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DIVISION II

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
BY DIVISION II ~~8~~

34591-9-II

STATE OF WASHINGTON
RESPONDENT,

VS.

ERIC VAN TRENT,
APPELLANT.

APPEAL FROM PACIFIC COUNTY SUPERIOR COURT
HONORABLE MICHAEL J. SULLIVAN, JUDGE

BRIEF OF RESPONDENT

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A.

STATE'S RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

1. There was sufficient evidence to support the jury verdict. Eric Van Trent, the defendant, was properly convicted of unlawful possession of a firearm, and there was no violation of due process clauses of the Fourteenth Amendment and Washington Constitution, Article 1, section 3.

2. The State did not impermissibly rely upon uncharged wrongful conduct that unduly prejudiced Mr. Trent. Mr. Trent was not deprived of due process of law.

3. Mr. Trent was not denied effective assistance of counsel in violation of the Sixth Amendment and Article 1, section 22 of the Washington Constitution.

4. The State did not commit misconduct during closing argument. The closing argument of the State did not violate Mr. Trent's right to a fair trial under the due process clauses of the State and Federal Constitutions.

B.

STATEMENT OF THE CASE

The State accepts the appellant's version of the statement of the case.

C.

ARGUMENT

1. THE TRIER OF FACT WAS PRESENTED WITH SUFFICIENT EVIDENCE TO FIND THAT ERIC VAN TRENT UNLAWFULLY POSSESSED A FIREARM IN THE FIRST DEGREE.

When a claim of insufficient evidence is made, a reviewing court examines whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,” viewing the evidence in the light most favorable to the State. State v. Hughes, 154 Wash. 2d 118, 152, 110 P.3d 192 (2005) (quoting State v. Green, 94 Wash. 2d 216, 221, 616 P.2d 628 (1980)), overruled on other grounds by Washington v. Recuenco, 126 S. Ct. 2546, 165 L.Ed. 2d 466 (2006). “Determinations of credibility are for the fact finder and are not reviewable on appeal.” Id. (citing State v. Camarillo, 115 Wash. 2d 60, 71, 794 P.2d 850 (1990)). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant, State v. Salinas,

119 Wash. 2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. State v. McNeal, 98 Wash. App. 585, 592, 991 P.2d 649 (1999).

In determining whether the necessary quantum of proof exists, the reviewing court does not need to be convinced beyond a reasonable doubt, but only that substantial evidence supports the State's case. State v. Fiser, 99 Wash. App. 714, 718, 995 P.2d 107 (2000). Substantial evidence is evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed." State v. Hutton, 7 Wash. App. 726, 728, 502 P.2d 1037 (1972).

The parties stipulated that Mr. Trent previously had been convicted of a serious offense that made it illegal for him to possess a firearm. RP at 266 (2/9/06). Thus, the question presented by this appeal is whether Mr. Trent possessed a firearm. Mr. Trent argues that a trier of fact could not find that he possessed a firearm because any such "possession" was momentary. Appellant's Brief at 7-10. To establish actual possession, the State must show "actual control, not a passing control which is only a momentary handling." State v. Callahan, 77 Wash. 2d 27, 29, 459 P.2d 400

(1969). Whether constructive possession exists depends on the totality of the circumstances. State v. Turner, 103 Wash. App. 515, 521, 13 P.3d 234 (2000); State v. Collins, 76 Wash. App. 496, 501, 886 P.2d 243 (1995); and State v. Partin, 88 Wash. App. 899, 906, 567 P.2d 1136 (1997). No single factor is dispositive. Collins, 76 Wash. App. at 501. In addition, mere proximity to the item in question does not establish constructive possession, State v. Hystad, 36 Wash. App. 42, 671 P.2d 793 (1983).

The Appellant's Brief relies heavily on Callahan in asserting that Mr. Trent did not have dominion and control over the firearm. Callahan stands for the proposition that passing control is not actual control and therefore does not amount to possession, 77 Wash. 2d at 29. Nevertheless, it must be recognized that "passing control is not strictly a temporal concept." State v. Summers, 107 Wash. App. 373, 385, 28 P.3d 780 (2002). "All momentary possessions do not equal passing control." Id. The Summers Court quotes liberally from State v. Staley, 123 Wash. 2d 794, 872 P.2d 502 (1994), and articulates the penumbras of the law as follows:

Thus, we focus not on the length of the possession but on the quality and nature of that possession. Staley, 123 Wash. 2d at 801, 872 P.2d 502. The length of time is but a factor in determining whether it was actual or passing possession. Staley, 123 Wash. 2d at 801, 872 P.2d 502. A defendant's momentary handling of an item, along with other sufficient indicia of control, can support a finding of possession because the totality of the circumstances determines possession. Staley, 123 Wash. 2d at 802, 872 P.2d 502 (citing Partin, 88 Wash. 2d at 906, 567 P.2d 1136).

