

No. 34329-4-III  
*Consolidated with No. 34502-5-III*

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

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STATE OF WASHINGTON,

Respondent,

v.

JESSE WALDVOGEL,

Appellant.

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

The Honorable Judge Bruce A. Spanner

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APPELLANT'S OPENING BRIEF

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### **A. ASSIGNMENTS OF ERROR**

1. Mr. Waldvogel was denied his constitutional right to have the jury properly instructed on and find all required elements of the offenses, where the specific firearms were listed in the verdict forms, rather than in the to-convict jury instruction.
2. Mr. Waldvogel was denied his constitutional right to a unanimous verdict, where the specific firearms were listed in the verdict forms, rather than in the to-convict jury instruction.
3. An award of costs on appeal against Mr. Waldvogel would be improper in the event that the State is the substantially prevailing party.

### **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Whether Mr. Waldvogel was denied his constitutional right to have the jury properly instructed on and find all required elements of the offenses and his constitutional right to a unanimous verdict, where the specific firearms were listed in the verdict forms, rather than in the to-convict jury instruction.

- a. Mr. Waldvogel was denied his right to have the jury properly instructed on and find all required elements of the offenses, the specific firearms, and his right to a unanimous jury verdict, that he knowingly possessed or controlled each specific firearm.
- b. The error in this case was not harmless beyond a reasonable doubt.

Issue 2: Whether this Court should deny costs against Mr. Waldvogel on appeal in the event the State is the substantially prevailing party.

### **C. STATEMENT OF THE CASE**

On the night of May 31, 2015, Karina Al-Zayadi heard a female arguing with a male, and car tires screeching on pavement, outside of her Kennewick apartment. (RP<sup>1</sup> 53-54, 56-58). Ms. Al-Zayadi looked out her window and observed a male sitting in a car, spinning the tires on the pavement. (RP 58-60). She later identified this male as Jesse Waldvogel. (RP 60, 66-68, 74-76, 112-114).

According to Ms. Al-Zayadi, another man appeared outside with Mr. Waldvogel. (RP 60-61, 76). This man later began to walk away, and Mr. Waldvogel asked him to come back. (RP 63). The man declined, and Mr. Waldvogel lifted the trunk of the car, and pulled out a gun. (RP 63). Ms. Al-Zayadi then saw Mr. Waldvogel leave the area with the gun in his hand. (RP 63, 66, 74). After this, she did not observe anything else. (RP 63, 66, 74-75).

Ms. Al-Zayadi called the police. (RP 57-58, 63). In response, City of Kennewick police officer Brian Zinsli was dispatched to the apartment complex. (RP 80, 82). When he arrived, he observed Mr. Waldvogel in the parking lot, changing a tire on the car. (RP 83-84, 86-91). Officer Zinsli obtained Mr. Waldvogel's identification, and ran his name. (RP 86-

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<sup>1</sup> The Report of Proceedings consists of seven separate volumes. References herein to "RP" refer to the two consecutively paginated volumes, reported by Renee L. Munoz, containing two pre-trial hearings (1/4/16, 2/11/16), the jury trial (3/28/16, 3/29/16), and sentencing (4/1/16).

92). While Officer Zinsli was running his name, Mr. Waldvogel left the scene. (RP 92-93). After Mr. Waldvogel left, Officer Zinsli found out Mr. Waldvogel had a warrant for his arrest. (RP 93).

Officer Zinsli approached the car, and observed a shotgun in the front passenger seat. (RP 94, 99; Pl.'s Ex. 9, 10). He secured and impounded the car. (RP 102-103). Officer Zinsli discovered the car was registered to a Stacy Waldvogel. (RP 102).

City of Kennewick police detective Rick Runge executed a search warrant on the car. (RP 114). Detective Runge found a loaded 12 gauge Western Field shotgun in the front passenger seat. (RP 116, 119-121; Pl.'s Ex. 12, 13, 14). He also found an unloaded Remington .30-06 rifle inside a closed case located in the trunk of the car. (RP 127-129; Pl.'s Ex. 17, 18, 19).

