

NO. 38700-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

NATHAN R. WINFIELD,

Appellant.

FILED
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DIVISION II
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Gary Steiner Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The Prosecutor committed prejudicial misconduct when she argued during closing and rebuttal that two witnesses identified Mr. Winfield as the person with a gun at the earlier fight scene, when in fact there was no such evidence presented at trial.
2. There was insufficient evidence that Mr. Winfield possessed marijuana.
3. There was insufficient evidence that Mr. Winfield possessed a firearm.
4. There was insufficient evidence that Mr. Winfield possessed cocaine.
5. There was insufficient evidence that Mr. Winfield resisted arrest.
6. The trial court erred by failing to grant the defense motions to dismiss the drug, firearm charges for insufficient evidence.
7. Trial court erred by refusing to provide unwitting possession jury instruction where the state alleged that

Mr. Winfield was in the car where the drugs and gun were found and Mr. Winfield denied being in the car.

8. The prosecutor committed misconduct by arguing critical facts to the jury during closing and rebuttal regarding witnesses identifying Mr. Winfield when no such identifications occurred.

Issues Pertaining to Assignments of Error

1. Did the Prosecutor commit prejudicial misconduct when she argued during closing and rebuttal that two witnesses identified Mr. Winfield as the person with a gun at the earlier fight scene, when in fact there was no such evidence presented at trial?
2. Did the state fail to present sufficient evidence that Mr. Winfield possessed marijuana?
3. Did the state fail to present sufficient evidence that Mr. Winfield possessed a firearm?
4. Did the state fail to present sufficient evidence that Mr. Winfield possessed cocaine?

5. Did the trial court err by failing to grant the defense motions to dismiss the drug, firearm charges for insufficient evidence?
6. Did the trial court err by refusing to provide unwitting possession jury instruction where the state alleged that Mr. Winfield was in the car where the drugs and gun were found and Mr. Winfield denied being in the car?
7. Did the prosecutor commit misconduct by arguing critical facts to the jury during closing and rebuttal regarding witnesses identifying Mr. Winfield when no such identifications occurred?

B. STATEMENT OF THE CASE

1. Procedural Facts

Nathan Winfield was charged by amended information and convicted of unlawful possession of a firearm in the first degree contrary to RCW 9.41.040; unlawful possession of a controlled substance with intent to deliver contrary to RCW 69.50.401; unlawful possession of less than 40 grams of marijuana contrary to RCW 69.50.4014; resisting arrest contrary to RCW 9A.76.040; and bail jumping contrary to RCW 9A.76.170. CP 7-9; 82-95.

Mr. Winfield was convicted by a jury, the Honorable Judge Gary Steiner presiding. CP 82-95. This timely appeal follows. CP 96.

Half Time Motions

Mr. Winfield moved to dismiss the contraband charges based on insufficient evidence that he had any control over the items of contraband. RP 625. Mr. Winfield also moved to dismiss the resisting arrest charge because the police never told him he was under arrest until after he had been tackled. RP 426. The court denied the motions without reason. RP 626.

2. Substantive Facts

Mr. Winfield was suspected of having been involved in a gun fight at Orchard and 56th street. Police officer Stark interviewed two witnesses who described a car with several people including a black male involved in a domestic dispute a woman brandishing a gun. RP 68, 70, 231, 264, 277, 340. The witnesses described the person in question with the gun as being a 6'1" black male with blue jeans and a black puffy jacket and wearing a black and blue NYY baseball cap. RP 68, 70, 250, 257, According to officer Stark, witnesses are usually accurate when giving descriptions of clothing, but Mr. Winfield did not have a baseball hat and according to some

officers he did not have a black jacket and the state did not present as evidence a black jacket as part of their case. RP 253. .

The witnesses described the car as a silver Chrysler. RP 231, 264. A police officer who responded to the area in search of the car, radioed in the license plate number of the Chrysler after the car was located. RP 257-58. The witnesses were brought to the scene where Mr. Winfield was arrested, the distance of a 20 minute drive. The witnesses were not able to identify Mr. Winfield but were able to identify two passengers in the car the police believed Mr. Winfield drove. RP 66, 390.

