IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. LUKE TRAVIS GROVES, Appellant.	No. 40252-1-II UNPUBLISHED OPINION

Van Deren, J. — Luke Travis Groves appeals his conviction for unlawful possession of a firearm under RCW 9.41.040(1)(a). He argues that (1) his counsel's failure to bring a CrR 3.6 motion to suppress the firearms denied him effective assistance of counsel, (2) the trial court erred in denying his motion to dismiss because the Washington State Department of Corrections (DOC) misled him to believe that he could lawfully possess a firearm, and (3) the trial court erred in suppressing evidence of Groves's wife's firearm ownership. We affirm.

FACTS

On November 28, 2008, Bremerton Police Officers Lawrence Green and Daniel Fatt responded to a burglary call from Groves's residence in Bremerton. When the officers arrived at the residence, they asked Groves if anything had been taken and he indicated that the wires on his computer had been disconnected. Green asked Groves, "Is there anything else[?]" and Groves

responded, "Oh, my baby . . . [m]y guns." Report of Proceedings (RP) (Jan. 5, 2010) at 61. Groves went into the bedroom he shared with his wife and pulled a box out of the dresser. According to Green, Groves then started to take the gun out of the box stating, "It's my gun." RP (Jan. 5, 2010) at 61. The officers instructed him to put the gun down. Groves then went to the closet where he kept another gun and informed the officer, "Yeah, they are here." After the officers had concluded their burglary investigation, they left Groves's residence and returned to their patrol cars.

From his patrol car, Green ran Groves's data and determined that Groves had a second degree burglary felony conviction from 1990. The officers then returned to Groves's residence to arrest Groves for unlawful firearm possession. Because the officers did not want to arrest Groves in front of his children, they had him come downstairs and around the side of the apartment building. Green placed him under arrest and advised him of the charges against him. The officers removed the handgun and the rifle from the residence.[1] The State charged Groves with two counts of first degree unlawful firearm possession.

On November 23, 2009, Groves filed a motion to dismiss, alleging a due process violation because (1) at his 1991 sentencing, the trial court violated RCW 9.41.047 by not advising him that he was prohibited from possessing a firearm and (2) his understanding from the DOC notice that he signed after his sentencing was that he was only prohibited from possessing a firearm during his community supervision. On December 2, at the hearing on his motion to dismiss, Groves did not argue that DOC told him that he could possess a firearm at the conclusion of his

[1] The record does not indicate how the officers entered the residence when they returned to arrest Groves. Groves testified that, when the officers returned to his residence, "I was in the restroom, so my wife let them in." RP (Jan. 6, 2010) at 118.

community supervision. The State argued that (1) when Groves was sentenced in 1991, there was no requirement that a trial court notify a defendant convicted of a felony that he was prohibited from possessing firearms and (2) it did not have to retroactively notify every convicted felon of the firearm prohibitions when the notification requirement became effective in 1994.

The trial court denied Groves's motion to dismiss and found that (1) the 1991 trial court was not required to give a firearm notice, (2) Groves was notified by the DOC of the firearm prohibition on February 3, 1991, and (3) burglary was a crime of violence in 1991. On January 5, 2010, the trial court entered the following factual findings from the hearing on Groves's motion to dismiss:[2]

> I.
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> That as an adult in 1991 the defendant was convicted in Washington State of two counts Burglary in the Second Degree.
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> II.
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> That at the time the defendant was sentenced in 1991, the sentencing court did not provide oral or written notice to the defendant that the defendant was prohibited from possessing firearms.
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> III.
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> That the 1991 sentencing court was silent in regard to whether or not the defendant could possess a firearm.
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> IV.
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> That nine days after he was sentenced, the defendant met with his . . . DOC[ ] supervisor and signed a notification of firearms prohibition, wherein the notice signed and acknowledged by the defendant stated in plain language that once the defendant's supervision terminated he would still be subject to the firearm prohibition if the defendant had been convicted of a crime designated as a serious offense.
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> . . . .
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> IX.
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> That the defendant testified that he recalled his DOC supervisor telling the defendant he wasn't allowed to possess firearms because of DOC safety concerns.

