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Court of Appeals
Division I
State of Washington

NO. 71720-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY S. SOWERS,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. During a police investigation, a shooting victim gave a recorded statement under penalty of perjury. Did the trial court properly admit the statement as substantive evidence when the victim testified inconsistently at trial?

2. The defendant admitted that he purchased, cleaned, shot, and stored a semi-automatic pistol in his house for two weeks before he used it to shoot the victim. He testified that on the day of the shooting, the victim brought him a gun to clean and after she left the room he picked it up to turn off the laser sight and to avoid any potential suicide attempt. Did the trial court properly deny a proposed necessity instruction when the defendant possessed the gun before any "threat" arose, produced no evidence of an imminent threat, and presented no evidence of the lack of legal alternatives?

3. The defendant was charged with two counts of Unlawful Possession of a Firearm, one for a semi-automatic pistol and one for a shotgun. Was the defendant entitled to a unanimity instruction on either count when the evidence showed that the defendant actually and constructively possessed both weapons?

4. Did the trial court properly exercise its discretion when it found that possession of different firearms at separate locations was separate criminal conduct?

II. STATEMENT OF THE CASE

On January 27, 2014, a jury convicted the defendant Jeffrey Sowers of Third Degree Assault with a firearm enhancement and two counts of First Degree Unlawful Possession of a Firearm (UPF). CP 78, 79, 81, 82.

The crimes came to light at 7:30 pm on March 2, 2013, when the defendant, a convicted felon, called 911. Ex. 9. The defendant told the operator that his girlfriend, Monica Galarosa, had been accidentally shot. Asked how the shooting occurred, Galarosa can be heard saying, "I shot myself." The defendant said, "It was a gun. It was dropped." Asked who was holding the gun when it was dropped, the defendant said, "She was." Id.

When Snohomish County Sheriff's Office (SCSO) deputies arrived at the Everett home, they found Galarosa lying on the floor of a second floor bedroom and the defendant staunching the blood from a wound to her back. 1RP 76, 82. A semi-automatic pistol lay on the floor nearby. 1RP 82, 102. Deputies handcuffed the

defendant and tended to Galarosa until an ambulance arrived. 1RP 85, 106.

The defendant told responding deputies that he had been downstairs treating his leathers when he heard a gunshot from upstairs, ran up, and found Galarosa bleeding. 1RP 113, Exhibit 3. He said the gun, a .45 caliber Taurus, was on loan to him from a friend. 1RP 114; Ex. 3.

SCSO Detective Betts and a partner arrived shortly thereafter and found the living room furniture in disarray. 2RP 98-99. Upstairs, they saw the .45 caliber Taurus on the floor between the bedroom and the bathroom suite. 2RP 94, 104, 110. The Taurus was equipped with a laser sight. It was loaded with a live round in the chamber and more in the magazine. 2RP 110.

Detectives searched the bedroom's walk-in closet. Women's clothing was on the right side, hanging and in boxes. 2RP 114. Men's furnishings, including leathers, hats, and other items, were on the left. Id.

On the men's side of the closet, sandwiched between a dresser and the left side wall, was a soft case that held an unloaded shotgun. 2RP 114. The defendant's DNA was on the shotgun. 3RP 75. On a shelf on the men's side were firearm

cleaning supplies, a pistol box for the .45 Taurus, and ammunition for both the Taurus and the shotgun. 2RP 115, 116, 117, 118, 119. In a laptop bag were documents in the defendant's name, including an employment security form, envelopes addressed to the defendant, and the defendant's concealed weapons permit application. 2RP 120, 151-52.

There were no spent casings upstairs. 2RP 104. The only spent casing was in the living room. 2RP 102. The only bullet marks were on both sides of a second floor stub wall and on both sides of a small dresser in the upstairs hallway. 2RP 105-06, 153. Detectives realized that Galarosa had to have been shot by someone on the first floor shooting upwards. Id.

Detective Scott Wells did a shooting reconstruction. 3RP 121-123. He examined the bullet holes and placed a trajectory rod through them. 3RP 124-132, 4RP 34. He confirmed that the shooter had been downstairs when he fired. 4RP 37.

Detective Betts spoke to the defendant, who was still in a car in the driveway. Ex. 54. The defendant said he had lived at the house with Galarosa for five weeks and that they were both clean and sober. He had purchased the Taurus handgun for her about two weeks earlier and the gun had been in the house since. The

defendant had shown Galarosa how to clean the Taurus, how to oil it and scrub the barrel, and how to load the magazine. He had even taken the gun into the woods and shot it. Id. He denied having ever shot the gun in the house. Id.

The defendant said that Galarosa had come home that afternoon at about 4 pm, upset that a friend of hers had relapsed. Ex. 54. She went upstairs to paint her toenails and he brought his leathers downstairs to clean them. He heard a gunshot from upstairs and ran up to find Galarosa wounded and lying on the floor, the Taurus on the floor nearby. Id.

Detectives told the defendant they had found only one spent casing and that it was downstairs. Ex. 54. They challenged him to tell them the truth. The defendant said he had nothing to add to what he had already said and asked, "What's the charge?" Id.

