

71004-4

71004-4

NO. 71004-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DABALOS,

Appellant.

RECEIVED
APPELLANT'S BRIEF
JAN 11 2011

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY V. WHITE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. PROCEDURAL FACTS	2
2. SUBSTANTIVE FACTS	3
C. <u>ARGUMENT</u>	5
1. SUFFICIENT EVIDENCE SUPPORTS DABALOS' CONVICTION FOR FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM.....	5
2. THE TRIAL COURT PROPERLY DENIED DABALOS' MOTION FOR A NEW TRIAL BECAUSE TRIAL COUNSEL EFFECTIVELY REPRESENTED DABALOS	10
a. Relevant Facts	10
b. Trial Counsel Effectively Represented Dabalos By Making The Strategic Decision Not To Have Two Witnesses Testify Who Would Have Undermined The Defense That Dabalos Had No Knowledge Of The AK-47 In His Room	12
3. THE PROSECUTOR'S STATEMENTS IN CLOSING ARGUMENT DID NOT CONSTITUTE MISCONDUCT NOR WERE THE STATEMENTS FLAGRANT OR ILL-INTENTIONED	19
D. <u>CONCLUSION</u>	24

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
108 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) 12, 13, 14, 18

Washington State:

In re Personal Restraint of Davis, 152 Wn.2d 647,
101 P.3d 1 (2004)..... 13

State v. A.N.J., 168 Wn.2d 91,
225 P.3d 956 (2010)..... 14, 17

State v. Alvarez, 128 Wn.2d 1,
904 P.2d 754 (1995)..... 5

State v. Cantabrana, 83 Wn. App. 204,
921 P.2d 572 (1996)..... 7

State v. Chouinard, 169 Wn. App. 895,
282 P.3d 117 (2012)..... 6

State v. Collins, 76 Wn. App. 496,
886 P.2d 243 (1995)..... 6

State v. Davis, 174 Wn. App. 623,
300 P.3d 465 (2013)..... 14

State v. Delmarter, 94 Wn.2d 634,
618 P.2d 99 (1980)..... 6

State v. Echeverria, 85 Wn. App. 777,
934 P.2d 1214 (1997)..... 7, 9

State v. Emery, 174 Wn.2d 741,
278 P.3d 653 (2012)..... 19

<u>State v. Fiser</u> , 99 Wn. App. 714, 995 P.2d 107, <u>review denied</u> , 141 Wn.2d 1023 (2000).....	6
<u>State v. Garcia</u> , 57 Wn. App. 927, 791 P.2d 244, <u>review denied</u> , 115 Wn.2d 1010 (1990).....	13
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	12
<u>State v. Hagen</u> , 55 Wn. App. 494, 781 P.2d 892 (1989).....	7
<u>State v. Holm</u> , 91 Wn. App. 429, 957 P.2d 1278 (1998).....	12
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	13
<u>State v. McKenzie</u> , 157 Wn.2d 44, 134 P.3d 221 (2006).....	20
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994), <u>cert. denied</u> , 514 U.S. 1129 (1995).....	20
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	6
<u>State v. Swan</u> , 114 Wn.2d 613, 790 P.2d 610 (1990).....	20
<u>State v. Tadeo-Mares</u> , 86 Wn. App. 813, 939 P.2d 220 (1997).....	7
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	13
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	21, 24

<u>State v. Weber</u> , 159 Wn.2d 252, 149 P.3d 646 (2006).....	23
--	----

Statutes

Washington State:

RCW 9.41.040.....	6
-------------------	---

Rules and Regulations

Washington State:

CrR 7.4.....	3
CrR 7.5.....	3
ER 608.....	17
ER 609.....	19
ER 701.....	16
ER 801.....	16
ER 802.....	16

A. ISSUES

1. To prove first degree unlawful possession of a firearm, the State must show that Dabalos knowingly had in his possession or control a firearm. Police searched a home at 6:00 a.m. and detained Dabalos. In the master bedroom, police found Dabalos' wallet, three pieces of his identification, and a bill. Dabalos' Department of Corrections identification card was on top of the trunk in which police found an AK-47. Immediately beneath the firearm were Dabalos' temporary Washington identification card and a bill addressed to him. Did the State present sufficient evidence for a rational trier of fact to reasonably infer that Dabalos knowingly had the AK-47 within his possession or control?

