

No. 42969-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

JUSTIN FORD,
Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON L. GODFREY, JUDGE

BRIEF OF RESPONDENT

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COUNTER STATEMENT OF THE CASE

Appellant, Justin Ford, was charged by Information filed on August 23, 2011, with Possession of Heroin, alleged to have occurred on August 18, 2011. CP 1. Ford was found guilty after a jury trial held on December 6-7, 2011. CP 11. Ford was sentenced on December 19, 2011, to 24 months in prison. CP 33-41.

The State generally agrees with Appellant's recitation of the testimony offered at trial with a few additions. In addition to controlled substances and drug paraphernalia, indicia bearing Mr. Ford's name was also found in the backpack; specifically, a letter addressed to Ryan McCarthy with Mr. Ford's name and return address on it, a Washington State identification card in the name of Justin J. Ford, and two photographs addressed to Justin from Kimberly. RP 49-50.

Ms. Oschner testified that when the police arrived she was high, that she had used heroin and methamphetamine earlier that day (how many times she wasn't sure) and that she had last used within an hour of the police arriving. RP 140. Ms. Oschner further testified that she had been charged as a result of this incident, pled guilty, been sentenced and was doing her time at the time of the trial. RP 145. Ms. Oschner was also impeached with a prior consistent statement to Deputy Wilson that Mr. Ford had brought the drugs to the apartment

and that all of them had been using methamphetamine and heroin prior to the police arriving. RP 146, 151.

The jury was instructed on reasonable doubt using a version of WPIC 4.01 that excluded the last sentence of the first paragraph which reads “[t]he defendant has no burden of proving that a reasonable doubt exists as to these elements.” CP 6-7.

During closing the State made the following comments about the burden of proof:

[T]here is only two things the State has to prove beyond a reasonable doubt. I have to prove that Mr. Ford possessed heroin on August 18 of this year and I have to prove that the acts occurred in Grays Harbor County, Washington.

And you - in order to find that he possessed heroin you must find that I have proved that beyond a reasonable doubt.

And the judge has instructed you as to the definition of reasonable doubt, a doubt for which a reason exists and may arise from the evidence or lack of evidence, fully and fairly and carefully considering all of the evidence. If after such a consideration you have an abiding belief in the truth of the charge you are satisfied beyond a reasonable doubt. As I said during *voir dire* this is the highest standard in the law, highest standard of proof. I don't shy away from it, I would submit to you that I have met it in this case.

An abiding belief in the truth of the charge. If you can walk out - if you can find the defendant guilty and walk out of here knowing that you have done the right thing, that you don't have any question in

your mind that you have done the right thing, you have been convinced beyond a reasonable doubt.

RP 162-163. Defense counsel objected to this last comment and the court admonished the jury: “the instructions speak for themselves. Remarks and statements of counsel are not evidence. They are inserted [sic] in the instructions. The jury will follow the instructions. Proceed.” RP 163. Throughout the remainder of the closing the State never referred to reasonable doubt again, nor ever suggested that the defendant had to prove anything.

Defense counsel also made sure that the jury understood that the defendant did not have the burden to prove anything with regard to the underlying charge:

The charge itself is only an accusation and Justin is entitled to the full presumption of innocence until you determine that the State has overcome that with proof beyond a reasonable doubt. Secondly, the defense has zero burden of proof in this case as to the underlying charge. Zero burden of proof that he has ever possessed heroin.

So you don't even have to get to the point of considering whether Justin had unwitting possession in which he has to prove by a preponderance until you find that the State has met its burden in proving that he possessed the heroin beyond a reasonable doubt.

RP 172, 174.

At sentencing defense moved for a new trial based on the prosecutor's comment about reasonable doubt and the court denied the motion:

I reviewed the cases that were cited in this matter and that innocuous comment at best, doesn't even rise to the level of entertaining the thought of setting this for a new trial. The minute you objected, and you timely objected, counsel, I immediately instructed the jury . . . each of them had a copy of the jury instruction, I read them the jury instruction, they were instructed on the jury instruction, I have absolutely no question that there was no error. Denied.

RP 191.

This appeal timely followed.

1. **THE MODIFIED REASONABLE DOUBT INSTRUCTION WAS HARMLESS BEYOND A REASONABLE DOUBT.**

An erroneous jury instruction is generally subject to a constitutional harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002); *State v. Lundy*, 162 Wn. App. 865, 871, 256 P.3d 466 (2011). This Court may hold such an error harmless if it is satisfied "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *State v. Bashaw*, 169 Wn.2d 133, 147, 234 P.3d 195 (2010); *Lundy*, 162 Wn.App. at 872. Even a misleading instruction does not require reversal unless the complaining party can

show prejudice. *State v. Aguirre*, 168 Wn.2d 350, 364, 229 P.3d 669 (2010); *Lundy*, 162 Wn. App. at 872.

