

71004-4

71004-4

No. 71004-4-I

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

---

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DABALOS,

Appellant.

---

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

---

BRIEF OF APPELLANT

---

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2014 NOV -1 AM 11:19

ELAINE L. WINTERS  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

C. STATEMENT OF THE CASE..... 3

D. ARGUMENT..... 5

**1. The State did not prove beyond a reasonable doubt that Mr. Dabalos committed the crime of unlawful possession of a firearm in the first degree** ..... 5

        a. The State must prove every element of the charged crime beyond a reasonable doubt..... 5

        b. The State did not prove beyond a reasonable doubt that Mr. Dabalos knowingly owned, possessed, or controlled the rifle found in the Renton house ..... 6

        c. Mr. Dabalos’s conviction must be reversed..... 9

**2. Mr. Dabalos’s conviction must be reversed because he did not receive the effective assistance of counsel guaranteed by the state and federal constitution** ..... 9

        a. Mr. Dabalos has the constitutional right to effective assistance of counsel..... 9

        b. Mr. Dabalos’s attorney did not contact two potential witnesses who would have provided exculpatory testimony ..... 11

        c. Mr. Dabalos’s attorney’s failure to investigate was deficient performance ..... 14

        d. Mr. Dabalos was prejudiced by his attorney’s deficient performance ..... 20

e. Mr. Dabalos’s conviction should be reversed and remanded for a new trial .....	21
<b>3. Prosecutorial misconduct in closing argument denied Mr. Dabalos his constitutional right to a fair trial .....</b>	<b>22</b>
a. Misconduct by the prosecutor may violate a defendant’s constitutional right to a fair trial .....	22
b. The prosecutor committed misconduct by misstating the elements of the crime, thus reducing the State’s burden of proof.....	24
c. Mr. Dabalos’s conviction must be reversed.....	26
<b>E. CONCLUSION .....</b>	<b>28</b>

## TABLE OF AUTHORITIES

### **Washington Supreme Court Decisions**

<u>In re Marriage of Littlefield</u> , 133 Wn.2d 39, 940 P.2d 1362 (1997)....	20
<u>State v. A.N.J.</u> , 168 Wn.2d 91, 225 P.3d 956 (2010).....	10, 11, 15, 17
<u>State v. Anderson</u> , 141 Wn.2d 357, 5 P.3d 1247 (2000).....	6
<u>State v. Bozovich</u> , 145 Wash. 227, 259 Pac. 395 (1927) .....	27
<u>State v. Charlton</u> , 90 Wn.2d 657, 585 P.2d 142 (1978) .....	23
<u>State v. Copeland</u> , 130 Wn.2d 244, 922 P.2d 1304 (1996).....	27
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984) .....	24
<u>State v. Emery</u> , 174 Wn.2d 74, 278 P.3d 653 (2012).....	23, 24, 26
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
<u>State v Heddrick</u> , 166 Wn.2d 898, 215 P.3d 201 (2009).....	10
<u>State v. Jones</u> , 146 Wn.2d 328, 45 P.3d 1062 (2002).....	7
<u>State v. Monday</u> , 171 Wn.2d 667, 257 P.3d 551 (2011).....	23
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984) .....	23, 27
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	10, 22
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008), <u>cert. denied</u> , 556 U.S. 1192 (2009).....	24

### Washington Court of Appeals Decisions

<u>State v. Cantabrana</u> , 83 Wn. App. 204, 921 P.2d 572 (1996) .....	8
<u>State v. Chouinard</u> , 169 Wn App. 895, 282 P.3d 117 (2012), <u>rev. denied</u> , 176 Wn.2d 1003 (2013) .....	7
<u>State v. Echeverria</u> , 85 Wn. App. 777, 934 P.2d 1214 (1997) .....	8, 9
<u>State v. Gotcher</u> , 52 Wn. App. 350, 759 P.2d 1216 (1988).....	25, 27
<u>State v. Jury</u> , 19 Wn. App. 256, 576 P.2d 1302, <u>rev. denied</u> , 90 Wn.2d 1006 (1978).....	15
<u>State v. Maurice</u> , 79 Wn. App. 544, 903 P.2d 514 (1995) .....	15
<u>State v. Shumaker</u> , 142 Wn. App. 330, 174 P.3d 1214 (2007) .....	7
<u>State v. Stith</u> , 71 Wn. App. 14, 856 P.2d 415 (1993).....	27
<u>State v. Visitacion</u> , 55 Wn. App. 166, 776 P.2d 986 (1989).....	17
<u>State v. Walker</u> , 164 Wn. App. 724, 265 P.3d 191 (2011).....	24

