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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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. INSUFFICIENT EVIDENCE SUPPORTS THE
CONVICTIONS FOR FIRST DEGREE UNLAWFUL
FIREARM POSSESSION.

In the opening brief, Milonas cited numerous cases and fully discussed the multiple factors demonstrating that the State failed to present sufficient evidence of his constructive possession of the five firearms. Brief of Appellant (BOA) at 8-18. The State's response brief fails to discuss these cases and mostly ignores Milonas's arguments. See In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it."). Instead, the State suggests that Milonas had dominion and control over the firearms that were inside the locked safe because Vincent occasionally left her car keys, which included the gun safe key, hanging by the door. Brief of Respondent (BOR) at 4-5. This argument fails for several reasons.

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 evidence fails to establish that Milonas could have reduced the guns inside the safe to his own immediate actual possession.

First, the State failed to establish that Milonas was even aware that the gun safe key was on Vincent's car key ring. There was no testimony that the gun safe key was readably distinguishable from any other key, that Milonas ever handled Vincent's keys, that Vincent told Milonas where she kept the gun safe key, or that Milonas ever saw Vincent access the gun safe using a key from her car key ring. In short, even assuming Milonas had wanted to exercise dominion and control over the locked safe, there is no evidence that Milonas ever handled the key or even knew where the key was located that would enable him to reduce the guns to his own actual possession immediately.

Second, as the State properly recognizes, Vincent's key ring was only hanging by the door when she was home. BOR at 4. Otherwise, the key was with Vincent everywhere she went. RP 192. Even assuming therefore, that Milonas was always home at the same time as Vincent, the evidence demonstrates that as the undisputed owner of both the guns and gun safe key, Vincent, not Milonas, retained control of the guns inside the locked safe. See BOA at 10-11 (citing State v. Davis, 182 Wn.2d 222, 237, 340 P.3d 820 (2014) (Stephens, J., dissenting) (citing State v. Callahan, 77 Wn.2d 27, 31, 459 P.2d 400 (1969))). The State fails to address Milonas's lack of ownership of the guns or gun safe key, which is another factor cutting against the possession element.

Equally problematic for the State is the fact that Milonas was only charged with knowingly possessing the firearms on February 23, 2018. CP 15-18, 41-46 (instructions 10-15). On that date Vincent left the house before Milonas was even awake. After Vincent returned to the house several hours later, Milonas laid in bed, showered, then left for his own job. RP 144, 147-48, 151, 173-75, 206-07, 211-12. By the time Milonas returned to the house that afternoon both Vincent and the guns were gone. RP 104-05, 118, 128, 152-53, 212-15. What the evidence shows then is that during the only small window in which Milonas and Vincent – and by extension her keys – were together at the house, he could not have reduced the guns to his own immediate actual possession because his other actions prevented it.

Other evidence, ignored by the State, which demonstrates that Vincent retained exclusive dominion and control over the firearms, bears repeating here. Vincent always kept the safe locked and had the only key 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. Vincent never saw Milonas in possession of the key and he never asked her to open the safe for him. RP 193, 201. 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 denied handling the guns, even briefly, and there was also

no DNA or fingerprint evidence linking him to the guns. RP 122-23, 203-04, 220-21, 224-26.

Finally, the State attempts to reason the current case is no different than a situation where “guns [are] stored in a closet and Appellant had simply promised not to access them.” BOR at 4. Unlike the State's hypothetical, here Milonas’s inability to exercise dominion and control over the guns went far beyond a mere promise not to do so. The evidence demonstrates that Milonas could not reduce the guns to his actual possession immediately, even if he had wanted to.

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).

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

Milonas contends that 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. BOA at 18-23.

In response, the State suggests for the first time on appeal, that the

evidence was offered to prove that “the safe and the idea that his ‘fiancé’ just wouldn’t let him handle the firearms did not constitute an actual bar to his constructive possession.” BOR at 7-9. The State did not advance this “theory” at trial as basis for admitting the evidence. Significantly, the State offered no explanation at trial as to why the evidence was relevant. The State’s attempt to craft an articulable basis for the admission of this irrelevant evidence for the first time on appeal should be rejected. See State v. Wilson, 108 Wn. App. 774, 778, 31 P.3d 43 (2002) (recognizing that to argue an issue on appeal, the State must show that it "essentially argu[ed]" the same issue below), aff’d, 149 Wn.2d 1, 65 P.3d 657 (2003).

The State next argues that the evidence was relevant because Milonas’s alleged constructive possession constituted a continuing offense. BOR at 7-9. Again however, the State only charged Milonas with knowingly possessing each firearm on the specific date of February 23, 2018. CP 15-18, 41-46 (instructions 10-15). Milonas did not have actual possession of the guns on that date. RP 262. Thus, whether at some unspecified point a "few years" before February 23, 2018, Milonas actually possessed some of the guns during target shooting, was entirely irrelevant to proving that Milonas had constructive possession of the guns on February 23, 2018. Contrary to the State’s argument, the evidence does nothing to “directly prove[.]” the element “that on or about February

23, 2018” Milonas knowingly had a firearm in his possession or control. BOR at 9; CP 15-18, 41-46 (instructions 10-15).

