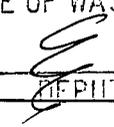


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COURT OF APPEALS  
DIVISION II

NO. 44387-2-II

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

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STATE OF WASHINGTON

BY   
DEPUTY

STATE OF WASHINGTON,

Respondent,

v.

NORMAN RUSSELL ADAMS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 11-1-01148-6

BRIEF OF RESPONDENT

RUSSELL D. HAUGE  
Prosecuting Attorney

JEREMY A. MORRIS  
Deputy Prosecuting Attorney

614 Division Street  
Port Orchard, WA 98366  
(360) 337-7174

SERVICE

Bryan G. Hershman  
1105 Tacoma Ave S  
Tacoma, WA 98402-2005  
Email: bghershman@aol.com

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically*. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED September 13, 2013, Port Orchard, WA   
**Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... ii

I. COUNTERSTATEMENT OF THE ISSUES ..... 1

II. STATEMENT OF THE CASE .....2

III. ARGUMENT.....17

    A. The Defendant’s claims regarding the jury instructions are without merit because the jury instructions used in the present case properly informed the jury of the applicable law..... 17

    B. The Defendant’s claim that his trial counsel was ineffective for failing to call several witnesses at trial must fail because: (a) The decision whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel; and (2) the Defendant has failed to show either deficient performance or prejudice. ....24

    C. The Defendant’s claim that his trial counsel provided ineffective assistance of counsel by failing to inform him of the State’s plea offer must fail because the record demonstrates that the plea offer was communicated to the Defendant.....28

    D. The Defendant’s claim that there was insufficient evidence to support the conviction for unlawful possession of a firearm must fail because the evidence, when viewed in a light most favorable to the State, was sufficient to allow a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt.....31

IV. CONCLUSION .....34

## TABLE OF AUTHORITIES

### CASES

<i>Burton v. Twin Commander Aircraft LLC</i> , 171 Wash.2d 204, 254 P.3d 778 (2011).....	21
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....	18, 29
<i>State v. Amezola</i> , 49 Wn.App. 78, 741 P.2d 1024 (1987).....	23
<i>State v. Berry</i> , 200 Wash. 495, 93 P.2d 782 (1939).....	21
<i>State v. Bourgeois</i> , 133 Wn.2d 389, 945 P.2d 1120 (1997).....	18, 29
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	32
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980).....	32
<i>State v. Fowler</i> , 114 Wash.2d 59, 785 P.2d 808 (1990).....	22
<i>State v. Hagen</i> , 55 Wn .App. 494, 781 P.2d 892 (1989).....	23
<i>State v. Jones</i> , 146 Wn.2d 328, 45 P.3d 1062 (2002).....	32, 33
<i>State v. Kolesnik</i> , 146 Wn.App. 790, 192 P.3d 937 (2008), <i>review denied</i> , , 208 P.3d 555 (2009).....	25, 27
<i>State v. Kronich</i> , 160 Wn.2d 893, 161 P.3d 982 (2007).....	19

<i>State v. Maurice,</i> 79 Wn.App. 544, 903 P.2d 514 (1995).....	25, 27
<i>State v. McFarland,</i> 127 Wn.2d 322, 899 P.2d 1251 (1995).....	19, 24
<i>State v. McKenzie,</i> 157 Wn.2d 44, 134 P.3d 221 (2006).....	18, 29
<i>State v. Partin,</i> 88 Wn.2d 899, 567 P.2d 1136 (1977).....	33
<i>State v. Redmond,</i> 150 Wn.2d 489, 78 P.3d 1001 (2003).....	18
<i>State v. Riley,</i> 137 Wn.2d 904, 976 P.2d 624 (1999).....	18
<i>State v. Salinas,</i> 119 Wn.2d 192, 829 P.2d 1068 (1992).....	32
<i>State v. Summers,</i> 107 Wn.App. 373, 28 P.3d 780, 43 P.3d 526 (2001).....	33
<i>State v. Turner,</i> 103 Wn.App. 515, 13 P.3d 234 (2000).....	32
<i>State v. Wilson,</i> 71 Wn.2d 895, 431 P.2d 221 (1967).....	18, 29
<i>Strickland v. Washington,</i> 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	19
<i>United States v. X-Citement Video, Inc.,</i> 513 U.S. 64, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994).....	20

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the Defendant's claims regarding the jury instructions are without merit when the jury instructions used in the present case properly informed the jury of the applicable law?

2. Whether the Defendant's claim that his trial counsel was ineffective for failing to call several witnesses at trial must fail when: (a) The decision whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel; and (2) the Defendant has failed to show either deficient performance or prejudice?

3. Whether the Defendant's claim that his trial counsel provided ineffective assistance of counsel by failing to inform him of the State's plea offer must fail when the record demonstrates that the plea offer was communicated to the Defendant?

4. Whether the Defendant's claim that there was insufficient evidence to support the conviction for unlawful possession of a firearm must fail when the evidence, viewed in a light most favorable to the State, was sufficient to allow a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Norman Russell Adams was charged by amended information filed in Kitsap County Superior Court with one count of assault in the second degree (DV), two counts of unlawful imprisonment (DV), and one count of unlawful possession of a firearm in the second degree. CP 26-30. Following a jury trial the Defendant was acquitted on one of the unlawful imprisonment counts and was found guilty on the remaining three counts. CP 124-25. After denying several post trial motions from the Defendant, the trial court imposed a standard range sentence. CP 278. This appeal followed.

