

NO. 48215-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

TWINN CALDWELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck, Judge

No. 15-1-01075-3

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the State prove beyond a reasonable doubt that the defendant possessed all of the guns at all times that were found in the home? (Appellant's Assignment of Error No. 1 & 2)
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B. STATEMENT OF THE CASE.

1. Procedure

Twinn Caldwell, hereinafter "defendant," was charged with one count of unlawful possession of a controlled substance

(methamphetamine), four counts of unlawful possession of a firearm in the first degree, and one count of reckless endangerment. CP 40-42.

The four firearms for which the defendant was charged were: (1) a .45 caliber handgun; (2) a .38 Revolver-Taurus; (3) a long-barrel .308 caliber rifle; and (4) a short-barrel .30-06 caliber rifle. *Id.*

During initial closing argument the prosecutor discussed the evidence admitted into the record. 3,4RP 247-249¹. Among the exhibits admitted was Exhibit 24, which is a packet of color photographs. CP 172-175. The photographs contained within the exhibit included a photograph of a receipt from Welcher's Gun Shop². Ex. 24. During the prosecutor's closing argument, when reviewing the photographs contained within this exhibit, this specific photograph was mentioned and was shown to the jury. 3,4RP 247-248.

During defense closing argument, defense counsel stated that there were a lot of police at the scene of the crime and that most of them did not testify at trial. 3,4RP 257-258. In rebuttal argument, the prosecutor responded by letting the jury know that there were other officers that could have been called. 3,4RP 264.

Further, defense counsel argued that the guns in the townhouse belonged to individuals other than the defendant. 3,4RP 260-261. In

¹ The trial record is contained in two packets with two volumes in each packet.

² The color photograph that shows the receipt from Welcher's Gun Shop is identified by exhibit marker 27.

rebuttal argument the prosecutor stated that there was no testimony, including by the defendant himself, that other individuals did in fact own the guns. 3,4RP 267-268.

At the conclusion of the trial, the jury convicted the defendant of unlawful possession of a controlled substance, three of the four counts of unlawful possession of a firearm in the first degree³, and of reckless endangerment. CP 117-122.

2. Facts

In late February 2015, the defendant moved into the townhouse of a friend to help the friend clean the townhouse following the death of the latter's mother. 3,4RP 182-183. The defendant planned on remaining at the townhouse until March 14, 2015, when the defendant was going to move with his two-year-old son to Texas. 3,4RP 185. While staying in the townhouse the defendant slept in the only bedroom with a bed, Bedroom 1.⁴ 3,4RP 197.

On March 12, 2015, Officer Peter Joyce of the Fircrest Police Department came into contact with the defendant⁵. 1,2RP 89. A few hours later at approximately 9:42 P.M., Officer Joyce received a dispatch about a

³ The defendant was found not guilty of Count III for possession the .38 caliber Revolver-Taurus. CP 119.

⁴ There were two bedrooms in the townhouse. The record refers to the bedroom with the bed as Bedroom 1, and the bedroom with the desk as Bedroom 2.

⁵ During the CrR 3.5 hearing, testimony showed that this contact was due to the defendant taking his roommate's vehicle. Both contacts were at the same location. 1,2 RP 42.

possible shooting at the same residence at which he had spoken to the defendant earlier that day. 1,2RP 85. Upon arriving at the residence and helping to secure the scene, a .45 caliber handgun was found on the ground outside the townhouse close to where the defendant was holding his two-year-old son. 1,2RP 73-74. At that point, the defendant was taken into custody and placed in a police vehicle while the police searched the residence to see if there was anyone else inside or if any individuals were injured. 1,2RP 76-77. There did not appear to be any other individuals in the townhouse. *Id.* After going through the townhouse, Officer Joyce spoke with the defendant. 1,2RP 78. The defendant admitted to Officer Joyce that he shot both the .45 caliber handgun and one of the rifles inside of the townhouse. 1,2RP 79-80.

Pierce County Sheriff's Department Forensic Investigator Steven Mell was called to the scene to investigate and arrived at the scene at approximately 11:30 P.M. 1,2RP 130. Forensic Investigator Mell found a .45 caliber magazine with the associated bullets (1,2RP 134), .308 caliber bullets, including some found in Bedroom 1 (1,2RP 136), and ammunition for a 30-06 rifle (1,2RP 138-139). Additionally, Forensic Investigator Mell testified that he found bullet strikes in the floor with .45 caliber shell casings in the defendant's bedroom. 1,2RP 141, 145-146. There were also additional spent shell casings and ammunition located throughout the remainder of the residence. 1,2RP 142-145. Spent shell casings from the 30-06 rifle were found in the upstairs hallway and downstairs under the

stairs. 1,2RP 152-153. The two rifles that were used were found wedged between two mattresses in the garage. 1,2RP 154-155. The defendant testified that after he used the short-barrel 30-06 rifle he placed it behind the long-barrel .308 rifle and wedged them between the mattresses. 3,4RP 200.

