

FILED

JUL 23 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 28904-4-III

STATE OF WASHINGTON, Respondent,

v.

GABRIEL MIGUEL TOSCANO, Petitioner.

APPELLANT'S BRIEF

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I. INTRODUCTION

Gabriel Toscano was spending the night with his girlfriend, Knorra Cano in the very early morning hours of November 6, 2009. At about 1:00 a.m., police stormed the house, knocking the front door down with a battering ram, and swarmed throughout the home looking for evidence of drug use or sale. Most individuals in the home, including children, were in their sleeping clothes.

Police entered the bedroom of Knorra Cano and found a .38-Special revolver under the mattress. While Mr. Toscana attempted to go into the bathroom to dress, police kicked in the door and physically dragged him out. A small amount of marijuana was found in one of his socks.

Police also found a 12-gauge shotgun, wrapped in a women's coat trimmed with fur, in the trunk of a car that Mr. Toscano had rented while his car was being repaired.

Although Mr. Toscano did not live or stay long-term at Ms. Cano's family home, although testimony showed that other members of the household used the car, although no witness saw Mr. Toscano handle any of the guns, and although Ms. Cano's mother claimed ownership of the .38-Special revolver, a jury found Mr. Toscano guilty of two counts of Unlawful Possession of a Firearm in the First Degree. Due to multiple

trial-level errors which prejudiced Mr. Toscano, an unsupported finding by the Jury, and other errors that only this Court can correct, Toscano submits the below facts and arguments to support his argument that his conviction rested less on the strength of the evidence than on the State's excessive efforts to impugn Toscano's character. Because the evidence is insufficient to support the convictions, they should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial jury was without sufficient evidence to find the Petitioner guilty beyond a reasonable doubt of two charges of Unlawful Possession of a Firearm in the First Degree where the State showed insufficient evidence of dominion and control over either firearm, ability to convert either of the firearms to actual possession, knowledge of the firearms, and where another witness claimed ownership of one of the guns.

Issue 1: Was there sufficient evidence for the jury to find the Defendant guilty of Unlawful Possession of a Firearm in the First Degree – Count One – where the Defendant was a weekend guest in the Cano home, where the weapon was found, and had a separate residence?

Issue 2: Was there sufficient evidence for the jury to find the Defendant guilty of Unlawful Possession of a Firearm in the First Degree – Count One – where there was no testimony to contradict the statements of Lucy Cano that she owned the firearm?

Issue 3: Was there sufficient evidence for the jury to find the Defendant guilty of Unlawful Possession of a Firearm in the First Degree – Counts One and Two – where the State failed to show evidence of knowledge of the firearms' presence?

Issue 4: Was there sufficient evidence for the jury to find the Defendant guilty of Unlawful Possession of a Firearm in the First Degree – Counts One and Two – where the State failed to show that the Defendant could convert the firearms to actual use?

ASSIGNMENT OF ERROR 2: The trial court erred by allowing thinly-concealed evidence of gang affiliation, and further erred by not issuing a striking or limiting instruction when a police witness violated the insufficient limitation on testimony.

Issue 5: Did the trial court err by allowing a police officer to testify that the Defendant admitted affiliation or participation in a “group,” where testimony also showed that a blue bandana had significance, that the admission was in the context of a police encounter, and that the police officer had training an experience in dealing with the group?

Issue 6: Did the trial court err by not issuing a striking or limiting instruction when the testifying officer used the word “gang” after being instructed not to do so?

ASSIGNMENT OF ERROR 3: The trial court erred by not issuing a limiting or striking instruction when a police witness testified regarding inadmissible evidence related to drug investigation of the Defendant.

Issue 7: Did the trial court err by not issuing a striking or limiting instruction when the testifying officer referred to drug investigation “buy money” three times after a motion in limine excluded testimony related to drug buys giving rise to the search warrants in the case?

ASSIGNMENT OF ERROR 4: Assuming Assignments of Error 2 and 3 are insufficient standing alone, the Cumulative Error Doctrine warrants reversal.

Issue 8: Did inadmissible evidence of gang membership, coupled with inadmissible evidence of drug buys have the cumulative effect of prejudicing the jury and denying a fair trial?

III. STATEMENT OF THE CASE

On November 6, 2009, Gabriel M. Toscano was charged with two counts of Unlawful Possession of a Firearm in the First Degree, and one count of Possession of Marijuana under 40 grams. (CP 1¹.) It was alleged that Mr. Toscano had possessed a 12-gauge shotgun and a .38 special revolver handgun after having been convicted of felonies. (CP 1-2.)

On the morning of the first day of the jury trial, the Defendant moved *in limine* to exclude any evidence that he was affiliated with a gang. (CP 6²; RP 9:12 – 12:3.) At that time, the trial judge reserved ruling until Defense Counsel had an opportunity to perform a *voir dire* in aid of objection of the witness expected to testify about gang involvement. (RP 11:20 – 12:3.)

