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COURT OF APPEALS, DIVISION II

ISIAH DAVON MARTIN

APPELLANT

v.

STATE OF WASHINGTON

RESPONDENT

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Appeal from the Superior Court of Pierce County

The Honorable Frank Cuthbertson, Cause No. 16-1-0222-3

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AMENDED OPENING BRIEF OF APPELLANT

By

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A. ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion when it ordered the defendant to register as a felony firearms offender?
2. Did the deputy prosecutor committed misconduct in closing arguments?
3. Did the trial court err when it ordered the defendant to pay certain costs and fees?
4. Did the State failed to prove the charge of unlawful possession of a firearm in the first degree, beyond a reasonable doubt?

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. A criminal defendant's sentence is unlawful when it is imposed by a court that abuses its discretion and sentences him for untenable reasons unsupported by any evidence.
2. A deputy prosecutor is a minister of justice and owes a duty to the defendant to present an argument that is free from prejudice, intentional misconduct, and improper inference. Impermissible arguments that deny defendant a fair trial require reversal.

3. The trial court abused its' discretion when it ordered the defendant to pay certain costs and fees.
4. A criminal defendant is entitled to dismissal when the government cannot prove the charges against him.

C. STATEMENT OF THE CASE

1. Procedural Facts.

On March 2, 2016, the State of Washington in Pierce County Superior Court case no. 16-1-01222-3 charged Isiah Davon Martin, hereinafter appellant, with the crimes of unlawful possession of a firearm in the first degree, count one; unlawful possession of a controlled substance with intent to deliver, counts two, three, and four. CP 1. The matter proceeded to trial on a corrected amended information., CP 26-28. Counts two, three, and four were dismissed after a suppression hearing. CP 144-145.

No testimony was adduced at the suppression hearing identifying the controlled substances allegedly in appellant's possession, the quantities thereof, and/or the value of them. *Passim*.

Defendant stipulated that he previously had been convicted of a serious offense for purposes of the unlawful possession of a firearm in the first degree charge CP 29.

In rebuttal argument, the deputy prosecutor argued that the defendant was exaggerating his physical limitations at trial. RP 545. The prosecutor argued that defendant told Det. Bradley that he was paralyzed from the waist down. RP 545. Defense counsel objected and the court overruled the objection. RP 545-546. The prosecutor emphasized that the detective was relying on his own observations and what the defendant told him. RP 545-465. Defense counsel objected to the prosecutor's misstatement of the evidence and the court overruled the objection. RP 546. The deputy prosecutor then attacked the defendant's full-time caregiver and mother to his child, True Treasure Bonds, "Ask yourselves why at trial, his girlfriend, the mother of his children, says it's from the waist down." RP 546. Defense counsel objected and the court again overruled. RP 546.

The deputy prosecutor argued that it "might be more reasonable" that defendant really wasn't paralyzed and "that he might just pull himself into that vehicle, isn't it pretty likely that he's going to be able to see the contents in that vehicle?" RP 547-548.

The deputy prosecutor argued that if the defendant could drive and operate the car on the roadways, then he had dominion and control for purposes of the legal standard in the unlawful possession of a firearms case. RP 548.

Defense counsel objected to this, arguing that the State was confusing the legal definition. RP 548.

The court ruled, “Overruled. Ms. Corey, please stop interrupting closing argument. He didn’t interrupt yours.” RP 549.

Defense counsel stated: “I have a duty to object.” RP 549.

The court: “Thank you.” RP 549.

The deputy prosecutor: “If defendant can do all of those things, if he can maneuver that car safely over the roadway, then he’s got dominion and control.” – RP 549.

Defense counsel: “Your Honor, I’m going to object to the misstatement of the law. Instruction 11 is clear about dominion and control.” RP 549.

The Court: “Thank you. Overruled.” RP 549.

The deputy prosecutor also misstated the evidence by suggesting that True’s ownership of two cars, one of which had not run for two-three years, was somehow relevant to the events of March 19, 2016. RP 550.

