mr. Trent momentarily held a firearm for the purpose of doing a favor for the person who owed the firearm and that another person owned the firearm. Was there insufficient evidence Mr. Trent unlawfully possessed the firearm?

2. The prosecution may not rely upon uncharged criminal conduct to demonstrate the accused is a dangerous person and therefore should be convicted of the charged crime. Here, the prosecution introduced evidence Mr. Trent was involved in

numerous uncharged violent offenses. Did the prosecution's reliance on accusations of uncharged dangerous conduct deny Mr. Trent a fair trial?

3. A defense attorney performs unreasonably when he fails to request available legal instruction from the judge explaining the theory of defense. Here, defense counsel did not seek a jury instruction explaining that momentary handling of a weapon does not establish unlawful possession and did not object to the prosecution's argument that such brief handling of the firearm sufficiently established the offense. Did defense counsel's unreasonable failure to request legal instruction essential to the defense theory and failure to object to the prosecution's misstatement of the law prejudice the outcome of the case?

4. A prosecutor is prohibited from flagrantly seeking a verdict upon passion or misrepresenting the law. In the instant matter, the prosecutor shifted the burden of proof, misrepresented the law of unlawful possession, called a witness a liar and injected his personal belief of a State witness's veracity into jury deliberations. Did the State's flagrant disregard for the rules governing appropriate arguments by the prosecution violate Mr. Trent's right to a fair trial?

D. STATEMENT OF THE CASE.

In February 2005, either Erin Bond or Eric Trent, or both, stole five firearms from Tim Bond's home. 2/8/06RP 61, 110-11. In March 2005, Mr. Trent asked Gary Pittman if he was interested in buying a rifle. Id. at 76. Mr. Trent went to Mr. Pittman's house with another person Mr. Pittman did not know. Id. at 77. Mr. Pittman could not recall who was holding a rifle, but said one of the two people brought the rifle to Mr. Pittman. Id. at 77, 87, 89.

Mr. Pittman realized the rifle's scope was not straight and he handed the rifle to Mr. Trent to fix it. Id. at 78. Mr. Trent straightened the scope and returned the rifle to Mr. Pittman. Id. Mr. Pittman gave Mr. Trent \$200 in exchange for the rifle, with an understanding that Erin Bond would use this money as a loan to help her son and in return, Mr. Trent would later give him \$300 for the loan of \$200. Id. at 80. After taking the rifle, Mr. Pittman tried to reach Erin Bond to discuss the rifle, but instead he spoke with her father Tim. Id. at 81. Tim Bond told Mr. Pittman about the rifles that had been stolen from his home and Tim Bond identified Mr. Pittman's rifle as one of the rifles stolen. Id. at 65, 81, 83.

Mr. Trent was charged with one count of unlawful possession of a firearm in the first degree. CP 43. At a jury trial

before Judge Michael Sullivan, Erin Bond testified under a grant of immunity that she stole the firearms from her father without Mr. Trent's involvement and used the firearms as collateral to obtain money to buy drugs for herself. 2/9/06RP 139, 215. Ms. Bond denied telling police that Mr. Trent was involved in stealing the guns and said she was high on drugs when she spoke with police. 2/8/06RP 112-13; 2/9/06RP 219-20.

The jury convicted Mr. Trent of the charged offense. CP 69. The court imposed a standard range sentence of 116 months imprisonment. CP 73-85. This appeal timely follows. CP 87-88.

E. ARGUMENT.

1. THERE WAS INSUFFICIENT EVIDENCE MR. TRENT POSSESSED A FIREARM.

a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article 1, section 3 of the Washington

Constitution¹ and the 14th Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) .

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). However, when an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a

¹ Art. 1, section 3 provides, “No person shall be deprived of life, liberty, or

reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn.App. 14, 42-43, 28 P.3d 817 (2001).

b. Unlawful possession is not proven by momentarily handling the item at issue. To prove Mr. Trent unlawfully possessed a firearm in the first degree, the prosecution needed to prove that he had dominion and control over the firearm, having been previously convicted of a serious offense. RCW 9.41.040(1)(a); CP 43. The parties stipulated that Mr. Trent had a prior qualifying conviction. 2/9/06RP 266.

