

FILED  
Court of Appeals  
Division II  
State of Washington  
2/27/2019 4:54 PM  
No. 96900-1

IN THE SUPREME COURT OF THE  
STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

RANCE MICHEL POINTEC,

Petitioner.

---

PETITION FOR REVIEW

---

Court of Appeals No. 50345-0-II  
Appeal from the Superior Court of Pierce County  
Superior Court Cause Number 15-1-03895-0  
The Honorable Karina Kirkendoll, Judge

---

STEPHANIE C. CUNNINGHAM  
Attorney for Petitioner  
WSBA No. 26436

4616 25th Avenue NE, No. 552  
Seattle, Washington 98105  
Phone (206) 526-5001

## TABLE OF CONTENTS

<b>I.</b>	<b>IDENTITY OF PETITIONER .....</b>	<b>1</b>
<b>II.</b>	<b>COURT OF APPEALS DECISION .....</b>	<b>1</b>
<b>III.</b>	<b>ISSUES PRESENTED FOR REVIEW.....</b>	<b>1</b>
<b>IV.</b>	<b>STATEMENT OF THE CASE .....</b>	<b>2</b>
	<b>A. PROCEDURAL HISTORY .....</b>	<b>2</b>
	<b>B. SUBSTANTIVE FACTS.....</b>	<b>2</b>
<b>V.</b>	<b>ARGUMENT &amp; AUTHORITIES .....</b>	<b>10</b>
<b>VI.</b>	<b>CONCLUSION .....</b>	<b>16</b>

## TABLE OF AUTHORITIES

### CASES

<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969).....	10, 12
<i>State v. Crane</i> , 116 Wn.2d 315, 804 P.2d 10 (1991) .....	11, 12
<i>State v. Holland</i> , 77 Wn. App. 420, 891 P.2d 49 (1995) .....	11
<i>State v. King</i> , 75 Wn. App. 899, 878 P.2d 466 (1994) .....	12
<i>State v. Kiser</i> , 87 Wn. App. 126, 940 P.2d 308 (1997) .....	11
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	11
<i>State v. Staley</i> , 123 Wn.2d 794, 872 P.2d 502 (1994).....	12
<i>State v. Turner</i> , 103 Wn. App. 515, 13 P.3d 234 (2000) .....	14

### OTHER AUTHORITIES

RAP 2.5(a) .....	11
RAP 13.4 .....	10

**I. IDENTITY OF PETITIONER**

The Petitioner is RANCE MICHEL POINTEC, Defendant and Appellant in the case below.

**II. COURT OF APPEALS DECISION**

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 50345-0-II, which was filed on January 29, 2018. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

**III. ISSUES PRESENTED FOR REVIEW**

1. Was Rance Pointec denied his right to a unanimous jury verdict on the charges of unlawful possession of a firearm where the State told the jury that Pointec actually possessed each firearm at one point in time and constructively possessed each firearm at a different point in time, and the trial court failed to instruct the jury that it must be unanimous as to which act of possession was proved beyond a reasonable doubt?
2. Where the evidence showed that Rance Pointec only handled an unpurchased 9 millimeter handgun while standing in a gun shop, and where a video that showed Pointec test-firing an AR-15 rifle did not establish that this act occurred within the charging period, could a rational jury have a reasonable doubt that Pointec actually possessed either of these firearms?

#### **IV. STATEMENT OF THE CASE**

##### **A. PROCEDURAL HISTORY**

The State charged Rance Michel Pointec with two counts of human trafficking in the second degree (RCW 9A.40.100), alleging in count one that he engaged in trafficking Nikita Allen, and in count five that he engaged in trafficking Ashley Wadsten. (CP 35-37) The State also charged Pointec with two counts of unlawful possession of a firearm in the first degree (RCW 9.41.040), and one count of promoting prostitution in the second degree (RCW 9A.88.080). (CP 35-37)

The jury found Pointec not guilty of the human trafficking charges, but guilty of the remaining firearm possession and promoting prostitution charges. (CP 81-86; 11RP 1135-36)<sup>1</sup> The trial court sentenced Pointec within his standard range to a total of 78 months of confinement. (CP 99, 102; 12RP 1174-75)

Pointec timely appealed. (CP 118) The Court of Appeals affirmed Pointec's conviction and sentence.