In the car's glove box, Detective Runge found mail for Stacy Waldvogel, and paperwork with Mr. Waldvogel's name on it. (RP 130-132, 134; Pl.'s Ex. 16, 24).

The State charged Mr. Waldvogel with two counts of unlawful possession of a firearm in the first degree. (CP 40-41). Count 1 alleged that Mr. Waldvogel "did knowingly own or have in his/her possession or control a firearm, to-wit: Western Field 12 gauge shotgun . . . ." (CP 40). Count 2 alleged that Mr. Waldvogel "did knowingly own or have in

his/her possession or control a firearm, to-wit: a Remington [sic] Model 760 Carbine 30.06 rifle . . . .” (CP 41).

The case proceeded to a jury trial. (RP 36-181). At the jury trial, witnesses testified consisted with the facts stated above. In addition, Ms. Al-Zayadi testified the gun Mr. Waldvogel removed from the trunk of the car “looked like a giant rifle . . . .” (RP 63). She testified that after he removed the gun from the trunk, he cocked the gun, and it made a “chick chick” sound. (RP 63-64).

Ms. Al-Zayadi testified that the incident occurred around 11:00 p.m., and that there were lights in the area. (RP 57, 71).

Ms. Al-Zayadi wore glasses during her testimony. (RP 69). She testified she was not wearing glasses when she observed Mr. Waldvogel in the parking lot. (RP 69). She testified she needs her glasses to see long distance, “[l]ike more than a mile.” (RP 77-78).

Officer Zinsli testified he observed Mr. Waldvogel access the car, by putting the tire he changed into the backseat of the car. (RP 91-92). He testified he believes the trunk of the car was closed, but he was not sure. (RP 92).

Officer Zinsli explained the difference between a shotgun and a rifle. (RP 99-100). He testified a shotgun is a “pump action,” requiring

the shooter to physically pull back the handle in order to shoot the gun. (RP 100). He testified that a rifle does not require this action. (RP 100).

Officer Zinsli testified there was “[p]robably not very much” light in the area, on the night in question. (RP 105-106).

Detective Runge demonstrated the sound that the 12 gauge Western Field shotgun, found in the front passenger seat of the car, makes when it is racked. (RP 123-124).

Mr. Waldvogel’s cousin David Rae testified on his behalf. (RP 141-147). He testified that last year he was living at the apartment complex where the incident occurred, along with Mr. Waldvogel, and Mr. Waldvogel’s wife Stacy Waldvogel. (RP 141-142, 145). Mr. Rae testified that Mr. Waldvogel and Stacy Waldvogel share a vehicle. (RP 145-146).

Mr. Rae testified that during the time they were living together, he has an argument with Mr. Waldvogel in the parking lot, around 9:00 or 10:00 p.m. one night. (RP 142-143). He identified the location of their argument as the same location where the incident in question here occurred. (RP 143; Pl.’s Ex. 1). Mr. Rae testified Mr. Waldvogel did not access the trunk of the car; did not threaten to grab a shotgun; did not grab a shotgun or rack a shotgun; did not access the passenger compartment of the car; and did not chase him. (RP 144).

The trial court instructed the jury:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

(CP 104; RP 162).

The trial court gave a single to-convict jury instruction:

To convict the defendant of the crime of unlawful possession of a firearm in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 31, 2015, the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted or adjudicated guilty as a juvenile of a serious offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 106; RP 162-163).

The trial court also instructed the jury on the definition of “possession.” (CP 110; RP 164-165).

The State proposed, and the trial court gave, two verdict forms to the jury. (CP 91-92, 113-116; RP 148-149, 166). The first verdict form,

Verdict Form A stated:

We, the jury, find the defendant JESSE WALDVOGEL  
\_\_\_\_\_ [Write in “not guilty” or  
“guilty”] of the crime of Unlawful Possession of a Firearm

in the First Degree, a Westernfield 12 gauge shotgun, as charged in Count 1.

(CP 113, 115; RP 166).

The second verdict form, Verdict Form B, stated:

We, the jury, find the defendant JESSE WALDVOGEL \_\_\_\_\_ [Write in “not guilty” or “guilty”] of the crime of Unlawful Possession of a Firearm in the First Degree, a Remington 30.06 rifle, as charged in Count 2.

