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Division II  
State of Washington  
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NO. 51152-5-II

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

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STATE OF WASHINGTON, Respondent

v.

TORY DEANDRE FLETCHER, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-00438-3

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BRIEF OF RESPONDENT

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## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **The State presented sufficient evidence that Fletcher unlawfully possessed two firearms.**
- II. **Fletcher received a “speedy trial.”**
- III. **The limiting instruction given regarding Fletcher’s prior convictions, to which he did not object, did not allow the jury to consider the evidence for any improper purpose.**
- IV. **Fletcher’s two convictions for Unlawful Possession of a Firearm in the First Degree constituted the same criminal conduct.**
- V. **The trial court did not abuse its discretion when it denied Fletcher’s motion to withdraw his plea to the domestic violence assault.**
- VI. **The trial court did not abuse its discretion when it allowed the State to present evidence of three prior convictions for serious offenses where an element of Unlawful Possession of a Firearm in the First Degree required the State to prove a conviction for a serious offense.**
- VII. **Fletcher received the effective assistance of counsel.**

## STATEMENT OF THE CASE

### A. PROCEDURAL HISTORY

On February 26, 2017, Tory Dean Fletcher was arrested based on probable cause for an incident on or about December 18, 2016 in which he assaulted Jennifer Denney, a former girlfriend. CP 2-5. Following his arrest, and during the booking process, the police discovered methamphetamine on Fletcher’s person. CP 4-5. On March 1, 2017, the

State charged Fletcher by information with Possession of a Controlled Substance – Methamphetamine and Assault in the Fourth Degree (Domestic Violence). CP 5.

After a review of the full police reports, the State moved to amend the information to add two counts of Unlawful Possession of a Firearm in the First Degree. RP 1; CP 7-8. The trial court allowed the amendment and the amended information was filed on May 9, 2017. RP 7-9; CP 10-11. On that same day, Fletcher, who was out of custody, waived his right to a speedy trial with a new commencement date of May 9, 2017. RP 11- 17; CP 12-13. Fletcher’s new trial date was set for July 12, 2017 with 64 days elapsed. RP 11- 17; CP 12-13.

When Fletcher appeared on July 6, 2017, his trial counsel made an oral motion to continue the trial, but Fletcher was not in agreement. RP 17-20. The court encouraged Fletcher’s counsel to file a written motion. On July 11, 2017, the day before the scheduled trial, Fletcher’s trial counsel again moved for a continuance. RP 28-31. This time he also filed a written motion in support of his request. CP 17-19. Fletcher’s trial counsel indicated that as a result of a recent interview and evidence viewing that he needed a continuance to further investigate the case to include the opportunity to obtain police reports that may have existed regarding the chain of custody of the firearms. RP 28-31; CP 18. The State

did not object to the continuance request and corroborated defense counsel's factual recitation. RP 31-32.

Nonetheless, Fletcher continued to object to the continuance and declined to waive his speedy trial rights. RP 35. The trial court based on the foregoing, however, found good cause for the continuance and continued the trial to September 13, 2017. RP 37-38.

Fletcher's case proceeded to trial as scheduled on September 13, 2017, but the day before it began the trial court heard motions and the State moved to dismiss the drug count. RP 56-57; CP 22, 27, 43. Additionally, following the trial court's denial of Fletcher's motion to sever the assault count from the gun counts, Fletcher pleaded guilty to Assault in the Fourth Degree (Domestic Violence) by way of a *Newton*<sup>1</sup> plea. RP 57-58, 77-82, 103-111; CP 23-26, 44-46. Because of the plea, the parties and the trial court agreed that the assault evidence was no longer relevant and not relevant to prove the Unlawful Possession of a Firearm counts. RP 111-16.

The next day, but before the first witness was called, Fletcher moved pro se to withdraw his guilty plea. RP 178-181. And while Fletcher did not make much of a record, it appears he desired to withdraw the plea in order to tell the jury the "whole story." RP 179. The trial court denied

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<sup>1</sup> *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

the motion and noted that the plea was made “knowingly, intelligently, and voluntarily and with the advice of counsel.” RP 180-81, 184. Thus, by the time the case made it to the jury—when considering the dismissal of the drug charge and the plea to the assault—Fletcher faced two counts of Unlawful Possession of a Firearm in the First Degree for possessing two handguns “on or about December 17, 2016, through December 18, 2016.” CP 78-79, 126-27.

