

65725-9

65725-9

NO. 65725-9-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER FENDICH,

Appellant.

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2011 APR 11 PM 1:16

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

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**BRIEF OF RESPONDENT**

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**A. ISSUE**

1. An accomplice must act with knowledge that he is facilitating the crime. Fendich's friend, Cunningham, testified that he handed Fendich the gun on October 9, 2009. There was no testimony that Cunningham knew that Fendich was a convicted felon that was prohibited from possessing a firearm. Did the trial court properly deny the defense request for WPIC 6.05, "Testimony of an Accomplice," because the evidence failed to show that Cunningham met the definition of an accomplice?

2. Alleged misconduct by the prosecutor is waived if there is no objection unless the remarks were flagrant and ill-intentioned. Fendich did not object to the prosecutor's closing argument, and failed to show the prosecutor's remarks were flagrant and ill-intentioned. Fendich has failed to show a substantial likelihood the prosecutor's remarks affected the verdict. Did the prosecution commit misconduct that prejudiced Fendich requiring reversal?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant, Alexander Fendich, was charged by information with unlawful possession of a firearm in the first degree.

CP 67. The State alleged that on October 9, 2009, Fendich possessed a .22 caliber handgun and fired it at a park in Auburn, Washington. CP 1-3. The trial commenced on June 2, 2010. RP 1. The jury found Fendich guilty as charged of unlawful possession of a firearm in the first degree. CP 79. Fendich received a standard range sentence. CP 133-40.

## **2. SUBSTANTIVE FACTS**

Alexander Fendich was friends with Justin Cunningham and had known him for five years. RP 441<sup>1</sup>. On October 9, 2009, the two met in Auburn. RP 442. They walked to the Green River, where Cunningham showed Fendich a gun he was carrying in his waistband. RP 446-47. The gun belonged to Cunningham. RP 446. As they walked, they passed the apartment of John Cook and Rebecca Cabrales. RP 630-31, 660. Cunningham turned and spoke to Cook<sup>2</sup>. RP 632-33, 663. Cunningham drew the gun and fired into the river five or six times. RP 450. The pair then walked

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<sup>1</sup> The Verbatim Report of Proceedings consists of seven paginated volumes and will be referred to in this brief as "RP \_\_\_\_."

<sup>2</sup> According to Cook and Cabrales, Cunningham jokingly asked if they would mind if he threw his friend (Fendich) into the river. According to Cunningham he asked if they would mind if he fired his gun. RP 632-33, 663.

southbound to a bridge. Cunningham handed the gun to Fendich, and Fendich fired a round into the river. RP 451-53.

Jack Newman was fishing with his daughter on the Green River. He saw a couple of guys fire a gun into the river. RP 590. He heard several shots and saw two people "fussing around" and run off. RP 592. Newman called 911 and reported that six or seven shots had been fired. RP 607. He told the 911 operator that only one of the individuals had the gun. RP 608.

Cunningham and Fendich walked away from the river to the car of Cunningham's friend, Marcus McCraney. RP 454. They got into McCraney's car and listened to music, with Cunningham in the back driver-side seat, and Fendich in the back passenger-side seat.<sup>3</sup> RP 455. McCraney knew Cunningham, but this was the first time he had met Fendich. RP 572. Fendich and Cunningham talked about the gun. Fendich acknowledged that he held the gun. RP 576. Cunningham told McCraney that they both had fired the gun into the river.<sup>4</sup> RP 576.

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<sup>3</sup> While Cunningham testified he got in the driver-side passenger seat, when police arrived Fendich exited the rear driver-side seat and Cunningham exited the rear passenger-side seat. RP 681, 736.

<sup>4</sup> This statement was admitted without objection by Fendich. RP 576.