Possession requires either actual physical possession or circumstances demonstrating dominion and control over an item. State v. Callahan, 77 Wn.2d. 27, 29-30, 459 P.2d 400 (1969). Constructive possession is established by viewing the totality of the circumstances, including proximity to the property and ownership of the premises in which the contraband is found. State v. Turner, 103 Wn.App. 515, 523, 13 P.3d 234 (2000); State v. Cantabrana, 83 Wn.App. 204, 208, 921 P.2d 572 (1996). The circumstances

property, without due process of law.”

must provide substantial evidence for a fact finder to reasonably infer the defendant had dominion and control. State v. Cote, 123 Wn.App. 546, 549, 96 P.3d 410 (2004). Close proximity is never enough to infer constructive possession. Id.

Additionally, possession requires more than passing control or momentary handling. Callahan, 77 Wn.App. at 29. In Callahan, the defendant was visiting a houseboat and admitted to the police that he had handled drugs on the houseboat that day. He also admitted that he owned two guns, two books on narcotics, and scales used to weigh drugs that the police found in the boat. Id. at 28. The Callahan Court concluded that the mere fact the defendant had handled the drugs did not show he had more than passing control, as “possession entails actual control, not a passing control which is only a momentary handling.” Id. at 29. Passing control that is “fleeting” in its nature does not establish possession. Id.

In the case at bar, Mr. Pittman only recalled that Mr. Trent momentarily handled the rifle when Mr. Pittman complained about the scope being crooked. 2/8/06RP 86-87, 89. Mr. Trent adjusted the scope and handed the rifle back to Mr. Pittman. Accordingly, Mr. Trent had only momentary control.

Mr. Pittman could not remember who held the rifle when Mr. Trent entered the house. 2/8/06RP 86-87, 89, 96. He disavowed any claim that he ever stated Mr. Trent carried the rifle on the porch as simply untrue. Id. at 96. He explained that he repeatedly told the prosecutor he could not recall the gun being in Mr. Trent's hands other than when he briefly adjusted the scope. Id. at 99-102. Since an inference that Mr. Trent was the person controlling the rifle upon entry would be entirely speculative, it cannot be grounds for upholding his conviction.

Additionally, Mr. Pittman explained that he was taking the gun as a favor for Erin Bond, and that the money for the gun was to help Erin and Erin's son. 2/8/06RP 80-81. Mr. Trent told Mr. Pittman he did not own the rifle. Id. at 102. Mr. Trent merely presented himself as an intermediary, not the seller of the rifle in a way that would indicate ownership of it. Instead, consistently with Erin Bond's testimony, Ms. Bond took the guns and used them as collateral to finance her drug use or other monetary needs.

Finally, an important fact in the Callahan Court's analysis was that another person claimed ownership of the drugs at issue. 77 Wn.2d at 31. Similarly, in the case at bar, Erin Bond testified she controlled the guns, she took them from her father's home for

the purpose of getting money for herself. She denied Mr. Trent played any role in taking or possessing the guns. Although the police claimed Ms. Bond told them otherwise, the police further described Ms. Bond as extremely “high” on drugs and said she was unreliable about many things during her conversation with the police. 2/8/06RP 111; 2/9/06RP 305. Her trial testimony establishes her exclusive dominion and control over the firearms once she stole them from her father, and is consistent with Mr. Pittman’s testimony that he obtained the firearm as a loan of money to Ms. Bond. Mr. Pittman’s claim that he was offered the rifle as a way to get money to Ms. Bond illustrates Ms. Bond’s ownership of the firearm. Mr. Trent’s minor role in facilitating this loan does not demonstrate his actual control over the firearm, especially in light of Ms. Bond’s claim of ownership.

Accordingly, the evidence does not show Mr. Trent exercised more than passing control of the firearm. Testimony indicating any further involvement by Mr. Trent was wholly unreliable and the purely speculative notion that he could have possessed the firearm at other times does not establish unlawful possession.

c. Reversal is required. The lack of evidence proving Mr. Trent unlawfully possessed the firearm requires reversal of the conviction and dismissal of the charge. State v. Hickman, 135 Wn.2d 97, 104, 954 P.2d 900 (1998); Callahan, 77 Wn.2d at 30.