The deputy prosecutor also argued, contrary to all of the evidence about defendant’s physical abilities, that “he could have reached down and picked up the gun.” RP 552. He argued, in derogation of the actual testimony.

The jury convicted defendant of the crimes of unlawful possession of a firearm in the first degree. CP 114 At sentencing, the trial court assailed defendant's statements that since becoming paralyzed he has been involved in community activities for kids. RP 590. The trial court questioned how that could be true, when on the morning of March 19, 2016, "at 3:00 you in a car with a Glock, with one in the chamber, and a high capacity magazine, sitting in the parking lot littering, and understanding that I dismissed these counts because the search was inappropriate. But when this case started, you alleged to be sitting in a car at 3:00 in the morning with a high capacity mag and the Glock, with enough heroin to sell, enough meth to sell, coke to sell, in the parking lot at 72nd and Pacific" – RP 590. The court proceeded to note that the area was a "high-crime location, particularly for prostitution and things like that, and I don't know why you'd even put yourself in the situation of being in that area for people to misconstrue what's going on." RP 590-91.

Defendant informed the court that he was not as independent as he was before he was injured. RP 591. He explained that he has an in-home caregiver. RP 591. He can't use with the bathroom without assistance in cleaning his own bottom. RP 591. He cannot shower independently. RP 591.

The court nevertheless found that defendant is “dangerous to the community.” RP 592. The court further found that “you’re playing the same old games you’ve been playing.” RP 592. The court sentenced defendant to 48 months in the department of corrections, \$500 crime victim penalty assessment, \$100 DNA fee, \$200 court costs, \$5,000 fine. RP 592. The court also found that because there were three firearms in the household, defendant had adequate income to pay the fine. RP 592-593. The court also ordered forfeiture of the firearm under RCW 9.4.098. RP 593. The court ordered defendant to register as felony firearm offender because the court believed defendant has “a propensity for violence, three guns in the house, high capacity magazine, one in the chamber.” RP 593. CP 146-158.

Appellant had an offender score of 5, with the following prior convictions: promoting prostitution (08/02/13), with an extra point because appellant was on community custody at the time of the commission of that crime; as well as juvenile convictions for taking a motor vehicle without owner’s permission (12/19/11), theft in the second degree (12/18/09), residential burglary (08/04/08), residential burglary (08/05/08), attempted residential burglary (07/01/08), theft in the second degree (07/24/08), and possession of stolen property in the second degree (07/24/08).

None of these crimes are “violent” crimes as defined by the Sentencing Reform Act. Appendix A – Stipulation to Criminal History.<sup>1</sup>

The court did not care that the guns are owned and registered to True Treasure Bonds, who has no disability for firearm ownership and possession and intends to continue her lawful possession of them. RP 593. True Bonds has testified that due to defendant’s unfortunate paralysis, she had no problem placing her firearms in locations he could never access. RP 450 The court stated that they did not say the firearms belonged to defendant, just that they were in the household and that was concerning. RP 593. The court agreed that defendant was to commence payments after he was out of the department of corrections but the court refused to waive accrual of interest during that time. RP 593-594.

The court refused to order that the defendant did not have to pay the costs of his incarceration. RP 595. The court stated, “I don’t have any basis to make that ruling.” RP 595. Defense counsel informed the court that defendant would not be working in the department of corrections. RP 595,

Later that day, the parties appeared back before the court because the Pierce County Jail would not accept the defendant for booking because of the

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<sup>1</sup> Appellant has filed a Supplemental Designation of Clerk’s Paper adding this document to the appeal.

level of assistance he required while in custody. RP 597. As the jail sergeant explained, “We are unable to accept Mr. Martin for booking for medical purposes; therefore, he is being medically rejected. I have contacted Lieutenant White, along with Lieutenant Miller, and we’ve devised a plan that would ---we’re requesting to allow Mr. Martin to remain out of custody on his own recognizance until Monday at 1:30 p.m., if it works for this court, at which we would ask him to – I’m sorry, Wednesday, 1:30 p.m., at which time he would return to court and, at that time, I would either take him into custody if the special transport for DOC is arranged or I would have the definitive date for him to return for the special transport.” RP 597-98.