### United States Supreme Court Decisions

<u>Berger v. United States</u> , 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935);.....	23
<u>Faretta v. California</u> , 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).....	9
<u>Herring v. New York</u> , 422 U.S. 853, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975).....	10
<u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	5

<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).....	6
<u>Rompilla v. Beard</u> , 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005).....	17
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	10, 11, 15, 16, 20
<u>United States v. Cronic</u> , 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).....	10
<u>Wiggins v. Smith</u> , 539 U. S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).....	16

### **Federal Circuit Court of Appeals Decisions**

<u>Correll v. Ryan</u> , 539 F.3d 938 (9 <sup>th</sup> Cir. 2008) .....	16
<u>Lord v. Wood</u> , 184 F.3d 1083 (9 <sup>th</sup> Cir. 1999), <u>cert. denied</u> , 528 U.S. 1198 (2000).....	17
<u>Vega v. Ryan</u> , ___ F.3d ___, 2014 WL 2019294 (9 <sup>th</sup> Cir., No. 12-15631, 5/19/14).....	15, 17

### **United States Constitution**

U.S. Const. amend. VI.....	1, 2, 9
U.S. Const. amend. XIV .....	1, 2, 5, 9, 22

### **Washington Constitution**

Const. art. I, § 22 .....	1, 9, 22
---------------------------	----------

**Washington Statute**

RCW 9.41.040 ..... 6, 24

**Other Authorities**

American Bar Association Criminal Justice Section, Standards for Criminal Justice – Prosecution Function and Defense Function (3<sup>rd</sup> ed. 1993)..... 15

Washington Bar Association, Standards for Indigent Defense Services (2011)..... 19

A. ASSIGNMENTS OF ERROR

1. The State did not prove beyond a reasonable doubt that Christopher Dabalos knowingly possessed a firearm, an essential element of unlawful possession of a firearm in the first degree.

2. The trial court erred by denying Mr. Dabalos's motion in arrest of judgment.

3. Defense counsel did not investigate exculpatory witnesses, thus violating Mr. Dabalos's constitutional right to effective assistance of counsel

4. The trial court erred by denying Mr. Dabalos's motion for a new trial based upon ineffective assistance of counsel.

5. Prosecutorial misconduct in closing argument violated Mr. Dabalos's constitutional right to a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amend. VI, XIV. Mr. Dabalos was convicted of unlawful possession of a firearm in the first degree based upon evidence that items belonging to him were in the same room as a rifle that was inside a closed wooden chest. Viewing the evidence in the light most favorable to the



State, must Mr. Dabalos's conviction be reversed and dismissed in the absence of proof beyond a reasonable doubt that he knowingly owned, possessed or controlled the rifle? (Assignments of Error 1, 2)

2. The accused's Sixth Amendment right to counsel includes the right to effective assistance of counsel. Defense counsel is required to investigate the facts of the case. Mr. Dabalos's trial attorney placed only two telephone calls in an effort to locate two witnesses he mentioned to her. The attorney never talked to the witnesses, but nevertheless decided their testimony would not be helpful. One of the witnesses, however, would have testified that another person hid the firearm a chest in Mr. Dabalos's room when Mr. Dabalos was not present. In addition, both witnesses lived with Mr. Dabalos in the house where the rifle was found and would have testified they never saw him with the rifle. Must Mr. Dabalos's conviction be reversed and remanded for a new trial because his constitutional right to effective assistance of counsel was violated? (Assignments of Error 3, 4).

3. The accused has the constitutional right to a fair trial, and a prosecutor's improper arguments may violate that right. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22. The prosecutor committed misconduct in closing argument by twice misstating the elements of the crime as set forth in the jury instructions in a manner that reduced the

State's burden of proof. Must Mr. Dabalos's conviction be reversed where the prosecutor's misconduct in closing argument was so flagrant and ill-intentioned that it could not have been cured by timely objections and curative instructions? (Assignment of Error 5).

C. STATEMENT OF THE CASE

Auburn Police personnel executed a search warrant at a three-bedroom house located at 14114 S.E. 192<sup>nd</sup> Street in Renton in March 2011. 5/13/14 RP 118-19, 121-22. Christopher Dabalos was one of four people inside the residence at the time. 5/13/14 RP 122-23.

Mr. Dabalos was arrested and questioned by Detectives Michael Houser and Jonathan Peterson. 5/13/14 RP 18-20, 49, 50-51. Mr. Dabalos told the detectives that he lived in the house. 5/13/14 RP 25. When asked about a rifle found in a bedroom in the house, Mr. Dabalos said Dennis Bertram had brought the gun to his home and tried to sell it to him, but Mr. Dabalos told Mr. Bertram to take the gun away. Post-Trial Ex. 1; 5/13/14 RP 30-31.

