

FILED  
Court of Appeals  
Division III  
State of Washington  
11/5/2020 11:51 AM

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
11/5/2020  
BY SUSAN L. CARLSON  
CLERK

SUPREME COURT NO. 99204-5

NO. 37348-7-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

---

---

STATE OF WASHINGTON,

Respondent,

v.

JOHN MILONAS,

Petitioner.

---

---

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

The Honorable Ann M. Cruser, Judge

---

---

PETITION FOR REVIEW

---

---

JARED B. STEED  
Attorney for Petitioner

NIELSEN KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. <u>IDENTITY OF PETITIONER/COURT OF APPEALS DECISION</u> .....	1
B. <u>ISSUES PRESENTED FOR REVIEW</u> .....	1
C. <u>STATEMENT OF THE CASE</u> .....	2
D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....	6
1. A CONVICTION BASED ON INSUFFICIENT EVIDENCE IS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION AND THE OPINION IN MILONAS’S CASE CONFLICTS WITH PRECEDENT CONCERNING CONSTRUCTIVE POSSESSION.....	6
2. MILONAS’S RIGHT TO A FAIR TRIAL WAS IMPROPERLY DENIED BY THE ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE.....	11
3. THE PROSECUTION’S CLOSING ARGUMENT MISSTATED THE LAW AND THE OPINION IN MILONAS’S CASE CONFLICTS WITH DIVISION TWO’S OPINION IN <i>STATE V. LEE</i> . .....	14
E. <u>CONCLUSION</u> .....	20

**TABLE OF AUTHORITIES**

Page

**WASHINGTON CASES**

**In re Pers. Restraint of Cross**

180 Wn.2d 664, 327 P.3d 660 (2014)..... 19

**State v. Anderson**

141 Wn.2d 357, 5 P.3d 1247 (2000)..... 17

**State v. Belgarde**

110 Wn.2d 504, 755 P.2d 174 (1988)..... 14

**State v. Callahan**

77 Wn.2d 27, 459 P.2d 400 (1969)..... 7

**State v. Chouinard**

169 Wn. App. 895, 282 P.3d 117 (2012)  
rev. denied, 176 Wn.2d 1003 (2013) ..... 7, 10, 17

**State v. Colquitt**

133 Wn. App. 789, 137 P.3d 892 (2006)..... 7

**State v. Davenport**

100 Wn.2d 757, 675 P.2d 1213 (1984)..... 14, 15, 17

**State v. Davis**

182 Wn.2d 222, 340 P.3d 820 (2014)..... 10, 11

**State v. Enlow**

143 Wn. App. 463, 178 P.3d 366 (2008)..... 7

**State v. Estill**

80 Wn.2d 196, 492 P.2d 1037 (1972)..... 15

**State v. Green**

94 Wn.2d 216, 616 P.2d 628 (1980)..... 7

**State v. Gregory**

192 Wn.2d 1, 427 P.3d 621 (2018)..... 19

**TABLE OF AUTHORITIES (CONT'D)**

	Page
<u>State v. Horton</u> 116 Wn. App. 909, 68 P.3d 1145 (2003).....	19
<u>State v. Jones</u> 146 Wn.2d 328, 45 P.3d 1062 (2002).....	7
<u>State v. Lee</u> 158 Wn. App. 513, 243 P.3d 929 (2010).....	1, 6, 14, 18, 20
<u>State v. Miles</u> 73 Wn.2d 67, 436 P.2d 198 (1968).....	14
<u>State v. Spruell</u> 57 Wn. App. 383, 788 P.2d 21 (1990).....	10, 18
<u>State v. Turner</u> 103 Wn. App. 515, 13 P.3d 234 (2000).....	10, 17
<u>State v. Vasquez</u> 178 Wn.2d 1, 309 P.3d 318 (2013).....	7
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	15
 <u>FEDERAL CASES</u>	
<u>Greer v. Miller</u> 483 U.S. 756, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987).....	14
<u>In re Winship</u> 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....	7
<u>United States v. Soto</u> 779 F.2d 558 (9th Cir.1986) <u>cert. denied</u> , 484 U.S. 833 (1987).....	10
<u>Viereck v. United States</u> 318 U.S. 236, 63 S. Ct. 561, 87 L. Ed. 734 (1943).....	14

**TABLE OF AUTHORITIES (CONT'D)**

Page

**RULES, STATUTES AND OTHER AUTHORITIES**

RAP 13.4.....	1, 11, 14, 20
U.S. Const. amend. XIV .....	14
Wash. Const. art. I, § 3.....	14

A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner John Milonas asks this Court to grant review pursuant to RAP 13.4 of the Court of Appeals' decision in State v. Milonas, 2020 WL 4783918 (No. 37348-7-III, filed August 18, 2020).<sup>1</sup>

B. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate under RAP 13.4(b)(1), (b)(2), and (b)(3), where the Court of Appeals opinion as to the sufficiency of the evidence conflicts with precedent from this Court and the Court of Appeals concerning constructive possession, and involves a significant question of law under the Washington and United States Constitution?

