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No. 52640-9-II

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

**STATE OF WASHINGTON,**

Respondent,

v.

**JOHN MILONAS,**

Appellant.

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**BRIEF OF RESPONDENT**

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## **I. ANSWERS TO ASSIGNMENT OF ERROR**

1. There was sufficient evidence to support the convictions for the firearms contained in the safe.
2. The trial court properly allowed testimony regarding the Appellant handling the firearms on previous occasions.
3. There was no prosecutorial misconduct, the State accurately state the law in closing argument.
4. Defense counsel was not ineffective for failing to object to prosecutorial misconduct where there was no prosecutorial misconduct.

## **II. STATEMENT OF THE CASE**

The Respondent generally accepts the Appellant's recitation of the facts and will present any additional facts in the context of argument.

## **III. ARGUMENT**

### **A. ISSUE #1: THERE WAS SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTIONS FOR THE FIREARMS LOCATED IN THE SAFE**

There was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Appellant committed the crimes of unlawful possession of a firearm in the first degree for the weapons found in the safe. The standard of review for a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Randhawa*, 133 Wn.2d 67, 74, 941 P.2d 661 (1997), citing *State v. Green*,

95 Wn.2d 216, 221, 616 P.2d 628 (1980). When the Appellant challenges the sufficiency of the evidence, they admit “the truth of the State’s evidence and all inferences that can reasonably be drawn from that evidence.” *State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). This is an intentionally generous standard, emphasizing that deference that should be shown to a jury verdict. There was sufficient evidence presented that a rational trier of fact could have found that the Appellant possessed those firearms.

Appellant had dominion and control over the firearms. The single most important fact for consideration of this question is one that is not mentioned by the appellant. Appellant had access to the keys to the safe any time Cassie Vincent was home. It is undisputed that the Appellant and Cassie Vincent lived together at the home where the firearms were located. RP 139. Cassie Vincent testified that when she was home she would leave her keys “hanging up by the door.” RP 193. This means that any time that Cassie Vincent was home, Appellant had access to the keys which were hanging by the doorway, and thus had access to the firearms. Taken in the light most favorable to the State, a reasonable juror could conclude that because Appellant had access to the keys any time Ms. Vincent was home, he could and did have dominion and control over the firearms. Ultimately it’s no different than if the guns were stored in a closet and Appellant had simply promised not to access them. Because the keys were kept in the open and not in the exclusive possession of

Vincent, there was no actual barrier to Appellant taking actual possession of the firearms. It is ultimately meaningless that the firearms were in a safe if Appellant could simply access them by grabbing the safe keys from a hook by the door. Nor does such access make any sense given the very real policy implications of a law designed to keep felons from having access to firearms. There was sufficient evidence for a rational trier of fact to conclude that Appellant had dominion and control over the firearms.

All three non-exclusive factors for determining whether an individual had constructive possession of an object were present in this case. Jurors were instructed to consider “whether the defendant had the immediate ability to take actual possession of the item, 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.” WPIC 133.52. In this case, Appellant had the ability to take immediate actual possession of the item any time Ms. Vincent was home and did not have possession of her keys on her immediate person. This was not disputed at trial. Appellant had the ability to exclude others from possession of the item, because he was a resident with the ability to exclude others from the residence where the items were located. This was not disputed at trial. Finally, Appellant had dominion and control over the premises where the item was located. This was also undisputed at trial. A reasonable trier of fact, given this evidence, could find beyond a

reasonable doubt that Appellant was in constructive possession of the firearms contained in the safe, and thus there was sufficient evidence to support each verdict and they should not be disturbed on appeal.

**B. ISSUE #2. THE TRIAL COURT DID NOT ERR BY ALLOWING TESTIMONY REGARDING PRIOR HANDLING OR POSSESSION OF THE FIREARMS BY APPELLANT**

The testimony by Cassie Vincent regarding the appellant's prior handling of the firearms that were contained within the safe was lawfully admitted. The evidence was not offered as propensity evidence, the evidence was more probative than prejudicial, and the trial court did not err in allowing it.

