DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 11-0846
	)	DEPARTMENT B
v.	)	**MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
JIMMY EDWARD ESTELL, JR., Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-117395-001

The Honorable Edward W. Bassett, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Angela Corinne Kebric, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
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Attorneys for Appellant

O R O Z C O, Judge

¶1 Defendant Jimmy Edward Estell, Jr. appeals his conviction and sentence for misconduct involving weapons because the trial court erred in: (1) denying his motion to suppress; (2) failing to strike the jury panel; (3) admitting jail phone calls; and (4) failing to declare a mistrial. For the reasons that follow, we affirm.

Motion to Suppress

¶2 Estell argues that the trial court erred when it denied his motion to suppress the firearm. He contends that police conducted an illegal search when they used their authority to compel him to open the apartment door and later obtained a search warrant based in part on the smell of marijuana emanating from the open door.

¶3 The Fourth Amendment bars unreasonable searches and seizures. U.S. Const. amend. IV. A warrantless search is presumptively unreasonable under the Fourth Amendment, "subject only to a few specifically established, 'jealously and carefully drawn' exceptions." *Rodriguez v. Arellano*, 194 Ariz. 211, 214, ¶ 9, 979 P.2d 539, 542 (App. 1999) (citations omitted). Consent and exigent circumstances are among the recognized exceptions to the requirement that officers obtain a warrant before entering a home. *State v. Canez*, 202 Ariz. 133, 151-52, ¶¶ 52-56, 42 P.3d 564, 582-83 (2002). In reviewing a trial court's ruling on a motion to suppress, we restrict our review to consideration of

the facts the trial court heard at the suppression hearing. *State v. Blackmore*, 186 Ariz. 630, 631, 925 P.2d 1347, 1348 (1996). We review the facts in the light most favorable to sustaining the trial court's ruling. *State v. Hyde*, 186 Ariz. 252, 265, 921 P.2d 655, 668 (App. 1996).

¶4 At the suppression hearing, a police detective testified that the manager of an apartment complex informed police that Estell, who had outstanding warrants for his arrest, lived in one of the apartments. He also stated that Estell was home most of the day babysitting the children and was seen there the morning of the incident. The detective also testified that he repeatedly knocked on the apartment door and announced that he was with the El Mirage Police and was looking for Estell. When Estell finally came to the door, he opened it about four inches secured by a chain, identified himself, and said he knew he had outstanding warrants. Estell told the detective, however, that he was not going to come out until his girlfriend returned and closed the door.

¶5 The detective testified that when Estell cracked the door open, he saw children in the house, and he "believe[d] it was at that point when [he] smelled some burning marijuana." He later testified, however, that the smell of marijuana "was strong from the first time I smelled it. I smelled it from

standing on the sidewalk out – 20 feet away from the front door I could smell it."

¶6 Estell's girlfriend arrived at the apartment within fifteen minutes and yelled to Estell to open the door and come out. After Estell exited the apartment and was handcuffed, he walked by his girlfriend and asked her, "Are you going to tell them about that?" When the detective asked, "What?", Estell responded, "The Glock."

¶7 After police cleared the house, Estell's girlfriend gave consent to the detective, allowing him into the apartment to secure the firearm. She told the detective that the Glock was in the downstairs master bathroom under some clothes in a basket. Police secured the firearm and subsequently obtained a warrant. The warrant was based on the smell of marijuana emanating from the apartment and the presence of the firearm.

¶8 Relying on *United States v. Connor*, 127 F.3d 663 (8th Cir. 1997), Estell argues that the police illegally gained "olfactory access" to the apartment when they used their authority to compel him to open the door. In *Connor*, the court held that "an unconstitutional search occurs when officers gain visual or physical access to a motel room after an occupant opens the door not voluntarily, but in response to a demand under color of authority." *Id.* at 666. Estell argued that the gun found during the subsequent consensual search, and seized

after police obtained a search warrant based in part on the marijuana smell, was the fruit of the initial illegal search. The trial court denied the motion to suppress, finding that *Connor* was neither persuasive nor applicable and that the gun was "not the fruit of an illegal search." The court found that defendant's girlfriend, "a resident of the home, consented to the search and told the officers where the gun was located. The items were found during a valid protective sweep for safety based on knowledge of a weapon and at least one other adult male inside the residence."