The two passengers, like Mr. Winfield were black males. One of the passengers was wearing blue jeans and a black jacket. The passengers were released, even though one of the passengers had a black jacket and blue jeans and was an African American male the witness Blessum described as the person with the gun. RP 68, 422. Without any facts to support their logic, the police released the passengers believing that they had not been in the car for very long even though the witnesses to the fight positively identified them as being present and could not identify Mr. Winfield. RP 66, 390.

When Mr. Winfield was arrested officers contradicted each

other in testifying as to whether Mr. Winfield had a black jacket. RP 252, 267, In any event the police did not find a black jacket during their search of the area and the state did not present any evidence at trial of a black jacket. RP 252, 299.

When Mr. Winfield was arrested he was wearing two arm holsters: one was empty and the other held a Glock 21 magazine. RP 299. After arresting Mr. Winfield following a chase, the police searched the car associated with Mr. Winfield and found a gun hidden under the carpet in front of the front passenger's seat with a Glock 21 with a light attachment (RP 376, 448) and cocaine in a Crown Royal bag in the center console (RP 365) and three grams of marijuana in the center console drink holder. RP 364, 372. Police also found a scale and a box for the Glock light attachment and a hip holster for the gun. RP 364-66, 374-75, 382. The police determined that it would not have been easy for Mr. Winfield to reach the firearm. RP 440. The police did not find any documents or evidence connecting Mr. Winfield to the car. RP 461

Closing Argument Facts Not In Evidence

The prosecutor argued in closing the following facts not in evidence:

Mr. Blessum testified that he saw the defendant reach under his jacket.

RP 676. The court overruled the defense objection that the prosecutor was arguing facts not in evidence. RP 676. Mr. Blessum testified as follows:

Basically, that I saw someone pull out a possible semiautomatic weapon, a pistol from their jacket – it was a black jacket, blue baseball cap – threatening people around them that he was going to shoot someone. . . I saw them leave in a silver Chrysler.

RP 63. Mr. Blessum gave a generic description of the person with the gun as being an African American male in his 20's to 30's wearing a black jacket and a blue baseball cap. RP 68. Out of the presence of the jury, Mr. Belssum stated that he could not identify Mr. Winfield. When asked if he could identify Mr. Winfield as the person with the gun, Mr. Blessum responded, “[b]ased on what he was he was wearing, it is very hard to identify someone with a hooded jacket from 25 yards away.” RP 66. When asked by the court if he could identify Mr. Winfield, Mr. Blessum responded, “not one hundred percent. Not with what he was wearing”. RP 66.

When asked who was fighting, Mr. Blessum stated that “you know, the only one that had the gun was the person I didn’t know. “ RP 70. Witness Dustin Williams described the person with the gun

as “wearing a black puffy coat.” RP 80. This witness saw four black men involved in the fight. RP 80

During rebuttal closing, the prosecutor argued additional facts not in evidence. The prosecutor argued that, “I believe he testified as to the clothes that they were wearing [occupants of car]. Neither of them were wearing a black jacket or a New York Yankee’s baseball hat.” RP 729. The court overruled the defense objection that the prosecutor was arguing facts not in evidence. RP 729. Officer Betts testified that the passengers were African American. RP 422. “For the clothing, from my report, the one I described was wearing a button up white and beige shirt, black jacket, blue jeans.” RP 422.

The prosecutor finished her rebuttal by again arguing facts not in evidence. The prosecutor informed the jury that the civilian witnesses “said I saw him [Mr. Winfield] pull a gun, I saw that person pull a gun out from underneath and wave it around.” RP 733. The defense did not object.

During officer Betts testimony he informed the jury that the civilian witnesses could identify the passengers as being involved in the fight but could not identify Mr. Winfield as being involved in the fight. RP 390.

