

64187-5

64187-5

COA No. 64187-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW BRANCH,

Appellant.

2010 MAY 28 PM 4:50



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ON APPEAL FROM THE SUPERIOR COURT OF KING COUNTY  
OF THE STATE OF WASHINGTON

The Honorable Mary I. Yu

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. The defendant's identity theft, possession of stolen property, and VUCSA drug possession convictions must be reversed because there was insufficient evidence that Mr. Branch "possessed" the contraband.

2. There was no evidence that Mr. Branch had knowledge that the stolen property was stolen.

3. There was no evidence of intent to commit a crime for purposes of the charges of identity theft.

4. There was no evidence of guilt to any of the crimes charged under an accomplice liability theory.

5. The prosecutor committed flagrant misconduct and caused constitutional error in closing argument.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Must the defendant's identity theft and possession of stolen property convictions be reversed where there was no evidence that Mr. Branch had "actual" possession of the contraband found in the apartment by police, and where the law of the case required proof of actual possession as to these counts?

2. In the alternative, was there insufficient evidence of "constructive" possession of the identity theft documents or the

stolen computers that were found in the apartment, where the factor of Mr. Branch's alleged dominion and control over the apartment was (at best) weakly supported, and where there was, in total, no substantial evidence from other sources showing Mr. Branch had dominion and control over the items themselves.

3. Was there insufficient evidence of constructive possession of the controlled substance found in the apartment, for the same reasons heretofore stated?

4. Was there insufficient evidence that Mr. Branch had knowledge that the computers were stolen, where a reasonable person could not discern that fact upon observation of the machines, and even the owners had to disassemble them to determine if they were theirs and were stolen from them?

5. Even assuming, arguendo, that the defendant possessed the identity documents, was there proof beyond a reasonable doubt that he had any intent or plans to commit some crime?

7. Was there insufficient evidence of guilt on the offenses under the accomplice liability theory introduced late in the case?

8. Did the prosecutor commit flagrant misconduct in closing argument by commenting unfavorably on the fact that Mr. Branch had not provided any innocent explanation for the presence of the

large number of identity documents and financial information found in the apartment?

### **C. STATEMENT OF THE CASE**

Andrew Branch was charged with multiple counts of identify theft in the second degree, one count possession of stolen property in the first degree, and one count VUCSA possession of a controlled substance. CP 37-47. According to the affidavit of probable cause, police executed a warrant from the Department of Corrections for the arrest of Andrew Branch on December 1, 2008, at an apartment he had given to DOC as his residence. Numerous identity documents, stolen computers, and an amount of controlled substances were found in the apartment. CP 37-47.

At trial, the evidence showed that on that date, Seattle Police Officers Marcus Inouye and Chris McNulty were dispatched to 9308 N. Greenwood Avenue, Apt. # 4, for an investigation. 7/6/09RP at 18-21. Officer Inouye knocked on the apartment door, but there was no answer. The police officers then spoke with a building resident downstairs who claimed that the man Officer Inouye described lived in apartment 4, although Officer Inouye later admitted that he had simply given the woman the description of a black male, and an

approximate age, with no actual real identifying information.

7/6/09RP at 22-23, 56.

This woman later called the officer and said that a black male had arrived at the apartment, although it was revealed later that, in fact, numerous people came and went from the residence.

7/6/09RP at 26, 44. Therefore, with additional officers, Officer Inouye returned to the apartment and executed the DOC warrant by bursting into the residence. 7/6/09RP at 26-30.

Based on identification documents and financial information found in the highly cluttered apartment, along with computers that were later determined to be stolen, and the presence of drugs in the apartment, Mr. Branch was charged with the multiple counts of identity theft and possession of stolen property, and possession of drugs. CP 37.

Mr. Branch's jury trial, held in July of 2009 before the Honorable Mary Yu of the King County Superior Court, centered on whether Mr. Branch was in fact an inhabitator of the apartment in question, and whether in particular he could be deemed to have possession of the identity documents, the computers, and the drugs, knowledge of the stolen nature of the computers, or the intent required for identity theft.

Following jury verdicts of guilty, Mr. Branch was sentenced to standard terms of incarceration of 52 months on the identity theft convictions, 52 months on the possession of stolen property conviction, and 18 months on the VUCSA possession of a controlled substance. CP 144-55.

He appeals. CP 156.

#### **D. ARGUMENT**

**1. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT ANDREW BRANCH “POSSESSED” IDENTITY THEFT DOCUMENTS, STOLEN PROPERTY, OR A CONTROLLED SUBSTANCE.**

**a. No criminal convictions may stand where the defendant's jury verdicts of guilty rest on constitutionally insufficient evidence.** In every criminal prosecution, the State must prove all elements of the charged crimes beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

On appeal, a reviewing court should reverse any conviction (and dismiss the prosecution on that charge) for insufficient evidence where no rational trier of fact could find that all the essential elements of the crime were proved beyond a reasonable doubt.

State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996).

**b. Every crime charged against Andrew Branch in this case required proof of an essential element of "possession."**

Mr. Branch was charged with multiple counts of identify theft in the second degree pursuant to RCW 9.35.020(1), (3), one count of possession of stolen property in the first degree pursuant to RCW 9A.56.150 and RCW 9A.56.140(1), and one count of VUCSA possession of a controlled substance pursuant to RCW 69.50.4013. CP 37-47.

Each of these charges share an essential element of the State's required proof that Mr. Branch "possessed" the items or contraband in question. Thus under the identity theft statute, RCW 9.35.020, the prosecution must prove guilt as follows:

No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

(Emphasis added.) RCW 9.35.020(1); see State v. Leyda, 157 Wn.2d 335, 345, 138 P.3d 610 (2006) (possession is element of identity theft). The jury was correctly instructed on this offense. See CP 88 (jury instruction defining identity theft). In the present case, the prosecutor elected to prove solely "possession" of identification

or financial information, and no other means of identity theft was pursued. 7/15/09RP at 26.