Summers, 107 Wash. App. at 386.

Furthermore, Summers explicitly states that “[t]he case law is clear that brief actual possession is illegal. What Callahan and its progeny hold is that passing control does not amount to actual control.” Id. at 387.

The Appellant's Brief focuses on the fact that Gary Pittman only saw Mr. Trent handle the gun when Mr. Pittman observed that the rifle scope was crooked. RP at 78, 89, 93 (2/8/06). Mr. Trent makes much of the fact that Mr. Pittman could not remember who carried the firearm onto the porch of his residence. All that Mr. Pittman was sure of is that Mr. Trent and another male, whom Mr. Pittman did not know, arrived at Mr. Pittman's residence with a rifle. Mr. Trent asserts that one cannot infer that he was controlling the

firearm upon entry into Mr. Pittman's residence. According to Mr. Trent, any such inference is entirely speculative; therefore, there is insufficient evidence to sustain his conviction. Appellant's Brief at 9. Mr. Trent wishes to portray himself as an intermediary who had fleeting contact with the firearm. Id.

This assertion fails to win the day, especially when the facts are examined in a light most favorable to the State. Mr. Pittman testified that he had a telephone conversation with Mr. Trent, wherein Mr. Trent asked Mr. Pittman if he wanted to buy a rifle from Mr. Trent. RP at 76-77 (2/8/06). Subsequently, Mr. Trent and another male came into Mr. Pittman's residence. RP at 77-78 (2/8/06). Equally important, Mr. Pittman paid Mr. Trent \$200.00 for the rifle with the understanding that Erin Bond would use this money. Mr. Trent promised to give Mr. Pittman \$300.00 in the future in exchange for the rifle. Mr. Trent never fulfilled this promise. RP at 80 (2/8/06).

Although Mr. Trent told Mr. Pittman that he did not own the firearm, RP at 102 (2/8/06), the trier of fact reasonably could come to the conclusion that Mr. Trent exercised dominion and control over the firearm. This conclusion flows from the fact that Mr. Trent

initiated a telephone conversation with Mr. Pittman and inquired as to whether Mr. Pittman wanted to buy a rifle from Mr. Trent. Mr. Trent then appeared at Mr. Pittman's residence with an unknown male and proceeded to handle the firearm. Mr. Trent then concluded a deal wherein Mr. Pittman gave Mr. Trent \$200.00 for the rifle.

All of these facts taken together rebut the contention that Mr. Trent's only connection with the firearm was a momentary touching of the firearm at the Pittman residence. Mr. Trent solicited a sale of the firearm on the telephone, drove to the Pittman residence with the firearm, handled the firearm at the Pittman residence, and then received money for the firearm that he left with Mr. Pittman. These facts constitute substantial evidence that "would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed," Hutton, 7 Wash. App. at 728, viz., Mr. Trent had dominion and control over the firearm in question and thereby "possessed" the firearm. Cf. State v. Echeverria, 85 Wash. App. 777, 934 P.2d 1214 (1997) (Mr. Echeverria was adjudicated guilty of unlawful possession of a firearm based on the fact that a gun

was in plain sight at Mr. Echeverria's feet.). Hence, Mr. Trent's insufficient evidence argument should be rejected.

2. THE STATE DID NOT DEPRIVE MR. TRENT OF A FAIR TRIAL BY IMPERMISSIBLY RELYING ON UNCHARGED BAD ACTS.

Mr. Trent cites State v. Trickler, 106 Wash. App. 727, 25 P.2d 445 (2001), for the proposition that the State was impermissibly allowed to introduce evidence of numerous uncharged criminal acts of the defendant. Mr. Trent complains that he

was charged with possessing a single firearm. Yet the prosecution introduced evidence that Mr. Trent possessed four additional guns after burglarizing Tim Bond's home and stealing the guns. 2/8/06 RP 61; 2/9/06 RP 261-62, 264. The prosecution also elicited evidence Mr. Trent was wanted by the police for a domestic disturbance against his then girlfriend Erin Bond. Ms. Bond was scared to death of Mr. Trent, and Mr. Trent had an outstanding arrest warrant for another matter. 2/9/06 RP 230-31, 291-92, 340.

Appellant's Brief at 14.

