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

STATE OF WASHINGTON, RESPONDENT

v.

ADRIAN O. JACOBS, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 16-1-03844-3

Brief of Respondent

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

1. Whether, viewing the evidence in the light most favorable to the State, there was sufficient evidence to prove defendant exercised dominion and control over a firearm that was found in his residence and contained his fingerprint?
2. Whether the trial court properly exercised its discretion in excluding irrelevant evidence pertaining to defendant's "other suspect" theory of possession?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On September 28, 2016, the Pierce County Prosecuting Attorney's Office charged ADRIAN JACOBS (hereinafter "defendant") with one count of Unlawful Possession of a Firearm in the First Degree. CP 1. The case proceeded to trial on March 21, 2017, and resulted in a hung jury. CP 237-244. The court declared a mistrial and reset the matter for trial. CP 244.

The case proceeded to trial again on April 19, 2017, before the Honorable John R. Hickman. RP¹ 3. On that date, the court addressed motions in limine, including defendant's motion to introduce "other suspect evidence." RP 16-35; CP 9-20. The court denied defendant's motion to introduce evidence of another individual's prior criminal history and arrest to prove motive to deny ownership of the firearm, but the court allowed defendant to introduce evidence of the individual's presence at the scene. RP 37-40. The court then recessed the matter until May 4, 2017. RP 42-44; CP 40.

During trial, the State called the following individuals as witnesses: Department of Corrections (DOC) Officers Lucy Luzano and Amanda Mullenix; Tacoma Police Officer Patrick O'Neill; Forensic Specialist Donovan Velez; Forensic Investigator Loree Barnett; and Latent Print Examiner Toni Martin. CP 252; RP 87, 117, 139, 165, 192, 201. Defendant called one witness – friend Ryan Dolan – and elected not to testify himself. RP 268-70, 277.

The jury subsequently found defendant guilty as charged. CP 59; RP 333. On June 30, 2017, the court imposed a standard range sentence of

¹ The verbatim report of proceedings is contained in six volumes of consecutive pagination and will be referred to as "RP."

80 months in the Department of Corrections. RP 351-52; CP 65-77.

Defendant filed a timely notice of appeal. CP 227.

2. FACTS

On September 27, 2016, defendant was on DOC supervision. RP 140-41, 149. Defendant had previously been convicted of a felony classified as a serious offense and could not lawfully own or have in his possession or under his control any firearm. RP 262; Exhibit 26. The morning of September 27, 2016, defendant reported to the DOC office in Tacoma, Washington, and officers thereafter responded to defendant's residence located at 1723 East 46th Street in Tacoma to conduct a search.² RP 89-91, 141-42. DOC officers were made aware of a firearm inside the residence. RP 94.

Because defendant was on DOC supervision, he was required to provide a "valid and verifiable address" to his DOC probation officer. RP 143, 149. DOC conducted home visits to verify the address. RP 149, 155. Defendant first reported 1723 East 46th Street as his residence on September 24, 2015. RP 152. Defendant's probation officer observed him at the residence. RP 142-43. On July 12, 2016, defendant changed his address to his mother's residence. RP 152. Just two months later, on

² DOC was authorized to conduct a warrantless search of defendant's residence by virtue of defendant being on DOC supervision. RP 149.

September 15, 2016, defendant reported that he moved back to his girlfriend's residence at 1723 East 46th Street. RP 143, 149-50, 154. On September 21, 2016, DOC attempted a home visit at the East 46th Street address and contacted Leslie Cabrerros – the father of defendant's girlfriend – who confirmed that defendant had moved back into the home.³ RP 144, 155, 163.

When DOC officers responded to defendant's residence on September 27, 2016, Mr. Cabrerros answered the door. RP 92, 144. Defendant was present at the scene and remained in a vehicle with an officer. RP 91, 93-94, 144. No one else was present in the residence. RP 92. A DOC officer advised Mr. Cabrerros that they were there to conduct a search; Mr. Cabrerros stepped aside and officers entered the residence. RP 94, 144.