The court set the return for Thursday July 15, 2017 at 1:30 p.m. RP 601.

Defendant timely filed this appeal. CP 162-175.

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2. Testimonial Facts.

True Treasure Bonds is a licensed home care aide for the defendant.

RP 436. Since he was paralyzed in 2015, she has provided care for him 24/7.

RP 436. Defendant is paralyzed “T2”, from the nipples down. RP 440. He has no control over his legs. RP 440. When he is awake, he is either in a wheelchair or lying down when his body gets tired. RP 440.

Defendant is able to drive a car with the use of driving sticks, which fit on the brake and accelerator and are operated with the hands. RP 438. True had driven with the driving sticks and knew they were “easy to use.” RP 472-474. Defendant and True also have a handicapped or disabled person’s placard that they may use in vehicles as needed. RP 439.

Defendant lacks the physical ability to get himself in and out of vehicles. RP 440. When he is going to a car, he needs to be wheeled there in a wheelchair because he cannot walk. RP 441. Someone needs to open the car door for him because he cannot pull the door all the way open and keep it open. RP 441. At that point someone needs to lift up defendant and put him in the driver’s seat. RP 442. The defendant is able to use the lever by the seat to adjust the seat angle. RP 442-443. Defendant exits the car through the reverse process, again requiring the assistance of another person. RP 444.

Although the defendant's recorded weight on his driver's license was 150 pounds, this license was obtained prior to his paralysis. RP 476. After becoming paralyzed, defendant lost substantial weight and weighs about 120 pounds. RP 443.

In addition to help from True, defendant is fortunate to have assistance from many family members in the area, including his parents, aunties, uncles, brothers, and sisters. RP 444.

True owned two cars in March 2016. RP 437. She owned a Camaro. RP 437. She also owned an Audi. RP 437. The Audi was not operable and had not been for two or three years. RP 465. In fact, it did not even have valid tabs. RP 465.

After defendant became paralyzed and True suffered a home invasion incident, she acquired firearms which she kept loaded for protection. RP 445, 447. She has a concealed pistol license. RP 445. She owns several firearms, including a Glock firearm. RP 446, 448. True sometimes accidentally left the firearm in the car. RP 448, 468-470.

She knew that defendant could not possess any firearm. RP 448. She did not tell him where the firearms were. RP 448. Due to his paralysis, defendant could not physically access the firearms in the family residence. RP 450.

When she drove her cars and the firearms were in her possession, she did not make them available to defendant for his possession. RP 450. On March 19, 2016, she did not even think to mention to defendant that there was a firearm in the Camaro because it never crossed her mind. RP 450.

Early in the evening, on March 18, 2016, True went to a party with some friends from high school and college. RP 450-451. She had a ride to the party with her friend Kiara. RP 454. Isiah stayed home. RP 455. Kiara had agreed to drive her home from the party. RP 455.

However, as it got later, Kiara became too tired to drive True all the way home to Tacoma. RP 455. True needed to get someone to pick her up halfway between the party, which was in Fircrest/University Place and Tacoma, where she lived. RP 455. The only person she was able to reach was the defendant and they arranged to meet at the 72<sup>nd</sup> Street bowling alley. RP 455.

When True arrived at the bowling alley, she saw that police were surrounding her car. RP 456 She saw defendant being taken away from the scene in an ambulance. RP 456.

True knew that someone from his family had helped him get into the car in order for him to drive to the bowling alley to meet her. RP 463.

When defendant was arrested, he had \$5,000 on his person. RP 71-72. This cash was benefit money from SSI, disability, as well as money that True had given him in the event that he found himself in an emergency situation. RP 72.

Police earlier had responded to that location to a call about the littering and spoke to defendant about this. RP 133-134. Defendant was sitting in the driver's seat of a Camaro next to the trash on the ground by the driver's door, which included a catheter and a bag with some urine in it. RP 134.

The driver's door was opened a little bit and so defendant leaned out of the car, with his left hand he picked up the catheter and the bag with the urine. RP 43, 139. He put the bag on the floorboard in the driver's footwell. RP 43.