Police arrived approximately five minutes later. RP 456. Officers Millan and Deroche responded to a "shots fired" call and approached the area. RP 674, 734. They saw four individuals in a green car and noted that two people in the back seat (Fendich and Cunningham) matched the descriptions of the suspects. RP 733-34, 736. Cunningham hid the gun under the driver's seat. RP 456. Police ordered all the people out of the car. RP 689. Fendich exited the rear driver-side seat, and Cunningham got out of the rear passenger-side seat. RP 681, 736. Officer Deroche found a .22 caliber Ruger MK2 handgun under the driver's seat. RP 683, 739. Deroche later found six .22 caliber Ruger casings on a path in the park. RP 686.

At the time of the incident, Cunningham was a convicted felon who was prohibited from possessing a firearm. RP 440, 447. He pleaded guilty to unlawful possession of a firearm in the second degree. RP 447. His plea did not require him to testify and he did not receive any benefit from his testimony. RP 448. Cunningham later testified at Fendich's trial and said that he and Fendich were together by the Green River. RP 449. Cunningham testified that he took a gun from his waistband and fired into the river several times, then gave the gun to Fendich, who also fired it. RP 450,

451-52. Cunningham acknowledged that he initially told police that the gun belonged to Fendich. RP 463. Cunningham later told Fendich's lawyer that it was his gun and that Fendich did not touch it. RP 463. Cunningham testified at trial and acknowledged his inconsistent statements. RP 463.

Fendich was interviewed by Detective Hauser on October 12, 2009. RP 385. Fendich was in custody at the jail, and Hauser advised him of his Miranda<sup>5</sup> rights. RP 385. Fendich waived his rights and agreed to speak to the detective. RP 385. Fendich told the detective that he had received a call from Justin Cunningham on October 9, 2009 asking him to meet. RP 390. Fendich went to Brandon Park in Auburn and found Cunningham. RP 390. They walked to the Green River and Cunningham took a handgun from his waistband and fired it toward the river. RP 390-92. Initially Fendich denied touching the gun. RP 391. Hauser used a ruse and told Fendich that there were witnesses who saw him fire the gun. RP 392. Fendich then admitted that he took the gun and fired it three or four times. RP 392. Fendich told the detective that he knew he was a felon and was not supposed to have a gun.

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<sup>5</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

RP 394. He also told the detective that his parole officer had told him that he "could not be around firearms." RP 394.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY DECLINED TO GIVE WPIC 6.05, "TESTIMONY OF AN ACCOMPLICE."**

Fendich argues that Cunningham became an accomplice by handing him the gun. Hence, Fendich argues, the trial court should have given WPIC 6.05 "Testimony of an Accomplice." Fendich is incorrect. Cunningham was not an accomplice as defined by Washington law, and WPIC 6.05 is required only when the State relies solely on the testimony of an accomplice.

A trial court's refusal to give proposed jury instructions, if based on a factual dispute, is reviewed for an abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

The Washington Supreme Court has articulated the following three-part rule for evaluating the necessity of WPIC 6.05

"Testimony of an Accomplice" instruction:

(1) [I]t is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies **solely** on accomplice testimony;

and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.

State v. Harris, 102 Wn.2d 148, 155, 685 P.2d 584 (1984),

overruled on other grounds by State v. Brown, 111 Wn.2d 124,

761 P.2d 588 (1988) (emphasis added).

**a. Cunningham Did Not Meet The Definition Of An Accomplice.**

As a threshold matter, WPIC 6.05 only applies if the witness is an accomplice. As the notes to WPIC 6.05 indicate, the definition of an accomplice should be given to the jury as well. That definition is:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing the crime.

WPIC 10.51(emphasis added).

There was no evidence that Cunningham had any knowledge that handing a gun to Fendich was a crime, hence no

evidence to show that he knowingly facilitated the crime of unlawful possession of a firearm. The trial court asked Fendich's lawyer if there was any evidence that Cunningham knew about Fendich's criminal conviction, and she conceded, "I can't make the argument in good conscience, Your Honor, that there was any testimony presented to the jury that would indicate that Mr., or that would say anything to the jury that Mr. Cunningham knew the peril that he was placing Mr. Fendich in." RP 789. Cunningham was not an accomplice to unlawful possession of a firearm. Given that Cunningham clearly did not meet the definition of an accomplice, the "testimony of an accomplice" instruction would not apply to him.