Three days later, Detective Betts visited Galarosa at Harborview Hospital. 2RP 76. Since Galarosa was groggy, he agreed to speak with her on another day. Id. On March 7, Galarosa called him and asked him to come and take her statement. 2RP 77.

Detective Betts interviewed Galarosa the next day. 2RP 77. Galarosa was much more alert, tracked his questions, and gave

appropriate answers. 2RP 78. She begged him not to send the defendant to prison. Id.

At first, Galarosa said the gun went off either when she was twirling it on her finger or when she dropped it. 2RP 79. Detectives told her they did not believe her because of the physical evidence. 2RP 79-80. Galarosa agreed to give a recorded statement. 2RP 81; Exhibit 56.

Detective Betts started the recording by giving the date, time, and location, and identifying the voices on the tape. Ex. 56. Galarosa told detectives that she was an addict who had relapsed on the day she was shot. When she came home, she tried to push the defendant's buttons but he was not responding. He told her to go upstairs while he stayed downstairs polishing his jacket and cleaning the Taurus. Id.

After Galarosa went upstairs, she heard a shot and realized she had been hit. Ex. 56. She thought the defendant had shot in the air to get her attention. She knew it was an accident. Id.

Galarosa said the defendant had purchased the Taurus for her about a month earlier. Ex. 56. She said it was usually in a holster or a box. She said the laser on it was only used to play with the dog. She explained that the shotgun was hers as well and that

she had had it for about four months. It, too, was kept in the bedroom closet. Id.

At the end of the interview, which lasted just over 20 minutes, Detective Betts asked:

> Do you certify or declare under penalty of perjury under the laws of the State of Washington that the facts stated on this tape are true and correct to the best of your knowledge and that the statement has been made freely, voluntarily, and without threats or promises of any kind?

Ex. 56. He offered to read it again and she responded as he did:

> Do you certify or declare under penalty of perjury under the laws of the State of Washington that the facts stated on this tape are true and correct (yeah) to the best of your knowledge (yeah) and that this statement has been made freely, voluntarily, and without threats or promise of any kind?

Id. She then said, "Yes, I understand that." She said she wanted to add one last thing, that she did not know who had shot her. Detective Betts asked her to sign the statement and he signed underneath her name. Ex. 56.

At trial, Galarosa told a somewhat different story. She testified that the shotgun and pistol were hers alone, that the defendant had not gotten them for her, and that she had never seen him use them. 2RP 9. She said she had brought the Taurus downstairs to play with the dog the day she was shot. 2RP 38.

When the defendant told her to put it down, she tossed the Taurus onto a table. 2RP 41.

She said the gun just went off. 2RP 41, 25. She said she did not remember much of what had occurred or telling anyone she dropped the gun or making a statement at Harborview. 2RP 57. She said there were inaccuracies in her recorded statement. 4RP 79.

The court admitted the entire recorded statement under ER 801(d)(1)(i) as substantive evidence. 2RP 67. Defense objected because although the language at the end was that typically accepted under the rule, the statement was recorded, not written, and Galarosa had not had a chance to review it. 1RP 20. The court rejected that argument because a recorded statement was less likely to be inaccurate or incomplete than one filled out by an officer for a victim. Id. "[I]t strikes me that there's no inherent flaw with a recorded statement in terms of the reliability aspects that the rule is founded on." Id. at 22.

The defendant also told a different story at trial. The defendant testified that he and Galarosa were addicts and that in the past while he was using drugs he had been convicted of felonies. 4RP 108.

He said he gave Galarosa money to purchase the Taurus and arranged with a friend for its purchase. 4RP 115, 135. He said he knew there were firearms in the house he shared with Galarosa but they were not his and he told her to get rid of them. 4RP 114, 115, 128. He said he knew Galarosa tried to commit suicide with a shotgun so he cleaned it and put it back in the shared closet. 4RP 106, 114. He made a decision that both guns needed to be taken from the house. 4RP 137.

The defendant testified that on the day he shot Galarosa he was home cleaning his leathers and she came home high on drugs. 4RP 116. She went upstairs but came back down with the Taurus so that he could either clean it or show her how to. 4RP 136. She began to wave the gun around and let the dog chase the laser. 4RP 118-19.

The defendant said Galarosa never threatened him with the gun. 4RP 136. Instead, she became angry when he would not clean the guns or show her how to do it. 4RP 136, 138.

The defendant said Galarosa put the Taurus on the table but left the laser light on and the dog was nipping at it. 4RP 119. Asked why he had picked up the gun, the defendant said,

> Well, I was – I was – I have to say that I was mad that the gun was still in the house. You know, I didn't want to go through another suicide attempt. I wanted to eliminate any potential. So in the back of my mind, I figured I would just take the gun and return it myself.

4RP 120. He said when he picked it up, his finger was on the trigger and the dog made him fire it by jumping up and biting him on his hand, not hard and leaving no marks. 4RP 120, 142, 145.

