

NO. 40252-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LUKE GROVES,

Appellant.

STATE OF WASHINGTON
BY 
10 OCT 22 PM 2:34
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 09-1-00244-2

BRIEF OF RESPONDENT

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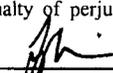
This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED October 22, 2010, Port Orchard, WA 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Groves' claim of ineffective assistance of counsel must fail when Groves has failed to show that his attorney's performance was deficient and that the deficient performance was prejudicial?

2. Whether Groves has failed to show that the trial court abused its discretion in denying his motion to dismiss when the trial court correctly determined that: (1) although the State was under no obligation to do so at the time, the State accurately informed Groves that he was prohibited from possessing firearms; and, (2) Groves failed to demonstrate that the State provided affirmative, misleading information that reasonably caused Groves to believe that he could lawfully possess firearms?

3. Whether the trial court abused its discretion in excluding testimony from Groves' wife that she owned the firearms at issue when ownership was not an issue and was thus irrelevant, and when even if the trial court erred in this regard, any error was harmless because the record shows beyond a reasonable doubt that a reasonable jury would have reached the same result had the error not occurred?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Luke Groves was charged by amended information filed in Kitsap County Superior Court with two counts of unlawful possession of a firearm in the second degree. CP 49. A jury found Groves guilty of the charged offenses. CP 100. At sentencing, the State recommended an exceptional sentence downward, and the trial court agreed and imposed an exceptional sentence downward of credit for time served (23 days). CP 112-13. This appeal followed.

B. FACTS

In 2008 Groves reported that his home had been burglarized and two officers from the Bremerton Police Department responded to his call. CP 7. Groves and the officers went through the residence to see what if anything had been taken, and Groves pointed out that firearms had not been taken and were still present in the home. CP 7.

Later, after the officers had left the scene they learned that Groves had been convicted of two felony counts of burglary in the second degree in 1991. The officers then returned to the scene and arrested Groves for unlawful possession of a firearm. CP 7-8.

Prior to trial, Groves filed a motion to dismiss arguing that when he was sentenced in 1991 the trial court had violated RCW 9.41.047 by failing

to advise him that he was prohibited from possessing a firearm. CP 18. Groves also argued that although the Department of Corrections had him sign a notice shortly after he was sentenced informing him that he was prohibited from possessing a firearm, Groves thought that the prohibition would expire when his community supervision ended. CP 15. Groves then argued that these facts violated his due process rights. CP 14-19.

At the hearing on the defense motion the trial court asked defense counsel if she was arguing that DOC had specifically told Groves that he could possess a firearm after his supervision was over. RP (12/2/09) at 19. Defense counsel answered that she was not arguing that DOC specifically told Groves that he could possess a firearm at the conclusion of his supervision. RP (12/2/09) at 19-20.

The State argued that at the time Groves was sentenced there was no statutory requirement that a trial court notify a defendant of the firearm prohibition that followed from a felony conviction, as the statutory requirement did not become law until 1994. RP (12/2/09) at 20; See RCW 9.41.047. The State also argued that Washington Courts (specifically *State v. Reed*, 84 Wn. App. 379, 928 P.2d 469 (1997) and *State v. Sweeney*, 125 Wn. App. 77, 104 P.3d 46 (2005)) had held that a defendant's due process rights were not violated when the State failed to go back and notify an offender who had been sentenced prior to 1994 of the relevant firearm prohibitions. RP

(12/2/09) at 20-22.

The trial court then explained the it understood that both parties agreed that the trial court in 1991 was not required to give a firearm notice because the law didn't require such notice in 1991. RP (12/2/09) at 28. The only issue at hand, therefore, was the narrow issue of whether Groves had been misled by the State into believing that the firearm prohibition did not apply to him. RP (12/2/09) at 28. The trial court then noted that the firearm notice that Groves had received from DOC stated that the firearms prohibition would continue even after his discharge from supervision if the offense for which he was convicted was a crime of violence. RP (12/2/09) at 29. After taking a brief recess to double check the operative law in 1991, the trial court came back and denied the defense motion, noting that burglary has been defined as a crime of violence since at least 1983. RP (12/2/09) at 36.

At trial, Officer Green from the Bremerton Police Department explained that he and Officer Fatt had been dispatched to Groves' residence in response to a reported burglary. RP 58-59. The officers arrived and spoke to Groves who explained that he thought his home had been burglarized and asked the officers to clear the residence. RP 59. The officers went inside, but found no one inside. RP 59. Mr. Groves then came inside while the officers looked for any evidence or fingerprints, and Groves looked to see if anything had been taken. RP 60-61. Mr. Groves found that some wires on his

computer had been disturbed, but it didn't appear that anything else had been taken. RP 61. Officer Green then asked if there was anything else, and Groves responded, "My baby." RP 61. Officer Green looked at Groves curiously, and Groves explained, "My guns." RP 61. Groves and the officers then went into Groves' bedroom where Groves opened a dresser drawer and pulled out a small box saying, "It's my gun." Officer Fatt specifically testified that he saw the handgun at this point, and saw that there was ammunition and a spare magazine in the box with the handgun. RP 74-75, 84-85. The officers then asked Groves not to handle the gun. RP 62, 74-75. Officer Green told Groves that as long as you know it is there, that is all we care about." RP 61.