### **B. FACTS**

On November 12, 2011 Christina Boyd received a number of text messages from Larane Wuilliez. RP 206-07, 210. Ms. Boyd and Ms. Wuilliez were friends and co-workers, and the text messages caused Ms. Boyd some concern, so she went to Ms. Wuilliez's residence to check on her friend. RP 210-11. Ms. Boyd banged on the doors and called Ms. Wuilliez's phone, but got no response. RP 211.

Later that day Ms. Boyd called the police and requested that they check on Ms. Wuilliez. RP 83-85; 211-12. Deputy Sonya Matthews was dispatched to do a welfare check on Ms. Wuilliez and went to her house

on Sunset Lane. RP 83-85. Deputy Matthews knocked on several doors of the residence but got no response. RP 85-86.

Ms. Boyd continued sending text messages to Ms. Wuilliez, and when Ms. Boyd finally got a response she and her fiancé (Clayton Young) went back to Ms. Wuilliez's residence and met with her. RP 211-12, 240. Ms. Wuilliez's face was "very bruised" and it appeared that she was in a lot of pain. RP 212-13. Ms. Boyd thought that her nose might have been broken. RP 212-13. Mr. Young similarly testified that it looked like Ms. Wuilliez had been "playing hockey or something and got in a fight." RP 240. He further described that she had two black eyes and marks on her arms. RP 240. Mr. Young then called the police. RP 216.

Deputy Matthews and Deputy Daniel Twomey responded to Ms. Wuilliez's house. RP 86, 113. The deputies immediately saw that Ms. Wuilliez had obvious injuries to her face. RP 87, 116. The deputies described that Ms. Wuilliez was a smaller, petite woman and that both of her eyes were black and swollen. RP 87, 116. She also had bruising across her nose, chin, and mouth, and had obviously been "severely injured." RP 87. She also had injuries had a bruise on her shoulder that was about the size of a fist and injuries to her legs. RP 93, 96.

Ms. Wuilliez was very quiet and was hesitant to talk with law enforcement. RP 88. Deputy Twomey described that Ms. Wuilliez was

very shaken up and that she was trembling. RP 119. Wuilliez explained that she was scared but she eventually told the deputies about the assault that had caused her injuries. RP 88-89.

At trial, Ms. Wuilliez explained that she rented the home on Sunset Lane and that she was the only person named on the lease. RP 306, 342. Ms. Wuilliez had been dating the Defendant for approximately two and a half years and he also lived at the residence. RP 307.

On November 12<sup>th</sup>, Ms. Wuilliez and the Defendant argued over the rent money, as she had spent money bailing a car out of impound and needed the money back in order to pay the rent. RP 308-09. The argument continued while the Defendant was in the shower and Ms. Wuilliez was in the living room. RP 309-10, 326. At some point the Defendant came out of the shower and pushed Ms. Wuilliez down and began hitting her. RP 310. While Ms. Wuilliez was on the ground the Defendant punched her in the nose with such force that she thought her nose was broken. RP 311-12, 328. The Defendant continued to hit her in the face, "choked" her with his hands, and then put his legs on top of her which put pressure on her neck on her neck. RP 310-12, 328. This caused Ms. Wuilliez to have trouble breathing and she felt like she was going to pass out. RP 311-12.

The Defendant eventually got off of Ms. Wuilliez and dragged her to the shower. RP 312-13. Although Ms. Wuilliez was clothed, the

Defendant pushed her into the shower. RP 313. Ms. Wuilliez described that she did not want to be in the shower but she was too scared to get out, so she remained seated in the shower with her head between her knees, until the Defendant was done. RP 313-14, 318. After the Defendant was finished showering, Ms. Wuilliez went to her room and lay down on the bed. RP 314. The Defendant eventually gave her ice for her face, and he then left the residence. RP 314. Ms. Wuilliez took off her wet clothes and took a pill to go to sleep. RP 330

Ms. Wuilliez was asked why she did not call the police after the Defendant left, and she explained that she was afraid to call the police as she thought it would only cause more problems. RP 317-18.<sup>1</sup>

As mentioned above, Ms. Wuilliez spoke to the police when they eventually came to her residence on November 12<sup>th</sup>, but she explained at trial that she did not really want the police involved and that she had not wanted the Defendant to be arrested. RP 319. She also explained that she did not want to be in court testifying. RP 319.

After the police left Ms. Wuilliez's residence, Mr. Young asked her if there were any weapons in the house that could be used to hurt the people that were trying to help her. RP 241. Mr. Young eventually asked

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<sup>1</sup> Ms. Wuilliez also described several previous instances where she had been assaulted by the Defendant. RP 315-17. Ms. Wuilliez also testified about how she had observed the

Ms. Wuilliez if he could look in a locked shed in the back yard. RP 243. Ms. Wuilliez said that he could and handed him three or four key rings that each had approximately 30 keys on them. RP 243.<sup>2</sup> Mr. Young tried a majority of the keys, but was unable to open the lock. RP 243. He then asked Ms. Wuilliez if he could cut the lock, and after Ms. Wuilliez agreed he removed the lock and entered the shed. RP 243. There were a number of tools and car parts in the shed, and Mr. Young eventually found a loaded firearm in the shed. RP 217, 227, 244-45. The police were called again, and they responded and seized the firearm. RP 217-18, 246.<sup>3</sup>

At trial, Ms. Wuilliez explained that the Defendant kept items in the shed and that the shed was usually locked. RP 319.<sup>4</sup> She specifically testified that the shed contained car related items and when she was asked whose items were stored in the shed she answered that it was the Defendant's "stuff" that was in the shed. RP 319. Ms. Wuilliez also testified that she had seen the Defendant with a firearm, although this did not occur very often. RP 320. Ms. Wuilliez described the firearm as a handgun, but did not know what kind of handgun it was. RP 320.