To begin with, there is only one passing reference in the record that implicates Mr. Trent in the burglary at Tim Bond's residence. RP at 262-264 (2/9/06). The tenor of the questioning of Officer Mike Robbins at this point in the proceedings was to show that Erin Bond had made numerous inconsistent statements to the

police. Any prejudice that inured to the defendant (assuming that the trier of fact was persuaded by this one statement that Mr. Trent took firearms from the residence of Erin Bond's father) was overshadowed by the fact that Erin Bond previously had testified that she took the weapons by herself, and that Mr. Trent was not involved in this enterprise. RP 136-139 (2/8/06); RP at 208-212, 215 (2/9/06). This testimony was elicited by Mr. Trent's attorney. The State therefore had the right to elicit testimony which showed that Erin Bond made inconsistent statements to the police.

With regard to proffering testimony concerning a domestic situation involving Erin Bond and Mr. Trent, the reviewing Court needs to look at the context in which the comment arose. See RP at 230 (2/9/06). The State's attorney asked South Bend Police Chief David Eastham if he were aware of any personal feelings that Erin Bond had for the defendant. The State's attorney asked this question to elicit any bias that Erin Bond might have had. Unbeknownst to the State's attorney, Chief Eastham made a passing reference to a "domestic situation." In short, this brief exchange did not indicate if anyone was culpable. Because no other information was provided to the trier of fact, this generic

comment does not rise to the level of reversible error. Moreover, Mr. Trent's counsel did not object to this testimony.

Similarly, Chief Eastham's statement that Erin Bond loved Mr. Trent and that she was scared to death of him, RP at 231 (2/9/06), is equivocal. This statement does not necessarily put Mr. Trent in a bad light; it simply indicates that there was some tension between Erin Bond and Mr. Trent. The reviewing court should note that Mr. Trent's attorney did not object to Chief Eastham's comments.

Lastly, the comment by Deputy Pat Matlock concerning the fact that Mr. Trent had a warrant for his arrest from the Department of Corrections was addressed with a curative instruction by the Court. The State's attorney asked an innocuous question that produced an answer which appeared to be unexpected.

To summarize, Mr. Trent seems to allege that the State underhandedly attempted to paint the defendant "as a violent and dangerous person, as well as being a career thief and criminal." Appellant's Brief at page 14. Mr. Trent then goes on to argue that prejudicial evidence concerning firearms is especially egregious. To support his contention, Mr. Trent cites State v. Freeburg, 105

Wash. App. 492, 501, 20 P.3d 984 (2001); State v. Oughton, 26 Wash. App. 74, 83-84, 612 P.2d 812 (1980); and State v. Rupe, 101 Wash. 2d 664, 707-708, 683 P.2d 571 (1984). Appellant's Brief at 15.

The cases cited above miss the mark in the following respects. Freeburg involved a murder suspect who possessed a gun at the time of his arrest which was more than two years after the homicide occurred. In Oughton, which also involved a murder, the State introduced a knife even though the prosecutor admitted outside the presence of the jury that he could not prove that the knife in question was used to kill the victim. 26 Wash. App. at 83-84. Rupe involved a death penalty determination. The Court saw "no relation between the fact that someone collects guns and the issue of whether they deserve the death sentence." 101 Wash. 2d at 708.

In each of these three cases, the gun/weapon issue was significantly removed from the matters which the trier of fact needed to decide, whereas the "gun" issue in the present case, RP passim, is directly connected to how Mr. Trent came into possession of a rifle. Simply put, in this case the reviewing Court

should not view any mention of “guns” as an anathema. As stated in Oughton:

In this state we have followed a liberal approach, admitting evidence with only a slight probative effect, and allowed consideration of “whatever inferences may sensibly be drawn therefrom when it is viewed in connection with other evidence.” State v. Gersvold, 66 Wash. 2d 900, 903, 406 P.2d 318, 320 (1965). Even where evidence does have some probative value, however, the trial judge may exclude it if its prejudicial impact on the defendant outweighs that probative value. State v. Stevenson, 16 Wash. App. 341, 346, 555 P.2d 1004 (1976). Goodell v. ITT-Federal Support Servs. Inc., 89 Wash. 2d 488, 493, 573 P.2d 1292 (1978); State v. Goebel, 36 Wash. 2d 367, 380, 218 P.2d 300 (1950).

26 Wash. App. at 83.

While the probative value of the background details surrounding how Mr. Trent came into possession of the firearm may not have been large, the Court certainly had the discretion to determine the scope of the questioning by counsel. The Court did not abuse that discretion.

