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NO. 51152-5-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

TROY D. FLETCHER,

Appellant.

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

The Honorable Gregory M. Gonzales

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. Insufficient evidence was presented to establish beyond a reasonable doubt appellant Tory Fletcher unlawfully possessed a .38 Taurus handgun as alleged in Count 3.

2. Insufficient evidence was presented to establish beyond a reasonable doubt that Mr. Fletcher unlawfully possessed 9mm Bryco Arms Jennings Nine pistol as alleged in Count 4.

3. The trial court's failure to proceed to trial in a timely manner violated Mr. Fletcher's right to a speedy trial under CrR 3.3.

4. The court erred in giving a flawed limiting instruction for regarding use of prior convictions.

5. The court erred in failing to exercise its discretion in determining whether to treat the two convictions for first degree unlawful possession of firearm as the "same criminal conduct" for offender score purposes.

6. The trial court denied the defendant due process under Washington Constitution, Article I, § 3, and United States Constitution, Fourteenth Amendment, and violated CrR 4.2(f) when it refused to allow him to withdraw a guilty plea that was not knowingly, voluntarily, and intelligently entered.

7. The trial court erred in admitting evidence over defense objection that Mr. Fletcher had a total of three qualifying prior "serious offenses" where

one prior serious felony was required to prove the element of first degree unlawful possessions of a firearm.

8. Ineffective assistance of counsel deprived Mr. Fletcher of a fair trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. A criminal defendant's constitutional right to due process is violated when a conviction is based upon insufficient evidence. Here, the State failed to present any evidence Mr. Fletcher had dominion and control over two guns his former girlfriend Jennifer Denney gave to police. Was Mr. Fletcher's right to due process violated when he was convicted of unlawful possession of the guns which Ms. Denney gave to police in the absence he had constructive possession of the weapons? Assignments of Error 1 and 2.

2. CrR 3.3 requires that an out of custody defendant must be brought to trial within 90 days of the relevant commencement date or the matter must be dismissed with prejudice. Did the trial court abuse its discretion by granting a continuance for "good cause" beyond the speedy trial period, without agreement by Mr. Fletcher himself? Assignment of Error 3.

3. Whether the court committed reversible error in issuing a limiting instruction that allowed the jury to consider the evidence of prior convictions for improper evidentiary purposes? Assignment of Error 4.

4. The appellant was convicted of unlawful possession of firearm

based on an allegation that he possessed two guns given by his former girlfriend to police. The acts alleged by the State involved the same time and place, the same victim, and the same intent. Is remand for resentencing required because the court failed to exercise its discretion to treat the offenses as the same criminal conduct? Assignment of Error 5.

5. Does a trial court deny a defendant due process under Washington Constitution, Article I, § 3, and United States Constitution, Fourteenth Amendment, and does that court violate CrR 4.2(f) if it refuses to allow that defendant to withdraw a guilty plea that was not knowingly, voluntarily, and intelligently entered? Assignment of Error 6.

6. Did the trial court's erroneous admission of Mr. Fletcher's three prior serious convictions deprive him of a fair trial and due process where only one prior serious conviction was necessary to prove the element of first degree unlawful possession of a firearm? Assignment of Error 7.

7. A criminal defendant's constitutional right to the effective assistance of counsel is violated when counsel's performance is deficient and the deficiency is prejudicial to the defense. Here, defense counsel failed to (1) argue the two convictions for unlawful possession of a firearm encompassed the same criminal conduct for purposes of calculation of Mr. Fletcher's offender score and (2) failed to object to the giving of an erroneous limiting instruction. Was counsel's performance deficient and prejudicial so as to deprive him of his right

to effective assistance of counsel? Assignment of Error 8.

**C. STATEMENT OF THE CASE**

**1. Procedural facts:**

Tory Fletcher was charged in Clark County Superior Court on March 1, 2017 with possession of methamphetamines and fourth degree assault (domestic violence). Clerk's Papers (CP) 5. The State alleged that Mr. Fletcher was arrested on February 26, 2017 pursuant to a warrant issued as the result of an alleged incident of fourth degree assault on December 18, 2017, involving complaining witness Jennifer Denney. CP 2, 3, 5. After he was arrested and taken into custody, law enforcement alleged that methamphetamine was found in Mr. Fletcher's possession when he was searched at the jail. CP 3, 5.

The State filed an amended information on May 9, 2017, adding two counts of first degree unlawful possession of a firearm. CP 10-11. The State alleged in Count 3 that on December 18, 2017, Mr. Fletcher was previously convicted of felony offenses, and that he knowingly possessed a .38 Taurus revolver, and alleged that he knowingly possessed a 9mm Bryco Arms Jennings Nine pistol in Count 4. RCW 9.41.040(1)(a). The State alleged that the guns were given to police by Ms. Denney at a hotel on December 19,

2017 – a day after the alleged domestic violence incident – and that she alleged that guns belonged to Mr. Fletcher. CP 10-11.

*a. Motion to continue trial*

Following amendment of the information, defense counsel moved for continuance of the trial to investigate the chain of custody involving the guns, and to investigate Ms. Denney’s statement that she took a handgun with her while being transported by ambulance to Legacy Salmon Creek Hospital on December 18. CP 17, 23. Over Mr. Fletcher’s objection, the court granted defense counsel’s motion to continue the trial, finding good cause to continue the case. Report of Proceedings<sup>1</sup> (RP) (7/11/17) at 36.