2. THE PROSECUTION IMPERMISSIBLY RELIED ON UNDULY PREJUDICIAL UNCHARGED BAD ACTS AND THEREBY DEPRIVED MR. TRENT OF HIS RIGHT TO A FAIR TRIAL

a. Unduly prejudicial uncharged bad acts are inadmissible. Erroneous evidentiary rulings violate due process by depriving the defendant of a fundamentally fair trial. U.S. Const. amend. 14; Estelle v. McGuire, 502 U.S. 62, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991); Pulley v. Harris, 465 U.S. 37, 41, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984). Due process is violated where the admission of evidence was so prejudicial that renders the trial fundamentally unfair. Walters v. Maass, 45 F.3d 1355, 1357 (9th Cir. 1995); Colley v. Sumner, 784 F.2d 984, 990 (9th Cir. 1986). In the case at bar, the prosecution introduced substantial testimony about uncharged misconduct to imply Mr. Trent was a dangerous individual, despite a court ruling barring such evidence.

Uncharged criminal offenses are presumed inadmissible. ER 404(b). Uncharged criminal conduct may be admitted into

evidence only when it is materially relevant to an essential ingredient of the charged crime and its probative value outweighs its prejudicial effect. State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1145 (2002); State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); ER 404(b).² Doubtful cases should be resolved in favor of the defendant. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986). "Regardless of whether the evidence is relevant or probative, in no case may evidence be admitted to prove the character of the accused in order to show that he acted in conformity therewith." State v. LeFever, 102 Wn.2d 777, 782, 690 P.2d 574 (1984); see Saltarelli, supra at 362; ER 404(b).

Even if relevant, evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. ER 403. Prejudice is defined as that which suggests decision on an improper basis, commonly, though not necessarily, an

² Under ER 404(b):

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

emotional one. Fed.R. of Evid. 403, Notes of Advisory Committee on Proposed Rules.

The purpose of a motion in limine is to avoid objections to contested evidence during trial. State v. Powell, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). A losing party is deemed to have a standing objection unless the court specifically requires further objections when it makes its ruling. Id. Here, Mr. Trent objected to the prosecution's use of uncharged criminal acts and the State contended it would not be relying on any ER 404(b) evidence. 1/20/06RP 5-7; CP 89-97 (defense motion in limine).

b. The prosecution introduced evidence of numerous uncharged criminal acts. When the prosecution charges a person with the possession of a single item, ER 404(b) bars the prosecution from also introducing evidence that the accused had other stolen property in his possession. State v. Trickler, 106 Wn.App. 727, 732, 25 P.2d 445 (2001). In Trickler, the prosecution offered evidence of numerous presumably stolen items found in the defendant's car, although the defendant's possession of stolen property charge only involved his possession of a credit card. 106 Wn.App. at 733. The Trickler Court found it wholly impermissible

to admit evidence of these numerous uncharged crimes. 106

Wn.App. at 734. The court ruled that,

by allowing the jury to consider evidence that Mr. Trickler was in possession of a plethora of other allegedly stolen items for the State that Mr. Trickler must have known the credit card was also stolen, the court violated the purpose of ER 404(b). After hearing the witness' testimony and seeing evidence of 16 pieces of stolen property, the jury was left to conclude that Mr. Trickler is a thief.

Id.

In the case at bar, Mr. Trent was charged with possessing a single firearm. Yet the prosecution introduced evidence that Mr. Trent possessed four additional guns after burglarizing Tim Bond's home and stealing the guns. 2/8/06RP 61; 2/9/06RP 261-62, 264, 292. The prosecution also elicited evidence Mr. Trent was wanted by the police for a domestic disturbance against his then-girlfriend Erin Bond; Ms. Bond was scared to death of Mr. Trent, and Mr. Trent had an outstanding arrest warrant for another matter. 2/9/06RP 230-31, 291-92, 340.

These uncharged acts depicted Mr. Trent as a violent and dangerous person, as well as being a career thief and criminal. See Trickler, 106 Wn.App. at 734 (possession of uncharged stolen property impermissibly lets jury see defendant as career thief).