##### **B. SUBSTANTIVE FACTS**

On the morning of August 14, 2017, Puyallup Police were

---

<sup>1</sup> The transcripts labeled volumes I through XII will be referred to by their volume number (#RP). The remaining transcripts will be referred to by the date of the proceeding contained therein.

called to the Cambridge Apartments after a woman was found half-naked and unconscious in a car parked oddly on the property. (4RP 329, 330, 337, 338, 339-40; 6RP 744) The woman appeared to be injured, and did not respond when the officers tried to wake her. (4RP 339-40) The woman was transported to the hospital, where she eventually regained consciousness. (4RP 341, 390-91, 424)

The woman, Ashley Wadsten, was treated for facial fractures and a broken jaw. (4RP 427-28) Wadsten came to the police station a few days later to talk to investigators and to get her property back. (4RP 396, 399) She told investigating officers that “Rance and Nikita did this to her.” (4RP 392, 396-97) Investigators created photographic montages based on Wadsten’s description of Rance and Nikita. (4RP 401-02, Exh. 58, 59) Wadsten positively identified Rance Pointec and Nikita Allen. (4RP 404, 406) Wadsten also led investigators to Pointec and Allen’s apartment at the Cambridge Apartments. (5RP 554-55)

Wadsten testified that she has known Pointec since they were in middle school together. (5RP 581) She was 29 years old and had a four-year old daughter at the time of trial. (5RP 565, 566) Wadsten had struggled with drug addiction for many years.

In 2012, she worked at a strip club, but to earn extra money for drugs she became involved in prostitution. (5RP 567-69, 666) To get clients, she posted pictures online with information about her services and her telephone number. (5RP 570-72, 664) She would then meet the clients in a hotel where she would engage in sex acts for money. (5RP 572-73)

Wadsten eventually received treatment and stopped using drugs and engaging in prostitution. In 2013 she moved with her husband to Florida. (5RP 575) But they returned to Washington after about 10 months. (5RP 577-78) Wadsten moved in with her parents, and her daughter was born in January of 2013. (5RP 578) Sadly, she soon began abusing drugs again. (5RP 578) Around that same time, Wadsten reconnected with Pointec through Facebook. (5RP 580) She discussed with Pointec that she needed to earn money to buy drugs and wanted to begin prostituting again. (5RP 581-82)

Pointec told Wadsten that he and his girlfriend, Nikita Allen, had an arrangement whereby she would engage in sexual transactions for money, and he would provide security and manage their income. (5RP 582-54) Pointec offered to do the same for Wadsten. Pointec and Allen came to Wadsten's home and took

pictures, which Pointec posted online. (5RP 584-85, 590)

Wadsten testified that she and Allen would meet clients in a hotel room in Kent. They would alternate meetings, while Pointec waited outside in his car to make sure that the clients arrived and left without incident. (5RP 590-91) Wadsten gave Pointec a percentage of her earnings in exchange for his protection. (5RP 592-93) Pointec did not threaten Wadsten or force her to participate in this arrangement. (5RP 673, 710)

The arrangement lasted only about a week, however, because Wadsten decided she did not want to do it anymore. (5RP 594) Pointec did not object and did not try to force her to continue. (5RP 672-73)

By August of 2015, Wadsten's drug abuse had gotten worse and her marriage had ended. (5RP 594, 597, 597) She wanted money to buy drugs so she contacted Pointec about the possibility of prostituting with him again. (5RP 608-09, 618-19, 676-77, 682) They texted about taking and posting new pictures, about how they would split any of her earnings, and about what services he would provide her. (5RP 618-23; Exh. 41, 48)

Pointec and Allen met Wadsten and took new pictures, and agreed on the content of the new ads. (5RP 625-26, 627-28)



Pointec also gave Wadsten \$20.00 to pay for posting the ads, but Wadsten never did it. (5RP 628-29)

On August 13, 2015, Wadsten's mother caught her and another man shooting heroin in Wadsten's bedroom. (5RP 599, 600-01) Her mother told Wadsten to leave, so she loaded her belongings into her car and drove away. (5RP 599, 604) She had nowhere to go and no money. (5RP 605-06) She contacted Pointec, who agreed to help her. (5RP 606, 628) Pointec drove to where Wadsten was waiting, paid for her to fill her car's tank with gas, and told her to follow him back to the Cambridge Apartments. (5RP 630-31, 685)

When they arrived, they parked in the apartment building garage and waited because Allen was in the middle of meeting a client. (5RP 631-32) When Allen finished, Wadsten and Pointec went into the apartment. (5RP 633) Either Pointec or Allen provided drugs for the three of them to do together while they discussed their new arrangement. (5RP 636, 638-39, 641-42, 687) Pointec left for a short time and brought back food from Taco Bell, which Wadsten ate. (5RP 641-43, 690)