(CP 114, 116; RP 166).

The trial court also instructed the jury:

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your decision.

(CP 112; RP 166).

Mr. Waldvogel did not object to these jury instructions, as given.

(RP 149-154).

In its closing arguments, the State argued that the gun Ms. Al-Zayadi saw Mr. Waldvogel remove from the trunk of the car was the 12 gauge Western Field shotgun that was found in the front passenger seat of the car. (RP 173-175, 179). The State further argued:

Your jury instructions contain two verdict forms. There’s a Verdict Form A, and that’s for the shotgun in this case that was inside the car. There’s a Verdict Form B. That’s for the rifle that was inside the trunk.

(RP 175).

The jury found Mr. Waldvogel guilty as charged. (CP 115-116, 118-126; RP 187).

At sentencing, the trial court inquired into Mr. Waldvogel's current and future ability to pay legal financial obligations. (CP 120; RP 203-206). The trial court concluded "I cannot make a finding that you have or in the future will likely have the ability to pay legal financial obligations." (CP 120; RP 206). As a result, the trial court only imposed a \$500 victim assessment and \$100 DNA collection fee. (CP 120, 126; RP 206).

The Judgment and Sentence contains the following boilerplate language: "[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations." (CP 120).

Mr. Waldvogel timely appealed. (CP 127-128). The trial court entered an Order of Indigency, granting Mr. Waldvogel a right to review at public expense. (CP 129, 136-137; RP 208-209).

#### **D. ARGUMENT**

**Issue 1: Whether Mr. Waldvogel was denied his constitutional right to have the jury properly instructed on and find all required elements of the offenses and his constitutional right to a unanimous verdict, where the specific firearms were listed in the verdict forms, rather than in the to-convict jury instruction.**

The jury was provided a single to-convict instruction for Mr. Waldvogel's two counts of unlawful possession of a firearm in the first degree that purported to be a complete framework of the law for

convicting Mr. Waldvogel, but the to-convict instruction omitted a required element: the specific firearm for each count. While the verdict forms for each count did include the pertinent missing language from the to-convict instruction, the constitutional infirmity in the to-convict instruction cannot be cured by forcing the jury to ferret out the necessary elements from the verdict forms. By omitting necessary language from the to-convict instruction, the State was not held to its burden of proving each count of unlawful possession of a firearm in the first degree in this case, beyond a reasonable doubt. The omission of the specific firearms from the to-convict instruction also denied Mr. Waldvogel his right to a unanimous jury verdict. Given the conflicting evidence as to possession of the firearms in this case, the constitutional error in the jury instructions was not harmless, and therefore, this case should be remanded for a new trial.

- a. Mr. Waldvogel was denied his right to have the jury properly instructed on and find all required elements of the offenses, the specific firearms, and his right to a unanimous jury verdict, that he knowingly possessed or controlled each specific firearm.**

“In a criminal prosecution the State bears the burden of proving all of the elements of the crime charged.” *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004). The elements of a crime are considered the “constituent parts of a crime – usu[ally] consisting of the actus reus, mens

rea, and causation. . . .” *State v. Fisher*, 165 Wn.2d 727, 754, 202 P.3d 937 (2009). Washington “cases also identify the statutory elements of a crime as the essential elements.” *Id.*

In relevant part, a person commits unlawful possession of a firearm in the first degree “if the person . . . has in his . . . possession, or has in his . . . control any firearm after having previously been convicted . . . in this state or elsewhere of any serious offense as defined in this chapter.” RCW 9.41.040(1)(a). In addition, “[k]nowing possession’ is an essential element of the crime of unlawful possession of a firearm.” *State v. Hartzell*, 156 Wn. App. 918, 944, 237 P.3d 928, 941 (2010) (citing *State v. Anderson*, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000)). Importantly, “[e]ach firearm unlawfully possessed . . . shall be a separate offense.” RCW 9.41.040(7).

