

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	No. 2 CA-CR20050272
Appellee,	)	Department A
	)	
vs.	)	(Pima County Superior
	)	Court Cause No. CR-
	)	20043431)
GARY EDWARD COX,	)	
	)	
Appellant.	)	
_____	)	

---

APPELLANT'S OPENING BRIEF

---

Law Offices  
PIMA COUNTY LEGAL DEFENDER

ISABEL G. GARCIA  
Legal Defender

By: STEPHAN J. McCAFFERY  
Assistant Legal Defender  
32 North Stone, 8<sup>th</sup> Floor  
Tucson, Arizona 85701  
(520) 740-5775  
State Bar No. 21214  
LDO No. 00085900

# Table of Contents

## Page

1.	Table of cases and authorities . . . . .	iii
2.	Issues presented . . . . .	1
3.	Statement of the case . . . . .	1
4.	Arguments . . . . .	3
	<b>A. The evidence showed that Cox was driving his girlfriend home after she picked up her belongings from her friend. The evidence was insufficient to show that Cox exercised dominion and control over the firearms Perko and Pruett had placed in the car’s trunk . . . . .</b>	<b>3</b>
	<b>B. The evidence supported the inference that Cox’s relationship to the guns in the trunk did not amount to dominion and control. Cox requested that the court instruct the jury under <i>State v. Tyler</i>. The trial court abused its discretion in refusing to give the instruction . . . . .</b>	<b>9</b>
	<b>C. The trial court’s possession instruction inadequately stated the law and prejudiced Cox. Thus, the trial court’s instruction resulted in fundamental error . . . . .</b>	<b>15</b>
5.	Conclusion . . . . .	19
6.	Certificate of service . . . . .	20
7.	Certificate of compliance . . . . .	21

**1. Table of cases and authorities.**

	<b>Page</b>
<b>CASES</b>	
<i>Dodd v. Boies</i> , 88 Ariz. 401, 357 P.2d 144 (1960) . . . . .	4
<i>Francis v. Arizona Dept. of Transp.</i> , 192 Ariz. 269, 963 P.2d (App.1998) . . . . .	11
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1974) . . . . .	3
<i>Patterson v. New York</i> , 432 U.S. 197 (1977) . . . . .	3
<i>Smith v. Horn</i> , 120 F.3d 400 (3d Cir.1997) . . . . .	16
<i>State v. Crivellone</i> , 138 Ariz. 437, 675 P.2d 697 (1983) . . . . .	9
<i>State v. Gallegos</i> , 178 Ariz. 1, 870 P.2d 1097 (1994) . . . . .	16
<i>State v. Hurley</i> , 197 Ariz. 400, 4 P.3d 455 (App. 2000) . . . . .	15
<i>State v. Johnson</i> , 155 Ariz. 23, 745 P.2d 81 (1987) . . . . .	16
<i>State v. Mathers</i> , 165 Ariz. 64, 796 P.2d 866 (1990) . . . . .	3
<i>State v. Miramon</i> , 27 Ariz.App. 451, 555 P.2d 1139 (App.1976) . . . . .	5, 14
<i>State v. Orendain</i> , 188 Ariz. 54, 932 P.2d 1325 (1997) . . . . .	16
<i>State v. Rienhardt</i> , 190 Ariz. 579, 951 P.2d 454 (1997) . . . . .	4
<i>State v. Schad</i> , 142 Ariz. 619, 691 P.2d 710 (1984) . . . . .	16, 18

<i>State v. Tschilar</i> , 200 Ariz. 427, 27 P.3d 331 (App.2001) . . . . .	9
<i>State v. Tyler</i> , 149 Ariz. 312, 718 P.2d 214 (App. 1986) . . . . .	9-12, 14-15
<i>State v. Wall</i> , 212 Ariz. 1, 126 P.3d 148 (2006) . . . . .	12