Defendant braced himself against the steering wheel when he performed this task. RP 176. Bradley observed that defendant appeared to be holding onto the steering wheel with his right hand and grabbing the trash with his left hand. RP 176.

Police had noted that defendant was paralyzed. RP 47. Officer Bratcher could not remember at what point he determined that but he

remembered defendant telling them at some point that he was paralyzed after being shot. RP 47.

Officer Bradley saw a magazine sticking out of a pistol on the floor of the driver's footwell. RP 139. He yelled out "gun" and put his gun in the low ready position. RP 139. He ordered defendant to put his hand on the steering wheel and defendant complied RP 140.

Bratcher may have removed the firearm from the car and then cuffed defendant or he may have cuffed him first. RP 47, 124, 139-140. Defendant's hands were behind his back while he sat in the driver's seat. RP 47.

After he was cuffed, defendant appeared to move more. RP 173. It seemed quite difficult for him to remain upright at least initially. RP 174. He leaned forward. RP 174. He also leaned backward and rolled toward the front passenger seat two or three times RP 174. In his complaint for search warrant, Bradley informed the issuing magistrate that "he rolled into the front passenger seat two or three times." RP 174. Bradley had to physically assist defendant in sitting upright. RP 176. Defendant in fact asked Bradley to help him move back to the upright position. RP 176,

Bratcher asked defendant about the gun, although he could not recall whether it was before Bradley advised him of his Miranda rights. RP 49.

Bratcher recalled that defendant stated that the gun was "his 'baby momma's'

or he was holding it for her, it belonged to her or something along those lines.” RP 49.

Because police had decided to leave defendant in the vehicle due to his medical condition, police decided to do a frisk of the “lunge areas” of the vehicle to check anywhere in the vehicle he could reach any containers that were within that lunge area. RP 58. Officers checked the center console on the front driver’s seat and the rear passenger side seat, claiming defendant may have been able to reach that area. RP 59. There were a couple of bags on that portion of the seat. RP 60.

One was a camouflage bag that felt very bulky, like there were some hard objects inside. RP 60. The other bag, a zippered brown checkered satchel, was closed but was big enough that although Bratcher couldn’t feel what was inside and “it could have potentially contained a weapon.’ RP 60.

He opened the brown checkered satchel and noted that it contained “a quantity of pills.” RP 103. He clarified in his report that the item contained 50 small pills. RP 103, 104. After finding these 50 small pills, Bratcher ceased his search for weapons. RP 104.

Although Bratcher was concerned that defendant had access to weapons, neither he nor Bradley ever frisked him for weapons. RP 109, 117.

Bratcher could not recall whether anyone even frisked defendant prior to his departure in the ambulance. RP 109.

D. LAW AND ARGUMENT

1. THE TRIAL COURT ABUSED ITS' DISCRETION WHEN IT ORDERED DEFENDANT TO REGISTER AS A FELONY FIREARMS OFFENDER.

It is within the sentencing court's discretion whether to require a defendant to register as a felony firearm offender. RCW 9.41.330(1). The appellate court reviews a sentencing court's discretionary decisions for abuse of discretion. *State v. Miller*, 159 Wn. App. 911, 918, 247 P.3d 457, review denied, 172 Wn.2d 1010 (2011). A sentencing court abuses its discretion only where the sentencing court's decision is “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). “A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (internal quotation marks omitted).

Under RCW 9.41.330, the court “must consider whether to impose” the registration requirement and, in doing so, the court “shall consider all relevant factors including, but not limited to” three suggested factors. RCW 9.41.330(1), (2). The three suggested factors are the defendant's criminal history, whether the defendant has previously been found not guilty by reason of insanity, and the defendant's propensity for violence. RCW 9.41.330(2)(a)-(c). By using the “including, but not limited to” language in the statutory provision, the legislature afforded courts latitude in their registration determinations. RCW 9.41.330(1); see *State ex rel. Graham v. Northshore Sch. Dist. No. 417*, 99 Wn.2d 232, 238, 662 P.2d 38 (1983) (“The Legislature specifically used the terms ‘including, but not limited to’. . . and thus did not limit the discretion afforded [to the decision maker].”). RCW 9.41.330 does not dictate that a sentencing court must explicitly articulate its consideration of each factor when determining whether to impose the registration requirement.