2. Is review appropriate under RAP 13.4(b)(3) and (b)(4) to determine whether irrelevant testimony about a prior shooting incident was improperly admitted, thereby denying Milonas his right to a fair trial under the Washington and United States Constitution?

3. Is review appropriate under RAP 13.4(b)(2) and (b)(3) to determine whether the prosecution's closing argument misstated the law, and whether the Court of Appeals opinion in Milonas's case conflicts with Division Two's opinion in State v. Lee<sup>2</sup>?

---

<sup>1</sup> A copy of the opinion is attached as an appendix. Milonas's motion for reconsideration was denied on October 6, 2020.

<sup>2</sup> 158 Wn. App. 513, 517, 243 P.3d 929 (2010).

4. Is review appropriate under RAP 13.4(b)(3) to determine whether defense counsel's failure to object to the prosecutorial misconduct denied Milonas his right to a fair trial under the Washington and United States Constitution?

C. STATEMENT OF THE CASE

Milonas and Cassie Vincent lived together for almost the entirety of their six-year relationship. RP 136-38, 166, 199-200. Vincent knew Milonas could not possess guns due to a prior criminal conviction. RP 142-43, 169, 200. Still, Vincent acquired a .22 pistol, a .22 rifle, a .12-gauge shotgun, a .308 rifle, and a "Japanese Rifle." RP 139-41, 153, 162-65, 167-68, 180-81, 184, 200-01. Vincent "owned and purchased" these guns. RP 139-40, 162-65, 167-68, 184, 201-02. Milonas was present when Vincent purchased the shotgun, but he provided no assistance, financial or otherwise, to Vincent in buying the guns. RP 201-02, 225.

Vincent kept her guns inside a locked safe in the closet of the bedroom she shared with Milonas. RP 114, 139-41, 173-74. Vincent always kept the safe locked and had the only set of keys which could unlock it. RP 141, 145-46, 169-70, 179, 192, 200-01, 227-28. Milonas did not have keys of his own and had no access to the safe. RP 141-43, 147, 170, 201, 205, 230. The "express purpose" of the safe was "to make sure

that he [Milonas] could not get at them [guns] [.]” RP 169. Milonas never asked Vincent to open the safe for him. RP 201.

Vincent’s guns remained in the locked safe until February 23, 2018. RP 173-74. That morning, Vincent drove her children to school. Milonas was still asleep. RP 144, 147-48, 173-75, 206. Vincent returned to the house later that morning and told Milonas that she had been suspended from her job. RP 144, 147-48, 174-75, 207. Milonas left for his own job a short time later. RP 147, 151, 177, 211-12.

Police arrived at the house after Milonas left for work based on a firearms complaint.<sup>3</sup> RP 104-05, 124, 152-53. Police knew Milonas lived at the house and could not possess guns. RP 104-06. Vincent greeted police at the door. RP 105, 124. Vincent retrieved several guns from the safe and brought them outside to police. RP 105-06, 124, 129-30, 133, 153, 178. Vincent told police the guns were hers. RP 106. Vincent also gave police consent to search the house. RP 106-08, 124, 179, 181-82.

Vincent led police to the bedroom where they saw a holstered .40 pistol hanging from a bedpost on the side of the bed Milonas slept on. RP 106-07, 110-11, 121-22, 125-26. Vincent denied removing it from the safe. RP 179-80. Police also found a “Japanese Rifle” inside the safe along with ammunition and two sets of ear protection. RP 109, 115, 129-130.

---

<sup>3</sup> The nature of the complaint and how police learned about it is uncertain.



Police determined the bolt action of the rifle functioned normally. RP 115, 119. Vincent denied owning the .40 pistol and told police that it and the “Japanese Rifle” belonged to Milonas. RP 120, 142, 150-51, 154-56, 164, 171-73, 182-84, 190, 194, 197. As Vincent later explained however, she and Milonas jointly owned the “Japanese Rifle.” RP 139-41, 162-65, 183-84. In exchange for her testimony, Vincent was given immunity from any personal criminal prosecution. RP 150, 187-88, 194-97.

Milonas was not present while police were at the house. RP 118, 128. No one was at the house when Milonas arrived back at the house later that afternoon. Milonas noticed the bedroom closet light was turned on. When he went to turn the light off, he noticed the safe was open and empty. RP 212-13. Concerned the guns had been stolen, Milonas called Vincent. He then went outside to smoke a cigarette. RP 213-15.

Police arrived at the house and arrested Milonas while he was outside. RP 127, 131, 215. Milonas acknowledged he could not possess guns. RP 117-18, 128. Milonas described the guns to police, but explained that Vincent owned the guns, that she kept them in a locked safe, and that he did not have access to them. RP 118-19, 121, 131, 216-17, 226-27.