The State’s argument that evidence was relevant to proving the gun safe was no barrier to Milonas’s possession of the guns also necessarily fails. BOR at 9-10. 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.

Similarly, the State argues the evidence was relevant to disproving the “notion that his fiancé simply wouldn’t let him have any of the guns.” BOR at 9. In the next breath however, the State acknowledges “it is not even clear that his prior handling of the firearms was unlawful.” BOR at 10. The State cannot have it both ways. Either the shooting evidence is irrelevant because it proves only that Vincent did not act as barrier to Milonas’s prior lawful possession of guns, or it is irrelevant because it served only to improperly imply that Milonas had a propensity to unlawfully possess firearms.

Finally, the State argues that admission of the shooting testimony was not prejudicial because it was “barely mentioned.” BOR at 10-11.

This argument ignores the record. The State's direct examination of Vincent on this topic spans four pages. RP 163-66. The prosecutor returned to the topic with Vincent during re-direct examination. RP 195. The prosecutor further highlighted the alleged target shooting incident during closing argument. RP 268. The record reveals the State made the target shooting incident a central theme of its case. The State's repeated emphasis of the shooting evidence demonstrates the harmfulness of the improperly admitted propensity evidence.

The trial court erred in admitting the irrelevant and unfairly prejudicial about Vincent and Milonas's earlier shooting trip. This court must accordingly reverse Milonas's convictions.

3. PROSECUTORIAL MISCONDUCT VIOLATED MILONAS'S DUE PROCESS RIGHT TO A FAIR TRIAL.¹

The significance of the State's response to Milonas's prosecutorial argument is what it does not say. In barely more than one and a half pages, the State repeatedly glosses over the repeatedly problematic language in the prosecutor's closing argument by suggesting it was consistent with case law and the Washington Pattern Jury Instructions (WPIC). BOR at 12 (citing WPIC 133.52.).

¹ The State's arguments regarding the ineffectiveness of Milonas's trial counsel have been sufficiently addressed in the Brief of Appellant and need not be challenged further on reply.

Although the State suggests the cases relied on by Milonas are “easily refuted” it fails to undertake any actual analysis to distinguish the cases cited in the opening brief. See BOA at 24-34. Rather, the State argues that “living in a home with firearms is fundamentally different than being in ‘mere proximity’ to firearms”. BOR at 12. But the State’s own argument goes on to falsely equate living in a shared home with exercising dominion and control over a particular item inside that house based on mere proximity.

As discussed fully in the opening brief, Milonas disputes that his joint ownership of the premises with Vincent is sufficient to find that he exercised dominion and control over Vincent’s guns locked in a gun safe under the facts of this case. BOA at 12-14. Regardless of whether Milonas shared joint ownership of the house, the State also failed to prove that he had dominion and control over the locked gun safe or its content such that he could actually possess the guns immediately. Yet, the State suggests that Milonas’s mere proximity to an inaccessible locked gun safe is sufficient to infer that he exercised dominion and control over the guns. See BOR at 12 (“Appellant lived and slept next to a safe full of firearms, every day, whose key was hanging on a hook by the front door.”). Contrary to the State’s argument, proximity alone is insufficient to establish constructive possession. State v. Turner, 103 Wn. App. 515,

521, 13 P.3d 234 (2000) (citing State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990)). Whether Milonas slept next to a locked gun safe is of no moment when the state fails to prove that he had dominion and control over the safe and its contents.

The State also fails to recognize that the prosecutor's language during closing argument mirrors the language found to be problematic in State v. Lee, 158 Wn. App. 513, 517, 243 P.3d 929 (2010). BOR at 12. There, the trial court told Lee, "*So you cannot be in the same house or the same car with a firearm.*" Here, the prosecutor also told 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.*" BOA at 26-29 (emphasis added). Contrary to the State's suggestion, the prosecutor's closing argument did not draw any clear distinction between Milonas living in the house and those "individuals who truly were passing through, or had incidental proximity to firearms." BOR at 12.

The prosecutor committed misconduct by misstating the law and not confining his argument to the law as set forth in the jury instructions. Although the State does not contend the statements were harmless, reversal of the conviction is required because the misconduct was

incurable through instruction and resulted in a substantial likelihood that the verdict was affected.

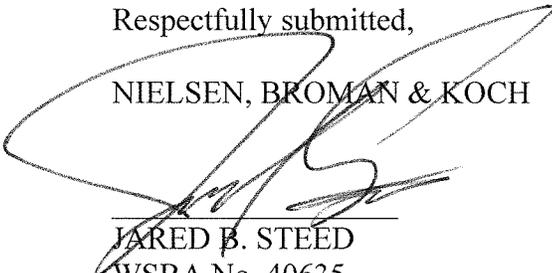
B. CONCLUSION

For the reasons discussed above, and in the opening brief, Milonas's convictions must be reversed and dismissed. Alternatively, Milonas's convictions should be reversed, and his case remanded for a new trial.

DATED this 5th day of December, 2019.

Respectfully submitted,

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