The King County Prosecutor charged Mr. Dabalos with unlawful possession of a firearm in the first degree. RCW 9.41.010. CP 1-2. At a jury trial before the Honorable Jay V. White, Detective Houser testified that he seized a rifle and two unloaded magazines he

found inside a unlocked wooden chest in a bedroom in the Renton house. 5/13/14 RP 125, 136-38, 150.

The detective found documents belonging to Mr. Dabalos and Sonya Gleason in the bedroom and in the chest. 5/13/14 RP 146-47. The detective found Mr. Dabalos's 2009 temporary driver's license and an undated bill in the chest underneath the rifle. 5/13/14 RP 144, 151-52. Both listed an address in Moses Lake. 5/13/14 RP 151-52; Ex. 10. Mr. Dabalos's driver's license was under the bed and his wallet was on the floor, also with a Moses Lake address. 5/13/14 RP 127, 131; Ex. 3. His Department of Corrections identification card, which does not include an address, was on top of the chest. 5/13/14 RP 133-35; Ex. 6.

Mr. Dabalos stipulated that he had previously convicted of a serious offense as defined by RCW 9.41.010. 4/13/14 RP 182. The rifle was an AK-47 that the police determined was operable. 5/13/14 RP 137, 178-79 No fingerprint of comparison value were found on the rifle. 5/13/14 RP 167-69, 170.

The State did not introduce any of Mr. Dabalos's statements to the police officers, and Mr. Dabalos did not testify or present any witnesses. He was convicted as charged. CP 54.

Mr. Dabalos obtained new counsel and moved for a new trial on the grounds of ineffective assistance of counsel because his attorney did not contact two witnesses who could have provided exculpatory evidence. CP 93-95, 98-100, 103-22; 9/13/13 RP 34-37. He also moved for arrest of judgment in light of the absence of evidence to prove possession beyond a reasonable doubt. CP 95-98, 106-07; 9/13/14 RP 31-33. The court denied both motions. 9/16/13 RP 95-110.

The court sentenced Mr. Dabalos to an 87-month standard-range prison term. CP 72, 74. He appeals. CP 79-90.

#### D. ARGUMENT

1. **The State did not prove beyond a reasonable doubt that Mr. Dabalos committed the crime of unlawful possession of a firearm in the first degree.**

a. The State must prove every element of the charged crime beyond a reasonable doubt.

The Due Process Clause protects the accused from conviction unless the State proves every element of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV. On appellate review, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v.

Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979);

State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Mr. Dabalos was convicted of unlawful possession of a firearm in the first degree, RCW 9A.04.040. CP 1-2; 54. The statute reads:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person, owns, has in his possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

RCW 46.41.040(1). The State must establish that the defendant knowingly owned, possessed, or controlled the firearm. State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000) (addressing second degree possession of a firearm); CP 46, 50. Mr. Dabalos's conviction must be reversed because the State did not prove beyond a reasonable doubt that he knowingly owned, possessed, or controlled the rifle.

b. The State did not prove beyond a reasonable doubt that Mr. Dabalos knowingly owned, possessed, or controlled the rifle found in the Renton house.

An essential element of first degree possession of a firearm is knowing possession, control, or ownership of a firearm. RCW 46.61.040(1); CP 50. The State offered no proof that Mr. Dabalos

owned the firearm or that he had actual possession or control of it. Instead, the State conviction was based upon constructive possession. 5/14/13 RP 10-11, 16.

Possession may be actual or constructive. State v. Chouinard, 169 Wn App. 895, 889, 282 P.3d 117 (2012), rev. denied, 176 Wn.2d 1003 (2013). Constructive possession may be established by proving dominion and control over the firearm. Id. Dominion and control means that the object may be reduced to actual possession immediately. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Proximity to a weapon alone is not sufficient to establish constructive possession. Id.

In this case, the State proved that Mr. Dabalos was in the home when the search warrant was executed and that his wallet, driver's license, temporary driver's license, DOC identification, and a bill were in the bedroom where the gun was found. At most, the State proved that Mr. Dabalos may have lived in the bedroom along with Ms. Gleason.

Constructive possession requires proof that the defendant had control over the firearm itself, not just the place where it was located. State v. Shumaker, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007);

State v. Cantabrana, 83 Wn. App. 204, 207-08, 921 P.2d 572 (1996).

Dominion and control over the premises where the rifle was found was but one factor to be considered by the jury in determining if Mr. Dabalos knowingly possessed it.