Wadsten was high and feeling groggy from lack of sleep. (5RP 691-92) She also began to feel uncomfortable and paranoid

that Pointec and Allen were laughing about her behind her back. (5RP 642-43, 644) She decided she did not want to participate in the prostitution arrangement anymore, and told Pointec and Allen that she had changed her mind. (5RP 644-45) Wadsten does not specifically remember what Pointec or Allen said in response, but she recalled that Pointec did not threaten or harm her. (5RP 644, 710)

Wadsten finished eating and left the apartment. (5RP 644) As she neared her car, she heard loud voices coming from the apartment. (5RP 646) She turned and saw Allen approaching her with her fist raised, and saw Pointec standing about five feet behind Allen. (5RP 643, 646-47) The next thing Wadsten remembers is waking up in the hospital. (5RP 646)

But a neighbor at the Cambridge Apartments saw Wadsten's car driving through the parking lot. (6RP 821-22) Wadsten's car was moving very slowly between the carport and garage. (6RP 821-22) The neighbor saw the brake lights go on and the car come to a stop, then no activity or movement. (6RP 821-23) She did not see anyone get into or out of the car. (6RP 824)

Investigators obtained and executed a search warrant for the apartment. (4RP 444) The officers waited until they saw Pointec

leave, then they approached and knocked on the door. (4RP 444-45) Allen answered wearing only a bathrobe. (4RP 447) Investigators found used and unused condoms, multiple bottles of sexual lubricants, various sex toys, lingerie and fishnet stockings, a 9 millimeter handgun, an AR-15 rifle, a Kindle tablet, a laptop computer, and a Samsung Galaxy cellular telephone. (4RP 449-56) They did not find any men's clothing or toiletries. (4RP 549-50)

Investigators located advertisements offering sexual services that had been posted on several websites known for prostitution and escort service listings. The ads contained pictures of Allen and Wadsten dressed in lingerie or other clothing found in the apartment. (4RP 438-39, 440-41, 453, 457; 5RP 531; 6RP 864-65, 866; Exhs. 28, 34, 49, 50, 51, 52, 69) Investigators found similar photographs of Allen and Wadsten on the laptop computer and the cellular telephones. (6RP 781-82, 789; Exh 47, 49, 50)

Investigators extracted texts from Wadsten's, Pointec's and Allen's cellular telephones. (4RP 408-09; 6RP 751, 774-77; Exhs. 41, 48, 68) In addition to texts about the business of prostitution, the texts show that Pointec and Allen occasionally fought about the arrangement and the status of their relationship. (Exh. 68)

Investigators located an undated video of Pointec test firing

the AR-15 rifle.<sup>2</sup> (6RP 853-57; Exh. 8) They found a gun store receipt and a pistol transfer application showing that Allen purchased a 9 millimeter handgun on September 25, 2015. (6RP 757, 764-65; Exh 7, 20) Surveillance video from the gun store shows Allen and Pointec together, and Pointec can be seen holding and inspecting the gun. (6RP 767-68, Exh. 5, 9)

Investigators also found hundreds of pictures of male genitalia texted to Allen's phone. (6RP 862-63) It is common for a prostitute to request this type of photograph from a potential client to insure that the client is not actually a law enforcement officer. (6RP 862-63)

Investigators also obtained and executed a search warrant for Wadsten's car. (4RP 380, 384) They found bags of clothing and papers, lingerie, a child's car seat and a cellular telephone, as well as hypodermic needles, a used methamphetamine pipe, and several prescription medication bottles. (4RP 385, 386-88, 471; 5RP 696; Exh. 4) One of the bottles found in Wadsten's purse contained medication prescribed to Nikita Allen. (5RP 697-98, 736; Exh. 4, 27) Wadsten acknowledged that she probably stole this

---

<sup>2</sup> The video was uploaded to Pointec's Snapchat account on August 26, 2015, but it is not clear when the video was actually taken. (6RP 853)

bottle from Allen's bathroom before she left the apartment. (5RP 698, 703)

## **V. ARGUMENT & AUTHORITIES**

The issues raised by Pointec's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

The State charged Pointec with one count of unlawful possession of a firearm for the 9 millimeter handgun, and one count of unlawful possession of a firearm for the AR-15 rifle. (CP 36) The State alleged that he possessed these firearms between May 14, 2015 and September 28, 2015. (CP 36, 76, 77) The jury was instructed that possession could be actual or constructive.<sup>3</sup> (CP 74)