One of Forensic Investigator Mell's duties at the scene was to photograph all of the evidence found at the scene. 1,2RP 131. Among other items, Mell found and photographed a crystal pipe and what appeared to be crystal methamphetamine on the floor of Bedroom 1. 1,2RP 158. Maureena Dudschus, a forensic scientist with the Washington State Patrol Crime Laboratory, testified that based upon the tests she conducted, the substance found at the scene was indeed methamphetamine. 3,4RP 180.

Detective Lynelle Anderson of the Pierce County Sheriff's Department testified, inter alia, that in Bedroom 2 documentation with the defendant's name on it was found. 1,2RP 112-113. Detective Anderson further testified that within Bedroom 2 was a red backpack in which the documentation with the defendant's name was located in addition to a box of ammunition, and children's and adult's clothes being in the backpack. 1,2RP 114-118.

C. ARGUMENT.

1. THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD POSSESSION OF ALL OF THE GUNS RELATING TO COUNTS II, IV, AND V.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993).

The sufficiency of the evidence is determined by whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt after viewing the evidence in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. *Id.* at 201. "All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant" when the sufficiency of the evidence is challenged. *Id.* at 201 (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Criminal intent may be inferred from

the conduct where “it is plainly indicated as a matter of logical probability.” *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). The weight of the evidence is determined by the fact finder and not the appellate court. *Id.* at 783.

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Sufficiency of the evidence is reviewed de novo. *State v. Berg*, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

- a. The defendant had actual possession of all of the guns for which he was convicted.

RCW 9.41.040 provides that a convicted felon may not possess a firearm. 9.41.040(1)(a). Possession may be actual or constructive. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). Actual possession occurs when something is in one’s physical custody, while constructive possession occurs when something is not in one’s physical custody, but is within their dominion and control. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). The ability to reduce an object to actual possession is an aspect of dominion and control. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 214 (1997). Brief actual

possession of a firearm is illegal. *State v. Summers*, 107 Wn. App. 373, 387, 28 P.3d 780 (2001). See also *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).

Here, the defendant had actual possession of the firearms. The firearms were in the defendant's physical custody. The defendant admitted at trial that he fired the 30-06 rifle and that he took the .45 caliber handgun outside of the townhouse with him. 3,4RP 200-201. Additionally, the defendant admitted to Officer Joyce that he handled and fired two of the three guns in question⁶. 1,2RP 79-80. In order to access the short-barrel rifle (the 30-06) the defendant went into the garage, removed the gun from between two mattresses, and then after shooting the gun not only replaced it, but moved it to behind the other rifle (the .308 caliber rifle). 3,4RP 200. The evidence presented also established that the defendant had fired the .45 caliber handgun. 3,4RP 186.

After shooting the .45 caliber gun, the defendant removed the .45 caliber gun from the townhouse and took it onto the front lawn. 1,2RP 73-74, 3,4RP 190-191. All of this goes to show that the defendant had actual possession of the firearms. Even if this was the only time that the defendant had actual possession of the firearms, under *Summers* the fact

⁶ The defendant admitted to Officer Joyce that he fired the .45 caliber handgun and one of the rifles. 1,2RP 79-80. The defendant at that time did not specify which of the two rifles he had fired.

that the defendant had actual possession, however brief, is illegal.

Summers, 107 Wn. App. at 387. The evidence is sufficient to prove that the defendant had actual possession of the firearms.

Forensic Investigator Mell testified that he found ammunition for the .45 caliber gun and the .308 caliber rifle and magazine in Bedroom 1, the bedroom with the mattress. 1,2RP 134, 136. Additionally, bullet holes were found in the floor with .45 caliber shell casings nearby in the same bedroom. 1,2RP 141, 145-146. The defendant testified that he slept in the room with the bed which, based on the totality of the evidence and testimony from various officers, was Bedroom 1. 3,4RP 197.

- b. Even if the defendant did not have actual possession of the firearms, he had constructive possession.