In Echeverria, the Court of Appeals affirmed a conviction for unlawful possession of a firearm when a juvenile was found driving a car with a firearm sticking out from underneath the driver's seat. State v. Echeverria, 85 Wn. App. 777, 779-80, 783, 934 P.2d 1214 (1997).

In that circumstance, the juvenile court made a reasonable inference that the defendant knowingly possessed or controlled the gun that was within his reach. Id. at 783. In contrast, the Court of Appeals overturned the juvenile's conviction for possession of throwing stars that were in the car but not visible. Id. at 783-84.

The gun in this case was not visible. It was found in a rifle case inside a wooden chest or trunk. 5/13/14 RP 136-37. The trunk was covered with items, including a globe, so that it could not be easily opened. Ex 4. And, while Mr. Dabalos's temporary driver's license was found in the chest, it was underneath the rifle case and thus would have been placed there before the rifle. 5/13/14 RP 133-45. Thus, the

State did not prove beyond a reasonable doubt that Mr. Dabalos knew the weapon was there.

c. Mr. Dabalos's conviction must be reversed.

The defendant may not be convicted unless the evidence supports every element of the crime beyond a reasonable doubt. The State did not prove that Mr. Dabalos knew there was a rifle in the trunk or that he had constructive possession of the rifle. Mr. Dabalos's conviction for unlawful possession of a firearm must be reversed and must be dismissed. See Chouinard, 169 Wn. App. at 903; Echeverria, 85 Wn. App. at 785.

2. **Mr. Dabalos's conviction must be reversed because he did not receive the effective assistance of counsel guaranteed by the state and federal constitutions.**

a. Mr. Dabalos has the constitutional right to effective assistance of counsel.

The federal and state constitutions guarantee a criminal defendant the right to counsel.<sup>1</sup> U.S. Const. amends. VI, XIV; Const. art. I, § 22; Faretta v. California, 422 U.S. 806, 807, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); State v Heddrick, 166 Wn.2d 898, 909-10, 215

---

<sup>1</sup> The right to counsel found in the Sixth and Fourteenth Amendment applies to the States. Gideon v. Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963).



P.3d 201 (2009). Defense counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 84-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronic, 466 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975)).

The right to counsel therefore necessarily includes the right to effective assistance of counsel. Strickland, 466 U.S. at 686; State v. A.N.J., 168 Wn.2d 91, 96-98, 225 P.3d 956 (2010). The right to effective counsel is not fulfilled simply because an attorney is present in court; the attorney must actually assist the client and play a role in ensuring the proceedings are adversarial and fair. Strickland, 466 U.S. at 685; A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under

Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable representation, and, if so, (2) was the defendant prejudiced by counsel's errors.

Strickland, 466 U.S. at 688, 694; Thomas, 109 Wn.2d at 226.

Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109.

- b. Mr. Dabalos's attorney did not contact two potential witnesses who would have provided exculpatory testimony.

Mr. Dabalos's trial attorney Jennifer Cruz did not call any witnesses at trial. Her defense was that the State did not prove Mr. Dabalos knowingly possessed the rifle. See 5/14/13 RP 32-35.

In her declaration, Ms. Cruz stated that Mr. Dabalos told her that he did not know the gun was in his bedroom. CP 67. He was working as a welder and was not home very much. CP 67. Ms. Cruz and Mr. Dabalos also reviewed his written statement to the police, in which he explained that Mr. Bertram had brought the rifle to his home and Mr. Dabalos told him to get the gun out of the house. CP 67; Post-Trial Ex. 1.

Ms. Cruz was aware that Michael Monroe, Paula Hopper, and Ms. Gleason were in the house with Mr. Dabalos when the house was searched. See CP 68; 5/13/13 RP 14. Mr. Dabalos informed his lawyer that Mr. Monroe and Ms. Hopper would corroborate his statement about telling Mr. Bertram to get the gun out of the house. CP 68. Mr. Dabalos asked Ms. Cruz to contact Michael Monroe, but he thought Ms. Hopper might have a criminal history and did not suggest Ms. Cruz contact her. CP 68.

Ms. Cruz tried to contact Mr. Monroe only two times, and did not reach him. CP 68-69. She did reach a woman who she suspected was Paula Hopper, but did not try to contact Ms. Hopper on the telephone number Mr. Dabalos gave her for Ms. Hopper. CP 69. Ms. Cruz decided not to investigate further because Ms. Hopper would “place the gun and Mr. Dabalos in the bedroom of the house.” CP 70.

After he was convicted, Mr. Dabalos retained Eric Lindell. Mr. Lindell was able to reach both Mr. Monroe and Ms. Hopper and provide the court with their declarations. CP 117-22. Mr. Monroe would have testified that Mr. Bertram came to the house and went to Mr. Dabalos’s room. He heard Mr. Dabalos say that he did not “mess

with guns” and ordered Mr. Bertram to get it out of there. Mr. Dabalos then left. CP 119, 121.