Defendant's probation officer searched defendant's bedroom as well as a downstairs closet and observed male clothing that "looked familiar" and that she had seen defendant wear before. RP 147-49. Another DOC officer searched the living room of the residence and found a loaded firearm on the floor near the couch. RP 94-95, 99, 145-46. The

³ At trial, defendant's friend, Ryan Dolan, testified that defendant stayed with him at his residence on South Asotin Street about five to seven days before defendant was put into jail. RP 269, 271. Defendant's address on file with DOC, however, was the East 46th Street residence. RP 90, 142-43, 149-50.

firearm was a black Smith and Wesson 40-caliber semiautomatic. RP 121-22, 133. A wallet containing Mr. Cabrerros' identification and other items were located near the firearm. RP 103, 135. *See also*, Exhibits 2-9.

Tacoma Police Officer Patrick O'Neill collected the firearm and placed it into property for further forensic testing. RP 128, 132. The firearm was later processed for latent fingerprints. RP 173. A partial fingerprint was recovered from the top of the firearm (i.e., the slide) and compared to the known fingerprints of defendant. RP 175-76, 182, 220-21. The recovered latent print matched the known print of defendant's right little finger. RP 222. The latent print was also compared to the known prints of Leslie Cabrerros, and Mr. Cabrerros was excluded as a match. RP 222-23. The firearm was also tested for operability and found to be operable. RP 195-200.

C. ARGUMENT.

1. VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE SUPPORTS DEFENDANT'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE.

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. Smith*, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction when, viewing the evidence in the light most

favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (citing *State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are considered equally reliable. *Id.* at 201; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering the 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)). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d

182 (2014); *State v. Martinez*, 123 Wn. App. 841, 845, 99 P.3d 418 (2004). Therefore, when the State has produced sufficient 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 person is guilty of unlawful possession of a firearm in the first degree if the person knowingly owns, has in his possession, or has in his control, any firearm after having previously been convicted of any serious offense as defined by chapter 9.41 RCW. Former RCW 9.41.040(1)(a) (2016); *State v. Anderson*, 141 Wn.2d 357, 5 P.3d 1247 (2000) (unlawful possession of firearm requires proof of knowing possession). *See also*, Washington Pattern Jury Instruction – Criminal (WPIC) 133.02; CP 43-58 (Instruction No. 8). Here, defendant stipulated that he had previously been convicted of a serious offense. RP 246-52; Exhibit 26. Thus, the only remaining issue is defendant’s claim that there was insufficient evidence to support that he had actual or constructive possession of the firearm recovered from the East 46th Street address. Brief of Appellant at 11. Defendant’s claim fails, because the State presented sufficient evidence that defendant had dominion and control over the firearm.⁴

⁴ The “to convict” instruction in this case did not require proof of ownership but rather knowing possession or control. CP 43-58 (Instruction No. 8).

Possession of a firearm may be either actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); *State v. Manion*, 173 Wn. App. 610, 634, 295 P.3d 270 (2013). Actual possession occurs when the firearm is in the actual physical custody of the person charged with possession and may be proved by circumstantial evidence. *Manion*, 173 Wn. App. at 634. Constructive possession occurs when the firearm is not in actual, physical possession, but the person charged with possession has dominion and control over the firearm. *Staley*, 123 Wn.2d at 798 (citing *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)).

The ability to reduce an object to actual possession is an aspect of dominion and control. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). However, the State need not prove exclusive control. *State v. Bowen*, 157 Wn. App. 821, 828, 239 P.3d 1114 (2010). And, “[m]erely that a defendant is not present when contraband is discovered will not make the evidence insufficient.” *State v. Summers*, 107 Wn. App. 373, 389, 28 P.3d 780 (2001).

Constructive possession “can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found.” *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). “[D]ominion and control over [the] premises raises

a rebuttable inference of dominion and control over the [contraband].”