*b. Motions in limine, entry of Alford plea in Count 2, and motion to withdraw plea*

The case came on for jury trial on September 12, 2017, the Honorable Gregory M. Gonzales presiding. 1RP at 55-190, 2RP at 191-368.

Prior to addressing motions in limine, the State moved to dismiss Count 1 (possession of methamphetamine) without prejudice. 1RP at 56. The court granted the motion and an order of dismissal was entered. CP 43.

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<sup>1</sup>The verbatim record of proceedings consists of the following hearings: May 9, 2017 (motion hearing); July 7, 2017 (motion to continue), July 11, 2017, September 7, 2017 (readiness hearing), September 12, 2017 (change of plea to Count 1, fourth degree assault); 1RP — September 13, 2017 (jury trial, day 1), 2RP — September 14, 2017 (jury trial, day 2); September 27, 2017;

Defense moved to sever Count 2 from Counts 3 and 4, which was denied. 1RP at 57-81; CP 23. The court ruled that a limiting instruction would be given instructing the jury regarding the fourth degree assault charge and ruled that the jury would not be told Ms. Denney's statement regarding why she gave the guns to law enforcement. 1RP at 178.

Following the denial of his motion to sever the counts, Mr. Fletcher entered a plea pursuant to *Alford/Newton*<sup>2</sup> regarding Count 2 (fourth degree assault) on the afternoon of September 12, 2017, and trial proceeded on the unlawful possession of firearms counts. 1RP at 104-110; CP 385.

Mr. Fletcher, acting pro se, moved to withdraw his guilty plea the morning of the second day of trial. 2RP at 177, 179. Mr. Fletcher's counsel stated that Mr. Fletcher "wants to tell the jury the whole story," which was precluded by entry of the plea. 1RP at 179. The court denied the pro se motion to withdraw the plea and reiterated that the plea meant that the jury would not hear the facts of the alleged assault involving Ms. Denney and would not hear any alleged statements by Ms. Denney why she gave the guns to the police. 1RP at 178.

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October 13, 2017; and November 7, 2017 (sentencing hearing).  
<sup>2</sup>*North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970), *State v. Newton*, 87 Wash.2d 363, 552 P.2d 682 (1976).

After the State rested, the defense moved to dismiss the “ownership” prong of both counts, stating that there was insufficient evidence regarding alternate theory of ownership of either weapon. 2RP at 308. Counsel made an offer of proof that Rachel Nugent would have testified that one of the guns was owned by her late father. 2RP at 308. Counsel argued that the State presented evidence of possession or control of the guns only, but not ownership. 2RP at 308-09. The court denied the motion to dismiss the alternate “ownership” prong. 2RP at 311.

*c. Jury instructions*

The State proposed and the court gave the following limiting instruction to the jury based on Washington Pattern Jury Instruction 5.30:

Certain evidence has been admitted in this case only for a limited purpose. This evidence consists of documents and testimony relating to previous convictions of the Defendant and may be considered by you only for the purpose of determining whether those convictions have been proved beyond a reasonable doubt. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Instruction 3, CP 117.

Defense counsel moved to limit the State to elect to use one of the three prior convictions to prove that he was ineligible to possess a firearm under RCW 9.41.040(1)(a) on the basis that using all three convictions was

cumulative and unduly prejudicial. 1RP at 172-73. The trial court denied the motion, finding that the fact of the three convictions was not unduly prejudicial and that the fact that the defendant has a criminal history will “come out no matter what—whether it’s one, two or three.” 1RP at 177. The court also stated that in any case, “there will be a limiting instruction that this information is only offered for the purpose of establishing an element” of the counts. 1RP at 177. During closing, the State argued regarding the three prior convictions:

So he’s been convicted of a serious offense at least once. I submit to you he’s been convicted of three but really only have to determine he’s at least been convicted of one.

2RP at 334.

## **2. Trial testimony**

Jennifer Denney lived in a house located in Vancouver, Washington. 2RP at 194. She was dating Tory Fletcher and in May 2016 he moved into her house. 2RP at 195. Ms. Denney paid the rent and Mr. Fletcher was not on the lease. 2RP at 194, 195.

Ms. Denney stated that she did not own guns and did not have any in her house prior to Mr. Fletcher moving in, and that he brought firearms with him when he moved into her house. 2RP at 197. Ms. Denney stated that Mr.

Fletcher showed her where two guns were in a bedroom closet. 2RP at 198. She alleged that he moved the guns from the closet to “a couple different places inside of the garage” and then moved them into a spare bedroom. 2RP at 198. Ms. Denney stated that Mr. Fletcher told her that he had previously been convicted of a felony. 2RP at 204-05.

Ms. Denney stated that around midnight on December 17 and December 18, 2016, Mr. Fletcher left her house. 2RP at 200-01. Clark County Sheriff Taylor Bossert was dispatched to Ms. Denney’s house and arrived shortly after midnight on December 18. 2RP at 211. He stated that while at her house, she brought a black and silver handgun to him “to make sure it wasn’t loaded.” 2RP at 212. He said that he cleared the gun and then put it on a kitchen cabinet. 2RP at 213.

A day later Ms. Denney contacted police and met a deputy at a motel down the street from her house and gave him two guns that she said belonged to Mr. Fletcher. 2RP at 202. Ms. Denney identified Exhibits 24 and 25 as guns that she gave the deputy. 2RP at 203-04.