Here, given that the State charged two separate counts of unlawful possession of a firearm in the first degree, the State had to prove that Mr. Waldvogel knowingly had in his possession or control each separate firearm. *See, e.g., State v. Murphy*, 98 Wn. App. 42, 45-47, 988 P.2d 1018 (1999) (finding sufficient evidence for five counts of unlawful possession of a firearm in the second degree, where “a rational trier of fact could reasonably find, beyond a reasonable doubt, that [the defendant] actually possessed the five handguns charged by the State.”); *State v. Mata*, 180

Wn. App. 108, 117-18, 321 P.3d 291 (2014) (each firearm possessed “constitutes a separate unit of prosecution.”) (citing *In re Personal Restraint of Shale*, 160 Wn.2d 489, 500, 158 P.3d 588 (2007)).

The jury’s single to-convict instruction for both counts of unlawful possession of a firearm in the first degree stated the following:

To convict the defendant of the crime of unlawful possession of a firearm in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 31, 2015, the defendant knowingly had *a firearm* in his possession or control;
- (2) That the defendant had previously been convicted or adjudicated guilty as a juvenile of a serious offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

If you find from the evidence that each of these elements has been proven beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

(CP 106; RP 162-163) (emphasis added).

Notably absent from this to-convict instruction is any mention of the specific firearms Mr. Waldvogel had in his possession or control. Instead, this missing language appeared in the verdict forms. (CP 113-116; RP 166). Verdict Form A refers to “a Westernfield 12 gauge shotgun,” and Verdict Form B refers to “a Remington 30.06 rifle[.]” (CP 113-116; RP 166). The to-convict instruction only referenced Mr.

Waldvogel knowingly having “a firearm” in his possession or control. (CP 106; RP 162-163).

The verdict forms did not require the jury to find that Mr. Waldvogel knowingly had in his possession or control the specified firearm, beyond a reasonable doubt or unanimously. (CP 113-116; RP 166). Without a thorough and clear to-convict instruction, setting forth that the jury must find the knowing possession or control of each specific firearm beyond a reasonable doubt, and that they must agree that Mr. Waldvogel’s knowing possession or control of each specific firearm was unanimous, Mr. Waldvogel’s convictions are constitutionally infirm.

As a threshold matter, “both the United States and Washington constitutions require that the jury be instructed on all essential elements of the crime charged.” *State v. O’Donnell*, 142 Wn. App. 314, 322, 174 P.3d 1205 (2007) (citing *State v. Van Tuyl*, 132 Wn. App. 750, 758, 133 P.3d 955 (2006); U.S. Const. amend. VI; Wash. Const. art. I, §22). “A jury instruction which omits an essential element of a crime relieves the State of its burden of proving each element of the crime charged beyond a reasonable doubt and is a violation of due process.” *Id.* (internal citation omitted).

The omission of an element from a to-convict instruction is of sufficient constitutional magnitude to warrant review when raised for the

first time on appeal. *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415 (2005); RAP 2.5(a)(3); *O'Donnell*, 142 Wn. App. at 322. In addition, “[t]he right to a unanimous verdict is a fundamental constitutional right and may, therefore, be raised for the first time on appeal.” *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

The adequacy of a challenged “to convict” jury instruction is reviewed de novo. *State v. DeRyke*, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003). The rule is that a jury must be “clearly instructed as to all the elements to which is must unanimously agree beyond a reasonable doubt...” *Mills*, 154 Wn.2d at 10. “[A]n instruction that purports to be a complete statement of the crime must in fact contain every element of the crime charged.” *Id.* at 8 (citing *State v. Emmanuel*, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)); *O'Donnell*, 142 Wn. App. at 322. The jury has the right to regard a to-convict instruction as a complete statement of the elements of the crime charged. *Emmanuel*, 42 Wn.2d at 819. “[A] charge attempting to define the offense which does not cover material elements of the offense is necessarily misleading and prejudicial to the accused.” *Id.* at 820-21 (quoting *Croft v. State*, 158 So. 454, 455 (Fla. 1935)). Whether another jury instruction supplied the missing element is of no moment, since the to-convict instruction must clearly contain every element required to convict in that single instruction. *See id.* at 819, 821;

*O'Donnell*, 142 Wn. App. at 322 (the “jury is not required to supply the omitted element by searching the other instructions ‘to see if another element alleged in the information should have been added to those specified in [the] instruction.’”)