Similarly, to prove possession of stolen property, the State was required to prove "possession" of articles (the computers) and that Mr. Branch knew them to be stolen. RCW 9A.56.150; RCW 9A.56.140(1); State v. Jennings, 35 Wn. App. 216, 219, 666 P.2d 381 (1983); see CP 105.

Finally, the State was required to prove "possession" of a controlled substance. RCW 69.50.4013; State v. Cleppe, 96 Wn.2d 373, 378, 635 P.2d 435 (1981), cert. denied, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982); State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); see CP 110. With regard to this charge, the jury was given a definition of possession that included "constructive" possession, in addition to actual possession, in the context of possession of a "substance." CP 121.

**c. There was no proof that Mr. Branch possessed identification documents, stolen property, or a controlled substance.**

***(i) Actual possession not proved.***

**1. Law of the Case.**

The jury instructions pertinent to the charges of identity theft and possession of stolen property did not define "possession." See CP 88-109. Mr. Branch's jury was given an instruction defining possession as either actual or constructive. CP 121. This instruction, however, expressly referred to possession of a "substance," and referred only to the charge of possession of a controlled substance. CP 121; see Supp. CP \_\_\_\_, Sub # 39 (State's proposed jury instructions, citing WPIC 50.03); see also 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (3d ed. 2008) (WPIC 50.03) (directing that this definition of possession should be used "for controlled substance or legend drug cases only").

The easier-to-prove fact of "constructive" possession thus did not apply to Mr. Branch's criminal prosecution on any of the charges except the VUCSA drug charge. Jury instructions to which there is no objection become the law of the case. State v. Hickman, 135

Wn.2d at 103-04; State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) (if “no exception is taken to jury instructions, those instructions become the law of the case”). In criminal cases, the State assumes the burden of proving elements of an offense as those elements are stated without objection in the jury instructions. Hickman, 135 Wn.2d at 104; State v. Lee, 128 Wn.2d 151, 159, 904 P.2d 1143 (1995).

Irrespective of what either or both counsel may or may not have assumed in representing the law to the jury, the law of the case is in the jury instructions, and nowhere else. Indeed, the rule is that “[a]rguments concerning questions of law must be confined to the instructions given by the court.” State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983); State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1983) (it is misconduct to explain the law to the jury in a way that conflicts with the court’s legal instructions).<sup>1</sup>

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<sup>1</sup>Accordingly, the trial court in Mr. Branch’s case issued the standard instruction that emphasizes twice that the jury has a duty and obligation to accept and apply only “the law from my instructions.” CP 76; see 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (3d ed. 2008) (WPIC 1.01). The jury was further instructed that it should disregard any statements regarding the applicable law made by counsel that are not supported by the legal instructions:

The lawyers’ remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that . . . the law is contained in my instructions to you. You must disregard any

An appellant's assignment of error may therefore include a challenge to the sufficiency of the evidence to prove the elements of the crimes charged, as those elements were expressed in the jury instructions, regardless of whether the State believed it was proceeding under some different technical statutory understanding of the meaning of the elements of the crimes. Hickman, 135 Wn.2d at 103-04. Such challenge may of course be raised for the first time on appeal. Hickman, 135 Wn.2d at 103 n. 3 (citing State v. Alvarez, 128 Wn.2d 1, 9, 904 P.2d 754 (1995)).

## **2. No Proof of Actual Possession.**

In this case, where the jury was not given a definition of constructive possession, the State was required under the "law of the case" doctrine to prove "possession" as simply stated in the jury instructions' definitions of the identity theft and stolen property crimes, and in their "to-convict" instructions. See CP 88-89, 105-06.

"Possession," of necessity, and with respect to these counts, means actual possession, absent further definition. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual

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remark, statement, or argument that is not supported by . . . the law in my instructions.

(Emphasis added.) CP 78. The Washington courts presume that the jury followed the trial court's instructions. State v. Daniels, 160 Wn.2d 256, 264, 156 P.3d 905 (2007) (citing State v. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001)).

possession occurs when the item in question is in the actual, physical custody of the person charged with possession. Callahan, 77 Wn.2d at 29. Actual possession and constructive possession are separate legal concepts. Thus, “dominion and control” for purposes of constructive possession, means that the object “may be reduced to actual possession immediately.” (Emphasis added.) State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

When facing a challenge to the sufficiency of the evidence, the reviewing court asks whether, after viewing the evidence and all reasonable inferences therefrom 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. Brockob, 159 Wn.2d 311, 336, 150 P.3d 59 (2006).

However, even viewed in that generous light, there was no evidence whatsoever in the present case of actual custody by Mr. Branch of identity documents, financial information, or stolen property on his person. The information charged Mr. Branch with identity theft and possession of stolen property committed on or about December 1, 2008. CP 37. When Officer Inouye heard that a black male had arrived at the apartment and officers executed the warrant by bursting into the residence, they encountered a woman in

the living room, and Inouye claimed that Mr. Branch, who was also present, tried to jump out of the bedroom window. 7/6/09RP at 26-30.

The evidence showed that Mr. Branch was immediately taken into custody. 7/6/09RP at 29, 49. No evidence whatsoever was presented to suggest he had, on or about the date in question, any person's identification documents or financial information, or any stolen property, on his person. There was no evidence of actual possession where Mr. Branch did not have the suspect items of contraband in his "physical custody." See State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (quoting State v. Callahan, 77 Wn.2d at 29).