On the second day of trial, the State indicated that it had stipulated that testimony relating to methamphetamine buys conducted by police prior to the November 6, 2009 raid on the Cano home, at 800 South Country Road in Warden, Washington, was inadmissible. (RP 39:23 – 40:2.) The trial judge further ensured that no reference to the

¹ Herein “Clerk’s Papers” are referred to as “CP,” followed by the page number. Page numbers of Clerk’s Papers in this case start at 1; Record of Proceedings for the trial herein is referred to by “RP [X:Y],” where X is the page number, and Y indicates line number. The Record of Proceedings for sentencing is referred to as RP-S.

² The written motion *in limine* appears to have been filed on February 16, 2010; however the parties argued part of this motion on the morning of February 11, 2010.

methamphetamine buys would be admitted through a back-door mechanism, such as the warrants for the search. (RP 43:2 – 45:6.)

During the second day of trial, the jury heard from Detective Chris Lloyd of the Washington State Patrol. Detective Lloyd had been present during the execution of the search warrant on the Cano home, had smashed down the door, and taken photos of evidence. (RP 56:25 – 57:2.) Detective Lloyd's testimony indicated that Mr. Toscano and Knorra Cano had a romantic relationship. (RP 66:18.) He also testified that he had found paperwork in Knorra Cano's bedroom that belonged to Mr. Toscano, and mail with a forwarding address label indicating a post-office box. (RP 67:13 – 18; RP 69:14 – 19; RP 70:1 – 5.) On cross examination, Detective Lloyd admitted that he had no knowledge of Mr. Toscano's residential address. (RP 80:22.) He testified further that he had not seen Mr. Toscano in actual possession of either firearm found during the search, nor did he see Mr. Toscano in close proximity to either gun; (RP 80:1 – 81:6.) and he testified that he had seen no evidence that Mr. Toscano was aware of the shotgun found in the trunk of his car. (RP 81:21 – 82:16.)

Detective Lloyd's testimony was followed by Sergeant Kenneth Jones of the Grant County Sheriff's Office. Sergeant Jones testified that he

oversaw the logistics of the execution of the warrant on the Cano home. (RP 87:24 – 25.) Sergeant Jones testified that while he saw the Defendant cross the upstairs hall of the home, he could not determine whether the Defendant was coming from the bedroom in which the gun was found. (RP 95:22 – 24.) He further testified that he had no knowledge of who resided at the Cano home, (RP 100:13 – 19.) that he did not see the Defendant in possession of either firearm at issue, (RP 100:20 – 101:1.) and that he did not know if anyone else saw the Defendant with either firearm. (RP 101:16 – 23.)

Dustin Canfield, an officer with the Quincy, Washington Police Department took the stand next. He testified that he collected a document from a bedroom of the home that referred to Lucy Cano. (RP 108:14 – 15; CP 20.) He also saw the Defendant “exit the bathroom” with Sergeant Jones. (RP 105:25 – 106:8.) On cross examination, Officer Canfield testified that he had no idea which of the people at the Cano home were residents, (RP 109:5 – 9.) and that he never saw the Defendant in actual possession of the firearms at issue. (RP 109:10 – 15.)

The State next called the supervising officer of the warrant execution, Detective Jeff Wentworth. Detective Wentworth testified that he had logged all seized evidence. (RP 114:7 – 11.) Through Detective Wentworth, testimony was elicited regarding Lucy Cano’s mail, (RP

119:8 – 11; CP 19.) and the car-rental documents for a car which the Defendant rented on November 6, 2009, (RP 120:15 – 121:10; CP 19.) and a DOL notice that the Defendant received. (RP 123:12 – 25; CP 19.) At this point during Detective Wentworth’s testimony, the judge corrected a frequently-made error of the testifying officers—referring to documents seized from the Cano home as “dominion and control” documents—clearly a legal conclusion that should not have been testified to. (RP 121:25 – 121:12.) Wentworth further aided in admission of mail for other residents and the marijuana found on the Defendant, (RP 124:3 – 126:18; CP 19 – 20.) as well as rounds for each of the guns found in the home. (RP 126:20 – 129:3; CP 20.) The Detective testified as to the guns at issue being in working condition. (RP 130:16 – 20; 131:17 – 24.)

Prior to the Defendant’s cross-examination of Detective Wentworth, the trial court and counsel discussed the redaction of the warrant return to “sanitize” it of inadmissible evidence regarding the drug-related nature of the warrant, and drug-related items found at the home. (RP 137:11 – 140:1.) The return was admitted into evidence with the careful redactions. (RP 140:1.)