In other words, “jury instructions are [generally] sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.” *State v. Clausing*, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Jury instructions are generally reviewed in context as a whole. *State v. Pirtle*, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, as an important exception to this general rule of viewing the instructions in context as a whole, a “reviewing court may not rely on other instructions to supply the element missing from the ‘to convict’ instruction.” *DeRyke*, 149 Wn.2d at 910. “We generally adhere to the principle that the ‘to convict’ instruction must contain all elements essential to the conviction.” *Mills*, 154 Wn.2d at 8.<sup>2</sup> “The ‘to convict’ instruction carries with it a

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<sup>2</sup> As an exception to this general rule, every element need not always be listed in the to-convict instruction where the to-convict instruction has been bifurcated to avoid prejudice to the defendant from the jury considering in its initial deliberations the existence of a prior conviction that might elevate the offense from a misdemeanor to a felony. *See e.g., Mills*, 154 Wn.2d at 8, 10 (internal quotations omitted) (reasoning that the defendant’s rights were better protected by a bifurcated to-convict instruction and special verdict form on the remaining element of the existence of a prior conviction, but reaffirming the general principle that “the jury has a right to regard the ‘to convict’ instruction as a complete statement of the law and should not be required to search other instructions in order to add elements necessary for conviction.”). In order to pass

special weight because the jury treats the instruction as a ‘yardstick’ by which to measure a defendant's guilt or innocence.” *Id.* at 6. “[A] defendant is denied a fair trial if ‘the jury must guess at the meaning of an essential element of the crime with which the defendant is charged, or if the jury might assume that an essential element need not be proven.’” *O’Donnell*, 142 Wn. App. at 322 (internal quotation omitted).

In *State v. Mills*, the to-convict instruction did not include all of the necessary elements to convict the defendant of felony harassment, and the State sought to supplement the missing information from the to-convict instruction by relying on a separate instruction. *Mills*, 154 Wn.2d at 13-15. The *Mills* Court rejected this attempted “gap-filling” by reliance on other instructions, reversing and remanding for a new trial since the to-convict instruction did not satisfy the “requirement that all elements of the offense be clearly set forth.” *Id.* at 15.

Similarly, in *State v. Emmanuel*, the jury was provided a to-convict instruction on bribery, purporting to set forth all of the elements of the charged crime that had to be proven beyond a reasonable doubt in four separately numbered paragraphs. *Emmanuel*, 42 Wn.2d at 817-19. However, one essential element of bribery was absent from the to-convict instruction. *Id.* at 817. The Court held the jury instructions were

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constitutional muster, the jury must be instructed in the bifurcated instruction that “it must unanimously agree beyond a reasonable doubt . . . .” *Mills*, 154 Wn.2d at 10.

deficient. *Id.* The Court explained, “[i]t is not a sufficient answer to this assignment of error to say that the jury could have supplied the omission of this element (pendency of the applications before the land office) by reference to the other instructions.” *Id.* at 819. The Court noted that all the pertinent law need not always be incorporated in one instruction. *Id.* However, where the judge furnishes a yardstick by which the jury is to measure the evidence to determine guilt or innocence, such as by telling the jury it may convict if it finds four certain elements have been proven beyond a reasonable doubt, the jury has the “right to regard [that to-convict instruction] as being a complete statement of the elements of the crime charged.” *Id.* In other words, since a jury is “not required to search the other instructions to see if another element alleged in the information should have been added to those specified in [the to-convict] instruction...,” the missing element in the to-convict instruction required a new trial. *Id.* at 819, 821.

Here, the trial court purported to establish the yardstick by which the jury could determine Mr. Waldvogel’s guilt or innocence for both counts of unlawful possession of a firearm in the first degree by setting forth three numbered paragraphs in its “to convict” instruction. (CP 106; RP 162-163). The jury was expected to rely on the single to-convict

instruction as a complete statement of the law pertinent to its determination of guilt.