For example, the mere finding of items of contraband next to a person where they are sitting is not proof of the actual possession necessary to convict. State v. Summers, 107 Wn. App. 373, 384, 28 P.3d 780 (2001). Where the State presents the case to the jury under an actual possession theory, and there was no evidence that the items were ever in the defendant's physical custody, the State fails to meet its burden to prove guilt of actual possession beyond a reasonable doubt. Staley, 123 Wn.2d at 798; see also State v. Spruell, 57 Wn. App. 383, 384-87, 788 P.2d 21 (1990) (finding

insufficient evidence of actual possession where the defendant was present in the kitchen where police found drugs on the table, and had just moved away from the table).

The evidence below, proffered to support the elements of actual possession as part of the crimes of identity theft and possession of stolen property, was constitutionally inadequate. The defendant's convictions for those crimes must be reversed with prejudice. State v. Spruell, 57 Wn. App. at 387; U.S. Const. amend 14.

**(ii). “Constructive” possession not proved, including with respect to the controlled substance.**

In the alternative, in the event that the prosecutor on appeal may somehow rely on a legal theory of "constructive possession" to save the identity theft and possession of stolen property offenses, despite the fact that the lay jury was never instructed upon this technical definition of possession in regard to those crimes, Mr. Branch points out that there was insufficient evidence of "constructive" possession as well.

This argument also pertains (as a non-alternative primary contention) with respect to the VUCSA charge, as to which the jury was in fact instructed on constructive possession. CP 121

(regarding constructive possession of a “substance”). The jury instruction defining possession read as follows:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

CP 121; see WPIC 50.03, supra.

Under a constructive possession theory, therefore, the State, in order to secure guilty verdicts, would have had to prove that the identity documents and stolen computers, and the controlled substance, were in Mr. Branch's dominion and control. See State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996); CP 121. To meet its burden on the element of possession the State must establish “actual control, not a passing control which is only a momentary handling.” State v. Staley, 123 Wn.2d at 799; Spruell, 57 Wn. App. at 388.

Importantly, as the Court of Appeals has pointed out, it is not a crime to have dominion and control over the premises where contraband is found. State v. Olivarez, 63 Wn. App. 484, 486, 820 P.2d 66 (1991). That is only one circumstance bearing on whether

the defendant had constructive possession of the items at issue. Olivarez, 63 Wn. App. at 486; State v. Cantabrana, 83 Wn. App. at 208.

The State's closing argument, which focused on the defendant's alleged dominion and control over the premises of the apartment as its alleged renter, was therefore in fact inadequate, seeming to suggest as it did that dominion and control over the premises was all that the State was required to prove. See 7/15/09RP at 26-27 ("Even if he sometimes didn't spend the night there, even if he had other people live in or look after it while he was in custody, this was his apartment."). In this case, Mr. Branch's dominion and control over the premises of Apartment 4, even if proved, which he contends it was not, fails to establish dominion and control over the contraband, without more.<sup>2</sup>

Whether a person has dominion and control over contraband, and thus constructive possession of same, is determined by examining the totality of the situation. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Mere proximity to contraband is

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<sup>2</sup>This case fortunately was not one in which the jury was erroneously instructed, pursuant to State v. Ponce, 79 Wn. App. 651, 904 P.2d 322 (1995), that dominion and control over premises establishes dominion and control over any substance found therein. See State v. Shumaker, 142 Wn. App. 330, 331, 174 P.3d 1214 (2007) (overruling Ponce).

insufficient to show dominion and control. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

However, the State's claim that Mr. Branch was guilty of possession of identity theft documents, possession of stolen computers, and the drug charge, was predicated on the theory that he surely must have been aware of the many identification and other documents in the apartment, the stolen computers. and the drugs located there. 7/15/09RP at 27 (arguing that Mr. Branch was guilty if he "acquiesced" to all these items "being there").

But temporary residence, the presence of one's personal possessions on the premises where illegal items are found, or even one's knowledge of the presence of the items, without anything else, are also insufficient to show dominion and control over items located on a premises. State v. Davis, 16 Wn. App. 657, 659, 558 P.2d 263 (1977).

In Davis, police officers entered a house with a search warrant. A party was in progress at the time, and about 20 people were present, including the owner and a permanent resident of the house. Davis, 16 Wn. App. at 658. The defendant's vehicle was parked outside, and he was found asleep in a bedroom normally occupied by the homeowner. The defendant stayed at the house on

occasion and kept a sleeping bag there. He also had a pile of clothes in the room where he was found during the search. Davis, 16 Wn. App. at 658-59. Mr. Davis was convicted of possession of the marijuana that was found in the house, but the Court of Appeals reversed, holding the evidence was insufficient to establish the defendant had dominion and control even over the premises. Davis, at 659.

The defendant in the present case did not live in the apartment, but even if he did, and even if he knew there were identity documents, computers, and contraband therein, this was inadequate. Mr. Branch had apparently considered sub-leasing the apartment from the actual tenant beginning in November of 2008, based on a sublease agreement that was, however, never signed. 7/8/09RP at 119-21. Van Lam, the building's landlord, claimed that the defendant was renting the apartment in question. Lam claimed that the defendant had been renting the apartment since July, 2008, and had always paid his rent in cash. 7/13/09RP at 37-39. However, Mr. Lam admitted that the person he claimed was the defendant living in the building was known to Mr. Lam as Mr. Love. 7/13/09RP at 39. And Cerise Brown testified that she lived in the

apartment -- Mr. Branch only visited there on an occasional basis; he did not have a key to the premises. 7/15/09RP at 125-26.