RCW 9.41.0108 defines “felony firearm offender”:

(8) “Felony firearm offender” means a person who has previously been convicted or found not guilty by reason of insanity in this state of any felony firearm offense. A person is not a felony firearm offender under this chapter if any and all qualifying offenses have been the subject of an expungement, pardon, annulment, certificate, or rehabilitation, or other equivalent procedure based on a

finding of the rehabilitation of the person convicted or a pardon, annulment, or other equivalent procedure based on a finding of innocence.

RCW 9A.01.012 defines “felony firearm offense”:

(9) “Felony firearm offense” means:

Any felony offense that is a violation of chapter 9A.01 RCW;

(b) A violation of RCW 9A.36.045 [drive-by shooting];

(c) A violation of RCW 9A.56.300 [theft of a firearm];

(d) A violation of RCW 9A.56.310 [possessing a stolen firearm];

(e) Any felony offense if the offender was armed with a firearm in the commission of the offense.

In this case, the present conviction for unlawful possession of a firearm in the first degree is the defendant’s only conviction for “felony firearm offense” as defined in the statute. The defendant’s predicate “serious offense” is promoting prostitution in the first degree from 2013. Mr. Martin was shot and became paralyzed in January 2015. RP436.

Mr. Martin has no convictions whatsoever for violent crimes or any crimes with firearm enhancements. He lives on state disability, is paralyzed from the chest down, and is confined to a wheelchair and/or his bed.

The trial obviously court did not like that Mr. Martin’s caregiver, who also is his son’s mother, has a valid concealed weapons license, something she obtained after Mr. Martin was shot and she suffered a home invasion. RP 445-

447. She purchased three firearms and keeps them at the residence in areas that are out of reach for Mr. Martin. RP 448. She admitted that she made a mistake by leaving one of them in the Camaro on the date of this incident. RP 450. The Camaro is her car, her only operable car. RP 437.

The trial court stated, “I think you have a high propensity for violence, three guns in the house, high capacity magazine, one in the chamber, so I think there’s a basis to impose the felony firearm registration requirement.” RP 592. However, the court did not, and could not, articulate any nexus between Ms. Bonds’ lawful ownership and possession of firearms and any propensity for violence on the part of the defendant, who had no cases of violence in his record. Defendant had a conviction for assault in the fourth degree in 2009, when he was 15 years old. Supplemental CP \_\_\_.

Given defendant’s physical limitations, he obviously cannot handle a firearm as he cannot fully open or close a car door, perform basic acts of personal hygiene such as cleaning his own bottom. RP 591. He lacks sustained coordination. *Id.*

Defendant is not a risk to community safety. When the court held that the defendant is dangerous to the community, the court had no facts to support its conclusion. RP 592.

Given the relevant factors and the defendant's history and unique situation, the trial court abused its discretion when it ordered the defendant to register as a felony firearms offender. It is a difficult standard for any defendant to meet but this defendant, an individual paralyzed from the chest down, with no crimes of violence and the inability care for himself and perform basic acts, should be exempt from the requirement. The trial court abused its' discretion when it imposed the requirement.

## 2. THE DEPUTY PROSECUTOR COMMITTED MISCONDUCT IN REBUTTAL ARGUMENT THAT REQUIRES REVERSAL.

A defendant who alleges prosecutorial misconduct in closing argument must establish that the prosecutor's comments were improper and, if so, that the improper comments caused prejudice. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014). If defendant fails to object to the prosecutor's conduct or request a curative instruction at trial, the misconduct is reversible error only if the defendant shows the misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *Id.*

The appellate court reviews allegations of prosecutorial misconduct under an abuse of discretion standard. *Id.* This court gives deference to the trial court's ruling because it is in the best position to most effectively

determine if the misconduct prejudiced the defendant's right to a fair trial.