More importantly, Mr. Monroe would also have testified that after Mr. Dabalos left the house, he saw Mr. Bertram put the gun in the chest in Mr. Dabalos’s bedroom. CP 119, 121. In addition, both Mr. Monroe and Ms. Hopper would have testified that they lived in the house with Mr. Dabalos and never saw him with the rifle or heard him talk about the rifle. CP 117, 120, 121.

The trial court denied Mr. Dabalos’s motion for a new trial. The judge reasoned that Ms. Cruz’s trial strategy was to argue that Mr. Dabalos had no knowledge of the firearm. 9/13/13 RP 82. Ms. Hopper and Mr. Monroe placed Mr. Dabalos in the house when Mr. Bertram brought the gun. 9/16/13 RP 103, 109. The court therefore concluded that, based upon what Mr. Dabalos told her about their possible testimony, Ms. Cruz was not obligated to contact the potential witnesses. 9/13/13 RP 82.

The court also opined that much of the information in Ms. Hopper and Mr. Monroe’s declarations was inadmissible and was concerned about perceived inconsistencies in Mr. Monroe’s two

declarations. 9/16/13 RP 93, 103-07. The court added that Ms. Cruz tried to contact them but was unable to reach them. 9/13/13 RP 82.

The court therefore concluded that Ms. Cruz's performance was not below that of a reasonable attorney and that Mr. Dabalos could not demonstrate that the outcome of the case might be different with the witnesses based upon the State's "strong evidence" of possession. 9/16/13 RP 110. The court did not enter written findings of fact and conclusions of law.

c. Mr. Dabalos's attorney's failure to investigate was deficient performance.

The American Bar Association Standards require defense counsel to investigate and explore all information relevant to the case:

Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in event of conviction. . . . The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.

American Bar Association Criminal Justice Section, Standards for Criminal Justice – Prosecution Function and Defense Function, Std. 4-

4.1(a) (3<sup>rd</sup> ed. 1993).<sup>2</sup> The Washington Supreme Court has also held that defense counsel duty to investigate and evaluate evidence in the context of helping the client make an educated decision as to whether to plead guilty) A.N.J., 168 Wn.2d at 111-12. The Strickland Court also established that defense counsel “has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.” Strickland, 466 U.S. at 691.

Ms. Cruz’s duty to investigate Mr. Dabalos’s case included contacting the two witnesses he identified as having possible exculpatory information. See State v. Maurice, 79 Wn. App. 544, 552, 903 P.2d 514 (1995) (counsel deficient for failing to have vehicle examined based upon recommendation by State’s accident reconstruction expert, supporting client’s theory that accident caused by mechanical problem with vehicle); State v. Jury, 19 Wn. App. 256, 266, 576 P.2d 1302 (counsel deficient for not interviewing or subpoenaing witnesses identified by client to support mental health defense), rev. denied, 90 Wn.2d 1006 (1978); Vega v. Ryan, \_\_\_ F.3d \_\_\_, 2014 WL 2019294 at \*5-7 (9<sup>th</sup> Cir., No. 12-15631, 5/19/14) (defense counsel

---

<sup>2</sup> Available at [www.abanet.org/crimjust/standards](http://www.abanet.org/crimjust/standards). Bar association and other standards are relevant in considering ineffective assistance of counsel claims. A.N.J., 168 Wn.2d at 110.

ineffective for not reviewing client's file that revealed complaining witness's recantation of testimony).

The trial court ruled that Ms. Cruz's performance was reasonable because, based upon what Mr. Dabalos told her, the two potential witnesses would not have helped his defense that he did not know the weapon was in his home. The court thus used the wrong legal standard. A strategic choice cannot reasonably be made in the absence of a thorough investigation. Strickland, 466 U.S. at 691 (“[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.”) (emphasis added); Wiggins v. Smith, 539 U. S. 510, 521-22, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (accord); Correll v. Ryan, 539 F.3d 938, 951 (9<sup>th</sup> Cir. 2008) (counsel's failure to investigate mitigation in death penalty case could not be excused as strategic because he failed “to conduct an investigation sufficient to make an informed judgment.”). Moreover, counsel's duty to investigate extends beyond investigating the information her client has provided her. See Rompilla v. Beard, 545 U.S. 374, 387-89, 125 S.