On cross-examination, Detective Wentworth admitted that he had not seen the Defendant in actual possession of either gun at issue, and had

no information that the Defendant had been in actual possession of either gun. (RP 147:10 – 18.) He further admitted that he had no knowledge of which of the persons present at the residence at the time of the search warrant execution were actually residents therein. (RP 147:25 – 148:3.) The Detective also admitted that Mr. Toscano’s “dominion and control” document, Exhibit 44, listed an entirely different address than that at which the search-warrant was executed. (RP 149:19 – 150:2.)

Deputy Derrik Gregg was the final witness called on the second day of trial. Deputy Gregg testified that he handcuffed any residents of the Cano home “if needed,” then aided in the search with the help of his K-9 Unit, Cody. (RP 157:25 – 158: 10.) Deputy Gregg found marijuana in a jewelry box in the bedroom of Knorra Cano. (RP 158:18 – 21.) He also found a rental car agreement showing that the Defendant rented the car at issue; the agreement was in the glove-box of the car. (RP 159:20 – 25.) Deputy Gregg then testified that he discovered the shotgun found in the trunk of the car; it was wrapped in a “jacket.” (RP 160:18.) On cross-examination, the Deputy revealed that the rental agreement for the car showed a different address for the Defendant than the one for which the search warrant was executed, (RP 161:17 – 162:4.) and that the “jacket” was actually a coat with fur trim, possibly a women’s coat. (RP 162:22 – 163:4.) On redirect, Deputy Gregg also admitted that he didn’t have any

information that Mr. Toscano had put the gun in the car trunk. (RP 163:11 – 14.)

At the end of the second day of trial, the Prosecuting Attorney informed the trial court that the State's theory was actual possession of the firearms, and that she was "not even sure if constructive possession applies." (RP 165:19 – 24.)

On the morning of the third day of trial, after a long weekend, Peter Hammerstrom testified. Mr. Hammerstrom was the owner of the business which rented the car at issue to Mr. Toscano. (RP 173:1 – 5.) Mr. Hammerstrom testified that the Defendant listed his address on the rental documents as 912 South Adams St., but provided 800 South County Road as an alternate address. (RP 176:24 – 177:23.) Mr. Hammerstrom finally testified that he had no way of knowing to whom Mr. Toscano may have allowed access to the car. (RP 185:15 – 19.)

Following Mr. Hammerstrom's testimony, Allan Barrowman was called as a witness for the State. Detective Barrowman testified that he assisted in the search of the Cano home, and found the .38-Special pistol under Knorra Cano's bed, wrapped in a blue bandana. (RP 194:12 – 18; RP 197:19 – 20.) Detective Barrowman also testified that there was clothing in the closet of Knorra Cano's bedroom; even upon an attempted

leading question, he did not testify that the clothing was Mr. Toscano's. (RP 195:20 – 196:1.) Detective Barrowman did testify that male shoes were located near the bed. (RP 197:5.) Detective Barrowman testified further regarding Mr. Toscano's DOL notice that was found in the bedroom. (RP 199:2 – 4.) On cross examination, Detective Barrowman admitted that he had referred to an individual named "Gabriel Castoreno" in his reports, but that this must have been a typographical error. (RP 204: 1- 25.) He also testified that he did not see Mr. Toscano with the .38-Special in his actual possession, and that the gun was under the mattress in the bedroom and not immediately visible. (RP 205: 18 – 25.) No fingerprints belonging to Gabriel Toscano were on either the pistol or the shotgun found in the car. (RP 206: 22 – 207: 8.)

Detective Dean Hallatt testified next. Detective Hallatt testified that he was the "lead officer" on the investigation of the Cano residence. (RP 214: 3 – 4.) Detective Hallatt testified that he had no personal knowledge that Mr. Toscano resided at 800 County Road. (RP 216:10 – 15.) Detective Hallatt told the jury that 5 other individuals were present at the residence at the time the warrant was executed, aside from the Defendant. (RP 218:21 – 24.) The guns seized were not sent for fingerprint testing. (RP 223:4.)

On cross-examination, Detective Hallatt, in response to unrelated questions regarding the vehicles for which search warrants were issued, referred to “buy money” from the investigation which led to the warrants—not once, but three times. (RP 228:12 – 13; RP 228: 23; RP 229:4.) This was objected to by Counsel, but no limiting or striking instruction was issued by the judge. (RP 228:15.) There does not appear to be any reason, from counsel’s questions, why “buy money” should be referred to by the Detective.

Detective Hallatt also admitted on cross-examination that Mr. Toscano’s residential address was 912 South Adams Street in Warden, Washington, not 800 County Road. (RP 229:22 – 230:6.) Hallatt further admitted that he never saw Mr. Toscano in possession of either gun seized. (RP 230:13 – 21.)

The State’s next two witnesses were Officer Mike Martin and Detective Dan Bohnet. Officer Martin testified as to evidence that Mr. Toscano and Knorra Cano were in a romantic relationship. (RP 245:5 – 22.) Detective Bohnet testified that he had tested the marijuana found on the Defendant. (RP 251:20 – 21.)