[2] The trial court's factual findings V, VI, VII, and VIII are mislabeled; they are actually conclusions of law. Additionally, the trial court's legal conclusions V and VI are factual findings. We treat mislabeled findings or conclusions consistent with their legal function. *Willener v. Sweeting*, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

X.

That the defendant told the Bureau of Land Management (BLM) that he had been convicted of two counts of Burglary in the Second Degree on three different occasions.

XI.

That the defendant was assigned to a BLM firefighting crew that used explosives to start fires.

Clerk's Papers (CP) at 52-53. Although labeled conclusions of law, the trial court also entered the following findings of fact:

V.

That no court or governmental agency and/or their representatives affirmatively misled the defendant such that he acted in accordance with the misleading information and reasonably believed that his conduct was legal, even though it was not, as a result of the defendant being affirmatively misled.

VI.

That there was no evidence presented by the defendant that he was prejudiced by any particular and affirmatively misleading statement or information provided by a court or other governmental agency responsible for interpreting statutory gun prohibitions.

CP at 54. Additionally, the trial court entered the following legal conclusions:

V.

That in 1991, "Burglary" was listed as a serious offense, which included all designations of "Burglary", i.e., first and second degree and residential.

VI.

That prior to 1994, there was no statute in Washington mandating that sentencing courts give notice of firearm prohibitions to offenders.

VII.

That in 1994, RCW 9.41.047 became effective and requires the court provide both written and oral notice to any defendant who is sentenced after 1994 for a felony crime that the defendant is prohibited from possessing firearms of any kind.

VIII.

That RCW 9.41.047 notification requirement was created to improve sentencing procedures and as such is passive in that it does not create a new crime; rather, the statute is designed to apprise offenders of their obligations as a result of their felony conviction.

. . . .

I.

That the above-entitled Court has jurisdiction over the parties and the

subject matter of this action.

II.

That the defendant was convicted of the predicate offense Burglary in the Second Degree prohibiting the defendant from possessing firearms.

III.

That in 1991 when the defendant was sentenced, there was no statutory mandate for the sentencing court to provide the defendant with written or oral notice that he was prohibited from possessing firearms.

IV.

That the Firearm Notice given to the defendant by the D[OC] correctly apprised the defendant of his rights.

. . . .

VII.

That the court and/or state has no duty to notify offenders sentenced pre-1994 that they are prohibited from possessing firearms.

CP at 53-54.

On January 5, 2010, the trial court held a CrR 3.5 hearing and determined that the officers had Groves in custody and interrogated him when they returned to his residence after discovering Groves's prior felony conviction. Because the officers had not advised Groves of his *Miranda*[3] rights, the trial court suppressed the statements he made to the officers when they returned to his residence to arrest him for unlawful firearm possession. Additionally, the trial court granted the State's request to exclude Groves's wife's testimony about her ownership of the firearms because it was "not relevant." RP (Jan. 5, 2010) at 52.

At trial, Green testified as described above. Fatt's testimony differed slightly from Green's. Fatt testified that, in response to the officers asking if any items were missing, Groves stated, "Wait. Let me check on the guns." RP (Jan. 5, 2010) at 74. Fatt also testified that Groves opened the dresser drawer but did not handle the box with the gun. Fatt stated that he (Fatt) picked up the box containing a handgun and ammunition. Fatt also verified that there was a

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

rifle in the bedroom closet. Bremerton Police Officer Russell Holt testified that he test fired the firearms removed from Groves's residence and both functioned properly.

Groves testified that the firearms belonged to his wife.[4] He denied referring to the firearms as "my baby" or stating that "my guns had been stolen." RP (Jan. 6, 2010) at 114. According to Groves, he did not remove the box containing the handgun from the dresser; he only "opened the drawer and lifted the lid on the box." RP (Jan. 6, 2010) at 115. Groves stated that he never picked up the rifle that was in the closet but just looked from across the room to make sure it was still there.