Ct. 2456, 162 L. Ed. 2d 360 (2005) (defense counsel had duty to investigate despite client's inability to assist and his active obstruction of counsel's efforts); Jury, 19 Wn. App. at 265 (client may not be able to supply information); Vega, 2014 WL 2019294 at \*7 ("counsel has a duty to investigate, even if his or her client does not divulge relevant information."). A reasonable investigation cannot be based solely on the police reports. State v. Visitacion, 55 Wn. App. 166, 174, 776 P.2d 986 (1989).

In addition, Ms. Cruz could not make a reasonable decision to call or not call Mr. Monroe and Ms. Hopper as witnesses without speaking to them personally. "Few decision a lawyer makes draw so heavily on professional judgment as whether or not to proffer a witness at trial." Lord v. Wood, 184 F.3d 1083, 1095 (9<sup>th</sup> Cir. 1999), cert. denied, 528 U.S. 1198 (2000). Given the importance of a witness's demeanor and reputation, responsible counsel cannot decide whether a witness will appear credible "without looking him in the eye and hearing his story." Id.

In A.N.J., a lawyer advised his juvenile client to plead guilty to first degree child molestation without performing a "meaningful investigation." A.N.J., 168 Wn.2d at 109. A.N.J.'s parents provided



the lawyer with the names of two witnesses who might have testified that the complainant had been sexually abused prior to making allegations against their son. Id. The lawyer made only one attempt to reach the witnesses, and the Supreme Court held that the investigation was so minimal that it prevented the attorney from providing A.N.J. with the information he needed to make a reasoned decision as to whether or not to plead guilty. Id. at 109-12. Similarly, Ms. Cruz's two attempts to contact Mr. Monroe and one telephone conversation with a woman who did not identify herself as Ms. Hopper was not adequate.

It was defense counsel's responsibility to interview the witnesses to determine what evidence they could offer and then develop a litigation strategy. Because Ms. Cruz did not talk to Mr. Monroe, she did not know that he saw Mr. Bertram put the rifle in the chest in Mr. Dabalos's bedroom when Mr. Dabalos was not home. CP 119, 121. This is exculpatory evidence of which Mr. Dabalos would not have been aware.

While Mr. Monroe and Ms. Hopper would have testified Mr. Dabalos lived in the home in bedroom where the firearm was found, Mr. Dabalos would have said the same thing if he had exercised his

right to testify. Mr. Monroe and Ms. Hopper both could have added that they lived in the house and never saw Mr. Dabalos with a rifle.

The trial court also found that Ms. Cruz tried to contact Mr. Monroe and Ms. Hopper. Ms. Cruz's declaration, however, shows that she made only two telephone calls to locate Mr. Monroe and none to locate Ms. Hopper. CP 68-69. After the short trial had begun, counsel also spoke to a woman she assumed was Ms. Hopper. That woman did not identify herself and Ms. Cruz made no attempt to reach Ms. Hopper at the number provided by Mr. Dabalos. CP 69. Ms. Cruz did not make any further attempts to obtain the assistance of an investigator to locate the potential defense witnesses. Her investigation thus fell below professional norms. See Washington Bar Association, Standards for Indigent Defense Services, Srt'd. 6 (2011)<sup>3</sup> (requiring court-appointed counsel to utilize investigators when needed).

Mr. Dabalos's attorney's investigation fell below reasonable professional standards. She made two tepid attempts to interview Mr. Monroe, one after trial had begun, and spoke to someone who may or may not have been Ms. Hopper. Defense counsel never obtained the assistance of an investigator in locating Mr. Monroe or Ms. Hopper.

---

<sup>3</sup> Available at [www.wsba.org](http://www.wsba.org) and [www.defensenet.org](http://www.defensenet.org).

right to testify. Mr. Monroe and Ms. Hopper both could have added that they lived in the house and never saw Mr. Dabalos with a rifle.

The trial court also found that Ms. Cruz tried to contact Mr. Monroe and Ms. Hopper. Ms. Cruz's declaration, however, shows that she made only two telephone calls to locate Mr. Monroe and none to locate Ms. Hopper. CP 68-69. After the short trial had begun, counsel also spoke to a woman she assumed was Ms. Hopper. That woman did not identify herself and Ms. Cruz made no attempt to reach Ms. Hopper at the number provided by Mr. Dabalos. CP 69. Ms. Cruz did not make any further attempts to obtain the assistance of an investigator to locate the potential defense witnesses. Her investigation thus fell below professional norms. See Washington Bar Association, Standards for Indigent Defense Services, Srt'd. 6 (2011)<sup>3</sup> (requiring court-appointed counsel to utilize investigators when needed).

Mr. Dabalos's attorney's investigation fell below reasonable professional standards. She made two tepid attempts to interview Mr. Monroe, one after trial had begun, and spoke to someone who may or may not have been Ms. Hopper. Defense counsel never obtained the assistance of an investigator in locating Mr. Monroe or Ms. Hopper.