Finally, Mr. Trent excoriates the State’s attorney for emphasizing Mr. Trent’s alleged “bad” behavior and for depicting Mr. Trent as a “dangerous” person during closing argument. Appellant’s Brief at page 17. However, if one carefully examines

the totality of the closing argument of the State, it is clear that the thrust of the argument was to discredit the testimony of Erin Bond. The prosecutor had every right to take this approach. If the trier of fact believed Erin Bond, Mr. Trent would have been acquitted. Therefore, it was crucial to the State's case to demonstrate that Erin Bond should not be believed, because she had made numerous contradictory statements to the police.

In accord with the Court's instructions, RP at 363-365 (2/9/06), the State's attorney did not argue that Mr. Trent should be convicted because of past "bad" behavior, or because of statements made by Erin Bond to the police. Rather, this ancillary information was used exclusively to impeach the testimony of Erin Bond. RP at 368-371, 389-390. During closing argument the State's attorney properly argued his theory of the case.

Consequently, in looking at the totality of the record, the reviewing court should not accept Mr. Trent's assertion that he failed to receive a fair trial due to references to "bad" behavior.

3. MR. TRENT HAS NOT DEMONSTRATED INEFFECTIVE ASSISTANCE OF COUNSEL WITH REGARD TO THE FAILURE TO REQUEST A JURY INSTRUCTION PERTAINING TO PASSING CONTROL OR WITH REGARD TO THE SUBSTANCE OF THE DEFENDANT'S CLOSING ARGUMENT.

- a. A claim of ineffective assistance of counsel must meet specific legal tests.

To sustain a claim of ineffective assistance of counsel, Mr. Trent must show both that trial counsel's performance was deficient and that this deficiency prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687-688, 104 S. Ct. 2052 80 L.Ed. 2d 674 (1984). Representation is deficient if it falls below an objective standard of reasonableness, based on a consideration of all of the circumstances. State v. McFarland, 127 Wash. 2d 322, 334-35, 899 P.2d 1251 (1995). Mr. Trent is prejudiced if there is a reasonable probability that but for the deficiency the trial result would have differed. McFarland, 127 Wash. 2d at 335. The reviewing court presumes that trial counsel's representation fell within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689; In re Pers. Restraint of Pirtle, 136 Wash. 2d 467, 487, 965 P.2d 593 (1998). Ineffective assistance of counsel claims are reviewed de novo. State v. Shaver, 116 Wash.

App. 375, 382, 65 P.3d 688 (2003). Strategic or tactical reasons for adopting a certain cause of action do not support an ineffective assistance of counsel claim. McFarland, 127 Wash. 2d at 336.

b. Trial counsel was not ineffective by failing to request a passing control jury instruction.

Based on State v. Staley, 123 Wash. 2d 794, 798, 802, 872 P.2d 502 (1994) and State v. Callahan, 77 Wash. 2d 27, 29, 459 P.2d 400 (1969), Mr. Trent argues that his trial attorney should have requested a jury instruction stating that unlawful possession of a firearm requires more than passing control. Appellant's Brief at 20-24. ¹

To support his argument for ineffective assistance of counsel, Mr. Trent relies heavily on Staley. However, it is important to note exactly what Staley said. Specifically, with regard to passing control, the Staley court opined:

While it may be proper to further explain "possession" by including language on the theory of passing control when defining possession for the jury, Staley did not request

¹ Mr. Trent's appellate counsel did not indicate that exact language of the passing control jury instruction that Mr. Trent now believes should have been proposed; delineating a precise instruction appears to be prerequisite for review. Thomas v. French, 99 Wash. 2d 95, 99, 659 P.2d 1097 (1983); State v. Anderson, 41 Wash. App. 85, 109, 702 P.2d 481 (1985), rev'd on other grounds, 107 Wash. 2d 745, 733 P.2d 517 (1987).

such an enhanced instruction. Instead, he proposed to instruct the jury that possession is not unlawful if the duration is brief. This is incorrect.

123 Wash. 2d at 802 [emphasis added].

The use of the word “may” in the above passage indicates that a court has discretion to further explain the meaning of “possession.” This language does not stand for the proposition that the court must give a passing control instruction. Moreover, Staley goes on to say:

Callahan did not create a legal excuse for possession based on the duration of the possession. Rather, evidence of brief duration or “momentary handling” goes to the question of whether the defendant has “possession” in the first instance. Depending on the total situation, a “momentary handling”, along with other sufficient indicia of control over the drugs, may actually support a finding of possession. See State v. Partin, 88 Wash. 2d 899, 906, 567 P.2d 1136 (1977) (court will look at the totality of the situation to determine if there is substantial evidence tending to establish circumstances from which dominion and control may be inferred).

Id.

Hence, while the court has discretion to give a passing control instruction, the circumstances of a particular case will dictate whether the court should choose to give such an instruction.