The defendant said he had lied to Detective Betts. 4RP 123. He said he was afraid the police knew his criminal history and he did not think they would believe his story about the dog. 4RP 120, 125. He said he was saving it for the jury. 4RP 125. He could not explain why he told Detective Betts that he had previously fired the Taurus. 4RP 150.

The defendant admitted he wanted a firearm, tried to get a firearms permit, and was not permitted, as a felon, to possess firearms. 4RP 145. He could not explain why he told Detective Betts that he had purchased the Taurus. 4RP 128.

The defendant also admitted to cleaning the shotgun a week earlier, zipping it in its case, and leaving it in the shared closet where detectives found it. 4RP 142-43. He admitted he had filled out the concealed weapons permit application and said a clerk had told him convicts could not possess weapons. 4RP 145. He did

not know why he had not called a friend to dispose of the firearms. 4RP 137. He said that except for the suicide attempt, Galarosa had not been acting erratically. 4RP 138.

The court admitted the defendant's pretrial statements, both to responding deputies and to Det. Betts. Ex. 3 and 54.

At the close of trial, the defendant proposed a necessity instruction related to Count III, the unlawful possession of the Taurus. 4RP 159. Defense appears not to have filed a copy of the proposed instruction but it was discussed on the record. The defendant argued he was entitled to a necessity instruction because he possessed the gun only as a "measured response" to a greater threat: that of leaving the laser on or leaving bullets in the gun. 4RP 162. The court disagreed. 4RP 163. The defendant had not testified that he picked up the gun to get it out of the house or insure the safety was on or to remove possible live rounds or out of fear the dog might fire it. 4RP 163-64. Galarosa was no longer a danger as she was not in the room. 4RP 164. There was no evidence that no reasonable alternatives existed such as calling a neighbor or 911 or a first responder to retrieve the gun. Id.

The jury found the defendant guilty of Third Degree Assault with a Firearm Enhancement and two counts of First Degree UPF.

CP 78, 79, 81, 82. At sentencing, the court denied the defense request to score the two UPF counts as "same criminal conduct." 2/16/14RP 20-21. The court found the defendant unlawfully possessed two separate firearms that were used, found, or possessed in different locations and were not, under the circumstances, same criminal conduct. Id.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED AS SUBSTANTIVE EVIDENCE THE VICTIM'S PRIOR INCONSISTANT STATEMENT WHICH WAS MADE DURING A POLICE INVETIGATION AND UNDER PENALTY OF PERJURY.

1. The Statement Met All The Requirement Of A Sworn Statement.

The defendant argues that the Galarosa's out-of-court statement to Detective Betts should not have been admitted as substantive evidence under ER 801(d)(1)(i) because it was not given under oath. However, the evidence showed that the statement was sworn under penalty of perjury.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). An abuse of discretion occurs when the trial court's ruling was manifestly unreasonable or based on untenable grounds. Stenson, at 701. An abuse occurs when a trial court's

ruling is based on a misunderstanding of the law. State v. McComas, 186 Wn. App. at 312.

Under ER 801(d)(1)(i), a prior inconsistent statement is not hearsay and may be admitted as substantive evidence if the declarant testified at trial and was subject to cross-examination, the statement was inconsistent with the testimony, was given under oath subject to penalty of perjury, and was provided at a another proceeding or in a deposition. State v. Nieto, 119 Wn. App. 157, 161, 79 P.3d 473 (2003). A statement made to investigating police officers as a complaint and subject to penalty of perjury, often called a "Smith affidavit", suffices as one made in another proceeding. State v. Smith, 97 Wn.2d 856, 651 P.2d 207 (1982); State v. Nelson, 74 Wn. App. 380, 386-87, 874 P.2d 170 (1994). The oath requirement exists to provide a minimal guarantee of truthfulness. Smith, 97 Wn. 2d at 862.

In the present case, the defendant argues that the recorded statement does not carry a minimal guarantee of truthfulness because it was not made under oath. He is incorrect since the statement was made under penalty of perjury.

RCW 9A.72.085 requires that a sworn statement:

(1) Recites that it is certified or declared by the person to be true under penalty of perjury;

(2) Is subscribed by the person;

(3) States the date and place of its execution; and

(4) States that it is so certified or declared under the laws of the State of Washington.

Nelson, 74 Wn. App. at 390. An unsworn statement that satisfies the statute is equivalent to a sworn statement for purposes of ER 801(d)(1)(i). Id. McComas, 186 Wn.2d at 318.

In State v. Sua, the court refused to admit as substantive evidence sworn but unsigned prior inconsistent statements. 115 Wn. App. 29, 48, 60 P.2d 1234 (2003). Without signatures, the statements were not given under oath. Id. The present case is entirely different because Detective Betts read Galarosa the oath and perjury language not once but twice, made sure she audibly agreed that she understood it, and watched her sign it.

No copy of the signature page was admitted into evidence. However the court heard testimony that made clear that Galarosa affixed her signature to the certification. The certification referred to the "foregoing" oral statement. No more was required.