---

<sup>3</sup> Available at [www.wsba.org](http://www.wsba.org) and [www.defensenet.org](http://www.defensenet.org).

Although Ms. Cruz claimed her decision not to call either as a witness was well-informed, she lacked the information necessary to make a reasoned decision. In fact, Mr. Monroe could have provided exculpatory testimony that someone hid the rifle in Mr. Dabalos's room when Mr. Dabalos was not present.

The trial court's determination that Ms. Cruz's performance complied with reasonable professional norms was based upon "an incorrect legal standard or the facts do not meet the requirements of the correct standard" of upon facts that are unsupported by the record. In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). The trial court therefore abused its discretion in ruling that Mr. Dabalos's counsel's performance was not defective.

d. Mr. Dabalos was prejudiced by his attorney's deficient performance.

When raising ineffective assistance of counsel, the defendant need not show that his attorney's deficient performance more likely than not altered the outcome of the case. Strickland, 466 U.S. at 693. Instead, he need only show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A "reasonable probability" is one that "undermine[s] confidence in the outcome." Id. "[T]he

ultimate focus of inquiry must be on the fundamental fairness of the proceeding.” Id. at 696.

The State presented scant circumstantial evidence that Mr. Dabalos possessed the rifle. The State did not prove who owned or rented the house. It relied only upon Mr. Dabalos’s presence in the house when the search warrant was executed and pieces of his identification and a letter addressed to him in the bedroom and chest where the rifle was found. The identification and letter, however, did not list the Renton address. The State did not present a witness who saw Mr. Dabalos with the weapon and did not find his fingerprints on the gun.

There is thus a reasonable probability that the jury would not have convicted Mr. Dabalos if they heard that the gun was placed in the trunk without his knowledge. The trial court’s determination that Mr. Dabalos was not prejudiced by any failure of his counsel to investigate because of the State’s strong evidence is not supported by the record, and the court therefore abused its discretion

e. Mr. Dabalos’s conviction should be reversed and remanded for a new trial.

Mr. Dabalos’s attorney’s performance was deficient because she did not investigate two potential witnesses to help establish Mr.

Dabalos's lack of knowledge of the firearm. One of the witnesses would have testified that Mr. Dabalos was not present when another man, Mr. Bertram, put the rifle in a chest in Mr. Dabalos's room. Both lived in the house and could have testified that they never saw Mr. Dabalos with the rifle. Given the limited circumstantial evidence in this case, there is a reasonable probability that, but for counsel's deficient investigation, the jury might not have convicted Mr. Dabalos. This Court should reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 229, 232.

**3. Prosecutorial misconduct in closing argument denied Mr. Dabalos his constitutional right to a fair trial.**

In closing argument, the deputy prosecuting attorney misstated the law in a manner that prejudiced Mr. Dabalos's case and violated his constitutional right to a fair trial. This misconduct was flagrant and ill-intentioned, and Mr. Dabalos's conviction should therefore be reversed.

a. Misconduct by the prosecutor may violate a defendant's constitutional right to a fair trial.

A criminal defendant's right to due process of law protects the right to a fair trial. U.S. Const. amend. XIV; Const. art. I, § 22. The prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based on reason. Berger v.

United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935); State v. Reed, 102 Wn.2d 140, 146-47, 684 P.2d 699 (1984). Washington courts have long emphasized the prosecutor's obligation to ensure the defendant receives a fair trial and the resulting need for professional conduct in closing argument. State v. Monday, 171 Wn.2d 667, 676, 257 P.3d 551 (2011); Reed, 102 Wn.2d at 146-49 (and cases cited therein); State v. Charlton, 90 Wn.2d 657, 665, 585 P.2d 142 (1978). When a prosecutor commits misconduct in closing argument, the defendant's constitutional rights to due process and a fair trial may be violated. Monday, 171 Wn.2d at 676; Charlton, 90 Wn.2d at 664-65.

To determine if a prosecutor's comments or argument constitute misconduct, the reviewing court must first decide if the comments were improper and, if so, whether a "substantial likelihood" exists that the comments affected the jury verdict. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). Where the defendant does not object to the improper argument, the reviewing court may still reverse the conviction if the misconduct is so flagrant and ill-intentioned that the resulting prejudice could not have been cured with a limiting instruction. Id. at 760-61.

- b. The prosecutor committed misconduct by misstating the elements of the crime, thus reducing the State's burden of proof.