The State may establish constructive possession by showing that the defendant had dominion and control over the firearm or over the premises where the firearm was found. *State v. Chouinard*, 169 Wn. App. 895, 900, 282 P.3d 117 (2012). While mere proximity by itself is insufficient to show dominion and control, physical proximity does need to be considered when determining whether one has constructive possession over a firearm. *Id.* To determine constructive possession of a firearm a court examines the totality of the circumstances. *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014).

In *State v. Turner*, 103 Wn. App. 515, 13 P.3d 234 (2000), this court found that because the defendant was in proximity of the firearm in question, the gun was in the vehicle with the defendant for an extended period of time, and there was nothing that was done to reject the presence of the firearm, such was sufficient for a finding of constructive possession. *Id.* at 524. Further, in *State v. McFarland*, 73 Wn. App. 57, 867 P.2d 660 (1994), this court also affirmed McFarland's conviction as that defendant told an officer that he had touched the guns, had taken the guns from a townhouse, and had handled the guns. *Id.* at 70.

Following the logic from *Turner*, in this case the defendant was in proximity of the three firearms in question, was in the presence of the guns for approximately two weeks, and did nothing to reject the presence of the guns in the townhouse. Additionally, in a similar manner to *McFarland*, the defendant not only handled, but fired the guns. 1,2RP 79-80. As previously mentioned, the defendant admitted that after he used the short-barrel 30-06 rifle he placed it behind the long-barrel .308 rifle and wedged them between the mattresses. 3,4RP 200. Further, just like in *McFarland*, the defendant removed the .45 caliber gun from the townhouse and took it onto the front lawn. 1,2RP 73-74, 3,4RP 190-191.

By his own admission, the defendant was sleeping in a room that had ammunition for both the .45 caliber gun and the .308 rifle. 3,4RP 197.

At a minimum, this illustrates that the defendant had constructive possession of the guns as they were in his dominion and control due to the ammunition being in his room, being able to access the guns and fire them at will, and that he had access to areas of the townhouse where the guns were located. Further, as previously mentioned, testimony showed that the defendant was able to, and did in fact, take the guns when he felt that he needed to use them, moved them, and then returned them to their original location.

- c. A necessity defense would not be a legitimate defense based upon the circumstances of this case.

This court has found that unlawful possession of a firearm is necessary when (1) the defendant *reasonably believed* they were under unlawful and present threat of death or serious bodily injury, (2) the defendant did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) the defendant had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. (emphasis added). *State v. Parker*, 127 Wn. App. 352, 354, 110 P.3d 1152 (2005). The trial court properly instructed the jury as to a necessity defense and noted all four of the requirements from *Parker*. CP 89-116. As the jury

found the defendant guilty on three of the four gun charges, the logical conclusion is that the jury rejected the necessity defense.

In *State v. Jeffrey*, 77 Wn. App. 222, 889 P.2d 956 (1995), a case with factual similarities to the present case, Division III found that the defendant did not have a necessity defense based upon the circumstances. The court noted that, inter alia, knowledge of a gun on the premises is a factor that can point to dominion and control of a firearm. *Jeffrey*, 77 Wn. App. 222, 227. In *Jeffrey*, the defendant knew that there was a firearm, a .45 caliber gun, under the couch. *Id.*

The court in *Jeffrey* found that the defendant had constructive possession of the gun because (1) he knew the gun was under the couch, (2) the defendant armed himself with the gun, (3) there was no verification of a person being outside as the defendant claimed, and, (4) even if there was a person outside, there was no evidence that they were capable of entering the residence. *Id.*

Here, (1) the defendant knew that the .45 caliber handgun was in a closet in the upstairs bedroom and the two rifles were in the garage, (2) the defendant armed himself and fired two of the guns, and (3) there was no other individuals, other than the defendant's two-year-old son, present in the townhouse. 1,2RP 76-77, 164, 3,4RP 195, 200-201. Finally, (4) as was the case in *Jeffrey*, there was no way that someone could have accessed the

townhouse as the defendant described. Kimberly Edwards, the landlady of the property, testified that there was no way for someone from outside of the unit to either access the crawl space or to get under the floors in the townhouse. 3,4RP 219-220. Based upon the circumstances, in a similar matter to *Jeffrey*, the defendant knew where the guns were located, armed himself with the guns, there was nobody actually in the townhouse or could access it in the manner the defendant described.