State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

To determine whether a defendant had constructive possession of a firearm, the court examines the totality of the circumstances touching on dominion and control. *State v. Jeffrey*, 77 Wn. App. 222, 227, 889 P.2d 956 (1995). No single factor is dispositive. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). “Evidence of temporary residence, personal possessions on premises, *or* knowledge of presence of [contraband], without more, are insufficient to show dominion and control.” *Collins*, 76 Wn. App. at 501 (emphasis in original). However, evidence of residence, personal possessions on the premises, *and* knowledge of the presence of contraband may suffice. *Id.*

Defendant relies on *State v. Callahan*,⁵ *State v. Spruell*,⁶ and *State v. Cote*,⁷ to argue that the evidence here is insufficient to support a finding of actual or constructive possession. Brf. of App. at 11. Defendant’s reliance on those cases is misplaced.

In *Callahan*, police entered a houseboat pursuant to a search warrant and found the defendant in close proximity to drugs. 77 Wn.2d at 28. The defendant admitted that he handled the drugs earlier that day and

⁵ 77 Wn.2d 27, 459 P.2d 400 (1969).

⁶ 57 Wn. App. 383, 788 P.2d 21 (1990).

⁷ 123 Wn. App. 546, 96 P.3d 410 (2004).

further admitted that “two guns, two books on narcotics and a set of broken scales...belonged to him.” *Id.* The defendant did not live on the houseboat but had stayed there for the preceding two or three days. *Id.*

The *Callahan* court held that the defendant’s momentary handling of the drugs was insufficient to establish actual possession. *Id.* at 29. The court also held that because the defendant was only a guest on the houseboat, the circumstances did not establish dominion and control over the drugs sufficient to prove constructive possession. *Id.* at 31. The court explained,

Although there was evidence that the defendant had been staying on the houseboat for a few days there was no evidence that he participated in paying the rent or maintained it as his residence. Further, there was no showing that the defendant had dominion or control over the houseboat. The single fact that he had personal possessions, not of the clothing or personal toilet article type, on the premises is insufficient to support such a conclusion.

...

Consequently, we find that there was insufficient evidence for the jury to find that the defendant had constructive possession of the drugs.

Id. at 31-32.

In *Spruell*, police forced their way into a residence to execute a search warrant. 57 Wn. App. at 384. The defendant was found in the kitchen in close proximity to cocaine, and his fingerprints were on a plate containing white powder residue. *Id.* The State did not present evidence

that the defendant was an occupant of the premises or had dominion and control over the premises. *Id.* at 387. Rather, the evidence seemed to establish that the defendant was merely a visitor in the residence. *Id.* at 388. The State argued that the defendant had dominion and control over the drugs based on his proximity to the drugs and his fingerprint on the plate containing white powder residue. *Id.* at 385, 387-88.

The *Spruell* court rejected the State's argument, noting,

So far as the record shows, [the defendant] had no connection with the house or the cocaine, other than being present and having a fingerprint on a dish which appeared to have contained cocaine immediately prior to the forced entry of the police. Neither of the police officers testified to anything that was inconsistent with Hill being a mere visitor in the house. There is no basis for finding that Hill had dominion and control over the drugs. Our case law makes it clear that presence and proximity to the drugs is not enough.

57 Wn. App. at 388-89.

In *Cote*, police observed a stolen truck in the driveway of a home when they served an arrest warrant on the resident. 123 Wn. App. at 548. The resident told police that the defendant and another man had arrived in the truck. *Id.* Police arrested the defendant inside the residence on an outstanding felony warrant and found components of a methamphetamine lab – including two Mason jars containing various chemicals – in the stolen truck. *Id.* The defendant's fingerprints were found on the Mason

jars. *Id.* The evidence at trial established that the defendant was a passenger in the stolen truck. *Id.*

On appeal, the court held that the evidence was insufficient to establish constructive possession of the contraband. *Id.* at 550. The court noted that (1) the defendant was not in or near the truck when police arrested him, (2) the defendant was a passenger in the truck, and (3) police found the Mason jar containing the defendant's fingerprint in the back of the stolen truck, not in the passenger area. *Id.* Additionally, evidence of the defendant's fingerprint proved only that he touched the Mason jar. *Id.* Thus, the State did not establish the defendant's dominion and control of the truck or the contraband; the evidence only established that defendant "was at one point in proximity to the contraband and touched it." *Id.*

Callahan, Spruell, and Cote are all distinguishable from the present matter. In those cases, the State presented no evidence of the defendant's dominion and control over the premises. Here, on the other hand, the evidence established that defendant lived at the residence where the firearm was recovered. Defendant himself reported the East 46th Street address to DOC as his residence (and had done so just twelve days prior to his arrest).⁸ RP 90, 141-43, 149, 152-54. DOC conducted home visits to

⁸ Aside from two months where defendant reportedly lived at this mother's residence, defendant lived at the East 46th Street address for almost a year. RP 149, 152-54.

verify the address. RP 149-50, 155. DOC Officer Mullenix had previously observed defendant at the residence. RP 142-43.