C. ARGUMENTS

1. THE STATE FAILED TO PRESENT EVIDENCE BEYOND A REASONABLE DOUBT THAT MR. WINFIELD POSSESSED MARIJUANA, COCAINE AND A FIREARM.

a. Standard of Proof

For a conviction to be upheld the State must prove every essential element of a crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072, 25 L. Ed. 2d 368 (1970); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984); State v. McCullum, 98 Wn.2d 484, 493-94, 656 P.2d 1064 (1983); State v. Green, 94 Wn.2d 216, 224, 616 P.2d 628 (1980). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). Circumstantial evidence and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The jury decides what evidence is credible. State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), citing, State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The reviewing court defers to the jury on issues of conflicting testimony, credibility of

witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Mr. Winfield challenges the essential element of possession in each of his convictions.

b. Firearm

Mr. Winfield was convicted of unlawful possession of a firearm contrary to RCW 9.41.040(1)(a). Mr. Winfield challenges the statutory element of possession. The statute reads as follows:

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

Id.

To convict Mr. Winfield of unlawful possession of a firearm as charged, the State had to prove that he knowingly had a firearm in his possession or his control and that he had previously been convicted of a felony. RCW 9.41.040(1)(b). State v. Anderson, 141 Wash.2d 357, 5 P.3d 1247 (2000). Officer Betts indicated that it would have been difficult for the driver, from the driver's seat, to have accessed the hidden gun located under the front passenger

seat rug. RP 440.

c. Cocaine Secreted in Velvet Bag

Mr. Winfield was convicted of unlawful possession of a controlled substance with intent to deliver contrary to RCW 69.50.401(1)(2)(a) Mr. Winfield challenges the statutory element of possession. RCW 69.50.401 provides in relevant part as follows:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

(a) A controlled substance classified in Schedule I or II which is a narcotic drug . . .

Id.

To convict Mr. Winfield of unlawful possession of cocaine, the state had to prove Mr. Winfield (1) unlawfully possessed (2) with intent to deliver (3) a controlled substance. State v. Atsbeha, 96 Wn. App. 654, 981 P.2d 883, reversed on other grounds, 142 Wash.2d 904, 16 P.3d 626. (1999). While circumstantial evidence carries the same weight as other evidence, an Officer's opinion that the defendant possessed more drugs than normal for personal use

is insufficient to establish intent to deliver. State v. Lopez 79 Wn. App. 755, 904 P.2d 1179 (1995). Here, officer Terry Krause opined that the amount of cocaine in the Chrysler, slightly over one ounce was more drugs than normal for personal use. RP 513, 517. As in Lopez, Krause's opinion is insufficient to establish intent to deliver.

d. Marijuana

RCW 69.50.4014 makes it illegal to possess less than 40 grams of marijuana. *Id.* The marijuana discovered in the instant case was located in a cup holder in the center console. RP 364, 372. No witness testified that the marijuana was plainly visible.

e. Constructive Possession

Based on the state's belief that Mr. Winfield was the driver of a specific silver Chrysler, the state alleged that Mr. Winfield was in constructive possession of the contraband found in the car.

Possession may be either actual or constructive. State v. Callahan, 77 Wash.2d 27, 29, 459 P.2d 400 (1969). Actual possession occurs when the contraband is in the personal custody of the person charged. State v. Staley, 123 Wash.2d 794, 798, 872 P.2d 502 (1994). The State did not argue that Mr. Winfield had actual possession of any of the contraband. Rather the State showed possible proximity to the contraband, which is insufficient

to prove constructive possession. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

Constructive possession requires a showing that the defendant had dominion and control over the contraband or over the premises where the contraband was found. Echeverria, 85 Wn. App. at 783. "The ability to reduce an object to actual possession is an aspect of dominion and control." *Id.* In establishing dominion and control, the totality of the circumstances must be considered and no single factor is dispositive. State v. Alvarez, 105 Wn. App. 215, 221, 19 P.3d 485 (2001); State v. Bradford, 60 Wn. App. 857, 862-63, 808 P.2d 174 (1991).

In Echeverria, the Court reversed a conviction for unlawfully possessing a "throwing star". The throwing star was found underneath the driver's seat, not in plain view. The Court explained the reversal, as being based on the fact that "[c]lose proximity alone is not enough." Echeverria, 85 Wn. App. at 784.