Following Detective Bohnet’s testimony, further argument was given relating the admission of gang-related evidence in the case. The

State wished to admit evidence that the Defendant was a member of the Sureño gang, and that “their color” is blue. (RP 254:9 – 11.) This, according to the State, was evidence that a gun wrapped in a blue bandana must belong to Mr. Toscano. (RP 254:11 – 12.) The defense argued that the prejudicial value of this testimony would outweigh any relevance, and that there existed no nexus between the membership and the possession of the .38-Special. (RP 256: 7 – 19.) The trial court ultimately ruled that the evidence was admissible, so long as the word “gang” was replaced by “group,” because the evidence showed identity of possessor, not action in conformity. (RP 260:8 – 21.) No “balancing test” was performed by the court relating to ER 404. (Id.)

Free to introduce this testimony, the State called Phillip Coats, a corrections officer in Grant County. Coats testified that he knew Mr. Toscano, that in the course of their “relationship,” Mr. Toscano revealed “an affiliation or participation in a group or association,” and that based upon his “training and experience” as a corrections officer, he is familiar with that “group or association.” (RP 269: 22 – 6.) Further, Coats testified that based upon his “training and experience” as a corrections officer, he was familiar with the “significance” that a blue bandana had to that “group or association.” (RP 270:7 – 10.) Coats then testified that blue was “the identity of the gang—or excuse me, the identity.” (RP 270:14 – 16.) The

court made no comment on this testimony, despite lengthy earlier discussion. (RP 270: 17.) Coats also testified that the shoes found in Knorra Cano's room belonged to the Defendant. (RP 274: 16 – 18.)

Detective Hallatt was recalled as the State's last witness to testify that a cell-phone had been found in Knorra Cano's bedroom with text messages to "Gabe," and the times of those messages. (RP 281:23 – 282:13.)

The Defense called Lucy Cano, Knorra Cano's mother and primary renter of the apartment home at 800 South County Road. (RP 284: 12 – 13.) Lucy Cano testified that Mr. Toscano did not live at the home, but visited. (RP 284: 14 – 16.) Ms. Cano also testified that the gun found under the mattress in Knorra Cano's bedroom was hers, (RP 285:20.) and that she had wrapped it in a bandana that she had been wearing when she acquired the gun. (RP 286:7 – 8.) Ms. Cano testified that she had never seen Mr. Toscano with a gun at her residence on his visits. (RP 287:19.)

Oscar Cano, Lucy Cano's son, testified next that Mr. Toscano did not live at 800 South County Road (RP 296:15.) that he saw him regularly, but never with a firearm. (RP 296:16 – 21.) Juan Gonzalez next testified that Mr. Toscano and he had been roommates at Mr. Toscano's mother's home, and that Mr. Toscano did not live at 800 South County Road. (RP

302:2 – 11; RP 303:2.) Gabriel Toscano’s mother, Linda Toscano, testified that Gabriel had lived at her home at 912 South Adams Road, not the Cano home. (RP 308: 12 – 13.) On cross, Ms. Toscano testified that Mr. Toscano sometimes visited his girlfriend on weekends. (RP 310:21 – 22.)

The defense recalled Oscar Cano, who testified that he was not sure whose rental car had been outside the home. (RP 317:24 – 318:3.) He testified that a number of people in the household had used the car on the day the search-warrant was executed. (RP 318: 7 – 17.)

The Defendant, Gabriel Toscano was the last witness. He testified that he was visiting his girlfriend, Knorra Cano, at the Cano home on the night the warrant was executed. (RP 326: 13 – 25.) He testified that he had not been aware of the .38-Special or the shotgun that were found that night. (RP 327: 13 – 21.) He testified that all other household members could use the rental car he rented, because nobody else had a car. (RP 328:18 – 25.)

The jury returned a verdict of “guilty” to all three charges: Unlawful Possession of a Firearm in the First Degree for the shotgun found in the car trunk, Unlawful Possession of a Firearm in the First Degree for the .38-Special revolver found under Knorra Cano’s mattress,

and Possession of Marijuana under 40 grams for the marijuana found in Knorra Cano's room and Mr. Toscano's sock. (CP 22 – 24.)