In addition, because there is no WPIC pertaining to passing control, giving such an instruction is fraught with peril. Cf. State v. Summers, 107 Wash. App. 373, 387, 28 P.3d 780 (2002) (“ . . . this case is a good example of why language from appellate court decisions should not necessarily be incorporated into jury instructions.”).

As argued earlier, supra, at 5-7, other indicia of Mr. Trent’s dominion and control over the firearm were present in this case besides Mr. Trent’s “fiddling” with the firearm at Gary Pittman’s residence. Thus, a passing control jury instruction, regardless of what the exact language might have been, would have tended to confuse the trier of fact. As noted in Staley:

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. State v. Hughes, 106 Wash. 2d 176, 191, 721 P.2d 902 (1986). However, he is not entitled to an instruction which inaccurately represents the law or for which there is no evidentiary support. State v. Hoffman, 116 Wash. 2d 51, 110-11, 804 P.2d 577 (1991).

123 Wash. 2d at 803.

Consequently, since a passing control jury instruction could have misled the trier of fact by causing them to focus exclusively on Mr. Trent’s handling of the firearm at Mr. Pittman’s residence, it

cannot be said that Mr. Trent's trial counsel was deficient in not proposing such an instruction. This is especially the case since there is a presumption that trial counsel's representation fell within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689; In re Pers. Restraint of Pirtle, 136 Wash.2d at 487.

With regard to the second prong of the Strickland test, there is not a reasonable likelihood that the outcome of the case would have been different if a jury instruction on passing control had been given. Assuming that the trier of fact believed Mr. Pittman (credibility determinations are the exclusive province of the trier of fact), they easily could have found that there were sufficient facts to link the firearm in question to Mr. Trent. The trier of fact also could have found that Mr. Trent exercised dominion and control over this firearm. Thus, the second prong of the Strickland test has not been met.

- c. The closing argument of Mr. Trent's trial counsel does not constitute ineffective assistance of counsel.

Mr. Trent asserts that his trial counsel's closing argument falls within the ambit of ineffective assistance of counsel. In particular, Mr. Trent vehemently objects to the "spirit of the law"

analysis that his trial counsel used during closing argument. Appellant's Brief at 21-23. The gravamen of Mr. Trent's contention is that his trial counsel did not need to speak about the spirit of the law because the letter of the law supported the defendant's position. Appellant's Brief at 21. Mr. Trent at this juncture wants the reviewing Court to think that the interplay between the law regarding passing control and its applicability to every case is straightforward. As discussed previously, supra, at 3-5, 15-17, this intersection is somewhat opaque, because the legal conclusions that should be reached depend on the relevant facts adduced at trial which speak to the question of dominion and control. What is clear is that there was sufficient ancillary testimony to rebut the argument that the trier of fact should have focused exclusively on whether Mr. Trent possessed the firearm at the very instant he adjusted the rifle scope in Mr. Pittman's residence.

Hence, it was not untenable for Mr. Trent's counsel to attempt to convince the trier of fact to look beyond a narrow definition of unlawful possession. If Mr. Trent's trial counsel had done what Mr. Trent is now urging, the State could have shifted its argument and emphasized more vociferously the pattern of conduct

by Mr. Trent (as described by Mr. Pittman) which establishes Mr. Trent's dominion and control over the rifle in question.

While one obviously can disagree with the strategy promulgated by Mr. Trent's trial counsel, the tactic adopted at trial does not fall below an objective standard of reasonableness. Additionally, since the reviewing Court starts with the presumption that trial counsel acted properly, Mr. Trent has not overcome his burden to demonstrate that his trial counsel's performance was outside the scope of reasonable strategic decision making. Hence, Mr. Trent's argument fails the first prong of the Strickland test.

With regard to the second prong of the Strickland test, Mr. Trent has not demonstrated that he was prejudiced by his trial counsel's strategy. In other words, Mr. Trent cannot show with a reasonable probability that, except for his trial counsel's alleged unprofessional errors, the trier of fact would have found Mr. Trent not guilty of the charge of unlawful possession of a firearm in the first degree.

By referring to the spirit of the law, Mr. Trent's trial counsel had the opportunity to explain the law in a manner that would put Mr. Trent's actions in a more favorable legal posture. The other

option would have been to directly attack Mr. Pittman's testimony with a vengeance. This strategy easily could have backfired since the trier of fact could have been sympathetic to Mr. Pittman. In short, it is unclear whether the outcome of the trial would have been different if Mr. Trent's trial counsel had used a different strategy during closing argument. Consequently, the second prong of the test for ineffective assistance of counsel has not been satisfied.