During closing statements, the prosecutor told the jury that it could convict Pointec of possessing the 9 millimeter handgun either because he actually possessed it in the gun store on September 25, or because he constructively possessed it when it was in the apartment. (7RP 962) Similarly, the prosecutor told the jury it

---

<sup>3</sup> A person has actual possession when he or she has physical custody of the item. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person has constructive possession when he or she has dominion and control over the item. *Callahan*, 77 Wn.2d at 29.

could convict Pointec of possessing the AR-15 rifle either because he actually possessed it when he is seen in the video test firing it, or because he constructively possessed it when it was in the apartment. (7RP 962)

A criminal defendant may be convicted only if a unanimous jury concludes he or she committed the criminal act charged in the information. *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980)). And if the State presents evidence of multiple acts that could form the basis of a particular charged count, the State must elect which of the acts it is relying on, or the court must instruct the jury to agree on a specific act. *State v. Crane*, 116 Wn.2d 315, 325, 804 P.2d 10 (1991) (citing *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)).

In this case, the prosecutor told the jury that there were two possible acts to rely on for each charge. The prosecutor did not elect which possessory act it was relying on for conviction, and the trial court did not give the jury a unanimity instruction.<sup>4</sup>

---

<sup>4</sup> This issue may be raised for the first time on appeal because failure to provide a unanimity instruction in a multiple acts case amounts to manifest constitutional error. RAP 2.5(a); *State v. Kiser*, 87 Wn. App. 126, 129, 940 P.2d 308 (1997); *State v. Holland*, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

If there is no election and no instruction, the resulting constitutional error is harmless only if no rational trier of fact could have had a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Crane*, 116 Wn.2d at 325. The rationale for this protection in multiple acts cases stems from possible confusion as to which of the acts a jury has used to determine a defendant's guilt. *State v. King*, 75 Wn. App. 899, 902, 878 P.2d 466 (1994). In this case, a rational juror could have had a reasonable doubt as to at least one act for each count.

Contrary to the Court of Appeals' decision, the jury could have had a reasonable doubt that Pointec actually possessed the 9 millimeter handgun at the gun store. (Opinion at 7) A person has actual possession when he or she has physical custody of the item. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). But, "[t]o establish possession the prosecution must prove more than a passing control; it must prove actual control." *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994). A momentarily handling, without more, is insufficient to prove that that person had actual possession because to "possess" means "to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature." *Staley*, 123 Wn.2d at 801 (emphasis

added, internal quotation omitted).

When Pointec held the 9 millimeter handgun at the gun store, neither he nor Allen had “control, care and management” of the gun. The gun belonged to the gun store. Pointec’s temporary handling of a gun still owned and controlled by the gun store cannot establish that Pointec actually possessed the gun for the purposes of the unlawful possession of a firearm statute.<sup>5</sup>

The Court of Appeals’ conclusion, that this temporary handling of the firearm on the premises of the store when the firearm was still owned by the store, will lead to absurd results. (Opinion at 7) Under the Court’s logic, a teenager who carries a bottle of beer from one end of a grocery store to another can be charged and convicted of unlawful possession of alcohol. Or, under the Court’s logic, a shopper who finds a misplaced bottle of prescription pills and carries those pills to the customer service desk can be charged and convicted of unlawful possession of a controlled substance. Without some attempt to purchase and/or remove the item from the premises, there cannot be actual control

---

<sup>5</sup> The jury seemed unsure that this act established the elements of the crime as well. During deliberations, the jury sent a note asking, “is a felon holding a gun in a gun store legally considered possession or control?” (CP 38; 8RP 142) The jury was told to re-read their instructions. (CP 38; RP 1042-43)



of the item.

Second, the jury could have had a reasonable doubt that Pointec constructively possessed the 9 millimeter handgun when it was at the apartment. A jury can find a defendant constructively possessed a firearm if the defendant had dominion and control over it or over the premises where the firearm was found. *State v. Turner*, 103 Wn. App. 515, 520-21, 13 P.3d 234 (2000) (citing *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997)). Here, the handgun was purchased by and registered to Allen, and kept in the apartment that she rented and lived in. (6RP 765; Exh. P20) No men's clothing or other personal items were found in the apartment. (5RP 549-50) A rational jury could have a reasonable doubt that Pointec exercised dominion and control over the apartment and the 9 millimeter handgun kept there. The Court of Appeals was therefore incorrect when it found that any error in omitting a unanimity instruction for the possession of the 9 millimeter handgun was harmless. (Opinion at 8)

The Court of Appeals was also wrong when it determined that the State elected to rely on Pointec's actual possession of the AR-15, and that therefore no unanimity instruction was needed for that charge. (Opinion at 8-9) During closing arguments, the

prosecutor specifically tells the jury that it can convict Pointec on the basis of either actually possessing or constructively possessing both firearms:

You can see him shooting that [AR-15] gun. You have direct evidence.

