

FILED
Court of Appeals
Division II
State of Washington
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No. 50116-3-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT VANDERVORT, Appellant.

Appeal from the Superior Court of Mason County
The Honorable Daniel L. Goodell
No. 16-1-00351-6

**REPLY BRIEF OF APPELLANT
ROBERT VANDERVORT**

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I. ARGUMENT

1. Prosecutorial Misconduct.

a. *The State Misstated the Law Regarding Unwitting Possession.*

The State committed misconduct by misstating the law regarding unwitting possession when the State argued, in closing argument:

[T]here are two ways that you get to an unwitting possession defense, and they're laid out. Didn't know that I had it, or didn't know what it was. Well, he knew that he had it. He indicated as much on the stand. And his prior criminal history possessing methamphetamine, that indicates that he knew what it was. And the heroin too in that particular case.

RP2 404. Vandervort never admitted that he knew he had drugs on him; he did make a statement acknowledging that he knew he had a scale. RP2 363. Vandervort's defense was unwitting possession. Although Vandervort knew he had a scale, it was not his, he had taken it from someone else's car, there was a small amount of residue only visible if you removed the cover, so he did not know he was in possession of drugs. Therefore, when the State argued that unwitting possession required Vandervort to prove he didn't know he had "it" or he didn't know what "it" was, and then the State argues that he knew he had "it" and admitted that on the stand, the State clearly misstated the law on unwitting possession. It is irrelevant whether or not Vandervort knew he was in

possession of a scale; the issue was whether he knew he was in possession of a scale.

In its brief, the State argues that this is proper argument, and an inference from the evidence. It is not. Closing arguments which misstate the law are improper. In *Allen*, our Supreme Court reversed murder convictions because the State improperly argued accomplice liability in its closing argument by arguing that Allen was guilty under accomplice liability if he knew or “should have known” that he was promoting or facilitating murder, when the law required that the State prove that he had actual knowledge. *State v. Allen*, 182 Wash. 2d 364, 341 P.3d 268 (2015).

In this case, the State did not argue that there was a reasonable inference that Vandervort knew there were drugs on the scale; the State argued that Vandervort had to prove that he didn’t know he had “it,” and that he admitted he had “it” on the stand. In the context of the evidence and argument, the State was clearly arguing that in order to establish unwitting possession, Vandervort had to prove he did not have the scale. That is not an inference from the evidence, that is a misstatement of the law.

2. Vandervort Received Ineffective Assistance of Counsel.

a. *Defense Counsel Failed to Properly Investigate and Present a Defense.*

Vandervort argued that the defense attorney failed to properly investigate by failing to interview witnesses prior to trial and by failing to interview witnesses, review hearsay rules, and be prepared for trial. The State argues that there is no evidence that this information would have been exculpatory. The State further argues that the defense may have interviewed witnesses and learned that the information was not helpful. It is clear from the record, that that is not the case.

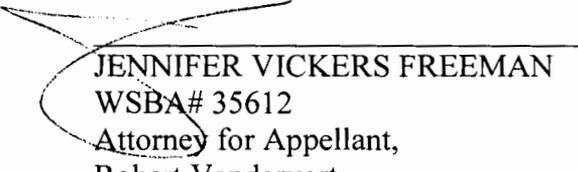
The defense attorney never interviewed one of the potential defense witnesses present at the scene, did not know she was represented by counsel, and had not contacted her attorney. RP 16-22, 35-36. Defense counsel tried to elicit testimony about the arrest in Olympia from Officer Anderson, but he who had no knowledge of the incident; clearly, he was not interviewed about this prior to trial. RP2 267. There is no indication in the record that the officers involved in the stop in Olympia were ever interviewed, and they were not subpoenaed. Furthermore, defense counsel attempted to elicit this information, unsuccessfully due to hearsay objections, from other witnesses. It is clear from the record that counsel did not interview and/or subpoena potential defense witnesses.

II. CONCLUSION

In conclusion, there was insufficient evidence to convict Vandervort. Therefore, these convictions should be reversed and dismissed. In the alternative, this court should reverse and remand for a new trial because Vandervort was denied a fair trial due to prosecutorial misconduct and ineffective assistance of counsel.

Dated this 17th day of December, 2017.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 50116-3-II
vs.)	
)	CERTIFICATE OF SERVICE
ROBERT VANDERVORT,)	
)	
Appellant.)	

The undersigned certifies that on this day correct copies of this Reply Brief of Appellant were delivered electronically to the following:

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.



Signed December 18, 2017 at Tacoma, Washington.

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