

04863-2

04863-2

NO. 64863-2-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RAUL ILERNA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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COURT OF APPEALS
DIVISION ONE
KING COUNTY

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A. SUMMARY OF ARGUMENT.

Raul Ilerna's conviction for possession with intent to deliver a controlled substance must be reversed because the State failed to prove every element of the crime beyond a reasonable doubt. Specifically, the State failed to meet its burden to prove that Mr. Ilerna had constructive possession of the narcotics seized from the floor of the bar in which he was arrested. In addition, Mr. Ilerna did not receive a fair trial where the prosecutor's closing argument improperly commented on the presumption of innocence and denigrated the defense, affecting the jury's verdict.

B. ASSIGNMENTS OF ERROR.

1. The State presented insufficient evidence to convict Raul Ilerna of possession with intent to deliver a controlled substance, in that the prosecutor failed to prove that Mr. Ilerna had constructive possession of a controlled substance.

2. The prosecutor committed misconduct by presenting improper closing argument which misstated the law and denigrated the defense.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. To prove constructive possession, the State must prove beyond a reasonable doubt that the defendant exercised dominion

and control over an item. Must Mr. Ilerna's conviction for possession with intent to deliver a controlled substance be reversed and dismissed where the State failed to prove beyond a reasonable doubt that Raul Ilerna exercised dominion and control over the drugs seized in this case?

2. A prosecutor, as a quasi-judicial officer, has an obligation to seek a verdict based upon reason, and the duty to see that the accused is given a fair trial before an impartial jury. Here, the prosecutor misstated the law during closing argument, arguing against the presumption of innocence. The prosecutor also denigrated the defense during closing argument. Did the prosecutor's closing argument thus deprive Mr. Ilerna of a fair trial?

D. STATEMENT OF THE CASE.

Raul Ilerna was charged, tried, and convicted of possession with intent to deliver a controlled substance, under the Violation of the Uniform Controlled Substances Act (VUCSA), as a result of his arrest on July 14, 2009. CP 1-4, 76, 77-84.

Evidence at trial showed that at approximately 11 p.m. that evening, uniformed bike patrol police officers believed they observed Mr. Ilerna engaged in some sort of transactions near the corner of South King Street and Maynard Avenue South in King County.

12/29/09 RP 57-59.¹ Officers Andrew Zwaschka and Terry Bailey saw what they believed to be a line of people waiting for something, with Mr. Ilerna standing in the front of that line, wearing all white clothing, including a white cap. Id. at 58-59. When officers attempted to make contact with Mr. Ilerna, he began to walk in the other direction. Id. at 60. When officers were about two feet away from him, Mr. Ilerna ran into the Fortune Sports Bar. Id. at 64-65. Officers followed Mr. Ilerna into the bar, brought him out a few seconds later, and placed him under arrest. Id. at 66. There were no drugs found on Mr. Ilerna upon a search incident to arrest. Id. at 69.

Officer Bailey returned to the bar and recovered a pill bottle containing alleged crack cocaine from the floor, beneath a table near the back of the bar.² 12/30/09 RP 15-17. Officer Zwaschka recovered over \$800 in small denominations from Mr. Ilerna's person. 12/29/09 RP 67.

¹ The verbatim report of proceedings consists of four volumes of transcripts from December 29, 2009, through January 29, 2010. The proceedings will be referred to herein as follows: "12/29/09 RP ___." References to the file will be referred to as "CP ___."

² At trial, the defense stipulated that the substance contained in the bottle was, in fact, crack cocaine. 12/30/09 RP 94-95.

The police officers never interviewed any of the alleged buyers or any other patrons at the bar that night, and agreed that the International District is considered a high-drug area. 12/29/09 RP 72-73; 12/30/09 RP 54-56. Officers also failed to ask anyone in the bar if they had witnessed drug dealing in the bar, or whether they had seen Mr. Ilerna “slough” or throw the bottle of drugs to the floor during the chase. 12/29/09 RP 72-73; 12/30/09 RP 54-56. In addition, Kyle La, the manager of the sports bar, only cleans the floor once per shift – at 4 pm – and did not hear anything unusual while Mr. Ilerna was in the back room of the bar. 12/30/09 RP 82-83.

Mr. Ilerna made no statements concerning the drugs, and despite the fact that the pill bottle was sent to the police laboratory, no latent prints were recovered from the bottle. 12/30/09 RP 67.

Mr. Ilerna timely appeals. CP 85-93.