At the outset, Respondent notes that the trial court's failure to conduct the appropriate balancing test analysis under ER 404(b) is not reversible error if "the record as a whole is sufficient to allow effective appellate review of the trial court's decision." *State v. Bradford*, 56 Wn.App. 464, 468, 783 P.2d 1133 (1989), *citing State v. Bowen*, 48 Wn. App. 187, 190-91, 738 P.2d 316 (1987). Such review must determine whether "the evidence serves a legitimate purpose, is relevant to prove an element of the crime charged, and, on balance, the probative value of the evidence outweighs its prejudicial effects. *State v. Cook*, 131 Wn. App. 845, 850, 192 P.3d 834 (2006), *citing State v. DeVries*, 149 Wn.2d 842, 848, 72 P.3d 748 (2003). Finally, evidentiary errors under ER 404(b) are not of constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984),

*citing State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982). A reviewing court must determine whether, within reasonable probabilities, if the outcome of the trial would have been different if the error had not occurred. *Id.*

This particular situation is unique in terms of ER 404 (b). While ER 404(b) does list a number of possible uses for prior bad acts evidence, such enumeration was not intended to be exclusive. *Id.* at 849, *citing State v. Kidd*, 36 Wn.App. 503, 505, 674 P.2s 674 (1983).

In fact, ER 404(b) exists largely to define the “impermissible purpose” rather than define the specific set of permissible purposes. *Id.* *citing, State of Hawaii v. Clark*, 83 Hawai’i 289, 301, 926 P.2d 194 (Haw 1996). “The range of relevancy outside the ban is almost infinite.” *Id.*, *citing State of Hawaii v. Clark*, 83 Hawai’i 289, 301, 926 P.2d 194, *quoting* MCORMICK ON EVIDENCE Section 190 at 448 (Cleary Ed. 1972). In this case, 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.

The evidence was not propensity evidence and thus admissible under ER 404(b). This case is unique in that Appellant has been basically committing the offenses since he moved in with his fiancé. This could be considered the same offense or a continuing offense from the time they moved in together. The underlying allegation and

conviction was based on constructive possession that arose simply from the fact of him living in the house with guns in his bedroom, with their placement in a safe a suggested bar to him possessing them. The situation would be different if he were convicted of actual possession of the firearms, because the different episodes of possession would likely represent discrete acts. Here, the allegation is that living on the premises with the guns in a safe where the key was left by the front door and his fiancé supposedly wouldn't give him the guns was an effective means to defeating the elements of constructive possession. The facts in this case more closely resemble a continuous act and present a fundamentally different question. Basically, this evidence shouldn't be considered propensity evidence because the evidence shows the failure of the structural bar to his constructive possession of the firearms for the purposes of THIS case. The evidence was not offered to show conformity with prior actions, but rather that the bars put in place to constructive possession are ineffective or they didn't exist. The evidence was offered to directly prove an element of the crime, that he constructively possessed the firearms, and is not propensity evidence. Because it was offered for a purpose other than propensity, the evidence was admissible under ER 404(b).

The testimony by Cassie Vincent was not more prejudicial than probative. There was no prejudice in the admission of those prior

acts, because the Appellant was accused of constructive possession that did not rely on him acting in any way at all. The evidence is only prejudicial, per the Appellant, insofar as the jury might consider this propensity evidence. It is not propensity, because the issue is not based on an action taken by the Appellant to commit a particular crime, but rather that the basic facts of his life constitute an ongoing constructive possession of prohibited firearms. The “prejudice” in this evidence exists only insofar as it shows the failure of the protective mechanisms that prevent him from having constructive possession of the firearms, i.e. the safe and notion that his fiancé simply wouldn’t let him have any of the guns. This is only prejudicial in that it is evidence that directly proves an element of the crime, which of course makes it probative and not really unfairly prejudicial at all.

If the entire trial is about whether or not the “safe” with the key in the possession of his fiancé is an effective enough barrier to prevent a convicted felon from having dominion and control of the firearms, it is relevant and fair to inquire exactly how effective the safe was in excluding him from reducing the guns to his possession. The answer was that it was not at all effective and this is the argument that underlies the entire position of the State, i.e. that Appellant could have grabbed the guns anytime he wanted and that the fact that Vincent had the key to the safe was not a sufficient barrier to access to

keep him from having constructive possession of the firearms.

Possession in this context is not a propensity question, because it is constructive possession. It doesn't matter if he handled firearms in the past except to show that the barrier that was erected to keep him from those firearms was ineffective, ineffective enough that it could not be considered a barrier and that he should be considered to be in constructive possession of the firearms.