Groves then explained that there was also a rifle in a closet. RP 61, 75. Officer Fatt personally opened the rifle case to verify that the rifle was still there. RP 85. The officers did not seize the firearms at that time, however, as they had no reason to believe that Groves was prohibited from possessing firearms. RP 75, 85.

After completing the burglary investigation at Groves home, the officers went back to their patrol cars and left the scene. RP 62, 67. Officer Green then ran Groves' information and learned that Groves was a convicted felon. The officers then ran a "triple I" report to confirm Groves' criminal history and found that Groves had two felony burglary convictions. RP 62.

The officers then returned to the residence to arrest Groves. RP 62.

On the second visit the officers eventually obtained the actual firearms, although the record is not developed in this regard. Groves did not challenge the actual seizure of the firearms below nor did he make any objection when the guns were admitted as evidence. See, RP 79-80. As the seizure was not contested, the record does not reveal the exact circumstance of how the guns were actually seized. For instance, the record does not reveal whether the officers did or did not obtain consent before seizing the guns, nor does the record even reflect whether the officer did or did not obtain a warrant before seizing the guns. The record, rather, is silent on this issue because no objection was raised below.

The record also does not reveal exactly how the officers' second contact with Groves at the residence proceeded.¹ The record does show that when the officers returned to the residence, Groves' wife and a child were present, and the officers decided that they did not want to arrest Groves in front of a child, so they had Groves come out of the residence onto a porch. RP 70-71. Groves was then arrested on the side of the building. RP 71.

¹ Groves briefly testified at trial that he was in the restroom when the officers returned to the residence and that his wife "let them in," although, again, this testimony was not fully developed below since no challenge to the search was raised below. RP 118-19.

III. ARGUMENT

A. GROVES' CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE GROVES HAS FAILED TO SHOW THAT HIS ATTORNEY'S PERFORMANCE WAS DEFICIENT AND THAT THE DEFICIENT PERFORMANCE WAS PREJUDICIAL.

Groves argues that he received ineffective assistance of counsel because his trial counsel failed to bring a 3.6 motion to suppress the firearms seized from his residence. This claim is without merit because, since no suppression motion was raised below, the record is inadequately developed and Groves thus cannot show that such a motion had any potential merit or would have been successful. Groves therefore cannot show deficient performance or prejudice, both of which are necessary requirements of a claim of ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Because the defendant must prove both deficient representation and resulting prejudice, a lack of prejudice will resolve the issue without requiring an evaluation of counsel's performance. *State v. Lord*, 117 Wn.2d 829, 884, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992). Moreover, when reviewing a claim of ineffective assistance brought on direct appeal, we may not consider matters outside the trial record. *McFarland*, 127 Wn.2d at 335.

Courts engage in a strong presumption counsel's representation was effective. *McFarland*, 127 Wn.2d at 335, *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226, 743 P.2d 816. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *McFarland*, 127 Wn.2d at 335; *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); *State v. Blight*, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition. *McFarland*, 127 Wn.2d at 335, citing See Washington State Bar Ass'n, Appellate Practice Desk Book § 32.2(3)(c), at 32-6 (2d ed. 1993) (citing *State*

v. Byrd, 30 Wn. App. 794, 800, 638 P.2d 601 (1981)). Because Groves has not filed a personal restraint petition, the issue in this case must be decided based on the trial records identified on appeal. *McFarland*, 127 Wn.2d at 335

The Washington Supreme Court has held that the failure to bring a pretrial suppression motion is not per se deficient representation and the defendant bears the burden of showing the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *McFarland*, 127 Wn.2d at 336, 899 P.2d 1251. In addition, when a defendant claims that his counsel was ineffective for failing to bring a suppression motion, the defendant must also show, based on the existing trial record, that the motion to suppress would have probably been successful, otherwise there can be no prejudice. *McFarland*, 127 Wn.2d at 334 n. 2, 337 n. 4; *see also State v. Klinger*, 96 Wn. App. 619, 623, 980 P.2d 282 (1999).