2. To succeed on a claim of ineffective assistance of counsel, a defendant must show that his attorney's performance was deficient and that he was prejudiced as a result. The decision of whether to call a witness to testify is strategic. Defense counsel at trial attempted to contact one witness that Dabalos suggested she contact, but the number was disconnected. Dabalos told counsel not to contact the other potential witness. The defense trial strategy was to show that the State had not proved knowing possession in that no witness testified Dabalos lived at the house or

had even been seen with the AK-47. The two potential defense witnesses would have testified that Dabalos lived at the house and had been seen with the AK-47. Did counsel reasonably rely on Dabalos' summary of these two witnesses' testimony in deciding that their testimony would undermine the defense trial strategy?

3. To prevail on a claim of prosecutorial misconduct where there was no objection below, a defendant must show that the alleged misconduct was so flagrant and ill-intentioned that an instruction could not have cured any prejudice. In closing argument, the prosecutor twice stated that Dabalos' stipulation to having a conviction for a serious offense meant that he had no business being around guns. Dabalos did not object to either statement. The jury was correctly instructed on the law and that the lawyers' remarks were not evidence. Has Dabalos failed to show that the remarks were improper or were so flagrant and ill-intentioned that any prejudice could not have been cured by an instruction?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged Christopher Dabalos with first degree unlawful possession of a firearm. CP 1-2. Judge Jay White

presided over the jury trial at which Dabalos was found guilty as charged. 4RP¹ 13; CP 37.

Prior to sentencing, Dabalos retained new counsel and filed motions to arrest judgment and for a new trial. CP 93-102. The CrR 7.4(a)(3) motion to arrest judgment alleged that the State did not present sufficient evidence of the crime. CP 95-98. The CrR 7.5(a)(8) motion for a new trial alleged that trial counsel Jennifer Cruz had been ineffective for failing to interview two potential witnesses. CP 98-100. The prosecutor filed responsive briefing and a declaration from trial counsel Cruz. CP 55-70. The trial court denied both motions. 4RP 99, 110. Dabalos was sentenced to a standard range sentence of 87 months of confinement. 4RP 123; CP 74.

2. SUBSTANTIVE FACTS

On March 9, 2011, police served a search warrant at a residence in Renton. 2RP 119. Dabalos was in the house at approximately 6:00 a.m. when the search warrant was served. 2RP 121. He was detained in the living room along with three other individuals. 2RP 123.

¹ The verbatim report of proceedings consists of four volumes, which will be referred to in this brief as follows: 1RP (5/8/13); 2RP (5/13/13); 3RP (5/14/13, closing arguments); 4RP (5/14/13, jury question & verdict; 9/13/13; & 9/16/13).

Auburn Police Detective Michael Hauser searched the master bedroom of the two-story house. 2RP 124. The master bedroom had a bed on one wall, an attached bathroom, and a wooden trunk located just inside the room. 2RP 125-26. The room appeared to be occupied by two people, Sonja Gleason and Dabalos. 2RP 146-47, 152. Gleason's documents and items mainly occupied one side of the room, while Dabalos' possessions occupied the other. 2RP 147.

Hauser found a number of pieces of Dabalos' identification in the master bedroom. 2RP 127, 131-33. He found Dabalos' wallet lying on the floor near the attached bathroom. 2RP 127. The wallet contained Dabalos' Washington driver's license or identification card and his credit cards. 2RP 127. The wallet was not photographed nor introduced into evidence at trial because Hauser released the wallet back to Dabalos prior to trial. 2RP 128, 130. Underneath the bed, Hauser found Dabalos' expired Washington driver's license with a Moses Lake address. 2RP 131-32; Ex. 3.