**ARIZONA CONSTITUTION**

Ariz. Const. Art. 2, § 4 . . . . .	15
Ariz. Const. Art. 6, § 9 . . . . .	1

**UNITED STATES CONSTITUTION**

Amendment 5 . . . . .	15
Amendment 14 . . . . .	15

**ARIZONA REVISED STATUTES**

A.R.S. §12-120.21 . . . . .	1
A.R.S. §13-105(30) . . . . .	16
A.R.S. §13-105(31) . . . . .	14
A.R.S. §13-3102 . . . . .	13
A.R.S. §13-4031 <i>et seq.</i> . . . . .	1

**ARIZONA RULES OF CRIMINAL PROCEDURE**

Rule 20(a) . . . . .	3
----------------------	---

## **2. Issues presented.**

## **3. Statement of the case.**

### **A. Procedural History.**

¶1 A 12-member jury convicted Appellant Gary Edward Cox of three counts of deadly weapon possession by a prohibited possessor. RA, 54. The trial court sentenced Cox to enhanced, concurrent, substantially mitigated 6-year terms. RA, 93. Cox timely filed a notice of appeal. RA, 97. This Court has jurisdiction under Ariz. Const. Art. 6, § 9, A.R.S. §§12-120.21 and 13-4031 *et seq.*

### **B. Facts.**

¶2 On August 1, 2004, Cox was driving with his girlfriend, Shari Perko. Tr. (3/1/05) 118. They were returning from Perko's friend's house. *Id.* at 120. Perko had been helping her friend, Barbara Pruet, pack. *Id.* They packed a shotgun Perko had loaned Pruet in the car's trunk. *Id.* Unknown to Perko, Pruet also packed two handguns she had borrowed. *Id.* Because Perko

had a child, she stored her guns at her friend, Rebecca Nao's, house. *Id.* at 136-137. Pruett borrowed the guns when she became afraid of an ex-boyfriend because he was stalking her and poisoning her animals. *Id.* at 141.

¶3 Deputy Jeffrey Bonds was on patrol and stopped Cox and Perko. Tr. (3/1/05) 82-83. While he was speaking with Cox, he noticed a shell casing between the seats. *Id.* at 85. Earlier, Pruett had gone through her brass belongings with Perko. *Id.* at 142. Pruett gave the belongings to Perko, who collected brass. *Id.* The brass shell might have come from the box of brass belongings Perko had taken. *Id.* at 162.

¶4 Bonds asked whether there were any weapons in the car, and Cox said there were not. *Id.* at 86. Bonds returned to his car to run a records check when Deputy Lyle arrived. *Id.* Lyle spoke with Perko and Bonds returned to speak with Cox. *Id.* at 87. Lyle told bonds that Perko had explained there was a shotgun in the trunk. *Id.* at 89. Bonds asked Cox whether there was a shotgun in the trunk, and Cox said there was. *Id.* Cox opened the trunk for Bonds. *Id.* Inside was a shotgun, power tools, and other

items. *Id.* Bonds also noticed a pistol case containing two pistols. *Id.* at 90.

¶5 The state charged Cox with three counts of possession of a deadly weapon by a prohibited possessor. RA, 1.

#### **4. Arguments.**

**A. The evidence showed that Cox was driving his girlfriend home after she picked up her belongings from her friend. The evidence was insufficient to show that Cox exercised dominion and control over the firearms Perko and Pruett had placed in the car's trunk.**

¶6 The denial of a motion for directed verdict is reversible for an abuse of discretion. *State v. Mathers*, 165 Ariz. 64, 796 P.2d 866 (1990). The prosecution must carry the burden of persuasion and production for each offense element. *Mullaney v. Wilbur*, 421 U.S. 684 (1974); *Patterson v. New York*, 432 U.S. 197 (1977) The state must present evidence substantial to warrant a conviction on the crime charged. *Mathers, supra*; Rule 20(a), Arizona Rules of Criminal Procedure.