¶9 We review the court's ruling for abuse of discretion if it involves a discretionary issue but review constitutional issues and purely legal issues de novo. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004). We find no error in the court's denial of the motion to suppress.

¶10 The holding in *Connor* is inapplicable under the facts of this case. In *Connor*, acting on an anonymous tip that the suspects in a burglary were hiding out in a motel room, police knocked loudly and repeatedly on the door of a room they believed might contain the burglars. The officers identified themselves as police and, with at least one weapon drawn, ordered the occupants to "Open Up." *Connor*, 127 F.3d at 665. The court held that under those circumstances, when the suspects opened the door in response to the police command that they do

so, the police conducted an illegal search when they observed the contraband in plain sight. *Id.* at 666. Here, the detective, who was in plain clothes and had his gun holstered, did not command Estell to open the door but simply announced that he was a police officer looking for Estell. We find that when Estell voluntarily opened the front door, albeit only a crack and only momentarily, the "olfactory access" the detective had to the apartment did not constitute a search within the meaning of the Fourth Amendment. *See United States v. Cephas*, 254 F.3d 488, 494 (4th Cir. 2001) (holding that when defendant opened the door without knowing who was on the other side, "he voluntarily exposed to the public any odors and such a view as one standing at the door could perceive," and no search occurred); *cf. United States v. Perea-Rey*, 680 F.3d 1179, 1188 (9th Cir. 2012) (noting that it is permissible to initiate consensual contact with the occupants of a home. Once such an attempt fails, however, "the officers should end the knock and talk and change their strategy by retreating cautiously, seeking a search warrant, or conducting further surveillance."). Although Estell cracked the door momentarily, he refused to exit the apartment for another fifteen minutes, indicating that he felt under no compulsion to respond to the detective's authority. Therefore, we find *Connor* is distinguishable, and its holding that police conduct an illegal search when they view

items in plain sight after compelling occupants to open a door has no applicability.

¶11 Even assuming arguendo that police conducted an illegal search by implicitly demanding that Estell open the door, we find that Estell's girlfriend's subsequent consent to a search for, and seizure of, the weapon was voluntary and was prompted by intervening circumstances that purged any taint of illegality. Whether the taint of an illegal search has dissipated is analyzed by evaluating the temporal proximity between the police illegality and the consent to search, the presence of intervening circumstances, and the purpose and flagrancy of the police misconduct. *State v. Blakley*, 226 Ariz. 25, 31, ¶ 20, 243 P.3d 628, 634 (App. 2010). Although the record indicates that the girlfriend consented to a search for the gun within fifteen minutes of the alleged illegal search, we give little weight to this temporal proximity in light of the intervening circumstances. *See State v. Guillen*, 223 Ariz. 314, 318, ¶ 16, 223 P.3d 658, 662 (2010).

¶12 First, the record gives no indication that the girlfriend was even aware of the pertinent details of the initial interaction between the detective and Estell. This constituted a break in causation that placed her "in the same posture . . . as a person not previously subject to an illegal entry." *See United States v. Furrow*, 229 F.3d 805, 814 (9th

Cir. 2000). Second, the spontaneous reference by Estell to the presence of a firearm in the apartment constituted another intervening circumstance, breaking the chain of causation between the initial alleged illegality and the girlfriend's consent to search the apartment for the weapon. *See Guillen*, 223 Ariz. at 318, ¶¶ 17-18, 223 P.3d at 662. Finally, we find that the alleged illegality in this case was not flagrant misconduct, further weighing in favor of finding that the taint had dissipated.

¶13 We find that the girlfriend's consent supplied an independent source for the seizure of the gun, notwithstanding any alleged initial illegality. We find no error in the court's denial of Estell's motion to suppress the gun.

Motion to Strike Jury Panel

¶14 Estell argues that the trial court erred when it failed to strike the jury panel because it was likely aware that he was in custody. Estell moved to strike the jury panel before jury selection began, based on the following record: When defense counsel returned from lunch, the prospective jury panel, defense counsel's paralegal, and the prosecutor were outside in the hallway waiting to enter the locked courtroom. When the jurors and counsel entered the courtroom, Estell was already seated at the defense table, and a deputy sheriff was present.