Various neighbors' claims to have seen the defendant or a black male coming and going from the apartment in question is not evidence that Andrew Branch lived at the Greenwood Avenue apartment. Indeed, Officer Inouye found only women's clothing in the apartment's hall closet. 7/6/09RP at 52. The State attempted to negate the force of this defense-elicited evidence by asking the officer if he would have remembered if there had been only and solely women's clothing in the apartment, to which the officer half-heartedly testified, "I think so." 7/8/09RP at 148-49.<sup>3</sup>

As a matter of law, constructive possession of contraband found in a residence cannot be based merely on a person's presence in the house even if, in a stronger case, it establishes dominion and control of the premises. Olivarez, 63 Wn. App. at 486; State v. Cantabrana, 83 Wn. App. at 208. Such dominion and control of premises can be inferred from circumstances such as payment of rent or possession of keys, and the fact that a person

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<sup>3</sup>Additionally, medical documentation was introduced that showed Mr. Branch had allergies to dog hair, yet the apartment in question was plainly resided in by a dog owner, there being a dog cage, dog food, and copies of "Pitbull" magazine laying about amongst the residence. 7/8/09RP at 117-18, 134-35.

was spending the night and had some personal possessions with him, but this is not enough – without more – to show dominion and control over the items of contraband found therein. Davis, at 659; State v. Olivarez, 63 Wn. App. at 486.

In the present case, there is no “more.” On the date of Mr. Branch's arrest at the apartment, Officer Inouye saw black and white copies of \$100 bills in the bedroom. 7/6/09RP at 31. On the headboard of the bed in the bedroom, officers saw a glass pipe commonly used to smoke methamphetamine, and a plastic bundle with narcotics inside, along with other drugs in the kitchen. 7/6/09RP at 32-34. Throughout the bedroom, living room, and hallway of the apartment, detectives subsequently found the bank information and personal information of the named complainants, along with computers the police were eventually able to determine were stolen. 7/8/09RP at 44-61, 69-82, 100; 7/9/09RP at 7-15.

However, many of these documents would not even be visible to a person who was a mere visitor to, or shared occupier of, the apartment, having been located by police in areas such as inside file cabinets. 7/8/09RP at 115-16. The evidence contained no proof that Mr. Branch had done anything more than be present in the apartment, which was a “hoarder”-type mess, with stacks of

countless papers through which pathways had been burrowed for humans to walk. 7/6/09RP at 55. The apartment was atrociously cluttered and dirty. 7/7/09RP at 39-41.

Even if mere knowledge of the presence of contraband could establish constructive possession, here, it was impossible to say that Mr. Branch even knew what various documents, that were found by the police in an archeologists' dig conducted into this detritus, even were, or that they were even there.

The clutter in the apartment, and a person's inability to discern without inspection what the various papers might be, was confirmed by police as cited above, and by federal Customs agent Thomas Musselwhite. 7/13/09RP at 96-98. There were no fingerprints of Mr. Branch found on any of the multiple identity documents, including laminated cards that could easily have held such fingerprints if he had ever handled them. 7/8/09RP at 127-30.

Detective Christopher Hansen, who was called in by the police to do much of the evidence collection and cataloging, could not even recall whether the various identity documents of other people – items he collected by arranging them in various areas in the apartment – had been in a position on top of the multiple stacks of dirty papers and garbage, such that a person in the apartment

could be said to have even been aware of their presence. 7/8/09RP at 141-43.

All of the above is inadequate. Of course, no single factor is dispositive when determining dominion and control over illegal items; the totality of the circumstances must be considered. Partin, at 906; State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). But that totality must add up to something more than a defendant who lives or stays in a premises shared by others, and is aware that bad things are present.

For example, in State v. Partin, police searched a house and found photographs and articles featuring Partin, and a payment book for the purchase of the house with Partin's paycheck stubs inside. State v. Partin, 88 Wn.2d at 907-08. Partin's motorcycle was parked outside, and a number of items of his clothing were located in the bedroom (none of these facts are present here, of course). In addition, Partin gave out the address as his own and acted as if he were the owner during a previous police visit. While police were present, the phone rang repeatedly with callers asking to speak to Partin. State v. Partin, 88 Wn.2d at 907-08. This evidence was sufficient to establish occupancy, and therefore dominion and control

of the premises, a first step to showing dominion and control over items inside. State v. Partin, 88 Wn.2d at 905, 908.

Conversely, in State v. Alvarez, police searched a shared apartment and found a firearm hidden in a closet in one of the bedrooms. State v. Alvarez, 105 Wn. App. 215, 218, 19 P.3d 485 (2001). Also in that bedroom, police found a savings account deposit book in Alvarez's name, pictures and newspaper articles featuring Alvarez and/or his friends, and Alvarez's book bag. State v. Alvarez, 105 Wn. App. at 218-19. Alvarez was present in the apartment but asleep in a different bedroom when police arrived. State v. Alvarez, 105 Wn. App. at 219. There was testimony that Alvarez resided elsewhere. State v. Alvarez, 105 Wn. App. at 223.

On appeal, the Court found that the evidence did not establish dominion and control over the bedroom where the firearm was found, and therefore did not even "meet the threshold requirement for constructive possession." State v. Alvarez, 105 Wn. App. at 217, 223.

The present case is most like Alvarez. The existence of an unsigned agreement to officially lease the premises, and evidence establishing that Mr. Branch visited at times or even stayed at the apartment frequently and paid rent, does not establish dominion and

control of the premises, much less the “more” that is required to show dominion and control over items located inside.

Also helpful is State v. Gutierrez, where the evidence the State produced to try and show Gutierrez's constructive possession of drugs found inside a storage unit included: pre-recorded drug money from an earlier controlled buy found on Gutierrez's person; and the fact that Gutierrez accompanied the renter of the storage unit to the unit, and stayed inside for 40 minutes. State v. Gutierrez, 50 Wn. App. 583, 585-86, 749 P.2d 213 (1988). This was found to be insufficient to establish dominion and control over the drugs or the storage unit. State v. Gutierrez, 50 Wn. App. at 594.