IV. ARGUMENT

A. Insufficient Evidence Existed for the Jury to Convict Mr. Toscano of Unlawful Possession of a Firearm.

Where a criminal defendant challenges the sufficiency of the evidence to support a jury's verdict, this Court reviews the evidence in light most favorable to the State to determine whether any rational trier of fact could have found guilt beyond a reasonable doubt, based on whether that rational trier of fact could have found that the essential elements of the crime charged were proved beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Allen*, 159 Wn.2d 1, 7, 147 P.3d 581 (2006). A claim of insufficiency of the evidence necessarily admits the truth of the State's evidence, and all inferences that may be reasonably drawn therefrom. *Id.* Direct and circumstantial evidence are of equal weight upon review by an appellate court. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

In trial on the case at bar, the truth of the State's evidence was unchallenged, and it remains so here. This is so because the evidence, even if true, is completely insufficient to support the convictions of the Defendant on the charges of Unlawful Possession of a Firearm. The State

presented absolutely no evidence of actual possession of the guns at issue—no witness saw Mr. Toscano holding or carrying either gun on his person. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969) (actual possession means that the item is in the actual, physical custody of the person charged with possession). Therefore, despite the Prosecuting Attorney’s hopeful contention that the State’s theory was actual possession, there is simply no basis for that theory.

The State instead would need to rely on a theory of constructive possession. *Callahan*, 77 Wn.2d at 29 (“Possession of property may be either actual or constructive.”). Constructive Possession may only exist when the goods in question are in the dominion and control of the defendant. *Id*, see also, *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). This Court examines the “totality of the situation” to determine whether substantial evidence demonstrates the Defendant’s dominion and control over the goods. *State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731 (1995).

The State completely failed to show sufficient evidence of dominion and control over the firearms, and failed to provide any evidence regarding knowledge of the location of the guns herein. Finally, the known locations of the Defendant do not support any finding that the Defendant

had sufficient ability to convert the items to his actual use. Necessarily, the convictions of the Defendant on the two charges of Unlawful Possession of a Firearm must be reversed.

1. Insufficient Evidence of Dominion and Control Existed to Find Possession of the .38-Special Where Defendant Was a Guest in the Cano Home and Kept a Separate Residence.

Evidence of temporary residence, or mere personal possessions on the premises, without more, is insufficient to show dominion and control. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995), *citing*, *State v. Bradford*, 60 Wn. App. 857, 862, 808 P.2d 174 (1991). It is insufficient to show that the defendant was merely visiting the premises. *State v. Amezola*, 49 Wn. App. 78, 87, 741 P.2d 1024 (1987), *see also*, *Callahan*, 77 Wn.2d at 31. Rather, constructive possession is usually established when it is shown that a defendant leased the premises, or paid rent and resided there. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001), *citing*, *State v. Todeo-Mares*, 86 Wn. App. 813, 815-16, 939 P.2d 220 (1997); *see also*, *Callahan*, 77 Wn.2d at 31 (finding some evidence of participation in paying rent is generally required). Letters and bills to the defendant at the address is also evidence of dominion and control which tend to show constructive possession. *State v. Walton*, 64 Wn. App. 410, 416, 824 P.2d 533 (1992). Evidence that a defendant has another address

or residence is also significant. *See, Collins*, 76 Wn. App. at 501. The mere presence of some personal possessions on the premises is insufficient, without more, to show dominion and control. *Callahan*, 77 Wn.2d at 31.

The case of *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969) is particularly instructive in the case at Bar. In that case, the defendant, Callahan, had been staying on an acquaintance's houseboat for a few days. *Callahan*, 77 Wn.2d at 31. A number of narcotics were found on the houseboat, which Callahan denied possession of; also found were two guns, a set of broken scales, and two books which Callahan admitted owning. *Id.* There was also evidence that Callahan had handled the narcotics earlier that day. *Id.* There was no evidence that Callahan used the houseboat as his residential address, and there was no evidence presented that he paid any rent or other bills on the houseboat. *Id.* Even though Callahan was in close proximity to the drugs, and even though he admitted to handling them earlier that day, our Supreme Court held that there was insufficient evidence of dominion and control over the houseboat to convict Callahan. *Id.* at 31-32.

Similarly in *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990), the Defendant, Hill, was found in a kitchen where cocaine was being "cut"

with “filler” adulterants. *State v. Spruell*, 57 Wn. App. 383, 384, 788 P.2d 21 (1990). Hill was sitting at a table in the kitchen near the cocaine and “filler” supplies. *Id.* A plate, on which cocaine and other residue was found, had Hill’s fingerprint on it. *Id.* The Court of Appeals, Division I, pointed out that the police witnesses did not “testif[y] to anything that was inconsistent with Hill being a mere visitor to the house.” *Id.* at 388. Mere proximity of a visitor to the premises on which contraband is found is clearly insufficient to show dominion and control sufficient to prove possession beyond a reasonable doubt.

Strikingly similar to the facts in *Callahan*, Mr. Toscano did not live at 800 South County Road. There was overwhelming evidence that he maintained a residence at his mother’s home at 912 South Adams. His mother and other witnesses testified to this fact, and even the paperwork touted by the State as showing “dominion and control” showed the address of 912 South Adams, or a PO box. No mail was received by Defendant at 800 South County Road. There were no utility or other bills for that address addressed to Mr. Toscano. No witness testified that Mr. Toscano paid rent at the 800 South County Road address.