The jury convicted Fletcher of both firearm crimes. RP 350-55; CP 131-32. At the sentencing hearing the State mentioned that the crimes were “the same criminal conduct” and indicated that defense was in agreement. Supp. RP 4. Neither Fletcher nor the trial court mentioned the same criminal conduct doctrine, however, and the trial court failed to make the associated same criminal conduct finding in Fletcher’s judgment and sentence. CP 371. Regardless of this failure, Fletcher’s standard sentencing range of 87 to 116 months remained the same because his criminal history put his offender score at 10. CP 372, 382.<sup>2</sup> The trial court sentenced Fletcher to a low-end sentence of 87 months. This timely appeal follows. CP 398.

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<sup>2</sup> The judgment and sentence lists Fletcher’s offender score as 9. CP 372.

B. STATEMENT OF FACTS

In June of 2015, Jennifer Denney met Tory Fletcher, they began dating, and by May of 2016 Fletcher moved into Denney's Vancouver home. RP 194. Fletcher was not added to Denney's lease, but he had a key and moved his belongings into the house. RP 195-96. When Fletcher moved in he brought two handguns with him, showed them to Denney, and showed her where he put them. RP 197-98, 203-04. Denney did not have any guns in her home prior to Fletcher moving in. RP 197.

Fletcher told Denney that he was a felon and that the guns were for protection. RP 200, 204-05. From time to time, Fletcher would relocate the guns within the house to include the garage and a spare bedroom. RP 198-99.

On or about late night December 17, 2016 and the very early morning of December 18, 2016, Fletcher assaulted Denney. CP 44-46.<sup>3</sup> Just after that incident, the police were dispatched to Denney's residence and Fletcher left the home. RP 200-01, 205-06. Fletcher left his guns behind. RP 200-01, 205-06. When a deputy arrived, Denney handed him a black and silver handgun, told him she did not like the gun being in the house, and asked him to make sure it was unloaded. RP 201, 212-13. The deputy cleared the gun, put it on a cabinet, and left it at the home. RP 213.

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<sup>3</sup> The trial testimony did not include the assault allegation.

The next day, Denney contacted the police again and met a deputy at a nearby hotel so that she could give the deputy Fletcher's handguns. RP 201-02, 300-01, 305-06. A deputy responded and took possession of the two handguns and gave them to another deputy to put into evidence. RP 214, 300-01, 305-06. Both firearms were functional. RP 246-259.

### ARGUMENT

#### **I. The State presented sufficient evidence that Fletcher unlawfully possessed two firearms.**

Evidence is sufficient to support a conviction if, when viewed in a 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. Salinas*, 119 Wn.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 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Furthermore, “specifics regarding date, time, place, and circumstance are factors regarding credibility . . .” and, thus, matters a jury best resolves. *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788 (1996) *rev. denied* 130 Wn.2d 1013 (1996). In order to determine whether the necessary quantum of proof exists, the reviewing court “need not be convinced of the defendant’s guilt beyond a reasonable doubt but only that substantial evidence supports the State’s case.” *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citations omitted).

Possession can be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession requires physical custody of, or direct physical control over, the item. *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572 (1996); *Henderson v. U.S.*, --- U.S. ---, 135 S.Ct. 1780, 1784, 191 L.Ed.2d 874 (2015). Constructive possession, on the other hand, “is established when a person, though lacking such physical custody, still has the power and intent to exercise control over the object.” *Henderson*, 135 S.Ct. at 1784 (citation omitted); *State v. Callahan*, 77 Wn.2d 27, 31 459 P.2d 400 (1969) (holding constructive possession requires dominion and control over the item). “The idea of constructive possession is designed to preclude,” for example, a felon from having control of guns while another person keeps physical custody. *Henderson* 135 S.Ct. at 1785 (quoting *United States v.*

*Al-Rekabi*, 454 F.3d 1113, 1118 (10th Cir. 2006)). Exclusive control is not necessary to establish constructive possession as possession can be joint amongst individuals, but proximity to the contraband, while a factor, is insufficient by itself to establish constructive possession. *State v. Chouinard*, 169 Wn.App. 895, 899, 282 P.3d 117 (2012); *State v. Raleigh*, 157 Wn.App. 728, 737, 238 P.3d 1211 (2010); *State v. George*, 146 Wn.App. 906, 920, 193 P.3d 693 (2008). The same can be said for mere knowledge of the presence of an item. *Chouinard*, 169 Wn.App. at 899 (citation omitted).

“Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found.” *Id.* at 899-900 (citing cases). In fact, when a person has dominion and control over premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises. *State v. Reichert*, 158 Wn. App. 374, 390, 242 P.3d 44 (2010) (citing *State v. Summers*, 107 Wn.App. 373, 389, 28 P.3d 780, 43 P.3d 526 (2001)).

Here, Denney almost exclusively provided the evidence of Fletcher’s possession of the two firearms and the jury could not have convicted Fletcher without finding her credible. Her credibility was also corroborated by her actions with and statements to responding deputies to

include telling one that she did not like having the gun in the house and asking him to make sure it was unloaded. Given this necessary credibility finding, Denney provided overwhelming evidence of Fletcher's guilt when she testified that Fletcher moved in with her, brought his guns, told her that he kept them for protection, and stored them in various locations—so that he could access them—within the home. Because he lived at Denney's home Fletcher is rightly considered to have had dominion and control over the firearms he brought to and controlled at Fletcher's home. Thus, taking the evidence in the light most favorable to the State, Fletcher had constructive possession over the firearms until the time at which Denney turned them over the police on December 19, 2016.

## **II. Fletcher received a “speedy trial.”**

Fletcher argues that he did not receive a speedy trial. Whether his argument is based on CrR 3.3, the Constitution, or some form of hybrid is unclear<sup>4</sup> but inconsequential as the State provided Fletcher with a speedy trial under any formulation.

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<sup>4</sup> Fletcher's third assignment of error is that “[t]he 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.” Brief of Appellant at 1. Fletcher's second issue pertaining to assignments of error suggests the trial court violated CrR 3.3 by “abus[ing] its discretion by granting a continuance for ‘good cause’ beyond the speedy trial period. . . .”. Br. of App. at 2. Meanwhile in Fletcher's argument section he states that “[t]he court violated Mr. Fletcher's constitutional right to a speedy trial” but seemingly transitions from that argument back into a rule based one. Br. of App. at 19-22.

a. Rule-based Right to a Speedy Trial

Under CrR 3.3(b)(2) a defendant who is not detained in jail shall be brought to trial within 90 days of arraignment though certain time periods are excluded from the calculation such as continuances granted for good cause, i.e., those required in the administration of justice. CrR 3.3(e)(3), CrR 3.3(f)(2). A trial court's decision to grant or deny a motion for a continuance is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Kenyon*, 167 Wn.2d 130, 135, 216 P.3d 1024 (2009). Continuances sought to enable defense investigation or preparation for trial are generally considered permissible and are those in which "counsel has authority to make binding decisions to seek." *State v. Ollivier*, 178 Wn.2d 813, 824-25, 312 P.3d 1 (2013); *State v. Flinn*, 154 Wn.2d 193, 200, 110 P.3d 748 (2005) (citing cases).

When defense counsel seeks such continuances CrR 3.3(f)(2) applies. *Id.* at 823-35. CrR 3.3(f)(2) provides, in part, "that a motion for continuance 'by or on behalf of any party waives that party's objection to the requested delay.'" *Id.* at 823 (quoting CrR 3.3(f)(2)). Consequently, when defense counsel makes a proper continuance request over his client's objection said request waives the defendant's rule-based speedy trial right. *Id.* at 825-26.

Here, Fletcher's trial counsel moved for a continuance so he could further investigate Fletcher's case and to prepare for trial. RP 28-31; CP 17-19. Because of this motion for a continuance, Fletcher's objection to the delay of his trial under CrR 3.3 is waived. *Ollivier*, 178 Wn.2d at 823; CrR 3.3(f)(2). Fletcher relies on *State v. Saunders* for the proposition that his trial counsel's motion for a continuance does not waive his rule-based argument. 153 Wn.App. 209, 220 P.3d 1238 (2009); Br. of App. at 21. But Fletcher fails to contend with our Supreme Court's decision in *Ollivier*, which distinguished *Saunders* by noting:

In *Saunders*, three continuances at issue were granted that the Court of Appeals found to be unsupported by convincing and valid reasons. Indeed, the continuances were granted to permit ongoing plea negotiations over the defendant's objection and contrary to his desire to go to trial. As the State points out in the present case, whether to plead guilty is an objective of representation controlled by the defendant and not a matter of trial strategy to achieve an objective. In contrast, under CrR 3.3, counsel has authority to make binding decisions to seek continuances. *Saunders* is unlike Mr. Ollivier's case because here the continuances were sought to enable defense investigation and preparation for trial.