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victim's injuries on previous occasions. RP 220-21.

<sup>2</sup> At trial Ms. Wuilliez testified that the key to the shed had been stored in the kitchen previously. RP 321.

<sup>3</sup> The firearm was later tested and was found to be a functioning firearm. RP 265. The serial number, however, had been removed. RP 267-69.

<sup>4</sup> On cross examination defense counsel asked Ms. Wuilliez if it was true that her brother (who had stayed at her house on occasion) had also stored items in the shed. RP 321-22. Ms. Wuilliez denied defense counsel's suggestion that her brother had stored anything in

At approximately four in the morning, deputies again responded to Ms. Wuilliez's residence. RP 121. The Defendant was found outside the residence in a car and the deputies ordered the Defendant to come out of the car. RP 122-29. The Defendant complied and was arrested. RP 129-30. Deputy Twomey then advised the Defendant of his Miranda warnings and the Defendant stated that he understood his rights and was willing to talk to the deputy. RP 133-34.

Deputy Twomey asked the Defendant if he knew why the deputies were there, and the Defendant responded that they were there because he had had an argument with his girlfriend. RP 134. The Defendant then explained that he had argued with the victim and that he had slapped her and pushed her down, but claimed that he did so only because she was not allowing him to get out of the shower. RP 135-36. Deputy Twomey described the extent of the victim's injuries to the Defendant (and explained that they did not appear to be consistent with the Defendant's explanation of the events), and the Defendant then responded that the victim may have fallen against a washing machine. RP 136. Deputy Twomey asked the Defendant if he had hit the victim's neck with his knee and the Defendant responded that he did not remember doing that, but the Defendant never denied that he had done that. RP 137. Deputy Twomey

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the shed. RP 322.

finally asked the Defendant if he had forced the victim to sit in the shower with him, and the Defendant stated “I don’t know.” RP 138.

At the conclusion of the trial the jury found the Defendant guilty of assault in the second degree (DV), unlawful possession of a firearm in the second degree, and guilty of one count of unlawful imprisonment (DV). CP 124-25. The jury found the Defendant not guilty on the second count of unlawful imprisonment. CP 124-25.

After trial but prior to sentencing, Bryan Hershman was allowed to substitute in as counsel in place of the Defendant’s trial counsel (Clayton Longacre). CP 129-30. Mr. Hershman then filed a “Motion for Relief from Judgment” which raised a number of issues that essentially mirror the issues raised in the present appeal. CP 189-239. Specifically, the defense motion included allegations that:

Jury Instruction #20 misstated the elements of the crime of unlawful possession of a firearm;

That Mr. Longacre had provided ineffective assistance of counsel by: (1) failing to request an instruction defining dominion and control; and (2) failing to call certain witnesses to testify for the defense; and

That there was insufficient evidence that the Defendant had committed the crime of unlawful possession of a firearm.

CP 189-239. Defense counsel also filed a memorandum arguing that the Defendant should be granted a new trial because Mr. Longacre had failed

to inform the Defendant of a 24 month plea offer from the State. RP 259-60. Hearings were subsequently held on both motions.

The original trial judge (Judge M. Karlynn Haberly) heard and addressed the defense motions except for the motion regarding the allegation that Mr. Longacre failed to inform the Defendant of a plea offer. The trial court indicated that as Mr. Longacre would be testifying on that issue a visiting judge would hear that matter. RP (11/26/2012) at 31-33.

A hearing was subsequently held before Judge Haberly on January 4, 2012. With respect to the jury instructions, the Defendant argued that Instruction 20 misstated the elements and contradicted Instruction 21. CP 192-94, RP (1/04/2013) 42-44. Jury Instruction 20 stated that,

A person commits the crime of unlawful possession of a firearm in the second degree when he or she knowingly owns a firearm or has a firearm in his or her possession or control and he or she has previously been convicted of a felony.

CP 104. Instruction 21, the “to-convict” instruction stated in order to convict the Defendant of the crime each of the following element shad to be proved:

- (1) That on or about November 12, 2011, the defendant knowingly owned a firearm or knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of a felony;
- (3) That the ownership or possession or control of the

firearm occurred in the State of Washington.  
CP 105.

The Defendant argued that Instruction 20 contained “disjunctive” language and that a juror could thus interpret the instruction to mean that the crime could be committed by a defendant (1) knowingly owning a firearm, or by (2) having a firearm in in his possession or control “notwithstanding his knowledge of the crime.” RP (1/04/2013) 42-43; CP 193.

The Defendant further argued that Instruction 23 was improper because it did not provide a definition of the phrase “dominion and control.” CP 193-97. In addition, the Defendant argued that he received ineffective assistance due to the fact that his counsel did not object to the instructions or propose additional instructions. RP (1/04/2013) 43-44; CP 197-99.<sup>5</sup>

The trial court ultimately denied the Defendant’s motion for a new trial. RP (1/08/2013) 5. The trial noted that it had reviewed Instruction 20 and 21 and found no inconsistency. RP (1/08/2013) 3. With respect to Instruction 23, the trial court noted that the Pattern Jury Instruction Committee had advised against providing a further definition of

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<sup>5</sup> Finally, at the hearing defense counsel briefly mentioned that the defense had submitted materials from several potential witnesses who were not called the Defendant’s trial counsel. RP (1/04/2012) 44. No substantive argument was present on this issue,

“dominion and control” and that prior cases indicated that the phrase was not a technical phrase that needed further definition. RP (1/08/2013) 3-4.