Estell argued that his right to a fair trial was violated "because the jury can figure out the fact that he's in custody."

¶15 The court denied the motion, reasoning "I don't think that the inference that the defendant is in custody naturally flows from what was observed . . . I don't think the jury would draw any unfavorable inference against your client." We review a trial court's ruling on a motion to strike a jury panel for an abuse of discretion. *See State v. Glassel*, 211 Ariz. 33, 45 ¶ 36, 116 P.3d 1193, 1205 (2005).

¶16 Knowledge of a defendant's in-custody status can create an unacceptable risk that the presumption of innocence will be eroded. *See State v. Eddington*, 226 Ariz. 72, 78, ¶ 16, 244 P.3d 76, 82 (App. 2010). As the party challenging the panel, however, Estell had the burden of showing that "the jurors could not be fair and impartial" because they had learned he was in custody. *State v. Davis*, 137 Ariz. 551, 558, 672 P.2d 480, 487 (App. 1983). "Unless the record affirmatively shows that a fair and impartial jury was not secured, the trial court must be affirmed." *State v. Greenawalt*, 128 Ariz. 150, 167, 624 P.2d 828, 845 (1981). Nothing in the record demonstrates that the prospective jurors noticed that Estell was seated in the room when they arrived or that he was in custody. We agree with the court that such an inference was not reasonable under the

circumstances. We accordingly find no abuse of discretion in the denial of his motion to strike the jury panel.

Admission of Jail Tapes

¶17 Estell next argues that the trial court erred in admitting the tapes of the jail calls because 1) the State failed to supply adequate foundation; 2) their admission violated his confrontation rights; and 3) the recordings revealed his in-custody status, depriving him of a fair trial. In the calls, Estell told his mother repeatedly that if his girlfriend failed to show up at trial, the court would have to declare a mistrial. Estell also told her that if the girlfriend did show up, his mother needed to make sure her story coincided with his mother's story. He also told his mother to tell his girlfriend to say that the phone bill found at the apartment was in his name because she had bad credit.

Foundation

¶18 Estell argues that the witness from the sheriff's office offered inadequate foundation for admission of the tapes. He contends the witness only testified as to the general procedures for pulling inmate calls and transferring them to a disc and had not personally pulled or transferred the calls or verified that the voice on the tape was Estell. The court overruled Estell's foundational objection without comment. "Whether a party has laid sufficient foundation for admission of

evidence is within the sound discretion of the trial court, and we will not disturb its ruling absent a clear abuse of that discretion." *State v. George*, 206 Ariz. 436, 446, ¶ 28, 79 P.3d 1050, 1060 (App. 2003).

¶19 We find no abuse of discretion. The requirement for authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. Ariz. R. Evid. 901(a). Circumstantial evidence may be used to prove the authenticity of a sound recording. *State v. Lavers*, 168 Ariz. 376, 388 n.8, 814 P.2d 333, 345 n.8 (1991). The question for the trial court is not whether the evidence is authentic, but only whether evidence exists from which the jury could reasonably conclude that it is authentic. *Id.* at 386, 814 P.2d at 343. Adequate foundation may be provided by "[t]estimony that a matter is what it is claimed to be," or by "[a]ppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Ariz. R. Evid. 901(b)(1), (b)(4).

¶20 In this case, the supervisor of the jail's inmate-telephone-records unit, which functions as "the custodian of records of all inmate telephone records and the audio recordings," testified that inmates must identify their booking number before making a phone call, and all inmate calls are

recorded. She testified that she received a subpoena requesting all calls made by Estell with his booking number, and her unit burned a CD of those calls. She identified the CD marked as exhibit 25 as the CD produced in her unit, containing the calls made by Estell with his booking number. She testified that the CD was in its original form because it was not possible to alter it: "[T]he only thing that you can do to it is destroy it." This testimony supplied sufficient foundation to admit the CD because the circumstances support a finding that it was what the State claimed it was: a CD of calls made by Estell from the jail. *See* Ariz. R. Evid. 901(a), (b)(1), (b)(4).