178 Wn.2d at 824-25 (internal footnote and citation omitted). Fletcher finds himself in the same position as the defendant in *Ollivier*, as such the holding of *Ollivier* applies while Fletcher's reliance on *Saunders* is misplaced; Fletcher's rule-based objection is waived.

b. Constitutional Right to a Speedy Trial

Review of the constitutional right to a speedy trial is de novo. *State v. Iniguez*, 167 Wn.2d 273, 280-81, 217 P.3d 768 (2009). In order to establish a violation of the constitutional right to a speedy trial a defendant “must establish *actual* prejudice to the ability to prepare a defense.” *Ollivier*, 178 Wn.2d at 826 (emphasis added). A defendant, however, can be relieved from that requirement when “the delay is so lengthy that prejudice to the ability to defend must be conclusively presumed.” *Id.* This is a threshold enquiry, i.e., in “order to trigger the speedy-trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from presumptively prejudicial delay.” *Id.* at 827 (citation and internal quotation omitted).

Here, Fletcher does not address the threshold question nor allege any prejudice to the ability to prepare his defense. Br. of App. at 21-23. In fact, Fletcher concedes that a “continuance [over his objection] of approximately four weeks . . . is not a particularly lengthy delay. . . .” Br. of App. at 22. Consequently, there is no reason to go any further and his argument that he was not accorded a constitutional, speedy trial is without merit.

If Fletcher were to have satisfied the threshold enquiry this court would “use the balancing test set out in *Barker v. Wingo*, 407 U.S. 514, 92

S.Ct. 2182, 33 L.Ed.2d 101 (1972) to determine whether a constitutional violation has occurred.” *Ollivier*, 178 Wn.2d at 827. Our Supreme Court’s extremely detailed application of the *Barker* test in *Ollivier*, where the defendant spent almost two years *in custody* awaiting trial but whose right to a speedy trial was not violated, shows that even had Fletcher, who was *not* in custody, met the threshold enquiry that he would still fall far short of establishing a violation of his right to a speedy trial. *See* 178 Wn.2d at 828-846.

**III. The limiting instruction given regarding Fletcher’s prior convictions, to which he did not object, did not allow the jury to consider the evidence for any improper purpose.**

Because Fletcher did not stipulate to a prior offenses that made his possession of firearms unlawful the State was required to prove a prior offense. RP 170-77; *State v. Roswell*, 165 Wn.2d 186, 197-98, 196 P.3d 705 (2008); RCW 9.41.040(1)(a). Thus, the State put on evidence showing that Fletcher had been convicted, on three separate occasions, of serious offenses. RP 171-72, 262-282; Ex. 33A, 34A, 35A, 36A, 37A, 38A. In turn, this evidence necessitated a limiting instruction based on WPIC 5.30, which was given as follows:

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.

CP 117. Fletcher did not object to this instruction nor propose his own limiting instruction. RP 290-91, 295. Fletcher now argues that the “instruction left the jury free to consider the fact of the prior convictions as propensity evidence” despite the fact that the instruction stated that the prior convictions “may be considered . . . *only* for the purpose of determining whether those convictions have been proved beyond a reasonable doubt” and that the jury “*may not* consider it [(the evidence of the convictions)] for *any other purpose*.” Br. of App. at 25; CP 117 (emphasis added). Fletcher’s argument is without merit.

The standard of review for jury instructions is dependent on the type of decision the trial court made—if the decision “was based on a factual determination, it is reviewed for abuse of discretion” and if “based on a legal conclusion, it is reviewed de novo.” *State v. Condon*, 182 Wn.2d 307, 315-16, 343 P.3d 357 (2015). When a limiting instruction is requested by either party “the trial court has a duty to correctly instruct the jury.” *State v. Gresham*, 173 Wn.2d 405, 424, 269 P.3d 207 (2012); *State v. Russell*, 171 Wn.2d 118, 123-24, 249 P.3d 604 (2011). Nonetheless, the trial court retains “broad discretion to fashion its own limitation on the use of the evidence.” *State v. Hartzell*, 156 Wn.App. 918, 937, 237 P.3d 928

(2010). Reversal for a legally insufficient limiting instruction that allows a jury to consider evidence for an improper purpose is not required unless “within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.” *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004) (quotation and citation omitted).

