

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

**No. 28904-4-III**

**Respondent,**

**Division Three**

**v.**

**GABRIEL M. TOSCANO,**

**UNPUBLISHED OPINION**

**Appellant.**

Brown, J. — Gabriel M. Toscano appeals his two unlawful possession of a firearm convictions. He contends the State failed to provide sufficient evidence of possession and raises evidentiary and cumulative error issues. We affirm.

**FACTS**

Officers executed a search warrant at 800 County Road, Apartment 17, in Warden. The Cano family rented the apartment; Knorra Cano was Mr. Toscano's girl friend. In Ms. Cano's bedroom, officers found a .38 caliber revolver located under the mattress, with three live rounds of ammunition. The gun was wrapped in a blue bandana. Also located in the bedroom was a Department of Licensing suspension notice to Mr. Toscano, a plugged-in cellular phone with text messages to Mr. Toscano,

and shoes that appeared to be Mr. Toscano's. Mr. Toscano listed the apartment as an alternate address on a car rental agreement found in the rental car parked outside the apartment. Mr. Toscano stayed with his girl friend about once a week, sleeping in her bedroom. Both Mr. Toscano and his girl friend denied ownership of the revolver and knowledge of its presence. Police found a shotgun and shotgun shells in the trunk of Mr. Toscano's rented car. The rental company gave Mr. Toscano one key fob to the vehicle.

Because Mr. Toscano was previously convicted of serious violent offenses, it was illegal for him to possess a firearm. Thus, the State charged him with two counts of unlawful possession of a firearm.<sup>1</sup>

At trial, Ms. Cano's mother claimed the revolver was hers. The State argued the revolver was wrapped in a blue bandana associated with Mr. Toscano's gang. Mr. Toscano moved in limine to exclude any evidence of gang affiliation. The trial court, in balancing the requirements to admit relevant evidence to show ownership with the need to avoid undue prejudice allowed the evidence. But, the State agreed to instruct its witnesses to use the alternate term "group" instead of "gang" to refer to those individuals whose color is associated with the bandana.

Sergeant Phillip Coats, a corrections officer, testified the blue bandana had significance to a group that Mr. Toscano had proclaimed membership. He inadvertently

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<sup>1</sup> The State also charged Mr. Toscano with possession of 40 grams or less of marijuana, but that conviction is not the subject of this appeal.

called the group a “gang,” during his testimony, but then quickly corrected himself. Report of Proceedings (Feb. 16, 2010) (RP) at 270. There was no defense objection. When asked about limiting instructions to the jury after closing arguments, defense counsel stated “there wasn’t any testimony about gang association.” RP at 339.

During trial, defense counsel handed Detective Dean Hallatt several documents, asking if the detective recognized them. The judge required that the detective first identify the documents. The detective then stated, “I’ve been handed, . . . an affidavit of search warrant on the 1996 Ford Explorer. . . . Police buy money.” RP at 228. Defense counsel objected, stating, “I didn’t ask you.” RP at 228. Detective Hallatt explained the documents included a list of police buy money. The detective continued describing the documents, again mentioning one was a list of police buy money. Without objection, defense counsel took back the documents and moved on.

The jury found Mr. Toscano guilty as charged. He appealed.

## ANALYSIS

### A. Evidence Sufficiency

The issue is whether, considering the possession evidence, sufficient evidence supports Mr. Toscano’s unlawful possession of firearm convictions.

In determining the sufficiency of the evidence, the standard of review is “whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a

reasonable doubt.” *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990). “A claim of insufficiency admits the truth of the State’s evidence and all reasonable inferences drawn therefrom.” *State v. Fleming*, 155 Wn. App. 489, 506, 228 P.3d 804 (2010).

RCW 9.41.040(1)(a) provides, “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 . . . of any serious offense as defined in this chapter.” Mr. Toscano acknowledges his prior conviction for a serious offense.

“Possession may be actual or constructive.” *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). “Actual possession occurs when the weapon is in the actual physical custody of the person charged with possession.” 11A Washington Practice: Washington Pattern Jury Instructions: Criminal § 133.52, at 617 (3d ed. 2008). “Constructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found.” *Echeverria*, 85 Wn. App. at 783. Dominion and control need not be exclusive to establish constructive possession. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). Close proximity alone is not enough to establish constructive possession – other facts must enable the trier of fact to infer dominion and control. *Id.* Factors pointing to dominion and control include knowledge of the illegal item on the premises

or evidence of residency or tenancy. *State v. Jeffrey*, 77 Wn. App. 222, 227, 889 P.2d 956 (1995).

Constructive possession is established by examining the totality of the situation and determining if substantial evidence exists from which a jury can reasonably infer the defendant had dominion and control over the item or the premises. *State v. Paine*, 69 Wn. App. 873, 879, 850 P.2d 1369 (1993); *see also State v. Spruell*, 57 Wn. App. 383, 387, 788 P.2d 21 (1990) (showing dominion and control over the premises where drugs are found is a means by which constructive possession of drugs is often established).