No case cited by the defendant supports his argument that the oath must be given before the statement is made. In Smith, the

victim wrote her statement, signed each page, read the oath, and signed her name. 97 Wn.2d at 856. Afterwards she appeared before a notary. Id. at 858. The court held that ER 801(d)(1)(i) did not automatically exclude or admit such an affidavit but rather directed the court to analyze the evidence with an eye to reliability and minimal guarantees of truthfulness. Id. at 861-62.

In Nelson, a police officer, not the witness, wrote down what the witness told him. 74 Wn. App. 380. The officer then took the witness and the statement to a notary. The notary did not administer an oath but testified that she asks affiants if they have read it. Id. at 390. The court found that the declarant's signature satisfied the minimal guarantee of truthfulness because it showed that she understood the statement was made under penalty of perjury. Id.

That is precisely what happened in the present case. The recording contained Det. Betts' voice as he read Galarosa the perjury language not once but twice. It contained her agreement that she understood the perjury language. It contained his directive to her to sign the statement to swear to its truth. It contained his statement that he would sign under her name. It contained the date

and location of its execution. The audio statement met the statutory requirements and was thus a sworn statement.

State v. McComas, 186 Wn. App. 307, 345 P.3d 36, review denied, __ P.3d __ (2015), calls for no other result. There, the witness gave police an audio statement about an assault. At the end, she was asked if she declared her statement was given under penalty of perjury. She said yes but did not add her signature. Id. at 309. Because the statement was neither signed nor dated, it did not meet the minimal guarantees of truthfulness required. Id. at 319.

In the present case, the audio recording did contain the location, date, Galarosa's explicit understanding of the oath, and her signature, "where it says signature". Ex. 56. The recording even picked up the sound of Galarosa's pen as she signed. Id. That is more than is sufficient to support the trial court's exercise of discretion because it met the minimal guarantees of truthfulness the case law requires. There was no need for the court to require the actual document, one not challenged by defense, because the court is not bound by the rules of evidence in questions of admissibility. ER 1101(c); ER 104(a).

The present case is nothing like Nieto, 119 Wn. App. 167. There, the trial court abused its discretion when it admitted a statement as substantive evidence when the oath was misleading. Id. at 161-62. The oath read:

> I have read each page of this statement consisting of ___ page(s). Each page bears my signature, and all corrections, if any, bear my initials. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Id. The penalty of perjury language was ambiguous because the term "foregoing" could have referred to the first two sentences of the boilerplate language rather than to the statement itself. Id. Moreover, the witness testified that she had not read the oath and no one testified that he had read it to her. Id. at 165.

There is no ambiguity in the present case. The perjury language referred not to anything "foregoing" but explicitly to the facts on the recording. Detective Betts read the oath twice and Galarosa stated on tape that she understood it. Her trial testimony was not that she was not given or did not understand the oath but rather that she did not remember it.

As the trial court noted, Galarosa's statement was more likely to be accurate than one an officer had written or transcribed.

There was no suggestion that the tape was doctored and no one raised an issue about its authenticity or accuracy. The court found the difference between a recording and a written statement unimportant. Id. "[I]t strikes me that there's no inherent flaw with a recorded statement in terms of the reliability aspects that the rule is founded on." Id. at 22. That was not an abuse of discretion.

2. If The Trial Court Erred, The Error Was Harmless Because The Evidence Of Guilt Was Overwhelming.

Even if the trial court abused its discretion, the defendant's conviction still should be affirmed because the evidence of his guilt was overwhelming. Any error that occurred was harmless because there was no reasonable probability the jury would have reached a different verdict without having heard the recorded statement.

When a trial court admits evidence in violation of an evidentiary rule, reversal is required if the reviewing court finds that, absent the error, there was a reasonable probability that the outcome would have been different. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004); McComas, 186 Wn. App. at 320-21. That did not occur in this case.

In McComas, despite the trial court's error in admitting a statement under ER 801(d)(1)(i), the conviction was affirmed

because evidence of guilt was overwhelming. Id. at 320. The victim had injuries consistent with an assault, and the defendant admitted to arguing with her, throwing items against a wall, and assaulting her. Id. It did not appear to the reviewing court that the jury would have acquitted the defendant absent the victim's inconsistent statement. Id.

The same is true in the present case on the assault conviction. Galarosa had injuries consistent with a shooting and the defendant admitted to shooting her unintentionally. In fact, they both testified that they were the only people in the house when she was shot, she upstairs and he downstairs. At trial, the defendant admitted that he had intentionally, not accidentally, picked up a gun, not knowing if it was loaded, put his finger on the trigger, and then accidentally discharged it. That is a gross deviation from the standard of care a reasonable person in the same situation would exercise. See WPIC 10.04, CP 104. There is no reasonable probability the outcome would have been different regardless of Galarosa's out of court statement.

The same is also true for the UPF conviction for the shotgun. The defendant admitted that he lived in the home with Galarosa and knew that she had a shotgun stored in their shared closet. He

admitted that he had cleaned the shotgun within a week of the shooting and that he stored it again in the shared closet. His DNA was on the shotgun.