¶21 We do not find fatal to the tape's admissibility the failure of the State to offer a foundational witness to confirm the voice on the tape was indeed Estell's. *cf. State v. Wooten*, 193 Ariz. 357, 368, ¶¶ 56-58, 972 P.2d 993, 1004 (App. 1998) (holding that sufficient foundation was supplied by testimony on procedure for taping inmate calls and testimony that a detective listened to the calls and identified the speakers by their voices). Under the circumstances here, the jurors could decide, based on the content of the tapes and from comparing the voice of the woman on the tape to that of Estell's mother, who had testified at trial, whether Estell was the other speaker. *See George,* 206 Ariz. at 446, ¶¶ 30-31, 73 P.3d at 1060 (holding that in view of circumstantial evidence suggesting defendant

wrote letter, the absence of a signature went to the weight of the evidence, not its admissibility). We find that the court did not abuse its discretion in finding that the State had supplied sufficient foundation to admit the tapes.

Confrontation Rights

¶22 Estell next argues that the trial court violated the Confrontation Clause of the Sixth Amendment when it permitted the State to introduce the CD without affording him the opportunity to cross-examine the person who actually prepared it. We review evidentiary rulings that implicate the Confrontation Clause de novo. *State v. Ellison*, 213 Ariz. 116, 120, ¶ 42, 140 P.3d 899, 903 (2006).

¶23 In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause prohibited the admission of "testimonial hearsay" from a witness who did not appear at trial, unless the proponent could show that the author of the statement was unavailable to testify, and that defendant had a prior opportunity to cross-examine him. *See id.* at 68. In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the United States Supreme Court clarified that "we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person

as part of the prosecution's case." *Melendez-Diaz,* 557 U.S. at 311 n.1.

¶24 In this case Estell's ability to cross-examine the supervisor was sufficient, not only to supply foundation for admission of the CD containing his jail calls, but also to satisfy his right to confrontation. *See State v. Gomez*, 226 Ariz. 165, 168-69, ¶¶ 14-21, 244 P.3d 1163, 1166-67 (2010) (holding that testimony of analyst about DNA profiles in absence of testimony from laboratory technicians who actually generated profiles did not violate the Confrontation Clause).

In-Custody Status

¶25 Estell finally argues that the trial court erred in admitting the CD without conducting voir dire to ensure that the jury could remain impartial after learning from the CD that Estell was in custody. The court found that the relevance of Estell's consciousness of guilt, as reflected in the statements he made on the jail calls, was not substantially outweighed by the prejudice that might arise from revelation of his in-custody status. The court denied Estell's request to conduct additional voir dire to ensure the jury's impartiality, but instructed the jury, as requested by Estell:

> You have heard evidence that indicates Mr. Estell is in custody for this offense. Conditions of release are set by a Judge based upon a variety of factors. You must not let the fact that Mr. Estell is in custody for this offense influence your decision in

> any manner. The law requires that all defendants be treated the same, regardless of their custody status. Even though Mr. Estell is in custody, you must still presume that Mr. Estell is innocent unless and until the State proves, beyond a reasonable doubt, that Mr. Estell is guilty.

We presume that the jurors followed the court's instruction. *State v. Morris*, 215 Ariz. 324, 336-37, ¶ 55, 160 P.3d 203, 215-16 (2007); *see also State v. Purcell*, 117 Ariz. 305, 309, 572 P.2d 439, 443 (1977) (holding that curative instruction was adequate to remedy jurors viewing defendant in handcuffs). Estell has failed to establish that revelation of his in-custody status actually prejudiced him. *See State v. Apelt*, 176 Ariz. 349, 361, 861 P.2d 634, 646 (1993) (requiring a showing of actual prejudice in order to reverse on basis that jurors had been inadvertently exposed outside courtroom to handcuffed or shackled defendant).

Denials of Mistrial

¶26 Estell next argues that the trial court erred when it denied him a mistrial based on an incorrect legal standard and instead granted a two-week continuance mid-trial. He also argues the court erred when it denied him a mistrial after the prosecutor "misstated the law" by arguing in closing that Estell was "more than a guest" at his girlfriend's apartment because he babysat her children four to five days a week, eight hours a day.