Courts have long-recognized the unduly prejudicial effect of evidence indicating an accused person possessed a firearm. Evidence alleging the defendant possessed a weapon that is not connected to the charged crime should not be admitted. State v. Freeburg, 105 Wn.App. 492, 501, 20 P.3d 984 (2001); State v. Oughton, 26 Wn.App. 74, 83-84, 612 P.2d 812 (1980). When the fact of gun possession has no direct bearing on an issue in the case, its admission into evidence causes unnecessary prejudice. State v. Rupe, 101 Wn.2d 664, 707-08, 683 P.2d 571 (1984). “Many view guns with great abhorrence and fear.” Id. at 708. “[O]thers may consider certain weapons as acceptable but others as dangerous.” Id. Many or all people “might believe that [the] defendant is a dangerous individual” if he or she has a gun. Id.

In the instant case, the allegations Mr. Trent burglarized Mr. Bond’s home, stole numerous guns, was wanted by the police, and was involved in domestic disturbances with his girlfriend who was scared to death of him, were not relevant to the material issue at trial of whether he possessed a particular gun at a particular time. Moreover, the evidence was overwhelmingly prejudicial. See Rupe, 101 Wn.2d at 708. The allegations of uncharged crimes were merely opportunities for the jury to speculate that Mr. Trent

has a dangerous character and a propensity to steal weapons.
See Rupe, 101 Wn.2d at 708. Permitting testimony for no material purpose other than establishing Mr. Trent's propensity to possess firearms, steal property, or violate criminal laws caused significant prejudice to Mr. Trent and improperly affected the jury's deliberations.

c. Reversal is required. When the prosecution relies upon unduly prejudicial information, the accused is deprived of the right to a fair trial.

Evidence of weapons is highly prejudicial, and courts have "uniformly condemned . . . evidence of . . . dangerous weapons, even though found in the possession of a defendant, which have nothing to do with the crime charged."

Freeburg, 105 Wn.App. at 501 (citing United States v. Warledo, 557 F.2d 721, 725 (10th Cir. 1977)). In the case at bar, the prosecution blatantly disregarded its promise to the court that it would not use any uncharged bad acts. The prosecution instead repeatedly offered evidence that Mr. Trent was involved in uncharged thefts of firearms, a residential burglary, was wanted for criminal conduct, and his girlfriend was scared to death of him.

2/9/06RP 261-62, 264, 292, 340.

In closing argument, the prosecutor emphasized the dangerous nature of the conduct in the case and the legislature's desire to bar Mr. Trent from access to a firearm based on his status as a person with a prior serious conviction. 2/9/06RP 370, 392. He emphasized that three police officers heard Ms. Bond say Mr. Trent stole the firearm from Tim Bond's home. *Id.* at 369-70. He urged the jury to consider that there is, "No question that this rifle could have killed somebody." *Id.* at 376. These arguments bolstered the prosecution's efforts to depict Mr. Trent as a dangerous person, wanted for committing various crimes and accused of committing numerous uncharged offenses.

Moreover, the evidence against Mr. Trent was far from overwhelming. As detailed in argument section 1, *supra*, the evidence indicated Mr. Trent had merely passing control of the firearm when he gave it to Mr. Pittman. Erin Bond disavowed her alleged statements to police that Mr. Trent stole the firearms, and even the police also cast doubt on these same statements, as Erin was extremely "high" when she gave these statements, behaving unreliably, and in a state of mind where she was not likely to tell the truth. 2/8/06RP 111; 2/9/06RP 305. Discounting the veracity of Erin Bond's description of events, as even the prosecutor urged,

the remaining evidence of passing control as described by Mr. Pittman would not establish unlawful possession, as argued above. The numerous allegations of uncharged criminal conduct surely affected the jury's deliberations in the instant case.

3 MR. TRENT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL FOR HIS TRIAL ATTORNEY'S FAILURE TO REQUEST A JURY INSTRUCTION CRITICAL TO THE DEFENSE.

a. Mr. Trent has the constitutional right to effective assistance of counsel. A person accused of a crime has a constitutional right to effective assistance of counsel. United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend. 6;³ Wash. Const. art. 1, section 22.

To prevail in a claim of ineffective assistance of counsel, a defendant must show, "First, [that] counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." Strickland v. Washington,

³ The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical reason. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms,” quoting Strickland, 466 U.S. at 688).