Judge Vicki Hogan presided over the hearing on the Defendant’s allegation that Mr. Longacre had failed to advise the Defendant of a pre-trial plea offer from the State. RP (12/17/2012) 3. At the hearing Mr. Longacre testified that the Defendant had initially been represented by another attorney at the beginning of the case, and the State had made a plea offer to the Defendant prior to Mr. Longacre’s involvement. RP (12/17/2012) 7-8. Once Mr. Longacre became involved he began speaking with the prosecutor about resolving the case with a misdemeanor charge. RP (1/08/2012) 8. The prosecutor, however, would not agree to this resolution and the State also, at least initially, refused to reduce the amount of prison time recommended in the initial plea offer, which Mr. Longacre recalled was approximately 8-10 years. RP (12/17/2012) 8.

Several days before trial the prosecutor offered to amend the charge to assault in the third degree, and offered to recommend an exceptional sentence downward. RP (12/17/2012) 8, 19. At the time of his testimony Mr. Longacre could not remember the number of months that the prosecutor had offered to recommend, but he believed the offer was approximately 30 months and he further testified that it could have

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however. See RP (1/04/2012) 44.

been higher or lower than 30 months. RP (12/17/2012) 8, 19. Mr. Longacre further testified that he discussed the matter with the prosecutor during a pretrial hearing and further testified that he would have relayed the exact offer to the Defendant there in the courtroom. RP (12/17/2012) 18-19.

On the day that jury selection was to begin, a witness that the defense did not believe was going to actually appear for trial had, in fact, appeared for the trial. RP (12/17/2012) 14-15. At this point Mr. Longacre and the prosecutor discussed the matter in the hallway outside the courtroom, and Mr. Longacre asked the prosecutor whether the State's most recent offer was still available. RP (12/17/2012) 15, 20. The prosecutor advised that a plea offer with the same recommendation in terms of prison time was still available, but that the charges would be "tweaked" since a jury had already been called in. RP (12/17/2012) 15-16. Mr. Longacre testified that he relayed this offer to the Defendant and spoke to the about the offer for "a while." RP (12/17/2012) 16, 20-21.

Mr. Longacre testified that after discussing the offer with the Defendant he then went back to the hallway to clarify the specifics regarding the actual charges that would be a part of the proposed plea offer. RP (12/17/2012) 16. After conferring with the prosecutor, Mr. Longacre then went back into the courtroom and discussed the matter

further with the Defendant. RP (12/17/2012) 16.

Mr. Longacre testified that the Defendant vacillated between taking the offer and not taking the offer, but ultimately decided to proceed to trial as he thought the witness “would not slam him in the trial” and that the defense could thereby argue for a misdemeanor. RP (12/17/2012) 16.

At the post trial hearing the defense also called the prosecutor who handled the case, Kelly Montgomery, as a witness. RP (12/17/2012) 35. Ms. Montgomery explained that another prosecutor had initially handled the case, but that she had taken over the case by the time Mr. Longacre had appeared as defense counsel. RP (12/17/2012) 35-36.

Prior to Mr. Longacre’s involvement a formal, written plea offer had been given to the Defendant through Travis Nye, who was the Defendant’s first attorney. RP (12/17/2012) 36. This written plea agreement was a standard form used in Kitsap County and was a “pretty beefy” form that contains, among other things, a Defendant’s criminal history, the details of the plea offer, as well as the standard ranges and seriousness levels of the charged offenses. RP (12/17/2012) 44. The Defendant’s standard range was 63 to 84 months and the initial plea offer included a standard range recommendation. RP (12/17/2012) 36.

Ms. Montgomery further testified that once Mr. Longacre took

over the defense she had several conversations with Mr. Longacre about potential resolutions. RP (12/17/2012) 37. Specifically, Ms. Montgomery exchanged a number of emails with Mr. Longacre, and she proposed an offer in which the State would amend the charge to assault in the third degree with a recommendation of an exceptional sentence downward. RP (12/17/2012) 38. No specific recommendation as to the exact length of prison time was mentioned at this point. RP (12/17/2012) 38.

Later, at a pretrial hearing on March 20<sup>th</sup>, Ms. Montgomery told Mr. Longacre that the State would recommend a sentence of 24 months on the amended charge of assault in the third degree. RP (12/17/2012) 38. Ms. Montgomery then saw Mr. Longacre immediately go and have a conversation with the Defendant who was sitting in the jury box, although Ms. Montgomery was not privy to what was actually said in that conversation. RP (12/17/2012) 38. Mr. Longacre then advised Ms. Montgomery that it was “gross misdemeanor or trial.” RP (12/17/2012) 39.

On the day of trial the parties argued their motions in limine. RP (12/17/2012) 39. Although there had been some concerns about whether the victim would actually appear and testify at trial, by the time the trial had begun Ms. Montgomery had learned that the victim would, in fact, testify. RP (12/17/2012) 47-48. As the victim was going to cooperate and

testify at trial, Ms. Montgomery was “adverse” to discussing any further plea negotiations at that time and she was “ready to go” to trial. RP (12/17/2012) 48. Mr. Montgomery testified that Mr. Longacre saw that the victim was going to testify and this appeared to be a shock to the defense. RP (12/17/2012) 48. During a brief recess (while the judge was off the bench) Mr. Longacre asked Ms. Montgomery if they could “talk outside.” RP (12/17/2012) 48. Ms. Montgomery agreed, and the two then went outside the courtroom to a hallway. RP (12/17/2012) 48-49. Mr. Longacre then inquired whether the plea offer that they had previously discussed was still available. RP (12/17/2012) 48.