E. ARGUMENT.

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. ILERNA OF POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE, AS CONSTRUCTIVE POSSESSION WAS NOT PROVED.

a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged

beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, section 3 of the Washington Constitution³ and the 14th Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

³ Art. I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

However, when an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

b. In order to prove that Mr. Ilerna was guilty of possession with intent to deliver a controlled substance, the prosecution was required to show constructive possession.

Constructive possession is defined as the exercise of dominion and control over an item. State v. Callahan, 77 Wn.2d. 27, 29-30, 459 P.2d 400 (1969). Constructive possession is established by viewing the totality of the circumstances, including proximity to the property and ownership of the premises in which the contraband is found. State v. Turner, 103 Wn. App. 515, 523, 13 P.3d 234 (2000); State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). The circumstances must provide substantial evidence for the fact finder to reasonably infer the defendant had dominion and

control. State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004).

Close proximity alone is never enough to infer constructive possession. Id.

Ownership of a vehicle, or a residence, where contraband is discovered, is one factor to consider when assessing constructive possession. Turner, 103 Wn. App. at 521-24; see Cantabrana, 83 Wn. App. at 208. For example, in Turner, the police found a gun in plain view in the car Turner owned. 103 Wn. App. at 518. Since Turner owned the car, drove it that day, and the gun was in plain view, his dominion and control of the gun was reasonably inferred. Id. at 524.

On the other hand, in Callahan, the defendant was not the owner of the houseboat where drugs were found, but was seen in close proximity to drugs discovered in a cigar box and admitted handling the drugs that day. 77 Wn.2d at 28-31. Callahan was an overnight guest and owned two books, two guns, and broken scales for measuring drugs found at the houseboat. Id. at 31. Yet the Supreme Court found his close proximity, knowledge of the drugs, and his ownership of other incriminating items insufficient to consider him a constructive possessor of the drugs. Id. The Callahan Court stressed that the defendant was merely using the

property, not paying rent or maintaining the houseboat as his residence. Id.

In State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990), the police observed the defendant standing up from a table as they entered the room; drugs and paraphernalia were found on the table. The court found the State failed to prove possession where the only evidence was defendant's proximity to the drugs and his fingerprints on a plate containing cocaine residue. Id. at 387-89. The Spruell Court found that the fingerprints proved only fleeting possession at best, which was insufficient to prove actual possession or dominion and control. Id. at 387. Because the defendant in Spruell lacked dominion and control over the premises, mere proximity and momentary handling were insufficient to prove constructive possession. Id. at 389.

Likewise, in Cote, the defendant was a passenger in a vehicle where contraband was found, and his fingerprints were found on a jar containing some of the contraband. 123 Wn. App. at 548. The State proved that "Mr. Cote was at one point in proximity to the contraband and touched it," but this was "insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession." Id. at 550.

c. The prosecution failed to prove that Mr. Ilerna had dominion or control over either the premises or the drugs; therefore, the evidence was insufficient to convict. Testimony was clear that Mr. Ilerna, like the defendants in Callahan, Spruell, and Cote, neither owned, rented, nor resided in the location in which he was found. 12/29/09 RP 64-65; 12/30/09 RP 14. Mr. Ilerna was arrested in a sports bar, not a private home, and according to the State's own witnesses, the bar was full of people whom the police elected not to interview. 12/29/09 RP 72-73; 12/30/09 RP 54-56. This bar was full of witnesses, and in this "high-drug area," those drugs could as easily have belonged to any of the individuals spending their evening at the bar, as to Mr. Ilerna. 12/29/09 RP 72-73; 12/30/09 RP 54-55.

In sum, the prosecution did not offer evidence based on anything other than sheer speculation that Mr. Ilerna's presence in the same bar as the seized cocaine demonstrated that he exercised dominion and control over it.⁴

⁴ The State's allegations of Mr. Ilerna's hand-to-hand transactions on the street were also inconsistent with drug-selling behavior. Officers admitted that they observed no money or drugs change hands, there was no "lookout," no drugs recovered from buyers, and the alleged perpetrator was dressed in the most conspicuous outfit imaginable (all white clothing on a dark night). 12/29/09 RP 74-76.

d. The prosecution's failure to prove all essential elements requires reversal. The prosecution failed to sufficiently connect Mr. Ilerna to the cocaine, by failing to prove that he had dominion or control over it, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. MR. ILERNA'S CONSTITUTIONAL RIGHT
TO A FAIR TRIAL WAS VIOLATED BY
PROSECUTORIAL MISCONDUCT
DURING CLOSING ARGUMENT