The facts here are similar to those in *McFarland* where trial counsel did not move to suppress evidence obtained as a result of a search. The Supreme Court held that “because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion.” *McFarland*, 127 Wn.2d at 334. The Supreme Court further noted:

Because no motion to suppress was made, there exists no record of the trial court's determination of the issue We recognize the predicament this causes for [defendants: each] must show the motion likely would have been granted based

on the record in the trial court, yet the record has not been developed on this matter because the motion was not made.

McFarland, 127 Wn.2d at 334 n. 2.

In the present case, Groves claims on appeal that the officers seized the firearms “without a warrant and without consent,” but the record below does not support this assertion. App.’s Br. at 10. Rather, because there was no challenge to the seizure of the firearms below, there was no record made regarding the circumstances regarding the seizure of the firearms, and there was little reference to the circumstances regarding the officers second entry into the house (which, of course, was not surprising since those actions were not challenged below). The State, for instance, is unaware of any reference in the record to whether the officers did or did not obtain consent (from either Groves, his wife, or both of them). Rather, the record is merely silent on this issue. The record is similarly silent on the issue of whether or not there might have been some other justification. Because a CrR 3.6 hearing was not held, any inquiry by this court on the constitutionality of the search would be mere speculation because, on the record before this court, it is impossible to make such a determination. Groves’ proper course of action, therefore, is to file a personal restraint petition, if there is an actual basis for his claims based on information outside of the record. *McFarland*, 127 Wn.2d at 335.

Furthermore, even if this court were to assume for the sake of argument that defense counsel had a valid basis to support a potential suppression motion, Groves' trial counsel could have still reasonably determined that bringing such a motion was essentially pointless. Groves, for instance, concedes that the officers' initial entry into the house was lawful, and that during this entry Groves volunteered that there were firearms in the house and that he then conducted a cursory check for the firearms in the presence of the officers. App.'s Br. at 9-10. In addition, the testimony below shows that Officer Fatt saw the handgun in a box with ammunition and also saw a rifle in a closet during this initial entry. RP 74-75, 84-85. Moreover, there was ample testimony below that Groves described the guns as his (and even called one "his baby"). RP 61. Thus, even if defense counsel had brought a motion to suppress the actual seizure of the firearms and was successful, the State would have still been allowed to produce Officer Fatt's testimony that he had seen the firearms in the house during the first entry into the house and that Groves himself had admitted there were firearms in the house.

Given these facts, defense counsel could have reasonably decided that the suppression motion would have done little to hinder the State's case (other than suppressing the actual, physical, firearms) and defense counsel could have concluded that this fact would not have prevented the State from

going forward, based on numerous cases that have held that the State need not produce the actual firearm at trial in order to prove that the gun was an actual firearm. *See, e.g., State v. McKee*, 141 Wn. App. 22, 30-32, 167 P.3d 575 (2007)(holding that witness testimony alone is sufficient to prove that a weapon was in fact a real firearm when the witness saw the weapon and there was evidence that the defendant had access to guns); *State v Bowman*, 36 Wn. App. 798, 803, 678 P.2d 1273 (1984)(The evidence was sufficient to show that the defendant was armed with a real gun when a witness was able to describe the gun in detail, even though no gun was ever admitted and no shots had been fired).

Thus, in the present case, defense counsel could have concluded that the State would have been able to proceed even without the actual firearms because Officer Fatt had seen both weapons and likely would have been able to describe them in a way that was legally sufficient. In addition, defense counsel could have concluded as a reasonable matter of trial strategy that suppressing the guns would have only forced the State to engage Officer Fatt in prolonged and detailed testimony about the guns he saw: testimony that the defense may have reasonable wanted not to emphasize.

Furthermore, defense counsel might have also reasonably concluded that suppression of the firearms would have made the operability of the firearms an issue and counsel could have reasonably concluded that making

an issue of this point would not serve the defendant's interest. For instance, defense counsel could have concluded that it would not be wise to argue that the weapons were not, in fact, operable firearms, since Groves himself had characterized the weapons as "guns." Thus, any argument that the guns were not in fact real guns could have caused the jury to view the defense in a negative light. In addition, Groves' theory at trial was that he was not in possession of the guns (not that the weapons were not real guns), and any argument that the guns were not actually guns would have been potentially viewed as absurd given Groves own admissions that there were guns in the house and that he wanted to check to make sure that they had not been taken in the burglary. Thus, defense counsel could have reasonably concluded that bringing a suppression motion and arguing that the guns were not operable firearms could have had a negative impact, caused the jury to view the defense in a negative light, and thereby lessened the force of the defense's main argument that Groves did not possess the guns under the law.

In short, defense counsel in the present case could have reasonably concluded that a suppression motion either would not have been successful or would have been of little use (or even potentially damaging) even if it were successful. Under Washington, law, however, conduct by a trial counsel that can be characterized as legitimate trial strategy or tactics cannot support a claim of ineffective assistance. *McFarland*, 127 Wn.2d at 336.