On September 21, 2016, Mr. Cabrerros confirmed to DOC that defendant had moved back into the residence. RP 155, 163. On the day of the search, Officer Mullenix observed clothing in the residence that she had seen defendant wear before. RP 148-49. Officers searched what was known to be defendant's bedroom. RP 145, 147, 149. The firearm was recovered in the living room and contained defendant's fingerprint. RP 94-95, 145-46, 175-76, 220-22. There is no indication that defendant was a temporary visitor in the home. Rather, 1723 East 46th Street was defendant's established residence. The evidence thus established that defendant had dominion and control over the premises and over the firearm contained therein.

In *State v. Summers*, 107 Wn. App. 373, 378, 28 P.3d 780 (2001), police responded to the defendant's residence to investigate a possible methamphetamine lab and to arrest the defendant for a parole violation. The defendant was not home when police arrived, but he arrived soon thereafter. *Id.* Police arrested the defendant for his parole violation, and he admitted post *Miranda*⁹ warnings (1) that he lived in the basement of the

⁹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

residence, (2) that there was a firearm in the basement, and (3) that the firearm belonged to a friend. *Id.* The defendant also admitted that the firearm “might have his fingerprints on it because he had handled it in the past.” *Id.* Police obtained a search warrant and recovered a loaded firearm from the basement. *Id.*

On appeal, the defendant argued there was insufficient evidence to support his conviction for unlawful possession of a firearm in the first degree, because “he was not present when the police discovered the firearm, he shared the basement with two other people, and one of those persons asserted ownership of the firearm.” *Summers*, 107 Wn. App. at 377, 388. The court rejected the defendant’s arguments and found sufficient evidence to support the defendant’s conviction. *Id.* at 388-90.

The court explained,

Summers admits he lived in the basement, which meant he had dominion and control over the premises. This fact alone would allow the jury to infer that Summers had constructive possession of the firearm and defeat his claim of insufficient evidence.

Id. at 389. Moreover, the evidence established that the defendant knew about the firearm and had even handled it. *Id.*

Here, as in *Summers*, defendant admitted to officers that he lived at the East 46th Street residence. RP 142-43. Defendant reported that address as his residence to DOC less than two weeks prior. *Id.* Officer

Mullenix had personally observed defendant at the address before. *Id.* Defendant thus had dominion and control over the premises, which would allow the jury to infer that he had constructive possession of the firearm. *See Summers*, 107 Wn. App. at 389. And, the evidence established that defendant knew about the firearm and had handled it, as shown by his fingerprint recovered from the top of the firearm's slide. RP 175-76, 220-22. Defendant's presence outside of the home during the search does not render the evidence insufficient. *Summers*, 107 Wn. App. at 388-90. Rather, sufficient evidence supports defendant's conviction for unlawful possession of a firearm in the first degree.

“Dominion and control over [the] premises raises a rebuttable inference of dominion and control over the [contraband]” on the premises. *Cantabrana*, 83 Wn. App. at 208. Defendant in this case attempted to rebut this presumption by presenting his friend Ryan Dolan as a witness, who testified that the defendant stayed with him “like five to seven days before he got put in jail.” RP 271. However, the jury was not obligated to accept defendant's explanation, and this Court should not disturb the jury's assessment of a witness's credibility. *Camarillo*, 115 Wn.2d at 71. *See also, Summers*, 107 Wn. App. at 389-90. Moreover, Dolan's testimony, at most, demonstrated that defendant was his temporary guest,

and Officer Mullenix testified that defendant could not change his address without DOC's permission. RP 159.