While an attorney’s decisions are treated with deference, his or her actions must be reasonable based on all circumstances. Wiggins, 123 S.Ct. at 2541; State v. Tilton, 149 Wn.2d 775, 72 P.2d 735 (2003). To assess prejudice, the defense must demonstrate grounds to conclude a reasonable probability exists of a different outcome, but need not show the attorney’s conduct altered the result of the case. Tilton, 149 Wn.2d at 784.

b. Mr. Trent's attorney performed unreasonably by failing to request a jury instruction essential to the theory of defense. An accused person is entitled to have their theory of defense explained to the jury if it is supported by substantial evidence. State v. Finley, 97 Wn.App. 129, 134, 982 P.2d 681 (1999), rev. denied, 139 Wn.2d 1027 (2000) ("A defendant is entitled to have his or her theory of the case submitted to the jury under appropriate instructions when the theory is supported by substantial evidence."). It is ineffective for a trial attorney to fail to request an instruction from the court addressing the theory of defense when one is available. State v. Kruger, 116 Wn.App. 685, 694-95, 67 P.3d 1147 (2003).

The law in Washington is clear: unlawful possession requires more than passing control. State v. Staley, 123 Wn.2d 794, 798, 802, 872 P.2d 502 (1994); Callahan, 77 Wn.App. at 29. If evidence suggests passing control is an issue at trial, the Court should appropriately instruct the jury that the State bears the burden of proving more than passing control. Staley, 123 Wn.2d at 802.

In the case at bar, Mr. Pittman testified that Mr. Trent possessed the rifle for a period of seconds, in which he adjusted

the scope for Mr. Pittman and returned the rifle to Mr. Pittman. Erin Bond testified she stole the rifle and used it as collateral to finance her drug addiction. Mr. Pittman concurred that he understood that he would keep the rifle and in exchange would loan money to Ms. Bond.

The prosecutor argued that by briefly holding the rifle and adjusting its scope, Mr. Trent possessed the rifle as defined by law. 2/9/06RP 372-73. He told the jurors they must reject defense counsel's argument that the law did not intend to embrace passing control as sufficient to establish possession. 2/9/06RP 392. The prosecutor argued, "Did the law intend to prevent a person convicted of a serious offense from adjusting the scope on a rifle that will fire? Yes, it is ladies and gentlemen. It is." Id.

Rather than explain the law to the jury, defense counsel meekly asked the jury to look at what the "spirit" of the law intended to include as unlawful possession of a firearm. 2/9/06RP 380-81. He emphasized that all Mr. Pittman said was that Mr. Trent had the rifle for a matter of seconds to fix the scope, and asked the jurors, "Is that really what the spirit of the law contemplates." Id. at 381.

Unbeknownst to the jury, it is contrary not only to the spirit of the law but the letter of the law to convict a person for unlawful

possession when he or she has only passing control of a firearm. See Callahan, 77 Wn.App. at 29-30. Had the jury received an instruction from the court on the state of the law, rather than an entreaty from defense counsel to apply the amorphous “spirit” of the law in Mr. Trent’s favor, the jury would have understood from the judge, who directs the jury on the law, what the law encompasses. Kruger, 116 Wn.App. at 694-95. Having heard so many negative things about Mr. Trent’s criminal history and proclivities, it is hard to imagine why a juror would craft a lenient “spirit of the law” that would favor Mr. Trent.

By failing to request an instruction explaining that temporarily handling a firearm in a momentary way that establishes only passing control does not prove unlawful possession, and compounding the error by implying that the jurors must rely on the “spirit” of the law to find insufficient evidence against Mr. Trent, defense counsel performed unreasonably. Kruger, 116 Wn.App. 685, 694-95

c. Counsel’s deficient performance requires reversal.

Reversal of a conviction is required when a defendant has been prejudiced by counsel’s deficient performance, causing a

reasonable probability of a different outcome. Tilton, 149 Wn.2d at 784.

In the case at bar, the central issue was whether Mr. Trent possessed a rifle while at Mr. Pittman's house and Mr. Pittman could only say with any degree of clarity that Mr. Trent briefly held the weapon while adjusting the scope and this handling lasted a matter of seconds before he returned the rifle to Mr. Pittman. The prosecution argued the law was intended to include such momentary handling as sufficient evidence of possession. 2/9/06RP 373, 376, 392.

Rather than explain the law in a jury instruction, defense counsel asked the jurors to guess as to the "spirit" underlying the law. Instead of having the judge tell the jury that passing control does not establish unlawful possession, the defense attorney argued to the jurors that the "spirit of the law" should not define unlawful possession as adjusting a scope on a rifle. Defense counsel did not object when the prosecution argued that momentary touching of the rifle established possession under the law or ask the court to clarify the degree of control required to establish unlawful possession. 2/9/06RP 392.

