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NO. 52640-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN MILONAS,

Appellant.

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

The Honorable Anne M. Cruser, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Insufficient evidence supports five of appellant's convictions for first degree unlawful possession of a firearm.

2. The trial court erred in admitting irrelevant and prejudicial evidence that appellant shot guns several years before the charging date for the current offenses.

3. Prosecutorial misconduct violated appellant's due process right to a fair trial.

4. Defense counsel provided ineffective assistance in failing to object and seek a curative instruction for the prosecutorial misconduct.

Issues Pertaining to Assignments of Error

1. Appellant was charged with six counts of first degree unlawful possession of a firearm. Police recovered five of the guns from a locked safe that appellant did not have access to. Appellant was not at the house when police searched the house and his cohabitant admitted the guns inside the safe belonged to her. Appellant denied that any of the guns belonged to him and his DNA and fingerprints were not found on any of the guns. Where the State presented insufficient evidence of appellant's dominion and control over the guns found inside the locked safe, must this Court reverse five of appellant's convictions for first degree unlawful possession of a firearm?

2. Over objection, the trial court allowed appellant's girlfriend to testify that at some unspecified point a "few years" before the alleged unlawful possession offenses on February 23, 2018, she and appellant went target shooting. RP¹ 164-66, 195. Did the trial court err when it allowed the State to admit this evidence when that evidence was prejudicial and irrelevant to the question of whether appellant knowingly possessed the gun on the date of the incident?

3. Whether appellant had dominion and control over the firearms and therefore constructively possessed them, was the only disputed issue at trial. The State did not dispute that appellant did not have access to the locked safe, that his DNA and fingerprints were not found on any of the guns, and that his girlfriend admitted ownership of the guns inside the safe. During closing argument, the prosecutor twice invited the jury to convict appellant on the basis that "the law says" "you can't live in a house with firearms." RP 277, 297. Defense counsel did not object or request a curative instruction.

a. Where the prosecutor's statements were not confined to the jury instructions and flagrantly misstated the law, must this Court reverse appellant's convictions because of prosecutorial misconduct?

¹ This brief refers to the consecutively paginated verbatim reports of proceedings for October 11, 12, and 22, 2018 as "RP".

b. Alternatively, was defense counsel ineffective in failing to object or request a curative instruction for the prosecutorial misconduct?

B. STATEMENT OF THE CASE

1. Procedural History.

The Cowlitz County prosecutor charged John Milonas by amended information with six counts of first degree unlawful possession of a firearm² for incidents alleged to have occurred on February 23, 2018. CP 15-18; RP 3.

Milonas stipulated before trial that he had previously been found guilty of serious offense which prohibited him from possessing firearms. CP 14; RP 6, 198. A jury found Milonas guilty as charged. CP 49-54; RP 320-21, 323. The trial court imposed concurrent prison sentences of 26 months for each conviction. CP 56-57; RP 323-27, 330, 334.

Milonas timely appeals. CP 68.

2. Trial Testimony.

Milonas and Cassie Vincent were in a romantic relationship for more than six years. Milonas and Vincent lived together for almost the entirety of their relationship. RP 136-38, 166, 199-200.

² The State alleged Milonas possessed a Sig Sauer SP2340 .40 pistol, a Walther P22 .22 pistol, a Mossberg 500 shotgun, a Marlin .22 rifle, a Panther Arms .308 rifle, and a "Japanese Rifle." CP 15-18.

Vincent knew that Milonas could not legally possess guns because of a prior criminal conviction. RP 142-43, 169, 200. Despite Milonas's objections to having guns in the house, Vincent acquired several guns, including a .22 pistol, a .22 rifle, a .12-gauge shotgun, a .308 rifle, and a "Japanese Rifle." RP 139-41, 153, 162-65, 167-68, 180-81, 184, 200-01. Vincent "owned and purchased" these guns. RP 139-40, 162-65, 167-68, 184, 201-02. Milonas was present when Vincent purchased the shotgun, but he provided no assistance, financial or otherwise, to Vincent in buying the guns. RP 201-02, 225.

Vincent kept her guns inside a locked safe in the closet of the bedroom she shared with Milonas. RP 114, 139-41, 173-74. Vincent always kept the safe locked and had the only set of keys which could unlock it. RP 141, 145-46, 169-70, 179, 192, 200-01, 227-28. Milonas did not have a set of keys of his own and had no access to the safe. RP 141-43, 147, 170, 201, 205, 230. As Vincent acknowledged, the "express purpose" of the safe was "to make sure that he [Milonas] could not get at them [guns] [.]" RP 169. Milonas never asked Vincent to open the safe for him. RP 201.

Vincent's guns remained in the locked safe until February 23, 2018. RP 173-74. That morning, Vincent drove her children to school. Milonas was still asleep. RP 144, 147-48, 173-75, 206. Vincent returned to

the house later that morning after she was suspended from her job. Vincent told Milonas that she had been suspended. RP 144, 147-48, 174-75, 207. Milonas left for his own job a short time later. RP 147, 151, 177, 211-12.