On top of the trunk in the bedroom, Hauser found Dabalos' Department of Corrections identification card. 2RP 126, 133; Ex. 4, 6. The trunk also had other items on top of it: a large globe, a

number of open plastic bottles of soda pop, a carton of orange juice, and a tape measure. Ex. 4. Inside the trunk, Hauser found an AK-47 rifle inside a gun case. 2RP 137, 143. Immediately underneath the rifle, Hauser found a bill addressed to Dabalos and a temporary driver's license in his name. 2RP 144-45. Both had the Moses Lake address. 2RP 151-52; Ex. 10.

At trial, Dabalos elected not to testify. 3RP 2. He stipulated that he had previously been convicted of a serious offense. 3RP 182. Additional relevant facts are included below.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS DABALOS' CONVICTION FOR FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM.

Dabalos asserts that the State did not present sufficient evidence to convict him of first degree unlawful possession of a firearm. This claim should be rejected. The State presented sufficient evidence from which a rational trier of fact could find Dabalos guilty.

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier

of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court draws all reasonable inferences in favor of the State and interprets them “most strongly against the defendant.” Id.

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

To prove first degree unlawful possession of a firearm, the State had to show that Dabalos knowingly had in his possession or control any firearm after having previously been convicted of a serious offense. RCW 9.41.040.

Possession may be actual or constructive. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). Constructive possession is established by showing that the defendant had dominion and control over the firearm. Id. Dominion and control is determined by evaluating a variety of factors. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (1995).

No one factor is dispositive; rather, the totality of the circumstances must be considered. Id.

Dominion and control over the premises where the contraband was found is one relevant factor. State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). If the State shows that the defendant had dominion and control over the premises, that raises a rebuttable inference that the defendant possessed the contraband. Id.; accord State v. Tadeo-Mares, 86 Wn. App. 813, 939 P.2d 220 (1997) (State presented sufficient evidence because it proved dominion and control of the premises, which raised the rebuttable inference that the defendant had dominion and control over the drugs on the premises.).

Another factor relevant to dominion and control is whether the defendant had the ability to reduce an object to actual possession. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Exclusive control is not necessary. State v. Hagen, 55 Wn. App. 494, 498-99, 781 P.2d 892 (1989). But, mere proximity alone is not sufficient. Echeverria, 85 Wn. App. at 784.

Here, the State presented sufficient evidence to convict Dabalos of first degree unlawful possession of a firearm. The AK-47 was found in the trunk in his bedroom. 2RP 137. Dabalos'

presence in the home at 6:00 a.m. along with the fact that in the master bedroom police found his wallet, three additional items of identification, and a bill identifying him by name raised the reasonable inference that he had dominion and control over the master bedroom. 2RP 121, 126-27, 131-33, 144-45.

Beyond dominion and control of the premises, the evidence showed Dabalos had constructive possession of the AK-47 itself. Dabalos could easily have actually possessed the firearm by simply opening the unlocked trunk. 2RP 150. Plus, Dabalos' Department of Corrections identification card was found on top of the trunk. 2RP 133. Inside the trunk and immediately below the AK-47 were Dabalos' temporary identification card and a bill addressed to him. 2RP 144-45. The location of these items further supported that Dabalos possessed the AK-47. Because possession need not be exclusive, the fact that Gleason's possessions were also found in the bedroom does not change this conclusion.

Moreover, the items on top of the trunk meant that it would have been more difficult for someone who did not live in the bedroom to conceal the AK-47 inside it. The large globe, various drink containers, and other possessions would have had to have been cleared off and then replaced without the person being

discovered. See Ex. 4. It would be far easier to simply shove it in a closet or under the bed. But, for one who lived in the bedroom, the trunk provided easy access to the AK-47 while the possessions on top discouraged others from discovering it.

Dabalos relies on Echeverria. This case is distinguishable. In Echeverria, the driver of a car was convicted of unlawful possession of a firearm and of furtively carrying a martial arts throwing star. 85 Wn. App. at 779. Officers stopped Echeverria as he exited the driver's side of a car that he did not own. Id. at 780. The officer saw that three inches of the barrel of a gun was sticking out from under the driver's seat. Id. When the officer removed the gun, she found the throwing star next to it. Id. The unlawful possession of a firearm conviction was affirmed because the gun was in plain sight at the defendant's feet. Id. at 783. However, the throwing star conviction was reversed because the throwing star was not visible to the driver and the State did not prove all the elements of the crime. Id. at 784.