Defense counsel thus permitted the jury to deliberate with an incomplete and incorrect understanding of the definition of unlawful possession. This lapse is critical, as the case hinged upon whether Mr. Trent's brief relationship with the rifle showed his possession even when Erin Bond testified she was the person in control of the rifle. The jury received instruction that counsel's argument was not supposed to supplant the court's legal instructions. By failing to ask the court to accurately and fully explain the pertinent law and to compound the error by failing to correct the misimpressions of the meaning of possession left by the prosecution, defense counsel's deficient performance affected the outcome of the proceedings.

4. PROSECUTORIAL MISCONDUCT DURING
CLOSING ARGUMENT REQUIRES REVERSAL

a. The defense timely objected to the improper arguments made by the prosecutor. Defense counsel tried to preempt and avoid the prosecutor's improper comments in a detailed motion in limine, moving to preclude the precise arguments made by the prosecution and during summation. 2/8/06RP 13-22. The trial court granted the motions in limine in large measure and warned the prosecutor against making improper arguments to the jury. Id. at 14-22.

Moreover, whether or not a defendant objects or requests a curative instruction in response to prosecutorial misconduct, the issue may be reviewed on appeal where the misconduct acts to deny appellant his constitutional right to a fair trial. State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Because the misconduct denied Mr. Trent a fair trial, he has standing to raise the full spectrum of the potential misconduct on appeal. State v. Kroll, 87 Wn.2d 829, 835-36, 558 P.2d 173 (1976); Powell, 126 Wn.2d at 256; RAP 2.5(a)(3).

b. The prosecutor has a duty of fair dealing. A prosecutor has a duty to act impartially and in the interest of justice; these duties are as important as his duty to prosecute violators of the law. State v. Rivers, 96 Wn.App. 672, 981 P.2d 16, 18 (1999); see 13 R. Ferguson, Washington Practice, Criminal Practice and Procedure, section 406 at 403 (1984); State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1956). The prosecution must seek verdicts “free of prejudice and based on reason.” Case, 49 Wn.2d at 70, (quoting People v. Fielding, 158 N.Y. 542, 53 N.E. 497 (1899)).

A prosecutor has an obligation to not make arguments that shift the burden of proof or imply that the defense has an obligation

to prove innocence. State v. Fowler, 114 Wn.2d 59, 66, 785 P.2d 808 (1990); State v. Traweck, 43 Wn.App. 99, 715 P.2d 1148, rev. denied, 106 Wn.2d 1007 (1986). It is a fundamental principle of constitutional law that the State bears the burden of proof and the prosecutor may not insinuate otherwise. U.S. Const. amend. 6; Wash. Const. art. 1, section 22. "It is proper for the State to comment on its own evidence. It is not proper for the State to comment on the failure of the defense to do what it has no duty to do." Traweck, 43 Wn.App. at 106-07.

i. The prosecutor may not call a witness a liar.

A prosecutor is prohibited from telling the jury that a witness is lying. See State v. Reed, 102 Wn.2d 140, 145-46, 684 P.2d 699 (1984) (prosecutor referred to defendant as liar four times, stated defense had no case, and implied defense witnesses should not be believed because they were from out of town and drove fancy cars). The impropriety of the prosecutor injecting into a case his or her personal opinion about the credibility of a witness is well-established. Id. at 145; see also Case, 49 Wn.2d at 71.

Here, the prosecutor told the jury that Ms. Bond lied when she testified. He argued, "She can make up whatever story she wants and get away with it and *that's what she did.*" 2/9/06RP 390

(emphasis added). He further told the jury that, “She did nothing for the State’s case. Nothing. I’ll admit it.” Id. at 389.

By telling the jury that he believed Ms. Bond lied during her testimony and was a useless witness, the prosecutor improperly injected his personal opinion of a witness’s credibility into the case. Reed, 102 Wn.2d at 145; Case, 49 Wn.2d at 71.

ii. A prosecutor unreasonably argued that its grant of immunity to a State’s witness demonstrated the witness was not credible. A prosecutor is held to high standards of ethical behavior, especially in light of the prestige by which the jury is likely to accord the prosecutor. State v. Boehning, 127 Wn.App. 511, 518, 111 P.3d 819 (2005). “Every prosecutor is a quasi-judicial officer of the court, charged with the duty of ensuring that an accused receives a fair trial.” Id.