Milonas told police his fingerprints might be found on the .40 pistol. RP 127-28, 220. Upon further questioning, Milonas stated, “Well, I’ll have to take ownership on that one since it wasn’t locked up.” RP 118,

122, 218. Milonas denied that his statement was a confession. Rather, as Milonas explained, he was frustrated and made the statement sarcastically because he believed police intended to pin ownership of the .40 pistol on him regardless. RP 219-20.

Milonas denied the .40 pistol belonged to him. RP 121-22, 127-28, 131, 202, 205, 224, 240. As Milonas testified, Vincent had purchased all the guns, including the .40 pistol. RP 201-02, 205. He was surprised that Vincent had told police otherwise. RP 217-19.

Milonas denied that the .40 pistol had been hanging from the bedpost when he left work that afternoon. RP 211, 218-19, 224. As Milonas explained, “it was in the safe as far as I knew.” RP 211. He told police the same fact. RP 216, 218-19. Milonas denied that he had ever shot or handled any of the guns found inside the house. RP 203-04, 220-21, 224-26. Milonas’s DNA and fingerprints were not found on any of the guns. RP 122-23.

Based on this evidence, Milonas was charged and convicted of six counts of first degree unlawful possession of a firearm<sup>4</sup> alleged to have occurred on February 23, 2018. CP 15-18; RP 3.

---

<sup>4</sup> The State alleged Milonas possessed a Sig Sauer SP2340 .40 pistol, a Walther P22 .22 pistol, a Mossberg 500 shotgun, a Marlin .22 rifle, a Panther Arms .308 rifle, and a “Japanese Rifle.” CP 15-18.

Milonas raised three arguments on appeal. First, he argued the prosecution's evidence was insufficient to prove that he had constructive possession of the guns in the locked safe on the charged date of February 23, 2018 because he did not have dominion and control over the safe or its contents. Second, Milonas argued that evidence of an alleged target shooting incident was irrelevant and unfairly prejudicial because it served only to improperly imply that Milonas had a propensity to unlawfully possess firearms. Finally, Milonas argued the prosecutor's closing argument was misconduct because it undermined the jury instructions and mirrored the language found to be problematic in State v. Lee, 158 Wn. App. 513, 517, 243 P.3d 929 (2010).

The Court of Appeals rejected Milonas's arguments and affirmed his convictions. Op. at 1-9. Milonas asks this Court to accept review and reverse and dismiss his convictions, or alternatively, remand his case for a new trial.

D. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. A CONVICTION BASED ON INSUFFICIENT EVIDENCE IS A SIGNIFICANT QUESTION OF LAW UNDER THE CONSTITUTION AND THE OPINION IN MILONAS'S CASE CONFLICTS WITH PRECEDENT CONCERNING CONSTRUCTIVE POSSESSION.

The State bears the burden of proving all elements of a charged offense beyond a reasonable doubt as a matter of due process. In re Winship,

397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). A conviction must be reversed where, viewing the evidence in the light most favorable to the State, no rational trier of fact could find all elements of the charged crime beyond a reasonable doubt. State v. Vasquez, 178 Wn.2d 1, 6, 309 P.3d 318 (2013).

Possession can be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Only constructive possession is at issue in this case. RP 262; Op. at 6-7. Constructive possession means the defendant has dominion and control over the firearm. State v. Chouinard, 169 Wn. App. 895, 899, 282 P.3d 117 (2012), rev. denied, 176 Wn.2d 1003 (2013). As this Court has held, “*Dominion and control means that the object may be reduced to actual possession immediately.*” State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002) (emphasis added). “The totality of the circumstances must provide substantial evidence for a fact finder to reasonably infer that the defendant had dominion and control.” State v. Enlow, 143 Wn. App. 463, 469, 178 P.3d 366 (2008).

Milonas argued the prosecution’s evidence was insufficient to prove constructive possession of the guns in the locked safe on the charged date of

February 23, 2018 because he did not have dominion and control over the safe or its contents. No evidence showed Milonas ever handled the gun safe key or knew where the key was located that would enable him to reduce the guns to his own actual possession immediately on February 23. Brief of Appellant (BOA) at 16; Reply Brief of Appellant (RBOA) at 3-4. Vincent always kept the safe locked and had the only key which could unlock it. RP 141, 145-46, 169-70, 179, 192, 200-01, 227-28. Milonas did not have a set of keys of his own and had no access to the safe. RP 141-43, 147, 170, 201, 205, 230. Vincent never saw Milonas in possession of the key and he never asked her to open the safe for him. RP 193, 201. The "express purpose" of the safe was "to make sure that he [Milonas] could not get at them [guns] [.]" RP 169.