Here, the limiting instruction fashioned by the trial court and provided to the jury was within the court’s discretion and properly limited the jury’s consideration of the evidence of Fletcher’s prior offenses to whether the State had proven beyond a reasonable doubt whether he had actually been convicted of a serious offense, an element of Unlawful Possession of a Firearm. Fletcher’s argument that the “instruction left the jury free to consider the fact of the prior convictions as propensity evidence” cannot be squared the explicit language of the instruction, which stated that evidence of the prior convictions “may be considered . . . *only* for the purpose of determining whether those convictions have been proved beyond a reasonable doubt” and that the jury “*may not* consider it [(the evidence of the convictions)] *for any other purpose.*” Br. of App. at 25; CP 117 (emphasis added). If the evidence of the prior convictions could only be considered for one purpose—a non-propensity purpose—and could not be considered for any other purpose than the instruction cannot fairly be construed to allow the jury to freely consider the evidence

of the prior convictions as propensity evidence. *See State v. Davis*, 185 Wn.App. 1027, 2015 WL 260855, 3-4 (2015).<sup>5</sup> Accordingly, Fletcher’s argument fails. In addition, even if the instruction was given in error, the error was harmless because there is not a reasonable probability that “the outcome of the trial would have been materially affected had the error not occurred” as there was no plausible reason to doubt Denney’s testimony that the firearms in question were Fletcher’s. *Thomas*, 150 Wn.2d at 871.

**IV. Fletcher’s two convictions for Unlawful Possession of a Firearm in the First Degree constituted the same criminal conduct.**

Fletcher was convicted of two counts of Unlawful Possession of a Firearm for possessing two handguns within the same home at the same time. These counts are properly considered the “same criminal conduct” for the purposes of calculating Fletcher’s offender score. RCW 9.94A.589(1)(a). At sentencing, the State mentioned that the crimes were “the same criminal conduct” and indicated that defense was in agreement. Supp. RP 4. Despite the agreement, the trial court failed, as Fletcher notes, to make the associated same criminal conduct finding in Fletcher’s judgment and sentence. Br. of App. at 27, 29; CP 371. This error appears to be an oversight since the trial court calculated Fletcher’s offender score

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<sup>5</sup> *Davis* is an unpublished opinion. Pursuant to GR 14.1(a) the opinion “may be accorded such persuasive value as the court deems appropriate.”

as a 9—a point less than his criminal history suggests—on his judgment and sentence. CP 372, 382. Regardless, Fletcher’s standard sentencing range remained the same and he received a low-end sentence. CP 371-73. Thus, this Court should remand to the trial court to correct Fletcher’s judgment and sentence by making the associated finding of same criminal conduct.

**V. The trial court did not abuse its discretion when it denied Fletcher’s motion to withdraw his plea to the domestic violence assault.**

Fletcher claims that his guilty plea to the assault count “was involuntary because it was entered under duress and coercion” and that the trial court “erred when it denied Mr. Fletcher’s motion to withdraw his guilty plea” to that count. Br. of App. at 29-30. But Fletcher never argued that he sought to withdraw his plea because it was made involuntarily, never intimated that his plea was the result of duress or coercion, and confirmed just the opposite orally and in writing. RP 103-111; CP 44-46. Withdrawal of Fletcher’s guilty plea was not “necessary to correct a manifest injustice” so the trial court did not abuse its discretion when it denied Fletcher’s pro se motion to withdraw it. CrR 4.2(f).

CrR 4.2(f) states that a “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.” This rule, as interpreted by our

Supreme Court, “imposes a demanding standard on the defendant to demonstrate a manifest injustice, i.e., an injustice that is obvious, directly observable, overt, not obscure.” *State v. Branch*, 129 Wn.2d 635, 641, 919 P.2d 1228 (1996) (citation and internal quotation omitted). Circumstances that may amount to a manifest injustice include “the denial of effective counsel, the defendant’s failure to ratify the plea, an involuntary plea, and the prosecution’s breach of the plea agreement.” *State v. Mendoza*, 157 Wn.2d 582, 587, 141 P.3d 49 (2006) (citation omitted). A trial court’s denial of a motion to withdraw a guilty plea is reviewed for abuse of discretion. *State v. Lamb*, 175 Wn.2d 121, 127, 285 P.3d 27 (2012).