That evidence is overwhelming that the defendant possessed the Taurus. According to his statement to Det. Betts, the defendant purchased the Taurus, permitted it to be in the house for two weeks before the shooting, cleaned and shot it, and taught Galarosa how to load and use it.

In court, the defendant said he paid for the gun, knew Galarosa kept it in the house or in her car, knew its case and ammunition were stored in their shared closet, and sought his own concealed weapons permit because he wanted a firearm in the house. Constructive possession occurs when, under the totality of circumstances, a person exerts dominion and control over the item. State v. Davis, 182 Wn.2d 222, 234, 340 P.3d 820 (2014). Mere proximity is not enough. Id. Having dominion and control over a premises alone is not enough but is a factor. Id.

Clemmons murdered four officers and stole a gun when he arrived at Davis's home. Davis, at 224-25. He and Davis then drove to Nelson's home. Id. Nelson put the gun into a bag on a counter and Davis later handed the bag to Clemmons. Id.

In a dissenting opinion joined by five justices, The Supreme Court found insufficient evidence of either actual or constructive possession. Neither defendant asserted an interest in the gun but instead briefly handled it before giving it to the true possessor, Clemmons. Id. at 235. The situation was chaotic as Clemmons made demands for assistance and admitted to the four murders. Id. Clemmons tended to control family members and was intimidating. Id. The issue of dominion and control had to be considered in that context. Id.

The opposite is true in the context of this case where the defendant did not have mere proximity to the Taurus but rather had exerted dominion and control over the premises and over the Taurus itself. There was no evidence that Galarosa intimidated the defendant. The situation in the house in the house leading up to the shooting was not chaotic. The defendant had paid for the gun and was aware it was in and out of the house of the house for the weeks leading up to the shooting. While the defendant may have only momentarily controlled it on March 2, he testified to constructive possession for the weeks leading up to the shooting.

The court in Davis looked for a nexus between the evidence and the house in which it was found. Id. at 236. There was no

evidence Nelson asked Clemmons to go to her home or consented to his bringing a gun into her home. Id.

The circumstances in the present case are entirely different. The defendant not only permitted Galarosa to bring a gun to his home but rather encouraged it by arranging for its purchase, paying for it, and storing its box and ammunition in his shared closet. There was a direct nexus between the defendant's house, his dominion and control over it, and his dominion and control over the Taurus.

The jury convicted the defendant of negligently shooting Galarosa and of unlawfully possessing both firearms. The defendant admitted at trial that he negligently shot Galarosa and that he was a felon in possession of both firearms. Even if the jury disregarded the defendant's out of court statements, there is no reasonable probability that, absent Galarosa's inconsistent statement, the jury would have acquitted him on any of the three counts.

B. THE DEFENDANT DID NOT PRODUCE EVIDENCE SUFFICIENT TO SUPPORT A NECESSITY INSTRUCTION ON COUNT III.

The trial court properly refused to instruct the jury on necessity in the absence of sufficient evidence to support the

instruction. The defendant produced no evidence of an unforeseen imminent danger, no evidence that there were no legal alternative, and no evidence that he had not possessed the gun before any threat arose.

Each side in a case is entitled to instructions that support its theory of the case but only if evidence supports the theory. State v. Benn, 120 Wn.2d 631, 654, 845 P.2d 289, cert denied, 510 U.S. 944, 114 S. Ct. 382, 126 L.Ed.2d 331 (1993); State v. Parker, 127 Wn. App. 352, 355, 110 P.3d 1162 (2005). A necessity defense is available when circumstances force a defendant to take an unlawful action to avoid a great injury. State v. Jeffrey, 77 Wn. App. 222, 224, 889 P.2d 956 (1995). Necessity applies in "unforeseen and sudden situation[s] when an individual is threatened with impending danger." Id. at 226. The defendant must produce some evidence that he believed the crime was necessary to avoid a greater harm and that no legal alternative existed. Id. at 225. A defendant is not entitled to a necessity instruction in a firearms case if he possessed the firearm before the necessity arose. Id. at 227. The refusal to give an instruction on an affirmative defense is reviewed for an abuse of discretion on factual issues and *de novo* on legal issues. State v. Walker, 136 Wn.2d 767, 777, 966 P.2d 883 (1998). The

analysis is objective and subjective. Id. at 773. The reviewing court may affirm on any ground supported by the record. State v. White, 137 Wn. App. 227, 230, 152 P.3d 364 (2007).

The defendant failed to produce the evidence necessary to have the jury instructed on necessity. He did not testify about an unforeseen or imminent danger. He presented no evidence that there were no legal alternatives.

The facts of the present case are like those in Parker, 127 Wn. App. 352. There, the defendant claimed he carried a gun as the result of an assault that had occurred months earlier. Id. at 355. The court found insufficient evidence of a reasonable belief that Parker was in imminent bodily harm. Id. Additionally, the evidence showed that Parker had time to try a reasonable legal alternative to arming himself but had not done so. Id. at 355-56.