¶7 In reviewing the evidence's sufficiency, this court examines the evidence in the light most favorable to sustaining the verdict and resolves all reasonable inferences against the defendant. *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997). Purely speculative inferences or conclusions are not substantial evidence. *Dodd v. Boies*, 88 Ariz. 401, 404, 357 P.2d 144, 146 (1960). An inference cannot stand where there is another equally reasonable inference. *Id.*

¶8 After the state presented its case, Cox moved for a judgment of acquittal on all counts. Tr. (3/2/05) 31. Cox argued that the state had not shown that he knew the guns were in the trunk or that he exercised dominion and control over them. *Id.* Cox further argued that at best, the state had shown his mere presence in proximity to the guns. *Id.* at 32. The state responded that there was evidence that Cox knew the guns were in the trunk and that this was sufficient to establish constructive possession. *Id.* The court denied Cox's Rule 20 motion. *Id.*

¶9 The state's closing argument focused almost entirely on the evidence regarding Cox's knowledge that the guns were in the

trunk. Tr. (3/2/06) 71-77. The state's argument equated Cox's knowledge and the guns' proximity with constructive possession:

We're not arguing that he had it in his lap and had actually possessed it. He had constructive possession of those guns. He knew they were there. He knew they could have stopped the car and gone back and gotten them. That's constructive possession.

Exercising dominion and control over them is to have the ability to pick up and move the items. That's what the defendant had. He knew the guns were there and he knew that he could possess and control them should the need arise.

*Id.* at 76.

¶10 Even taking the state's claim that Cox knew the guns were in his trunk as true, this is insufficient to establish the dominion and control necessary for constructive possession.

¶11 The state's closing argument equated the possibility of physical possession with constructive possession. According to the state, when someone is aware of an item's location and has the ability to physically possess the item, he has constructive possession. This is not the law.

¶12 In *State v. Miramon*, 27 Ariz.App. 451, 452, 555 P.2d 1139, 1140 (App.1976), the court explained that to prove constructive

possession of marijuana, the state must show that the accused exercised dominion and control over the marijuana. The court held that while the evidence may have shown the defendant knew there were bags of marijuana under his automobile seat, this was insufficient to establish that he exercised the dominion and control necessary to sustain the conviction for possessing marijuana for sale. *Id.* at 453.

¶13 The state did not dispute that Cox was helping Perko retrieve items from Pruett. Rather, the state's theory of Cox's guilt was that Cox knew Perko had her guns in the trunk. That this is inadequate can be seen from the following examples:

(1) Bob picks up his friend Bill, a police officer, after work. Bob is a felon. Bill has his firearm in a holster. Though Bob is aware that Bill, his passenger, has a gun in his car, Bob does not constructively possess that gun. This is so even though Bob might actually possess the gun by grabbing it.

(2) Bob again picks up Bill. This time, however, Bill is carrying his gun and other equipment in his hands. He asks Bob to open the trunk so that he can put his gun and other items there. Bob

complies. Bob is not in constructive possession, though he knows the gun is in his trunk and might stop his car, open it, and actually possess it.

(3) Bob picks up Bill, who is not a police officer, but has just finished shooting his new gun at a firing range. Bill asks Bob to open the trunk so that he can put the gun there. Bob complies. Bob does not constructively possess the gun because he does not exercise dominion and control over it. Bill's status as a police officer in the previous fact patterns is irrelevant.

(4) Bob again picks up Bill from the firing range. Bob tells Bill to put the gun in the trunk, because he does not like being around guns and does not want to alarm a police officer should he be stopped for some reason. Bob does not constructively possess the gun in his trunk. He is transporting Bill, who possesses the gun, but Bob has no intention to control the gun and so has not exercised dominion and control over the gun. This is true even though he directed Bill to place the gun in the trunk.

¶14 These conclusions are supported by *Miramon* and the distinction between evidence of a person's mere presence near a

prohibited item and evidence that he exercised dominion and control over the item.

¶15 The state's evidence established nothing more than the above fact patterns. The state did not even contend that from Cox's knowledge and proximity that the jury could infer that the guns were actually his. Rather, the state's theory was that Cox was guilty because he was driving a car, knew his passenger's guns were in the car, and could, if he wanted, physically possess the guns. Under this theory, Bob would also be guilty under all four fact patterns. Thus, the state's theory was incorrect and the evidence it presented to support its theory was insufficient to show Cox's constructive possession of the guns.