Among the duties required of a prosecutor is not to call a witness to testify when the prosecution knows that person has a valid testimonial privilege. American Bar Association (ABA), Standards for Criminal Justice, Prosecution Function and Defense

Function, Third Edition, 3-5.7(c) (1993).⁴ Additionally, a prosecutor may not seek a verdict based upon information outside the record. Boehning, 127 Wn.App. at 522 (even without objection, prosecutor's to references to charges dismissed during trial outside jury's presence is unreasonable argument requiring reversal).

Long before trial, State's witness Erin Bond told the trial prosecutor that she, not Mr. Trent, stole the firearm at issue in the instant case. CP 12-14 (Prosecutor's Declaration describing contact with Ms. Bond); CP 25 (Prosecutor's Motion in Limine noting Erin Bonds expected to perjure self at trial). Despite its knowledge Ms. Bond would testify that she was criminally responsible for the stolen firearm, the prosecution took no steps to protect her constitutional guarantee against self-incrimination. See e.g., ABA Standards, Prosecution Function, 3-3.2(b).⁵ The only accommodation the prosecution sought was to file a motion seeking to treat Ms. Bond as a hostile witness. CP 25-26.

⁴ ABA Standard of Criminal Justice, Prosecutorial Function 3-5.7(c) provides, "A prosecutor should not call a witness in the presence of the jury who the prosecutor knows will claim a valid privilege not to testify."

⁵ ABA Standard, Prosecution Function 3-3.2(b) provides in pertinent part, A prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires. It is also proper for a prosecutor to so advise a witness whenever the prosecutor knows or has reason to believe that the witness may be the subject of a criminal prosecution.

Upon hearing Ms. Bond testify that not only did she steal the firearms but she exchanged them for drugs, the prosecutor took no action to protect her from incriminating herself but defense counsel asked the court to provide Ms. Bond with an attorney. 2/8/06RP 142. A subsequently appointed attorney advised Ms. Bond to invoke her right to remain silent for all further questions about the incident. 2/9/06RP 168. The court informed the prosecution that it would declare a mistrial unless Ms. Bond received immunity and continued testifying, since Mr. Trent would not be afforded his right to cross-examine a prosecution witness if she refused to answer further questions. 2/9/06RP 172. The prosecutor offered Ms. Bond immunity from prosecution for any charges arising out of her testimony for any crimes committed in Pacific County. 2/9/06RP 193-94.

Ms. Bond continued testifying, but invoked her right to be free from self-incrimination when asked about whether she sold the stolen guns or committed crimes outside of Pacific County in relation to the guns. 2/9/06RP 213-14.

In closing argument, the prosecutor told the jury that the case was strictly about the credibility of the witnesses. 2/9/06RP 368-69. He then argued that because Ms. Bond had immunity, she

was free to say anything she wanted and she could never be prosecuted. 2/9/06RP 369. He told the jurors they should not believe her testimony. “She can make up whatever story she wants and get away with it and that’s what she did.” 2/9/06RP 390.

The prosecutor further emphasized, “she’s not believable.” Id. Part of her motivation not to tell the truth is that “she can’t get in trouble for it.” Id. at 370.

Moreover, the prosecution insinuated Mr. Trent arranged for Ms. Bond to receive this gift that allows her to lie when testifying, as she received immunity “during a break in cross-examination.” Id. at 389.

By referring to the timing of the grant of immunity, which occurred during a break in the proceedings when the jury was not present, the prosecutor impermissibly referred to matters not in evidence. Boehning, 127 Wn.App. at 522 (court’s ruling dismissing charges during trial not “evidence” before the jury). Moreover, the prosecutor bore great responsibility for the witness’s need for immunity and her failure to receive it earlier, as Ms. Bond was the prosecution’s own witness who the prosecutor expected to incriminate, or at least perjure, herself during her testimony. Finally, by dismissing Ms. Bond’s testimony as unbelievable and

worthless, the prosecutor improperly placed his own opinion before the jury.

iii. The prosecutor shifted the burden of proof.