In *State v. Bennett*, 161 Wn.2d 303, 318, 165 P.3d 1241 (2007), the Washington Supreme Court directed trial courts to use only WPIC 4.01 when instructing jurors that the State has the burden to prove every element of the crime beyond a reasonable doubt. However, in *State v. Lundy*, this Court recognized that an erroneous modification to WPIC 4.01 does not automatically constitute reversible error. 162 Wn. App. at 871-73.

In *Lundy*, this Court held the jury's verdict would have been the same absent any modification to WPIC 4.01 where the revisions (1) emphasized the defendant was presumed innocent, and (2) accurately described the State's burden of proof, instructing the jury that the State must prove each element of the crime charged beyond a reasonable doubt and the defendant had no obligation to prove a reasonable doubt existed. 162 Wn.App. at 872-73. Under such facts, a defendant could not show he was prejudiced or that the instruction relieved the State of its applicable burden of proof. *Lundy*, 162 Wn.App. at 872-73.

While the reasonable doubt instruction in the present case omitted the sentence that reads a defendant does not have an affirmative burden to prove the existence of a reasonable doubt, the instruction did not misstate the State's burden of proof. CP 6-7. In fact, the instruction properly informed the jury that the defendant was

presumed innocent unless and until the State proves each element of the crime beyond a reasonable doubt. CP 6-7.

The defendant cannot argue that the modified instruction prejudiced his defense. Like *Lundy*, the instruction properly informed the jury that the defendant was presumed innocent until the State proved each element of the crime beyond a reasonable doubt. Also, the trial court's "to convict" instructions properly informed the jury that it could only return a guilty verdict if it was satisfied that each element of the crime had been established beyond a reasonable doubt. CP 6. The defense explained to the jury that it did not have a duty to prove anything. RP 172, 174, 177. The State never contradicted this assertion, always affirming that it had the burden of proof. RP 162-163. While the modified reasonable doubt instruction was erroneous, the totality of the trial court's instructions correctly informed the jury of the applicable burden of proof. Because the jury is presumed to follow the trial court's instructions, *State v. Brown*, 132 Wn.2d 539, 618, 940 P.2d 546 (1992), the resulting error was harmless.

Additionally, the jury would have reached the same result regardless of the error. Controlled substances were found in Ford's backpack along with his identification. RP 49-50. Ford was already present in the apartment when Lilja arrived and Lilja couldn't say how the drugs got to the apartment. The jury had ample reason to doubt Ochsner's credibility: She was admittedly high at the time the police

arrived, she had been charged and sentenced as a result of this incident, and thus had nothing to lose with regard to testifying on Mr. Ford's behalf and her credibility was impeached with her prior inconsistent statement to Deputy Wilson that Ford had brought the drugs to the apartment and that they had all been using prior to the police. RP 140, 145, 146. Given the evidence introduced at trial the jury clearly found the defendant's unwitting possession claim unpersuasive and unjustified. *See State v. Thomas*, 150 Wash.2d 821, 874-75, 83 P.3d 970 (appellate courts must defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence), *abrogated in part on other grounds' by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The modified reasonable doubt instruction did not alter the jury's verdict.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE APPELLANT'S CONVICTION.

Appellant has challenged the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether, after reviewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

The challenge to the sufficiency of the evidence admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, affd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

An appellate court need not be convinced of the defendant's guilt beyond a reasonable doubt; it must only determine whether substantial evidence supports the State's case. *State v. Potts*, 93 Wn.App. 82, 969 P.2d 494 (1998). "Substantial evidence" is evidence sufficient to persuade a fairminded person of the truth of the matter. *State v. Thetford*, 109 Wn.2d 392, 396, 745 P.2d 496 (1987).

In considering the sufficiency of the evidence, circumstantial evidence is no less reliable than direct evidence, *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980), and in reviewing such evidence, the appellate court does not weigh the evidence, but merely examines whether or not the State has produced substantial evidence from which the jury could infer guilt. *State v. Palmer*, 1 Wn.App. 152, 459 P.2d 812 (1969).

"[T]he jury is free to believe the testimony presented by one side and disbelieve that presented by the other." *State v. Gilmore*, 42 Wn.2d 624, 627, 257, P.2d 215 (1953).

The jury was properly instructed on possession, both actual and constructive, as well as on unwitting possession. CP 7. To determine whether or not there is sufficient evidence to support a charge of constructive possession courts "will look at the totality of the situation to

determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the drugs and thus was in constructive possession of them.” *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Once again, the drugs were found in Mr. Ford’s backpack along with his identification. Although he may or may not have chosen to do so (which is irrelevant) he had the right to exclude others from his backpack. And, as previously demonstrated, the jury had every reason to question Ms. Ochsner’s credibility. Furthermore, they were free to totally disregard Ochsner’s and Lilja’s testimony. *Gilmore*, supra.