Edwards further testified that someone had broken into the crawl space upstairs and damaged such. 3,4RP 221-222. During an inspection the morning following the incident of the unit where the defendant was staying, Edwards saw that someone had used a tool to pry their way into the crawl space and that the lid for the crawl space was moved away. 3,4RP 222. While Edwards' testimony is ambiguous if the damage was caused from someone within the townhouse trying to enter the crawl space, the defendant admitted that he had entered the crawl space. 3,4RP 187-188. When taken together with Edwards' testimony that there was no way for someone outside of the unit to enter the crawl space, the only logical inference is that someone from inside the unit had broken into the crawl space. By the defendant's own admission he had broken into the crawl space from within the unit. Hence, it was unreasonable for the defendant to believe that there was an individual from the outside who tried to enter the

unit, given that it was impossible to do so.

Even if it is assumed, *arguendo*, that the defendant only had the guns in his possession when he fired the weapons, such would still not provide for a valid necessity defense. In this particular instance the defendant had no reasonable belief that he was under unlawful and present threat of death or serious injury. Rather, the testimony showed that there were no other individuals found in the townhouse and there was no blood found at the scene. 1, 2RP 76-77, 164. The conclusion of this is that there were not actually any individuals that were attempting to access the townhouse and harm the defendant or his son. The lack of individuals attempting to access the townhouse means that by default the defendant was not under unlawful and present threat of death or seriously bodily injury. As such, the defendant had neither a reasonable belief nor the threat of force being applied against him at that point in time.

Even if it is assumed that the defendant had a necessity for the firearms at the time that he fired them, the defendant had possession of the firearms for at least a day, if not longer, prior to necessity occurring. As previously mentioned, in *State v. Turner*, 103 Wn. App 515, 13 P.3d 234 (2000), this court found that because the defendant was in proximity of the firearm in question, the gun was in the vehicle with the defendant for an extended period of time, and there was nothing that was done to reject the

presence of the firearm, such was sufficient for a finding of constructive possession. *Id.* at 524. In the present case, the defendant was in proximity of the three firearms in question for approximately two weeks, and did nothing to reject the presence of the guns in the townhouse. Moreover, in order to access the short-barrel rifle (the 30-06) the defendant went into the garage, removed the gun from between two mattresses, and then not only replaced it, but moved it to behind the other rifle (the .308 caliber rifle). 3,4RP 200. This shows that the defendant was able to access the guns at his will and was able to move them at his will. The defendant had possession of the weapons prior to the time that he fired them and, when viewed in a light most favorable to the State, was found guilty of unlawful possession of a firearm.

2. THE STATE PROVED RECKLESS ENDANGERMENT BEYOND A REASONABLE DOUBT BY SHOWING HOW THE DEFENDANT FIRED A GUN WHILE HIS SON WAS IN THE SAME ROOM.

A person is guilty of reckless endangerment when they recklessly engage in conduct not amounting to a drive-by shooting, but that creates a substantial risk of death or serious bodily injury to another person. RCW 9A.36.050(1). In defining the general requirements of culpability, RCW 9A.08.010 states that:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a

gross deviation from conduct that a reasonable person would exercise in the same situation. (emphasis added).

RCW 9A.08.010(1)(c).

The defendant in this case clearly engaged in conduct that placed his two-year-old son at a substantial risk of death or serious bodily injury. During testimony, the defendant testified that not only was his two-year-old son in the townhouse with him when the defendant shot the gun, but that his son was in the same room where the defendant was firing. 3,4RP 197. Taken in the light most favorable to the State, a reasonable jury could have found that it was a gross deviation from the conduct of a reasonable person to have fired a gun into the floor of the room in which a person's two-year-old child is located. If a reasonable person would not engage in that type of conduct, then the defendant is guilty of reckless endangerment or causing a substantial risk of death or serious bodily injury. It is generally considered that firing a gun does indeed create a substantial risk of death or serious bodily injury.

In *State v. Rich*, 184 Wn.2d 897, 365 P.3d 746 (2016), the Supreme Court determined that because the defendant was speeding and intoxicated, both of those factors created a substantial risk of death or serious bodily injury for the young child in the car. *Rich*, 184 Wn.2d 897 at 909. In this case, because the defendant's two-year-old child was in the same room as the defendant when he was firing the guns, the State was

able to prove that the defendant could have caused serious bodily injury or death to the defendant's son.

3. THE STATE PROVED BEYOND A REASONABLE DOUBT THAT THE DEFENDANT HAD POSSESSION OF METHAMPHETAMINE THAT WAS FOUND IN THE BEDROOM WHERE THE DEFENDANT SLEPT.