Moreover, the evidence established Milonas also could not have reduced the guns to his immediate possession on February 23 because other actions that day prevented it. RBOA at 3. Vincent left the house before Milonas was even awake. When Vincent returned hours later, Milonas laid in bed, showered, then left for his own job. RP 144, 147-48, 151, 173-75, 206-07, 211-12. By the time Milonas returned to the house that afternoon both Vincent and the guns were gone. RP 104-05, 118, 128, 152-53, 212-15. The Court of Appeals opinion addresses none of these

points. Milonas's argument spans nearly 15 pages; the opinion spends only two pages addressing Milonas's arguments. Op. at 6-8.

More significantly, the opinion fails to address the legal requirement that constructive possession requires the ability to reduce a firearm to immediate actual possession. Jones, 146 Wn.2d at 333. Instead it conflates Milonas's ability to reduce the pistol hanging from the bedpost to his immediate possession with the remaining guns in the locked safe. Op. at 7-8. But Milonas did not challenge the sufficiency of the evidence regarding the pistol.

The opinion also fails to establish any nexus between having the pistol locked in the safe several months previously with Milonas's ability to reduce the remaining guns to his immediate possession on February 23. There was no evidence that Milonas personally placed the pistol inside the safe, removed it, or had Vincent move it at his direction. RP 141-43, 147, 170, 193, 201, 205, 230. Vincent testified only that she had not removed the pistol from the safe on February 23 and that it had been hanging on the bedpost "for months". RP 179-80.

The opinion also places significant weight on Milonas's statement to police that "he likely left fingerprints on at least one of the guns." Op. at 7. But the record shows Milonas only admitted to the possibility of fingerprints being on the pistol hanging from the bedpost. RP 127-28, 220.

None of Milonas's DNA or fingerprints were found on any of the guns. RP 122-23, 203-04, 220-21, 224-26. Regardless, even a “momentary handling” of a gun is insufficient to establish dominion and control where the true possessor retains interest in that gun. State v. Davis, 182 Wn.2d 222, 237, 340 P.3d 820 (2014). The uncontroverted evidence was that Vincent “owned and purchased” the guns found inside the locked safe. RP 106, 119, 139-41, 153, 162-65, 167-68, 183-84, 201-02.

The opinion also asserts that constructive possession is satisfied because the safe was located one foot from Milonas’s side of the bed, and he had access to the safe keys when Vincent was home. Op. at 7. But mere proximity to contraband is insufficient to show constructive possession. State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000) (citing State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990)). Proximity of a weapon goes only to its accessibility, not to dominion or control. United States v. Soto, 779 F.2d 558, 560-61 (9th Cir.1986), cert. denied, 484 U.S. 833 (1987). Likewise, “[k]nowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession.” Chouinard, 169 Wn. App. at 899.

Finally, the opinion cites to the prior target shooting incident a “few years” before the charged incident, as proof of Milonas’s constructive possession on that specific date. Op. at 7-8. This is a red

herring for several reasons. First, the evidence did not establish that it was even unlawful for Milonas to handle the firearms years earlier. BOA at 10; RBOA at 6. Second, during the target shooting, Milonas retrieved the guns, not from the locked safe, but from inside an unsecured car. RP 164-65. Thus, as addressed below, evidence of actual possession years earlier was entirely irrelevant to proving his ability to reduce the guns inside the locked safe to his immediate possession on February 23. RBOA at 6.

While the State is entitled to all favorable inferences in a challenge to the sufficiency of the evidence, appellate courts are not required to ignore unfavorable facts. Davis, 182 Wn.2d at 235. But the Court of Appeals did just that. Even in the light most favorable to the prosecution, the evidence is insufficient to sustain Milonas's convictions. Review is appropriate under RAP 13.4(b)(1), (b)(2), and (b)(3).

2. MILONAS'S RIGHT TO A FAIR TRIAL WAS IMPROPERLY DENIED BY THE ADMISSION OF IRRELEVANT AND PREJUDICIAL EVIDENCE.

“‘Relevant evidence’ means evidence having any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. Relevant evidence is admissible, but evidence that is not relevant is not admissible. ER 402.



During direct-examination of Vincent, the prosecutor elicited that she occasionally went target shooting. RP 163. The prosecutor asked Vincent “who do you go shooting with?” Defense counsel’s relevancy objection was overruled without further explanation. RP 163. Vincent testified that she had been shooting with Milonas and her children a “few years” earlier, that he had shot the .40 pistol, and that Milonas had helped unload Vincent’s guns from inside the car. RP 163-65. The prosecutor continued with his line of questioning, resulting in the following exchange:

Q: Okay. But when you went target-shooting, Mr. Milonas would handle the firearms and shoot them?

A: Yes

DC: I’m going to object on foundation and relevancy

Court: I’ll overrule on both points.

RP 166. During re-direct examination of Vincent, the prosecutor again eliciting that Milonas had been target shooting with her and “probably handled” all the guns as a result. RP 195.