Mr. Branch's constructive possession of identification documents, stolen property, or for that matter, a controlled substance, was never proved.

**d. The defendant's convictions on all counts violate his right to due process of law and must be reversed.** Mr. Branch maintains that the State was required to prove actual possession of identity documents and stolen computers in order to gain convictions on those counts. However, even if the State's evidence below may be assessed through the broader, more forgiving lens of "constructive possession," despite the fact that this technical legal

theory was never instructed upon as to those counts, the evidence remains insufficient. Finally, there was no evidence of constructive possession of the controlled substance found in the apartment.

Evidence is sufficient to support a conviction only if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Here, even in that light, the evidence is not sufficient on any of the counts, and Mr. Branch's convictions must therefore be reversed, as entry of judgment on the verdicts of guilty violated due process. U.S. Const. amend. 14.

**3. THERE WAS NO EVIDENCE OF INTENT TO COMMIT A CRIME, OR KNOWLEDGE THE COMPUTERS WERE STOLEN, AND ACCOMPLICE LIABILITY FAILS TO SAVE THE CONVICTIONS AS IT REQUIRES CONDUCT WITH THE PURPOSE TO PROMOTE OR ASSIST ANOTHER IN COMMITTING THE CRIMES.**

**a. Possession alone does not prove intent or knowledge in a circumstantial case.** Even assuming, arguendo, that there was proof of actual or constructive possession of the identity documents or the stolen computers, the State's proof on these charges also fails to survive constitutional scrutiny for sufficient

evidence, absent proof of possession with intent to commit a crime, and absent knowing possession of stolen property.

**(i). No proof of intent to commit a crime for purposes of the identity theft counts.**

In cases where a defendant “used” identity documents, as opposed to merely having possession of them, criminal culpability is clear under the “intent” element of the identity theft statute.

In this case, however, even if, arguendo, the defendant possessed the identity documents, it was not proved that Mr. Branch had any wrongful, criminal intent or plans. Identity theft as charged in the present case required proof beyond a reasonable doubt that Mr. Branch possessed the identity or financial documents with intent to commit, or to aid or abet a crime. State v. Milam, — Wn. App. —, 228 P.3d 788 (2010).

The appellate case law under RCW 9.35.020, the definition of identity theft, has involved instances where a defendant used someone's identification or financial information to actually obtain items or cash fraudulently, committing theft. State v. Baldwin, 150 Wn.2d 448, 449, 78 P.3d 1005 (2003). But of course, “use” is not the only means of identity theft under RCW 9.35.020.

Use is a way to commit identity theft, but it is not the only way. An individual also commits identity theft

when he has . . . possessed . . . a means of another's identification or information with the requisite intent.

State v. Leyda, 157 Wn.2d at 346. Where, as here, there was no financial transaction associated with Mr. Branch, or other evidence that Mr. Branch's alleged possession of the identity documents was with intent to commit some crime, the evidence was constitutionally insufficient to convict on the multiple identity theft counts.

Specific criminal intent may be inferred from the defendant's conduct where it is "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). But the mere act of possession does not establish intent. For example, bare possession of a controlled substance does not sufficiently support a conviction for intending to deliver the substance. State v. Hutchins, 73 Wn. App. 211, 216, 868 P.2d 196 (1994); State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993).

The State asked the jury to convict Mr. Branch for identity theft based on circumstantial evidence of the element of intent. 7/15/09RP at 22-23. Quite astonishingly – or perhaps not surprisingly, given the paucity of evidence – the State's argument in closing regarding the intent element appeared to be limited to the statement that certain of the persons whose identification was taken

reported that “it was used.” 7/15/09RP at 23. Therefore, the prosecutor argued, the other identity documents “hadn’t been used yet, but it was clearly possessed with the intent to commit a crime.” 7/15/09RP at 23.

It has been said that the appellate court will give circumstantial and direct evidence equal weight and that it may infer criminal intent circumstantially, from conduct. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004). Even under this standard, however, the present case did not contain evidence sufficient to find intent to commit a crime. For example, in State v. Baldwin, 111 Wn. App. 631, 45 P.3d 1093, affirmed, 150 Wn.2d 448, 78 P.3d 1005 (2002), the trier of fact could reasonably infer in the defendant's prosecution for identity theft that assets were obtained by her in other people's names in order to secure credit needed for wrongful purchases, where she used three different false identities to gain title to four different vehicles, and had acquired two credit cards in one of the names. State v. Baldwin, 111 Wn. App. at 634.

Here, it was abundantly clear that the use of the identity documents found in the apartment, in order to make purchases and obtain money, was all by various individuals who were not, in fact, Andrew Branch. See, e.g., 7/9/09RP at 64 (check made payable to

Cerise Brown); 122 (checks cashed by Anna Lopes). Various items of personal property taken from the owners of the identity documents were all elegant clothes and accessories for a woman such as a fancy coat and expensive purse. 7/9/09RP at 44, 132.

The jury cannot infer guilt to identity theft's intent requirement simply from the fact that Mr. Branch had spent time in an apartment which contained identity and financial information, and from the fact that persons with whom he was familiar had used some of the documents to make purchases. In cases involving only circumstantial evidence, as is certainly the case here, the essential proof of guilt cannot be supplied solely by a pyramiding of inferences where the inferences and underlying evidence are not strong enough to permit a rational trier of fact to find guilt beyond a reasonable doubt. State v. Bencivinga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

The State in closing argument asked the jury to find intent based on "the sheer amount of materials we're talking about here." 7/15/09RP at 23. That is not strong enough. It is well established that possession alone does not establish criminal intent. The evidence of identity theft was insufficient and those counts must be reversed.