That is what happened in the present case. The defendant presented no evidence of an imminent fear of suicide, but rather testified about a suicide attempt a week earlier. A suicide threat could not have been imminent because Galarosa was not near the Taurus but rather was upstairs. And a week before, when the suicide attempt had been made, the defendant did not get rid of the shotgun but simply cleaned it and put it back in the shared closet.

Even taken in the light most favorable to the defendant, there was no evidence that the defendant reasonably believed the gun presented an imminent danger to Galarosa.

Moreover, there was overwhelming evidence that the defendant possessed the firearm before the "threat" arose. In State v. Jeffrey, the defendant was a felon whose friend gave Jeffrey a gun to protect himself from a young man in the neighborhood. 77 Wn. App. at 222. Only one hour later, Jeffrey retrieved the gun in response to what he thought was the dangerous neighbor. The trial court properly denied Jeffrey's request for a necessity instruction because the evidence showed that Jeffrey was in constructive possession of the firearm for an hour before any necessity arose. Id. at 227.

In the present case, the defendant admitted that he was in constructive possession of the Taurus not just for hours before the "threat" arose but for at least a week after the alleged suicide. He admitted to detectives that he had purchased, cleaned, and shot the Taurus. He testified that Galarosa kept the Taurus in the car and home. He testified that on the day he shot her, Galarosa had brought the gun down for him to clean. Because the defendant

possessed the firearm long before the "threat" arose, the defense was properly disallowed.

Nor was there evidence that the defendant had no legal alternatives. Even if there was a remote suicide threat, the defendant presented no evidence regarding his failure to call 911, a non-felon friend, or otherwise lawfully get the Taurus out of the house. The defendant simply failed to produce evidence required to have the jury instructed on necessity.

He picked up the gun to turn off the laser, not to protect anyone. He worried about the potential of another suicide attempt, not an imminent danger of one, and he planned to take the gun and get rid of it himself, something a convicted felon is not permitted to do.

An entirely different scenario was presented in State v. Stockton, 91 Wn. App. 35, 955 P.2d 805 (1998). There, the defendant was attacked by two men and, when confronted with a gun, grabbed it, held it, and hid in bushes until the police arrived. Id. at 38. In the present case, no one attacked the defendant, confronted him with a gun, or forced him into hiding for his own safety. Here, the defendant was not threatened, not forced to flee,

and not forced to hide. He simply picked up a firearm he had had in the house for weeks.

Nor do the cited federal cases support the defendant's position. See, U.S. v. Newcomb, 6 F.3d 1129 (6th Cir.1993); U.S. v. Paolello, 951 F.2d 537 (3rd Cir. 1991). In each of those, a felon was confronted with a gun-wielding assailant whom he disarmed before almost immediately discarding the weapon. The "keystone" of the court's analysis was that defendant had no alternative to breaking the law either before or during the event. Newcomb, 6 F.3d at 1135-36. A high level of proof must be produced to establish the defense. Paolello, 951 F.2d at 542.

Even considering the evidence in the light most favorable to him, the defendant had a myriad of options both before and during the shooting. According to his own statements, he purchased the Taurus, or paid for it, or arranged for its purchase, permitted it to be in the house for two weeks before the shooting, cleaned and shot it, and taught Galarosa how to load and use it. During that time, he could have called 911 or first responders or a non-felon friend to dispose of the Taurus. He did not. On the day of the assault, by his own testimony, Galarosa was nowhere near the Taurus but instead upstairs, perhaps angry he would not clean her gun and

perhaps simply painting her toenails. The same alternatives existed. The defendant admitted he could simply have called a friend to dispose of the guns long before the shooting and did not know why he had not.

A recent Supreme Court case on the affirmative defense of mistake as to age in a rape case is helpful. State v. O'Dell, __ Wn.2d __, __ P.3d __ (2015 WL 4760476). There, a 12-year old rape victim testified that she told the defendant how old she was. Id. at ¶4. The defendant testified that he reasonably believed she was over 14 because when he told her she looked too young to be drinking, she said, "I get that a lot." Id. at ¶5. The defendant argued that the victim's statement was an assertion that she was older than she looked and entitled him to an affirmative defense of mistake as to age. Id. at ¶7. The trial court found insufficient evidence to warrant the instructions, the Court of Appeals agreed, and the case went to the Supreme Court.

The Supreme Court agreed with the Court of Appeals. Id. at ¶17. The victim's comment said nothing about her specific age so the court properly refused to give the mistake of age instruction. Id.

The same reasoning applies here because even the defendant's statement does not support his theory that he picked up the Taurus to prevent an imminent harm. He said,

> I walked over and picked up the gun and attempted to turn the laser off... I have to say that I was mad that the gun was still in the house. You know, I didn't want to go through another suicide attempt. I wanted to eliminate any potential. So in the back of my mind I figured I would just take the gun and return it myself.

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The defendant expressed anger. He expressed an intention to keep the gun and eventually dispose of it. He expressed a concern about the possibility of a future suicide attempt. He never said he picked up the gun in response to an imminent threat to him or anyone else. The trial court properly found that his evidence did not support a necessity instruction.