Sherriff's deputies arrived at the house after Milonas left for work. RP 104-05, 152-53. Police knew Milonas lived at the house and could not possess guns. RP 104-06. They went to the house based on a firearms complaint.³ RP 104-05, 124.

Vincent greeted police at the door. RP 105, 124. In response to police questioning, Vincent acknowledged there were guns inside the house. RP 105, 124. Vincent retrieved several guns from the safe and brought them outside to police. RP 105-06, 129-30, 133, 153, 178. Vincent told police the guns were hers. RP 106. Vincent also gave police consent to search the house. RP 106-08, 124, 179, 181-82.

Vincent led police to the bedroom where they saw a holstered .40 pistol hanging from a bedpost on the side of the bed Milonas slept on. RP 106-07, 110-11, 121-22, 125-26. Vincent denied removing it from the safe. RP 179-80. Police also found a "Japanese Rifle" inside the safe along with ammunition and two sets of ear protection. RP 109, 115, 129-130.

³ The record is silent as to the nature of the complaint and how police learned about it.

Although police could not identify the caliber of the "Japanese Rifle," they determined the bolt action of the rifle functioned normally. RP 115, 119. Not wanting to get in trouble, Vincent denied owning the .40 pistol and told police that it and the "Japanese Rifle" belonged to Milonas. RP 120, 142, 150-51, 154-56, 164, 171-73, 182-84, 190, 194, 197. As Vincent later explained however, she and Milonas jointly owned the "Japanese Rifle." RP 139-41, 162-65, 183-84. In exchange for her testimony, Vincent was given immunity from any personal criminal prosecution. RP 150, 187-88, 194-97.

Milonas was not present while the sheriff's deputies were at the house. RP 118, 128. No one was at the house when Milonas arrived back at the house later that afternoon after having been laid off from his job. Milonas noticed the bedroom closet light was turned on. When he went to turn the light off, he noticed the safe was open and when he looked inside it was empty. RP 212-13. Concerned the guns had been stolen, Milonas called Vincent. He then went outside to smoke a cigarette. RP 213-15.

Police arrived at the house and arrested Milonas while he was outside. RP 127, 131, 215. Milonas was cooperative and calm. RP 131-32. Milonas acknowledged to police that he knew he could not possess guns. RP 117-18, 128. Milonas described the guns to police, but explained that

Vincent owned the guns, that she kept them in a locked safe, and that he did not have access to them. RP 118-19, 121, 131, 216-17, 226-27.

Milonas did not respond when questioned further by police about the .40 pistol. RP 118, 122. Upon further questioning, Milonas stated, "Well, I'll have to take ownership on that one since it wasn't locked up."⁴ RP 118, 122, 218. Milonas denied that his statement was a confession. Rather, as Milonas explained, he was frustrated and made the statement sarcastically because he believed police intended to pin ownership of the .40 pistol on him regardless. RP 219-20.

Milonas denied the .40 pistol belonged to him. RP 121-22, 127-28, 131, 202, 205, 224, 240. As Milonas testified, Vincent had purchased all the guns, including the .40 pistol. RP 201-02, 205. He was surprised that Vincent had told police otherwise. RP 217-19.

Milonas denied that the .40 pistol had been hanging from the bedpost when he left work that afternoon. RP 211, 218-19, 224. As Milonas explained, "it was in the safe as far as I knew." RP 211. He told police the same fact. RP 216, 218-19. Milonas denied that he had ever shot

⁴ Milonas waived his right to a pretrial hearing regarding the admissibility of his statements to police. RP 93.

or handled any of the guns found inside the house.⁵ RP 203-04, 220-21, 224-26. Consistent with Milonas's testimony, none of Milonas's DNA or fingerprints were found on any of the guns. RP 122-23.

C. ARGUMENT

1. INSUFFICIENT EVIDENCE SUPPORTS FIVE OF MILONAS'S CONVICTIONS FOR FIRST DEGREE UNLAWFUL FIREARM POSSESSION BECAUSE THE STATE DID NOT PROVE HE ACTUALLY OR CONSTRUCTIVELY POSSESSED THE FIREARMS FOUND INSIDE THE LOCKED SAFE.⁶

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In determining the sufficiency of evidence, existence of a fact

⁵ As discussed in argument two, infra, Vincent testified that at some unspecified point a "few years" before the alleged offenses on February 23, 2018, she and Milonas went shooting with her children. RP 164-66, 195.

⁶ Milonas does not raise a sufficiency challenge to the .40 pistol found on the bedpost.

cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

A person is guilty of first degree unlawful possession of a firearm if the person owns or has in his possession or control a firearm after having previously been convicted of a serious offense as defined by chapter 9.41 RCW. RCW 9.41.040(1)(a).

Possession can be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession requires personal, physical custody. State v. George, 146 Wn. App. 906, 919-20, 193 P.3d 693 (2008). The State must prove knowing possession. State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000).