**(ii). No proof of “knowing” possession of stolen property.**

Second, the charge of possession of stolen property required the State to prove that Mr. Branch, assuming arguendo that he possessed the computers, had knowledge that the items in question were stolen. As the jury was correctly instructed, an essential element of the crime of possession of stolen property is knowledge that the property was stolen. CP 105-06; see RCW 9A.56.140(1) (possessing stolen property means “knowingly to receive, retain, [or] possess . . . stolen property knowing that it has been stolen”).

The fact of possession is a relevant circumstance to be considered with other evidence tending to prove the knowledge element of this crime. State v. Hatch, 4 Wn. App. 691, 693, 483 P.2d 864 (1971). Only “slight corroborative evidence of other inculpatory circumstances tending to show . . . guilt will support a conviction” for knowing possession of stolen property. Hatch, 4 Wn. App. at 694 (quoting 4 C. Nichols, Applied Evidence, Possession of Stolen Property § 29 at 3664 (1928)).

However, mere possession of recently stolen property is insufficient to establish that the possessor knew the property was stolen. State v. Couet, 71 Wn.2d 773, 775, 430 P.2d 974 (1967).

Thus, more is required; for example, an account given by the defendant as to how he acquired the stolen goods that is false is sufficient corroborative evidence to sustain a finding of guilt. Hatch, 4 Wn. App. at 694.

Here, after the defendant was taken into custody, the officers performed a quick safety sweep of the apartment and found computers in the living room and bedroom. But the computers, which formed the basis of the possession of stolen property allegations, had no identifying information visible that would indicate to a person that they were stolen property. 7/8/09RP at 104-05.

Knowledge may be inferred if “a reasonable person would have knowledge under similar circumstances.” State v. Womble, 93 Wn. App. 599, 604, 696 P.2d 1097 (1999). The instructions of law in Mr. Branch’s trial so informed the jury. CP 113. But in this case, the police had to have the owners of the computers identify their stolen property by use of serial numbers, including numbers inside the machines. 7/8/09RP at 105-07. There was simply no proof that the defendant actually knew the computers inside the apartment were stolen, or even that a reasonable person – even one who used the machines – would so know. The evidence on this count was inadequate to convict. Reversal is required.

**b. No proof of accomplice liability .**

Near the end of the evidence phase of the case, the State contended, in an effort to secure convictions that were slipping away if based on criminal liability of the defendant, that one “Anna Lopes” received assistance from Mr. Branch in committing the crimes charged. Detective Hansen had testified that there was an ongoing investigation of Ms. Lopes, who was the listed tenant of the N. Greenwood apartment in question. 7/8/09RP at 147-48. However, Mr. Branch contends there was no evidence that Ms. Lopes was committing crimes of identity theft.

The Washington courts have recognized that a defendant may be found guilty as an accomplice even though he was not expressly accused of accomplice liability in the information, and even though he was the only person charged. State v. Thompson, 60 Wn. App. 662, 666, 806 P.2d 1251 (1991); see, e.g., State v. Davenport, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1983).

But here, there was no evidence that Mr. Branch stole any of the identity documents, or used them fraudulently, or in any way was involved in any scheme, or provided assistance to another person in committing any of the offenses charged, with knowledge that some act he engaged in would promote or facilitate the crimes.

The addition of accomplice liability instructions into the mix near the terminus of trial therefore does not save the State's case on the identity theft or possession of stolen property charges.

This is because accomplice liability requires that one engage in assistive actions with knowledge that doing so will aid or abet some other person's commission of the crime. An accomplice, in order to be criminally liable under a theory of complicity, must encourage or aid the principal, and do so "with knowledge that [his conduct] will promote or facilitate" the principal's commission of the crime. (Emphasis added.) RCW 9A.08.020(3)(a). The Washington accomplice liability statute, RCW 9A.08.020, defines when a person is liable for another's crime by virtue of being an accomplice, providing as follows:

**RCW 9A.08.020. Liability for conduct of another--  
Complicity**

(1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

(2) A person is legally accountable for the conduct of another person when:

\* \* \*

(c) He is an accomplice of such other person in the commission of the crime.

(3) A person is an accomplice of another person in the commission of a crime if:

(a) With knowledge that it will promote or facilitate the commission of the crime, he

- (i) solicits, commands, encourages, or requests such other person to commit it; or
- (ii) aids or agrees to aid such other person in planning or committing it[.]

(Emphasis added.) RCW 9A.08.020. The pattern jury instructions provide an instruction which tracks the above statutory requirements for complicity, including the underscored requirement of what are in essence acts taken with a desire to promote or facilitate the criminal offense of another. See 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.51, at 217 (3d ed. 2008) (WPIC 10.51). The jury in Mr. Branch's trial was correctly instructed in this regard. CP 87 (accomplice liability instruction).

The “more than mere presence” language of WPIC 10.51 clarifies that even “mere presence and knowledge of the criminal activity of another” is not enough to find accomplice liability, and serves the result of making clear to the average juror that the knowledge requirement is a key element of this inchoate crime of accomplice liability. WPIC 10.51; see State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993).

The jury must understand that accomplice liability involves active efforts to help another person successfully commit a criminal offense. State v. Amezola, 49 Wn. App. 78, 89, 741 P.2d 1024 (1987)). It is not a crime to share or stay in an apartment where one

is aware that other persons are using the premises as part of their criminal enterprise. The knowledge requirement in its very essence means that an accomplice must associate himself with a principal's criminal undertaking, participate in it as something he desires to bring about, and seek by his actions to make it succeed -- mere presence at the scene and even "assent" to the crime are not enough. In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); Amezola, 49 Wn. App. at 89.

Thus, even if Mr. Branch was aware of some other apartment resident's offenses, he does not become criminally liable for those crimes absent assistance accompanied by knowledge that the assistance will promote the offense. RCW 9A.08.020.