To conclude, the reviewing Court should reject Mr. Trent's ineffective assistance of counsel argument. Mr. Trent's trial counsel made decisions that can be best characterized as strategic. An objection to strategic or tactical decisions does not support an ineffective assistance of counsel claim. McFarland, 127 Wash. 2d at 336.

4. THE STATE'S ATTORNEY DID NOT COMMIT MISCONDUCT DURING CLOSING ARGUMENT.

- a. An allegation of prosecutorial misconduct must meet specific legal tests.

A defendant who claims improper conduct on the part of the State's attorney must establish that the prosecutor's remarks were both improper and prejudicial. State v. Finch, 137 Wash. 2d 792,

839, 975 P.2d 967 (1999). Any allegedly improper statements must be viewed in the context of the State's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Brown, 132 Wash. 2d 529, 561, 940 P.2d 546 (1997). Where trial counsel does not object, the claim of error is waived unless the statement is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Id. at 561. Prejudice on the part of the State's attorney is established only when "there is a substantial likelihood the instances of misconduct affected the jury's verdict." State v. Pirtle, 127 Wash. 2d 628, 672, 904 P.2d 245 (1995). If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required. State v. Russell, 125 Wash. 2d 24, 85, 882 P.2d 747 (1994). The absence of a contemporaneous objection strongly suggests that the argument did not appear critically prejudicial to the defendant in the context of the trial. State v. Swan, 114 Wash. 2d 613, 661, 790 P.2d 610 (1990).

In this case, the State's attorney did not make comments during closing argument that were so flagrant and ill-intentional that

they could not be neutralized by a curative instruction. Mr. Trent's trial counsel objected twice during closing argument. An objection pertaining to the characterization of Mr. Pittman as "genuine" by the State's attorney was sustained. RP at 371 (2/9/06). A second objection by Mr. Trent's trial counsel was overruled when the State's attorney referred to a "Defense attorney's ploy." RP at 391 (2/9/06). The allegations of prosecutorial misconduct discussed by Mr. Trent at 26-33 of Appellant's Brief in general were not objected to by Mr. Trent's trial counsel. In order for a reviewing court to consider alleged misconduct during the State's closing argument, a defendant ordinarily must ask for a mistrial or request a curative instruction. Swan, 114 Wash.2d at 661.

Thus, much of Mr. Trent's argument fails at the outset because Mr. Trent's trial counsel did not preserve the issues that are being argued on appeal. As noted in Swan, "[c]ounsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for a new trial or on appeal." Id., citing Jones v. Hogan, 56 Wash. 2d 23, 27, 351 P.2d 153 (1960) and State v. Atkinson, 19

Wash. App. 107, 111, 575 P.2d 240, review denied, 90 Wash. 2d 1013 (1978).

- b. The State's attorney did not engage in misconduct by using an improper "liar" argument.

Mr. Trent cites State v. Reed, 102 Wash. 2d 140, 145-146, 684 P.2d 699 (1984) and State v. Case, 49 Wash. 2d 66, 710, 298 P.2d 500 (1956) for the proposition that an attorney cannot inject his personal views into a closing argument. The State readily admits that an attorney cannot argue that a witness is lying based on the attorney's personal beliefs. However, an attorney can argue that a witness should not be believed based on the testimony/exhibits that were admitted into evidence.

Mr. Trent argues that the State's attorney injected his personal beliefs into his closing argument when he asserted that Erin Bond was not telling the truth. Appellant's Brief at 26-27. See RP at 389-390 (2/9/06). In particular, Mr. Trent complains of this alleged inflammatory remark: ". . . she can make up whatever story she wants and get away with it and that's what she did." RP at 390 (2/9/06). The State admits that it would have been preferable if the

State's attorney had prefaced his remark by stating, "The evidence shows that" However, it is apparent from the context in which this remark occurred that the State's attorney made this statement based on the evidence that he had previously discussed. In any event, a curative instruction could have remedied any perceived misconduct, but Mr. Trent's trial counsel did not object to this statement. Hence, the verdict in this case should not be disturbed on the basis of this alleged impropriety.

c. The State's attorney did not engage in misconduct by discussing Erin Bond's grant of immunity.

Mr. Trent appears to make two arguments with regard to the grant of immunity given to Erin Bond during the trial. First, Mr. Trent argues that the State should not have called Erin Bond to testify, because the State had indications that she probably would not testify truthfully. Appellant's Brief at 28. While the State believed that Erin Bond probably would perjure herself, the State in truth did not know for certain what she would say on the stand. Moreover, Erin Bond appeared on Mr. Trent's witness list and was subpoenaed by Mr. Trent's trial counsel. See Appendix A.

Therefore, the State reasonably assumed that the defense would call Erin Bond if the State chose not to do so.