Of course, given the limited record below, defense counsel might well have been aware of factual circumstances (such as consent or plain view) that would have negated any potential basis for a suppression motion. In short, given the limited record before this Court, Groves has failed to show either that his trial counsel was ineffective or that he suffered prejudice. Groves' claim of ineffective assistance of counsel, therefore, must fail.

B. GROVES HAS FAILED TO SHOW THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS MOTION TO DISMISS BECAUSE THE TRIAL COURT CORRECTLY DETERMINED THAT: (1) ALTHOUGH THE STATE WAS UNDER NO OBLIGATION TO DO SO AT THE TIME, THE STATE ACCURATELY INFORMED GROVES THAT HE WAS PROHIBITED FROM POSSESSING FIREARMS; AND, (2) GROVES FAILED TO DEMONSTRATE THAT THE STATE PROVIDED AFFIRMATIVE, MISLEADING INFORMATION THAT REASONABLY CAUSED GROVES TO BELIEVE THAT HE COULD LAWFULLY POSSESS FIREARMS.

Groves next claims that the trial erred in denying his motion to dismiss based on his claim that he was misled into believing that he could lawfully possess a firearm. App.'s Br. at 11. This claim is without merit because Groves' argument is premised on the language of several statutes, yet Groves misstates the language of these statutes. His arguments (based on this misstated and inaccurate language), therefore, are without merit.

In his motion to dismiss below Groves argued that his case should have been dismissed due to a due process violation. CP 14-19. Although Groves did not cite CrR 8.3, his motion is properly characterized as a motion to dismiss due to governmental mismanagement pursuant to CrR 8.3.

A trial court's denial of a motion to dismiss under CrR 8.3(b) is reviewed for manifest abuse of discretion. *See State v. Hanna*, 123 Wn.2d 704, 715, 871 P.2d 135 (1994).

On appeal, Groves argues that the trial court erred in denying the motion to dismiss, and cites to the language of former RCW 9.41.010 as support. Groves, however, misstates the language of RCW 9.41.010 as it existed at the time of Groves' predicate convictions. Groves claims that from 1983 to 1994 the definition of "crime of violence" included the crime of "burglary" but did not include the crime of "burglary in the second degree." App.'s Br. at 15-16. Specifically, Groves claims that from 1983 to 1994 RCW 9.41.010(2) stated that,

Crime of violence as used in RCW 9.41.010 through 9.41.160 means any of the following crimes or an attempt to commit any of the same: Murder, manslaughter, rape, riot, mayhem, first degree assault, second degree assault, robbery, **burglary**, and kidnapping.

App.'s Br. at 15 (emphasis added). Groves' claim, however, is incorrect.

The version of the statute cited by Groves was the version of the statute in

effect *until* 1983. In 1983 (pursuant to Laws 1983, ch 232, §1), the statute was amended to read as follows:

(2) “Crime of violence” as used in this chapter means:

(a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, rape in the second degree, kidnapping in the second degree, arson in the second degree, assault in the second degree, extortion in the first degree, **burglary in the second degree**, and robbery in the second degree.

See e.g., Former RCW 9.41.010(2) (1991) (emphasis added)(attached as Appendix A); *See also* Laws 1983, ch 232, §1.²

Groves also claims that the crime of burglary in the second degree did not exist prior to 1989. App.’s Br. at 16. This claim is completely inaccurate. The crime of burglary in the second degree has existed at least since 1976. See, laws 1975, 1st Ex.Sess., ch 260, §9A.52.020., Amended by Laws 1975-76, 2nd Ex.Sess., ch 38, §7, eff. July 1, 1976. While it is true that the crime of “residential burglary” was created in 1989, the crime of “burglary in the second degree” has been on the books at least since 1976. In

² It is true that the statute was amended in 1994 (see Laws 1994, ch. 121, § 1), but that amendment only added the crime of residential burglary. That amendment, of course, is irrelevant as Groves’ predicate convictions were for the crime of burglary in the second degree.

the present case, Groves' predicate convictions were for two counts of burglary in the second degree, thus the enactment date for residential burglary is irrelevant. In any event, Groves' assertion that the crime of burglary in the second degree did not exist until 1989 is patently false.