The State produced the judgment and sentence from Groves's 1991 felony conviction. The State also produced a DOC firearms notice signed by Groves. The notice stated:

> I, Groves . . . have been advised and understand that I have been convicted of a felony and that as a felon I am prohibited by law from possessing, receiving, shipping or transporting a firearm, ammunition, or explosives.
> I understand the prohibition extends to every sort of gun, rifle or destructive device or similar device including the frame or receiver of firearms. I understand this prohibition will continue after I am discharged from supervision if the offense for which I was convicted is a crime of violence, as defined by [former] RCW 9.41.040 [(1983)].

CP at 30 (capitalization omitted).

A jury found Groves guilty of two counts of first degree unlawful firearm possession. The trial court agreed with the State's recommended exceptional sentence below the standard range and sentenced Groves to 23 days confinement, the amount of time he had already served. Groves

[4] The trial court initially ruled that ownership testimony was irrelevant because the State was not proceeding under the ownership prong of the felony firearm possession statute. But because Groves was contesting that he had referred to the firearms as his baby or as his guns, the trial court allowed him to testify regarding his response to the officers asking if anything else was missing from his residence.

appeals.

ANALYSIS

I. Ineffective Assistance of Counsel

First, Groves argues that his counsel's failure to bring a CrR 3.6 motion to suppress the firearms denied him effective assistance of counsel. Groves contends that "[t]he officers entered [his] home without a warrant and without consent" and, as a result, unlawfully seized his firearms. Br. of Appellant at 10. The State responds that Groves's argument must fail because (1) it is not supported by the record and, (2) even if his attorney brought a successful motion to suppress the firearms, the State presented sufficient evidence that Groves had firearms in his house based on testimony regarding the officers' first entry.

We review claims of ineffective assistance of counsel de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006). To prove ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient, i.e., that it fell below an objective standard of reasonableness and (2) the deficient performance prejudiced him, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). This standard is "highly deferential and courts will indulge in a strong presumption of reasonableness" until the defendant shows in the record the absence of legitimate or tactical reasons supporting trial counsel's conduct. *Thomas*, 109 Wn.2d at 226.

"Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). "The burden is on a defendant alleging ineffective assistance of counsel to show

deficient representation based on the record." *McFarland*, 127 Wn.2d at 335. If a defendant's claim of ineffective assistance depends on evidence or facts not in the existing trial record, then the appropriate means of raising the issue is a personal restraint petition. *McFarland*, 127 Wn.2d at 335.

Failure to move for suppression of evidence is not per se deficient representation because there may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial. *McFarland*, 127 Wn.2d at 336. A reasoned judgment that the suppression motion will fail is a legitimate reason not to pursue it. *See McFarland*, 127 Wn.2d at 337 n.3.

Although Groves argues on appeal that the officers entered his home "without a warrant and without consent," Br. of Appellant at 10, Groves testified that when the officers returned to his residence, "I was in the restroom, so my wife let them in." RP (Jan 6, 2010) at 118-19. The State did not challenge Groves's statement, presumably because the legality of the officers' second entrance was not in dispute. But, based on Groves's testimony, it was uncontested at trial that his wife consented to the officers' second entry. Because that appears to be the only evidence Groves's counsel had at trial, Groves's counsel could have determined that a suppression motion would fail and thus, had a legitimate reason not to pursue it. *See McFarland*, 127 Wn.2d at 337 n.3. Thus, this claim fails.

II. Motion to Dismiss

Next, Groves argues that we should vacate his conviction because the trial court erred in denying his motion to dismiss the charges. Groves contends that (1) the sentencing court's failure in 1991 to give him a firearm restriction warning affirmatively misled him and (2) DOC misled him to believe that he could lawfully possess a firearm after he served his sentence, including DOC

community supervision.

A. Standard of Review

Groves does not provide a standard of review. The State argues that we review the trial court's denial of Groves's motion to dismiss for manifest abuse of discretion. The State contends that, although Groves has not cited CrR 8.3, his motion is properly characterized as a motion to dismiss due to governmental mismanagement under CrR 8.3. But, whether the State's prosecution of Groves violated his due process rights because, as he argues, he was misled by DOC and the trial court to believe he could lawfully own a firearm, is a question of law that we review de novo. *See generally*, *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996) (stating that we review issues of law de novo).