Under these circumstances, it was appropriate for the State to make the tactical decision to call Erin Bond as a witness during its case in chief. The question of immunity was properly considered by the Court when Erin Bond made statements on the stand that potentially could have placed her in legal jeopardy. In passing, the State would point out that it ultimately granted Erin Bond transactional immunity that covered the entirety of her testimony. Consequently, any prejudice that Mr. Trent might have suffered is minimal; it certainly does not rise to the level of reversible error.

Second, Mr. Trent lambastes the State for discussing the question of immunity during closing argument. Mr. Trent also chides the State for referring to the timing of the grant of immunity. Appellant's Brief at 30. The State would point out that the attorney for the State only referred to the timing of the grant of immunity, RP at 389 (2/9/06), after Mr. Trent's trial counsel already had made a similar observation. See RP at 379 (2/9/06). Both sides made reasonable inferences during their closing argument concerning what significance the trier of fact should ascribe to the grant of

immunity. Neither side objected to the inferences that the other side presented to the trier of fact. Under such circumstances, it cannot be said that the defendant experienced any prejudicial error.

d. The State's attorney did not shift the burden of proof to Mr. Trent.

Mr. Trent asserts that the State shifted the burden of proof to him by making the statement, "You didn't hear from Dale Hendrickson to say he took the weapon Ms. Bond, did you." RP at 370 (2/9/06). In addition, Mr. Trent objects to another statement made by the State's attorney during rebuttal argument. The relevant part of the rebuttal argument reads as follows:

Defense counsel is correct that -- you know, he touched on this during jury selection too -- is, you know, the Defendant doesn't have to do anything. I have the burden to prove this case so he can just sit there. Does he have to sit there? No. Can he call witnesses? Yes, he can.

Defense counsel mentioned that the police were just after Eric Trent even though there was another person in that -- in that room. Well, guess what? Gary Pittman testified he didn't know who this person was. He knew who the Defendant was. He knew the Defendant was the one that picked up the firearm and adjusted the scope for him. So what the witness isn't here. Is that the State's responsibility to bring all the witnesses in? Nope, not at all.

RP at 390-391 (2/9/06).

While the State acknowledges that the last two sentences of this passage are problematic, the State's attorney in the paragraph cited above explicitly noted that the State bears the burden of proof and that a defendant does not have to do anything. The State's attorney at the beginning of his closing argument also emphasized that the State has the burden of proving its case beyond a reasonable doubt. RP at 368 (2/9/06). Although the State's attorney could have delineated the State's burden of proof with more specificity, Mr. Trent's trial counsel did not object to the manner in which the State's attorney described the State's burden of proof. Because defense counsel did not object, and because any actual prejudice to Mr. Trent was slight, the defendant cannot establish prejudice that merits reversal of his conviction for unlawful possession of a firearm in the first degree.

Moreover, instruction no. 1 that was given to the jury contained the following language:

The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony of the witnesses. The law is

contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

See Appendix B.

When the Court gives an instruction to disregard statements of counsel, the reviewing court should presume that the jury followed the instruction. Swan, 114 Wash. 2d at 662. “[This] presumption will prevail until it is overcome by a showing otherwise.” City of Bellevue v. Karvik, 69 Wash. App 735, 743, 850 P.2d 559 (1993). So even if one assumes arguendo that the prosecutor’s remarks were improper, “[t]he trial court minimized prejudice when it stated the State’s argument was not evidence.” State v. Rice, 120 Wash.2d 549, 573, 844 P.2d 416 (1993). Consequently, the argument of Mr. Trent fails to pass legal muster.

e. The State’s attorney did not misrepresent what constitutes unlawful possession of a firearm in the first degree.

Mr. Trent asserts that the State’s attorney “purposefully mislead the jury” during closing argument in discussing what constitutes unlawful possession of a firearm in the first degree. Appellant’s Brief at 33. Nothing in the record indicates that the

State's attorney acted "purposefully" in an attempt to confuse the trier of fact.

Both sides had a full opportunity to argue their theories of the case pertaining to fleeting possession. Even if one accepts that the State's attorney could have been more precise in delineating all of the parameters surrounding the concept of passing control, this lack of specificity does not constitute misconduct.

Furthermore, Mr. Trent's trial counsel did not raise an objection to the State's argument, and the Court instructed the jury to disregard any argument that is not supported by the Court's instructions. See, supra, at 28-29. In short, the definitional dispute over what constitutes dominion and control in no way rises to the level of reversible error.

f. Cumulative error did not prevent Mr. Trent from receiving a fair trial.