But you have the circumstantial as well: The text messaging, the transfer, the guns found in the apartment, his connection to the apartment, his just leaving the apartment before they were found on that motorcycle, et cetera, the targets in the garage. That's circumstantial evidence that would assist somebody trying to determine the evidence, does it support the charge that he was in possession of those weapons either constructively or directly. Yes.

(7RP 1025) The State clearly did not elect to rely on actual possession of the AR-15.

As with the 9 millimeter handgun, the jury could have a reasonable doubt that Pointec actually possessed the AR-15 rifle. The State relied on a video uploaded to the mobile messaging application Snapchat, which showed Pointec test firing the rifle. (6RP 804, 853-57; Exh. 8) But the State did not establish when that video was taken. So no rational jury could have found beyond a reasonable doubt that Pointec actually possessed the rifle during the charging period.<sup>6</sup>

---

<sup>6</sup> Investigators located some electronic communications between Pointec and another man indicating that Pointec had purchased or received the rifle from that man. (6RP 803-5; Exh. 6)

Because any rational trier of fact could have had a reasonable doubt that Pointec actually or constructively possessed the firearms, the lack of either prosecutorial election or a unanimity instruction was not harmless. Furthermore, the trial court did give a unanimity instruction for the promoting prostitution charge. (CP 71) The lack of a similar instruction for the unlawful possession of a firearm charges would have led the jury to infer that unanimity was not required. Pointec's convictions for unlawful possession of a firearm should therefore be reversed.

**VI. CONCLUSION**

This Court should accept review, reverse Pointec's unlawful possession of a firearm convictions, and remand this case for a new trial on those charges.

DATED: February 27, 2019



---

STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Petitioner Rance M. Pointec

**CERTIFICATE OF MAILING**

I certify that on 02/27/09, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Rance M. Pointec #316303, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.



---

STEPHANIE C. CUNNINGHAM, WSBA #26436

## APPENDIX

COURT OF APPEALS OPINION IN *STATE V. RANCE M. POINTEC*, No. 50345-0-II

January 29, 2019

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

**DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

RANCE MICHEL POINTEC

Appellant.

No. 50345-0-II

UNPUBLISHED OPINION

SUTTON, J. — Rance M. Pointec appeals his convictions for two counts of unlawful possession of a firearm.<sup>1</sup> Pointec argues that his right to a unanimous jury verdict was violated because the State failed to elect which alleged act of possession supported each charge and the jury did not receive a unanimity instruction. We disagree and affirm Pointec’s convictions.

In a supplemental brief, Pointec argues that certain legal financial obligations (LFOs) in his judgment and sentence should be stricken pursuant to Engrossed Second Substitute House Bill (ESSHB) 1783.<sup>2</sup> The State concedes this issue and we accept the State’s concession. Consequently, we affirm Pointec’s convictions but remand to the trial court to amend the judgment and sentence by striking the criminal filing fee, deoxyribonucleic acid (DNA) collection fee, and the interest accrual provision on nonrestitution LFOs.

---

<sup>1</sup> Pointec was also convicted of promoting prostitution, but he does not appeal that conviction.

<sup>2</sup> 65th Leg., Reg. Sess. (Wash. 2017).

## FACTS

On August 14, 2015, police responded to an apartment complex after being notified of an unresponsive, injured woman in a car. The injured woman later identified her assailants as Pointec and Nikita Allen. The police subsequently obtained a search warrant for Pointec's and Allen's apartment. The police executed the search warrant on the apartment on September 28, 2015, after obtaining keys to the apartment from Pointec during a traffic stop.

Police found a 9 mm handgun lying on the bed in the apartment and an AR-15 rifle in a gun case between the mattress and footboard of the bed. Police also found a receipt from Surplus Ammo and Arms showing the sale of the 9 mm handgun to Allen on September 25, 2015.