Ms. Montgomery testified that she told Mr. Longacre that she was still willing to recommend a sentence of 24 months, but that since the parties had already finished the motions in limine the State would not amend the charge down to assault in the third degree. RP (12/17/2012) 40, 49. Rather, the State’s offer was that the Defendant could plead guilty to assault in the second degree and the State would dismiss the other charges and recommend an exceptional sentence downward of 24 months. RP (12/17/2012) 40, 49.

Ms. Montgomery testified that Mr. Longacre then immediately went back into the courtroom where he sat down and had a conversation with the Defendant for approximately 10 minutes. RP (12/17/2012) 40-

41. Ms. Montgomery remained in the hallway and thus could not hear the conversation between Mr. Longacre and the Defendant, but she could see that they were talking and having an “animated” discussion. RP (12/17/2012) 40-41. Ms. Montgomery further explained that at some point Mr. Longacre came back to the hallway to clarify whether the plea offer involved a charge of assault in the second or third degree, and Mr. Longacre also asked again for a misdemeanor. RP (12/17/2012) 41, 50. Ms. Montgomery said she was not willing to amend the charge to a misdemeanor. RP (12/17/2012) 50. Mr. Longacre then returned to the courtroom and had another, shorter, conversation with the Defendant. RP (12/17/2012) 51.

Ms. Montgomery testified that ultimately no agreement was reached, and the trial then resumed. RP (12/17/2012) 41, 51.

After the testimony from Ms. Montgomery concluded, the defense next called the Defendant to testify. RP (12/17/2012) 55. The Defendant claimed that Mr. Longacre never informed him that the State had made a 24 month offer. RP (12/17/2012) 61. The Defendant, however, did admit that he had hoped for an offer of a gross misdemeanor with credit for time served. RP (12/17/2012) 65. In addition, the Defendant also acknowledged that he did not remember everything he had discussed with Mr. Longacre, and the Defendant admitted that he had been pretty “dope

sick” during the plea negotiations. RP (12/17/2012) 65, 67-68. The Defendant testified that his drug of choice was “meth” and he acknowledged that it was “difficult” for him while he was in the jail withdrawing from the drug. RP (12/17/2012) 70. The Defendant further explained that being “dope sick” affected his ability to perceive, and he admitted that he was still “dope sick” during the period when Mr. Longacre was representing him. RP (12/17/2012) 70. The Defendant, in fact, admitted that he was still “dope sick” at the time of his testimony at the December 17<sup>th</sup> hearing. RP (12/17/2012) 70.

At the conclusion of the hearing, Judge Hogan found that there had been no ineffective assistance of counsel and she therefore denied the Defendant’s motion for a new trial. RP (12/17/2012) 83.

### **III. ARGUMENT**

#### **A. THE DEFENDANT’S CLAIMS REGARDING THE JURY INSTRUCTIONS ARE WITHOUT MERIT BECAUSE THE JURY INSTRUCTIONS USED IN THE PRESENT CASE PROPERLY INFORMED THE JURY OF THE APPLICABLE LAW.**

The Defendant first raises several arguments regarding the jury instructions in the present case, and these issues mirror the claims raised by the Defendant in his motion for new trial below. For the reasons outlined below, each of these arguments is without merit.

The Washington Supreme Court has repeatedly stated that “the granting or denial of a new trial is a matter primarily within the discretion of the trial court and that the reviewing court will not disturb its ruling unless there is a clear abuse of discretion.” *State v. McKenzie*, 157 Wn.2d 44, 51-42, 134 P.3d 221 (2006), *citing State v. Wilson*, 71 Wn.2d 895, 899, 431 P.2d 221 (1967); *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). An abuse of discretion will be found “only ‘when no reasonable judge would have reached the same conclusion.’ ” *Bourgeois*, 133 Wn.2d at 406, 945 P.2d 1120 (*quoting Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)). Explaining this deferential standard, the *Wilson* court recalled “the oft repeated observation that the trial judge,” having “seen and heard” the proceedings “is in a better position to evaluate and adjudge than can we from a cold, printed record.” *Wilson*, 71 Wn.2d at 899.

Under Washington law, jury instructions are sufficient if they properly inform the jury of the applicable law. *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). “Parties are entitled to instructions that, when taken as a whole, properly instruct the jury on the applicable law, are not misleading, and allow each party the opportunity to argue their theory of the case.” *State v. Redmond*, 150 Wn.2d 489, 493, 78 P.3d 1001 (2003). Generally, a criminal defendant may not raise an objection to a

jury instruction for the first time on appeal unless it relates to a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *See, State v. Kronich*, 160 Wn.2d 893, 899, 161 P.3d 982 (2007).

Furthermore, to establish ineffective assistance of counsel, a defendant must show that (1) his counsel's performance was deficient and (2) the deficient performance resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052; *McFarland*, 127 Wn.2d at 335.

The Defendant in the present case first argues that Instruction 20 (or instruction 20 in combination with Instruction 21) misstated the law, and that his counsel was ineffective for failing to object to these instructions App.'s Br. at 13, 19. The Defendant's arguments, however, are without merit as the trial court's instructions properly informed the jury of the applicable law.

As outlined above, Jury Instruction 20 stated that,

A person commits the crime of unlawful possession of a firearm in the second degree when he or she knowingly owns a firearm or has a firearm in his or her possession or

control and he or she has previously been convicted of a felony.