By contrast, here, the evidence showed that Dabalos had dominion and control over the master bedroom and the AK-47. He was not simply momentarily sleeping in the bedroom, for his identification, wallet, and other items were all over the bedroom and

in and on top of the trunk. 2RP 127, 131-47. It did not matter that the AK-47 was not visible. Therefore, the State presented sufficient evidence that Dabalos unlawfully possessed the AK-47.

2. THE TRIAL COURT PROPERLY DENIED DABALOS' MOTION FOR A NEW TRIAL BECAUSE TRIAL COUNSEL EFFECTIVELY REPRESENTED DABALOS.

Dabalos contends that his counsel was ineffective for not interviewing two potential witnesses. This claim also fails. The trial court properly found that trial counsel was effective and that Dabalos was not prejudiced by the strategic decision not to have these witnesses testify at trial.

a. Relevant Facts.

Early on in Dabalos' case, trial counsel Jennifer Cruz discussed with him potential witnesses. CP 68. Dabalos told Cruz that Paula Hopper and Michael Monroe were present when he was arrested. CP 68. He told Cruz to contact Monroe, but not Hopper because Hopper had criminal history. CP 68. Dabalos was correct; Hopper has felony and misdemeanor convictions, including for second degree robbery. CP 60.

Cruz attempted to contact Monroe at the number Dabalos provided, but it was disconnected. CP 68. Regardless, she

discussed in detail with Dabalos the potential testimony of Monroe and Hopper. CP 68. Cruz understood that Monroe and Hopper would have stated that Dabalos was present at his home when Dennis Bartram brought over the AK-47, Bartram went into Dabalos' room, and then Dabalos told Bartram "to get the gun out of here." CP 68. Monroe's and Hopper's declarations filed in support of the motion for a new trial are consistent with the summary Cruz received from Dabalos. CP 119-22. They were also consistent with Dabalos' statement to police, which Cruz reviewed with Dabalos.² CP 68.

During trial, Dabalos gave Cruz new contact information for Monroe. Cruz again attempted to reach Monroe. CP 69. A woman, who she assumed was Hopper, answered the phone. CP 69. The woman was reluctant to take a message and said it was unclear when she would see him. CP 69. She also said it was "laughable" that Dabalos was trying to get Monroe to testify about the gun as "everyone knew" that Dabalos had the gun. CP 69.

² Dabalos told Detective Hauser that he lived in the house with his girlfriend and two others. 1RP 25; Post-trial Ex. 1. He said that Dennis Bartram had brought the gun to the house and into his bedroom. 1RP 30-31; Post-trial Ex. 1. Dabalos said he told Bartram, "get that thing out of here, because I do not mess with guns." Post-trial Ex. 1. He said that Bartram told him he wanted to sell the gun for \$400.00. 1RP 44. Dabalos said he did not know that Bartram placed the gun in the trunk in his room. Post-trial Ex. 1. The State did not introduce Dabalos' statement at trial. 1RP 27.

When Cruz relayed this to Dabalos, he provided a new number for Hopper. CP 69. Because the State was about to rest its case, Cruz felt it was too late to contact Hopper. CP 69.

In pretrial motions, Cruz successfully convinced the trial court to exclude all references to the drug activity, drug paraphernalia, surveillance equipment, and police scanner found at the house. 1RP 16-31, 103-06; CP 14-16. This ruling was subject to defense “opening the door” to the testimony. 1RP 21, 70; CP 16.

- b. Trial Counsel Effectively Represented Dabalos By Making The Strategic Decision Not To Have Two Witnesses Testify Who Would Have Undermined The Defense That Dabalos Had No Knowledge Of The AK-47 In His Room.