Fendich nevertheless argues that "[e]ven if Cunningham knew nothing about Mr. Fendich's ineligibility to possess a firearm, Cunningham admitted his accomplice liability on the stand - that he knowingly placed a gun into Mr. Fendich's hands . . ." Brief of Appellant at 9. But it is not enough that Cunningham knowingly handed the gun to Fendich. The law requires that an accomplice act with knowledge that he will facilitate the crime. State v. Roberts, 142 Wn.2d 471, 511-12, 14 P.3d 713 (2001). The accomplice need only have general knowledge of the crime, not the specific degree of that crime. Id.

Hence, a potential accomplice to Fendich would not have to know what crimes Fendich had been convicted of in order to distinguish between unlawful possession of a firearm in the first or second degree. However, the accomplice would need to have some general knowledge that Fendich was prohibited from possessing a firearm.

Merely handing someone a gun is not a crime, nor is it a crime to unwittingly hand a gun to a convicted felon. There was no evidence before the trial court to establish that Cunningham was aware that Fendich had a criminal conviction. The trial court correctly concluded that there was no evidence that Cunningham met the definition of an accomplice, and WPIC 6.05, the "Testimony of an Accomplice" instruction, was not applicable.

**b. The State Did Not Rely Solely On Cunningham To Prove Fendich Possessed A Firearm.**

Even if the trial court should have given WPIC 6.05, reversal is only required when the State relies solely on the testimony of an accomplice. In the present case, the State did not rely solely on the testimony of an alleged accomplice.

In State v. Johnson, 40 Wn. App. 371, 699 P.2d 221 (1985), the defendants unlawfully entered a home, then robbed and murdered the victim. A girlfriend of one defendant informed the police about her boyfriend's involvement in the crime, leading to the defendants' arrest. Johnson, 40 Wn. App. at 373. When one of the defendants' accomplices testified for the State, the defendants sought an accomplice instruction. The trial court refused, ruling that there was sufficient corroboration when (1) the defendants were together both before and after the crime; (2) one of the defendants later admitted he had committed the crime; and (3) one of the defendants had injuries consistent with the accomplice's description of the crime. Id. at 379-80. Division I affirmed the trial court, reasoning that this additional evidence established sufficient corroboration. Id. at 380. See also State v. Sherwood, 71 Wn. App. 481, 485, 860 P.2d 407 (1993) (no need to give instruction when testimony and physical evidence sufficiently corroborated accomplice's testimony); State v. Mannhalt, 68 Wn. App. 757, 845 P.2d 1023 (1992).

Similarly, there was sufficient corroboration here. In addition to Cunningham's testimony that Fendich handled and fired the gun,

Fendich admitted to handling and firing the gun.<sup>6</sup> RP 392. McCraney testified that he heard Fendich acknowledge handling the gun, and he also heard Cunningham say Fendich fired the weapon. RP 575-76. Witness Newman saw Cunningham and Fendich together "fussing around" with something after hearing the shots. RP 592. The gun was found under the driver's seat in a location where Fendich would have had access. RP 727, 739. Substantial evidence thus corroborated Cunningham's testimony that Fendich possessed the gun, obviating the need for WPIC 6.05. Since the State did not rely solely on Cunningham's testimony, the failure to give WPIC 6.05 was not error.

**c. Any Error Was Harmless.**

Even if the trial court erred by declining to give WPIC 6.05, any error was harmless. As the Supreme Court noted, whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence

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<sup>6</sup> Fendich urges this Court to discount his confession because the detectives used a ruse by telling him witnesses had seen him fire the gun. Police use of deception is permissible so long as it does not overbear a suspect's will. State v. Burkins, 94 Wn. App. 677, 695-96, 973 P.2d 15 (1999). Fendich does not challenge the voluntariness of his confession on appeal.

depends upon the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction. Harris, 102 Wn.2d at 155.