Deputy Bossert stated that he saw the handgun he had seen at Ms. Denney’s house on December 18<sup>th</sup> when Ms. Denny gave the gun and a second handgun to Deputy Ethan Ogdee on December 19, which he then

placed into evidence. 2RP at 214. Deputy Ogdee testified that Ms. Denney wanted police to “pick up some firearms for safekeeping” and on December 19<sup>th</sup> he received two firearms from her at a Quality Inn, which he then transferred to Deputy Bossert. 2RP at 300-01.

Clark County Deputy Sheriff Kevin Schmidt test-fired a 9mm Bryco Arms Jennings Nine and a Taurus .38 cal. revolver obtained from the Property Evidence Unit and testified that both guns were operable. 2RP at 253, 254, 259. Exhibits 22, 23.

Nancy Druckenmiller compared fingerprints obtained from Mr. Fletcher at the time he was booked into the jail with fingerprints from a 2002 Judgment and Sentence in Cowlitz County cause no. 02-1-00861-2 for robbery in the second degree. Ms. Druckenmiller testified that the fingerprints matched the booking sheet fingerprints on the Judgment and Sentence. 2RP at 276. Exhibit 33A. The State also introduced Warrants of Commitment for two separate convictions for residential burglary in Pierce County cause no. 94-1-00319-6 and 94-1-01132-6. Exhibits 35A and 37A.

The defense rested without calling witnesses. 2RP at 314.

### **3. Verdict and sentence**

The jury found Mr. Fletcher guilty of both counts of first degree

unlawful possession of a firearm as charged in the third amended information. 2RP at 350-51; CP 78, 131, 132.

The matter came on for sentencing for Counts 2, 3, and 4 on November 7, 2017. RP (11/7/17) at 1-18. The State argued that Mr. Fletcher had an offender score of “10” and a standard range of 87 to 116 months and argued for 95 months for each count. RP (11/7/17) at 4, 6. The prosecution agreed that Counts 3 and 4 are the same criminal conduct. RP (11/7/17) at 4. Defense counsel requested a sentence at the bottom of the range. RP (11/7/17) at 9. Without comment regarding whether the counts constitute the same criminal conduct, the court imposed a sentence of 87 months for unlawful possession of a firearm, and 364 days for fourth degree assault with all days suspended, to be served concurrently,<sup>3</sup> followed by 12 months of probation and domestic violence evaluation and recommended treatment. RP (11/7/17) at 12; CP 370, 385. Following announcement of the sentence, Mr. Fletcher requested new counsel. RP (11/7/17) at 12. The court imposed legal financial obligations including \$500.00 for victim assessment, and \$100.00 felony DNA collection fee. RP (11/7/17) at 14; CP 375.

Timely notice of appeal was filed on November 28, 2018. CP 398. This appeal follows.

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<sup>3</sup>The concurrent sentences are in accord with *State v. McFarland*, 189 Wn.2d 47, 58, 399 P.3d 1106 (2017) (a sentencing court has discretion to impose an exceptional, mitigated sentence by imposing concurrent

**D. ARGUMENT**

**1. INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT BOTH CONVICTIONS FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE**

The State bears the burden of presenting sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.*; U.S. Const. amend. XIV; Wash. Const. art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1970); *State v. Hosier*, 157 Wash.2d 1, 8, 133 P.3d 936 (2006).

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v.*

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firearm-related sentences.)

*Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wash.2d at 201, 829 P.2d 1068. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In determining whether the necessary quantum of proof exists, the reviewing court v need not be convinced of the defendant's guilt beyond a reasonable doubt but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wash.App. 714, 718, 995 P.2d 107 (2000), review denied, 141 Wash.2d 1023, 10 P.3d 1074 (2000). Substantial evidence is evidence that “would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.” *State v. Hutton*, 7 Wash.App. 726, 728, 502 P.2d 1037 (1972).

Mr. Fletcher was charged with two counts of first degree unlawful possession of a firearm, contrary to RCW 9.41.040(1)(a). CP 78. The statute provides, in pertinent part:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

The element of possession may be established upon proof of either actual possession or constructive possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). A person has actual possession when he or she has physical custody of the item. *Id.*; *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person has constructive possession when he or she has “dominion and control” over the item, that is, he or she can reduce the item to actual possession. *Id.*; *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

To determine constructive possession a court examines whether, under the totality of the circumstances, the defendant exercised dominion and control over the item in question. *State v. Partin*, 88 Wash.2d 899, 906, 567 P.2d 1136 (1977), overruled on other grounds by *State v. Lyons*, 174 Wash.2d 354, 275 P.3d 314 (2012).

Constructive possession may be established by showing dominion and control either over the premises where the item was found or over the item itself. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001). Proof of dominion and control over the premises gives rise to a rebuttable presumption of dominion and control over items within the premises. *State v. Summers*, 107 Wn. App. 373, 389, 28 P.3d 780 (2001).

When an appellant challenges the sufficiency of evidence to establish constructive possession, the reviewing court is to look at the totality of the circumstances to determine whether the appellant had dominion and control over the premises or the item in question. *Id.*; *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

Here, the State sought to establish Mr. Fletcher had constructive possession of the guns. 2RP at 341. The deputy prosecutor argued that Mr. Fletcher was in constructive possession of the guns “because he was in the house with those guns right before midnight or right after midnight.” 2RP at 341. The mere fact that Mr. Fletcher had lived in the house up until shortly before police arrived, however, was insufficient to establish that he owned or possessed the guns that Ms. Denney gave to police a day later.