The prosecution was required to prove Milonas knowingly possessed each firearm on February 23, 2018. CP 15-18, 41-46 (instructions 10-15). Milonas argued the unsubstantiated evidence that he had “probably handled” some of the guns a “few years” earlier was entirely irrelevant to proving that Milonas had constructive possession of the guns on the charged date of February 23. As the prosecution acknowledged, “it is not even clear that

his prior handling of the firearms was unlawful.” Brief of Respondent (BOR) at 10.

Milonas also argued the target shooting testimony was irrelevant to rebutting the assertion that Milonas did not have access to the locked safe, whether years earlier, or on the charged date. As Vincent explained, at the time of the target shooting, Milonas retrieved the guns, not from the locked safe, but from inside an unsecured car. RP 164-65.

Thus, as Milonas argued, either the shooting evidence was either irrelevant because it proved only that Vincent did not act as barrier to Milonas’s prior lawful possession of guns, or it was irrelevant because it served only to improperly imply that Milonas had a propensity to unlawfully possess firearms.

Although Milonas’s argument and citations to legal authority on these points spans 10 pages, the court’s entire analysis of this issue encompasses a total of one page. BOA at 18-23; RBOA at 4-7; Op. at 5-6. The Court of Appeals conclusory analysis held the prior shooting incident was relevant to establishing that Vincent took a permissive attitude, and was therefore not a barrier, toward Milonas’s handling of the guns. Op. at 6. But the opinion fails to establish any nexus as to how Milonas’s actual, and possibly lawful, possession of the guns a “few years” earlier from an unsecured car is relevant to proving whether he had the ability to reduce

the guns inside the locked safe to his immediate possession on February 23.  
BOA at 20; RBOA at 6.

Review is appropriate under RAP 13.4(b)(3) and (b)(4) to determine whether this irrelevant evidence was improperly admitted, unfairly prejudicial, and denied Milonas his right to a fair trial.

3. THE PROSECUTION'S CLOSING ARGUMENT MISSTATED THE LAW AND THE OPINION IN MILONAS'S CASE CONFLICTS WITH DIVISION TWO'S OPINION IN *STATE V. LEE*.

Prosecutorial misconduct violates the due process right to a fair trial when there is substantial likelihood the prosecutor's misconduct affected the jury's verdict. Greer v. Miller, 483 U.S. 756, 765, 107 S. Ct. 3102, 97 L. Ed. 2d 618 (1987); State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, § 3. "A trial in which irrelevant and inflammatory matter is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

A prosecutor is forbidden from appealing to the passions of the jury and thereby encouraging it to render a verdict based on emotion rather than properly admitted evidence. Viereck v. United States, 318 U.S. 236, 247-78, 63 S. Ct. 561, 87 L. Ed. 734 (1943); State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). In addition, a prosecutor who misstates

the law commits a serious irregularity that has the potential to mislead the jury. Davenport, 100 Wn.2d at 763; State v. Walker, 164 Wn. App. 724, 736, 265 P.3d 191 (2011); State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972) (arguments concerning questions of law must be confined to the instructions given by the court). The prosecution's statements to the jury must be confined to the law stated in the court's instructions. Davenport, 100 Wn.2d at 760; Estill, 80 Wn.2d at 199.

The jury was instructed that "proximity alone without proof of dominion and control is insufficient to establish constructive possession." RP 262, 278; CP 40 (instruction 9). At the end of his closing argument however, the prosecutor invited the jury to disregard this instruction, telling them instead:

Now the law says a person who has been adjudicated guilty of a serious offense, you're not allowed to possess firearms, and so does that mean you can't live in a house with firearms? I would say, yes, absolutely, you can't live in a house with firearms. That's what the law says.

RP 277.

In response, defense counsel explained that dominion and control was a complicated subject matter, and just because Milonas had dominion and control over the residence, did not necessarily mean that he had dominion and control over the guns that were locked in the safe. RP 280-81.

The prosecutor began his rebuttal closing argument by returning to the issue of dominion and control, telling the jury:

Ladies and gentlemen, he [Milonas] cannot be in a home with firearms. He cannot be in a home with firearms because if he's in a home with firearms, he has dominion and control over the premises. So whether you believe Cassie Vincent or not, he [Milonas] should not be in a home with firearms. [...] We'll get into the weeds about that, but he can't live a house with firearms.

RP 297.

Milonas first argued the prosecutor's remarks were improper because they contradicted and undermined the trial court's instructions to the jury. The jury was instructed that unlawful possession required more than mere "proximity". Rather, the prosecution had to prove beyond a reasonable doubt that Milonas had "dominion and control" over the firearms. CP 40 (instruction 9). As the jury was instructed:

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 time, 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 40 (instruction 9) (emphasis added).