The due process clause of the Fourteenth Amendment protects the right of every criminal defendant to a fair trial before an impartial jury. U.S. Const. amends. V, XIV; Wash. Const. art. I 3, 21, 22. The right to a fair trial includes the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d P.2d 1129 (1996). The Fourteenth Amendment also "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." Winship, 397 U.S. at 364. The requirement that the government prove a criminal charge beyond a

reasonable doubt – along with the right to a jury trial -- has consistently played an important role in protecting the integrity of the American criminal justice system. Blakely v. Washington, 542 U.S. 296, 301-02, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2000); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

a. Prosecutors have special duties which limit their advocacy. A prosecutor, as a quasi-judicial officer, has a duty to act impartially and to seek a verdict free from prejudice and based upon reason. State v. Echevarria, 71 Wn. App. 595, 598, 860 P.2d 420 (1993) (citing State v. Kroll, 87 Wn.2d 829, 835, 558 P.2d 173 (1976)). In State v. Huson, the Supreme Court noted the importance of impartiality on the part of the prosecution:

[The prosecutor] represents the state, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial ... We do not condemn vigor, only its misuse ...

73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096 (1969) (citation omitted); see also Reed, 102 Wn.2d at 147.

To determine whether prosecutorial comments constitute misconduct, the reviewing court must decide first whether such comments were improper, and if so, whether a “substantial likelihood” exists that the comments affected the jury.” Reed, 102 Wn.2d at 145. The burden is on the defendant to show that the prosecutorial comments rose to the level of misconduct requiring a new trial. State v. Sith, 71 Wn. App. 14, 19, 856 P.2d 415 (1993) (holding that in the absence of a defense objection, reversal for prosecutorial misconduct in closing argument is required only if the misconduct was so prejudicial that it could not have been cured by an objection and appropriate curative instruction) .

b. The prosecutor misstated the law during closing argument, requiring a new trial. In rebuttal, in an apparent attempt to respond to defense counsel’s closing argument, the prosecutor managed to undermine the long-standing principle of the presumption of innocence. The prosecutor argued:

So the law tells you, yes, you can presume things by you reasonable and rational inferences. Because the law tells you to make a presumption. The law doesn’t tell you that you can make presumptions in favor of one party and not in favor of another. It tells you to be reasonable and rational. And it tell you most importantly to use your common sense.

12/30/09 RP 129 (emphasis added).

This dramatic undercutting of the presumption of innocence was so remarkable that it took several moments for the court to recover, at which time the trial court, sua sponte, interrupted the prosecutor. The court then briefly instructed the jury:

The presumption of innocence does not mean that you accord the State that same presumption in any way, either in evaluating the evidence or anything else. The presumption of innocence is not an evidentiary rule. Do not be confounded by that.

12/30/09 RP 130 (emphasis added).

The prosecutor's dramatic dismissal of the presumption of innocence during closing argument must be soundly rejected as a clear violation of Mr. Ilerna's right to a fair trial and due process of law. State v. Carr, 160 Wash. 83, 90-91, 294 Pac. 1016 (1930) (holding that a prosecutor is a quasi-judicial officer, whose duty it is to assure a defendant a fair and impartial trial, "in the character of fair play").

The court's attempt to give a curative instruction was insufficient to cure the harm caused by the prosecutor's argument. Even the court seemed to understand the confusion that the prosecutor's argument had caused, as is shown in the court's

admonition to the jury: “Do not be confounded by that.” 12/30/09 RP 130.

Appellant is aware that in State v. Warren, this Court held that where a prosecutor gave a similarly “remarkable misstatement of the law” during closing argument, the trial court’s curative instruction was deemed sufficient to cure the error. 165 W.2d 17, 28, 195 P.3d 940 (2008). This case, however, is distinguishable from Warren. Here, the trial court’s curative instruction was far less complete than the court’s instruction in Warren. Id. at 25; 12/30/09 RP 130. The court in Warren specifically referred the jury to the court’s jury instructions on reasonable doubt, actually reading the instruction to the jury. 165 Wn.2d at 25. In contrast, in Mr. Ilerna’s case, the trial court merely compounded the confusion caused by the prosecutor’s misstatement by failing to read the proper jury instruction on the presumption of innocence in its curative instruction. 12/30/09 RP 130.

c. Prosecutorial misconduct is properly before this court. Generally, an objection to prosecutorial misconduct is waived by the failure to timely object and request a curative instruction. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991). However, the issue

may be addressed for the first time on appeal when the misconduct was so “flagrant and ill-intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect.” Id. (citations omitted); see also State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996). “When no objection is raised, the issue is whether there was a substantial likelihood the prosecutor’s comments affected the verdict.” State v. Dhaliwal, 150 Wn.2d 559, 576, 79 P.3d 432 (2003); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984) (conviction reversed where prosecutor repeatedly called defendant a liar during closing argument).