When a defendant fills out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledges that he or she has read it and understands it and that its contents are true, the written statement provides prima facie verification of the plea’s voluntariness. *In re Keene*, 95 Wn.2d 203, 206-07, 622 P.2d 360 (1980). Moreover, when the trial court “goes on to inquire orally of the defendant and satisfies himself on the record of the existence of the various criteria of voluntariness, the presumption of voluntariness is well-nigh irrefutable.” *State v. Perez*, 33 Wn.App. 258, 262, 654 P.2d 708 (1982).

Here, Fletcher filled out a written statement on plea of guilty in compliance with CrR 4.2(g) and acknowledged that he read it and

understood it and that its contents were true. RP 103-111; CP 44-46. The trial court inquired orally of Fletcher and concluded that his plea of guilty was knowingly, intelligently, and voluntarily made. RP 107-111. More specifically, the following exchanged occurred:

Judge: Are you making this plea freely and voluntarily?

[Fletcher]: Yes.

Judge: No one has threaten – or made promises to enter the guilty plea?

[Fletcher]: No.

RP 107. Following this plea, the parties and the court agreed that the State could not present evidence of the assault since it was no longer relevant to the issues before the jury regarding Fletcher's possession of firearms. RP 112-16.

The next day, Fletcher, acting pro se for the purpose of this one motion only, sought to withdraw his guilty plea.

[Judge:] Do you wish to address the court sir?

[Fletcher]: Yes I wish to (inaudible) withdraw my plea.

Judge: And the basis for it?

[Fletcher]: For being not guilty.

Judge: Well yesterday you said –

[Defense Counsel]: No I – I think his basis Your Honor is – is that he wants to tell the jury the whole story.

[Fletcher]: Yeah. That's it.

RP 179. The discussion continued between the trial court and Fletcher as to the strategic soundness of withdrawing the plea, which would necessarily result in the admissibility of the assault evidence. RP 179-181. Ultimately, the trial court denied Fletcher's motion and concluded that Fletcher "entered the *Newton* Plea yesterday knowingly, intelligently, and voluntarily and with the advice of counsel." RP 180-81, 184.

Nonetheless, for the first time, Fletcher claims that his plea was coerced. Br. of App. at 30-32. And while he acknowledges that a "bare allegation of coercion, without other evidence in the record, is . . . insufficient to overcome a defendant's statements in the plea proceeding indicating that the plea was voluntary," Fletcher offers nothing more than a bare allegation. Br. of App. at 31 (citing *State v. Osborne*, 102 Wn.2d 87, 97, 684 P.2d 683 (1984)).

Fletcher contends that "fear that the facts of the assault would be prejudicial resulted in an unwise decision" to plead guilty "because he was not able to 'tell the jury the whole story' . . . ." Br. of App. at 31. But an unwise strategic decision does not constitute a "manifest injustice" nor does hindsight or regret transform a voluntary plea into a coerced one; the

record is absent of evidence of coercion. Importantly, the trial court never prohibited Fletcher from testifying on certain topics or raising potential defenses to the charges; rather it only prohibited—on Fletcher’s motion—the State from introducing evidence of the assault after Fletcher pleaded guilty. RP 112-16, 179-181.

First, by raising the coercion and involuntariness argument for the first time on appeal, and not addressing RAP 2.5, Fletcher has waived the argument. Additionally, Fletcher has failed to establish involuntariness, coercion, or any basis for a manifest injustice finding that would have obligated the trial court to allow him to withdraw his guilty plea. In contrast, the trial court did not abuse its discretion in denying the motion and finding that the plea was knowingly, voluntarily, and intelligently made.

**VI. The trial court did not abuse its discretion when it allowed the State to present evidence of three prior convictions for serious offenses where an element of Unlawful Possession of a Firearm in the First Degree required the State to prove a conviction for a serious offense.**

Fletcher claims that the trial court abused its discretion under ER 403 based on the admission of “the two addition [sic] prior convictions” because this evidence constituted the “needless presentation of cumulative evidence” and was more prejudicial than probative. Br. of App. at 33-34.

Fletcher further claims that “there was a great likelihood that the jury’s verdict was tainted by their emotional response to the evidence that he [sic] convicted of the felonies, including two counts of burglary and one first degree robbery.” Br. of App. at 33. But because the State was required to prove<sup>6</sup> the element that Fletcher had been previously convicted of a serious offense the trial court did not abuse its discretion when it allowed the State to put on its evidence.