If admission of the evidence was an error, any such error was harmless. The State's sole reference to the testimony was one line out of an entire closing argument which focused primarily on some illicit surveillance video and character issues about one of the witnesses. It was not made a central theme of the case or of closing argument and the only reference to the prior handling being illicit was a quick two word statement at the end of a jumbled sentence. Other than that single reference, it is not even clear that his prior handling of the firearms was unlawful, other than to do a third level inference based on the stipulation that the disqualifying offense was a juvenile offense. The central issues in the case were the accessibility of the key, the location of the safe, and dominion and control over the area in which the safe was located. In turn, the argument on those issues was dwarfed by comparison to the argument related to the Sig Saur .40 Pistol, which was hanging from the bedpost. The Sig Saur argument focused primarily on completely different stories from the two

witnesses and had no reference to the prior handling of firearms, since the State's position was that the appellant had purchased the firearm himself. RP 268. The testimony was barely mentioned and had very little significance in the ultimate issues that consumed the majority of argument. The State's closing argument ran from RP 260-77 and should be briefly reviewed.

The admission of the testimony about the prior handling of the firearms was lawfully admitted and the conviction should not be disturbed on appeal. While the court did not do an on-the-record balancing test under ER 404(b), there is a sufficient record for this court to engage in that analysis. Here the evidence was offered for a purpose other than propensity, in support of proving an actual element of the crime charged, and was not unduly prejudicial. Even if admitted in error, any prejudice was minimal at best, and the verdict should not be disturbed.

**C. ISSUE #3. THERE WAS NO PROSECUTORIAL MISCONDUCT**

There was no prosecutorial misconduct. The claim made by the Appellant regarding prosecutorial misconduct is easily refuted using the very cases cited by Appellant to support their proposition. In making the argument for misconduct, Appellant conflates "mere proximity" with "dominion and control of the premises," which are two very different things. At no point did the State argue that "mere proximity" to the firearms made Appellant guilty, but rather the State

repeatedly claimed “you can’t ‘live’ in a house with firearms,” RP 277, RP 297. This is directly in line with the caselaw cited by the Appellant, specifically “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**,” (emphasis added), so it is unclear how this could constitute misconduct. App. Brief Pg.28, citing *State v. Lee*, 158 Wn.App. 513, 517, 243 P.3d 929 (2010). Living in a home with firearms is fundamentally different than being in “mere proximity” to firearms. The prosecutor’s statement is taken almost directly from the pattern jury instruction which indicates that a factor in considering whether an item has been constructively possessed is “whether the defendant had dominion and control over the premises where the item was located.” WPIC 133.52. This case is unlike the myriad of cases cited by Appellant that focused on individuals who truly were passing through, or had incidental proximity to firearms. Appellant lived and slept next to a safe full of firearms, every day, whose key was hanging on a hook by the front door. There was no prosecutorial misconduct.

**D. ISSUE #4. BECAUSE THERE WAS NO PROSECUTORIAL MISCONDUCT, DEFENSE COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT**

There was no prosecutorial misconduct, so defense counsel was not ineffective for failing to object. Please see the prior section for analysis.

#### **IV. CONCLUSION**

The appellant was convicted of multiple counts of unlawful possession of a firearm and those convictions should be affirmed. There was sufficient evidence to support the convictions related to the firearms contained in the safe because the appellant had dominion and control over the residence, access to the firearms through a safe key hanging from the front door, and was able to reduce those firearms to his possession. This is sufficient for a rational trier of fact, taking such facts in the light most favorable to the State, to find the appellant guilty beyond a reasonable doubt. Further the trial court admitted evidence regarding him handling the firearms on at least one prior occasion, indicating that any structural bar that was presented by the safe and his reliance on his fiancé not letting him handle the firearms was nothing more than a fiction. This evidence, admitted to show the appellant's ability to reduce the firearms to his own possession and illustrate how his dominion and control of the premises allowed him access to those firearms was lawfully admitted, and not unduly prejudicial. Finally, the State did not commit prosecutorial misconduct by misstating the law by noting that a convicted felon cannot live in a house with firearms, because the

prosecutor's statement of the law was legally accurate. Likewise, it was not ineffective for defense counsel not to object to such argument, because it was not a misstatement of the law. The convictions should be affirmed.

Respectfully submitted this 1st day of November, 2019.

RYAN P. JURVAKAINEN  
Prosecuting Attorney

By:



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Deputy Prosecuting Attorney  
Representing Respondent

## **APPENDIX A**

**Washington Rules of Evidence, ER 404  
RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO  
PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES**

**(a) Character Evidence Generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

**(1) *Character of Accused.*** Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

**(2) *Character of Victim.*** Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

**(3) *Character of Witness.*** Evidence of the character of a witness, as provided in rules 607, 608, and 609.

**(b) Other Crimes, Wrongs, or Acts.** Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

**CERTIFICATE OF SERVICE**

DAVID PHELAN, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 4, 2019.

  
LSBA#36657  
\_\_\_\_\_  
DAVID PHELAN

**COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE**

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