In short, Groves' claims regarding the creation date of the crime of burglary in the second degree and the language of former RCW 9.41.010 are false, and his arguments based on his misstatements of the statutes are therefore, without merit. Specifically, Groves' argument on appeal is that he was "mislead into believing that he could lawfully possess a firearm after the completion of his probationary period." App.'s Br. at 11. His argument is comprised of the following premises and conclusion:

1. In 1991 Groves was convicted of the crime of "burglary in the second degree."
2. The Firearm notice that Groves received and signed in 1991 stated that he understood that he was prohibited from possessing firearms and that this prohibition will continue after he is discharged from supervision if the offense for which he was convicted is a "crime of violence." App.'s Br. at 15
3. The statutory definition of "crime of violence" that existed until 1994, however, did not include the crime of "burglary in the second degree" (but rather only included the outdated and then-nonexistent crime of "burglary"). App.'s Br. at 16.
4. The crime of burglary in the second degree was created in 1989, but the legislature did not amend the definition of "crime of violence" until 1994, and left the old and then non-existent crime of "burglary" in

the statutory definition of “crime of violence” until 1994. App.’s Br. at 15-16.

5. That based on the firearm notification (and the laws as they existed in 1991), Groves was misled into believing that the firearm restriction applied only to the period of his supervision since under the laws as they existed in 1991 he had not been convicted of a “crime of violence.” App.’s Br. at 17.

This argument, however, is fatally flawed. In reality, the definition of “crime of violence” in RCW 9.41.010(2) has included the crime burglary in the second degree since 1983. Thus, when Groves received his firearm warning he was correctly informed that the firearm prohibition would extend beyond his supervision if he had been convicted of a crime of violence, which, under the then existing law, he clearly was. In short, Groves was in no way misled or misinformed regarding the law. His claims to the contrary, therefore, must fail.

Furthermore, although RCW 9.41.047 now requires a trial court to give a defendant notice that he or she is prohibited from possessing a firearm, that statute did not exist at the time of Groves’ sentencing in 1991. Thus, the trial court in 1991 did not violate the statute.³ In addition, since the trial court

³ In addition, Washington Courts have previously held that the State is not required to go back and give notice regarding firearms prohibitions to offenders who were sentenced before 1994 (when the statutory notice provisions of RCW 9.41.047 came into effect). *See, e.g., State v. Sweeney*, 125 Wn. App. 77, 83-84, 104 P.3d 46 (2005) (The State to contact all felons convicted before 1994 to give the notice prescribed in RCW 9.41.047, and the State’s failure to do so does not violate due process, thus a dismissal was not warranted when “Mr. Sweeney never relied upon an express statement of a government official that he retained the

did not violate RCW 9.41.047 (since it did not yet exist), the cases that discuss what remedy should follow when a trial court fails to give the notice required by RCW 9.41.047 are inapplicable to the present case.⁴

As outlined above, that law as it existed at the time of Groves' predicate convictions prohibited Groves from possessing a firearm. The Washington Supreme Court has made it abundantly clear that "Ignorance of the law is generally not a defense, and Washington case law provides that knowledge of the illegality of firearm possession is not an element of the crime. *State v. Minor*, 162 Wn.2d 796, 802, 174 P.3d 1162 (2008). Although no notice was required, the State nevertheless gave Groves' notice that he was prohibited from possessing firearms.

Furthermore, although ignorance of the law is no excuse, there is, however, a narrow exception for where a governmental entity has provided affirmative, misleading information. *Minor*, 162 Wn.2d at 802, 174 P.3d 1162; *see also State v. Moore*, 121 Wn. App. 889, 895, 91 P.3d 136 (2004); *State v. Leavitt*, 107 Wn. App. 361, 371 n. 13, 27 P.3d 622 (2001). Claims of this sort are essentially traditional claims of entrapment by estoppel. The

right to possess firearms after his juvenile conviction"); *State v. Reed*, 84 Wn. App. 379, 385-86, 928 P. 2d 469 (1997) (because of the difficulty in giving notice, the equal protection clause does not require courts to give notice under RCW 9.41.047 to felons convicted before 1994).

⁴ See, e.g., *Minor*, 162 Wn.2d at 802-04, discussing the appropriate remedy for violations of RCW 9.41.047 and discussing other cases addressing violations of the statute.

defense of “entrapment by estoppel” may be raised “where a government official or agent has actively assured the defendant that certain conduct is reasonable, and the defendant reasonably relies on that advice and continues or initiates the conduct.” *State v. Krzeszowski*, 106 Wn. App. 638, 646, 24 P.3d 485 (2001).

To allow an entrapment by estoppel defense based on misleading governmental conduct, however, “more is required than a simple showing that the defendant was as a subjective matter misled, and that the crime resulted from his mistaken belief.” *State v. Locati*, 111 Wn. App. 222, 227, 43 P.3d 1288 (2002) (quoting *United States v. Lansing*, 424 F.2d 225, 227 (9th Cir.1970)). “At a minimum, a criminal defendant relying on an estoppel or misleading conduct defense must show his or her reliance on misleading information provided by the government was objectively reasonable under the particular circumstances of the case.” *Locati*, 111 Wn. App. at 227 (emphasis added). As the *Locati* Court noted, the Ninth Circuit in *Lansing* court reasoned:

When a defendant claims, as does appellant here, that his criminal conduct was the result of reliance on misleading information furnished by the government, society's interest in the uniform enforcement of law requires at the very least that he be able to show that his reliance on the misleading information was reasonable--in the sense that a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.