The State acknowledged there was no evidence that Milonas had actual possession of the five guns found inside the locked safe. RP 262. The State therefore needed to prove Milonas had constructive possession. Constructive possession means the defendant has dominion and control over the firearm. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012), rev. denied, 176 Wn.2d 1003 (2013). "Dominion and control means that the object may be reduced to actual possession immediately." State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). "The totality of the circumstances must provide substantial evidence for a fact finder to

reasonably infer that the defendant had dominion and control." State v. Enlow, 143 Wn. App. 463, 469, 178 P.3d 366 (2008).

WPIC 133.52, provided to jurors as instruction 9, summarizes the law as follows:

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP 40 (instruction 9).

In determining possession, "consideration should be given to the ownership of the item, as ownership can carry the right of dominion and control with it." State v. Davis, 182 Wn.2d 222, 237, 340 P.3d 820 (2014)

(Stephens, J., dissenting)⁷ (citing Callahan, 77 Wn.2d at 31); See, also, Parnell v. State, 438 So. 2d 407, 407-08 (Fla. App. 1983) (evidence insufficient to prove Parnell's constructive possession of rifle on floor of back seat when car's owner admitted he possessed it); Woodall v. State, 97 Nev. 235, 627 P.2d 402, 403 (1981) (evidence showed Woodall or other occupant had equal access to gun found in truck; other occupant's admission of possession created reasonable doubt of Woodall's possession); Henderson v. State, 715 N.E.2d 833, 838 (Ind. 1999) (fact that passenger could have picked up gun at his feet did not establish dominion and control where gun was registered to and within reach of driver, and no evidence showed passenger made any movement or action to exercise dominion).

The uncontroverted evidence was that Vincent "owned and purchased" the guns found inside the locked safe.⁸ RP 106, 119, 139-41, 153, 162-65, 167-68, 183-84, 201-02. While the State is entitled to all favorable inferences in a challenge to the sufficiency of the evidence, appellate courts are not required to ignore unfavorable facts. Davis, 182

⁷ The dissenting opinion in Davis, which garnered five votes, is actually the majority decision on the sufficiency of evidence issue. Davis, 182 Wn.2d at 224.

⁸ Although Vincent's own testimony was inconsistent as to whether she individually owned the "Japanese Rifle" or jointly owned it with Milonas, there was no dispute that it was among the many guns that she purchased and that she considered herself its owner. Compare RP 139-40, 162-65, 180-81, 183-84 with RP 141, 153, 167-68, 200-01.

Wn.2d at 235. The lack of Milonas's ownership of the guns is a factor cutting against the possession element.

Ownership of a premises⁹ is also one factor to consider when assessing whether an accused has asserted dominion and control. Chouinard, 169 Wn. App. at 899-900; State v. Turner, 103 Wn. App. 515, 521-24, 13 P.3d 234 (2000). Several cases are instructive in demonstrating why Milonas's joint ownership of the premises with Vincent is insufficient for a finding of dominion and control under the facts of this case.

In State v. Bowen, this Court affirmed Bowen's conviction of unlawful possession of a firearm because Bowen owned, drove, and solely occupied the truck containing a firearm in a nylon bag next to Bowen's driver's seat. 157 Wn. App. 821, 828, 239 P.3d 1114 (2010).

In Turner, the Court found sufficient evidence for an unlawful constructive possession of a firearm conviction. 103 Wn. App. at 524. A friend of Turner's claimed the gun was his, but evidence showed that Turner sat in close proximity to the gun in his truck, that he knew of its presence in the backseat, that he was able to reduce it to his own possession, and that he solely owned and drove the truck in which the gun was found. Turner, 103 Wn. App. at 521. This Court noted that a key

⁹ A vehicle is considered a "premises" for purposes of determining constructive possession. Turner, 103 Wn. App. at 521.

factor demonstrating Turner's constructive possession of the gun was that he owned and drove the vehicle in which officers found the gun in close proximity to him:

[W]here there is control of a vehicle and knowledge of a firearm inside it, there is a reasonable basis for knowing constructive possession, and there is sufficient evidence to go to the jury. In this case, there was even more to convict Turner, the proximity of the firearm, the extended duration of the time the firearm was in the truck, and that Turner did nothing to reject the presence of the firearm in the truck.

Turner, 103 Wn. App. at 524.

This Court also upheld convictions for unlawful possession of a firearm in State v. McFarland where evidence established that McFarland and an associate were seen carrying sawed-off shotguns. 73 Wn. App. 57, 70, 867 P.2d 660 (1994), aff'd, 127 Wn.2d 322, 899 P.2d 1251 (1995). The trial court reasoned that even without the evidence of McFarland carrying the shotgun, he had told police that he had touched the guns at the associate's parent's house, had taken the guns from that house, and had "handled" the guns. McFarland, 73 Wn. App. at 70. The Court concluded the evidence of constructive possession was sufficient because McFarland had knowingly transported the guns in his car. Id.

Finally, in State v. Reid, a conviction of unlawful possession of a firearm was upheld where Reid admitted to having a pistol in the front seat with him as he drove his own car, and admitted that he had moved it to the

back so that pursuing police officers would not see it. 40 Wn. App. 319, 326, 698 P.2d 588 (1985).