CP 104. This instruction is a pattern instruction. *See*, WPIC 133.02.01. The Defendant, however, argues that this instruction can be read to require that a defendant knowingly owned a firearm, but the instruction can also be read to mean that a person can commit the crime by possessing a firearm without knowingly possessing the firearm. App.'s Br. at 13.

From a grammatical point of view, the issue is whether the adverb “knowingly” modifies only the verb “owns” or whether the adverb also modifies the verb phrase “has a firearm in his possession or control.” The United States Supreme Court addressed a remarkably similar issue in *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 68, 115 S.Ct. 464, 130 L.Ed.2d 372 (1994). In that case the Court examined a statute which created criminal penalties for anyone who “knowingly transports or ships” or who “knowingly receives, or distributes” any visual depiction of a minor engaging in sexually explicit conduct. *X-Citement Video*, 513 U.S. at 68, 115 S.Ct. 464 (*quoting* 18 U.S.C. § 2252). The Court explained that “the most natural grammatical reading” suggested that the term “knowingly” modified “the surrounding verbs: transports, ships, receives, distributes, or reproduces.” *Id.*

Washington courts have also previously addressed similarly

worded statutes and found no confusion. For instance, in *State v. Berry*, 200 Wash. 495, 93 P.2d 782 (1939) the court addressed a statute that required the State to prove that a defendant did certain acts “With the intent to cause [the victim] to be secretly confined or imprisoned against his will.” The Court expressed no difficulty in concluding that “the adverb ‘secretly’ qualified each of the verbs ‘confined’ and ‘imprisoned.’” *Id* at 506.

More recently, in *Burton v. Twin Commander Aircraft LLC*, 171 Wash.2d 204, 208, 254 P.3d 778 (2011) the Court addressed a statute that required a showing that a defendant manufacturer “knowingly misrepresented, concealed, or withheld from the Federal Aviation Administration (FAA)” certain information. The Court held that “knowledge as a state of mind applies to each of these forms of keeping information from the FAA; that is, ‘knowingly’ modifies each of the words ‘misrepresented,’ ‘concealed,’ and ‘withheld’ in the exception.” *Id* at 208.

In the present case, the cases above demonstrate that the most natural grammatical reading of Instruction 20 is that the term “knowingly” modifies the verb “owns” as well as the verb phrase “has a firearm in his or her possession or control.” In short, there simply is no ambiguity, as knowledge is required in each instance.

Even if there were some ambiguity, however, (such that a jury could have been somehow confused by the as to whether knowingly applied to the phrase “had in his possession or control”) any potential ambiguity was rectified by Instruction 21 which clearly and unambiguously required that in order to convict the Defendant the jury had to find that he “*knowingly* owned a firearm or *knowingly* had a firearm in his possession or control.” CP 105 (emphasis added). Given the clear language of Instruction 21, the Defendant has failed to show any error.

The Defendant next argues that the trial court erred in failing to provide the jury with a further definition of “dominion and control.” App.’s Br. at 14-16 . The trial court, however, again used the pattern instruction. *See* WPIC 133.52; CP 107. The Defendant did not object below, nor did he propose a supplemental instruction, nor has he offered any authority that demonstrates that a further definition of dominion and control is constitutionally required. The Defendant, therefore, has waived this issue on appeal. *See, e.g., State v. Fowler*, 114 Wash.2d 59, 69, 785 P.2d 808 (1990) (An objection to a jury instruction cannot be raised for the first time on appeal unless the instructional error is of constitutional magnitude).

The Defendant however, claims that his trial counsel was ineffective for failing to propose a further instruction on “dominion and

control.” App.’s Br. at 18-20. The Defendant, however, cannot show deficient performance or prejudice since under Washington law a trial court need not give a further instruction on dominion and control. *See State v. Amezola*, 49 Wn.App. 78, 88, 741 P.2d 1024 (1987) (“Thus far our courts have not treated ‘dominion and control’ as a technical phrase or term of art, and we decline the invitation to do so.”); *State v. Hagen*, 55 Wn .App. 494, 498, 781 P.2d 892 (1989) (trial court not required to define dominion and control). Furthermore, the Committee on pattern instructions has clearly explained that Washington’s “case law has not developed a direct definition” of dominion and control and that the case law has not yet “has not yielded a consistent definition that can be incorporated into a jury instruction.” *See*, Comment to WPIC 50.03. Given this state of the law the Defendant simply cannot show that the trial court erred or that his counsel’s performance was deficient (or caused the Defendant any prejudice) merely by failing to request a further definition of dominion and control. Rather, there is no Washington law requiring such an instruction and thus the Defendant cannot show that the trial court would have given such an instruction even if his counsel had raised the issue.

For all of the above mentioned reasons, the Defendant’s claims regarding the jury instructions in the present case are without merit.

**B. THE DEFENDANT'S CLAIM THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL SEVERAL WITNESSES AT TRIAL MUST FAIL BECAUSE: (A) THE DECISION WHETHER TO CALL A WITNESS IS A MATTER OF LEGITIMATE TRIAL TACTICS AND WILL NOT SUPPORT A CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL; AND (2) THE DEFENDANT HAS FAILED TO SHOW EITHER DEFICIENT PERFORMANCE OR PREJUDICE.**

The Defendant next claims that his trial counsel was ineffective for failing to call several potential defense witnesses to testify. App.'s Br. at 20-21. This argument is without merit because the Defendant has failed to show either deficient performance or prejudice.