Mr. Winfield's possession of a firearm charge and possession of cocaine are similar to the possession of a throwing star in Echeverria. As in Echeverria, the State argued that Mr. Winfield constructively possessed the contraband because he was the driver of the car where the contraband was located. As in

Echeverria, this is incorrect. Mr. Winfield was not in constructive possession of the firearm, because the firearm like the throwing star in Echeverria was not in plain view and was further away from Winfield than the throwing star located under Echeverria's seat. Here the firearm was not within the driver's reach and could not easily be reduced to actual possession. RP 440.

As for the cocaine, it was located in a velvet bag. Although the bag was in plain view, its contents were not discernable without opening the bag and there was no evidence that Mr. Winfield was aware of the contents of the bag or had any more access to it than the other two passengers. There was also nothing linking MR. Winfield to the car: no papers or personal effects. RP 390.

No witness testified that Mr. Winfield had actual physical contact with any of the contraband. The police determined there were two other passengers in the car with Mr. Winfield: one in the front passenger seat and one in the back and both were African American males like Mr. Winfield. RP 390, 422. The passengers had equal access to the marijuana and the police testified that the front passenger had easier access to the firearm than the driver. RP 440.

No witness could identify Mr. Winfield as having been

present or involved in the gun fight that precipitated the stop, but the witnesses were able to identify the passengers and one of the passengers, like Mr. Winfield had on blue jeans and a black jacket. RP 422.

If there was any type of possession, it had to be based on constructive possession; i.e., dominion and control over the contraband. However, mere proximity to the item in question is insufficient. State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990); State v. McCaughey, 14 Wn. App. 326, 329, 541 P.2d 998 (1975). Passing control is also insufficient. Callahan, 77 Wn.2d at 29. Rather, there must be “other sufficient indicia of control over the [item]” State v. Staley, 123 Wn.2d 794, 802, 872 P.2d 502 (1994). And the evidence in this regard must be substantial. Callahan, 77 Wn.2d at 29.

The circumstances in Callahan are instructive. In Callahan, police executed a search warrant on a houseboat. The defendant was found sitting at a table on which police found various pills and hypodermic needles. Police also found a cigar box filled with drugs close to the defendant on the floor. The defendant admitted ownership of two books on drugs, two guns, and a set of broken scales found on the boat. He also admitted actually handling the

drugs earlier that day. Callahan, 77 Wn.2d at 28. Although the defendant in that case admitted to exercising control over the drugs by handling them, was in close proximity to other drugs, and admitted ownership of guns, books on narcotics, and measuring scales, this evidence was not sufficiently substantial to support a finding of constructive possession. Callahan, 77 Wn.2d at 31-32.

In Spruell, the defendant was arrested in the kitchen of a home in which officers found cocaine and marijuana, along with paraphernalia associated with drug manufacturing. From outside the home, they also heard what sounded like a plate hitting the back door from inside the home. Once inside, they found cocaine along the door and doorjamb and a plate on the floor located within a few feet of the door. The defendant's fingerprint was on that plate. Spruell, 57 Wn. App. at 384-85. Still, the evidence – which suggested at least temporary control over the drugs – was not sufficiently substantial to support a finding of constructive possession. Id. at 387-89.

Callahan and Spruell make clear that constructive possession is not established with proximity to drugs or even proximity with momentary physical handling. In Mr. Winfield's case there was far less evidence of constructive possession than in

Callahan and Spruell. There were no fingerprints, no admissions of passing control and nothing to connect Mr. Winfield to the contraband.

Cases in which the defendant contested probable cause are also instructive by demonstrating that police may not rely on their assumptions and hunches any more than a jury can infer an essential element without proof beyond a reasonable doubt.

In State v. Chavez, 138 Wn. App. 29, 156 P.3d 246 (2007), a police officer interrupted what appeared to be a drug transaction in progress in a nightclub restroom. The officer saw three men, including Chavez, standing together in an open stall. One man left immediately upon seeing the officer. Another man was holding a partially folded dollar bill that appeared to have cocaine on it. The man was handing it to Chavez, who was refusing to take it in the officer's presence. Chavez, 138 Wn. App. at 31-32. Chavez was arrested for constructive possession of a controlled substance. In a search incident to arrest, officers found more cocaine in his wallet. Chavez, 138 Wn. App. at 32.