In paragraph (1), the jury was instructed it had to find beyond a reasonable doubt “[t]hat on or about May 31, 2015, the defendant knowingly had *a firearm* in his possession or control[.]” (CP 106; RP 163) (emphasis added). Absent from this instruction is each specific firearm the State alleged Mr. Waldvogel had in his possession or control.

Where the court purports to offer the jury a complete statement of the law as its framework for conviction, but misstates or omits a necessary consideration from the jury’s deliberations, the instructions are deficient. *Emmanuel*, 42 Wn.2d at 817-19. The to-convict instruction in this case failed to include the pertinent language that the jury may only convict Mr. Waldvogel of two separate counts of unlawful possession of a firearm in the first degree if it found he knowingly had *each separate firearm* in his possession or control. *See* RCW 9.41.040(1)(a); RCW 9.41.040(7); *Murphy*, 98 Wn. App. at 45-47 (to uphold convictions of five counts of unlawful possession of a firearm in the second degree, there must be sufficient evidence that the defendant possessed all five firearms); *Mata*, 180 Wn. App. at 116-20 (reversing a conviction for unlawful possession of a firearm as violating double jeopardy, where the defendant was

acquitted of unlawful possession of the same firearm on the same day, in a different county).

Given that the jury was purportedly given a complete statement of the law by which to deliberate on Mr. Waldvogel's guilt, there is no guarantee that it properly considered that he knowingly had in his possession or control each distinct firearm, beyond a reasonable doubt.

Moreover, the jury instructions did not ensure a unanimous verdict for each separate firearm: without including each separate firearm in the to-convict instruction, it cannot be said that the jury was unanimous in determining Mr. Waldvogel knowingly had in his possession or control each separate firearm. Based on the language in the to-convict instruction, the jury could only have unanimously determined Mr. Waldvogel knowingly had in his possession or control *a firearm*, rather than each separate firearm.

The jury was inadequately instructed, infringing on Mr. Waldvogel's constitutional rights to have a unanimous and properly instructed jury determine his guilt.

**b. The error in this case was not harmless beyond a reasonable doubt.**

Where a to-convict instruction fails to list all essential elements of the crime, the remedy is to reverse and remand for a new trial, unless the error was harmless beyond a reasonable doubt. *State v. Richie*, 191 Wn.

App. 916, 929, 365 P.3d 770 (2015); *O'Donnell*, 142 Wn. App. at 322. “[S]uch an error is harmless ‘only if the reviewing court is ‘convinced beyond a reasonable doubt any reasonable jury would reach the same result absent the error.’” *O'Donnell*, 142 Wn. App. at 322-23 (internal citations omitted). The omission of an essential element from a to-convict instruction “is harmless when it is clear that it did not contribute to the verdict; for example, when uncontroverted evidence supports the omitted element.” *Richie*, 191 Wn. App. at 929. The “error is not harmless when the evidence and instructions leave it ambiguous as to whether the jury could have convicted on improper grounds.” *Id.* (quoting *State v. Schaler*, 169 Wn.2d 274, 288, 236 P.3d 858 (2010)).

“Possession may be actual or constructive, and constructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found.” *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). “A vehicle is a ‘premises’ for purposes of this inquiry.” *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000).

“The ability to reduce an object to actual possession is an aspect of dominion and control.” *Echeverria*, 85 Wn. App. at 783 (*citing State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989)). “Mere proximity to the firearm is insufficient to show dominion and control.”

*State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012).

“[K]nowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession.” *Id.* at 120 (citing *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983)).

In addition to possession, for purposes of unlawful possession of a firearm, “control” means “[t]o exercise authority or influence over.” *State v. Holt*, 119 Wn. App. 712, 720, 82 P.3d 688 (2004), *overruled on other grounds by State v. Eckenrode*, 159 Wn.2d 488, 496-97, 150 P.3d 1116 (2007) (quoting Webster's II New College Dictionary 246 (1st ed. 1999))

Here, there was conflicting evidence as to whether Mr. Waldvogel knowingly had in his possession or control each separate firearm. Ms. Al-Zayadi testified Mr. Waldvogel pulled a gun out of the trunk of the car and left the scene with his gun in his hands, with another man present. (RP 63, 66, 74). However, the incident occurred at night, and there was conflicting testimony as to the lighting at the scene. (RP 57, 71). Ms. Al-Zayadi testified there were lights in the area, but Officer Zinsli testified there was “[p]robably not very much” light in the area. (RP 71, 105-106). Also, Ms. Al-Zayadi wore glasses during her testimony, which she uses to see long distances; but she acknowledged she was not wearing glasses on the night in question. (RP 69, 77-78).