The only evidence of dominion and control produced by the State at trial was the following:

- (1) Mr. Toscano was at the residence;
- (2) Mr. Toscano apparently was not wearing shoes in the home;
- (3) Mr. Toscano had left his shoes in Knorra Cano's bedroom;
- (4) A cellular telephone, not exclusively or definitely linked to Mr. Toscano was charging in Knorra Cano's bedroom;
- (5) A DOL notice for Mr. Toscano, addressed to him at another address, was found in a dresser in Knorra Cano's bedroom.

This evidence hardly measures up even to the seemingly-damning evidence in *Callahan*. The Defendant did not admit to having touched the gun, he had not been staying for "a few days," just possibly the weekend, and he was not even apprehended in the same room as the .38-Special; he was apprehended in the bathroom, and no witness could testify as to where he was before he was dragged out of the bathroom by the officers. Indeed, there was no testimony presented that Toscano was even in close proximity to the handgun (or shotgun).

The law is glaringly clear: constructive possession relies upon dominion and control; dominion and control cannot be proven through the evidence that the State submitted to the jury in this case. Even assuming all evidence presented by the State was 100% true, and assuming all reasonable inferences and conclusions in the most charitable and forgiving light most favorable to the State, no rational fact-finder could have found

Mr. Toscano guilty of possessing the .38-Special revolver; therefore, there is insufficient evidence to support Mr. Toscano's conviction, and the jury's verdict must be reversed by this Court. The Petitioner respectfully requests that this Court so find.

2. Insufficient Evidence of Dominion and Control Existed Where No Evidence was Presented to Contradict Lucy Cano's Admission of Ownership of the .38-Special Revolver.

The case of *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969) has more to contribute to the Court's review of this case. In that case, another of the numerous individuals on the houseboat with Callahan admitted to the authorities that the seized narcotics belonged to him. *Callahan*, 77 Wn.2d at 31. The testimony of the other individual was uncontradicted by the State. *Id.* The Supreme Court mentioned this as another reason for the abundant reasonable doubt present in the case. *Id.*

In the case at Bar, Lucy Cano testified that she was the owner of the handgun. The State provided no evidence as to the registered owner of the handgun based on the serial number, or any other evidence showing that the .38-Special did not belong to Ms. Cano. Certainly, the serial number of the gun and the registration records of the state and federal government were available to the State, but Lucy Cano's testimony was uncontradicted by any evidence from the State.

Because uncontradicted evidence exists that the actual, rent-paying tenant of the apartment was the owner of the .38-Special, evidence was insufficient to show dominion and control over the gun. Even when assuming all evidence presented by the State to be true, and even when viewing the evidence in the light most favorable to the State, no rational fact-finder could have found Mr. Toscano guilty of possessing the .38-Special revolver; therefore, there is insufficient evidence to support Mr. Toscano's conviction, and the jury's verdict must be reversed by this Court. The Appellant respectfully requests that this Court so hold.

3. Insufficient Evidence of Constructive Possession Existed Where No Evidence was Presented that Defendant was Aware of Firearms' Presence.

Knowledge of possession is an essential element of the crime of Unlawful Possession of a Firearm in the First Degree. RCW 9A.040(1)(a); *State v. Barnes*, 153 Wn.2d 378, 384-85, 103 P.3d 1219(2005), *citing State v. Anderson*, 141 Wn.2d 357, 363-66, 5 P.3d 1247 (2000). This reality is reflected in the jury instructions in this case. (CP 13, 14, 15.) Knowledge of possession may be inferred from a defendant's conduct when such conduct indicates knowledge as a matter of logical probability. *State v. Warfield*, 119 Wn. App. 871, 884, 80 P.3d 625 (2003).

In this case, there was absolutely no attempt even to address Mr. Toscano's knowledge of either the .38-Special revolver or the shotgun located in the trunk of the rental car. A review of the record of proceedings shows no admission of knowledge, and no behavior of the Defendant that would suggest such knowledge.

Because there was no evidence on the record to support the Defendant's knowledge of possession of either firearm, there is no basis for a jury to find that essential element of the crime charged. Even when assuming all evidence presented by the State to be true, and even when viewing the evidence in the light most favorable to the State, no rational fact-finder could have found Mr. Toscano guilty of knowingly possessing the .38-Special revolver or the shotgun; therefore, there is insufficient evidence to support Mr. Toscano's conviction, and the jury's verdict must be reversed by this Court. The Appellant respectfully requests that this Court so hold.

4. Insufficient Evidence of Constructive Possession Existed Where No Evidence was Presented that Defendant Could Convert the Firearms to actual use.

The ability to reduce an object to actual possession is an element of dominion and control. *State v. Escheverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). In *Escheverria*, this Court contrasted a gun, on the

floorboards of a car, visible and accessible to the defendant in that case, to a throwing star, which was not visible, and where no evidence that the defendant could reach and grab it was presented. *Id.* at 783-84.