*State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

In the context of closing arguments, the prosecutor has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)

(quoting *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). The reviewing court considers the prosecutor's alleged improper conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Anderson*, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009).

In this case, appellant's attorney objected to many of the prosecutor's improper arguments in rebuttal. She stopped objecting after the trial court “shamed” her for objecting, stating before the jury that the State had not objected during her argument, that it was not her turn to speak, etc. RP 549, 550, 552, 554 [in response to defense counsel's objection the court stated: “is it your turn again?]. The trial court belittled counsel for making objections and counsel was put in the unfortunate position of making objections or having the jury believe that she was incompetent based on the trial court's entirely inappropriate comments.

The fact remains that the deputy prosecutor made many arguments, some of which were objected to and some of which were not objected to for the reasons noted above, that were improper and which prejudiced defendant, denying him a fair trial.

First, the prosecutor knowingly misstated the law in his rebuttal argument. He told the jury that if the defendant can drive and operate a vehicle, then he has “dominion and control” over that vehicle. If he doesn’t have dominion and control, he shouldn’t be driving it.” RP 548. When defense counsel attempted to interpose an objection, “Objection, counsel is confusing the legal definition –“, the court stated, “Overruled, Overruled. Ms. Corey, please stop interrupting closing argument. He didn’t interrupt yours. Defense counsel, “I have a duty to object.” The court, “Thank you.” RP 548-549. The prosecutor wanted the jury to believe that control over a car equated to dominion and control over every object in the car. That was a misstatement of law.

The prosecutor’s argument on dominion and control was particularly damaging and prejudicial to defendant. It was contrary to instruction 11. CP \_\_; Appendix \_\_. In deciding whether the defendant had dominion and control, the jury was to consider all relevant circumstances in the case, including whether the defendant had the immediate ability to take possession

of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. Whether the disabled defendant could drive a car specially equipped with driving sticks is not determinative.

On these unique facts of this case, the defendant, with his extremely limited physical abilities did not have the immediate ability to take possession of the item. This is so because he could not move his body from the chest down. He can move his arms and hands but he cannot bend over or turn without great assistance. In this case, the firearm, even assuming he knew of its presence, was on the floor of the car. There is no evidence that he could have reached over to get it. The defendant could have excluded others from possession of the gun only if he never left the car, never opened a door or window and simply stayed inside. Similarly, his dominion and control over the premises was limited – that is, so long as no one else had a key or the ability to get into the car, he was safe inside the locked car. But he could not close or open the door by himself. The defendant could not volitionally take immediate possession of the item, could not volitionally exclude others from possession of the item, and did not have actual dominion and control over the

premises where the item was located. He relied even on the assistance of others to carry him to the car and lift him into the seat.

For the prosecutor to argue that because the defendant could drive the car with the driving sticks, he had possession of the firearm was a coy argument that misled the jury and resulted in an unjust conviction.

Further, the prosecutor made impermissible inferences from the evidence. He mocked the testimony of True Treasure Bonds, who had testified that she needed defendant to pick her up. RP 550. He noted that this was not credible because “she testified she owned two vehicles.” RP 550. Of course, it was uncontroverted that one of the cars, an older Audi, had not been operable for 2-3 years and did not have valid tabs. RP 465. The deputy prosecutor knew that because he had elicited that testimony. RP 465. The deputy prosecutor also argued that she “could have consulted” with other friends to pick her up, the deputy prosecutor made that up out of whole cloth. However, True Treasure Bonds testified that there was no one else she could have called. RP 462.

The deputy prosecutor also argued that the defendant was physically able to control who had access to the gun because he could close the car doors, drive away, lock the doors, and drive away. RP 553. Of course, the

deputy prosecutor misstated the evidence. The defendant is physically incapable of opening and/or closing the car doors by himself. RP 441-442 .

Defendant cannot get into the car by himself. RP 411 et seq. Someone lifts him up and places him into the car as parents places a child into a car seat. RP 442. Defendant operates the car with driving sticks, which do not require much strength to use. RP438-439. The deputy prosecutor again discounted the uncontroverted evidence on the ease of use of driving sticks with his personal opinion by speculating that it was “actually probably tougher than what you and I do on a daily basis two hands on the wheel and a foot on the pedals because he’s got to do both of those with his hands. He’s got that dexterity. He’s got the ability to apply that force to those sticks and that steering wheel.” RP 555.