See Locati, 111 Wn App. at 227-28, *quoting Lansing*, 424 F.2d at 227.

Furthermore, the Court of Appeals has noted that,

In those cases where courts have applied entrapment by estoppel, the defendant relied upon an express, active representation by a government agent that the proscribed activity was in fact legal. Where the government agent has not expressly represented the activity as legal, the defense does not apply.

State v. Krzeszowski, 106 Wn. App. 638, 646, 24 P.3d 485 (2001), *citing United States v. Brebner*, 951 F.2d 1017, 1024 (9th Cir.1991), *United States v. Clegg*, 846 F.2d 1221 (9th Cir.1988); *United States v. Tallmadge*, 829 F.2d 767, 773 (9th Cir.1987), and *United States v. Trevino-Martinez*, 86 F.3d 65, 69 (5th Cir.1996).

Any suggestion by Groves that he was actively misled by the firearms notice that referenced “crimes of violence” is without merit, because Groves’ argument that the definition of “crimes of violence” did not include the crime of second degree burglary is patently incorrect. As noted above, former RCW 9.41.010 specifically listed burglary in the second degree as a crime of violence since at least 1983. The firearms notice in the present case, therefore, did not in any way represented to Groves that he could possess a firearm.

Groves also argues that his firearm notification incorrectly listed RCW 9.41.040 as the statute that defined “crimes of violence.” App.’s Br. at 15. Groves, however, did not raise this argument below and thus failed to properly preserve it for appeal. RAP 2.5. Even if this Court were to address this specific argument, however, Groves’ claim is without merit.

It is true that the actual statutory definition of “crime of violence” was found in former RCW 9.41.010, not RCW 9.41.040 (which defines the crime of unlawful possession of a firearm, and states that a person commits the crime if he or she possess a gun after having been convicted of a crime of violence). Although the firearm form in the present case contained a citation to the RCW that did not actually contain the definition of “crime of violence,” Groves has failed to show that this clerical error could have conceivably affirmatively misled him into believing that he could possess a firearm. Rather, the clerical error itself did nothing more that lead a reader to the statute defining the crime of unlawful possession of a firearm (which again clearly states that it is unlawful for a person who has been convicted of a crime of violence to possess a firearm). In addition, the incorrect citation to the statute did not prejudice or mislead Groves, because if he had gone to the listed statute he would have found yet another reference to “crimes of violence” and the definition of this term is explained in more detail in the very same title and chapter. Thus, at the least, the notice form’s reference to

RCW 9.41.040 would have put Groves on notice to make further inquiries regarding the definition of “crime of violence.” *See Locati*, 111 Wn.App. at 227-28.

In short, although the firearm form did contain an incorrect citation, this error was insignificant because the State was under no obligation at the time to expressly inform Groves of the firearm prohibition, and the citation error did not affirmatively mislead Groves into believing that he could possess firearms when the law clearly prohibited him from doing so. While the citation error, at best, arguably failed to remedy Groves’ ignorance of the law, ignorance of the law is no excuse and knowledge of the illegality of firearm possession is not an element of the crime.

Furthermore, the firearm form itself was signed by Groves and the front page indicates that the reverse side contained a list of offenses. CP 30. Groves’ however, did not produce a copy of the reverse side of the form. See RP (12/2/09) 35. The trial court, therefore, could have reasonably concluded that Groves’ failure to produce the complete form prevented him from being able to prove his claim that he had been affirmatively misled.

Finally, since Groves has never asserted that any State agent ever expressly told him that he could legally possess firearms, the defense of

entrapment by estoppel does not apply. *Krzeszowski*, 106 Wn. App. at 646.⁵

Given all of these facts, Groves has failed to show that the trial court erred in denying his motion to dismiss.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING TESTIMONY FROM GROVES' WIFE THAT SHE OWNED THE FIREARMS AT ISSUE BECAUSE OWNERSHIP WAS NOT AN ISSUE AND WAS THUS IRRELEVANT, AND EVEN IF THE TRIAL COURT ERRED IN THIS REGARD, ANY ERROR WAS HARMLESS BECAUSE THE RECORD SHOWS BEYOND A REASONABLE DOUBT THAT A REASONABLE JURY WOULD HAVE REACHED THE SAME RESULT HAD THE ERROR NOT OCCURRED.