On appeal, Division Three reversed. The Court found that despite Chavez' "placement and posture within the stall," there had not been probable cause to arrest him. Recognizing that proximity

alone was insufficient for constructive possession, the Court noted that police had no knowledge of what occurred prior to the officer's arrival and never saw Chavez actually holding or using the cocaine. And although the circumstances gave the officer involved a "strong suspicion" Chavez was involved with the cocaine, the evidence was insufficient for probable cause. Chavez, 138 Wn. App. at 34-36.

Mr. Winfield's case is similar to Chavez. At best, the State demonstrated proximity to the drugs and the opportunity to possess them. Mr. Winfield did not own the car; he may or may not have been the driver and he had equal access to the drugs as the other passengers and access to the gun than the front seat passenger. The contraband could have been placed in the car by any of the car's occupants.

Mr. Winfield's case is distinguishable from cases in which there was in fact probable cause to arrest for possession.

In State v. Morgan, 78 Wn. App. 208, 896 P.2d 208, review denied, 127 Wn.2d 1026 (1995), a police officer came upon a pickup truck in a public park after midnight. There was water, aluminum foil, and a white powdery substance on the hood of the pickup, and the officer concluded the items were being used to freebase cocaine. The officer arrested the driver and the

passenger (Morgan). In a search incident to arrest, the officer found more cocaine on Morgan. On appeal, Morgan argued the officer did not have probable cause to arrest based on the items found on the truck's hood. Morgan, 78 Wn. App. at 210.

This Court found that Morgan and the driver had joint constructive possession of the drug paraphernalia. Specifically, the Court noted that the paraphernalia was not located in an area where Morgan could have been unaware of it. Rather, it was in plain view on the vehicle's hood. There was sufficient evidence to support the officer's conclusion that Morgan knew about the paraphernalia and intended to use it. Morgan, 78 Wn. App. at 213.

In Mr. Winfield's case, in contrast to Morgan, the gun found in the car was not in plain view to Mr. Winfield or anyone else in the car. Moreover, the cocaine was in a purple velvet bag and thus also not visible to anyone in the car and the marijuana was secreted in the passenger's cup holder. Unlike in Morgan, the contraband in Winfield's case was not in plain view and was not in imminent use.

In another case, State v. Coahran, 27 Wn. App. 664, 620 P.2d 116 (1980), the Court incorrectly determined that Coahran had constructive possession of marijuana based on his presence in

the vehicle with the marijuana. The defendant was a passenger in a truck driven by a parolee. Police stopped the truck and arrested the driver for a parole violation. Coahran had two sleeping bags in the truck, which he retrieved, and police told him he was free to go. A search of the truck's sleeping compartment revealed a paper bag containing marijuana located directly behind the passenger seat. Police arrested Coahran and, in a search incident to arrest, found that he possessed various other controlled substances. Coahran, 27 Wn. App. at 665-666. Division Three found probable cause for his arrest. Coahran, 27 Wn. App. at 668-669.

As an initial matter, the Coahran court mistakenly assumed that constructive possession is proved when it is shown "that the defendant exercised dominion and control over either the drugs or the area in which they were found." Coahran, 27 Wn. App. at 668-69 (quoting State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)). This is incorrect. It is not a crime to have dominion and control over the premises where drugs are found. Rather, dominion and control is but one factor to consider in deciding whether the defendant exercised dominion and control over the drugs in question. State v. Cantabrana, 83 Wn. App. 204, 207-208, 921 P.2d 572 (1996); State v. Shumaker, 142 Wn. App. 330,

333-335, 174 P.3d 1214 (2007). The Coahran Court's failure to recognize this distinction may have influenced its probable cause finding.

In any event, Coahran is distinguishable. Coahran had two sleeping bags in the truck and, although not clear from the opinion, they may have been in the sleeping compartment when police stopped the truck. In that same sleeping compartment, and directly behind Coahran, police found the bag of marijuana. Thus, it was not unreasonable for officers to conclude that Coahran was intimately familiar with that section of the truck, knew about the marijuana, and had exercised control over it.