In the instant case, the Defendant was never observed in any proximity to either the .38-Special or the shotgun. In order to access the shotgun, assuming the Defendant even knew it was in the trunk of the rental car, the Defendant would need to leave the Cano apartment home, go down the stairs to the car, unlock and open the trunk, remove the shotgun from the trunk, unwrap it from the fur-trimmed coat, and then he would have actual possession of it. No evidence was presented that Mr. Toscano even had the keys to the rental car in his possession at the time he was arrested. Certainly, he would need those keys to even attempt to reduce the shotgun to his actual use and possession. To reduce the .38-Special to his actual possession, he would have to go into the bedroom of Knorra Cano, remove the gun from the mattress, and unwrap it from the blue bandana around it.

Evidence of Mr. Toscano's ability to reduce either of the guns at issue to his actual use and possession was nonexistent in this case. Therefore, even in the light most favorable to the State, and assuming all evidence presented by the State to be true, no rational fact-finder could

have found Mr. Toscano guilty of constructively or actually possessing the .38-Special revolver or the shotgun; therefore, there is insufficient evidence to support Mr. Toscano's conviction, and the jury's verdict must be reversed by this Court. The Appellant respectfully requests that this Court so hold.

B. The Trial Court Erred by Allowing Evidence of Gang Affiliation, and Failing to Issue a Curative Instruction for "Accidental" Evidence of Gang Affiliation Ruled Inadmissible.

The United States Constitution protects the rights of each and every American to enjoy the freedom to associate with like-minded individuals, no matter the creed. U.S. CONST. Am. 1. Evidence of membership in a church, social club, or community organization is protected by the United States Constitution; this same protection is extended to membership in a gang. *Dawson v. Delaware*, 503 U.S. 159, 163, 112 S.Ct. 1093, 117 L.Ed.2d 309 (1992).

It is a well-settled principle of evidentiary law in Washington and the United States of America that evidence of a defendant's affiliation with a criminal street gang is inadmissible to reflect a defendant's beliefs or associations. *State v. Scott*, 151 Wn. App. 520, 526, 213 P.3d 71 (2009). There must be some nexus, or connection, between the crime charged and the gang before the evidence can be relevant. *Id.*, citing *Dawson*, 503 U.S.

at 166. Evidence of gang affiliation is considered to be inherently prejudicial. *Id.* at 526. Admission of such evidence is weighed under the standards of ER 404(b), as it is considered to be evidence of other crimes, acts or wrongs. *Scott*, 151 Wn. App. at 527. Where gang affiliation evidence is admitted without a connection to the crime charged, admission of such evidence has been found to be prejudicial. *Id.* at 527.

Evidence of gang affiliation may be admissible for purposes such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but only after the trial court identifies a significant reason for admitting the evidence, and only after the court determines that the relevance of the evidence outweighs any prejudicial impact. *Id.*, citing, *State v. Lane*, 125 Wn.2d 825, 831, 889 P.2d 929 (1995). The balancing of these interests must be done on the record, and the decision of the trial court is reviewed for abuse of discretion. *Id.* Discretion is abused when the trial court admits evidence based upon untenable grounds, or for untenable reasons. *Id.* at 527, citing, *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

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1. The Trial Court Erred by Allowing a Police Officer to Testify as to Defendant's Gang Membership in a Clumsily-Disguised Manner.

In the case at Bar, the trial court allowed testimony about the Defendant's alleged "gang" membership; however, it was allowed in a thinly-veiled manner, with a wink and a nod. A corrections officer was allowed to testify that, in his "relationship" with the Defendant, he was made aware of the Defendant's "an affiliation or participation in a group or association," and that in his "training and experience" as a corrections officer, he was aware of that organization, and the "significance" that a blue bandana would have to the organization.

Thinking logically for a moment, the Petitioner asks the Court what can be made of these sly references in a multi-step syllogistic manner:

MAJOR PREMISE: the witness works in a jail;

1st MINOR PREMISE: the witness has had a "relationship" with the defendant;

2nd MINOR PREMISE: the witness has knowledge of an organization through his training and experience as a jail guard;

3rd MINOR PREMISE: a blue bandana has some significance to the organization;

4th MINOR PREMISE: the knowledge of what the blue bandana's significance is to the organization is known to the witness, also as a result of his training and experience working in a jail;

The conclusions to be drawn from these premises are obvious—the Defendant is a former jailbird who belonged to some kind of illegal organization investigated by the police, that uses blue bandanas. From one’s experience and training as a citizen of the United States who views media sources, criminal gangs spring immediately to mind. News stories of bloody battles between youths with red and blue bandanas spring irresistibly to mind, and the Defendant is now one of those youths.

