

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	DIVISION ONE
Respondent,)	
)	No. 65725-9-1
v.)	
)	UNPUBLISHED OPINION
ALEXANDER P. FENDICH,)	
)	
Appellant.)	FILED: January 23, 2012
_____)	

Dwyer, C.J. — Alexander Fendich was convicted of unlawful possession of a firearm in the first degree arising from an incident in which he fired a friend’s .22 caliber handgun into a river at a state park. At Fendich’s trial, the owner of the handgun testified that Fendich had both handled and fired the weapon. Fendich contends that his conviction must be reversed because (1) the trial court erred by declining to instruct the jury regarding the “testimony of an accomplice,” and (2) several statements by the prosecutor during closing argument constituted flagrant misconduct. Finding Fendich’s contentions to be without merit, we affirm.

On October 9, 2009, Alexander Fendich and Justin Cunningham met in

Auburn. The two men proceeded to walk to the Green River, where Cunningham showed Fendich a .22 caliber handgun that he was carrying in his waistband. Cunningham drew the weapon and fired into the river five or six times. Thereafter, Cunningham and Fendich continued to walk southbound along the river. Near a bridge, Cunningham handed the gun to Fendich, and Fendich also fired a round into the river. Cunningham and Fendich then walked to a nearby car belonging to a friend of Cunningham. They entered the parked car and proceeded to listen to music.

William Newman was fishing with his daughter on the Green River when he observed “a couple [of] guys were shooting into the river.” Report of Proceedings (RP) at 590. He heard several shots and saw two people “fussing around” before leaving the area. RP at 592. Newman called 911 and reported that six or seven shots had been fired.

The police arrived at the scene approximately five minutes later. The officers observed several individuals sitting in a parked car. The officers approached the vehicle and ordered these individuals to exit the car. Fendich exited through the rear driver-side door. Officers discovered a .22 caliber Ruger MK II handgun hidden beneath the driver’s seat.¹ The officers proceeded to take Fendich into custody.

Fendich was interviewed by the police three days later.² Although he

¹ Officers later found six .22 caliber Ruger casings on a path near the river.

² Fendich, who was in custody at the time of the interview, waived his Miranda rights before speaking to the detective. See Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

initially denied touching the firearm, Fendich eventually admitted to firing the handgun three to four times. Fendich told the detective conducting the interview that he knew that, as a convicted felon, he was not permitted to possess a gun.³ Fendich explained that his parole officer had told him that he “could not be around or own any firearms.” RP at 394. Fendich was subsequently charged with unlawful possession of a firearm in the first degree.⁴

At Fendich’s trial, Cunningham testified that Fendich had fired the gun into the river several times.⁵ The detective who interviewed Fendich also testified regarding Fendich’s statement that he had fired the gun “three to four times.” RP at 392. Fendich requested that the jury be instructed that the “[t]estimony of an accomplice” should “be subjected to careful examination” and that such testimony standing alone is insufficient to support a guilty verdict.⁶ Clerk’s Papers (CP) at 45; RP at 783-85. The trial court declined to issue this instruction. The jury convicted Fendich as charged.

³ Fendich was prohibited from possessing a gun as a result of two felony convictions. Fendich had been previously convicted of both residential burglary and arson in the second degree in King County Superior Court.

⁴ “A person . . . is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.” RCW 9.41.040(1)(a).

⁵ Cunningham was also prohibited from possessing a firearm at the time of the incident. He pleaded guilty to unlawful possession of a firearm in the second degree. However, his plea did not require him to testify, and he did not receive any benefit from his testimony.

⁶ Fendich’s requested instruction, based upon 11 Washington Practice: Washington Pattern Jury Instruction: Criminal 6.05 (3d ed. 2008) (WPIC), stipulated:

Testimony of an accomplice, given on behalf of the State, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

CP at 45.

Fendich appeals.

II

Fendich first contends that the trial court erred by declining to instruct the jury that, because Cunningham was an accomplice to the crime of unlawful possession of a firearm, his testimony should be subjected to careful examination. We disagree.

Where evidence exists in the record to support a defendant's theory of the case, the defendant is entitled to have the court instruct the jury on that theory. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). However, a defendant is not entitled to an instruction that is not supported by the evidence. State v. Ager, 128 Wn.2d 85, 93, 904 P.2d 715 (1995). We review a trial court's determination that there was insufficient evidence to support the defendant's proposed jury instruction for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). A trial court abuses its discretion only where its decision is manifestly unreasonable or based on untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

In order for a person to act as an accomplice in the commission of a crime, he or she must have "knowledge that it will promote or facilitate the commission of the crime."⁷ RCW 9A.08.020(3)(a); State v. Hayes, 164 Wn. App. 459, 468, 262 P.3d 538 (2011). A person does not, of course, facilitate a crime

⁷ Fendich's proposed jury instruction likewise stipulated that "[a] person is an accomplice in the commission of a crime" only where that person has knowledge that his actions "will promote or facilitate the commission of the crime." WPIC 10.51.

by simply handing a gun to a person who may lawfully possess it. Nor does a person incur accomplice liability by unknowingly handing a gun to a convicted felon. Instead, the person must have knowledge that his or her actions will promote and facilitate the crime. State v. Roberts, 142 Wn.2d 471, 511-12, 14 P.3d 713 (2000). Although an accomplice need not have specific knowledge of every element of the crime for which the principal is charged, he must have “general knowledge of that specific crime.” Roberts, 142 Wn. 2d at 512. Accordingly, in order to be entitled to his proposed instruction, Fendich was required to produce some evidence of Cunningham’s general knowledge that Fendich’s possession of the gun was unlawful.