The deputy prosecutor’s rebuttal was not a proper rebuttal but rather an effort to recast or “spike” the evidence into false facts to gain a conviction. The deputy prosecutor was aided by the trial courts’ inexplicable refusal to permit objections. Nevertheless, defendant objected sufficiently to preserve error and made a new trial motion. The deputy prosecutor’s misconduct requires reversal.

Further, although Ms. Bonds testified, and the evidence was uncontroverted that it not difficult to move the driving sticks from one vehicle

to another, the deputy prosecuting attorney impermissibly inferred that the Camaro, titled and licensed to Ms. Bonds, somehow was defendant's car. RP 555. Urging the jury to adopt this baseless argument he argued, "he's going to know about the gun because it's his car." RP 555.

3. THE TRIAL COURT ERRED WHEN IT ORDERED APPELLANT TO PAY THE COSTS OF HIS INCARCERATION WITHOUT CONSIDERING HIS ABILITY TO PAY WHERE APPELLANT IS PARALYZED AND ON GOVERNMENT DISABILITY.

The imposition and collection of LFOs have constitutional implications and are subject to constitutional limitations. *State v. Barklind*, 87 Wn.2d 814, 817, 557 P.2d 314 (1976) (citing *Fuller v. Oregon*, 417 U.S. 40, 44-47, 94 S. Ct. 2116, 40 L. Ed. 2d 642 (1974)). A constitutionally permissible system that requires defendants to pay court ordered LFOs must meet seven requirements:

- "1. Repayment must not be mandatory;
- "2. Repayment may be imposed only on convicted defendants;
- "3. Repayment may only be ordered if the defendant is or will be able to pay;
- "4. The financial resources of the defendant must be taken into account;
- "5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
- "6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;

“7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.”

*State v. Curry*, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992)

(quoting *State v. Eisenman*, 62 Wn. App. 640, 644 n.10, 810 P.2d 55, 817 P.2d 867 (1991) (citing *Barklind*, 87 Wn.2d at 814))

In *State v. Blazina*, 182 Wn.2d 827, 830, 344 P.3d 680 (2015), the Court held that a trial court has a statutory obligation to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs.” In *State v. Duncan*, 185 Wn.2d 430, 185 P.3d 83 (2016), the Court held a defendant could raise for the first time on appeal the trial court’s failure to make an individualized inquiry into a defendant's current and future ability to pay before the court imposes LFOs and that the appellate court would remand the matter to the sentencing court so that the proper inquiry could be made.

In this case, the trial court was well aware that defendant in paralyzed, on disability, cared for by a State paid full time caregiver. Because the defendant had substantial cash on his person at the time of his arrest, the trial court, in an apparent fit of pique, determined that defendant’s cash was criminal proceeds of some kind and concluded that he could pay extraordinary

costs, including the costs of his incarceration, apparently on the baseless theory that during his years in prison he would continue to run a profitable criminal enterprise. Of course, there is no evidence to support any of this.

Defendant is a paralyzed individual who needs help with the basic acts of daily living. RP 591. He is paralyzed from the chest down. RP 449. He exists in a wheelchair and/or lying down on a bed. RP 440.

The court criticized defendant for having \$5000 on his person when arrested. RP 592. The court speculated that the money came from illegal activities but there was absolutely no evidence to support this conjecture. Ms. Bonds, who is not his wife and whose property therefore is not available to defendant, owns two cars [one operable, one not operable] and three handguns. RP 592. The trial court found that Ms. Bonds' assets were available to defendant to pay for his LFO's and costs of his incarceration.

There is not a scintilla of evidence that defendant can pay LFO's and the costs of his incarceration. Defendant is entitled to an evidentiary hearing that comports with *Blazina*.

4. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT COMMITTED THE CRIME OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE.