In contrast, the most that can be said in Mr. Winfield's case is that there were drugs in the console secreted in a bag hidden from plain view and a firearm that was hidden under the front passenger seat a difficult reach from the driver's seat. The contraband was not visible to anyone in the car and not readily identifiable without opening the bag or looking inside the cup holder. Moreover, the front passenger alone who was not arrested but identified by witnesses, had the closest access to the gun which was under the carpet at his feet.

State v. Turner, 103 Wn. App. 51513 P.3d 234 (2000) is

also distinguishable. Turner is similar to the gun in plain view in Echeverria, where the court found that a rational trier of fact could reasonably infer that the defendant possessed or controlled a gun that was within his reach. The gun was in plain sight, sticking out from underneath the defendant's driver's seat. Echeverria, 85 Wn. App. at 783, 934 P.2d 1214.

Here, the gun was not under the driver's seat and it was not in plain view; rather it was secreted under the carpet in front of the passenger's seat. Similarly, the cocaine and marijuana were not in plain view but secreted in a velvet bag and the console drink holder. While the drugs were within the reach of the driver and passengers, they were not in plain view and Mr. Winfield had no more access than the other passengers. And there was no evidence that Mr. Winfield owned the car or used the car regularly. RP 390. For these reasons, the facts fail to establish that Mr. Winfield constructively possessed the firearm or the drugs.

Dismissal of the charges is required where the state fails to present sufficient evidence of an essential element: here possession in each of the enumerated charges. Winship, 397 U.S. at 364; Acosta, 101 Wn.2d at 615; McCullum, 98 Wn.2d at 493-94; Green, 94 Wn.2d at 224.

2. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE REFUSED TO CONSIDER THE EVIDENCE IN ITS ENTIRETY AND REFUSED TO GIVE AN UNWITTING POSSESSION INSTRUCTION.

Mr. Winfield proposed an unwitting instruction that the trial court rejected on grounds that the defendant denied possession and therefore despite of the state's evidence to the contrary, Mr. Winfield was not entitled to the unwitting possession instruction. RP 660, 664.

Unwitting possession is a well-established judicially created defense to possession of contraband. State v. George, 146 Wn. App. 906, 193 P.3d 693, 697 (2008) The State has the burden of proving the elements of unlawful possession of a controlled of contraband. A defendant then can prove the affirmative defense of unwitting possession. This affirmative defense mitigates the harshness of a strict liability crime. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Unwitting possession must be proved by a preponderance of the evidence. George, 193 P.3d at 696, citing, State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931 (1998).

A defendant in a criminal case is "entitled to have the trial

court instruct upon its theory of the case if there is evidence to support the theory.” George, 193 P.3d at 697, quoting, State v. Hughes, 106 Wash.2d 176, 191, 721 P.2d 902 (1986). It does not matter who presents the evidence. State v. Gabryschack, 83 Wn. App. 249, 253, 921 P.2d 549 (1996). A defendant may exercise his right to remain silent and rely on the State's evidence and cross-examination of the State's witnesses to support a defense instruction. Gabryschack, 83 Wn. App. at 253. A trial court commits legal error by not instructing the jury on the defense of unwitting possession when evidence supporting the defense is presented at trial. State v. May, 100 Wn. App. 478, 482-83, 997 P.2d 956 (2000).

“In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury.” George, 193 P.3d at 697, quoting, May, 100 Wn. App. at 482, 997 P.2d 956. The affirmative defense of unwitting possession “must be considered in light of all the evidence presented at trial, without regard to which party presented it.” State v. Olinger, 130 Wn. App. 22, 26, 121 P.3d 724 (2005).

A defendant is not required to present expert testimony to establish that he or she was too intoxicated to form the necessary mental state. State v. Thomas, 109 Wash.2d 222, 231, 743 P.2d 816 (1987). Indeed, a defendant may exercise his or her right to refrain from testifying at trial and to rest at the close of the State's case without presenting defense testimony, . . . , so long as the evidence presented by the State and elicited by the defense during cross examination of the State's witnesses contains substantial evidence of the [proposed defense] []. Although affirmative evidence presented by a defendant may ordinarily be more effective, nothing prohibits a defendant from attempting to persuade the trier of fact of his [theory of the case] [].