In the case at bar, Mr. Trent asked the court to prohibit the prosecutor from shifting the burden of proof by suggesting the defense could have called or subpoenaed witnesses. 1/8/06RP 19. The court agreed, directing the prosecution that it could not argue, “Hey, why didn’t the Defense call Joe Blow?” unless the defense opened the door. 1/8/06RP 20.

In the prosecutor’s closing argument, the prosecutor hewed closed to the precise argument the court warned him against as he argued that the defense could have called witnesses and failed to do so. The prosecutor asked in his closing argument, “You didn’t hear from Dale Hendrickson today to say he took the weapon from Ms. Bond, did you?” 2/9/06RP 370.⁶ The defense responded in its closing argument by reminding the jury that the prosecution has the burden of proof. Id. at 381.

In its rebuttal argument, the prosecution elaborated on its claim that the defense failed to present witness testimony. The

⁶ Dale Hendrickson is the person Ms. Bond testified she gave the rifles to help finance her drug habit.

prosecutor argued, "Can he [Mr. Trent] call witnesses? Yes, he can." Id. at 390. He further argued, "Is it the State's responsibility to bring all the witnesses in? Nope, not at all." Id. at 391.

These statements blatantly shifted the burden of proof to the defense. State v. Fleming, 83 Wn.App. 209, 215, 921 P.2d 1076 (1996) (impermissible burden shifting by arguing defendant's failure to present evidence demonstrates guilt); Traweek, 43 Wn.App. at 106 (questioning why defendant did not testify or present witnesses improperly infringes on protection against self-incrimination and shifts burden of proof).

Mr. Trent did not open the door to this argument, as the prosecution was the first party to argue that no one called Dale Hendrickson to testify. The prosecutor further insinuated that Mr. Trent should be held responsible for his failure to call witnesses, without regard to the prosecution's burden of proving its witnesses credibly demonstrated Mr. Trent's guilt, and thus committed misconduct. Fleming, 83 Wn.App. at 215; Traweek, 43 Wn.App. at 106.

iv. The prosecutor misrepresented the definition of unlawful possession. As discussed above, the prosecutor directed the jury that Mr. Trent possessed the rifle as

defined by law by briefly holding the rifle and adjusting its scope. 2/9/06RP 372-73. He told the jurors they must reject defense counsel's argument that the law did not intend to embrace passing control as sufficient to establish possession. 2/9/06RP 392. The prosecutor argued, "Did the law intend to prevent a person convicted of a serious offense from adjusting the scope on a rifle that will fire? Yes, it is ladies and gentlemen. It is." Id. By failing to properly explain that it is lawful for a person to temporarily and momentarily handle a firearm, even a person convicted of a serious offense, where that person does not have dominion and control over the weapon, the prosecutor purposefully mislead the jury on the critical legal issue in the case.

d. Reversal is required. The prosecution's flagrantly erroneous arguments unacceptably lowered the threshold for a conviction, violating Mr. Trent's right to a fair trial and are not harmless beyond a reasonable doubt. Fleming, 83 Wn.App. at 215-16. As a public officer invested with the prestige accorded to the prosecutor's office, the prosecutor's comments carry substantial weight. Reed, 102 Wn.2d at 146-47. Many of these arguments were anticipated by the defense and expressly prohibited by the court. The prosecutor's efforts to minimize its

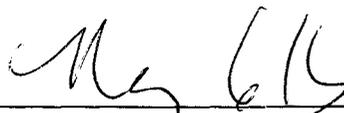
burden of proof, distort the meaning of critical legal terms, and seek a verdict based on improper grounds surely affected the jury's verdict. Id. Accordingly, reversal of the conviction is required.

F. CONCLUSION.

For the foregoing reasons, Mr. Trent respectfully requests this Court vacate and dismiss his conviction for insufficient evidence, or alternatively, order a new trial.

DATED this 30th day of November 2006.

Respectfully submitted,



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Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)
)
 RESPONDENT,)
)
 v.)
)
 ERIC VAN TRENT,)
)
 APPELLANT.)

COA NO. 34591-9-II

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AMENDED DECLARATION OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 30TH DAY OF NOVEMBER, 2006, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S OPENING BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | |
|--|---|
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PACIFIC COUNTY PROSECUTOR'S OFFICE
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