The State acknowledges that the combined effects of many errors may require the reviewing Court to order a new trial, even though individual errors, standing alone, may not be sufficient, to merit a new trial. State v. Coe, 101 Wash. 2d 772, 789, 684, P.2d 668 (1984). However, this case does not contain a series of errors

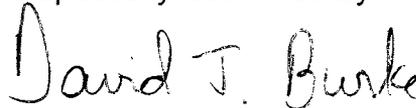
that would constitute cumulative error. Although Mr. Trent alleges a multiplicity of errors, on close scrutiny these allegations of impropriety are mostly specious. Any errors that actually occurred were harmless, i.e., the errors did not affect the outcome of the trial. The Appellant's Brief reads as though Mr. Trent believes that he is entitled to a perfect trial rather than a fair trial. Cf. State v. Green, 71 Wash. 2d 372, 373, 429 P.2d 540 (1997). Mr. Trent received a fair trial. Hence, there is no basis to disturb the decision of the trier of fact.

D.

CONCLUSION

For the reasons listed above, the relief sought by Mr. Trent should be denied. Mr. Trent's conviction for unlawful possession of a firearm in the first degree should be upheld.

Respectfully Submitted by:



DAVID J. BURKE, WSBA#16163
Pacific County Prosecuting Attorney

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8 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
9 IN AND FOR PACIFIC COUNTY

10 STATE OF WASHINGTON,)

11)
12 Plaintiff,)

13 vs.)

14 ERIC V. TRENT,)

15 Defendant.)
16)

NO. 05-1-00173-7

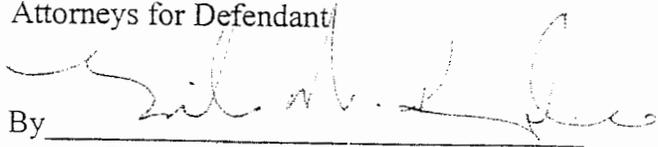
SUBPOENA

17 TO: Erin Bond

18 IN THE NAME OF THE STATE OF WASHINGTON, you are hereby required to
19 appear in the said Superior Court at the Courthouse in South Bend, Washington, on February 8,
20 2006, at 11:00 a.m. to give evidence in the above-entitled cause on the part of the defendant, and
21 you are further directed to claim your attendance each day at the Clerk's office and to verify your
22 claim for mileage, or no fees can be allowed.

23 DATED: January 12, 2006.

24
25 INGRAM, ZELASKO & GOODWIN
26 Attorneys for Defendant

27
28 By 

Erik M. Kupka
WSBA #28835

29 EMK:HS
30 H:\TRENT, ERIC CRS158\SUBPOENA - ERIN BOND.DOC

31 I hereby acknowledge receipt of this subpoena and comply
32 with appeal as received on the date & time noted above.
SUBPOENA - 1


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APPENDIX 'A'

PACIFIC COUNTY PROSECUTOR
RECEIVED

06 FEB -2 PM 3:38

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR PACIFIC COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

ERIC V. TRENT,

Defendant.

NO. 05-1-00173-7

LIST OF WITNESSES

COMES NOW the above-named defendant, Eric V. Trent, by and through his attorney of record, Erik M. Kupka of Ingram, Zelasko & Goodwin, LLP, and presents his list of witnesses herein pursuant to CrR 4.7.

1. Erin Bond
Address and Phone Number Unknown

The defense may call Erin Bond to testify consistent with recollection of events given to investigators and law enforcement in this case. The State of Washington has in its possession all reports in this case. This witness will be called by the State in its case-in-chief.

2. Gary Pitman
1045 Crossing Street
Raymond, WA 98577
360-942-2934

LIST OF WITNESSES - 1

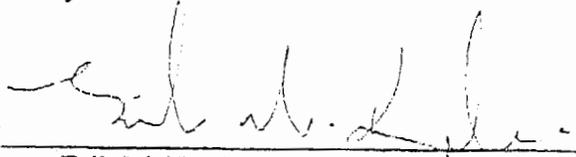
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1 The defense may call Gary Pitman to testify consistent with his recollection of events and
2 reports given to investigators and law enforcement in this case. The State of Washington has in
3 its possession all reports in this case. This witness will be called by the State in its case-in-chief.

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DATED: January 16, 2006.

INGRAM, ZELASKO & GOODWIN, LLP
Attorneys for Defendant

By 

Erik M. Kupka
WSBA #28835

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32 LIST OF WITNESSES - 2

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INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled

to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony of the witnesses. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.


VICKI FLETMETIS

SUBSCRIBED & SWORN to before me this 1ST day of
FEBRUARY, 2007.


NOTARY PUBLIC in and for the State
Of Washington, residing at Raymond