The State theorized during closing and will argue again here, that Ms. Ochsner did not see the police pull up in their patrol cars as she claimed, but rather did not know the police were there until they knocked on the door. RP 170. That explains why there was so much drug and drug paraphernalia on the coffee table. Ford, Ochsner, and Lilja were just standing or sitting in the living room. RP 33-34; RP 95. Mr. Ford seemed “surprised.” RP 95. The reasonable inference from this evidence is that Ms. Ochsner was not busy hiding drugs and drug paraphernalia and putting things in Mr. Ford’s backpack, but that the drugs in Mr. Ford’s backpack were his.

Ms. Ochsner was charged as a result of this incident because drugs were found in her apartment. Mr. Ford was charged because police were told that he had brought the drugs to the apartment and because drugs were

found in his backpack. That fact is substantial evidence of constructive possession. Mr. Lilja was not charged because “[m]ere proximity to a controlled substance alone is insufficient to show dominion and control. *State v. Bradford*, 60 Wn.App. 857, 862, 808 P.2d 174 (1991). *State v. Callaghan*, 77 Wn.2d 27, 459 P.2d 400 (1969) and *State v. George*, 146 Wn.App. 906, 193 P.3d 693 (2008) cited by appellant are both “mere proximity” cases and are inapplicable here.

There was substantial evidence from which the jury could infer that Ford was in constructive possession of the drugs.

3. THE STATE’S COMMENT DURING CLOSING ARGUMENT WAS NOT IMPROPER AND DID NOT DENY APPELLANT A FAIR TRIAL.

To establish prosecutorial misconduct during closing argument, a defendant must establish “that the prosecutor’s conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial.” *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008).

“Allegedly improper statements should be 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. Gregory*, 158 Wn.2d 759, 810, 142 P.3d 1201 (2006). The defendant establishes prejudice by showing “there is a substantial likelihood [that] the instances of misconduct affected the jury’s verdict.” *Magers*, 164 Wn.2d at 191.

Where the allegedly improper remark is objected to the reviewing court must evaluate the trial court’s ruling for abuse of discretion. *Gregory* at

809. A court abuses its discretion if its decision is manifestly reasonable or exercised on untenable grounds or reasons. *State, ex. rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 42 P.2d 775 (1971).

Once counsel objected, although the court did not use the words “sustained” or “overruled,” the court told the jury that “[r]emarks and statements of counsel are not evidence” and that “[t]he jury will follow the instructions.” RP 163. This was not an abuse of discretion. The objected to comment amounted to three lines out of eleven pages of closing argument. RP 163; RP 160-171. Once the objection was made and the jury admonished, the State moved on arguing the evidence, never returning to the subject of reasonable doubt again. Once again, the defense reminded the jury that they did not have a duty to prove anything, RP 172, 174, 177, and the State never contradicted this assertion, always affirming that it had the burden of proof. RP 162-163. The jury was admonished to follow the court’s instruction, RP 163, and the jury must be presumed to have done so. *Brown, supra*.

The appellant has not shown that there is a substantial likelihood that this one single comment affected the jury’s verdict, when it is reviewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument, the instructions given, and the entire

record and the circumstances at trial. *Gregory*, supra at 810; *Magers*, supra at 191.

There was no prejudice.

CONCLUSION

“The Constitution guarantees a fair trial, not a perfect trial.” *State v. Ingle*, 64 Wn.2d 491, 499, 392 P.2d 442 (1964). Mr. Ford had a fair trial. The modified reasonable doubt instruction was harmless beyond a reasonable doubt, the evidence was sufficient to support his conviction, and the state’s one allegedly improper comment was not improper did not deny him a fair trial.

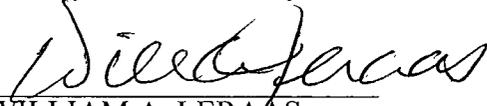
For all the foregoing reasons, appellant’s conviction should be affirmed.

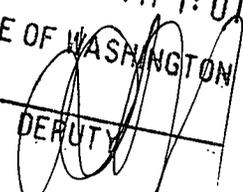
DATED this 11 day of October, 2012.

Respectfully Submitted,

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DECLARATION OF MAILING

JUSTIN J. FORD,

Appellant.

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 11th day of October, 2012, I mailed a copy of the Brief of Respondent to Carol A. Elewski, Attorney at Law, PO Box 4459, Tumwater, WA 98501-0459, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 11th day of October, 2012, at Montesano, Washington.

Barbara Chapman