The prosecutor's statements undermined the court's instructions, and explicitly told the jury that simply living in a home that contained firearms was sufficient evidence, standing alone, to convict Milonas of unlawful possession. That was misconduct because the prosecution's statements to the jury must be confined to the law stated in the court's instructions. Davenport, 100 Wn.2d at 760; Estill, 80 Wn.2d at 199.

The opinion fails to address Milonas's argument that the prosecutor's remarks contradicted and undermined the trial court's instructions which required the jury to find beyond a reasonable doubt that Milonas had "dominion and control" over the guns, not just that he was within mere proximity to them. BOA at 26-29; RBOA at 9; CP 40 (instruction 9).

The opinion focuses only on Milonas's second argument that the prosecutor's repeated statement that, "you can't live in a house with firearms. That's what the law says[,]” is itself a misstatement of the law. To sustain a conviction for unlawful possession, the State must prove knowing possession of a firearm. State v. Anderson, 141 Wn.2d 357, 359, 366, 5 P.3d 1247 (2000). “[K]nowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession.” Chouinard, 169 Wn. App. at 899. Proximity alone is insufficient to establish constructive possession. Turner, 103 Wn.

App. at 521 (citing Spruell, 57 Wn. App. at 388-89). “Thus, a defendant with prior felony convictions may not be in violation of the law by simply being near a firearm if he or she has not exercised dominion and control over the weapon or premises where the weapon is found.” State v. Lee, 158 Wn. App. 513, 517, 243 P.3d 929 (2010).

During sentencing Lee was advised of the consequences of possessing a firearm:

When we say, “possess a firearm,” we don't just mean own a firearm, *we mean be anywhere near a firearm. So you cannot be in the same house or the same car with a firearm.* This lasts forever, unless a judge signs an order that changes it.

Id. at 515 (emphasis in original). Lee argued on appeal that the court’s oral advisement was in derogation of the law on constructive possession. Id. at 516. Division Two agreed, concluding, “However well intentioned the court's remarks may have been, the court misadvised Lee that he could not ‘be anywhere near a firearm’ or ‘in the same house or the same car with a firearm.’” Id. at 517.

Like Lee, the prosecutor’s repeated statements to the jury, which told them otherwise, was clear a misstatement of the law and outside the scope of the jury instructions. The Court of Appeals opinion fails to address Lee. Instead, the opinion concludes, “the prosecutor’s comments about the law prohibiting Mr. Milonas from being in a home with firearms

were specific to the circumstances of Mr. Milonas's case. Because there were no effective barriers to Mr. Milonas's access to firearms in his home, the prosecutor correctly argued it was unlawful for Mr. Milonas to have firearms in his home." Op. at 8. As Milonas argued however, the prosecutor's closing argument did not draw any clear distinction between mere proximity to firearms and Milonas's situation of living in a house with a locked gun safe that he could not access.

Milonas alternatively argued his trial counsel was ineffective for failing to object to the prosecutor's misconduct during closing argument. BOA at 34-36. "If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance." In re Pers. Restraint of Cross, 180 Wn.2d 664, 721-22, 327 P.3d 660 (2014), abrogated on other grounds by, State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018). If a curative instruction could have erased the prejudice resulting from the prosecutor's misconduct, then counsel was deficient in failing to request such instruction. State v. Horton, 116 Wn. App. 909, 921-22, 68 P.3d 1145 (2003). Finding no misconduct, the Court of Appeals concluded trial counsel was not ineffective. Op. at 8-9.

Review is appropriate under RAP 13.4(b)(2) and (b)(3) to determine whether the prosecutor's closing argument misstated the law, whether



defense counsel provided ineffective assistance in failing to object, and whether the Court of Appeals opinion conflicts with State v. Lee.

E. CONCLUSION

Milonas satisfies the criteria under RAP 13.4(b)(1), (b)(2), (b)(3), and (b)(4). This Court should grant review, reverse the court of Appeals, and dismiss his convictions, or alternatively, remand his case for a new trial.

DATED this 5<sup>th</sup> day of November, 2020.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read 'Jared B. Steed', is written over the printed name.

JARED B. STEED

WSBA No. 40635

Office ID No. 91051

Attorneys for Appellant



**FILED**  
**AUGUST 18, 2020**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	No. 37348-7-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
JOHN DIMITROS MILONAS,	)	
	)	
Appellant.	)	

PENNELL, C.J. — John Dimitros Milonas appeals his convictions for unlawful firearm possession. We affirm.

FACTS

Sheriff’s deputies went to Mr. Milonas’s house to investigate a tip that Mr. Milonas, a convicted felon, was in unlawful possession of firearms. Mr. Milonas was not home at the time. The deputies instead met with Mr. Milonas’s girlfriend and roommate, Cassie Vincent.

Ms. Vincent talked to the deputies and acknowledged there were guns inside the home. She turned over four firearms, explaining that they belonged to her and that she

kept them in a locked safe in the bedroom she shared with Mr. Milonas. Ms. Vincent subsequently consented to a residential search.