The implications of the evidence given were obvious: gang affiliation. The trial court’s attempt to limit the evidence were insufficient. A weighing test should have been performed on the record, but it was not. Instead, the trial court concluded that the evidence was “merely” to show that the blue bandana was a sure-fire connection between the Defendant and the found handgun, and let the evidence in without any examination of prejudicial impact.

Because the trial court failed to perform any ER 404(b) weighing or balancing of the prejudice and relevance of the gang testimony, and because the testimony was so poorly disguised as to be glaringly obvious to the jurors, the judge’s decision was made on untenable grounds, and for untenable reasons. Thus, the trial court abused its discretion in allowing the evidence, and erred in its decision. The effect of that error had the

result of prejudicing the jury, as such evidence is inherently prejudicial. Based upon this error, Toscano could not receive a fair trial, and he respectfully requests that this Court reverse the jury's verdict.

2. The Trial Court Erred by Failing to Issue a Curative Instruction on "Gang Expert's" "Accidental" Gang Testimony.

Just in case any of the jurors were unable to work out what Officer Coats meant by "group or association" on their own, the Officer helped them out a little more by simply blurting out "gang" later in his testimony.

Following this slip-up, the Court made no corrective instruction, despite the fact that the defense had made numerous objections to the gang testimony in advance. Thus, the jury was free now to consider Toscano's alleged gang membership as part of the evidence. The judge made no mention of his reasons for failing to make such an instruction.

Because the failure to correct the witness's use of the word "gang" was untenable, the court committed an abuse of discretion in failing to strike or correct the testimony. As such, the gang affiliation membership testimony had the effect of prejudicing the jury against Toscano as a gang member; such evidence is inherently prejudicial. Based upon this error, Toscano could not receive a fair trial, and he respectfully requests that this Court reverse the jury's verdict.

C. The Trial Court Erred by Failing to Issue a Curative Instruction When Inadmissible Evidence Relating to Drug Buys Was Introduced.

The parties in this case had stipulated, earlier, that no evidence of the drug buys which led to the search warrants was admissible; much care was taken to avoid these issues, and to extricate their mention from any exhibits.

Nonetheless, Detective Hallatt, during his cross-examination, mentioned the drug buy money not once, not twice, but three times, seemingly as non-sequiturs when asked about warrants for different automobiles—this was not invited error, because the defense attorney did not ask about buy money, about the substance of the warrants, or any other questions which would suggest an appropriate answer of “drug buy money.” Defense Counsel objected to these answers, but the trial court did not rule on the objections, and made no curative instructions, such as striking the answers in which drug buy money was mentioned, or limiting the jury’s consideration of the drug buy money.

The admission of the evidence of the drug buys and buy money was clearly error, and the court failed to rule on the objection of counsel. The result was the undoing of much work of all parties, and the prejudice of the jury toward Toscano. Based upon this error, Toscano could not

receive a fair trial, and he respectfully requests that this Court reverse the jury's verdict.

D. The Cumulative Effect of Improper Gang and Drug Buy Evidence Warrants Reversal.

Even if this Court finds that, standing on their own, the two errors claimed immediately above (evidence of gang affiliation and evidence of drug buy money) are not prejudicial, they may be examined as prejudicial in their combined, overall impact. The doctrine of Cumulative Error holds that, when numerous errors are not sufficient standing alone, they may be improperly prejudicial in their cumulative effect. *State v. Korum*, 157 Wn.2d 614, 652, 141 P.3d 13 (2006); *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). If the errors, in total, have a prejudicial effect, the remedy is reversal. *Id.*

When taken together, the improperly admitted evidence's prejudicial effect is clear: Mr. Toscano is painted as a gang member who is also a major drug-dealer from whom the police have organized an undercover drug buy. When coupled with evidence of a team of police officers armed with a battering-ram and a midnight raid on an apartment where Mr. Toscano was staying with his girlfriend, and the location of numerous firearms, the prejudicial impact is clear. Mr. Toscano was made to look like a major criminal through the improper evidence.

Because the cumulative effect of errors was prejudicial to the Defendant, he could not receive a fair trial, and the remedy is reversal. Mr. Toscano respectfully requests that this Court reverse the verdict of the lower court.

V. CONCLUSION

The jury's verdict in Gabriel Toscano's trial was unsupportable on the evidence presented, leading to the inescapable conclusion that the jury convicted Toscano not on the weight of the State's evidence, but on its ability to paint Toscano as a dangerous, gang-banging, drug-selling, gun-wielding criminal. It is within this Court's power to correct those mistakes that fraught Mr. Toscano's trial, and reverse the faulty verdicts of the jury. Mr. Toscano respectfully requests that this court find error in those issues pointed out above, for those reasons argued above and reverse his convictions.

RESPECTFULLY SUBMITTED this 22nd day of July, 2010.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 22nd day of July, 2010 in Walla Walla, Washington.



Andrea Burkhart