*State v. Callahan*, provides an example of insufficient evidence to support constructive possession. 77 Wash.2d 27, 459 P.2d 400 (1969). In that case, the defendant was temporarily residing on a houseboat, was in close proximity to the drugs, and admitted to handling the drugs momentarily. *Id.* at 31. The Court held that there must be substantial evidence to show dominion and control in order to find constructive possession; and found the defendant's mere proximity to and momentary handling of the drugs was not sufficient to

establish dominion and control. *Id.* at 29, 459 P.2d 400; see also *State v. Mathews*, 4 Wash.App. 653, 656, 484 P.2d 942 (1971).

To determine constructive possession a court examines whether, under the totality of the circumstances, the defendant exercised dominion and control over the item in question. *Partin*, 88 Wash.2d at 906. Factors supporting dominion and control include ownership of the item and, in some circumstances, ownership of the premises. But, having dominion and control over the premises containing the item does not, by itself, prove constructive possession. *State v. Tadeo–Mares*, 86 Wash.App. 813, 816, 939 P.2d 220 (1997).

Mere proximity is not enough to establish constructive possession. *State v. Potts*, 93 Wash.App. 82, 88, 969 P.2d 494 (1998). Temporary residence, personal possessions on the premises, or knowledge of the presence of the contraband, without more, are also insufficient to establish dominion and control. *State v. Hystad*, 36 Wn. App. 42, 671 P.2d 793 (1983).

In this case, it is not contested that Mr. Fletcher lived in the house from May, 2016 until around midnight on December 17, 2016. However, other than Ms. Denney's accusation that guns belonged to him, there is no evidence that he knew about the firearm seen by police on that night or the weapons given

to police on December 19, or that he had ever handled the weapon. The State presented no evidence of registration or of the legal owner or owners of the guns. And there was no other evidence linking Mr. Fletcher to the firearms; investigators did not find any fingerprints on the firearms. Other than Ms. Denney's accusation, there was no testimony that anyone ever saw or heard Mr. Fletcher buy, use, handle, or even refer to the firearms, or that he was even aware of presence of the guns in the house.

The proper remedy is reversal of the convictions based on insufficient evidence. A conviction based on insufficient evidence must be reversed and the charge dismissed. *State v. Kilburn*, 151 Wn.2d 36, 54, 84 P.3d 1215 (2004). To retry Mr. Fletcher for the same conduct would violate the federal and state constitutional prohibitions against double jeopardy. U.S. Const. amend. V; Wash. Const. art. 1, § 9. In the absence of sufficient evidence to establish beyond a reasonable doubt that Mr. Fletcher owned or possessed the guns, his conviction for unlawful possession of the guns must be reversed and the charges dismissed.

**2. THE CONVICTIONS MUST BE REVERSED  
AND THE CHARGES DISMISSED BECAUSE  
MR. FLETCHER WAS DENIED HIS RIGHT TO  
A SPEEDY TRIAL**

*a. Mr. Fletcher objected to the continuance of his trial.*

Mr. Fletcher, who remained out of custody, signed a waiver of speedy trial on May 9, 2017, setting a new commencement date. CP 12. A trial date was set for July 12, 2017 and a readiness hearing was set for July 6, 2017. RP at 14-16. At the July 6, 2017 hearing, defense counsel requested a continuance following an interview with State's witness Jennifer Denney, in order to obtain records to determine if she had a firearm in her possession when she was taken to the hospital on December 18, 2016 in order to challenge an assertion of constructive possession of the firearms and to investigate a potential chain of custody issue. 1RP at 18. Mr. Fletcher stated that he was not willing to waive speedy trial. 1RP at 20. The trial court was unwilling to grant the motion for continuance based on Mr. Fletcher's objection and trial remained set for July 12, which was 64 days past the commencement date of May 9. 1RP at 22. Defense counsel filed a motion and order for continuance on July 11, 2017 and the motion was heard the same day. 1RP at 27-40. Defense counsel argued that he needed a continuance in order to obtain additional police reports and EMT reports regarding the incident during which Ms. Denney gave two guns to law enforcement at a hotel where she was staying on December 19, 2016. 1RP at 31-32. The prosecution concurred that it was in the process of obtaining additional reports as requested by the defense and did not object to the defense's

motion to continue. 1RP at 31-32.

Despite Mr. Fletcher's objection, the court found good cause and in the administration of justice pursuant to CrR 3.3(f)(2) to continue the trial from July 12, 2017 to September 13, 2017. 1RP at 39.

***b. The court violated Mr. Fletcher's constitutional right to a speedy trial***

An accused is guaranteed the right to a speedy trial by both the federal and state constitutions. *Barker v. Wingo*, 407 U.S. 514, 531-32, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972); U.S. Const. amend. VI; Const. art. I, § 22. Our state constitution "requires a method of analysis substantially the same as the federal Sixth Amendment analysis and does not afford a defendant greater speedy trial rights." *State v. Iniguez*, 167 Wn.2d 273, 290, 217 P.3d 768 (2009). Where a defendant claims the denial of constitutional speedy trial rights, review is de novo. *Iniguez*, 167 Wn.2d at 280.