The evidence presented during trial proved unequivocally that the defendant was in possession of the methamphetamine in the townhouse. Forensic Investigator Mell testified that Officer Moss found a crystal-like substance on the floor of Bedroom 1. 1,2RP 157-158. Dudschus testified that based upon the tests that she conducted, the substance found by Officer Moss was indeed crystal methamphetamine. 3,4RP 180. The defendant admitted that he slept in Bedroom 1. 3,4RP 197.

Based upon the evidence presented the defendant had constructive possession, if not actual possession, over the methamphetamine. The methamphetamine was found in the defendant's bedroom. 1,2RP 157-158. There was no evidence presented that any other individuals used that bedroom or slept in Bedroom 1. As such, because the methamphetamine was found in the defendant's room, the defendant would have dominion and control over the methamphetamine and therefore, had possession of the methamphetamine.

Defense argues that *State v. Cote*, 123 Wn. App. 546, 96 P.3d 410 (2004) should control because the facts in *Cote* and in the present instance are similar. However, that is not the case. Rather in *Cote* the defendant

was a passenger in another's vehicle and touched the methamphetamine as evidenced by his fingerprints being found on such. *Cote*, 123 Wn. App. at 548. However, no evidence was presented that established that the defendant in *Cote* had dominion or control over the methamphetamine. In the present instance, the defendant is more than just a passenger in another's vehicle. Here, the methamphetamine was found in a room that the defendant admits was his own room. 3,4RP 197. He was living in the townhouse for numerous weeks and the methamphetamine was found in the defendant's room along with other items belonging to the defendant. 3,4RP 182-185, 200. As such, the defendant had dominion and control over the methamphetamine and, if he did not want to have control over such, the defendant had plenty of time to remove the methamphetamine from his dominion and control.

4. THE DEFENDANT WAS AFFORDED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL CORRECTLY DID NOT REQUEST AN UNWITTING POSSESSION INSTRUCTION.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such an adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred.

Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." ***Kimmelman v. Morrison***, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. ***Strickland v. Washington***, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); ***State v. Hendrickson***, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. ***State v. Garrett***, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. ***State v. Thomas***, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." ***Strickland***, 466 U.S. 668 at 689. This court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; ***State v. Benn***, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The State must prove beyond a reasonable doubt that the defendant was in possession of a controlled substance, but the defendant can attempt to prove the affirmative defense of unwitting possession. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2010). If the affirmative defense

is attempted, the defendant must prove unwitting possession by a preponderance of the evidence. *State v. Buford*, 93 Wn. App. 149, 152 967 P.2d 548 (1998) (quoting *State v. Trujillo*, 75 Wn. App. 913, 917, 883 P.2d 329 (1994)). See also WPIC 52.01. In the present instance, the evidence showed that the methamphetamine was found in the defendant's bedroom. 1,2RP 157-158. As previously discussed, the defendant, at a minimum, had constructive possession of the methamphetamine. As such, the defendant would not have been able to prove, even by a preponderance of the evidence, that he only had unwitting possession of the methamphetamine.

In *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994), the Supreme Court found that even if possession is "momentary, temporary, or fleeting" such goes to the weight of the evidence and whether the State has met its burden, not if unwitting possession occurred. *Staley*, 123 Wn.2d at 802. Here, the defendant had more than a momentary, temporary, or fleeting possession. Forensic Officer Mell made it clear in his testimony that the methamphetamine was found in Bedroom 1, which is the defendant's bedroom. 1,2RP 156-158. Therefore, the defendant had control over methamphetamine. Because the methamphetamine was found in a room over which the defendant had dominion and control, there was no need for an unwitting possession instruction, and any such instruction would inaccurately represent the law before the jury. *Staley*, 123 Wn.2d at 803. As such, defense counsel properly exercised their discretion in not

moving for an unwitting possession instruction, as such a request would have been properly denied.

In order to establish that the failure to request the instruction was prejudicial, the defendant must show a reasonable probability that the deficient performance affected the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668, 694 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Here, there is not a reasonable probability that the deficient performance, if there was one, affected the outcome of the trial. Even if the jury was instructed on an affirmative defense of unwitting possession, the defendant still likely would have been convicted of possession of methamphetamine due to the presence of the methamphetamine in the defendant's bedroom given the overwhelming evidence presented. Hence, the second prong of *Strickland* is not met, and this court should affirm the defendant's conviction.

5. THE PROSECUTOR PROPERLY ARGUED THAT THE DEFENDANT DID NOT PROVIDE EVIDENCE TO SUPPORT HIS THEORY OF THE CASE, MENTIONED THAT OTHER OFFICERS COULD HAVE TESTIFIED AFTER THE DEFENSE ARGUED SUCH IN THEIR CLOSING ARGUMENT, AND ONLY ARGUED FACTS IN EVIDENCE.