In the present case, Fendich admitted to police that he possessed the firearm, and acknowledged to McCraney that he possessed the firearm, Newman saw both men "fussing around" after the shots were fired, and the gun was found under the seat within Fendich's reach. There was strong evidence corroborating Cunningham's testimony that Fendich possessed the gun.

Fendich argues that "when a jury instruction is deficient in a manner that relieves the State of its burden to prove each essential element of a charged crime" then the State must show the error was harmless beyond a reasonable doubt. Fendich applies the wrong standard. The absence of WPIC 6.05 did not relieve the State of the burden to prove each element of unlawful possession of a firearm. The instructions correctly contained every element of unlawful possession of a firearm. CP 105. Even if the trial court erred by declining to give the "testimony of an accomplice" instruction, this did not relieve the State of the burden to prove

every element of the offense. Furthermore, Fendich fails to reconcile this with the standard articulated by the Supreme Court in Harris, where the "harmless beyond a reasonable doubt" standard was not applied.

The trial court properly declined to give WPIC 6.05 because Cunningham did not meet the definition of an accomplice, and the State did not rely solely on the testimony of Cunningham. In light of the extensive corroboration of Cunningham's testimony, any error from declining to give the instruction was harmless.

**2. FENDICH HAS FAILED TO PRESERVE ANY CLAIM OF PROSECUTORIAL MISCONDUCT AND FAILED TO SHOW ANY PROSECUTORIAL MISCONDUCT THAT AFFECTED THE VERDICT.**

Fendich argues that the prosecutor committed misconduct during closing argument by misstating the terms of his ineligibility to possess a firearm. However, Fendich did not object to the prosecutor's argument. Furthermore, Fendich has failed to demonstrate a substantial likelihood that the alleged misconduct affected the verdict.

A defendant claiming prosecutorial misconduct bears the burden of establishing that the challenged conduct was both

improper and prejudicial. State v. Cheatam, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). Unless a defendant objected to the improper comments at trial, requested a curative instruction, or moved for a mistrial, reversal is not required unless the prosecutorial misconduct was so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Smith, 67 Wn. App. 838, 847, 841 P.2d 76, 81 (1992). Prejudice occurs only if "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995).

Possession of a firearm can be actual or constructive. Constructive possession means, "there is not actual possession but there is dominion and control over the item." WPIC 133.52; CP 100. The phrase that a defendant cannot be "around" or "near" guns is often used as a shorthand way to reference the concept of constructive possession. Fendich himself used the phrase when he told the police that he cannot be "around" firearms. RP 374.

Admittedly, referring to constructive possession as prohibiting a person from being "around" guns is overly broad. Proximity alone is not sufficient to find a person constructively possessed a gun. The jury was specifically instructed that

proximity alone, without proof of dominion and control, is insufficient to establish constructive possession. CP 100.

Fendich cites two passages of the prosecutor's closing argument in alleging misconduct. In the first passage, the prosecutor's reference focused on Fendich's statements to police that he was told that he could not be "around" firearms and about his understanding of the prohibited conduct. This is not misconduct. Fendich's awareness that his prohibition against possessing firearms went beyond just holding or firing the gun is relevant to the element of knowledge.<sup>7</sup> The prosecutor made the following argument:

Alex Fendich admitted that he knew he was not supposed to be near firearms and it wasn't just that he couldn't hold them or fire one he explained it himself to Detective Hauser he couldn't be around firearms. That demonstrates that he understood what possessing meant. His parole officer as he explained to Detective Hauser had explained to him you can't be around guns. He also admitted that he knew he couldn't be around guns. Obviously his parole officer told him, two separate court orders that you saw yesterday that will go back with you to the jury room told him you can't.

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<sup>7</sup> Unlawful possession of a firearm requires proof beyond a reasonable doubt that Fendich "knowingly has in his possession or control a firearm." WPIC 133.02; CP 102.

RP 823-24. The prosecutor's challenged remarks appear while she argued about the "knowledge" element of possession. Because Fendich had been told he was "not supposed to be around guns," he knew that holding Cunningham's gun, and having access to the gun on the floorboard of the car, was illegal.