Regarding the revolver, officers testified they located it under a mattress in a room where Mr. Toscano regularly slept. While the apartment did not appear to be Mr. Toscano's primary residence, it was his secondary residence considering he listed it as such on his car rental agreement. Officers located Mr. Toscano's mail, cellular phone and shoes in the room. A corrections officer familiar with Mr. Toscano testified the blue bandana signified a group in which Mr. Toscano had proclaimed membership. While Ms. Cano's mother claimed ownership of the revolver, credibility determinations are for the trier of fact. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Based on the totality of the circumstances, substantial evidence exists from which a jury can reasonably infer Mr. Toscano had dominion and control over the premises where the revolver was located. Thus, the evidence supports constructive firearm possession.

Accordingly, a rational trier of fact could have found the essential elements of unlawful possession of a firearm beyond a reasonable doubt.

Regarding the shotgun, it was located in the trunk of Mr. Toscano's rental car. He was the sole individual listed on the rental agreement with authority to use the rental car and he was the sole person given a key. Viewing this evidence in the light most favorable to the State, Mr. Toscano was the sole individual with dominion and control over the car. As set forth above, constructive possession can be established by showing the defendant had dominion and control over the location where the firearm was found. *Echeverria*, 85 Wn. App. at 783. Again, resolving Mr. Toscano's contrary evidence is left to the jury. *Camarillo*, 115 Wn.2d at 71.

In sum, sufficient evidence supports both of Mr. Toscano's unlawful possession of firearm convictions.

#### B. Evidentiary Issues

The issue is whether the trial court erred in allowing Sergeant Coats' gang testimony and Detective Hallatt's buy money testimony.

We review evidentiary rulings for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). A trial court abuses its discretion when it adopts a view that no reasonable person would take, applies the wrong legal standard, or relies on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010).

Regarding the gang testimony, Sergeant Coats testified about Mr. Toscano's affiliation with a group identified with the color blue. After being advised prior to testifying to use the word, "group" instead of "gang," Sergeant Coats inadvertently called the group a "gang," during his testimony, but immediately corrected himself, without defense objection. RP at 270. Defense counsel noted when asked about limiting instructions, "there wasn't any testimony about gang association." RP at 339. The State correctly argues under RAP 2.5(a) an evidentiary error that is not of constitutional magnitude cannot be raised for the first time on appeal. Our Supreme Court has decided evidentiary errors under ER 404(b) (character evidence) are not of constitutional magnitude. *State v. Jackson*, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

"The purpose of requiring an objection in general is to apprise the trial court of the claimed error at a time when the court has an opportunity to correct the error." *State v. Moen*, 129 Wn.2d 535, 547, 919 P.2d 69 (1996). Here, the State did not object to Sergeant Coats' testimony. Since the sergeant quickly corrected himself, defense counsel's decision to not call attention to the inadvertent slip could have been tactical based upon the lack of impression on the jury, or with the design not to call attention to the oversight. And, counsel chose not to request a limiting instruction. Any alleged error cannot now be raised on appeal. We consider the claimed error waived.

Regarding the buy-money testimony, defense counsel handed Detective Hallatt several documents and asked if he recognized the documents. The court required the

documents to be identified for the record. The documents included a list of police buy money. Defense counsel stopped the testimony and, without objection, moved on. Again, evidentiary errors in general cannot be raised for the first time on appeal.

Moreover, under the invited error doctrine, a party may not set up an error at trial and then complain about the error on appeal. *State v. Korum*, 157 Wn.2d 614, 646, 141 P.3d 13 (2006). “The invited error doctrine prevents parties from benefiting from an error they caused at trial regardless of whether it was done intentionally or unintentionally.” *State v. Recuenco*, 154 Wn.2d 156, 163, 110 P.3d 188 (2005), *rev’d on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). As the State correctly notes, defense counsel provided the documents to Detective Hallatt leading to their identification for the record. The claimed error was set up by defense counsel. Since even unintentional errors caused by the complaining party cannot be raised on appeal, Mr. Toscano’s buy money issue is waived.

In sum, we find no evidentiary error. Having so found, we do not reach Mr. Toscano’s cumulative error issue. *In re Det. of Law*, 146 Wn. App. 28, 42, 204 P.3d 230 (2008), *review denied*, 165 Wn.2d 1028 (2009). And, we do not address Mr. Toscano’s statement of additional grounds for review (SAG) because he solely asks us to “take everything into consideration when reviewing my case,” without raising any legal issues. SAG at 1. Lastly, we note Mr. Toscano attaches two declarations outside



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our record. Under RAP 10.3(a)(8), we do not review appendix material not contained in the record.

Affirmed.

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

WE CONCUR:

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Brown, J.

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Kulik, C.J.

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Korsmo, J.