There is sufficient evidence to sustain a conviction when viewing evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). The appellate court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of evidence. *State v. Raleigh*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010), review denied, 170 Wn.2d 1029 (2011).

A felon may not lawfully possess a firearm. See RCW 9.41.040. Possession may be actual or constructive. *Raleigh*, 157 Wn. App. at 737. The State may establish constructive possession by showing the defendant had dominion and control over the firearm. *State v. Murphy*, 98 Wn. App. 42, 46, 988 P.2d 1018 (1999), review denied, 140 Wn.2d 1018 (2000). However, mere proximity to the firearm is insufficient to show dominion and control. *Raleigh*, 157 Wn. App. at 737. “[T]he ability to reduce an object to actual possession” is an aspect of dominion and control, but “other aspects such as physical proximity” should be considered as well. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989).

And knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession. *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983).

In this case, defendant was the driver of the Camaro wherein the police located the Glock. Police saw the butt of the magazine of the Glock when defendant picked up the catheter and bag of urine from outside the car and dropped the items on the floor of the car. RP 134.

Defendant is paralyzed and could not perform even the act of picking up litter outside the car without bracing himself with one hand on the steering wheel. RP 176. Defendant's disability prevented him from driving the car without the use of driving sticks, implements that attach to the car's accelerator and brakes and are operated with the individual's hands. RP 439-439. They are easy to use and allow an individual to drive without using the feet and, accordingly, even needing to look at his feet. RP 438-439.

Defendant's paralysis is such that he cannot get into a car unless another person picks him up and places him in the car just as a parent places a child into a car seat. RP 442. Defendant does not have the ability to move his body below his nipples due to the nature of his paralysis. RP 440. Defendant lacks even the ability to ambulate a short distance to a car. RP 440.

Thus, although Tacoma Police Department Officers Bratcher and Bradley could see the butt of the magazine from their vantage points outside the car, defendant never had that vantage point due to his disability. RP 139. Defendant never was in a position in the car where he could see the firearm. RP 139. Defendant did know that True Treasure Bonds, the legal owner of the car, lawfully owned firearms and he concluded that any firearm in the car must belong to her.

Defendant's paralysis rendered him so physically weak that he is unable to open and close car doors by himself, unable to lift many common objects and requires a State licensed care-giver 24/7. RP 436. Defendant lacks the physical ability to perform simple tasks of daily living. RP 440.

In this case, the State failed to prove that defendant possessed the firearm within the meaning of the law. The State's evidence showed that defendant was in the Camaro where police found a Glock. RP 139. The evidence established that defendant is paralyzed "T2", from the nipples down, and that he is physically very weak, requiring a State-licensed care-giver 24/7. RP 436. The defendant picked some light weight items of litter from outside his car but had to brace himself with one hand on the steering wheel in order to do this. RP 176. He dropped the items inside the car. RP 43. Inside the car, defendant was unable to maintain an upright position when ordered to do so

by police RP 174. Defendant required assistance of one of the police officers to right himself and maintain that upright position. RP 176. All of this evidence easily affirms that defendant lacked the physical ability to establish dominion and control over the firearm. The State therefore failed to establish constructive possession. The State did not and could not have argued that defendant had actual control of the firearm.

When the State fails to prove the elements of a crime beyond a reasonable doubt, the remedy is dismissal. As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

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E. CONCLUSION

For the foregoing reasons, Isiah Martin respectfully asks this court to reverse his conviction for unlawful possession of a firearm in the first degree. Alternatively, Martin asks this court to remand for a new trial and/or to remand for a new sentencing hearing regarding the imposition of monetary sanctions.

DATED this 5th day of April, 2018.

/s/ Barbara Corey  
Barbara Corey, WSB #11778

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via the filing portal a copy of this Document to: Appellate Division Pierce County Prosecutor's Office and via USPS to Isiah Martin #368017 Stafford Creek Correctional Facility 191 Constantine Way Aberdeen, WA 98520

4/5/18  
Date

/s/ William Dummitt  
Signature

**BARBARA COREY, ATTORNEY AT LAW**

**April 05, 2018 - 4:15 PM**

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