Here, viewing the evidence in the light most favorable to the State and drawing all inferences against defendant, the jury had sufficient evidence to find that defendant exercised dominion and control over the firearm. Therefore, this Court should affirm defendant's conviction.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN EXCLUDING IRRELEVANT EVIDENCE PERTAINING TO DEFENDANT'S "OTHER SUSPECT" THEORY OF POSSESSION.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee a criminal defendant the right to present a defense. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). That right, however, is not absolute. *Montana v. Egelhoff*, 518 U.S. 37, 42, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996); *Maupin*, 128 Wn.2d at 924-25. The right to present a defense does not extend to irrelevant or inadmissible evidence. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Franklin*, 180 Wn.2d 371, 377 n. 2, 325 P.3d 159 (2014); *State v. Gunderson*, 181 Wn.2d 916, 922, 337 P.3d 1090 (2014). "An abuse of discretion exists only where no reasonable person

would take the position adopted by the trial court.” *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). On review, however, the court may affirm the trial court on any grounds established by the pleadings and supported by the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004); *Truck Ins. Exchange v. Vanport Homes, Inc.*, 147 Wn.2d 751, 766, 58 P.3d 276 (2002).

Here, defendant erroneously claims the trial court violated his right to present a defense by excluding “other suspect” evidence, as “there was an adequate nexus between the alternative suspect and possession of the firearm.” Brf. of App. at 1. The record instead establishes the trial court allowed defendant to introduce “other suspect” evidence and only excluded the introduction of irrelevant evidence pertaining to the “other suspect’s” criminal history. Defendant’s claim of error is therefore more properly a challenge to the trial court’s exclusion of evidence on relevance grounds. For the reasons set forth below, the trial court properly exercised its discretion in excluding irrelevant evidence.

To be admissible in Washington, proffered “other suspect” evidence must create a train of facts or circumstances that clearly point to someone other than the defendant as the guilty party, establishing a connection between the other suspect and the crime. *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651 (1992) (quoting *State v. Downs*, 168

Wash. 664, 667, 13 P.2d 1 (1932)). The proponent of the evidence must show some nexus “tending to connect such other person with the actual commission of the crime charged.” *State v. Franklin*, 180 Wn.2d 371, 379, 325 P.3d 159 (2014). Evidence that another person had a motive to commit the crime – or even had a motive and the opportunity to commit it – is insufficient to show such a nexus. *State v. Russell*, 125 Wn.2d 24, 77, 882 P.2d 747 (1994). Admissibility requires a train of facts linking the suspect to the crime beyond mere opportunity, motive, or character evidence. *Franklin*, 180 Wn.2d at 379-81 (approving *Downs*, 168 Wash. at 667; *State v. Kwan*, 174 Wash. 528, 533, 25 P.2d 104 (1933)). “[R]emote acts, disconnected and outside the crime itself, cannot be separately proved for such a purpose.” *Id.* at 380 (quoting *Kwan*, 174 Wash. at 533).

A trial court’s exclusion of “other suspect” evidence is an application of the general evidentiary rule that excludes evidence if its probative value is outweighed by such factors as unfair prejudice, confusion of the issues, or potential to mislead the jury. *Franklin*, 180 Wn.2d at 378 (citing *Holmes v. South Carolina*, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)). Before the trial court will admit “other suspect” evidence, the defendant must present a combination of facts or circumstances that points to a nonspeculative link between the

other suspect and the crime. *Franklin*, 180 Wn.2d at 381. The defendant bears the burden of establishing relevance and materiality. *State v. Starbuck*, 189 Wn. App. 740, 752, 355 P.3d 1167 (2015). Evidence which is not relevant is not admissible, ER 402, and even relevant evidence may be excluded based on ER 403 considerations.

Defense counsel below sought to introduce evidence of Mr. Cabrerros' arrest and prior felony conviction to prove motive to deny ownership of the firearm found at 1723 East 46th Street. CP 9-20; RP 26-27, 34-36. Counsel argued,

Our position is that that weapon is [Mr. Cabrerros'], in his control. And he's not going to say anything about it obviously because he's a convicted felon, and that's where the other suspect should be able to be argued. He's not going to be called as a witness.

...