The deputies focused their search on the master bedroom. Once inside, they saw a pistol in a holster hanging from a bedpost. Ms. Vincent explained that the pistol belonged to Mr. Milonas and that the holster was hanging from his side of the bed. While in the master bedroom, the deputies examined the safe referenced by Ms. Vincent. It was located approximately one foot from Mr. Milonas's side of the bed. The safe contained a large amount of ammunition and an additional firearm.

Mr. Milonas was arrested later that afternoon. During a postarrest interview, Mr. Milonas claimed the guns in the safe were not his and he did not have access to them. When asked about the gun hanging from the bedpost, Mr. Milonas said, "well, I'll have to take ownership on that one since it wasn't locked up." 1 Report of Proceedings (RP) (Oct. 11, 2018) at 122. Mr. Milonas was able to provide detailed descriptions of the guns taken from the bedroom's safe. He also admitted his fingerprints might have been on one of the guns because he had handled it in order to place it in the safe.

Mr. Milonas was charged with six counts of unlawful firearm possession. The case went to trial and the State elicited testimony from the two sheriff's deputies and Ms. Vincent.

Ms. Vincent described herself as a gun person. She testified she knew Mr. Milonas was prohibited from possessing guns and because of that she kept her guns in the safe located in the master bedroom. Ms. Vincent testified that she kept the safe locked and possessed the only key. Ms. Vincent acknowledged that while she was at home, she would leave the key to the safe “[h]anging up by the door.” 1 RP (Oct. 11, 2018) at 193.

During her testimony, Ms. Vincent affirmed that the pistol found in the holster belonged to Mr. Milonas. According to Ms. Vincent, the holstered pistol had been hanging there for a few months. Before that, it had been kept in the gun safe. Over a relevance objection, Ms. Vincent testified she and Mr. Milonas would sometimes go target shooting together. During those excursions, Mr. Milonas handled the various firearms, helped load them, and participated in shooting them.

Mr. Milonas testified in his own defense. He claimed he never had access to any of the firearms at the residence, including the pistol found in the holster on the bedpost.<sup>1</sup> According to Mr. Milonas, Ms. Vincent always kept all the guns locked in the safe. He denied ever handling the guns or going shooting.

---

<sup>1</sup> The defense theory was that Ms. Vincent set Mr. Milonas up by removing the pistol from the safe and hanging it on the bedpost. She allegedly did this because she was worried the pistol might be stolen and she did not want to get herself in trouble.

At the close of trial, the jury was instructed on the definition of “possession,” including the difference between actual and constructive possession.

During final argument, both parties agreed the case revolved around constructive possession and the question of whether Mr. Milonas had access to the firearms found in his home. The State pointed out that Mr. Milonas knew the law, including the law of constructive possession, and Mr. Milonas knew he was not supposed to have access to firearms. According to the State, Mr. Milonas fabricated facts in order to fit them around the legal theory of lack of access. The State never claimed that because the firearms were found in Mr. Milonas’s home, it did not need to prove access. The State instead emphasized it needed to prove a combination of Mr. Milonas’s residency *and* access to the firearms. 2 RP (Oct. 12, 2018) at 297 (“If there are firearms in his home and he can access them, that would be a problem under the law.”).

Relevant to this appeal, the prosecutor made two additional comments regarding constructive possession:

Now the law says as a person who has been adjudicated guilty of a serious offense, you’re not allowed to possess firearms, and so does that mean you can’t live in a house with firearms? I would say, yes, absolutely, you can’t live in a house with firearms. That’s what the law says.

*Id.* at 277.

[Mr. Milonas] cannot be in a home with firearms because if he's in a home with firearms, he has dominion and control over the premises. So whether you believe Cassie Vincent or not, he should not be in a home with firearms.

*Id.* at 297. The defense did not object to either statement.

The jury convicted Mr. Milonas of all six counts. He was sentenced to 26 months' confinement and timely appeals.

## ANALYSIS

### *Testimony regarding target shooting*

Mr. Milonas contends the trial court improperly allowed Ms. Vincent to testify about Mr. Milonas's prior shooting excursions. At trial, the only bases for Mr. Milonas's objection were relevance and lack of foundation. On appeal, Mr. Milonas does not argue lack of foundation. We therefore limit our review to the issue of relevance. *See* RAP 2.5(a); *State v. Mason*, 160 Wn.2d 910, 933, 162 P.3d 396 (2007).

Evidence is relevant if it has any tendency to make a fact material to trial more or less probable. ER 401. "There must be a logical nexus between the evidence and the fact to be established." *State v. Cochran*, 102 Wn. App. 480, 486, 8 P.3d 313 (2000). The threshold for this connection is low. *State v. Briejer*, 172 Wn. App. 209, 225, 289 P.3d 698 (2012). Trial courts enjoy considerable discretion in assessing the relevance of contested evidence. *State v. Barry*, 184 Wn. App. 790, 801, 339 P.3d 200 (2014).