Detective Kenneth Lewis went to the store and viewed video surveillance from the date on the receipt. The surveillance video showed Pointec and Allen selecting the 9 mm gun, selecting ammunition, and purchasing the gun. Detective Lewis also saw himself in the surveillance video while he was off duty.

The State charged Pointec with two counts of first degree unlawful possession of a firearm, two counts of second degree human trafficking, and one count of second degree promoting prostitution. Pointec stipulated that he had previously been convicted of a felony defined as a "serious offense" and that during the period from May 14, 2015, through September 28, 2015, he was not permitted by law to possess a firearm. Clerk's Papers (CP) and 34. The charging information identified the two counts of first degree unlawful possession of a firearm as occurring "on or about the period between May 14th, 2015 through September 28th, 2015." CP at 36.

At trial, the court admitted the surveillance video, as well as still images from the video, showing Pointec and Allen purchasing the 9 mm handgun. The photos and video show Pointec

handling the handgun, selecting ammunition for the gun, handing Allen money to purchase the handgun, and chatting with Detective Lewis who happened to be present at the store at the same time.<sup>3</sup> The video also shows Pointec handling the gun for over 25 minutes while discussing the gun with store employees. At one point on the video Allen appears wholly disengaged in the gun purchase, using her phone while standing away from the counter where Pointec remained handling the gun and chatting with an employee.

The trial court also admitted still images from a Snapchat video found on Pointec's phone that showed him firing an AR-15 rifle. In addition to the still images, the court admitted a video of Pointec firing the AR-15. The court also admitted a log of messages dated August 5, 2015, between Pointec and the man who allegedly sold him the AR-15 rifle. The messages detailed the price of the rifle and complaints that Pointec had about it malfunctioning after he purchased it.

The State introduced evidence showing that Pointec lived with Allen in the apartment where the guns were found. The State also introduced a series of text messages wherein Pointec refers to the apartment as his home and discusses living there.

Regarding both firearm charges, the trial court instructed the jury as follows:

A person commits the crime of unlawful possession of a firearm in the first degree when he has previously been convicted of a serious offense and knowingly owns or has in his possession or control any firearm.

CP at 73.

---

<sup>3</sup> Detective Lewis testified that on September 25, 2015, while off duty, he had gone to Surplus Ammo and Arms to purchase ammunition storage cans. Detective Lewis also testified that while at the store, he briefly interacted with Pointec by commenting on the 9 mm handgun, "It's a great pistol. I own one. You guys will like it." 6 Verbatim Report of Proceedings at 768.

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 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 at 74.

For count III—the first unlawful possession of a firearm charge—the court instructed the jury to find Pointec guilty if each of the following elements of the crime were proved beyond a reasonable doubt:

(1) That on or about the period between the 14th day of May, 2015 and the 28th day of September, 2015, the defendant knowingly had a firearm, to wit: a 9 mm handgun, in his possession or control;

(2) That the defendant had previously been convicted of a serious offense;  
and

(3) That the possession or control of the firearm occurred in the State of Washington.

CP at 76. The instruction for count IV—the second unlawful possession of a firearm charge—was identical to the instruction for count III except that it identified the firearm as “an AR-15 rifle.”

CP at 77.



In closing argument, the State argued the firearm charges as follows:

Understanding the common-sense viewpoint with the gun charges, the evidence is extremely clear. We have these stills of the video surveillance from this Surplus Ammo showing the defendant and Nikita. They are purchasing a 9[]mm. You have the detective who was standing right beside them. You have in the video the defendant racking the 9[]mm, looking at it. That's an operable weapon.

He's stipulated he's been convicted of a serious offense, a felony offense defined as a serious offense, and he can't possess a firearm in any means and for any purpose. So he's guilty in the store of possessing an operable firearm there.

But they bought it. Nikita bought it that day, took it back to the apartment where they both reside. And any argument that he doesn't reside there, you'll see in these text messages, that's just completely not credible.

Then you have the AR-15. You have the [Snapchat] video showing the defendant firing the AR-15 that was then found during the service of the search warrant.

So the firearm charge, both counts, are not difficult to prove, and the evidence supports them beyond a reasonable doubt. The defendant's guilty of possessing those weapons.

7 Verbatim Report of Proceedings (VRP) at 961-62.

The jury found Pointec not guilty of second degree human trafficking but found him guilty of second degree promoting prostitution and both counts of first degree unlawful possession of a firearm. Pointec appeals.