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's objectively deficient performance prejudiced her. *McFarland*, 127 Wn.2d at 334-35. An appellate court is to strongly presume that counsel was effective, and the defendant must show no legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 335-36. To demonstrate prejudice, a defendant must show that there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *McFarland*, 127 Wn.2d at 335.

Furthermore, "The decision whether to call a witness is ordinarily a matter of legitimate trial tactics and will not support a claim of

ineffective assistance of counsel.” *State v. Kolesnik*, 146 Wn.App. 790, 812, 192 P.3d 937 (2008), *review denied*, 165 Wash.2d 1050, 208 P.3d 555 (2009) (*citing State v. Maurice*, 79 Wn.App. 544, 552, 903 P.2d 514 (1995)).

In the present case the Defendant claims that there were six witnesses who contacted trial counsel. App.’s Br. at 20. The record, however, only shows that three of these witnesses ever had any contact with trial counsel. CP 210-36. The affidavits of Mr. Chambers, Mr. Lacy, and Mr. Willard do not in anyway indicate that these people ever spoke with trial counsel or anyone from his office. CP 213-15, 221-22, 234-36. Thus Defendant clearly cannot show any deficient performance with respect to these witnesses since there is no evidence counsel was aware of their existence.

Although the remaining three individuals (Ms. Adams, Ms. Jones, and Mr. McLeod) claimed to have either spoken with defense counsel or to have left a message for him, the Defendant fails to demonstrate that these witnesses could have provided admissible testimony that would have been helpful to the Defendant. Mr. McLeod, for instance, indicates that he was aware that the Defendant kept items in the shed; a fact that would have bolstered the State’s case. CP 225 (“The shed is where Norm kept tools and equipment . . .”). Furthermore, none of these individuals claimed

any direct knowledge that anyone other than the Defendant stored items in the shed.

The Defendant further claims that three of the “witnesses *told Mr. Longacre* that the key to the shed hung on a cabinet in the kitchen and that the shed was often left unlocked.” App.’s Br. at 20 (emphasis added), citing the declarations of Mr. McLeod, Mr. Lacy, and Mr. Willard. This claim, however, misconstrues the record, as neither Mr. Lacy nor Mr. Willard assert that they had any contact with trial counsel or his office. See CP 221-22, 234-36.

Mr. McLeod, on the other hand, did claim that he had spoken to trial counsel, but, as mentioned above, Mr. McLeod also states that he was aware that the Defendant stored items in the shed and Mr. McLeod makes no mention of any other person storing any items in the shed. CP 224-26. Thus, his testimony could have potentially bolstered State’s case. Furthermore, although Mr. McLeod asserts that he was aware that the key to the shed was kept in the kitchen, any testimony about this fact would have been merely cumulative, since the evidence at trial showed that the key to the shed had been kept in the kitchen. RP 321.

Additionally, although the three affidavits from Ms. Adams, Ms. Jones, and Mr. McLeod do claim that these individuals had not seen the Defendant with a gun, the Defendant fails to explain how this evidence

was admissible. ER 404(a) explains that evidence of a person's character (or a trait of a character) is generally not admissible. Furthermore, even in those limited circumstances where character evidence is admissible, the method of introducing such character evidence is through "testimony as to reputation." ER 405(a). None of the affidavits in the present case make any reference to the Defendant's reputation. Thus, there is nothing in the record to indicate that these potential witnesses had any admissible testimony to offer.

Finally, with respect to those potential witnesses who did speak to defense counsel, it is entirely possible that defense counsel found their testimony to be less than credible or had other legitimate concerns regarding their testimony. It is for this reason that Washington courts have held that the decision whether to call a witness is ordinarily a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. *Kolesnik*, 146 Wn.App. at 812; *Maurice*, 79 Wn.App. at 552.

In the present case the Defendant has failed to overcome the strong presumption that his counsel provided effective representation. Furthermore, the Defendant can show no prejudice because even if the jury had heard testimony from several witnesses who said that they had never seen the Defendant with a firearm, that fact would have done

nothing to bolster the Defendant's case. The claim by the State was not that the Defendant always carried a firearm or that he frequently carried or displayed a firearm. Rather, the State's claim was that the Defendant kept a firearm wrapped up and hidden in a tool shed: a place where the gun would be hidden from view and not seen by others. Thus, testimony that other individuals had not seen the Defendant with a firearm was not at all inconsistent with the State's theory, nor did it otherwise bolster the Defendant's case. In short, the Defendant has failed to show how such testimony, even if it was admissible, could have changed the outcome of the trial.

**C. THE DEFENDANT'S CLAIM THAT HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INFORM HIM OF THE STATE'S PLEA OFFER MUST FAIL BECAUSE THE RECORD DEMONSTRATES THAT THE PLEA OFFER WAS COMMUNICATED TO THE DEFENDANT.**

The Defendant next claims that his trial counsel provided ineffective assistance of counsel by failing to communicate the State's 24 month plea offer. App.'s Br. at 21. This claim is without merit because the record below shows that the plea offer was communicated to the Defendant. Thus, the trial court did not err in rejecting the Defendant's claim in this regard. As mentioned previously, the Washington Supreme

Court has repeatedly stated that “the granting or denial of a new trial is a matter primarily within the discretion of the trial court and that the reviewing court will not disturb its ruling unless there is a clear abuse of discretion.” McKenzie, 157 Wn.2d at 51-42; Wilson, 71 Wn.2d at 899; Bourgeois, 133 Wn.2d at 406. An abuse of discretion will be found “only ‘when no reasonable judge would have reached the same conclusion.’ ” Bourgeois, 133 Wn.2d at 406. Explaining this deferential standard, the Wilson court recalled “the oft repeated observation that the trial judge,” having “seen and heard” the proceedings “is in a better position to evaluate and adjudge than can we from a cold, printed record.” 71 Wn.2d at 899, 771 P.2d 711.