The appellate court reviews a trial court’s denial of a motion for a new trial for abuse of discretion. State v. Holm, 91 Wn. App. 429, 435, 957 P.2d 1278 (1998). The trial courts factual findings are reviewed for substantial evidence and the legal conclusions are reviewed de novo. Id.

In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel’s performance was deficient, and (2) counsel’s deficient performance prejudiced him. State v. Grier, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (citing Strickland v. Washington, 466 U.S. 668, 687, 108 S. Ct. 2052,

80 L. Ed. 2d 674 (1984)). The first prong of the test “requires a showing that counsel’s representation fell below an objective standard of reasonableness based on consideration of all of the circumstances.” State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 689).

The second prong of the test requires a showing that counsel’s deficient performance prejudiced the defendant, in that there is a reasonable probability that, but for counsel’s errors, the outcome of the proceeding would have been different. Id. If one prong has not been met, a reviewing court need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

In reviewing such claims, the appellate court engages in a strong presumption that trial counsel was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Trial counsel’s legitimate strategy or tactics cannot be the basis for a claim of ineffective assistance. Id. at 336. The entire record is reviewed. Id. at 335. “An attorney’s action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices.” In re Personal Restraint of Davis, 152 Wn.2d 647, 722, 101 P.3d 1 (2004).

The decision of whether to call a witness is a matter of legitimate trial strategy that presumptively does not support a claim of ineffective assistance of counsel. State v. Davis, 174 Wn. App. 623, 639, 300 P.3d 465 (2013). The presumption may be overcome if the defendant shows that counsel failed to adequately investigate or prepare for trial. Id. “The degree and extent of investigation required will vary depending upon the issues and facts of each case.” State v. A.N.J., 168 Wn.2d 91, 111, 225 P.3d 956 (2010).

“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 (emphasis added). Counsel may properly base her investigation on the informed, strategic choices of the defendant and on information supplied by the defendant:

[W]hen the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel’s failure to pursue those investigations may not later be challenged as unreasonable.

Id.

Here, trial counsel Cruz made the reasonable, strategic decision not to interview or call as witnesses Michael Monroe and Paula Hopper. First, Dabalos told Cruz not to contact Hopper. CP 68. To the extent Dabalos later changed his mind during trial, Cruz made the sound decision to maintain their chosen trial strategy. Thus, Dabalos' claim should be analyzed only as to Monroe.

Cruz was effective. After finding Monroe's number disconnected, she made the reasonable strategic decision to rely on Dabalos' representation of his expected testimony and decided not to call Monroe as a witness. She was not required to exhaustively pursue Monroe given what she already knew and their trial strategy.

Dabalos' defense at trial was that he had no knowledge of the AK-47 in his bedroom and that he did not have dominion and control over it. CP 68. The trial court excluded any reference to drug activity, drug paraphernalia, police scanners or surveillance equipment found at the home. 1RP 16-31, 103-06; CP 14-16. Yet, the evidence could be introduced if defense "opened the door." 1RP 21, 70; CP 16.

Monroe's testimony would have undermined the defense strategy. 4RP 83, 109-10. His testimony would have established that Dabalos lived in the master bedroom and that Dabalos was in the house with the AK-47. CP 119, 121. Monroe's second declaration goes even further by clarifying that Dabalos was in his bedroom with the AK-47 and Bartram. CP 121.

Monroe would not have been allowed to testify to the statements that he heard from Dabalos or Bartram, as these would have been inadmissible hearsay. See ER 801, 802; 4RP 71-72, 94; CP 119. He also would not have been able to testify to his opinion that Dabalos had no knowledge of the gun. See ER 701; 4RP 91, 105-06; CP 71-72, 121.

Dabalos agreed with this chosen strategy, as he decided not to testify. 3RP 2; CP 69. That decision was based on the fact that the State had not introduced Dabalos' statement to the police and that he risked potentially opening the door to the excluded evidence. 4RP 108; CP 69.