Gabryschack, 83 Wn. App. at 253.

In Gabryschack, the defendant requested an instruction on voluntary intoxication instruction. The Court of Appeals determined that while the state's evidence would be considered, there was insufficient evidence to support the instruction. Id.

In George, a possession of marijuana and paraphernalia case, the Court of Appeals reversed the conviction for possession of marijuana where the testimony of the only witness-Trooper Thompson-provided a evidence that justified the jury being instructed on the defense of unwitting possession. Thompson testified that all three vehicle occupants denied knowing anything about any marijuana or the pipe being present and George was not driving the vehicle and did not own the vehicle. Moreover, the

vehicle owner was present in the front passenger seat. Moreover, there was no fingerprint evidence linking George to the pipe. George, 19 P.3d at 697.

In Mr. Winfield's case, as in George, the state presented volumes of evidence trying to place Mr. Winfield in or near the car with the contraband and as in George, there were other occupants with access to the contraband. Based on the state's evidence in Winfield's case as in George, the trial court erred by failing to give the unwitting possession instruction. The trial court made a legal error by refusing to consider all of the evidence. The judge merely stated that because Mr. Winfield did not present evidence in his case of unwitting possession the judge did not have to consider any other evidence. The judge stated: [I]f he was saying I was in the car, but I didn't know the drugs were there because maybe a passenger put them there. I don't think we have unwitting possession." RP 660. The judge continued in his decision to deny the instruction by stating:

There is one case that Judge Tollefson had in which a guy was in a car and then got out of the car. He did not give an unwitting possession, I think, in that case. [sic] That was reversed. In this case, there is an absolute denial that he was ever in the car, that he knew anything about this situation, or that he knew anything about these people or was in any way

associated. I don't think an unwitting possession is given.

RP 664.

Under Thomas George, and Grabyschack, this was error. The standard is not whether the defendant proffered the evidence but rather whether there was substantial evidence adduced at trial to support the instruction. Thomas, 109 Wn.2d at 231; Gabryschack, 83 Wn. App. at 253. Citing the Fifth Amendment right to remain silent both Courts recognized that the source of the evidence was irrelevant. *Id.*

In Mr. Winfield's case, the state presented evidence that Mr. Winfield was the driver of the car with two other occupants and that the car contained the contraband. The state also presented evidence that the driver could not have easily accessed the firearm and that none of the drugs were plainly visible. Mr. Winfield denied being in the car. The state also presented evidence that Mr. Winfield denied everything to the officer in the hospital. This evidence is sufficient to support the instruction. The state's entire case revolved around placing Mr. Winfield in the car. Taking this evidence, it is reasonable to infer that Mr. Winfield was unaware of the contraband.

Based on Thomas, George and Grabyschack, the trial court erred by not considering the evidence and by failing to give the unwitting possession instruction. George, 19 P.3d at 697, citing, Hughes, 106 Wash.2d at 191.

3. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY ARGUING CRITICAL FACTS NOT IN EVIDENCE.

The prosecutor in closing argument told the jury that Mr. Winfield was present at the fight and left the scene in the Chrysler. RP 676. There were no such facts presented at trial. The defense objected and the court overruled the objection. *Id.* During rebuttal closing, the prosecutor again argued facts in evidence by telling the jury that the witnesses saw Mr. Winfield pull a gun. RP 733. During rebuttal argument the prosecutor also told the jury that the witnesses never identified any of the males at the gun fight as having a dark jacket or NYY baseball cap. RP 729. The prosecutor's arguments contradicted the evidence presented and were not supported by evidence.

The Sixth and Fourteenth Amendments to the United States Constitution and Wash. Const. art. 1, § 22 guarantee a criminal defendant the right to a fair and impartial trial. State v. Finch, 137

Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Statements by a prosecutor constitute reversible misconduct if the comments were improper and the defendant was prejudiced. . State v. Yates, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), cert. denied,--- U.S. ----, 128 S.Ct. 2964, 171 L.Ed.2d 893 (2008); State v. Russell, 125 Wash.2d 24, 85, 882 P.2d 747 (1994); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Prejudice is shown where there is a substantial likelihood the prosecutor's remarks affected the outcome of trial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996).