Under both the federal and state constitutions, this Court must use the balancing test introduced in *Barker* to determine if the pretrial delay violated the defendant's speedy trial right. *Iniguez*, 167 Wn.2d at 283. The balancing test examines the conduct of both the State and the defendant to determine whether speedy trial rights have been denied." *Iniguez*, 167 Wn.2d at 283. As articulated in *Barker*, the factors to be considered are: (1) the length of pretrial delay, (2)

the reason for delay, (3) the defendant's assertion of his or her right, and (4) prejudice to the defendant. 407 U.S. at 530.

The right to a speedy trial is a fundamental right under Washington's speedy trial rule. *State v. Ross*, 98 Wn. App. 1, 4, 981 P.2d 88 (1999). CrR 3.3 provides that a defendant has a right to be brought to trial within 90 days of the arraignment if the defendant is not held in custody, or within 60 days if the defendant is incarcerated during that time period.

CrR 3.3 ensures that criminal defendants are granted a speedy trial by governing the time for arraignment and trial. *State v. Huffmeyer*, 145 Wn.2d 52, 56, 32 P.3d 996 (2001). The State is primarily responsible for seeing that the defendant is tried in a timely manner, although the trial court is ultimately responsible for enforcing the speedy trial rule. *State v. Ross*, 98 Wn.App. 1, 4, 981 P.2d 888 (1999).

Certain periods may be excluded in computing the time for trial, including valid continuances granted by the court pursuant to CrR 3.3(f). CrR 3.3(e)(3). The court is required to state the reasons for the delay on the record. CrR 3.3(f)(2).

The determination of whether a defendant's time for trial has elapsed in violation of CrR 3.3 requires application of the court rules to the particular facts

of the case and is, therefore, reviewed de novo. *State v. Swenson*, 150 Wn.2d 181, 186, 75 P.3d 513 (2003); *State v. Ollivier*, 178 Wn.2d 813, 826, 312 P.3d 1 (2013), *State v. Lackey*, 153 Wn. App. 791, 798, 223 P.3d 1215 (2009), review denied, 168 Wn.2d 1034, 230 P.3d 1061 (2010).

*c. Mr. Fletcher's right to a speedy trial was not waived by his attorney's unilateral request for a continuance*

Mr. Fletcher contends that the trial court abused its discretion in granting defense counsel's motion for a continuance of trial over his objection. Where a defendant repeatedly objects to further continuances and insists upon his right to a speedy trial, that request must be respected. This Court has therefore dismissed convictions for a CrR 3.3 violation despite defense counsel's agreement to continuances beyond the speedy trial period. *State v. Saunders*, 153 Wash.App. 209, 217, 220 P.3d 1238 (2009). In *Saunders*, two continuances were requested by defense counsel for the purpose of investigation or preparation for trial, two were agreed motions purportedly for the purpose of negotiations, and two were requested by the State without adequate explanation—but Saunders personally objected to all six, refused to sign each and every continuance form, and moved to dismiss pro se. *Id.* at 212-15. Because he “consistently resisted extending time for trial,” this Court found he did not waive his objection. *Id.* at 220.

Here Mr. Fletcher objected to the continuance at the hearing on July 6 ,

2017 (IRP at 20), and again on the eve of trial on July 11, 2017. IRP at 35.

Mr. Fletcher's continuous objections weigh in favor of finding a violation of his constitutional speedy trial rights. *Barker*, 407 U.S. at 529-30, 533. As an initial matter, Mr. Fletcher himself was never himself the basis for any continuance.

Although a continuance of approximately four weeks beyond speedy trial is not a particularly lengthy delay, another factor weighs in favor of a speedy trial violation; the facts of the case are not particularly complex and involve very few witnesses, no forensic evidence and simply amount to a "he said/she said" testimony. Despite the request for a continuance further investigate the circumstances under which the guns were given by Ms. Denney to the officers, cross examination of Ms. Denney consisted of slightly more than one page of typed transcript.

The fact of the case are in contrast to *State v. Campbell*, 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984), in which the trial court was found to have not abused its discretion in granting a continuance requested by defense counsel to prepare for a capital trial, even over the defendant's objection. *Campbell* involved three counts of aggravated first degree murder, aggravating factors, the death penalty, and large amounts of complex forensic physical evidence, but the

trial was delayed for only six months and the defendant objected to only a single continuance. *Id.* at 5-15. Here, Mr. Fletcher's case was decidedly not complex and after initially waiving speedy trial he objected at each subsequent hearing in which a continue was discussed.

In this case, the trial court abused its discretion by granting continuances over Mr. Fletcher's objections. Absent valid bases for the continuances, the trial court lacked authority to bring Mr. Fletcher to trial outside the 90-day speedy trial period. Thus, under the federal and state constitutions as well as CrR 3.3, Mr. Fletcher's convictions must be reversed and remanded for entry of an order dismissing the charges with prejudice.

### **3. THE TRIAL COURT GAVE A DEFECTIVE LIMITING INSTRUCTION**

An accused has the right to a limiting instruction to minimize the damaging effect of properly admitted—but limited—evidence by explaining the limited purpose of that evidence. *State v. Donald*, 68 Wn. App. 543, 547, 844 P.2d 447 (1993). Once the trial court rules that the evidence is admissible for one purpose, the court should give limiting instructions to direct the jury to focus solely on its permissible evidentiary effect. *State v. Griswold*, 98 Wn. App. 817, 825, 991 P.2d 657 (2000), abrogated on other grounds, (abrogated on other grounds by *State v. DeVincentis*, 150 Wash.2d 11, 74 P.3d 119

(2003)).