B. Findings of Fact

We review challenged findings of fact for substantial evidence, whereas we review conclusions of law de novo. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997); *State v. Halstien*, 122 Wn.2d 109, 128–29, 857 P.2d 270 (1993). Unchallenged findings of fact are verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

Regardless of its label as a legal conclusion or factual finding, we review a finding of fact as what it actually is, a factual finding. *State v. Ross*, 141 Wn.2d 304, 309, 4 P.3d 130 (2000). Findings of fact are determinations of "whether evidence shows that something occurred or existed." *State v. Niedergang*, 43 Wn. App. 656, 658, 719 P.2d 576 (1986). Conclusions of law are determinations "made by a process of legal reasoning from facts in evidence." *Niedergang*, 43 Wn. App. at 658-59. Here, Groves does not challenge the trial court's factual findings. Thus, they are verities on appeal.

C. Claims of Misleading Conduct by the Sentencing Court and DOC

Groves argues that he was "misled into believing that he could lawfully possess a firearm after the completion of his probationary period." Br. of Appellant at 11 (boldface omitted). Groves relies on *State v. Leavitt*, 107 Wn. App. 361, 27 P.3d 622 (2001), *State v. Minor*, 162 Wn.2d 796, 174 P.3d 1162 (2008), and *State v. Breitung*, 155 Wn. App. 606, 230 P.3d 614 (2010), *petition for review granted*, No. 84580-8 (Wash. Apr. 26, 2011) to support his argument that the sentencing court had a duty to advise him of his loss of the right to own, possess, or control firearms. But because these three cases rely on and discuss the 1994 RCW amendment[5] that required the sentencing court to notify the convicted person of the firearm restriction and the statute was not in effect when Groves was convicted in 1991, these cases are inapplicable to our analysis. In 1991, the sentencing court was not required to give Groves notice of the prohibition on his right to possess firearms. Moreover, Groves agrees that, "[a]lthough he was not notified of the firearm restriction, the date of offense makes that unnecessary." Br. of Appellant at 14. The argument that he was misled about his ability to possess firearms because the sentencing court did not advise him of the limitation on his right to possess them lacks merit.

Next, Groves contends that DOC's firearm notice misled him to believe that the firearm restriction would not continue beyond his DOC supervision. Groves specifically argues that the trial court erred because in 1991 burglary was not a crime of violence as defined in former chapter 9.41 RCW (1983). But in 1991 second degree burglary was included in the definition of "crime

[5] *See* former RCW 9.41.047(1) (1994); Laws of 1994, 1st Spec. Sess. ch. 7, § 404 (effective June 13, 1994). Moreover, former RCW 9.41.047 did not require courts to give notice to felons convicted before the 1994 enactment. *State v. Sweeney*, 125 Wn. App. 77, 83-84, 104 P.3d 46 (2005); *State v. Reed*, 84 Wn. App. 379, 385-86, 928 P.2d 469 (1997).

of violence." Former RCW 9.41.010(2)(a) (1983) ("'Crime of violence' as used in this chapter means . . . [a]ny of the following felonies . . . burglary in the second degree."). Because at the time of his conviction second degree burglary was a crime of violence under former RCW 9.41.010(2), DOC's notice did not mislead him.

Groves also appears to argue that the DOC notice misled him because it misstated that crimes of violence were defined in former RCW 9.41.040 when they were actually located in former RCW 9.41.010. Groves does not provide analysis or legal authority to support his argument that DOC's citation to an erroneous statute misled him to believe that second degree burglary was not a crime of violence. We do not address this argument.[6] *See* RAP 10.3(a)(6) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record); *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970, *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed.2d 177 (2004). Moreover, the trial court's unchallenged factual finding states, "That no court or governmental agency and/or their representatives affirmatively misled the defendant." CP at 54. The trial court did not err in denying Groves's motion to dismiss.[7]

[6] Additionally, Groves did not raise this argument at the trial court and has failed to argue that it is a manifest error affecting a constitutional right. *See* RAP 2.5.