¶16 The evidence here was even more favorable to Cox's lack of possession than the hypothetical fact patterns. Perko explained to the jury that she bought the guns before she met Cox. Tr. (3/1/05) 136. She produced the bills of sale, which were admitted into evidence. *Id.* at 138. *See also*, Exhibits A, B, C, and D. She shared payments on the Mustang. *Id.* at 137. She had her own set of keys. *Id.* Thus, unlike Bob's passengers who

depended on Bob for access to the trunk, Cox's passenger had the ability and right to open the trunk.

¶17 The trial court erred when it denied Cox's Rule 20 motion and permitted the jury to convict Cox on insufficient evidence in violation of Cox's state and federal due process rights. Thus, this Court should vacate the convictions.

**B. The evidence supported the inference that Cox's relationship to the guns in the trunk did not amount to dominion and control. Cox requested that the court instruct the jury under *State v. Tyler*. The trial court abused its discretion in refusing to give the instruction.**

¶18 This Court reviews the trial court's decision to refuse a jury instruction for an abuse of discretion. *State v. Tschilar*, 200 Ariz. 427, 27 P.3d 331 (App.2001).

¶19 A defendant is entitled to an instruction reasonably supported by the evidence. *State v. Crivellone*, 138 Ariz. 437, 675 P.2d 697 (1983). "[W]here an appropriate instruction is requested by the defendant, the trial court should present it to

the jury.” *State v. Tyler*, 149 Ariz. 312, 316, 718 P.2d 214, 218 (App. 1986).

¶20 Cox requested that the court instruct the jury that

As for each count of the indictment, the State must prove beyond a reasonable doubt that Mr. Cox did willfully have or keep a deadly weapon in his possession with the intent to control the use and management thereof, or that Mr. Cox did willfully have a deadly weapon in his control with the power and intent to guide or manage such deadly weapon.

RA, 32 at p. 2. Cox cited *Tyler* in support of the instruction. *Id.*

¶21 When settling jury instructions, Cox argued he was entitled to the instruction. Tr. (3/2/05) 38-39. The state argued that *Tyler* was wrongly decided. *Id.* at 39. The state also argued it suggested that constructive possession was insufficient. *Id.*

¶22 Several reasons appear to underlie the trial court’s refusal to give the instruction. *Id.* at 40-41. First, the court agreed with the state that *Tyler* was wrongly decided. *Id.* at 40 (“I think the *Tyler* court went too far. It imposes a higher standard than the statute.”). Second, the court explained that Cox’s defense was that he did not know that the guns were in the trunk and therefore did not exercise dominion and control over them. *Id.* at

41. Third, the court explained that its instruction requiring that Cox exercise the right of control adequately captured the dominion and control requirement, so the requested instruction was already covered. Fourth, the court reasoned that because the charge in *Tyler* was possession of a prohibited weapon, its holding did not apply to cases involving possession of a weapon by a prohibited possessor. *Id.* at 43.

¶23 None of the court's reasons were cogent and the court's denial of the requested instruction was an abuse of discretion.

¶24 The court's opinion that *Tyler* went too far cannot serve as the basis for its refusal to grant the instruction. A trial court is bound by the decisions of higher courts. *Francis v. Arizona Dept. of Transp.*, 192 Ariz. 269, 271, 963 P.2d 1092, 1094 (App.1998) (superior court bound by court of appeals's decisions). Thus, its first reason for refusing to give the instruction was an abuse of discretion.

¶25 The court's second reason for denying the instruction was error. Cox was entitled to an appropriate instruction on request even though his defense was that he did not exercise dominion

and control by virtue of his ignorance of the guns' presence in his trunk. This is because he was entitled to an instruction supported by the evidence, regardless of its consistency or inconsistency with his defense. *See State v. Wall*, 212 Ariz. 1, 6, 126 P.3d 148, 153 (2006) (defendant presenting all-or-nothing defense nonetheless entitled to instructions on lesser offenses). Further, Cox's defense was not limited to his claim of ignorance. The defense argued in closing that Cox's knowledge of the guns' presence was insufficient to prove possession:

At some point, if he had knowledge of the guns, that still doesn't make it possession. That just makes it knowledge.