An adult or juvenile who possesses a firearm after being convicted of any serious criminal offense is guilty of first degree unlawful possession of a firearm. RCW 9.41.040(1)(a). to have committed first degree unlawful possession of a firearm, a class B felony, a defendant must have a prior conviction that qualifies as a serious offense. RCW 9.41.040(1)(a), (b). Second degree unlawful possession of a firearm, a class C felony, requires only a prior conviction of a felony that is not a serious offense, or certain gross misdemeanors. RCW 9.41.040(2)(a), (b). The State must prove all of the elements of the crime beyond a reasonable doubt, including that the defendant has been previously convicted of any other felony offense. *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002).

Prior convictions that elevate a crime from a Class C felony to Class B felony need to be proved to a jury. See *Blakely v. Washington*, 542 U.S. 296, 302–05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *State v. Roswell*, 165 Wn.2d 186, 197–98, 196 P.3d 705 (2008) (where prior conviction is an element of the crime charged, it is not error to allow jury to hear evidence on that issue). To avoid the details of the prior offense being placed before the jury, a defendant may stipulate to the predicate offense. See *Old Chief v.*

*United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997);  
*State v. Gladden*, 116 Wn. App. 561, 565–66, 66 P.3d 1095 (2003). In this  
case, Mr. Fletcher elected not to stipulate to the prior convictions.

The court gave the following instruction to the jury:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of documents and testimony relating to previous convictions of the defendant and may be considered by you only for the purpose of determining whether those convictions have been proved beyond a reasonable doubt. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

Jury Instruction 3, CP 117.

A court reviews the adequacy of jury instructions de novo as a question of law. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996). Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999).

Once either party requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction. *State v. Gresham*, 173 Wn.2d at 424. “[J]ury

instructions read as a whole must make the relevant legal standards manifestly apparent to the average juror.” *State v. Marquez*, 131 Wn. App. 566, 575, 127 P.3d 786 (2006). A trial court is under no obligation to give inaccurate or misleading instructions. *State v. Ehrhardt*, 167 Wn. App. 934, 939, 276 P.3d 332 (2012).

Here, the instructions given is legally insufficient because it did not instruct the jury it could only use the fact of the prior convictions to decide an element of Counts 3 and 4. Instead, the instruction left the jury free to consider the fact of the prior convictions as propensity evidence. The mistake is significant enough that there is a reasonable probability that it affected the outcome. The jury was not instructed to consider fact of the prior convictions to prove an element of the offenses. The limiting instruction allowed the jury to consider a prior conviction as evidence of a propensity to commit crimes. The prejudice was exacerbated by the State’s use of three prior convictions for a serious felonies to prove the fact that Mr. Fletcher had a prior conviction that elevated second degree unlawful possession of a firearm to a first degree unlawful possession of a firearm.

Such error requires reversal if within reasonable probability, the evidence materially affected the outcome of the trial. *State v.*

*Everybodytalksabout*, 145 Wash.2d 456, 468–69, 39 P.3d 294 (2002). Here, based on the “he said/she said” nature of the evidence, it cannot say with sufficient confidence that the jury would have found Mr. Fletcher guilty without being correctly instructed that evidence of the prior convictions was intended to be limited to the purpose of determining a specific element of the crimes only.

**4. MR. FLETCHER’S SENTENCE WAS BASED ON AN IMPROPERLY CALCULATED OFFENDER SCORE**

Although the defense and State were in apparent agreement that counts 3 and 4 compromised the same criminal conduct, the sentencing court inexplicably did not make a ruling that the two current convictions for unlawful possession of a firearm encompassed the same criminal conduct. The sentencing court failed to reach a determine if the counts are the same criminal conduct.

The SRA directs a trial court to determine whether multiple current offenses encompass the “same criminal conduct” for purposes of calculating a defendant’s offender score. RCW 9.94A.589(1)(a); *State v. Murphy*, 98 Wn.2d 42, 51, 988 P.2d 1018 (1999).

Judicial review of a trial court’s determination regarding same criminal

conduct is based on abuse of discretion or misapplication of law. *State v. Maxfield*, 125 Wn. 2d 378, 402, 886 P.2d 123 (1994). An accused may challenge “[t]he procedure by which a sentence within the standard range was imposed.” *State v. Ammons*, 105 Wn.2d 175, 181, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986).

The crimes charged in this case involved the same time, the same place, and the same victim. The Legislature has provided that (1) each firearm a defendant possesses is a separate offense, RCW 9.41.040(7); but (2) when separate offenses encompass the “same criminal conduct,” they count as one crime for offender-score calculation purposes, RCW 9.94A.589(1)(a). Multiple crimes encompass the “same criminal conduct” if they result from the same criminal intent, involve the same victim, and occur at the same time and place. RCW 9.94A.589(1)(a). Unlawful firearm possession convictions constitute the same criminal conduct if the possessions occurred at the same time and place. *State v. Simonson*, 91 Wash.App. 874, 885–86, 960 P.2d 955 (1998), review denied, 137 Wash.2d 1016, 978 P.2d 1098 (1999).