To find a person guilty of Unlawful Possession of a Firearm in the First Degree, the State must prove “a person . . . has in his or her possession, or has in his or her control any firearm after having previously been convicted . . . of any serious offense. . . .” RCW 9.41.040(1)(a)(i). Because of statutes like the above “[c]ourts have long held that when a prior conviction is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue.” *State v. Roswell*, 165 Wn.2d at 198 (citing cases). Moreover, “[a]ny prejudice created by evidence of the prior conviction may be countered with a limiting instruction from the trial court.” *Id.* at 198 (emphasis added) (citation omitted). Relatedly, “[s]o long as the defendant maintained his not guilty plea, the State had the right to prove its case up to the hilt in whatever manner it chose, subject only to the rules of evidence and standards of fair play.” *State v. Adler*, 16

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<sup>6</sup> Fletcher did not stipulate to the fact that he had *a prior* conviction for a serious offense.

Wn.App. 459, 465, 558 P.2d 817 (1976) (citation omitted). A trial court's evidentiary rulings are reviewed for abuse of discretion. *State v. Blair*, 3 Wn.App.2d 343, 349-354, 415 P.3d 1232 (2018).

Here, the trial court did not abuse its discretion in admitting the evidence that Fletcher had three prior convictions for serious offenses. The quality of the documentary evidence for Fletcher's convictions varied in quality as two of the convictions were quite old (1994) and only one conviction (2002) had fingerprints for which a match could be made. RP 263, 267-69, 272-77. Absent a stipulation the State could not assume that the "best" conviction would suffice to prove the element to the satisfaction of the jury. Moreover, as the State analogized below, had the case been a theft case in which a TV, a radio, and money been stolen, nobody would suggest that evidence of the theft of the radio or the money should be excluded because the evidence that the TV was actually stolen was very strong. Instead, by challenging each element Fletcher invited the State to prove its case and as our Supreme Court has concluded, "[a]ny prejudice created by evidence of the prior conviction may be countered with a limiting instruction from the trial court." *Roswell*, 165 Wn.2d at 198 (emphasis added). The jury in this case was given a limiting instruction. Consequently, the trial court did not abuse its discretion when it admitted

the evidence of Fletcher's convictions over his ER 403 objection. RP 176-177.

#### **VII. Fletcher received the effective assistance of counsel**

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, the burden of showing ineffective assistance of counsel is the defendant's. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel provided ineffective representation, and (2) that counsel's ineffective representation resulted in prejudice. *Strickland*, 466 U.S. at 687. In order to satisfy the first requirement (deficiency), the defendant must show his or her counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. In order to satisfy the second requirement (resulting prejudice), the defendant must show by a

reasonable probability that, “but for” counsel’s errors, the outcome of the case would have been different. *Id.* at 694.

Here, Fletcher argues his attorney was ineffective for (1) failing to argue same criminal conduct and (2) failing to object the limiting instruction. The substance of each contention has been addressed, *supra* sec. III-IV.

As to the same criminal conduct issue, the State represented that the parties were in agreement that the crimes constituted the same criminal conduct. The trial court, however, failed to make that specific finding in the judgment and sentence. This Court should remand for a correction of the judgment and sentence to incorporate the same criminal conducting finding on which the parties agree(d).

Fletcher did not receive the ineffective assistance of counsel based on his attorney not challenging the limiting instruction. This is because, as discussed, the limiting instruction was proper and did not allow the jury to consider the evidence of the convictions for an improper purpose. Moreover, even assuming error, Fletcher cannot establish a reasonable probability that, “but for” counsel’s errors, the outcome of the case would have been different. The jury accepted the uncontroverted testimony of Denney that Fletcher kept two firearms at the home the two shared prior to Fletcher’s departure. The outcome of the case would not

have been different if Fletcher proposed, and the court accepted, a reworded limiting instruction. Fletcher's claims of ineffective assistance fail.

**CONCLUSION**

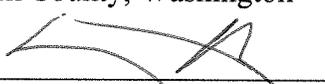
For the reasons argued above, this Court should affirm Fletcher's convictions and remand to correct the judgment and sentence to include the finding of same criminal conduct.

DATED this 14<sup>th</sup> day of November, 2018.

Respectfully submitted:

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