In the second passage cited by Fendich as misconduct, the prosecutor simply adopted the shorthand phrase to refer to constructive possession:

The law says we have to jurors to our peers and when a court ordered you to show up to do that you did. Same kind of court order that prohibits this defendant from owning a firearm, can't be near them, can't possess them, told twice in two different court orders you cannot be near firearms. It's claimed further by a human, a parole officer who says you can't be near firearms and for whatever reason does it matter or not he decided to ignore willfully and unlawfully that court order because he didn't care, because he just made a bad choice, it doesn't matter.

RP 835 (emphasis added). This is admittedly an overly broad way to refer to constructive possession. However, Fendich did not object. The failure to object to an improper remark constitutes a waiver of error, and will not result in reversal unless the remark is so flagrant and ill-intentioned that it resulted in prejudice that could not have been neutralized by a curative instruction. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). Therefore,

Fendich must demonstrate misconduct so flagrant and ill-intentioned that a curative instruction could not have obviated the resultant prejudice. Smith, 67 Wn. App. at 847. Fendich has failed to show that the prosecutor's remarks were flagrant and ill-intentioned when they are placed within the context of her arguments that properly summarize the facts and the law.

The State argued that Fendich had actual possession of the gun and fired it. The prosecutor did not argue that the jury should find Fendich possessed the gun because he was "near" the gun or "around" the gun. The prosecutor started her closing argument by stating, "[t]he evidence that we have shown you over the last couple of weeks shows beyond a reasonable doubt that Alexander Fendich the defendant not only held and shot that gun into the Green River, but that he had immediate ability to control or possess that weapon." RP 823. The State properly argued that Fendich should be found guilty because he had actual possession of the gun:

We've shown that by showing that Alex Fendich held, actually possessed and fired that weapon. RP 823.

It's very hard to argue that you're not knowingly in possession of a weapon when you're actually standing there holding it and shooting it. RP 829.

Actual possession has been proven. RP 830.

The prosecutor went on to properly reference the definition of constructive possession: "constructive possession means, among other things having the immediate ability to touch, possess, hold, access that item." RP 823. The prosecutor also argued that Fendich had constructive possession of the firearm when he sat in the back seat of the car with the gun right in front of him. RP 831. The prosecutor again did not urge the jury to find Fendich guilty based solely on his proximity to the weapon:

And then they went back to the car where Marcus was parked and he sat next to Justin with that gun, right next to his feet with the immediate ability to again control and possess that firearm. RP 824-25.

He went back to that car and the defendant sat beside the gun in the car within visible, each [sic] reach of it. RP 829.

The prosecutor's arguments were founded upon proper factual and legal basis. Many of the shorthand references to Fendich being prohibited from being "near" or "around" guns were

statements made to Fendich that demonstrate his knowledge that he was prohibited from more than just handling the gun. The occasions on which the prosecutor adopted the overly broad shorthand were in the context of proper arguments that Fendich had actual and constructive possession of the gun. At no point did the prosecutor urge the jury to convict Fendich based on his mere proximity to the gun.

Furthermore, Fendich has failed to show there is a substantial likelihood the instances of alleged misconduct affected the jury's verdict in light of all the evidence that Fendich possessed the firearm by more than mere proximity. Fendich had actual possession of the gun, by his own admissions to the police and to McCraney. Police found the gun on the floor of the car within Fendich's reach, and within his dominion and control. Fendich's friend Cunningham told the jury that he handed the gun to Fendich and watched him fire it. Fendich cannot show prejudice in light of the clear evidence that he had actual possession of the gun.

D. **CONCLUSION**

For the foregoing reasons, the State asks this Court to affirm Fendich's conviction for unlawful possession of a firearm in the first degree.

DATED this 11<sup>th</sup> day of April, 2011.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle WA 98101, containing a copy of the Brief of Respondent, in STATE V. ALEXANDER FENDICH, Cause No. 65725-9-I, in the Court of Appeals, Division I, for the State of Washington.

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

*uBrame*  
Done in Seattle, Washington

4/11/10  
Date 4/11/10