To prove that a prosecutor's actions constitute misconduct⁷, the defendant must show that the prosecutor did not act in good faith and that the prosecutor's actions were improper. *State v. Manthie*, 39 Wn. App. 815, 820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). For the defendant to prevail on a claim of prosecutorial error, the defendant has the burden of establishing that the alleged error is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the

⁷ “‘Prosecutorial misconduct’ is a term of art, but is really a misnomer when applied to mistakes made by the prosecutor during trial.” *State v. Fisher* 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public’s confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association’s Criminal Justice Section (ABA) urge courts to limit the use of the phrase “Prosecutorial misconduct” for intentional acts, rather than mere trial error. See American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b_authcheckdam.pdf (last visited June 28, 2016); National District Attorneys Association, Resolution Urging Courts to Use “Error” Instead of “Prosecutorial Misconduct” (Approved April 10, 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited June 28 2016). A number of appellate courts agree that the term “prosecutorial misconduct” is an unfair phrase that should be retired. See, e.g., *State v. Fauci* 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft* 759 N.W.2d 414, 418 (Minn. App. 2009), review denied, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford* 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant’s arguments, the State will use the phrase “prosecutorial error.” The State urges this court to use the same phrase in its opinions.

prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), (*overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002)). Failure by the defendant to object to an improper remark constitutes a waiver of that error unless the remark is deemed so “flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Stenson*, 132 Wn.2d at 719 (citing *State v. Gentry*, 125 Wn.2d 570, 593-594, 888 P.2d 1105 (1995)).

Failure to object or move for mistrial at the time of the argument “strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P. 2d 610 (1990); *see also State v. Monday*, 171 Wn.2d 667, 679, 257 P.3d 551 (2011).

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)).

- a. The prosecutor properly argued the defendant's failure to present evidence when such was invited by the defendant's closing argument.

Improper remarks by the prosecutor are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to their statements and actions, unless such was not a pertinent reply or are so prejudicial that a curative instruction would be ineffective. *State v. Jones*, 144 Wn. App. 284, 299, 183 P.3d 307 (2008) (quoting *State v. Weber*, 159 Wn.2d 252, 276-277, 149 P.3d 646 (2006) (quoting *Russell*, 125 Wn.2d at 86)). Even when a prosecutor's remarks are improper, when such are done in direct response to a defense argument they are not grounds for reversal as long as they do not go beyond what is necessary to respond to the defense. *State v. Dixon*, 150 Wn. App. 46, 56 207 P.3d 459 (2009) (quoting *State v. Francisco*, 148 Wn. App. 168, 178-179, 199 P.3d 479 (2009)) (quoting *State v. Dykstra*, 127 Wn. App. 1, 8, 110 P.3d 758 (2005)).

In closing argument defense counsel stated "If there were other people that resided in that [townhouse]—and I would submit that there were—those were the people who those guns belong to, not Mr. Caldwell." 3,4 RP 260-261. In response, during rebuttal closing the prosecutor stated

...[defense counsel] tells you that the guns belong to other people who lived at the residence. He told you that. The guns don't belong to my client. They belong to other people. And there was no proof that he could exclude other people from the guns. He said that. Did anyone testify?

Think about that: When the defendant testified⁸, did he say who the guns belonged to? No, he did not. And the officers don't know. Ms. Edwards doesn't know. Steve Mell, the forensic specialist, doesn't know. But we do know one thing: Who knew where the ammunition was? Mr. Caldwell. Who knew where the guns were? Mr. Caldwell. Who knew how to operate the guns? Mr. Caldwell. Who shot the guns? Mr. Caldwell.

3,4RP 267. In this instance, the prosecutor's comments were neither improper nor outside of the scope of the defense argument. Defense argued that the defendant did not own the guns. 3,4RP 260-261. In reply to this statement, the prosecutor stated that the evidence and testimony presented showed that the defendant was the only person who had control of the guns, knew where the guns and ammunition were located, knew how to operate the guns, and did in fact fire the guns. 3,4RP 267.

The mere mention that defense evidence is lacking does not constitute prosecutorial error or shift the burden of proof to the defense, especially when a defense was presented. *State v Jackson*, 150 Wn. App. 877, 885-886, P.3d 553 (2009). In this case, the prosecutor was doing

⁸ Defense argues that this was an impermissible violation of the defendant's Fifth Amendment right to remain silent. See App. Brf. at 26-29. However, there was no argument made that the defendant should have testified, just what actually occurred when the defendant chose to testify in his defense. 3,4RP 260-261.

exactly what *Jackson* said is permissible, making a mere mention that defense evidence is lacking and is not supported by the facts in evidence.