What the evidence shows is that Gary was merely present where the guns were at. [. . .] that's insufficient. You need more. You need dominion and control.

Those are tough legal words, dominion and control. What that means is power and authority over that object.

Tr. (3/2/05) 80-81. Thus, the trial court was incorrect that the defense was restricted to Cox's lack of knowledge.

¶26 The court's third reason was faulty in two ways. First, it did not capture the dominion and control requirement. Instead, it

eliminated the dominion requirement altogether. Second, its statement that it captured the *Tyler* instruction Cox requested is both incorrect and inconsistent with its first reason for rejecting the instruction. It is inconsistent because the court stated that it would not give the *Tyler* instruction because it “went too far.” Therefore, its instruction could not be both legally correct and equivalent to *Tyler*’s legally incorrect instruction. In fact, the court’s instruction fell far short of the requested instruction. Because its instruction eliminated the dominion requirement, it did not adequately capture the instruction actually given in *Tyler*.

¶27 The court’s fourth reason, that *Tyler* involved possession of a prohibited weapon, relies on a distinction without a difference. Both the charge in *Tyler* and the charge here arise from the same statute—A.R.S. §13-3102. Both subsection (A)(4) governing possession by a prohibited possessor and (A)(3) governing possession of a prohibited weapon use the same word, “possessing,” to define the crimes. There is no indication within the statute that the legislature intended these two uses of the

word “possessing” to carry different meanings. Further, both occurrences have the same definition. See A.R.S. §13-105(31).

¶28 In *Tyler*, the court considered whether the trial court erred in refusing to give a defense-requested instruction regarding firearm possession. The court concluded that the trial court had properly denied the request because the instruction added a criminal intent requirement and erroneously stated the law. *Id.* Had the defendant asked the court to instruct the jury that the state must prove beyond a reasonable doubt

[t]hat the defendant ... did wilfully have or keep a pistol in his possession with the intent to control the use and management thereof, or that defendant did wilfully have a pistol in his control with the power and intent to guide or manage such pistol.

the trial court would have been obliged to give it. *Id.* at 316-17.

The trial court had instructed the jury that for the defendant’s possession to be criminal, he was required to exercise dominion or control over the firearm. *Id.* at 316. The *Tyler* court explained that this instruction was adequate because the terms “dominion” and “control” had their ordinary meanings, which were “absolute ownership” and “power over,” respectively. *Id.*

¶29 Cox was entitled to the instruction not given in *Tyler*, but which the *Tyler* court explained should be given on request. Further, unlike the instruction the trial court in *Tyler* gave, the instruction on possession the trial court gave here failed to adequately cover what the law requires for possession. The reasons the trial court offered for refusing Cox's request were based on the court's disagreement with and misunderstanding of the law. Without an adequate and accurate instruction, the trial court denied Cox his state and federal constitutional rights to due process and a fair trial. Ariz. Const. Art. 2, § 4; U.S. Const. Amends. 5 and 14. Thus, the trial court abused its discretion in refusing to give the requested instruction and this Court should vacate the convictions.

**C. The trial court's possession instruction inadequately stated the law and prejudiced Cox. Thus, the trial court's instruction resulted in fundamental error.**

¶30 This Court reviews a trial court's decision to give a particular instruction for an abuse of discretion. *State v. Hurley*, 197 Ariz. 400, ¶9, 4 P.3d 455 (App. 2000). Review of whether an

instruction correctly stated the law, however, is *de novo*. *State v. Orendain*, 188 Ariz. 54, 56, 932 P.2d 1325, 1327 (1997). When the instructions, taken as a whole, may have misled the jury, the convictions must be reversed. *State v. Johnson*, 155 Ariz. 23, 26, 745 P.2d 81, 84 (1987) (“Where there is the possibility that the defendant was convicted on deficient jury instructions, the conviction must be reversed.”); *State v. Gallegos*, 178 Ariz. 1, 10, 870 P.2d 1097 (1994) (error in jury instruction reversible if instruction supports reasonable presumption that jurors would be misled). *See also Smith v. Horn*, 120 F.3d 400 (3d Cir.1997) (granting *habeas* relief because reasonable likelihood that jury interpreted instruction so as to eliminate essential element).