To the contrary, Mr. Rae testified that Mr. Waldvogel did not access the trunk or the passenger compartment of the car, or touch a shotgun. (RP 144). In addition, Officer Zinsli did not recall the trunk of the car being open. (RP 92).

In addition, with respect to Count 2, there was not uncontroverted evidence that Mr. Waldvogel knowingly had the rifle in his possession or control. Ms. Al-Zayadi did not testify to any observations of the rifle alleged in Count 2. (CP 41, 114, 116). At most, her testimony established Mr. Waldvogel's mere proximity to the rifle, which is insufficient to show dominion and control of that firearm. *See Chouinard*, 169 Wn. App. at 899.

Based on the testimony of Ms. Al-Zayadi, Mr. Rae, and Officer Zinsli, instructing the jury it could convict Mr. Waldvogel if he knowingly had in his possession or control *a firearm*, rather than the rifle, “[le]ft it ambiguous as to whether the jury could have convicted on improper grounds.” *Richie*, 191 Wn. App. at 929 (quoting *Schaler*, 169 Wn.2d at 288). Specifically, the jury could have convicted Mr. Waldvogel on both counts, for only having possession or control of the shotgun.

In order to ignore the constitutional violation in this case, this Court must be satisfied that the error was harmless beyond a reasonable doubt based on uncontroverted evidence. Given the conflicting evidence

of possession and control of the firearms in this case, and the lack of evidence regarding the rifle, it is not clear that the omission of the specific firearms from the to-convict instruction did not contribute to the verdicts. *See Richie*, 191 Wn. App. at 929. Therefore, Mr. Waldvogel's convictions should be reversed and the matter remanded for a new trial. *Richie*, 191 Wn. App. at 929; *O'Donnell*, 142 Wn. App. at 322 (setting forth this remedy).

**Issue 2: Whether this Court should deny costs against Mr. Waldvogel on appeal in the event the State is the substantially prevailing party.**

Mr. Waldvogel preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair*, 192 Wn. App. 380, 385-94, 367 P.3d 612 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

At sentencing, the trial court inquired into Mr. Waldvogel's current and future ability to pay legal financial obligations (LFOs). (CP 120; RP 203-206). After determining it could not conclude that Mr. Waldvogel had the current or future ability to pay LFOs, the trial court imposed only mandatory LFOs. (CP 120, 126; RP 206); *see also In re Personal Restraint of Dove*, 196 Wn. App. 148, 152, 381 P.3d 1280 (2016)

(acknowledging that a \$500 crime victim assessment and a \$100 DNA collection fee are mandatory LFOs). Subsequently, the trial court entered an Order of Indigency. (CP 129, 136-137; RP 208-209).

Since the date of sentencing, there has been no known improvement to Mr. Waldvogel's indigent status. (CP 129, 136-137; RP 208-209). To the contrary, Mr. Waldvogel's report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Waldvogel remains indigent. The report shows that Mr. Waldvogel has no property other than his personal effects, no income from any source, outstanding LFOs, and mental disabilities that may interfere with his ability to secure future employment.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. See *State v. Blazina*, 182 Wn.2d 827, 832-39, 344 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts

“arrive at an LFO order appropriate to the individual defendant’s circumstances.” *Id.*