The central issue in this case was whether Ms. Vincent made effective efforts to deny Mr. Milonas access to firearms. Testimony about the prior shooting excursions tended to show she did not do so. The testimony indicated Ms. Vincent took a permissive attitude toward the guns. Although the guns were kept in a safe and the key was possessed by Ms. Vincent, Mr. Milonas was still allowed to handle the guns and use them. The evidence was relevant and properly admitted over Mr. Milonas's objection.

*Sufficiency of the evidence*

Mr. Milonas contends the evidence was insufficient to support five of his six firearm convictions. He does not challenge the sufficiency of the evidence with respect to the gun found in the holster. His argument goes to the remaining guns, which had all been stored in the safe. Mr. Milonas claims those guns were in the sole possession of Ms. Vincent and no rational trier of fact could have found Mr. Milonas possessed the firearms. We disagree.

When faced with a sufficiency challenge, we view the evidence in the light most favorable to the State. *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "Circumstantial evidence and direct evidence are equally reliable." *State v.*



No. 37348-7-III  
*State v. Milonas*

*Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004), *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). We defer to the trier of fact on issues of “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *Thomas*, 150 Wn.2d at 874-75.

This case involves an allegation of constructive, as opposed to actual, possession. Constructive possession is shown where the defendant had dominion and control over the firearms themselves or the premises in which the firearms were found. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001). Dominion and control need not be exclusive to establish constructive possession, but close proximity alone is insufficient; other facts must enable the trier of fact to infer dominion and control. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

The evidence here was sufficient to prove constructive possession. Although five of the six guns were stored in the safe, the State’s evidence showed Mr. Milonas had access to the safe. The evidence indicated Mr. Milonas kept his pistol in the safe before storing it in a holster on the bedpost. In addition, Mr. Milonas admitted he likely left fingerprints on at least one of the guns, as he had previously moved it into the safe. The gun safe was located approximately one foot from Mr. Milonas’s side of the bed and Mr. Milonas had access to the safe’s key whenever Ms. Vincent was home. The totality of this

evidence, coupled with the testimony that Mr. Milonas had occasionally used the guns in the safe for target practice, was sufficient to show Mr. Milonas had constructive possession of the guns in the safe on the day of the police search.

*Prosecutorial misconduct*

Mr. Milonas contends the prosecutor committed misconduct by misstating the law during summation. He alternatively argues his attorney was ineffective for failing to object. Neither claim merits relief.

Viewed in context, we find no misconduct. The prosecutor never argued Mr. Milonas could not be convicted even if the jury found he lacked access to the guns in the safe. The prosecutor repeatedly recognized the State needed to prove access. The prosecutor's comments about the law prohibiting Mr. Milonas from being in a home with firearms were specific to the circumstances of Mr. Milonas's case. Because there were no effective barriers to Mr. Milonas's access to firearms in his home, the prosecutor correctly argued it was unlawful for Mr. Milonas to have firearms in his home.

Mr. Milonas's ineffective assistance of counsel claim fails for the same reason as his misconduct claim. Establishing a violation of the constitutional right to effective assistance of counsel requires a defendant to show both deficient performance and prejudice. *Premo v. Moore*, 562 U.S. 115, 121, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011).

No. 37348-7-III  
*State v. Milonas*

Mr. Milonas has not satisfied this standard. Because the prosecutor's statements, in context, did not misstate the law, it was not unreasonable for defense counsel not to object.

CONCLUSION

The judgment of conviction is affirmed.

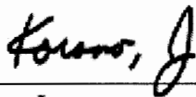
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



---

Pennell, C.J.

WE CONCUR:



---

Korsmo, J.



---

Siddoway, J.

**NIELSEN KOCH P.L.L.C.**

**November 05, 2020 - 11:51 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division III  
**Appellate Court Case Number:** 37348-7  
**Appellate Court Case Title:** State of Washington, Respondent v. John D. Milonas, Appellant  
**Superior Court Case Number:** 18-1-00269-6

**The following documents have been uploaded:**

- 373487\_Petition\_for\_Review\_20201105115004D3206778\_1065.pdf  
This File Contains:  
Petition for Review  
*The Original File Name was PFR 37348-7-III.pdf*

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

- appeals@co.cowlitz.wa.us
- jmilonas@gmail.com
- pheland@co.cowlitz.wa.us

**Comments:**

Copy emailed to client: jmilonas@gmail.com

---

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

**Filing on Behalf of:** Jared Berkeley Steed - Email: steedj@nwattorney.net (Alternate Email: )

Address:  
1908 E. Madison Street  
Seattle, WA, 98122  
Phone: (206) 623-2373

**Note: The Filing Id is 20201105115004D3206778**