Monroe's testimony likely would have opened the door to the excluded evidence. 4RP 64-65. The police scanner and surveillance equipment were found in Monroe's room along with

evidence of check forging activity. The latter would have been admissible to impeach Monroe under ER 608.³

Cruz's strategy, however, allowed her to argue that the State had not proved Dabalos' residence in the house or his connection to the AK-47. 3RP 25-27, 31-32. She recounted that detectives had not collected all of the documents in the room, and argued that Dabalos' identification could have been there because he could have been a victim of identity theft. 3RP 27-29. Finally, she argued that there was no testimony that anyone had seen Dabalos with the AK-47. 3RP 33- 34.

If Monroe or Hopper had testified, this entire strategy would have been undermined. Their testimony would have shown that Dabalos had been seen with the AK-47 in his room, and, thereby, strengthened the State's case. 4RP 83; CP 117, 119, 121. That counsel's strategy was not ultimately successful does not have any bearing on its reasonableness.

Dabalos compares this case to A.N.J. This comparison fails. In A.N.J., counsel misinformed the twelve-year old defendant of the consequences of his plea to first degree child molestation.

168 Wn.2d at 119-20. Among a number of deficiencies, counsel

³ ER 608 allows cross-examination on specific instances of conduct of a witness if probative of truthfulness or untruthfulness.

failed to conduct any meaningful investigation of the case. Id. at 109. Instead, he relied on the defendant's admission of guilt. Id. at 110.

By contrast, trial counsel Cruz was well-informed of the factual and legal issues, conducted an appropriate investigation, and pursued a sound trial strategy. Cruz insisted on interviewing the lead detective in-person prior to the start of trial, even though the detective lived out-of-state. 1RP 3-7. She also successfully excluded the potentially damaging evidence found at the house. 1RP 16-30; CP 15-16. Finally, she ably argued that the State had not proved Dabalos had constructive possession of the AK-47. 3RP 25-35.

As to Strickland's prejudice prong, Dabalos fails to show that he was prejudiced by trial counsel's actions. Even if this Court were to find that Cruz should have made more efforts to contact Monroe or Hopper, neither's testimony would have strengthened the defense case. The case would have become a credibility call for the jury as to Monroe's testimony that Bartram had put the gun in the trunk without Dabalos' knowledge. CP 121. Monroe and Hopper would have been impeached with their criminal convictions

for crimes of dishonesty⁴, and the police surveillance and evidence of check forging activity found in their room.⁵ 1RP 16-31, 103-06; 4RP 64-65; CP 14-16, 61.

As such, there was not a reasonable probability that the outcome would have been different had Monroe or Hopper testified. The trial court properly exercised its discretion in denying the motion for a new trial.

3. THE PROSECUTOR'S STATEMENTS IN CLOSING ARGUMENT DID NOT CONSTITUTE MISCONDUCT NOR WERE THE STATEMENTS FLAGRANT OR ILL-INTENTIONED.

Dabalos next alleges that two of the prosecutor's statements in closing argument misstated the elements of the crime and reduced the State's burden of proof. This argument should be rejected. The prosecutor's statements were not improper. Moreover, Dabalos' trial counsel did not object. He cannot show that the statements were so flagrant and ill-intentioned that any prejudice could not have been cured by an instruction.

To prevail on a claim of prosecutorial misconduct, a defendant bears the burden of establishing that the conduct was

⁴ Monroe had criminal convictions for crimes of dishonesty under ER 609. CP 61. He had convictions for second degree theft, possession of burglary tools, and two convictions for third degree theft. CP 61.

⁵ Hopper and Monroe were arrested in the room with the evidence of check forging activity, police scanner, and surveillance equipment. 4RP 64.

both improper and prejudicial. State v. Emery, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). “If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor’s misconduct was so flagrant and ill-intentioned that an instruction could not have cured the prejudice.” Id. at 760-61. This requires a defendant to show that (1) a curative instruction could not have corrected the prejudicial effect of the misconduct, and (2) the resulting prejudice had a substantial likelihood of affecting the verdict. Id. The reviewing court’s focus is on whether the resulting prejudice could have been cured. Id. at 762.