Mr. Cabrerros was arrested. Mr. Cabrerros was taken to the jail. Okay, no charges were filed. That's a charging decision. That's fine. But the fact that he was arrested, he is the convicted felon who's standing there next to the gun in the living room by his wallet, that is our argument, to be able to have that other suspect evidence in, that the jury gets the full picture of what is going on here.

...

The police come in. Five authorities come to the house knocking on the door. Of course he's going to point the finger that this gun does not belong to him. And he is the one who's there. My client is the one who is charged. It's fair enough. That's their charging decision, but the fact is he's the one who's sitting here charged with a crime when we have the other convicted felon standing right by the gun next to his wallet. No, that's not mine. That's Mr. Jacobs'.

RP 26-27, 34. *See also*, CP 10 (requesting admission of Mr. Cabrerós' criminal history "so that defense can argue that another suspect committed this crime and had motive to deny ownership of the firearm in question"), 19 (purpose of evidence to show "motive to deny ownership of the weapon for which Mr. Jacobs is charged"). The State objected to the admission of such evidence based on relevance. RP 29, 34-35.

Relying on *State v. Russell*, 125 Wn.2d 24, 75-77, 882 P.2d 747 (1994),¹⁰ the court denied defendant's motion, ruling:

I want to make a decision on this motion in limine. I'm going to deny the motion, and I'm denying it based on State v. Russell. State v. Russell stands for the proposition that mere evidence of motive in another party or motive coupled with threats of such person is inadmissible unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged.

The sole motive for a showing that this gentleman had a prior criminal history is to indicate that he's trying to deflect his own guilt onto somebody else because he would end up going to prison having been a felon who was not allowed to have any firearm in his possession.

And motive alone is not enough for me to open the door in terms of him being -- bringing in the fact that he was a convicted felon. His fingerprint wasn't found on the weapon. The gun wasn't registered to him, obviously. It was in his house, but I'm not going to forbid counsel from arguing that there were other people in the home that could have possessed it. But to bring up the fact that because this gentleman had a prior conviction and could not own another -- couldn't own a weapon, that's the only motive

¹⁰ Defendant cited *Russell* in his memorandum regarding the other suspect evidence. CP 14, 16

that's been suggested here as to why we should bring in this other gentleman as a potential suspect.

Again, motive alone is not enough, and there's no other way to connect him with this other than the motive that he would have to want to palm this off onto somebody else because he could go to prison, especially in light of the fact that I'm not closing the door on the defense from arguing that there were other people in the home that could have had actual or constructive possession other than the defendant himself.

Based on that ruling, I'm not going to allow introduction of his prior criminal history or as to why he was[] arrested.

...
[But] you can certainly bring up the fact that his wallet was there or other indicia of possession or the fact that he shared the residence with other individuals[.]

RP 37-39. *See also*, RP 29 (State did not object to the introduction of evidence that "Mr. Cabreros was present... [and] his wallet and keys were found in close proximity to the firearm").

At trial, the jury heard testimony that Mr. Cabreros answered the door when officers responded to the East 46th Street residence to conduct the search. RP 92-94, 144. No one else was present in the residence. RP 92. Officers had observed Mr. Cabreros at the residence before but were unaware if he actually lived there. RP 155-56, 163. Officers found a wallet containing Mr. Cabreros' identification near the firearm. RP 103, 135.

Defense counsel argued during closing,

And apparently Mr. Cabreros hides that gun everywhere, and when the officers came, it's hidden under the couch.

But I think it's pretty evident by looking at the evidence that that's his gun. He's the one that definitely has dominion and control over that, possession of the -- that is Mr. Cabrerros' gun. I think that is common sense.

RP 315.