The facts of these cases clearly demonstrate that the defendants exercised both sole dominion and control over the premises at issue and were able to reduce the guns to their own possession immediately. In Bowen, Turner, and Pierce, the defendants were the sole owners or occupants of the premises and were in close proximity to the guns and could therefore reduce them to actual possession immediately. In McFarland, the defendant admitted to handling the guns and knowingly transporting them in his car.

The State's evidence here is much weaker than in the cases discussed above. There was no DNA or fingerprint evidence or admission to handling the guns, even briefly. It was also clear in this case that Vincent, not Milonas, always retained control of the guns inside the locked safe. While Milonas may have shared ownership of the premises with Vincent, the State did not prove that Milonas ever had dominion and control over the locked safe, Vincent's guns inside, or was able to reduce the guns to his own actual possession immediately. In fact, the State's evidence proved the opposite proposition. See also State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (temporary residence, personal possessions on the premises, and knowledge of the presence of the drug is

insufficient to prove constructive possession), rev. denied, 126 Wn.2d 1016 (1995); State v. Galbert, 70 Wn. App. 721, 727-28, 855 P.2d 310 (1993) (temporary residence in house, defendant sleeping inside, and proximity to drugs insufficient to show dominion and control over premises or drugs).

Other factors to consider are: (1) whether the defendant had the immediate ability to take actual possession of the item, and (2) whether the defendant had the capacity to exclude others from possession of the item. CP 40 (instruction 9). These factors likewise fail to support sufficient evidence of Milonas's constructive possession.

Preliminarily, mere proximity to contraband is insufficient to show constructive possession. Chouinard, 169 Wn. App. at 899; State v. Spruell, 57 Wn. App. 383, 388, 788 P.2d 21 (1990). This is because proximity of a weapon goes only to its accessibility, not to dominion or control, which must be proven to establish constructive possession. United States v. Soto, 779 F.2d 558, 560-61 (9th Cir.1986), cert. denied, 484 U.S. 833 (1987). Likewise, knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession. Chouinard, 169 Wn. App. at 899 (citing State v. Hystad, 36 Wn. App. 42, 49, 671 P.2d 793 (1983)).

In any event, the State offered no evidence Milonas had the capacity to either take immediate possession of the guns inside the locked safe or exclude others from possessing the guns inside that safe. The evidence instead established that Vincent owned the guns and had the only key to the safe which she kept locked at all times, for the "express purpose" of "mak[ing] sure that he [Milonas] could not get at them [guns] [.]" RP 114, 139-47, 169-70, 173-74, 179, 192, 200-01, 205, 227-28, 230. While Vincent did not always have the keys on her person, there was no evidence Milonas obtained those keys in her absence. RP 193; Cf. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (finding a rational trier of fact could reasonably infer that the defendant controlled a gun that was within arm's reach within a vehicle he owned and was driving).

While the above factors weigh strongly against a finding a dominion and control, Milonas anticipates the State will argue that a trier of fact could find possession based on some other undefined fact. During closing argument, for example, the State pointed to Vincent's testimony at trial which suggested that at some unspecified point a "few years" before the charged offenses of February 23, 2018, Milonas "handled" some of the guns when he accompanied Vincent and her children while they went

target shooting. RP 164-66, 195, 269. Such an argument is problematic for two reasons.

First, as discussed in argument two, infra, this evidence was irrelevant and prejudicial, and therefore improperly admitted. Second, such an argument is inconsistent with the State's acknowledgment that there was no evidence that Milonas had actual possession of the five guns found inside the locked safe on the charged date. RP 262.

Even assuming such "passing control"¹⁰ was sufficient to establish possession however, there was no evidence as to how long Milonas "handled" the guns, or even which ones. There was also no evidence showing Milonas's DNA or fingerprints were found on any of the guns. RP 122-23; Cf. Davis, 182 Wn.2d at 235 (concluding that despite a "momentary handling," neither Nelson nor Davis exercised dominion and control over the gun because neither "asserted any interest" in the gun, merely "briefly handled the item for Clemmons, the true possessor of the gun," and there was no evidence that Clemmons intended to transfer control).

More importantly, Vincent's testimony unequivocally establishes this alleged shooting incident happened years before the charging period at

¹⁰ See George, 146 Wn. App. at 920 ("[P]ossession entails actual control, not a passing control which is only a momentary handling.") (quoting Callahan, 77 Wn.2d at 29).

issue here and therefore this evidence could not serve as a basis for satisfying the elements the State necessarily had to prove beyond a reasonable doubt. See CP 15-18, 41-46 (instructions 10-15).

Five of Milonas's convictions for unlawful firearm possession must be reversed and the charges dismissed with prejudice. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction). The prohibition against double jeopardy forbids retrial after conviction is reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 742, 638 P.2d 1205, cert. denied, 459 U.S. 842 (1982).

2. EVIDENCE THAT MILONAS HAD SHOT GUNS SEVERAL YEARS BEFORE THE CHARGING DATE OF THE CURRENT OFFENSE WAS IRRELEVANT AND UNFAIRLY PREJUDICIAL.