Defense argues that this case is analogous to *Dixon*, 150 Wn. App. 46, 207 P.3d 459 (2009), however the factual situations are quite different. In *Dixon*, the prosecutor specifically commented regarding a witness to the incident who could have potentially exonerated the defendant. *Id.* at 52. The prosecutor argued that the only reason that the witness was not called is that the witness would not have helped the defendant's case. *Id.* Further, in *Dixon*, the defendant chose not to take the stand. *Id.* In this case, the prosecutor did not state that there were any additional witnesses that could have supported the defense's argument and the defendant willingly chose to testify in their own defense. The prosecutor simply pointed out, in response to defense's closing argument, that there was no evidence presented on who actually owned the guns, that none of the witnesses that testified knew who owned the guns, and that it was defendant who had access to, and used, the guns. 3,4RP 267. This was done in direct response to defense counsel asserting that someone other than the defendant owned the guns. 3,4RP 260-261.

When looking at the context of the whole argument, as is necessary under *Russell*, the statements made by the prosecutor were in relation to the actual evidence presented in the case. *State v. Russell*, 125 Wn.2d 24,

85-86, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990)). The prosecutor stated that his argument regarding the gun ownership was based upon what defense counsel had previously argued and that such did not align with the evidence presented.

What [defense] says is not evidence and I [prosecutor] would ask you not to consider that, because the instructions tell you to. When I refer to something, I'm referring to the testimony and the exhibits and the evidence: Mr. Caldwell told you he shot. He told Officer Joyce he shot. He told you he knew where the ammunition was. He told you that he grew up with guns. He told you that his room was where the bed was and that's where him [sic] and his son slept. He said he was there at the house to clean it up because, why? Because someone was moving out. He was there. He had dominion and control of the residence.

3,4RP 267-268. When taken in context of the whole argument, the statements by the prosecutor were made in order to directly respond to the defense argument and then illustrate how the evidence presented supported the State's case. As such, the arguments presented by the prosecutor were proper under the whole context standard in *Russell*.

- b. The prosecutor properly argued that there were other officers that could have testified as such was invited by defense counsel's clothing argument.

During closing argument, defense argued that:

The police came and a lot of lease [sic] police came. Most of the police officers didn't even testify in this case, that were there. How do we know that? Well, we know because we have only had a couple. And we know that other officers

have been mentioned. They found a lot of the evidence, they just didn't testify.

3,4RP 257-258. In reply during rebuttal closing the prosecutor stated:

You didn't hear from the officers. There was [sic] a lot of officers at the scene. I could have called about 12 more officers. But what did Steve Mell say? He said he took a picture of the item as it was found, where it was found.

3,4RP 264. In this instance, the prosecutor did not vouch for the credibility of the State. Rather, the prosecutor simply argued that it was not necessary for the State to have called every single officer that was at the scene because the evidence found at the scene was photographed and catalogued by Forensic Investigator Mell. This is not vouching for the credibility of the State, and even if it was, was done in direct reply to defense stating that there were other officers that were at the scene, but who did not testify at trial.

The closing argument in this case is similar to the argument made in *State v. Jackson*, 150 Wn. App. 877, 209 P.3d 553 (2009). In *Jackson*, the prosecutor reminded the jury that they were the sole judge of credibility and outlined what evidence and reasonable inferences of the evidence could support the jury's conclusion that the witnesses were credible. *Id* at 884-885. Here, the argument made by the State was that Forensic Officer Mell's documented and photographed the evidence and therefore, it was not necessary for the State to have called all of the officers that were

present at the scene to testify. The prosecutor was not vouching for the State, but rather allowing the jury an opportunity to determine the credibility of one of its witnesses in response to defense's closing.

- c. The prosecutor only argued facts that were in evidence.

Defense counsel asserts that the prosecutor argued facts not in evidence by mentioning a gun receipt that was found at the scene of the crime. App. Brf. at 31-33. However, the receipt was mentioned in the context of an exhibit that was properly admitted into evidence. The prosecutor was describing various items that were found in Bedroom 2 that were included in a packet of color photographs that were admitted into evidence as part of Exhibit 24. 3,4RP 247. While the receipt itself was never mentioned specifically during examinations, it was still visible in the exhibit. CP 172-175 (Ex. 24). The exhibit was properly admitted into evidence without objection on October 1, 2015. 1,2RP 112-113. The photograph containing a close-up of a receipt from Welcher's Gun Shop is within this packet of color photographs and has evidence mark 27 in the photograph to identify the receipt. CP 172-175 (Ex. 24).