Groves next claims that the trial court erred by excluding proposed evidence from Groves' wife that she owned the two firearms in question. App.'s Br. at 17. This claim is without merit because Groves has failed to

⁵ Although the court in *Minor* held that a dismissal was appropriate when the trial court had not affirmatively told the defendant that he could possess firearms but had only failed to check the firearms notification box on a judgment and sentence, that case is distinguishable. First, the court in *Minor* violated RCW 9.41.047, a fact that is not present in the case at bar. Secondly, by failing to check the box, a reasonable defendant could conclude that the trial court was stating that the firearms prohibition did not apply to him. Thus, the Court in *Minor* concluded that

Though the State argues that *Minor* has provided no evidence of being misled by the predicate offense court, by failing to check the appropriate paragraph in the order, the predicate offense court not only failed to give written notice as required by former RCW 9.41.047(1) but, we conclude, affirmatively represented to Minor that those paragraphs did not apply to him.

Minor, 162 Wn.2d at 803. In the present case, however, there was no "unchecked box" as in *Minor*. Thus, no State agent even told Groves, directly or through implication, that he could legally possess firearms. The defense, therefore, does not apply.

show that the trial court abused its discretion and because even if the trial court did err, any error was harmless.

Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and are reviewed only for manifest abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010); *In re Welfare of Shope*, 23 Wn. App. 567, 569, 596 P.2d 1361 (1979); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A court abuses its discretion when it exercises it on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In the present case the proposed testimony at issue was that Groves' wife would testify that she was the owner of the guns and that she had purchased them. RP 11-12. The trial court noted, however, that the State was not proceeding on the "ownership prong" of the statute, and the to-convict instruction at trial informed the jury that the State had to prove that defendant "knowingly had a firearm in his possession or control." CP 97. The trial court thus concluded that evidence that Groves' wife owned the guns was not relevant. RP 52. This ruling was not an abuse of discretion.

Furthermore, even if assuming that the trial court's ruling was an abuse of discretion, any error was harmless. An error, even a constitutional error, is harmless if the appellate court is convinced beyond a reasonable

doubt that a reasonable jury would have reached the same result had the error not occurred. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Similarly, an erroneous ruling excluding evidence requires reversal only if there is a reasonable possibility that the testimony would have changed the outcome of trial. *Aguirre*, 168 Wn.2d at 361-62; *State v. Fankhouser*, 133 Wn. App. 689, 695, 138 P.3d 140 (2006).

There is no reasonable doubt that the outcome of the trial would not have differed had the jury heard testimony from Groves' wife. First, ownership was not an issue, possession was. Second, the offer of proof regarding the wife's testimony was only that she owned the guns, not that she exclusively possessed or exclusively exercised dominion and control over the guns. In addition, Groves testified at trial, yet he did not claim or assert that he had never handled or otherwise exercised control over the guns. Third, although his wife was not allowed to testify that she was the owner of the guns, Groves took the stand at trial and testified that the guns belonged to his wife (and the State did not contest this point), thus the proposed testimony from Groves' wife would have been cumulative.⁶ See RP 114.⁷

⁶ In determining whether the error was harmless, courts look to factors such as "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and ... the overall strength of the prosecution's case." *State v. Saunders*, 132 Wash.App. 592, 604, 132 P.3d 743 (2006), *review denied*, 159 Wash.2d 1017, 157 P.3d 403 (2007).

⁷ Furthermore, the present case did not involve a potential defense of unwitting possession.

Finally, the issue of ownership was clearly insignificant in the present case since the officers explained that there were guns in the room and the officers saw Groves go to the handgun to check on it. In addition, Officer Green specifically noted that Groves picked up the box containing the firearm, thus demonstrating actual possession of the gun. See RP 65. Furthermore, constructive possession is established by examining the totality of the situation and determining if there is substantial evidence from which a jury can reasonably infer the defendant had dominion and control over the item. *State v. Porter*, 58 Wn. App. 57, 60, 791 P.2d 905 (1990). Factors that point to dominion and control include knowledge of the illegal item on the premises and evidence of residency or tenancy. *State v. Paine*, 69 Wn. App. 873, 878-79, 850 P.2d 1369, *review denied*, 122 Wn.2d 1024, 866 P.2d 39 (1993). In the present case the evidence of constructive possession was overwhelming since it was undisputed that Groves' lived in the room where the guns were found and was aware of their presence. In addition, Groves' actions in checking on the guns (as well as his statements that they were his guns) supported the conclusion that he had dominion and control over them.

Unwitting possession can be a defense, but in order to establish the defense a defendant must show that he did not know he was in possession of the item or that he did not know the nature of the item he possessed. *City of Kennewick v. Day*, 142 Wn.2d 1, 11, 11 P.3d 304 (2000); *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). In the present case Groves' could not show that he was unaware of the guns or didn't know they were guns since his own (admitted) statements to the officers demonstrated that he knew the guns were present in the bedroom.