During direct-examination of Vincent, the prosecutor elicited that she would occasionally go target shooting with her guns. RP 163. The prosecutor then asked Vincent "who do you go shooting with?" Defense counsel immediately lodged a relevancy objection, but it was overruled without further explanation. RP 163.

Vincent then testified that she had been shooting with Milonas and her children a "few years" earlier, that he had shot the .40 pistol, and that Milonas had helped unload Vincent's guns from inside the car. RP 163-65.

The prosecutor continued with his line of questioning, resulting in the following exchange:

Q: Okay. But when you went target-shooting, Mr. Milonas would handle the firearms and shoot them?

A: Yes

DC: I'm going to object on foundation and relevancy

Court: I'll overrule on both points.

RP 166. The prosecutor returned to this theme a final time during re-direct examination of Vincent, again eliciting that Milonas had been target shooting with her and "probably handled" all the guns as a result. RP 195.

Significantly, the State offered no explanation at trial as to why the evidence was relevant. Because Vincent's testimony about the prior target shooting was wholly irrelevant to the specific charges at issue, defense counsel's timely objections should have been sustained.

“‘Relevant evidence’ means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Relevant evidence is admissible, but evidence that is not relevant is not admissible. ER 402. Here, the unsubstantiated evidence that Milonas had "probably handled" some of the guns a "few years" earlier did not make the existence of any fact of consequence more or less probable for several distinct reasons.

First, the unlawful possession of a firearm charges required the State to prove Milonas knowingly possessed each firearm on the charged date of February 23, 2018. CP 15-18, 41-46 (instructions 10-15). The only issue at trial was whether Milonas constructively possessed the guns on February 23, 2018. There was no dispute that Milonas did not have actual possession of the guns on the charged date. RP 262. Thus, Vincent's testimony that at some unspecified point a "few years" before the charged offenses, Milonas "handled" (i.e. actually possessed) some of the guns when he accompanied Vincent and her children target shooting, was irrelevant to proving that Milonas had constructive possession of the guns on February 23, 2018.

Second, as Vincent explained, at the time of the target shooting, Milonas retrieved the guns, not from the locked safe, but from inside an unsecured car. RP 164-65. Vincent's testimony therefore was completely irrelevant to rebutting the extensive evidence which showed Milonas never had access to the locked safe, whether years earlier, or on the charged date.

Finally, Vincent's testimony was also not relevant to show knowledge because Milonas did not raise an unwitting possession defense or argue that he was unaware that Vincent kept guns in the house. RP 200-01, 207. Although evidence may be admissible to show knowledge where the defendant raises the defense of unwitting possession, evidence of a prior drug conviction has also been held to be irrelevant for example, except as

impermissible propensity evidence, even where the defendant asserts an unwitting possession defense. State v. Pogue, 104 Wn. App. 981, 985, 17 P.3d 1272 (2001); Compare State v. Weiss, 73 Wn.2d 372, 377, 438 P.2d 610 (1968) (evidence of prior possession of drugs was relevant to show knowledge specifically because defendant denied knowing it was there).

Evidence of Milonas's alleged actual possession of guns during target shooting years before the charged incident was simply irrelevant to proving that he constructively possessed the guns on February 23, 2018. The trial court's erroneous admission of this evidence was also unduly prejudicial.

ER 403 provides, “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” Evidence is unfairly prejudicial when it is “likely to arouse an emotional response rather than a rational decision among the jurors.” State v. Rice, 48 Wn. App. 7, 13, 737 P.2d 726 (1987); accord State v. Castellanos, 132 Wn.2d 94, 100, 935 P.2d 1353 (1997). When, as here, trial courts admit evidence in error, on review the error is prejudicial if “within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.” State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980).

By hearing Vincent's testimony about the alleged target shooting, the jury likely inferred Milonas, who it already knew was a convicted felon¹¹, likely unlawfully possessed the guns on February 23, 2018 because he had also unlawfully possessed them before. Such inferences are improper and unfairly prejudicial. This is especially true where the improper testimony impermissibly “shif[t] the jury’s attention to the defendant’s propensity for criminality, the forbidden inference. . . .” State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (quoting State v. Bowen, 48 Wn. App. 187, 196, 738 P.2d 316 (1987)), rev. denied, 133 Wn.2d 1019 (1997). Evidence of Milonas's prior unlawful possession of the guns was precisely the type of evidence that was likely to cause a jury to make the “forbidden inference.” It tainted the entire case and was extremely prejudicial to Milonas because it depicted him in the worst light possible -- as a convicted felon who willingly defied the law by repeatedly possessing guns unlawfully.

Further exacerbating the prejudice, the prosecutor highlighted the alleged target shooting incident during closing argument. As the prosecutor told jurors, “[S]he allowed the defendant to use the guns on the range, right, allowed him to shoot the guns, not allowed to handle firearms.” RP 268. Courts are reluctant to find harmless error when the

¹¹ Each of the unlawful possession of a firearm counts required the State to prove that Milonas had previously been convicted of a 'serious offense' as defined in RCW 9.41.010. CP 15-18, 41-46 (instructions 10-15). Milonas stipulated that he had a prior 'serious offense' conviction. CP 14; RP 198.