- d. Defense counsel properly did not object to the prosecutor's rebuttal closing argument as the argument presented was valid.

The defendant asserts that their counsel should have objected to statements made during closing arguments regarding shifting the burden of proof, commenting on the defendant's right to remain silent, vouching

for the state, and arguing facts not in evidence. App. Brf. at 21. However, as previously explained above, the prosecution did not shift the burden of proof or vouch for the state as the prosecutor in rebuttal argument responded directly to what defense counsel argued in their closing statement, never commented on the defendant's right to remain silent, and argued only facts that were in evidence and presented either in testimony or in exhibits that were admitted into evidence. As such, the court need not reach the conclusion of if defense counsel had a valid tactical reason for electing not to object during the State's closing argument.

Even assuming, arguendo, that the comments were improper, it was harmless. In a prosecutorial error claim the burden is on the defendant to prove that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). If the defendant does not object to the prosecutor's statements at trial, the defendant is deemed to have waived any error, unless the prosecutor's error was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Under this heightened standard, the defendant must show that (1) "no curative instruction would have obviated any prejudicial effect on the jury" and (2) the error resulted in prejudice that "had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d at 761 (quoting *State v. Thorgerson*, 172 Wn.2d 438, 455, 258 P.3d 43 (2011)). Here, the defendant cannot show that these particular

statements made by the prosecutor during closing were solely responsible for the jury's verdict. The State provided ample testimony and evidence to prove its case. The State was only required to prove that the defendant was in possession of firearms. CP 40-42.

The jury instructions made it clear that the jury could find that the defendant was in either actual or constructive possession of the firearms. CP 86-116. Throughout closing argument, defense counsel argued that dominion and control by the defendant did not exist over the guns. 3,4RP 260-262. Dominion and control is an element for constructive possession. CP 86-116. The jury was instructed on the requirements for constructive possession and therefore, any statements by the prosecutor regarding the defendant having dominion and control over the firearms was proper as such was necessary to prove constructive possession. *Id.*

Additionally, this argument did not shift the burden of proof. The prosecutor never stated or claimed that it was the responsibility of the defendant to provide witnesses to corroborate their version of events. Rather, throughout both closing argument and rebuttal the prosecutor made it clear that the State has the burden of proving each and every element of all of the charges beyond a reasonable doubt. 3,4RP 230, 250, 255, 264.

The jury in this case was correctly instructed to only consider testimony they heard from witnesses, stipulations, and admitted exhibits.

CP 89-116. The jury was also instructed that the lawyers' statements are not evidence and the jury was to disregard any remark, statement, or argument that was not supported by the evidence. *Id.* A jury is presumed to follow the court's instructions. *State v. Lamar*, 180 Wn.2d 576, 586, 327 P.3d 46 (2014). Any prejudice resulting from the prosecutor's statements during closing regarding there being no defense evidence presented on whom owned the firearms would be minimized by these instructions to the jury. *See, State v. Perkins*, 97 Wn. App. 453, 460, 983 P.2d 1177 (1999) (holding any prejudice from prosecutor's argument that the amount of drugs found on the defendant is an amount unlikely to be left unattended was minimized by jury instructions to disregard remarks unsupported by evidence).

D. CONCLUSION.

The evidence presented for all three charges of unlawful possession of a firearm in the first degree on which the defendant was convicted, the reckless endangerment conviction, and the possession of a controlled substance charge are supported by the evidence presented and a rational jury could have convicted the defendant based upon the evidence presented. Further, defense counsel was effective in that an unwitting possession charge was not warranted in this case and there was nothing that defense counsel could have objected to in the State's closing argument. Finally, the prosecutor properly conducted his closing argument

by not shifting the burden of proof, not vouching for the credibility of the State, and only replying in rebuttal closing to statements made during defense closing. Even if there was error in the prosecutor's statement, any such error would be harmless. For the aforementioned reasons, the State requests that the court affirm the defendant's convictions.

DATED: July 26, 2016.

MARK LINDQUIST

Pierce County

Prosecuting Attorney



MICHELLE HYER

Deputy Prosecuting Attorney

WSB # 32724



Nathaniel Block

Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S.~~ mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

7.27.16 Therese Ka

Date

Signature

PIERCE COUNTY PROSECUTOR

July 27, 2016 - 10:43 AM

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