A prosecutor's closing argument may only address the law as stated in the trial court's instructions. State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984); State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). In addition, it is misconduct for a prosecutor to argue to the jury in a manner that removes or reduces its high burden of proof of every element of the crime. State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192 (2009); accord Emery, 174 Wn.2d at 759-60 (misconduct for prosecutor to shift the burden of proof to the defendant or argue it is jury's job to "declare the truth").

Mr. Dabalos was charged with unlawful possession of a firearm in the first degree. CP 1-2. That offense is committed when the defendant knowingly owned or possessed a firearm, and the jury was so instructed. RCW 9.41.040(1)(a); CP 50, 54. The prosecutor misstated the elements of the crime in a manner that reduced his burden of proving knowing possession beyond a reasonable doubt.



First, the prosecutor told the jury that people with prior convictions for serious offenses were prohibited from being near firearms:

The law says that we don't want the gun in your hands, period. We don't want the gun within your reach, period. And so the way the law is written, the way the instructions read, it's reflective of that.

5/14/13 RP 11. The prosecutor repeated this theme near the end of his rebuttal closing argument, telling the jury that Mr. Dabalos "was convicted of a serious offense that means he has no business being anywhere around a gun." 5/14/13 RP 40.

The prosecutor's argument was an incorrect statement of the law. A person with a prior conviction may momentarily handle, be within reach of, or be "around" a firearm as long as he did not own, possess, or control it. The State's argument also ignores the requirement that any possession be knowing; a person can be "around" a concealed weapon without knowing it.

A similar misstatement of the law was found to be misconduct in State v. Gotcher, 52 Wn. App. 350, 759 P.2d 1216 (1988). The defendant was charged with first degree burglary while armed with a deadly weapon after he was arrested inside a residence with an opened switchblade knife in his pocket. Gotcher, 52 Wn. App. at 350. To

prove that the knife was a deadly weapon, the State was required to prove, under the circumstances in which it was used or threatened to be used, is was readily capable of causing death or serious bodily injury. Id. at 353-54. In closing argument, however, the prosecutor asserted that mere possession of the knife was sufficient to prove it was a deadly weapon. Id. at 351-52, 354-55. This Court found the prosecutor misstated the law and concluded that the misconduct required reversal. Id. at 352, 355-56. The prosecutor in Mr. Dabalos's case similarly misstated the law as provided in the court's instructions to the jury.

c. Mr. Dabalos's conviction must be reversed.

Defense counsel did not object to the prosecutor's misstatements of the elements of the crime, probably to avoid highlighting the improper argument. This Court must therefore determine if the misconduct was so flagrant and ill-intentioned that no objection or curative instruction would have cured the prejudice. Emery, 174 Wn.2d at 760-61. It was flagrant and ill-intentioned for the prosecutor to misrepresent the elements of the crime arguing that Mr. Dabalos could never be near a firearm. .

A curative instruction would not have guaranteed that the prejudice caused by prosecutor's error would be cured. See State v.

Copeland, 130 Wn.2d 244, 284, 922 P.2d 1304 (1996) (addressing whether defendant prejudiced by misconduct even when curative instruction given); State v. Bozovich, 145 Wash. 227, 233, 259 Pac. 395 (1927) (defendant's prompt objections and court's curative instructions could not obviate prejudice when prosecutor had elicited defendant's other bad acts in cross-examination of defendant's character witnesses); State v. Stith, 71 Wn. App. 14, 21-23, 856 P.2d 415 (1993) (court's strongly-worded curative instruction could not cure prejudice where prosecutor's remarks struck at the heart of the right to a fair trial before an impartial jury).

The prosecutor's incorrect statement of the elements of unlawful possession of a firearm reduced the State's burden of proof. Given the limited evidenced produced by the State to prove constructive or actual possession, there is a substantial likelihood the jury verdict was affected by the prosecutor's misconduct. This Court should reverse Mr. Dabalos's conviction and remand for a new trial. Reed, 102 Wn.2d at 148; Gotcher, 52 Wn. App. at 356-57.

E. CONCLUSION

Mr. Dabalos's conviction for unlawful possession of a firearm in the first degree must be reversed and dismissed because the State did not prove beyond a reasonable doubt that he knowingly possessed a firearm.

In the alternative, the conviction must be reversed and remanded for a new trial because (1) his attorney did not investigate exculpatory witnesses, and (2) the prosecutor misstated the law in closing argument.

DATED this 31<sup>st</sup> day of July 2014.

Respectfully submitted,



---

Elaine L. Winters – WSBA # 7780  
Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 71004-4-I
v.	)	
	)	
CHRISTOPHER DABALOS,	)	
	)	
Appellant.	)	

---

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF JULY, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] CHRISTOPHER DABALOS 793719 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF JULY, 2014.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710