State specifically attempts to put the disputed evidence before the jury and relies on that evidence in closing argument. See e.g., State v. Jasper, 174 Wn.2d 96, 119, 271 P.3d 876 (2012) (State unable to prove harmless beyond a reasonable doubt where prosecutor emphasized inadmissible evidence in closing argument); State v. Carnahan, 130 Wn. App. 159, 169, 122 P.3d 187 (2005) (prejudicial error when prosecutor emphasized evidence in closing argument); State v. Aaron, 57 Wn. App. 277, 282, 787 P.2d 949 (1990) (harmless error claim should be closely examined when error results from State's deliberate effort to put improper evidence before the jury). The State's emphasis of Vincent's testimony during closing argument further demonstrates the harmfulness of the improperly admitted propensity evidence.

Because Vincent's testimony about the alleged target shooting incident served only to improperly imply that Milonas had a propensity to unlawfully possess firearms, it was irrelevant and unfairly prejudicial. The trial court erred in admitting the evidence. This error undoubtedly materially affected the outcome of trial. This court must accordingly reverse Milonas's convictions.

3. PROSECUTORIAL MISCONDUCT VIOLATED MILONAS'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Prosecutorial misconduct violates the due process right to a fair trial when there is substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. In this case, the prosecutor committed misconduct by misstating the law and not confining his argument to the law as set forth in the jury instructions. Even in the absence of objection, reversal of the conviction is required because the misconduct was incurable through instruction and resulted in a substantial likelihood that the verdict was affected. In the alternative, counsel was ineffective in failing to object to the misconduct and seek curative instruction.

- a. The prosecutor committed misconduct by misstating the law and exceeding the law conveyed in the jury instructions.

A prosecutor is a quasi-judicial officer who has a duty to ensure a defendant in a criminal prosecution is given a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Because of their unique position in the justice system, prosecutors must steer wide from unfair trial tactics. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

Defendants are among the people the prosecutor represents and, therefore, the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. Id. When a prosecutor commits misconduct, she may deny the accused a fair trial. Id.; U.S. Const. amend. 14; Wash. Const. art. 1, § 3.

“A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial.” State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968). The prosecutor is therefore forbidden from appealing to the passions of the jury and thereby encouraging it to render a verdict based on emotion rather than properly admitted evidence. Viereck v. United States, 318 U.S. 236, 247-78, 63 S. Ct. 561, 87 L. Ed. 734 (1943); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

In addition, a prosecutor who misstates the law commits a serious irregularity that has the potential to mislead the jury. Davenport, 100 Wn.2d at 763; State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011); State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972) (arguments concerning questions of law must be confined to the instructions given by the court). The prosecution's statements to the jury must be confined to the law stated in the court's instructions. Davenport, 100 Wn.2d at 760; Estill, 80 Wn.2d at 199.

Prosecutorial misconduct violates the defendant's right to a fair trial and requires reversal of the conviction when the prosecutor's argument was improper misconduct and there is a substantial likelihood the misconduct affected the verdict. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012).

As discussed in argument one, supra, the only disputed issue at trial was whether Milonas had constructive possession of the firearms in question. The jury was instructed that "proximity alone without proof of dominion and control is insufficient to establish constructive possession." RP 262, 278; CP 40 (instruction 9). At the end of his closing argument however, the prosecutor invited the jury to disregard this instruction, telling them instead:

Now the law says a person who has been adjudicated guilty of a serious offense, you're not allowed to possess firearms, and so does that mean you can't live in a house with firearms? I would say, yes, absolutely, you can't live in a house with firearms. That's what the law says.

RP 277.

Defense counsel tried to minimize the damage of the prosecutor's closing argument, explaining that dominion and control was a complicated subject matter, and just because Milonas had dominion and control over the residence, did not necessarily mean that he had dominion and control over the guns that were locked in the safe. RP 280-81.

The prosecutor began his rebuttal closing argument by returning to the issue of dominion and control, telling the jury:

Ladies and gentlemen, he [Milonas] cannot be in a home with firearms. He cannot be in a home with firearms because if he's in a home with firearms, he has dominion and control over the premises. So whether you believe Cassie Vincent or not, he [Milonas] should not be in a home with firearms. [...] We'll get into the weeds about that, but he can't live a house with firearms.

RP 297.

There are two reasons why the prosecutor's argument was improper misconduct. First, the prosecutor's remarks contradicted and undermined the trial court's instructions to the jury. The court properly instructed the jury that unlawful possession required more than mere "proximity" and necessarily required the State to prove beyond a reasonable doubt that Milonas had "dominion and control" over the firearms. CP 40 (instruction 9). As the jury was instructed:

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the time, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP 40 (instruction 9) (emphasis added).

The prosecutor took it upon himself to undermine the court's instructions, and explicitly told the jury that simply living in a home that contained firearms was sufficient evidence, standing alone, to convict Milonas of unlawful possession. That was misconduct all by itself. The prosecution's statements to the jury must be confined to the law stated in the court's instructions. Davenport, 100 Wn.2d at 760; Estill, 80 Wn.2d at 199.