The State's evidence simply failed to show that Mr. Branch had anything to do with any person's identity theft, stolen property, or drug crimes that rose to the level of criminality as an accomplice. Regardless whether Mr. Branch knew what was going on in the apartment which he visited often and may well have stayed at for certain times, and apparently intended at one time to sublease, he does not by that presence and awareness become an aider or abettor. In re Wilson, 91 Wn.2d at 491; Amezola, 49 Wn. App. at 89. Mr. Branch was not involved in any aspect of any scheme.

Remarkably, the State's evidence regarding various thefts, during which the prosecution alleged that many of the items of identity were either stolen, or incidents in which they were used for fraudulent purposes, were incidents that occurred while Andrew Branch, the defendant, was in fact in custody. 7/14/09RP at 59, 68-69. He was in custody during a number of key and apparently illegal incidents in which identity documents were procured, and used.

Complainant Kenneth Shovlin had identity and financial documents stolen from him in July of 2007, and in November of 2008, when someone named "Annie" attempted to write a check on his Bank of America account. 7/9/09RP at 154-55. There was no proof Mr. Branch assisted this person.

Complainant Jennifer Swallwell indicated that her identity and financial information was used in September of 2008 to order pizzas. 7/9/09RP at 178-79. There was no proof Mr. Branch assisted the person, whoever it was, to buy these pizzas while he was in Jail.

Complainant Travis Nakamura, of Ridgeline Development, testified that checks for his company were used without authority. 7/13/09RP at 131-32. There was no proof Mr. Branch assisted the person who used the checks.

There was no evidence that the defendant, Andrew Branch, had stolen any of these or other documents in question, or assisted in their theft, or used them as described by the complainants, and he was, indeed, in custody at the time the identity and financial information was used for certain fraudulent purchases or to obtain cash in these transactions. 7/14/09RP at 59, 68-69; 7/15/09RP at 66. These incidents tended to show that Mr. Branch was in fact not part of either end of the criminal transactions that were apparently going on, masterminded by some principal to the seeming ignorance of all around.

Furthermore, despite all of the evidence establishing that the apartment contained identity documents and stolen property, this fails to establish more than mere knowledge. Arguendo, if it had been proved that Andrew Branch was aware of the items present in the apartment, and their illegal nature, and could be said to have had non-exclusive possession of them – the way a person might be said to possess a stolen TV set left by his roommate on the floor, that the person never throws away or moves – there was still no evidence that Mr. Branch took any action to assist his mystery principal in committing the crimes of identity theft and possession of stolen property, with the mental state of a purpose to provide

assistance. Failure to throw the TV set out of the door, or failure to stop visiting a desired paramour who is a criminal, is not proof of “the intent to facilitate another in the commission of a crime by providing assistance through his presence or his act.” State v. Galisia, 63 Wn. App. 833, 840, 822 P.2d 303, review denied, 119 Wn.2d 1003, 832 P.2d 487 (1992).

The State's case rested on pure conjecture, and that is inadequate to convict:

When substantial evidence is present, the drawing of reasonable inferences therefrom and the doing of some conjecturing on the basis of such evidence is permissible and acceptable. If, however, the necessity for conjecture results from the fact that the evidence is merely scintilla evidence, then the necessity for conjecture is fatal.

State v. Liles, 11 Wn. App. 166, 171, 521 P.2d 973, review denied, 84 Wn.2d 1005 (1974); see also State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006).

As to this, the prosecution’s alternative, last-minute argument regarding accomplice liability to the crimes charged, the State argued to the jury that Mr. Branch, “given the state of that apartment, must have known what was going on.” 7/15/09RP at 37.

This reasoning fails under all of the above-cited law. There was simply no proof of the requisite mental state required for

conviction, including as to the identity documents and the computers, and because essential elements of identity theft, and possession of stolen property, including under an accomplice theory, was lacking, the convictions on these counts must be reversed. U.S. Const. amend. 14.

**3. THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT AND CAUSED MANIFEST CONSTITUTIONAL ERROR IN CLOSING ARGUMENT.**

Mr. Branch argues that the prosecutor committed flagrant misconduct in closing argument when he told the jury that the defendant had a burden of, and had failed at, providing an “innocent explanation” for the multiple items of contraband present in the apartment. After telling the jury that there might be an “innocent explanation” for the presence of any one piece of identification or other contraband in the apartment, the State contended, unfortunately absent defense objection, as follows:

So the question is there an innocent explanation for any one thing becomes suddenly much greater when this innocent explanation needs to cover all of this.

7/15/09RP at 65. This brief but improper, and devastatingly prejudicial remark, was flagrant misconduct and caused manifest constitutional error.

**a. The prosecutor must not commit misconduct in**

**closing argument.** A public prosecutor is a quasi-judicial officer charged with the duty to seek a verdict based upon reason. State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324 (1995) (citing State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978)). Prosecutors must therefore act impartially and "with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided." (Emphasis added.) State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976).

As a general principle, when prosecutorial misconduct is alleged, the defendant bears the burden of establishing its prejudicial effect. State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 1105 (1995); State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). To prevail on the claim, a defendant must show that the improper conduct prejudiced the outcome of his trial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S.1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007).

However, when prosecutorial misconduct impacts a specific constitutional right, such as the right to proof beyond a reasonable doubt or the right to counsel, the State must demonstrate the error

was harmless beyond a reasonable doubt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (prosecutor's comment on defendant's right to remain silent); State v. French, 101 Wn. App. 380, 386, 4 P.3d 857 (2000) (prosecutor's comment on defendant's exercise of right to not testify), review denied, 142 Wn.2d 1022 (2001).