As a quasi-judicial officer, a prosecutor is duty bound to act impartially in the interest of justice. "It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." Berger v. United States, 295 U.S. 78, 88, 79 L. Ed. 2d 1314, 55 S. Ct. 629 (1934). It is the rule in Washington that the prosecution may not argue facts not in evidence that prejudice the defendant. State v.

Warren, 165 Wn.2d 17, 29, 195 P.3d 940 (2008); State v. Boehning, 127 Wn. App. 511, 519, 111 P.3d 899 (2005).
State v. Staten, 60 Wn. App. 163, 802 P.2d 1384 (1991).

In Boehning, the prosecutor made reference to three uncharged rapes when there was no such evidence presented at trial. The Court of Appeals held that even though the defense did not object, the prosecutor's statements were flagrant, ill-intentioned and prejudicial error that could not have been cured with an instruction. This Court reversed the convictions holding that the prejudicial remarks likely affected the outcome. Boehning, 127 Wn. App. at 519.

In the instant case, even though the defense objected to two of the three offending arguments, the prosecutors arguing facts not in evidence the trial court denied the objection. As in Boehning, the prosecutor's comments were flagrant and ill-intentioned and clearly impacted the outcome of the trial. In Boehning, the prosecutor argued actual facts not in evidence. In Mr. Winfield's case, the prosecutor made up facts to bolster her weak case. She provided the jury with facts to connect Mr. Winfield to the fight scene where none existed. Without the prosecutor's comments there was no evidence that Mr. Winfield was involved in any criminal activity that

justified the police chasing him and searching his car for contraband.

The basis of the state's entire case was a 911 call from the two male witnesses discussed during trial that were unable to identify Mr. Winfield. The prosecutor's misconduct provided the jury with an identification that did not exist and eliminated the witnesses' identification of the occupants in the car where the contraband was found. Without the misconduct the jury would have understood that one of the occupants of the car who matched Mr. Winfield's description and was positively as being at the fight scene was likely the suspect. This is so particularly because the witnesses were positively stated that they could not identify Mr. Winfield.

In essence the prosecutor made up a case against Mr. Winfield and supplied it to the jury during both closing and rebuttal arguments. This misconduct was prejudicial and as egregious as the facts improperly argued in Boehning. In both cases the prosecutor was able to fill holes in its case to prejudicially convince the jury to find guilt based on matters that were not presented as evidence.

Mr. Winfield's case is also similar to State v. Belgard, 110 Wn.2d

504, 755 P.2d 174 (1988) where the prosecutor told the jury to consider facts not in evidence such as Mr. Belgard's involvement in the group AIM and the nature of that group as being violent and to remember Wounded Knee. Belgard, 110 Wn.2d at 507-09. None of this information was evidence adduced at trial. Id. The Court in Belgard held that even without an objection such argument was prejudicial because it introduced inflammatory facts not in evidence which no curative instruction could cure. Belgard, 110 Wn.2d at 507-09, 512.

When a defense objection to prosecutorial misconduct is overruled, reversal is required if there is a substantial likelihood that the misconduct affected the verdict. Reed, 102 Wn.2d at 145. Here, there was a substantial likelihood the misconduct affected the verdict.

D. CONCLUSION

There was insufficient evidence to prove beyond a reasonable doubt that Mr. Winfield possessed: a firearm, cocaine, or marijuana. The trial court also failed to provide an unwitting possession instruction which prejudiced Mr. Winfield's ability to argue his case to the jury. The prosecutor also committed

prejudicial misconduct by arguing critical facts not in evidence. For these reasons, Mr. Winfield respectfully requests this Court reverse and dismiss these convictions or in the alternative remand for a new trial with the proper unwitting possession instruction.

DATED this 12th of May 2009

Respectfully submitted,

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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor 930 Tacoma Ave S. Rm. 946 Tacoma, WA 98492 and Nathan Windfield DOC# 862035 MCC Wash State Reform Unit P.O. Box #77 Monroe , WA 98272 a true copy of the document to which this certificate is affixed, On May 12, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.