The trial court did not exclude “other suspect” evidence. Defendant was allowed to present evidence in support of his “other suspect” theory that Mr. Cabrerros had dominion and control over the firearm, and defendant argued the same to the jury during closing argument. Instead, the trial court properly excluded the introduction of irrelevant criminal history evidence to show Mr. Cabrerros’ motive to deny ownership or association with the firearm.¹¹ Such evidence would only become relevant provided there was substantive admissible evidence that established Mr. Cabrerros in fact denied ownership of the firearm in question. No such evidence was introduced at trial. Mr. Cabrerros was not called as a witness, and the trial record is silent as to whether Mr. Cabrerros denied or admitted ownership/possession of the firearm (or said anything at all).¹² Because Mr. Cabrerros’ alleged denial of ownership was never adduced at trial, his

¹¹ Although the trial court did not exclude the evidence on this basis, this Court can affirm the trial court on any grounds adequately supported by the record. *Costich*, 152 Wn.2d at 477; *Truck Ins. Exch.*, 147 Wn.2d at 766.

¹² Moreover, any out of court statements by Mr. Cabrerros denying ownership of the firearm would be inadmissible hearsay. ER 801, 802.

motive for such denial was not relevant and therefore not admissible.¹³ ER 402.

The proffered evidence was also irrelevant and inadmissible, because Mr. Cabrerros' alleged motive to deny ownership of the firearm would not make it more nor less likely that he possessed the firearm to the exclusion of defendant. As the trial court instructed the jury, "Dominion and control need not be exclusive to support a finding of constructive possession." CP 43-58 (Instruction No. 11). *See also, Bowen*, 157 Wn. App. at 828; *State v. Lane*, 56 Wn. App. 286, 300-01, 786 P.2d 277 (1989); WPIC 50.03. The State argued the same during motions in limine below. RP 35 ("[C]onstructive possession does not have to be exclusive to one individual. So even if the jury wants to say, well, maybe Mr. Cabrerros did exercise a certain amount of dominion and control over the firearm, that doesn't exclude the defendant from exercising dominion and control"). Therefore, even if Mr. Cabrerros lied about owning or possessing the firearm, his motivation to lie would not affect defendant's culpability, as both defendant and Mr. Cabrerros could exercise dominion and control over the same firearm and defendant could still be found guilty of unlawful possession. *See Summers, supra*. Moreover, Mr. Cabrerros'

¹³ Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence. ER 401.

motivation to deny ownership would not explain the presence of defendant's fingerprint on the firearm.

Finally, any error in excluding the evidence was harmless. A constitutional error does not require reversal if, beyond a reasonable doubt, the untainted evidence is so overwhelming that a reasonable juror would have reached the same result in the absence of the error. *State v. Quaaale*, 182 Wn.2d 191, 202, 340 P.3d 213 (2014); *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). An erroneous evidentiary ruling that is not of constitutional magnitude is not prejudicial unless, within reasonable probabilities, the trial's outcome would have been different had the error not occurred. *State v. Brockob*, 159 Wn.2d 311, 351, 150 P.3d 59 (2006); *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). To determine whether the error is harmless, the court looks to the clearly admissible evidence to determine whether it is so overwhelming that it "necessarily leads to a finding of guilt." *Guloy*, 104 Wn.2d at 426.

As argued above, the trial court allowed defendant to introduce "other suspect" evidence and only excluded irrelevant evidence pertaining to the other suspect's motivation to deny ownership. The nonconstitutional harmless error test therefore applies. However, any error in excluding the proffered evidence was harmless under either standard. Defendant's

fingerprint was found on the firearm; Mr. Cabrerros' fingerprint was not. RP 220-23. Defendant had dominion and control over the premises; it is unclear if Mr. Cabrerros even lived at the residence. RP 90, 141-43, 149-56. And, again, the State did not have to prove that defendant had exclusive possession over the firearm. The overwhelming evidence necessarily leads to a finding of guilt.

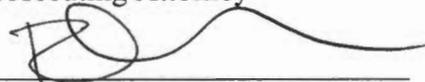
The trial court allowed defendant to present evidence that Mr. Cabrerros was present in the residence and his wallet was found in close proximity to the firearm. The court's exclusion of the proffered criminal history evidence did not deprive him of the opportunity to present his "other suspect" theory. The proffered evidence was irrelevant and therefore inadmissible. "Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant* evidence." *Jones*, 168 Wn.2d at 720 (emphasis in original). This Court should therefore affirm defendant's conviction.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's conviction.

DATED: April 11, 2018

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Pierce County
Prosecuting Attorney



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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.

4.11.18 Therese Kar
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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