Although the misconduct quoted above was not objected to by defense counsel when made, the issue is nonetheless properly presented for the first time on appeal, since the “law tells you to make a presumption” comments were so “flagrant and ill-intentioned” as to irrevocably prejudice the jury, lowering the burden of proof and impacting the verdict in this case – thus affecting Mr. Ilerna’s constitutional right to due process. RAP 2.5(a)(3). Because Mr. Ilerna’s conviction resulted from prejudicial prosecutorial misconduct, it must be reversed. See also State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996) (finding

manifest constitutional error and reversing conviction, despite failure of defense counsel to object at trial, where prosecutor misstated nature of reasonable doubt and shifted burden of proof to defense in closing argument).

d. The prosecutor's additional misconduct in closing argument denied Mr. Ilerna a fair trial. The prosecutor also made additional comments rising to the level of misconduct in closing argument, violating Mr. Ilerna's right to due process of law.

First, the prosecutor repeatedly employed improper rhetoric, labeling Mr. Ilerna a "smart criminal," and asking the jury not to "reward this Defendant for being smart." 12/30/09 RP 107, 131, 134. Although defense counsel promptly objected to the disparaging use of the word "criminal" during closing argument, the objection was overruled by the trial court. 12/30/09 RP 131-32.

In addition to the "criminal" comments, the prosecutor denigrated the defense by telling the jury, "There isn't a hole in the State's case. The Defense is doing his job. He's arguing to you about what reasonable doubt is." 12/30/09 RP 133.

This argument is tantamount to implying that defense counsel is engaging in trickery, or is operating smoke and mirrors in order to "get a client off," and is improper. See, e.g., State v.

Gonzalez, 111 Wn. App. 276, 283-84, 45 P.3d 205 (2002)

(reversing where prosecutor disparaged defense counsel by stating that while the defense has an obligation to his client, the prosecutor only seeks justice). The prosecutor's argument also undermines the concept of reasonable doubt – implying that a cornerstone of the American legal tradition and a fundamental right is just another defense trick to be pulled out of defense counsel's hat. But see, e.g., Winship, 397 U.S. at 364; Blakely, 542 U.S. at 301-02; Apprendi, 530 U.S. 476-77; U.S. Const. amend. 14.

As in Fleming, the prosecutor here repeatedly implied that because Mr. Ilerna was charged with a serious offense, he was not entitled to the same constitutional protections as others. "The State must convict on the merits, and not by way of misstating the nature of reasonable doubt, misstating the role of the jury,... and improperly shifting the burden of proof to the defense." 83 Wn. App. at 216. The prosecutor's comments regarding the presumption of innocence and reasonable doubt, as well as her remaining improper rhetoric, thus served to undermine fundamental principles of due process and to deprive Mr. Ilerna of a fair trial.

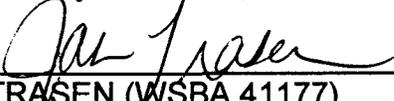
e. Reversal is required. The cumulative effect of various instances of prosecutorial misconduct may violate a defendant's right to a fair trial. State v. Reeder, 46 Wn.2d 888, 893-94, 285 P.2d 884 (1955); State v. Torres, 16 Wn. App. 254, 262-63, 554 P.2d 1069 (1976). Due to the several instances of misconduct in the closing argument during Mr. Ilerna's trial, there is a substantial likelihood the cumulative effect affected the jury's verdict; thus, this Court should reverse his conviction. Reed, 102 Wn.2d at 146-47; see also United States v. Holmes, 413 F.3d 770, 778 (8th Cir. 2005) (reversing due to prosecutor's denigration of defense in closing argument, which court finds particularly egregious due to comments made during rebuttal, giving defense no opportunity to respond).

F. CONCLUSION.

For the foregoing reasons, Mr. Ilerna respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 15th day of July, 2010.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64863-2-I
v.)	
)	
RAUL ILERNA,)	
)	
Appellant.)	

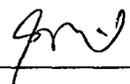
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