The *Blazina* Court addressed LFOs imposed by trial courts, but the “problematic consequences” are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then “become[s] part of the trial court judgment and sentence.” RCW 10.73.160(3); *see also* CP 120 (language in Mr. Waldvogel’s Judgment and Sentence stating “[a]n award of costs on appeal against the defendant may be added to the total legal financial obligations.”). Imposing thousands of dollars on an indigent appellant after an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants’ ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court’s reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary

obligations. This is particularly true where, as here, Mr. Waldvogel has demonstrated his indigency and current and future inability to pay costs. In addition, as set forth above, it is not proper to defer the required ability to pay inquiry to the time the State attempts to collect costs. *See Blazina*, 182 Wn.2d at 832, n.1. Mr. Waldvogel would be burdened by the accumulation of significant interest and would be left to challenge the costs without the aid of counsel. RCW 10.82.090(1) (interest-bearing LFOs); RCW 10.73.160(4) (no provision for appointment of counsel); RCW 10.01.160(4) (same). The trial court is required to conduct an individualized inquiry prior to imposing the costs, not prior to the State's collection efforts. *See State v. Lundy*, 176 Wn. App. 96, 103, 308 P.3d 755 (2013); RCW 10.01.160(3); *Blazina*, 182 Wn.2d 827.

Furthermore, the *Blazina* court instructed *all* courts to “look to the comment in GR 34 for guidance.” *Blazina*, 182 Wn.2d at 838. That comment provides, “The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis.” GR 34 cmt. (emphasis added). The *Blazina* court said, “if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously question that person's ability to pay LFOs.” *Blazina*, 182 Wn.2d at 839.

Mr. Waldvogel met this standard for indigency. (CP 129,136-137; RP 208-209).

This Court receives orders of indigency “as a part of the record on review.” RAP 15.2(e); CP 129, 136-137; RP 208-209. “The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party’s financial condition has improved to the extent that the party is no longer indigent.” RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to “seriously question” this indigent appellant’s ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839.

It does not appear to be the burden of Mr. Waldvogel to demonstrate his continued indigency given the newly amended RAP 15.2, because his indigency is presumed to continue during this appeal. Nonetheless, Mr. Waldvogel’s report as to continued indigency, filed in this Court on the same day as this opening brief, shows that Mr. Waldvogel remains indigent.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the “supreme court . . . may require an adult . . . to pay appellate costs.” (Emphasis added.) “[T]he word ‘may’ has a permissive or discretionary meaning.” *Staats v. Brown*, 139 Wn.2d 757, 789, 991

P.2d 615 (2000). *Blank*, too, recognized appellate courts have discretion to deny the State's requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined that the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id.*

There is no evidence Mr. Waldvogel's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. And, to the contrary, there is a completed report as to continued indigency showing that Mr. Waldvogel remains indigent.

Appellate costs should not be imposed in this case.

**E. CONCLUSION**

Based on the foregoing, Mr. Waldvogel respectfully requests that his convictions be reversed and remanded for a new trial. Upon retrial, if any, the jury should be properly instructed on the pertinent elements of each offense, including the specific firearm for each count, and the requirement that it return a unanimous jury verdict on each offense.

Mr. Waldvogel also asks this Court to deny the imposition of any costs against him on appeal.

Respectfully submitted this 28th day of April, 2017.

  
Jill S. Reuter, WSBA #38374

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

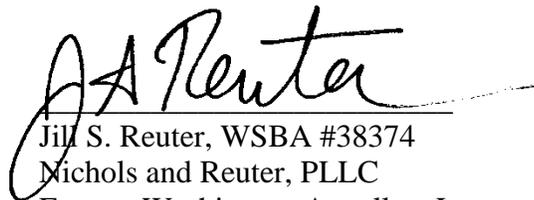
STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 34329-4-III, *consolidated with*  
vs. ) COA No. 34502-5-III  
)  
JESSE WALDVOGEL ) PROOF OF SERVICE  
Defendant/Appellant )  
\_\_\_\_\_)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 28, 2017, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Jesse Ray Waldvogel, DOC #390089  
Coyote Ridge Corrections Center  
PO Box 769  
Connell, WA 99326

Having obtained prior permission from the Benton County Prosecutor's Office, I also served the Respondent State of Washington at prosecuting@co.benton.wa.us using the Washington State Appellate Courts' Portal.

Dated this 28th day of April, 2017.

  
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**April 28, 2017 - 12:32 PM**

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**Appellate Court Case Number:** 34329-4  
**Appellate Court Case Title:** State of Washington v Jesse Ray Waldvogel  
**Superior Court Case Number:** 15-1-00792-4

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