Here, as the trial court correctly determined, there was no such evidence adduced at trial. There was no evidence before the trial court to establish that Cunningham was aware that Fendich had a criminal record, and no reasonable jury could have found that Cunningham had knowledge that handing the gun to Fendich would facilitate the crime for which Fendich was charged.⁸ Indeed, when Fendich’s counsel was asked whether any such evidence had been adduced, she conceded, “I can’t make the argument in good conscience, Your Honor, that there was any testimony presented to the jury that would indicate that . . . Mr. Cunningham knew the peril that he was placing Mr. Fendich in.” RP at 789. Accordingly, the trial court’s determination that the evidence did not

⁸ It may well be that Cunningham had knowledge that his actions would promote or facilitate some other unlawful act. However, Fendich was charged only with unlawful possession of a firearm. Accordingly, evidence that he was an accomplice for purposes of this particular crime was required.

allow for a determination that Cunningham was an accomplice to the crime of unlawful possession of a firearm was neither manifestly unreasonable nor based on untenable reasons. The trial court did not abuse its discretion when it declined to issue Fendich's proposed jury instruction.⁹

III

Fendich next contends that several statements made by the prosecutor during closing argument constituted flagrant prosecutorial misconduct requiring reversal. We disagree.

"A defendant claiming prosecutorial misconduct must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial." State v. Miles, 139 Wn. App. 879, 885, 162 P.3d 1169 (2007). We review the propriety of a prosecutor's conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). Improper comments are prejudicial only where "there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict." State v. Magers, 164 Wn.2d 164, 191, 189 P.3d 126 (2008) (alteration in original) (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995)). Moreover, where a defendant does not object and request a curative instruction

⁹ Fendich asserts that "[e]ven if Cunningham knew nothing about Mr. Fendich's ineligibility to possess a firearm, Cunningham admitted . . . that he knowingly placed a gun into Mr. Fendich's hands." Br. of Appellant at 9. However, it is not enough that Cunningham knowingly handed the gun to Fendich. Instead, the law requires that an accomplice act with general knowledge that he will facilitate the crime charged. Roberts, 142 Wn.2d at 511-12.

or mistrial, reversal is unwarranted unless we determine that the objectionable remark “is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.” State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (quoting State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)).

Here, Fendich asserts that the prosecutor committed flagrant misconduct by misstating the terms of his ineligibility to possess a firearm. During closing argument, the prosecutor told the jury that Fendich knew that he “was not supposed to be near firearms” and that two different court orders stipulated that Fendich could not “be near firearms.” RP at 823-24, 835. As Fendich correctly points out, these court orders in fact specified merely that he was not permitted to “possess” firearms. Exhibit 49, 50. Although possession may be actual or constructive, proximity alone, without proof of dominion and control, is insufficient to establish possession. State v. Raleigh, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029 (2011). Thus, Fendich contends that the prosecutor’s statements impermissibly lowered the State’s burden of proof by inviting the jury to convict Fendich for something less than actual or constructive possession of a firearm. However, because Fendich failed to object to any of these remarks, he must demonstrate that any resulting prejudice could not have been neutralized by a curative instruction.

Fendich’s claim of prosecutorial misconduct fails under this standard. As

our Supreme Court has recently reiterated, in analyzing prejudice, we do not assess a prosecutor's remarks in isolation. State v. Warren, 165 Wn.2d 17, 28, 195 P.3d 940, 945 (2008). Here, although the prosecutor inaccurately described the language of the court orders in closing argument, the jury received copies of these notices to aid in its deliberations. Thus, the jury had access to the actual language of the terms of Fendich's ineligibility to possess a firearm. Moreover, the jury was properly instructed that, in order to convict Fendich of unlawful possession of a firearm in the first degree, it must find beyond a reasonable doubt that Fendich had actual or constructive possession of the firearm. The jury was instructed that constructive possession occurs only where "there is dominion and control over the item." CP at 93. Because we presume that the jury was able to follow these instructions, Warren, 165 Wn.2d at 28, Fendich has failed to demonstrate that the prosecutor's remarks had a substantial likelihood of affecting the jury's verdict. Magers, 164 Wn.2d at 191. Moreover, we have little doubt that—had Fendich objected to the prosecutor's inaccurate statements—a simple instruction from the trial court would have been sufficient to address any concern emanating from the prosecutor's argument. Because the prosecutor's conduct was not so flagrant and ill-intentioned that any resulting prejudice could not have been neutralized by a curative instruction, reversal is unwarranted.

Affirmed.

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Dupe, C. S.

We concur:

Leach, A. C. J.

Jan, J.