While the proposed testimony from Groves' wife might have demonstrated that she was the legal owner or that she also had dominion and control over the guns, this fact would not have negated Groves' possession of the guns nor would it have rebutted the overwhelming evidence that Groves had been in actual or constructive possession of the guns.

Given all of these facts, the record below aptly demonstrates that a reasonable jury would have reached the same result had the alleged error not occurred and there is no reasonable possibility that the testimony would have changed the outcome of the trial. Any error, therefore, was harmless.

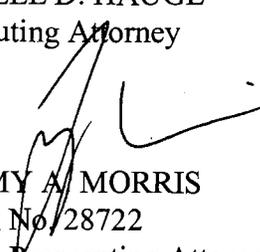
IV. CONCLUSION

For the foregoing reasons, Groves' conviction and sentence should be affirmed.

DATED October 22, 2010.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



JEREMY A. MORRIS
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DOCUMENT 1

Appendix A

Former RCW 9.41.010 (1991)

West's RCWA 9. 41. 010

WEST'S REVISED CODE OF WASHINGTON ANNOTATED
COPR. (c) WEST 1991 No Claim to Orig. Govt. Works
TITLE 9. CRIMES AND PUNISHMENTS
CHAPTER 9.41—FIREARMS AND DANGEROUS WEAPONS

9. 41. 010. Terms defined

- (1) "Short firearm" or "pistol" as used in this chapter means any firearm with a barrel less than twelve inches in length.
- (2) "Crime of violence" as used in this chapter means:
 - (a) Any of the following felonies, as now existing or hereafter amended: Any felony defined under any law as a class A felony or an attempt to commit a class A felony, criminal solicitation of or criminal conspiracy to commit a class A felony, manslaughter in the first degree, manslaughter in the second degree, indecent liberties if committed by forcible compulsion, rape in the second degree, kidnapping in the second degree, arson in the second degree, assault in the second degree, extortion in the first degree, burglary in the second degree, and robbery in the second degree;
 - (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, which is comparable to a felony classified as a crime of violence in subsection (2)(a) of this section; and
 - (c) Any federal or out-of-state conviction for an offense comparable to a felony classified as a crime of violence under subsection (2)(a) or (b) of this section.
- (3) "Firearm" as used in this chapter means a weapon or device from which a projectile may be fired by an explosive such as gunpowder.
- (4) "Commercial seller" as used in this chapter means a person who has a federal firearms license.

1988 Main Volume Credit(s)

Enacted by Laws 1935, ch. 172, § 1. Amended by Laws 1961, ch. 124, § 1; Laws 1971, Ex.Sess., ch. 302, § 1, eff. May 21, 1971; Laws 1983, ch. 232, § 1.

HISTORICAL NOTES

1988 Main Volume Historical Notes

Laws 1961, ch. 124, § 1, in the first paragraph, following "Short firearm" inserted "or pistol".

Laws 1971, Ex.Sess., ch. 302, § 1, in the second paragraph, which defined "crime of violence", following "rape," inserted "riot," and preceding "robbery" inserted "second degree assault,". Following amendment, this section read:

" 'Short firearm' or 'pistol' as used in RCW 9. 41. 010 through 9.41.160 means any firearm with a barrel less than twelve inches in length.

“ ‘Crime of violence’ as used in RCW 9. 41. 010 through 9.41.160 means any of the following crimes or an attempt to commit any of the same: Murder, manslaughter, rape, riot, mayhem, first degree assault, second degree assault, robbery, burglary and kidnapping.”

Laws 1983, ch. 232, § 1, rewrote the section to read as it now appears.

Severability—Laws 1983, ch. 232: “If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.” [Laws 1983, ch. 232, § 14.]

Severability—Laws 1971, Ex.Sess., ch. 302: “If any provision of this act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected.” [Laws 1971, Ex.Sess., ch. 302, § 35.]

Severability—Laws 1961, ch. 124: “If any part of this act is for any reason declared void, such invalidity shall not affect the validity of the remaining portions of this act.” [Laws 1961, ch. 124, § 13.]

Preemption and general repealer—Laws 1961, ch. 124: “All laws or parts of laws of the state of Washington, its subdivisions and municipalities inconsistent herewith are hereby pre-empted and repealed.” [Laws 1961, ch. 124, § 14.]

Short title—Laws 1935, ch. 172: “This act may be cited as the ‘Uniform Firearms Act.’ ” [Laws 1935, ch. 172, § 18.]

Severability—Laws 1935, ch. 172: “If any part of this act is for any reason declared void, such invalidity shall not affect the validity of the remaining portions of this act.” [Laws 1935, ch. 172, § 17.]

Construction—Laws 1935, ch. 172: “This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.” [Laws 1935, ch. 172, § 19.]

Source:

RRS § 2516-1.