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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37553-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Corinne Dixon,

Appellant.

Thurston County Superior Court

Cause No. 07-1-01511-0

The Honorable Judge Gary R. Tabor

Appellant's Reply Brief

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ARGUMENT

I. RESPONDENT'S CONCESSION REQUIRES REVERSAL AND DISMISSAL OF THE BAIL JUMPING CHARGE.

Respondent has conceded that the evidence was insufficient to support the bail jumping charge, and that the case is controlled by *State v. Liden*, 118 Wn. App. 734, 77 P.3d 668 (2003). Brief of Respondent, pp. 1-2. The conviction for bail jumping must be reversed and the charge dismissed with prejudice. *Liden, supra*.

II. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT THAT INFRINGED MS. DIXON'S CONSTITUTIONAL RIGHTS.

A. The prosecuting attorney's missing witness argument was not supported by the record and unconstitutionally shifted the burden of proof.

Limitations on the missing witness doctrine "are particularly important when... the doctrine is applied against a criminal defendant." *State v. Montgomery*, 163 Wn.2d 577, 598, 183 P.3d 267 (2008). A prosecutor may not make a missing witness argument unless (1) the missing testimony is material and not cumulative, (2) the missing witness is particularly under the control of the accused, (3) the witness' absence is not satisfactorily explained, (4) the argument does not shift the burden of proof, and (5) the doctrine is raised early enough to provide an opportunity for rebuttal or explanation. *Montgomery*, at 599.

In this case, the prosecutor argued in closing that Ms. Dixon should have called her passenger to testify that the drugs belonged to him. The prosecutor did not create a record supporting this argument: first, the missing witness was not particularly under Ms. Dixon's control; second, defense counsel could not locate the witness, and furthermore, his absence is explained by the incriminating nature of his testimony (*see Montgomery* at 599); third, the state raised the missing witness argument after both parties had rested.

Without citation to the record, Respondent claims "it is a fair inference" that the witness was more available to Ms. Dixon than to the prosecutor. Brief of Respondent, p. 4. Even if this unsupported contention were true, being "more available" is not the correct standard, which requires proof that the witness is "particularly under the control" of the accused person. *Montgomery*, at 598.

Without citation to authority, Respondent suggests Ms. Dixon bore the burden of proving she was still unable to locate the passenger in March of 2008. Brief of Respondent, p. 4. Where no authorities are cited, it is presumed that counsel, after diligent search, has found none. *Coluccio Constr. v. King County*, 136 Wn. App. 751, 779, 150 P.3d 1147 (2007). Furthermore, as noted above, the passenger's absence is explained by the incriminating nature of the proposed testimony. *Montgomery*, at 599.

Even if she had been able to locate him, the prosecutor's argument would have been unwarranted.

The prosecutor's improper comments were not invited or provoked by defense counsel. Brief of Respondent, p. 5-6. Neither Ms. Dixon nor her attorney "unequivocally" suggested that the passenger would have testified that the drugs belonged to him. *See Montgomery* at 598, n. 12. Instead, Ms. Dixon's strategy was to suggest that there was reasonable doubt on the issue of possession, because of the passenger's proximity and access to her purse after the arrest.

The prosecutor's misconduct infringed Ms. Dixon's constitutional right to the presumption of innocence and violated the constitutional requirement that the prosecution bear the entire burden of proof. Such misconduct may be reviewed even absent an objection from defense counsel under RAP 2.5(a). *See State v. Perez-Mejia*, 134 Wn. App. 907, 920 n. 11, 143 P.3d 838 (2006); *See also State v. Belgarde*, 110 Wn.2d 504, 510-12, 755 P.2d 174 (1988). Respondent's suggestion that the error should be reviewed under the "flagrant and ill-intentioned" standard is incorrect. Brief of Respondent, pp. 5-6.

Because the misconduct here infringed a constitutional right, prejudice is presumed. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). The prosecutor has not even attempted to argue that any

reasonable jury would reach the same result absent the error and that the evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). The drugs were not on her person and the passenger had access to the area in which they were found. A reasonable juror could therefore have acquitted Ms. Dixon. Accordingly, the misconduct was not harmless beyond a reasonable doubt.

The prosecutor's attempt to shift the burden of proof requires reversal of Ms. Dixon's conviction. The case must be remanded to the superior court for a new trial. *Montgomery, supra*.

B. Respondent's concession that the prosecuting attorney committed misconduct by commenting on Ms. Dixon's constitutional privilege against self-incrimination requires reversal of the conviction.

Respondent concedes that the prosecutor committed misconduct by commenting on Ms. Dixon's constitutional privilege against self-incrimination. Brief of Respondent, p. 7. This misconduct is presumed to be prejudicial, and requires reversal unless the state establishes beyond a reasonable doubt that the error is harmless. *Easter*, at 242. The state must show beyond a reasonable doubt that "any reasonable jury would reach the same result absent the error, [and that] the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *Easter*, at 242.

The prosecutor has not attempted to meet this test. Instead, the prosecutor argues that the misconduct was not “so persuasive as to cause the jury to ignore the jury instructions and convict...” Brief of Respondent, p. 8. This is not the correct standard for analyzing constitutional error.

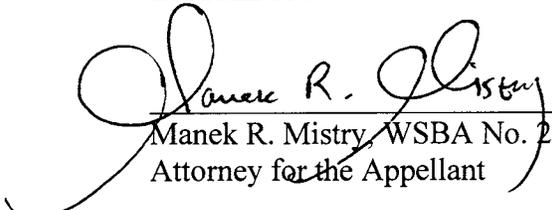
A reasonable jury could have acquitted Ms. Dixon; thus, it cannot be said that the prosecutor’s remark was harmless beyond a reasonable doubt. *Easter, supra*. The conviction must be reversed and the case remanded for a new trial.

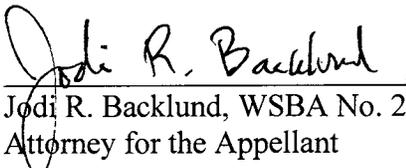
CONCLUSION

Ms. Dixon’s bail jumping charge must be dismissed with prejudice. Her possession conviction must be reversed and remanded for a new trial.

Respectfully submitted on November 6, 2008.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

STATE OF WASHINGTON
BY CA
DEPUTY

Corinne Dixon
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and to:

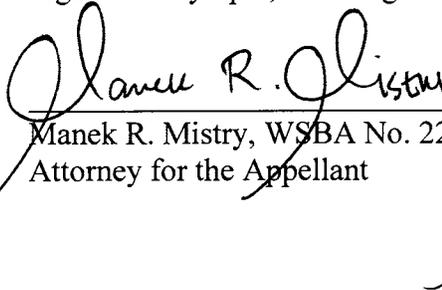
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 6, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on November 6, 2008.



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