Second, the prosecutors repeated statement that, "you can't live in a house with firearms. That's what the law says[.]" is itself a misstatement of the law. RP 277, 297. To sustain a conviction for unlawful possession, the State must prove knowing possession of a firearm. State v. Anderson, 141 Wn.2d 357, 359, 366, 5 P.3d 1247 (2000). "[K]nowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession." Chouinard, 169 Wn. App. at 899. Proximity alone is insufficient to establish constructive possession. Turner, 103 Wn. App. at 521 (citing Spruell, 57 Wn. App. at 388-89). "Thus, a defendant with prior felony convictions may not be in violation of the law by simply being near a firearm if he or she has not exercised dominion and control over the weapon or premises where the weapon is found." State v. Lee, 158 Wn. App. 513, 517, 243 P.3d 929 (2010).

Lee was convicted of several offenses each of which rendered him ineligible to possess firearms. Id. at 515. At sentencing, the court verbally advised Lee of the consequences of possessing a firearm:

When we say, "possess a firearm," we don't just mean own a firearm, *we mean be anywhere near a firearm. So you cannot be in the same house or the same car with a firearm.* This lasts forever, unless a judge signs an order that changes it.

Id. (emphasis in original).

Lee argued on appeal that the court's oral advisement was in derogation of the law on constructive possession. Id. at 516. The Court of Appeals agreed, concluding, "However well intentioned the court's remarks may have been, the court misadvised Lee that he could not 'be anywhere near a firearm' or 'in the same house or the same car with a firearm.'" Id. at 517.

Like Lee, while it can be debated whether it was wise for Milonas to live in a house with firearms, the law unequivocally requires more than his mere proximity to them to sustain a conviction for unlawful possession. The prosecutor's repeated statements to the jury, which told them otherwise, was clear a misstatement of the law and outside the scope of the jury instructions. This Court should hold that the prosecutor's argument was flagrant and ill-intentioned misconduct.

- b. Reversal is required because the misconduct could not be cured by court instruction and there is a substantial likelihood that it affected the outcome.

Defense counsel did not object to the misconduct. In the absence of objection, appellate review is not precluded if the misconduct is so flagrant and ill-intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.2d 937 (2009). In general, arguments that have an inflammatory effect on the jury are not curable by instruction. State v. Pierce, 169 Wn. App. 533, 552, 280 P.3d 1158, rev. denied, 175 Wn.2d 1025 (2012).

When applying this standard, reviewing courts should "focus less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012)). The touchstone of due process analysis is the fairness of the trial: regardless of whether the prosecutor deliberately committed misconduct, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? Davenport, 100 Wn.2d at 762 (citing Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)); accord State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). If prosecutorial "mistakes" deny a defendant fair trial, then the defendant should get a new one. Fisher, 165 Wn.2d at 740 n.1. The standard for showing prejudice is

a substantial likelihood that the misconduct affected the verdict. Id. at 711. To determine whether misconduct warrants reversal, courts consider its cumulative effect on the jury. State v. Case, 49 Wn.2d 66, 73, 298 P.2d 500 (1956).

Disregard of a well-established rule of law is deemed flagrant and ill-intentioned misconduct. State v. Fleming, 83 Wn. App. 209, 214, 921 P.2d 1076 (1996), rev. denied, 131 Wn.2d 1018 (1997). A prosecutor's misconduct is similarly flagrant and ill-intentioned where case law and professional standards available to the prosecutor clearly warned against the conduct. Glasmann, 175 Wn.2d at 707.

Case law in existence well before Milonas's trial clearly warned against the prosecutor's improper conduct in this case. As discussed above, it was already well established that prosecutors must not go outside the jury instructions or misstate the law. Estill, 80 Wn.2d at 199; Davenport, 100 Wn.2d at 763. Case law also unequivocally made clear that simply being near a firearm without dominion and control over the weapon or premises where the weapon is found, is insufficient to sustain a conviction for unlawful possession. Lee, 158 Wn. App. at 516-17.

The misconduct here was not the type to be remedied by a curative instruction. The prosecutor's misstatement of the law trivialized the only disputed issue at trial; whether Milonas had dominion and control, and

therefore constructive possession, over the firearms. RP 97, 262, 278. Milonas did not dispute the he could not possess firearms, that he knew Vincent owned firearms, or that he lived at the residence. RP 6, 94-95, 198, 200, 277-78, 281. Rather, Milonas argued he had no constructive possession of the firearms because they were kept in a locked safe which he had no ability to access. RP 201, 205, 228-30.

The State cannot show, as it must, that the misconduct was harmless. Prosecutors, in their quasi-judicial capacity, usually exercise a great deal of influence over jurors. Case, 49 Wn.2d at 70-71. Statements made during closing argument are presumably intended to influence the jury. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Trained and experienced prosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. Fleming, 83 Wn. App. at 215.