The supreme court has recognized that “the absence of an objection by defense counsel ‘*strongly suggests* to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial.’” State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

On review, the prosecutor’s remarks are viewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given.” State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

It is misconduct for a prosecutor to misstate the law or to argue in a manner that reduces the State's burden of proof. State v. Warren, 165 Wn.2d 17, 24-27, 195 P.3d 940 (2008). However, reversal is required only if the misconduct had a substantial likelihood of affecting the verdict. Id. at 28-29.

In this case, the context of the closing argument shows that the prosecutor did not misstate the elements of the crime nor argue in a manner that reduced the State's burden of proof.

Near the beginning of his closing argument, the prosecutor discussed the elements of the crime. 3RP 10. He directed the jurors to their instructions and to a visual aid of the elements. 3RP 11. In doing so, he reminded the jurors that the instructions in the packet always controlled and had the correct statement of the law. 3RP 12. The prosecutor then stated the elements of the crime:

That the defendant, Mr. Dabalos, knowingly had a firearm in his possession or control...

The defendant was previously convicted of a serious offense. That's the stipulation that was read to you at the very end of the day yesterday. That's not in dispute here. That is considered to be proven by both parties beyond a reasonable doubt.

And what that means is that the defendant had no business having a gun. That element is not in dispute.

3RP 12. The prosecutor's statement "what that means is that the defendant had no business having a gun" referred only to the defendant's stipulation. He immediately preceded it with a correct statement of the element that the State had to prove that Dabalos knowingly had a firearm in his possession or control. 3RP 12. The prosecutor then discussed in detail the evidence that proved that Dabalos knowingly had possession or control of the AK-47. 3RP 13-16.

Next, the prosecutor discussed constructive possession. 3RP 16. He pointed the jury to the instruction defining constructive possession and again informed them that their instruction was the correct statement of the law, even though he used a visual aid of the instruction. 3RP 16-17. The prosecutor discussed the different factors to determine constructive possession. 3RP 17-19. In conclusion, he reminded the jury of the State's burden of proof and read from the instruction defining reasonable doubt. 3RP 19-20.

In rebuttal, the prosecutor responded to defense counsel's argument that the stipulation simply meant that the defendant had a

conviction for a serious offense, which she characterized as a mistake. 3RP 32. The prosecutor responded:

Ms. Cruz referred to the fact that the defendant has previously been convicted of a serious offense [as] simply a mistake that any of us might have made. Really? It's more than just a simple mistake. . . It is a serious breach of the law. It is defined as a serious offense under the law. It is that fact. . .that he was convicted of a serious offense, that means he has no business being anywhere around a gun, much less having a gun in a chest in his bedroom.

3RP 40. Again, this reference was only to the stipulation. The prosecutor concluded the rebuttal by stating the correct elements of the crime again—that Dabalos knowingly had in his possession or control a firearm. 3RP 41.

In context, neither of these statements misstated the law nor the State's burden of proof. Indeed, the prosecutor repeatedly reminded the jury of the State's burden of proof and that the jury instructions contained the correct statement of the law, not his statements or the visual aids. 3RP 12, 16-17, 19-20. Moreover, arguments made in response to a defense attorney's argument are generally not so prejudicial as to deny a defendant a fair trial. See State v. Weber, 159 Wn.2d 252, 278-79, 149 P.3d 646 (2006).

In addition, Dabalos cannot show that the prosecutor's two statements were so flagrant or ill-intentioned that an instruction

could not have cured any prejudice. Dabalos' counsel did not object. And, the jury was correctly instructed to base their decision on the evidence, that the lawyers' remarks were not evidence, and on the State's burden of proof. CP 38, 40-41, 44. Jurors are presumed to follow the court's instructions. Warren, 165 Wn.2d at 28. Any prejudice from these statements did not have a substantial likelihood of affecting the trial.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Dabalos' conviction.

DATED this 29th day of October, 2014.

Respectfully submitted,

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King County Prosecuting Attorney

By: 
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Elaine L. Winters, the attorney for the appellant, at elaine@washapp.org, containing a copy of the Brief of Respondent, in State v. Christopher Robert Dabalos, Cause No. 71004-4, 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.

Dated this 30th day of October, 2014.

U Brame

Name:

Done in Seattle, Washington