¶27 A declaration of mistrial is "the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted." *State v. Dann*, 205 Ariz. 557, 570, ¶ 43, 74 P.3d 231, 244 (2003) (citation omitted). We review a trial court's denial of a motion for mistrial for abuse of discretion. *State v. Jones*, 197 Ariz. 290, 304, ¶ 32, 4 P.3d 345, 359 (2000).

Denial of Mistrial for Mid-Trial Delay

¶28 Estell argues first that the trial court erred in denying him a mistrial and instead granting a continuance for two weeks to allow a witness to resume testifying, based on an incorrect legal standard. In denying the motion for mistrial, the court noted in part that "on the basis of the current record, I don't think there is a manifest necessity." Because none of the jurors had a problem with returning in two weeks, the court determined that it would continue the trial for that period of time.

¶29 This case involved an unusual circumstance, in which a witness, Estell's girlfriend, went into labor immediately after her direct testimony concluded. After she gave birth by a C-Section, she was prescribed Percocet. Defendant objected to cross-examining her while she was on pain medication and to continuing the trial for two weeks when her prescription ran

out, and asked for a mistrial instead. Defendant expressed concern that the jurors would not remember the testimony by the time of closing arguments and would be "lost." The court thoroughly considered Estell's objection, noting that a break in trial of three weeks would not be "optimum by any means." After confirming that jurors could return in two weeks, the court asked counsel if allowing them to make "mini openings" after they returned would alleviate any concerns about the delay, but defense counsel told the court it would not. The court ultimately decided to continue the trial for the two weeks.

¶30 Estell argues that "manifest necessity" is inapplicable when the defendant requests the mistrial, *see United States v. Dinitz*, 424 U.S. 600, 607-08 (1976), the court predicated its denial of a mistrial on an incorrect legal standard, and therefore abused its discretion, requiring reversal. However, we are not willing to conclude on this basis alone that the trial court erred in denying the mistrial and continuing the trial until the witness could resume testifying. "We will affirm the trial court when it reaches the correct result, even though it does so for the wrong reasons." *See State v. Oakley*, 180 Ariz. 34, 36, 881 P.2d 366, 368 (App. 1994).

¶31 In this case, Estell's girlfriend's testimony supported his defense that he did not "possess" the gun within the meaning of the prohibited possessor statute. The

girlfriend testified that the gun belonged to her and that Estell did not know that the gun was in the apartment. Thus, the girlfriend's testimony supported Estell's defense. Estell has not indicated how he was prejudiced by the court permitting the girlfriend to return two weeks later for cross-examination. Therefore, we find no abuse of discretion. *See McLaughlin v. Fahringer*, 150 Ariz. 274, 277–78, 723 P.2d 92, 95–96 (1986) (recess of twenty-four to forty-eight hours to hold evidentiary hearings was a feasible alternative to mistrial and thus, no manifest necessity); *State v. Lawrence*, 123 Ariz. 301, 303–04, 599 P.2d 754, 755–56 (1979) (no prejudice when trial court permitted four-day continuance to allow time for witness interview); *State v. Johnson*, 122 Ariz. 260, 270, 594 P.2d 514, 524 (1979) (rejecting defendant's argument that he was prejudiced by a ten-day recess so juror could take pre-planned vacation because jurors would be unable to recall the trial testimony).

¶32 Estell's claim that "the trial court recognized that a continuance was problematic because it would have created a substantial break between periods of testimony" is unpersuasive because the witness's direct testimony supported Estell's defense theory. Also, the trial court never stated that Estell would be prejudiced by the delay; it simply recognized that the delay was not ideal.

¶33 Although the court applied the incorrect legal standard, we find that it did not err in denying the mistrial because it reached the correct result. *See Oakley*, 180 Ariz. at 36, 881 P.2d at 368.

Denial of Mistrial for Prosecutor's Argument

¶34 Estell finally argues that "the trial court erred when it denied defendant's motion for a mistrial, in light of the State's misstatement of the law regarding his status in the home during rebuttal argument." He also argues the trial court erred when it "failed to accurately instruct the jury when the improper argument led to jury questions."