Ms. Denney testified that the guns were in the house and did not testify they were kept in separate rooms or in separate places and both were given to police at the same time. The general public is the victim of the crime

of unlawful possession of a firearm. *State v. Haddock*, 141 Wn.2d 103, 110-11, 3 P.3d 733 (2000). Thus, multiple current convictions for unlawful possession of a firearm at the same time and place constitute the same criminal conduct as a matter of law. *State v. Simonson*, 91 Wn. App. 874, 886, 960 P.2d 955 (1998).

Here, contrary to the mandate of the SRA, the sentencing court failed to consider whether the two firearm convictions encompassed the same criminal conduct. The court abused its discretion in failing to exercise its discretion. Remand for resentencing is required to give the court an opportunity to exercise its discretion.

**5. THE COURT ERRED WHEN IT DENIED MR. FLETCHER'S MOTION TO WITHDRAW HIS GUILTY PLEA TO COUNT 2**

A court shall allow a defendant to withdraw a guilty plea "whenever it appears that the withdrawal is necessary to correct a manifest injustice." CrR 4.2(f). CrR 4.2 states in pertinent part:

(d) Voluntariness. The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

(f) Withdrawal of Plea. The court shall allow a defendant to withdraw the defendant's plea of guilty whenever

it appears that the withdrawal is necessary to correct a manifest injustice.

The appellate courts have developed four criteria of manifest

Injustice:

denial of effective assistance of counsel; (2) failure of the defendant or one authorized by him to do so ratify the plea; (3) involuntary plea; and (4) violation of the plea agreement by the prosecution.

See generally, *State v. Taylor*, 83 Wn.2d 594, 521 P.2d 699 (1974);

*State v. Ross*, 129 Wn.2d 279, 283, 916 P.2d 405 (1996).

A motion to withdraw a guilty plea is reviewed for abuse of discretion.

*State v. Hurt*, 107 Wn.App. 816, 828, 27 P.3d 1276 (2001) (citing *State v.*

*Martinez-Lazo*, 100 Wn.App. 869, 872, 999 P.2d 1275, review denied, 142

Wn.2d 1003 (2000)).

If coerced, a plea of guilty is involuntary and constitutes a manifest injustice. Here, Mr. Fletcher's plea was involuntary because it was entered under duress and coercion. Mr. Fletcher entered the plea in apparent fear that testimony regarding the alleged fourth degree assault involving Ms. Denney would be prejudicial. The plea, however, left Mr. Fletcher unable to delve into possible motive for Ms. Denney to claim the guns she gave to police belonged to Mr. Fletcher. After entering the plea, Mr. Fletcher was unable to inquire regarding the facts of the assault and was therefore unable present his theory

that Ms. Denny fabricated the claim due to anger at him resulting from the incident and resulting end of the relationship.

Plea bargaining pressures may render a plea involuntary. *State v. Swindell*, 93 Wn.2d 192, 198-99, 607 P.2d 852 (1980). Coercion renders a guilty plea involuntary whether or not the State was involved in or knew about the coercion. *State v. Frederick*, 100 Wn.2d 550, 556, 558-59, 674 P.2d 136 (1983) (reversed and remanded for a new trial on habitual criminal charge in which the defendant may present evidence of coercion in entering plea).

Although a defendant may indicate in his plea statement that the plea is being made "freely and voluntarily," that statement is not conclusive evidence that the plea was in fact voluntary, and it does not preclude a later claim of coercion. *Frederick*, 100 Wn.2d at 557. A bare allegation of coercion, without other evidence in the record, is, however, insufficient to overcome a defendant's statements in the plea proceeding indicating that the plea was voluntary. *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984). Here, the fact that Mr. Fletcher's fear that the facts of the assault would be prejudicial resulted an unwise decision to enter an Alford plea because he was not able to "tell the jury the whole story," a fact he apparently realized the following day when he moved to withdraw his plea. 2RP at 178, 179. The

circumstances of the change of plea indicate Mr. Fletcher's plea was the result of coercions in the form of fear of the evidence would be viewed by the jury, without full consideration of the facts.

In sum, Mr. Fletcher's due process rights were violated because his guilty plea was coerced and not voluntary. *Henderson v. Morgan*, 426 U.S. 637, 645, 49 L.Ed.2d 108, 96 S.Ct. 2253 (1976) (quoting *Smith v. O'Grady*, 312 U.S. 329, 334, 85 L.Ed.859, 61 S.Ct. 572 (1941)). This Court should reverse the trial Court's ruling denying Mr. Fletcher's motion, and remand for a hearing on the merits of Mr. Fletcher's motion to withdraw his *Alford* plea to fourth degree assault.

**6. THE TRIAL COURT VIOLATED MR. FLETCHER'S  
RIGHT TO A FAIR TRIAL BY ADMITTING  
EVIDENCE OF THREE PRIOR FELONY  
CONVICTIONS**

In order to find a person guilty of unlawful possession of a firearm in the first degree, the State must prove "a person, whether an adult or juvenile, . . . has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . of any serious offense as defined in this chapter." RCW 9.41.040(1)(a)(i).

Under ER 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion

of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” ER 403. “Evidence that is likely to elicit an emotional response, rather than a rational decision, is unfairly prejudicial.” *State v. Rivera*, 95 Wn. App. 132, 137, 974 P.2d 882 (1999), modified by 992 P.2d 1033 (2000) (citing *State v. Rice*, 48 Wn. App. 7, 13, 737 P.2d 726 (1987)).