#### ANALYSIS

Pointec argues that his right to a unanimous jury verdict was violated because the State failed to elect which alleged act of possession supported each firearm charge and the jury did not receive a unanimity instruction. He contends that the State alleged both actual and constructive possession for both charges and the jury had to unanimously accept either the State's theory of actual possession or its theory of constructive possession. We disagree.

For a conviction to be constitutionally valid, a unanimous jury must conclude that the accused committed the criminal act charged. *State v. Beasley*, 126 Wn. App. 670, 682, 109 P.3d 849 (2005). When multiple incidents are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on which incident constitutes the crime. *Beasley*, 126 Wn. App. at 682. Under these circumstances, unless the State elects which incident it will rely on for the conviction, a trial court must instruct the jury that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. *Beasley*, 126 Wn. App. at 682.

We review de novo whether a unanimity instruction is required. *See State v. Boyd*, 137 Wn. App. 910, 922, 155 P.3d 188 (2007). “A constitutional error occurs if the State fails to properly elect the criminal act and the trial court fails to instruct the jury on unanimity.” *Beasley*, 126 Wn. App. at 682. Because the failure to give a unanimity instruction is an error of constitutional magnitude, a defendant may raise the issue for the first time on appeal. *State v. Locke*, 175 Wn. App. 779, 802, 307 P.3d 771 (2013). However, any error is harmless if no rational juror could have a reasonable doubt that each alleged incident established the crime beyond a reasonable doubt. *Beasley*, 126 Wn. App. at 682-83.

To convict Pointec for two charges of unlawful possession of a firearm, the jury had to find beyond a reasonable doubt that between May 14, 2015 and September 28, 2015, Pointec knowingly had a 9 mm handgun and an AR-15 rifle in his possession or control and was previously convicted of a felony offense. RCW 9.41.040(1)(a); CP at 76-77.

Possession of a firearm may be actual or constructive. *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Actual possession occurs when the firearm is in the actual physical custody of the person charged. *State v. Manion*, 173 Wn. App. 610, 634, 295 P.3d 270 (2013). Constructive possession occurs when the person charged does not have physical possession of the firearm but instead has dominion and control over the firearm. *Manion*, 173 Wn. App. at 634.

#### I. 9 MM HANDGUN: HARMLESS ERROR

Assuming without deciding that the trial court erred by not giving a unanimity instruction for the charge involving the 9 mm handgun, we hold that any error was harmless. Based on the evidence admitted at trial, no rational trier of fact could have had a reasonable doubt as to whether Pointec had actual possession of the 9 mm handgun at the gun store as seen in the surveillance video and photographs, or that he had constructive possession of the handgun in the apartment where he resided and where the handgun was found.

The evidence at trial showed Pointec extensively handling the handgun in the gun store with Allen. The photographs and video showed Pointec selecting the handgun, holding it for over 25 minutes, discussing the handgun with store employees and Detective Lewis, selecting ammunition for it, and giving the handgun and money to pay for it to Allen. Given the extent to which Pointec handled the handgun at the gun store, no rational juror could have had reasonable doubt that Pointec actually possessed the 9 mm handgun while at the gun store.

The State also provided sufficient evidence to prove beyond a reasonable doubt that Pointec constructively possessed the handgun in the apartment that Pointec and Allen shared. A defendant has constructive possession of an item when the defendant has dominion and control over the item or the premises where the item is located. *State v. Turner*, 103 Wn. App. 515, 524, 13 P.3d 234 (2000). Dominion and control of a premises can be shared. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004).

Pointec's dominion and control of the apartment is demonstrated by the fact that he had possession of keys to the apartment. *See State v. Turner*, 18 Wn. App. 727, 731, 571 P.2d 955 (1977) ("Possession of keys to a locked area is probative of constructive possession of items within that area."). Further, the State introduced evidence of multiple conversations between Pointec and others wherein he referred to the apartment as his apartment or his home and wherein he provided the address of the apartment as his address. Based on the evidence at trial, no rational juror could have had a reasonable doubt that Pointec had constructive possession of the 9 mm handgun in the apartment over which he had dominion and control.

Consequently, any error in omitting a unanimity instruction as to the 9 mm handgun was harmless.

## II. AR-15 RIFLE: ELECTION

As to the charge involving the AR-15 rifle, the State argues that it properly elected the possessory act upon which it charged Pointec with unlawful possession of the AR-15. We agree.