C. NO PETRICH INSTRUCTION WAS REQUESTED OR GIVEN BECAUSE THE CASE DID NOT INVOLVE EITHER MULTIPLE OR ALTERNATIVE MEANS.

1. A Unanimity Instruction Was Not Required Because The Possession Of An Unlawful Firearm Is Not A Crime With Alternate Means.

A criminal defendant has a constitutional right to a unanimous verdict on each crime charged. State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007). If the State alleges multiple acts that constitute the crime charged, the jury must agree on which

act constituted the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

A unanimity instruction is not required merely because a jury may find the defendant committed the offense by one of several alternate means. Individual jurors may be divided on the means and still unanimous in their collective verdict. State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998), review denied, 137 Wn.2d 1016 (1999). Alternate means analysis does not apply to definitional instructions. State v. Smith, 159 Wn.2d 778, 785, 154 P.3d 873 (2007) (definitions of assault do not create alternate means); State v. Linehan, 147 Wn.2d 638, 649, 56 P.3d 542 (2002) (definitions of "unauthorized control" do not create alternative means). Mere definitional instructions do not create alternate means and the jury should not be instructed that they do. Smith at 785.

The defendant has framed his argument as one of multiple acts but is really about the definition of possession as either actual or constructive. In the present case, the State did not present evidence of separate acts. Instead, it presented both direct and circumstantial evidence of possession, both actual and

constructive, in the weeks leading up to March 2, 2013. The State was required to, and did prove, possession of both firearms and no unanimity instruction was required.

The defendant was convicted of possessing the semi-automatic Taurus in Count III and the shotgun in Count IV. CP 81, 82. The jury was given the WPIC 133.52 definition of possession.

> Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.
>
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
>
> In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP 107.

All of the State's evidence on firearms showed possession, both constructive and actual. The defendant admitted that he actually and constructively possessed the Taurus in the time leading up to the assault on March 2. He purchased it, shot it, cleaned it, and permitted Galarosa to store it in the shared closet, and sometimes placed it on the shelf when Galarosa left it lying around. The defendant admitted that he actually and constructively possessed the shotgun in the days leading up to March 2. He knew the shotgun was in the closet because he put it there himself. He cleaned the shotgun and kept it next to the firearm cleaning materials and ammunition for both firearms. Although he testified he asked Galarosa to dispose of it, she did not and he took no other steps to do so.

2. No Unanimity Instruction Was Required Because The Evidence Showed A Continuing Course Of Contact With One Goal, Unlawful Possession Of Firearms.

The defendant's possession of the Taurus and the shotgun was a continuing course of conduct. Thus, no unanimity instruction was required.

A good example of a continuing course of conduct is State v. Love, 80 Wn. App. 357, 908 P.2d 395, review denied 129 Wn.2d 1016 (1996). Police arrested Love and found five rocks of cocaine

in his pocket. They later found in his home 40 rocks more together with drug paraphernalia and proceeds. The jury convicted of one count of unlawful possession of cocaine with intent to deliver. Id. at 360. On appeal, Love he argued that the trial court should have given a Petrich instruction based on the multiple acts (two quantities of cocaine). The court disagreed because the evidence was not of multiple acts but rather a continuing course of conduct. Id. at 363. The five rocks Love carried, the 40 rocks in his home, and the other evidence of sales (paraphernalia and cash) all combined to prove single intent of earning money by selling cocaine. Id. at 363.

The same is true in the present case. The evidence produced about each firearm showed not a fleeting possession but an ongoing and intentional possession. The defendant possessed the Taurus for at least a week when it was in and out of the defendant's closet and living room, he cleaned and stored it, and he stored ammunition and a case for it. He possessed the shotgun for at least a week when he cleaned it and stored it together with ammunition on his side of the shared closet. As in Love, the evidence combined to show a single intent as to each weapon: to

possess each weapon in his home where it was available to him and under his dominion and control.

The reasoning of State v. King illustrates why no unanimity instruction was necessary in the present case. 75 Wn. App. 899, 878 P.2d 466 (1994), review denied, 125 Wn.2d 1021 (1995). King was one of two men, the passenger, in in a car where police found cocaine secreted. They also found another batch of cocaine in King's personal possession. King denied knowing about the drugs in the car and claimed police planted the other drugs on him. Id. at 901-02. The State said it would elect in closing whether it was relying on the cocaine in the car or on King's person but neglected to do so. Because there was no Petrich instruction, the conviction had to be reversed. Id. at 903. The evidence showed two distinct instances of possession of cocaine in different containers at different times and places, to which there were two defenses. Id.

Nothing like that occurred in the present case because there was a separate count for each gun. There is no question that the jury convicted on Count III for the Taurus and Count IV for the shotgun. The State was not required to elect whether it wished the jury to consider the defendant's actual possession or constructive possession of each firearm. The jury was free to consider either or

both. All of the evidence showed a continuing course of conduct, that is possession of two separate firearms over the course of at least a week prior to March 2.

Because the evidence showed not multiple acts but rather a continuing course of conduct, no unanimity instruction was required and no error occurred.

D. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION AND FOUND THAT FIREARMS FOUND IN DIFFERENT LOCATIONS COUNTED AS SEPARATE CRIMINAL CONDUCT.

The trial court exercised its discretion and it determined the defendant's convictions on the UPF charges, Counts III and IV, were not the same criminal conduct for scoring purposes. The trial court found that under the circumstances of this case, with weapons being used and found in different rooms of the same house, the counts should be scored separately.

When a person is convicted for two or more current offenses, his offender score on each offense is determined by counting all prior and all other current convictions. RCW 9.94A.589(1). If some of the current convictions involve the "same criminal conduct", they count as one point. Id. The statute should be narrowly construed and most crimes are considered separate.

State v. Stockmyer, 136 Wn. App. 212, 218, 148 P.3d 1077 (2007), review denied, 161 Wn.2d 1023 (2007); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Multiple convictions are the "same criminal conduct" only if they require the same intent, are committed at the same time and place, and involve the same victim. Id.

The trial court's determination of what constitutes "same criminal conduct" is reviewable for an abuse of discretion. State v. Johnson, 180 Wn. App. 92, 100, 320 P.3d 197, review denied, 181 Wn.2d 1003 (2014). Reviewing courts give deference to a trial court's determination and will reverse only if there is a clear abuse of discretion, such as a misapplication of the law. Stockmyer, 136 Wn. App. at 218, State v. Elliott, 114 Wn.2d 6, 786 P.2d 440, cert. denied, 498 U.S. 838, 111 S.Ct. 110, 112 L.Ed.2d 80 (1990).

The trial court here did not abuse its discretion and did not misapply the law. In fact, the court considered the applicable law and determined that under the circumstances a finding either way would be a valid exercise of its discretion.

The facts of this case are similar to those in Stockmyer. Stockmyer was arrested on a during a warrant service. Id. at 213. He shot at officers who later found three firearms at various

locations throughout his house and four more in a safe. Stockmyer was convicted of, among other crimes, seven counts of UPF, all of which the trial court scored separately. Id. at 217.

On appeal, the court accepted the State's concession that the firearms in the safe encompassed the same criminal conduct. Id. at 218. It also found that the lower court had acted within its discretion in scoring the other firearms counts separately. Id. at 219. The "same place" requirement was to be narrowly construed. Id. The court could not say as a matter of law that possession of different weapons in three different locations in one home was the same criminal conduct. Id. "[M]ultiple guns in different rooms in felons' homes increase the peril to both law enforcement and the general public in that they provide felons with easier and more ready access to guns in the home, thus increasing the possibility of harm to others." Id. at 220. The trial court did not abuse its discretion when it found separate criminal conduct. Id.

The same reasoning applies here. The defendant possessed two firearms that at times were found or used on different floors of the same house. His possession of multiple guns in different locations gave the defendant easier and readier access and increased not just the possible but actual harm to another.

For multiple crimes to be considered the same criminal conduct, they must be committed at the same time, in the same place, and involve the same victim. State v. Simonson, 91 Wn. App. 874, 960 P.2d 955 (1998). All three factors must be present. Id. at 885. Simonson had six firearms, all of which were found by police in his bedroom and available for his use from his bed. Id. at 877-78. Because all three factors were present, the six counts should have been scored as the same criminal conduct. Id. at 885-86.

In the present case, the trial court exercised its discretion and found that the same place factor was missing. On March 2, the defendant's firearms were in two separate locations in the home. The Taurus was fully loaded and used on the first floor; the shotgun was unloaded and stored in an upstairs closet. The court did not abuse its discretion because the two convictions were the same criminal when it scored the two UPF convictions separately.

The burden is on the appellant to show that the trial court abused its discretion in ruling on same criminal conduct. State v. Davis, 174 Wn. App. 523, 300 P.2d 465 (2013), review denied, 178 Wn.2d 1012 (2013). In Davis, the trial court found that an attempted murder and an assault conviction were the same criminal conduct when a mentally ill defendant chased and fired at a deputy who was

responding to a trespass call, despite the fact that the shots were fired from different but proximate locations. Id. at 643. The reviewing court affirmed because the trial court was in the best position to evaluate whether the locations were separate for purposes of same criminal conduct analysis. Id. at 643-44. The reviewing court noted that, as in Stockmyer, whether three locations were the same place for scoring purposes was not a matter of law but something that the trial court was in the best position to decide. Id. at 643.

That reasoning applies here. The trial court was in the best position to decide whether the two locations in the defendant's house were the same place for scoring purposes. The court decision that they were not was not a misapplication of the law, was not an abuse of discretion, and should be affirmed.

IV. CONCLUSION

For the foregoing reasons, the Court should affirm the defendant's conviction.

Respectfully submitted on October 14, 2015.

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

THE STATE OF WASHINGTON, Respondent, v. JEFFREY S. SOWERS, Appellant.	No. 71720-1-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 22nd day of October, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Mick Woynarowski, Washington Appellate Project, wapofficemail@washapp.org and mick@washapp.org.

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

Dated this 22nd day of October, 2015, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office