Some misstatements of the law can be overlooked because they are relatively minor or so obvious that even lay jurors can act without prompting on the instruction to disregard any argument not supported by the court's instructions. But some misstatements are not so easily dismissed, particularly those pertaining to the State's burden and proof requirements. Fleming, 83 Wn. App. at 213-14 (argument that jury could

only acquit if it found a witness was lying or mistaken misstated the State's burden of proof, was "flagrant and ill-intentioned," and required a new trial).

Here, jurors would be particularly tempted to follow the prosecutor's approach because his comments had the ring of truth. To a layperson, the prosecutor's statements that "you can't live in a house with firearms. That's what the law says[,] " sounds correct and provided a simple (albeit incorrect) way for jurors to decide Milonas's guilt or innocence. RP 277, 297. Given Milonas's testimony that he lived at the house and knew about the firearms, the prosecutor's flagrant misstatement of the law made convictions for unlawful possession of a firearm a certainty.

Although jurors are instructed to disregard any argument not supported by the court's instructions, the problem is that the jury was in no position to determine whether the prosecutor's misstatement of the law was actually supported by the trial court's instructions. The prosecutor's arguments have a seductive attraction even though they are wrong. The harm in this case is that jurors concluded the prosecutor's misstatements of the law were consistent with the jury instructions and provided a convenient and understandable way to decide Milonas's guilt.

Repeated instances of misconduct and their cumulative effect must be considered as a whole: "the cumulative effect of repetitive prejudicial

prosecutorial misconduct may be so flagrant that no instruction or series of instructions can erase their combined prejudicial effect." Glasmann, 175 Wn.2d at 707 (quoting Walker, 164 Wn. App. at 737)).

The prosecutor's repeated misconduct, both in opening and rebuttal closing, combined to create a cumulative prejudicial force that deprived Milonas of his due process right to a fair trial. Taken together, the prosecutor's improper comments created a theme used to unfairly attack Milonas's theory of the case. That theme involved repeatedly misstating the law in an attempt to sway the jury. See Walker, 164 Wn. App. at 738 (improper comments used to develop theme in closing argument impervious to curative instruction).

Reversal is appropriate where, as here, the reviewing court is unable to conclude from the record whether the jury would have reached its verdict but for the misconduct. State v. Charlton, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

- c. Alternatively, counsel was ineffective in failing to object to the misconduct or request a curative instruction.

In the event this Court finds an objection or request for a curative instruction could have cured the prejudice, then defense counsel was ineffective in failing to take such action. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 LEd. 2d 674 (1984)); U.S. Const.

amend. VI; Wash. Const., art. I, § 22. The most obvious responsibility for putting a stop to prosecutorial misconduct "lies with the State, in its obligation to demand careful and dignified conduct from its representatives in court. Equally important, defense counsel should be aware of the law and make timely objection when the prosecutor crosses the line." State v. Neidigh, 78 Wn. App. 71, 79, 95 P.2d 423 (1995).

"If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross, 180 Wn.2d 664, 721-22, 327 P.3d 660 (2014), abrogated on other grounds by, State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018). If a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. See State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003) (defense counsel deficient in failing to object to prosecutor's improperly expressed personal opinion about defendant's credibility during closing argument).

Counsel's performance here fell below an objective standard of reasonableness. The prosecutor's comments were clearly improper. If an objection and instruction could have redirected the jury to the proper considerations and cured the prejudice resulting from the improper comments, then counsel had no legitimate tactical reason for not objecting.

No legitimate reason supported the failure of counsel to properly object and request curative instruction given the prejudicial nature of the prosecutor's misstatement of the law.

When a reviewing court decides misconduct occurred and instruction could have cured the prejudice resulting from that misconduct, it necessarily recognizes the presence of prejudice that was susceptible to cure. See State v. Warren, 165 Wn.2d 17, 26-28, 195 P.3d 940 (2008) (prosecutor's misstatement of the burden of proof and presumption of innocence during closing argument did not require reversal only because the court gave a strongly worded curative instruction), cert. denied, 556 U.S. 1192 (2009). No legitimate strategy justified allowing the prosecutor's prejudicial tactics and misstatement of the law to fester in juror's minds without court instruction that they should be disregarded. Defense attorneys must be ever vigilant in defending their clients' rights to fair trial, including being aware of the law and making timely objections in response to misconduct. Neidigh, 78 Wn. App. at 79. Such vigilance is necessary to allow the trial court to cure prejudice at the time of trial.

Reversal is required where, as here, defense counsel incompetently fails to object to prosecutorial misconduct and there is a reasonable probability the failure to object affected the outcome.

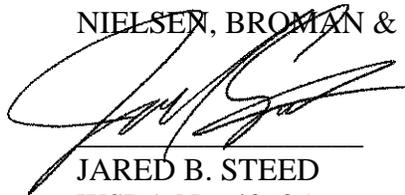
D. CONCLUSION

For the reasons stated, five of Milonas's convictions for unlawful possession of a firearm must be reversed and dismissed for insufficient evidence. Alternatively, Milonas's convictions should be reversed, and his case remanded for a new trial.

DATED this 12th day of July, 2019.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over a horizontal line.

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