Courts consider several factors when determining whether the State elected a specific act, including the charging document, evidence, instructions, and closing argument. *State v. Kier*, 164 Wn.2d 798, 813, 194 P.3d 212 (2008). A prosecutor's statement in closing argument alone is

insufficient to make a “clear election” when the evidence and jury instructions indicate that multiple acts constitute the crime charged. *Kier*, 164 Wn.2d at 813-14 (holding no “clear election” was made in prosecutor’s closing argument when the evidence suggested multiple acts could have constituted the charged crime and the jury instructions did not specify the underlying criminal act).

Here, the evidence and opening statements and closing arguments, taken together, show that the State made a clear election as to the basis of its charge for the AR-15 rifle. The primary evidence supporting the firearm charge involving the AR-15 rifle was the Snapchat video from August 26, 2015, showing Pointec firing the rifle. During opening statements, the State only mentioned the Snapchat video of Pointec shooting the AR-15 rifle as the forthcoming evidence of his possession. During closing arguments the State argued, “Then you have the AR-15. You have the [Snapchat] video showing the defendant firing the AR-15 that was then found during the service of the search warrant.” 7 VRP at 962. The State did not reference the AR-15 rifle being found in the apartment other than to identify the rifle found in the apartment as the same rifle seen in the Snapchat video.

Thus, we hold that the State properly elected to rely on Pointec’s actual possession of the AR-15 rifle shown in the Snapchat video as the basis of its charge and, thus, Pointec was not entitled to a unanimity instruction.

### III. LFOs

In his supplemental brief, Pointec argues that the court imposed LFOs that are no longer authorized following our legislature’s enactment of ESSHB 1783. Specifically, Pointec argues that the trial court’s imposition of a \$100 DNA collection fee, \$200 criminal filing fee, and an

interest accrual provision are improper and should be stricken. The State agrees and we accept the State's concession.

ESSHB 1783 modified statutes relating to Washington's system of LFOs and established that the DNA database fee is mandatory only if the offender's DNA has not been previously collected as a result of a prior conviction. LAWS OF 2018, ch. 269, § 18. It also prohibits the imposition of the \$200 criminal filing fee on indigent defendants. LAWS OF 2018, ch. 269, § 17. ESSHB 1783 also eliminates any interest accrual on nonrestitution LFOs. *State v. Ramirez*, 191 Wn.2d 732, 746-47, 426 P.3d 714 (2018). The new statutes apply prospectively to cases on appeal. *Ramirez*, 191 Wn.2d at 747.

According to the State, their records show that Pointec's DNA was previously collected and is on file with the Washington State Patrol Crime Lab. Therefore, the imposed DNA database fee should be stricken.

There does not seem to be any question that Pointec is "indigent" under RCW 10.101.010(3)(a). The State acknowledges that the sentencing court found Pointec indigent. Therefore, the \$200 criminal filing fee should also be stricken because it is a discretionary fee that cannot be imposed on indigent defendants.

The judgment and sentence also contained an interest accrual provision that should be stricken because ESSHB 1783 eliminates interest accrual on nonrestitution LFOs. *Ramirez*, 191 Wn.2d at 747.

## CONCLUSION

We hold that any error by the court in not giving a unanimity instruction regarding the 9 mm handgun was harmless and the State properly elected to rely on Pointec's actual possession

No. 50345-0-II

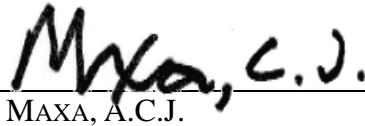
of the AR-15 rifle captured in the video. Consequently, we affirm Pointec's convictions but we remand to the trial court to amend the judgment and sentence by striking the criminal filing fee, DNA collection fee, and the interest accrual provision on nonrestitution LFOs.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



\_\_\_\_\_  
SUTTON, J.

We concur:



\_\_\_\_\_  
MAXA, A.C.J.



\_\_\_\_\_  
LEE, J.

**February 27, 2019 - 4:54 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50345-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Rance Pointec, Appellant  
**Superior Court Case Number:** 15-1-03895-0

**The following documents have been uploaded:**

- 503450\_Petition\_for\_Review\_20190227164949D2925218\_7764.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was POINTEC P4R.pdf*

**A copy of the uploaded files will be sent to:**

- PCpatcecf@piercecountywa.gov
- rsand@co.pierce.wa.us

**Comments:**

---

Sender Name: Stephanie Cunningham - Email: sccattorney@yahoo.com  
Address:  
4616 25TH AVE NE # 552  
SEATTLE, WA, 98105-4183  
Phone: 206-526-5001

**Note: The Filing Id is 20190227164949D2925218**