¶35 The defense theory throughout trial was that Estell's girlfriend owned the gun. Therefore, he contended that he could not have possessed the gun because he did not live in the apartment; he did not have permission from his girlfriend to use the gun, hold the gun, or take the gun because he was simply a "guest" there. The State's theory was that Estell constructively possessed the weapon found in his girlfriend's apartment because he was not simply a "guest," but was left in control of the apartment eight hours a day, four or five days a week, when he babysat the children.

¶36 In her rebuttal closing, the prosecutor responded to Estell's argument that he was simply a "guest" at his girlfriend's apartment by reiterating that Estell was not just a

"guest" in the sense of someone "invited over to have a cup of coffee"; he was someone who was left in complete control of the apartment and the items contained within, including the gun, eight hours a day, four or five days a week. Estell moved for a mistrial on the ground that the prosecutor had misstated the law by implying that his status as a "guest" "alters ownership status or possession status." The court denied the motion for mistrial, reasoning:

> I don't find that the -- to the extent that there was some characterization of the status of defendant as something, a guest, something more than a guest, something less than a guest, I don't find that that legal issue is before the jury. They're to determine possession and – possession, control, ownership, the issues that were covered or are covered by the instructions that were argued by both counsel. So I don't find that there was any misstatement of relevant law made, so I am going to deny the motion for mistrial.

¶37 We find no abuse of discretion in the court's denial on this basis. "[P]rosecutors have wide latitude in presenting their closing arguments to the jury." Jones, 197 Ariz. at 305, ¶ 37, 4 P.3d at 360. Moreover, "prosecutorial comments which are fair rebuttal to areas opened by the defense are acceptable." *State v. Hernandez*, 170 Ariz. 301, 307-08, 823 P.2d 1309, 1315-16 (App. 1991). To determine whether a prosecutor's remarks are improper, we consider whether the statements caused the jurors to focus on matters they would not be justified in considering, and the probability, under the

circumstances, that the jurors were influenced by the remarks. *Jones*, 197 Ariz. at 305, ¶ 37, 4 P.3d at 360.

¶38 The prosecutor's remarks in this case did not call the jurors' attention to an inappropriate legal standard governing tortious liability as Estell claims. Rather, the prosecutor argued that the facts showed that Estell constructively possessed the weapon because he was left in complete control of the apartment and everything in it for extended periods of time. These remarks were fair rebuttal to the defense theory that Estell was only a guest at his girlfriend's apartment, with no more control over the gun inside the apartment than any other visitor. *See Hernandez*, 170 Ariz. at 307-08, 823 P.2d at 1315-16. The prosecutor's remarks were not improper, and the trial court did not abuse its discretion in denying a mistrial. *See Jones*, 197 Ariz. at 305, ¶ 37, 4 P.3d at 360.

¶39 In addition, the trial court's response to the jurors' questions on what responsibility Estell had as a probationer was appropriate. The parties had stipulated that Estell was on probation and was aware that a term of his probation prohibited him from possessing or controlling a firearm. The court instructed the jury that the crime of misconduct involving weapons required proof that the defendant was prohibited from possessing a weapon and proof that he

knowingly possessed a weapon.

¶40 Estell argues that the court erred in responding to the jury's questions during deliberation on 1) whether it would be a violation of Estell's probation if he knew a gun was in the apartment; and 2) what responsibility Estell had as a probationer to ensure the gun was not in the apartment while he was there. The court rejected Estell's argument that it should respond "no" to the first question and "none" to the second question. The court instead responded that whether Estell was in violation of his probation was not a matter to be determined by the jury. Also the issue of his probationary status was relevant only to his status as a prohibited possessor and could not be considered by the jury in determining whether he possessed the firearm.

¶41 We find no error in the court's response. The question of Estell's responsibility as a probationer was not before the jury. The only question before the jury was whether Estell constructively or actually possessed the gun, an issue on which the court had appropriately instructed the jury. Accordingly, the court correctly responded that the questions on Estell's duties as a probationer were not relevant except with respect to whether he was prohibited from possessing a gun.

Conclusion

¶42 For the foregoing reasons, we affirm Estell's conviction and sentence.

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Patricia A. Orozco, Judge

CONCURRING:

/S/
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Maurice Portley, Presiding Judge

/S/
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Randall M. Howe, Judge