The State does not dispute that an actual failure to convey a plea offer can constitute ineffective assistance of counsel. In the present case, however, the record clearly demonstrated that the plea offer was conveyed to the Defendant. Specifically, the record shows that immediately after receiving the plea offers from the State Mr. Longacre conveyed those offers to the Defendant. RP 16, 19-21, 38-41, 49-50. Judge Hogan, who heard the testimony and was in the best situation to evaluate the credibility of the witnesses, found no ineffective assistance of counsel.

Furthermore, the defense theory on this issue made little sense. It was undisputed, for instance, that it was the Defendant’s trial counsel who

approached the prosecutor on the day of trial and asked if a 24 month offer was still available. RP 15, 20, 48. When the prosecutor explained that the Defendant could still plead in exchange for a 24 month recommendation, Defense counsel then immediately went into the courtroom and had a lengthy conversation with the Defendant and counsel even came back outside at one point to clarify the terms of the agreement. RP 20, 40-41, 49-50.

These facts not only corroborate defense counsel's testimony that he conveyed the offer to the Defendant, they also demonstrate that the Defendant's post-trial claim made no sense. If for instance, one were to assume that defense counsel did not want to convey a plea offer to his client (perhaps in order to be able to bill the Defendant for his trial services) it simply makes no sense that defense counsel would actually approach the prosecutor and ask about the possibility of a plea offer. If trial counsel was deadset on proceeding to trial (despite the defendant's willingness to plead) then there would be no reason for him to approach the prosecutor and specifically inquire about the availability of the previous offer.

Finally, although the Defendant claimed he was not aware of the plea offer, the credibility of the Defendant's testimony was called into serious question by several facts. First, the Defendant's claim that he did

not know of the 24 month offer was clearly self-serving since he had just been found guilty of a number of serious charges and was thus facing a lengthy prison sentence. Secondly, the Defendant admitted that he was “dope sick” from meth during the relevant time periods and he admitted that being “dope sick” could have an effect on his ability to perceive events.

In short, the record below clearly supports the trial courts finding that there had been no showing of ineffective assistance of counsel. The Defendant, therefore, has failed to show that the trial court abused its discretion in denying his motion for a new trial.

**D. THE DEFENDANT’S CLAIM THAT THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM MUST FAIL BECAUSE THE EVIDENCE, WHEN VIEWED IN A LIGHT MOST FAVORABLE TO THE STATE, WAS SUFFICIENT TO ALLOW A RATIONAL TRIER OF FACT TO FIND THE ESSENTIAL ELEMENTS OF THE CRIME BEYOND A REASONABLE DOUBT.**

The Defendant next claims that there was insufficient evidence that he committed the crime of unlawful possession of a firearm. App.’s Br. at 23-26. This claim is without merit because the evidence at trial, when viewed in the light most favorable to the prosecution, was sufficient to permit a rational trier of fact to find the essential elements of the crime

beyond a reasonable doubt.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Furthermore, credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). An appellate court is to defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011, 833 P.2d 386 (1992).

Under Washington law, possession may be actual or constructive and constructive possession need not be exclusive. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002); *State v. Turner*, 103 Wn.App. 515, 522, 13 P.3d 234 (2000). A person has constructive possession of an item if he or she has dominion or control over the item such that the item may be reduced to actual possession immediately. *Jones*, 146 Wn.2d at 333. A

court reviews the totality of the circumstances to determine whether dominion and control exist. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

A person has dominion and control if the object can be immediately reduced to actual possession. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Dominion and control need not be exclusive. *State v. Summers*, 107 Wn.App. 373, 384, 28 P.3d 780, 43 P.3d 526 (2001). When determining whether a person has dominion and control, courts look to the totality of the circumstances. *Summers*, 107 Wn.App. at 384. Finally, when a person has dominion and control over a premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises. *Summers*, 107 Wn.App. at 384.

In the present case the evidence, when viewed in a light most favorable to the State, showed that the Defendant lived at the residence on Sunset Lane with Ms. Wuilliez. RP 306, 342. In addition, Ms. Wuilliez testified that the Defendant kept items in the shed and that the shed was usually locked. RP 319.<sup>6</sup> When asked specifically whose items were in the shed, Ms. Wuilliez testified that it was “Norm’s stuff.” RP 319. Ms. Wuilliez also testified that she had seen the Defendant with a handgun.

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<sup>6</sup> On cross examination defense counsel asked Ms. Wuilliez if it was true that her brother had also stored items in the shed. RP 321-22. Ms. Wuilliez denied defense counsel’s suggestion that her brother had stored anything in the shed. RP 322.

RP 320. When Mr. Young went through the shed he found that the shed contained a number of tools and car parts in the shed, and Mr. Young eventually found a loaded firearm in the shed. RP 217, 227, 244-45.

Viewing this evidence in a light most favorable to the State, the evidence was sufficient to permit a rational trier of fact to find that the Defendant (who stipulated that he had been convicted of a felony) was in constructive possession of a firearm. Nothing more was required.

#### IV. CONCLUSION

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

DATED September 13, 2013.

Respectfully submitted,  
RUSSELL D. HAUGE  
Prosecuting Attorney

JEREMY A. MORRIS  
WSBA No. 28722  
Deputy Prosecuting Attorney