¶31 The possibility that a jury convicted the defendant based on deficient jury instructions is fundamental error. *State v. Schad*, 142 Ariz. 619, 621, 691 P.2d 710, 712 (1984).

¶32 A.R.S. §13-105(30) defines “possess”:

“Possess” means knowingly to have physical possession or otherwise exercise dominion or control over property.

¶33 The court’s instruction to the jury on constructive possession

was erroneous because it eliminated the dominion requirement.

The instruction stated in relevant part:

A person who knowingly has direct physical control over a thing is in actual possession of it. A person who, although not in actual possession, knowingly exercises the right of control over a thing, either directly or through another person, is then in constructive possession of it.

RA, 45 at 31.01.

¶34 The state's closing argument only exacerbated the problem created by the court's instruction. Both the state and the defense argued in closing what it meant to have dominion and control over an item. These arguments did not rectify the instruction's omission, however, for their discussion of dominion in the absence of parallel language in the instructions would have seemed anomalous. The attorneys' references to "dominion" are ungrounded, because the court's instructions mentioned only control.

¶35 Even had the jurors gleaned that "dominion" was necessary, the closing arguments differed widely as to what was needed to establish this requirement. The state's argument was that

constructive possession was established because Cox knew that the guns were in his trunk and could, had he wanted, stopped the car and taken them from the trunk. This argument buttressed an understanding of the court's instructions that some minimal control of an item, such as driving a car containing it, is sufficient for culpable possession of the item. But this is not the law. See Argument B, incorporated by reference herein.

¶36 The error was also prejudicial. The state's evidence was far from compelling. At one point during deliberations, the jury informed the court that it was deadlocked and asked for guidance. RA, 47 ("We are deadlocked. What next?"). It was only after further deliberation the following day that the jury reached a verdict. RA, 54. It is plain from the jury's note that it was having difficulty finding Cox possessed the guns on the state's evidence. Thus, there is more than a possibility—which is all that is required to show fundamental error under *Schad*—that the court's and state's weakening of the requirement enabled the jury to find possession when it otherwise would have found none.

Thus, this Court should vacate the convictions.

## **5. Conclusion.**

¶37 For the reasons given in argument A, the trial court erred in denying Cox's Rule 20 motion. For the reasons given in argument B, the trial court erred in refusing Cox's requested jury instruction on possession. For the reasons given in argument C, the trial court's jury instruction on possession resulted in fundamental error and prejudiced Cox. Thus, this Court should vacate the convictions.

RESPECTFULLY SUBMITTED this 6th day of November, 2006.

Law Offices  
PIMA COUNTY LEGAL DEFENDER

By \_\_\_\_\_  
Stephan J. McCaffery  
Assistant Legal Defender

**Certificate of Service.**

I hereby certify that two copies of the Appellant's Opening Brief have been mailed this date to:

Arizona Attorney General  
Criminal Division  
1275 West Washington, 1<sup>st</sup> Floor  
Phoenix AZ 85007

and that one copy of Appellant's Opening Brief has been mailed this date to:

Gary E. Cox  
DOC #063034  
ASPC - Lewis - Stiner Unit  
P. O. Box 3100  
Buckeye, AZ 85326  
Appellant

DATED this 6th day of November, 2006.

Law Offices  
PIMA COUNTY LEGAL DEFENDER  
ISABEL G. GARCIA

By \_\_\_\_\_  
L. Needal  
Secretary - Appellate Section

**Certificate of Compliance.**

This is to certify that this brief complies with Arizona Rules of Criminal Procedure 31.13(b): This brief is double-spaced and uses a proportional typeface (Verdana, 14 point) that contains 3,381 words.

---

Stephan J. McCaffery