Thus, the State must now convince this Court beyond a reasonable doubt that the guilty verdicts in this case were not materially affected by the prosecutor's misconduct. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

**b. The prosecutor's misconduct in this case was flagrant and incurable, and caused manifest constitutional error under RAP 2.5(a)(3).** Mr. Branch may appeal the instance of prosecutorial misconduct in the closing argument of his trial, despite his trial attorney's failure to object contemporaneously, under several rationales. This Court will review prosecutorial misconduct even in the absence of an objection in the trial court where the misconduct is flagrant and ill-intentioned. Belgarde, 110 Wn.2d at 507.

In addition, the Court of Appeals in State v. Reed, 25 Wn. App. 46, 48, 604 P.2d 1330 (1979), closely interlinked the prohibition on prosecutorial misconduct that impinged on a constitutional right to

be misconduct of the “flagrant” variety, also requiring no objection to be challenged on appeal. Reed, 25 Wn. App. at 48-50. Where the error was “manifest,” as here, by causing identifiable prejudice in an insufficient or severely close case, RAP 2.5(a)(3) allows appeal. State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992).

First, it is improper for the prosecutor to engage in closing argument that misstates the burden of proof. State v. Traweek, 43 Wn. App. 99, 106-08, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986). The prosecutor in this case improperly faulted Mr. Branch for not coming up with an innocent explanation for the presence of contraband in the apartment. State v. Cleveland, 58 Wn. App. 634, 647-49, 794 P.2d 546, review denied, 115 Wn.2d 1029, 803 P.2d 324 (1990) (error for prosecutor to imply defendant had duty to present any favorable evidence in existence).

Importantly, this was not a case in which the defendant somehow proffered a factual defense that there was some witness ‘out there’ who could prove that he had not committed the charged crimes. For example, in State v. Contreras, 57 Wn. App. 471, 788 P.2d 1114, review denied, 115 Wn.2d 1014, 797 P.2d 514 (1990), an argument was made in which the prosecutor asked “where is” the

witness who could corroborate defendant's exculpatory testimony.

Contreras, at 476. The Contreras court held:

When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence. The prosecutor may comment on the defendant's failure to call a witness so long as it is clear the defendant was able to produce the witness and the defendant's testimony unequivocally implies the uncalled witness's ability to corroborate his theory of the case.

(Emphasis added.) Contreras, at 476; see also State v. Bebb, 44 Wn. App. 803, 815, 723 P.2d 512 (1986), affirmed on other grounds, 108 Wn.2d 515, 740 P.2d 829 (1987). Here, the State was not arguing that Mr. Branch had propounded a theory of the defense and failed to support it with some missing witness. It was misconduct for the prosecutor to argue that Mr. Branch had a general, overall burden to produce an innocent explanation for the items present in the apartment. Rather, it was for the State to prove each and all of the elements of identity theft, beyond a reasonable doubt. U.S. Const amend. 14.

This was constitutional error. A defendant has no duty to present any evidence. In re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Thus a prosecutor's comments in closing argument that improperly suggest that the defendant has a duty to

prove his innocence must be shown to be harmless beyond a reasonable doubt. Traweek, 43 Wn. App. at 107; Chapman v. California, 386 U.S. at 24.

It is also well-established that prosecutorial comment in closing argument on the accused's failure to testify at trial is strictly forbidden. State v. Reed, 25 Wn. App. at 48; State v. Bennett, 20 Wn. App. 783, 786, 582 P.2d 569 (1978); U.S. Const. amend. 5; Wash. Const. art. I, § 9. The State is prohibited from putting forward an inference of guilt on this basis, which necessarily flows from implications that the accused has 'failed' to testify, because as a matter of federal and state constitutional law, he is not required to do so. Reed, 25 Wn. App. at 48 (citing State v. Charlton, 90 Wn.2d at 662).

Yet this is precisely what the State did in this case when it told the jury that the defendant had not adequately demonstrated his innocence to the jury members. The direct implication was that the defendant, plainly the person in possession of the best evidence on the question of his mental state with regard to the items of contraband in the apartment, had failed to take the stand and offer that evidence. The prosecutor's remark was constitutionally improper because it was of such character that the jury would

naturally and necessarily accept it as a comment on the defendant's failure to testify. State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987). Well beyond just an implication that Mr. Branch's failure to testify was incompatible with innocence, the prosecutor specifically urged the jury to draw that conclusion. This argument cannot be deemed so subtle and so brief that it did not naturally and necessarily emphasize defendant's testimonial silence. State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442 (1978).

There was misconduct, and reversal is required. Allegedly improper comments are reviewed "in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given." State v. Bryant, 89 Wn. App. 857, 873, 950 P.2d 1004 (1998). Here, the implication that Mr. Branch was required to provide witness testimony and other evidence establishing his innocence, could only lead the jury to conclude he had failed to make some basic showing necessary to succeed in gaining acquittal, when in fact in law the defense could be successful merely if the jury did not believe the State's evidence.

Prosecutors commit serious misconduct when they misstate the applicable law. State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). In these circumstances, in a case where the

State's proof, if not legally insufficient (but see Part D.1, D.2, supra), was particularly thin, the State's constitutional misstatement of the law produced such a misconception on the jury's part, which could not have been harmless beyond a reasonable doubt, and reversal is required.

#### **E. CONCLUSION**

Based on the foregoing, Mr. Branch respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 28<sup>th</sup> day of May, 2010.

*Oliver R Davis by Patrick White*  
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Washington Appellate Project - 9105  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64187-5-I
v.	)	
	)	
ANDREW BRANCH, JR.,	)	
	)	
Appellant.	)	

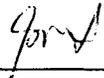
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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28<sup>TH</sup> DAY OF MAY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ANDREW BRANCH, JR. 303132 OLYMPIC CC 11235 HOH MAINLINE RD FORKS, WA 98331	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 28<sup>TH</sup> DAY OF MAY, 2010.

X \_\_\_\_\_ 

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