Here, to convict Mr. Fletcher of both counts of unlawful possession of a firearm in the first degree, the State had to prove that he had previously been convicted of a serious offense. RCW 9.41.040(1)(a). The prejudicial effect of Mr. Fletcher’s three prior convictions for serious offenses substantially outweighs their probative value, given that only one was necessary to prove the required element of the charged crimes. See ER 403. Because just one conviction would have proved he was a felon, the probative value of the additional two prior convictions was negligible. See *State v. Johnson*, 90 Wn. App. 54, 63, 950 P.2d 981 (1998).

Furthermore, there was a great likelihood that the jury’s verdict was tainted by their emotional response to the evidence that he convicted of the felonies, including two counts of burglary and one first degree robbery. See *Rivera*, 195 Wn. App. at 139. The sheer number of prior convictions raises the

risk that the verdict was based on improper considerations.

In addition, where only one prior felony was required to convict Mr. Fletcher of both counts of unlawful possession of a firearm in the first degree, the admission of the two additional prior convictions was “needless presentation of cumulative evidence.” ER 403. Accordingly, the trial court abused its discretion in admitting all of the prior felony convictions.

**7. MR. FLETCHER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL**

The federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. 6; Const. art. 1, § 22 (amend. 10); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). Ineffective assistance of counsel is established if: (1) counsel’s performance was deficient, and (2) the deficient performance prejudiced the defendant. *Thomas*, 109 Wn.2d at 225-26 (adopting two-prong test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Deficient performance occurs when counsel’s conduct falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for counsel’s unprofessional errors, there is a reasonable probability that the outcome of the proceeding would have differed. *In re Personal Restraint of Pirtle*, 136

Wn.2d 467, 487, 965 P.2d 593 (1998).

*a. Defense counsel was ineffective for failing to argue the two firearm convictions encompassed the same criminal conduct*

Here, defense counsel's performance was deficient and prejudicial for failure to argue the two convictions for unlawful possession of a firearm constituted the same criminal conduct for purposes of calculation of Mr. Fletcher's offender score. As discussed above, multiple current convictions for unlawful possession of a firearm at the same time and place are the "same criminal conduct" as a matter of law. No conceivable tactical strategy could justify counsel's failure to advocate for a correct offender score, especially where, as here, the law supporting same criminal conduct is well-settled.

Accordingly, Mr. Fletcher's trial counsel provided deficient assistance by failing to argue that offenses constitute the same criminal conduct and he was prejudiced by being sentenced pursuant to an erroneous offender score.

The proper remedy is reversal of the sentence and remand for sentencing based on a properly calculated offender score. See *In re Personal Restraint of LaChapelle*, 152 Wn.2d 1, 14, 100 P.3d 805 (2004).

*b. Defense counsel was ineffective for failing to object to the erroneous limiting instruction*

As argued above, the limiting instruction (Instruction No. 3, CP 117) was improper because it failed to inform the jury of the proper purpose for which they could consider the prior convictions; to decide an element of the charged offenses. There was no legitimate reason for defense counsel not to object to the trial court's erroneous instruction. By failing to object, defense counsel allowed the jury to consider Fletcher's prior convictions for improper purposes, including as propensity evidence.

Defense counsel's deficient performance also prejudiced Mr. Fletcher. The State presented only the testimony of Ms. Denney that he brought the guns with him when he moved in with her, and law enforcement testimony that they saw one handgun on the morning of December 18 when responding to the domestic violence call and were given two guns by Ms. Denney the following day. No evidence other than her accusation puts Mr. Fletcher in the same room as the guns, and no evidence points towards ownership or use of the guns other than her accusation. Allowing the jury to consider Mr. Fletcher's convictions for second degree robbery and residential burglary for any purpose other than establishment of the element of a prior serious conviction, casts the Mr. Fletcher's conviction in doubt. Counsel's failure to object to the erroneous jury instruction therefore undermines confidence in the

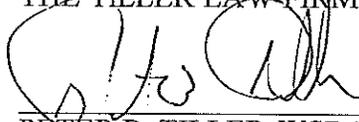
outcome of Mr. Fletcher's case. This Court should reverse his convictions.

**E. CONCLUSION**

The State presented insufficient evidence to support two convictions for unlawful possession of a firearm beyond a reasonable doubt. Based on the foregoing facts and authorities, Mr. Fletcher respectfully asks this Court to reverse his convictions for first degree unlawful possession of a firearm and dismiss the charges with prejudice. In addition, Mr. Fletcher's sentence was based on an improperly calculated offender score when the court failed to reach a decision if the two counts are the same criminal conduct. For the foregoing reasons, Mr. Fletcher respectfully requests this Court reverse and dismiss both convictions for unlawful possession of a firearm. In the alternative, Mr. Fletcher requests this Court reverse his sentence and remand for sentencing based on an offender score properly calculated by considering the two firearms convictions as the "same criminal conduct."

DATED: June 27, 2018.

Respectfully submitted,  
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CERTIFICATE OF SERVICE

The undersigned certifies that on June 27, 2018, that this Appellant's Opening Brief was sent by the JIS link to Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, Clark County Prosecutor and copies were mailed by U.S. mail, postage prepaid, to the following:

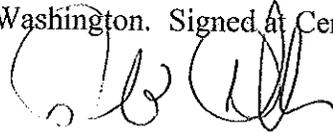
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 27, 2018.



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**THE TILLER LAW FIRM**

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