[7] The State also argues that no governmental entity affirmatively misled Groves to believe he could lawfully possess a firearm. The State then contends that any entrapment by estoppel defense must fail. Because Groves did not argue entrapment by estoppel in his opening brief, and we hold that the trial court did not err in denying his motion to dismiss, we need not address the State's entrapment by estoppel argument. *See* RAP 10.3(a); *see also State v. Olson*, 126 Wn.2d 315, 321, 893 P.2d 629 (1995) ("[W]hen a[defendant] fails to raise an issue in the assignments of error, in violation of RAP 10.3(a)(3), *and* fails to present any argument on the issue or provide any legal citation, an appellate court will not consider the merits of that issue.").

III. Suppression of Groves's Wife's Firearm Ownership Evidence

Lastly, Groves argues that the trial court erred in suppressing his proffered evidence that Groves's wife owned the firearms. Groves contends that "[e]vidence of ownership is always relevant in a prosecution for possession of contraband," but he provides no citation to legal authority for this proposition. Br. of Appellant at 19. We disagree.

Before trial, the trial court granted the State's motion in limine to preclude Groves from presenting evidence that his wife owned the firearms because his "wife's statements [we]re not relevant." RP (Jan. 5, 2010) at 52. The trial court noted that the State could prove Groves's unlawful firearm possession "by proving ownership[,] possession[,] or having control." RP (Jan. 4, 2010) at 14.

"[A] criminal defendant has no constitutional right to have irrelevant evidence admitted in his or her defense." *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983) (citing *Washington v. Texas*, 388 U.S. 14, 16, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)). Moreover, evidence is relevant and necessary if the purpose of admitting the evidence is of consequence to the action and makes the existence of the identified fact more probable. ER 401; *State v. Powell*, 126 Wn.2d 244, 259, 893 P.2d 615 (1995). Even relevant evidence may be excluded if its "probative value is substantially outweighed by the danger of unfair prejudice." ER 403. The trial court determines whether evidence is relevant and we review the trial court's decision to admit or exclude evidence for "abuse of discretion." *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A trial court abuses its discretion if its decision "is manifestly unreasonable or based upon untenable grounds." *Powell*, 126 Wn.2d at 258.

The State charged, and the jury ultimately convicted, Groves under RCW 9.41.040(1)(a).

RCW 9.41.040(1)(a) states:

> A person, whether an adult or juvenile, 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.

The State proceeded under the theory that Groves had the firearms in his possession or control, not that he owned them. The State contended that, not only was it irrelevant who owned the firearms but, if admitted, the evidence "would be more prejudicial than probative, particularly since it doesn't present a defense and doesn't go to the elements of the crime." RP (Jan. 4, 2010) at 13.

We agree with the State. Groves's wife's ownership of the firearms was not relevant to the proceedings because it would not have any tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable than it would have without the evidence. *See* ER 401. Firearm ownership was not relevant at Groves's trial because the State presented evidence of Groves's possession and control, not ownership, through the officers' testimony.

Next, citing the res gestae rule, Groves asserts that the trial court denied him the opportunity "to present a complete picture of the facts and circumstances surrounding the crime." Br. of Appellant at 18. But the ER 404(b) res gestae exception is inapplicable to the evidence regarding Groves's wife's ownership of the firearms. "Under the res gestae . . . exception to ER 404(b), evidence of other crimes or bad acts is admissible to complete the story of a crime or to provide the immediate context for events close in both time and place to the charged crime." *State v. Lillard*, 122 Wn. App. 422, 432, 93 P.3d 969 (2004); *Powell*, 126 Wn.2d at 263.

Because the evidence Groves contends was excluded in error was not "evidence of other crimes or bad acts," nor did it relate to the immediate context of the events, res gestae is inapplicable. We conclude that the trial court did not abuse its discretion in excluding the evidence of Groves's wife's firearm ownership because it was not relevant.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Van Deren, J.

We concur:

Penoyar, C.J.

Johanson, J.