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Division II
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NO. 50952-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

SHYLEE BARTLETT,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

Cowlitz Cause No. 17-1-00338-4

The Honorable Marilyn K. Haan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The State failed to prove beyond a reasonable doubt that Bartlett violated the controlled substance act.

2. The prosecutor committed prejudicial misconduct by arguing to the jury a critical fact that was not in evidence and suppressed by the trial court: to wit - that the police found male and female clothing in a clothes dresser in the room where Bartlett was arrested.

3. Defense counsel was ineffective when she obtained suppression of evidence regarding women's clothing but did not object to the prosecutor's prejudicial misconduct and when she referenced this suppressed evidence: to wit – that the police found male and female clothing in a clothes dresser in the room where Bartlett was arrested.

B. ISSUES PRESENTED ON APPEAL

1. Whether the State failed to prove beyond a reasonable doubt that Bartlett violated the controlled substance act when the State failed to present any evidence that Bartlett actually possessed the drugs that she exercised dominion and control of the premises, or that Bartlett had any connection to the

drugs other than mere proximity?

2. Did the prosecutor commit prejudicial misconduct by arguing to the jury a critical fact that was not in evidence and suppressed by the trial court: to wit - that the police found male and female clothing in a clothes dresser in the room where Bartlett was arrested?

3. Was defense counsel ineffective when after successfully obtaining suppression of evidence regarding women's clothing, she did not object to the prosecutor's remark that the police found male and female clothing in a clothes dresser in the room where Bartlett was arrested, and where she referenced that evidence?

C. STATEMENT OF THE CASE

1. Procedural History

Shylee Bartlett was charged by information with two counts of violation of the Uniform Controlled Substance Act (RCW 60.50.4013(1)). CP 2. After trial, the jury convicted Bartlett on count one, possession of methamphetamine, and acquitted on the possession of heroin in count two. RP 159. Bartlett timely appeals. CP 49.

2. Substantive Facts

The Longview Police Department executed a warrant at the home of Brandon Coons in Longview. RP 48, 59. The warrant targeting Coons, was based on information from a confidential informant (CI) who had been to Coons' residence within the previous 72 hours. RP 48, 54. Neither the CI nor the warrant mentioned Bartlett. RP 55. Detectives Jordan Sanders, Joseph Mortenson, and Ryan Durbin all participated in the raid. RP 47, 59, 69.

The officers forcibly breached the front door with a ram. RP 49. Once inside, Sanders went into the garage area of the residence that was separated by a makeshift wall. RP 50. Part of the garage served as a bedroom and when Sanders rounded the wall, he saw Coons and Bartlett sitting on a bed. RP 51, 60. Sanders immediately handcuffed Bartlett. When he looked around, he saw drugs, pipes, foil and packaging for drugs in plain sight "around the room". RP 51-52.

Mortenson searched this same area and saw a meth pipe sitting on the ground in plain sight about five to seven feet from the bed Bartlett was sitting on. RP 60, 63. Mortenson also found a briefcase under that bed. RP 60.

Mortenson opened the brief case and found several items including a plastic container with a white crystal substance, a digital scale, and hospital bracelet with Bartlett's name on it. RP 60-61. The white substance in the baggie Mortenson found in the briefcase tested positive for methamphetamine. RP 95.

The search warrant was not admitted into evidence and was not challenged during trial, but the statement of probable cause expressly indicated that the warrant was for Coons and his residence. CP 1; RP 52-53.

The officers did not find any electric, utility, or any other bills in Bartlett's name, and Mortenson did not collect fingerprints from any of the items he found. RP 65.

During trial, the prosecutor asked Mortenson if there was male and female clothing in the dresser, but the court sustained defense counsel's objection before he answered. RP 63. Subsequently, Mortenson testified he could not remember anything he found in the dresser other than the drugs. RP 63.

After the State rested its case, the defense moved for a directed verdict. RP 106. The defense argued as a matter of law there was insufficient evidence to support the charges because the

State did not prove Bartlett had dominion and control of the drugs. RP 115. The court denied the motion relying on facts not in evidence regarding the police finding male and female clothes in the dresser to rule that these clothes could support an inference that Bartlett was not just a visitor. RP 116-17. However, there was no evidence presented during trial regarding male and female clothing in the dresser. RP 63.

During closing argument, the prosecuting attorney made the following statements:

We also heard that the drawer – the dresser that was searched contained male and female clothing.

RP 139.

So now theoretically this clothing could belong to anyone. However, we're not talking about beyond an unreasonable doubt, we're talking about beyond a reasonable doubt. And if Ms. Bartlett is in this room staying with Mr. Coons or visiting Mr. Coons, we have this female clothing in the dresser...

RP 140.

You've got some clothes in the dresser, you clearly have an established presence there.

RP 141.

Defense counsel did not object to any of these remarks.

Defense counsel in closing argument also referred to "a dresser with

men's and women's clothes." RP 143. The jury found Bartlett guilty of Count I for possession of the methamphetamine in the suitcase and not guilty on Count II. RP 159.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT BARTLETT ACTUALLY OR CONSTRUCTIVELY POSSESSED A CONTROLLED SUBSTANCE.

The State failed to prove beyond a reasonable doubt that Bartlett possessed a controlled substance. The State merely proved that Bartlett was in the proximity of a controlled substance which is insufficient to prove the crime of possession. *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000).

In a criminal prosecution, the State must prove beyond a reasonable doubt every fact necessary to constitute the crime with which a defendant is charged. *State v. Sundberg*, 185 Wn.2d 147, 152, 370 P.3d 1 (2016) (citing, *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (quotations omitted)).

Evidence is sufficient to support a conviction if when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a

reasonable doubt. *State v. Salina*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If there is insufficient evidence to prove an element of a crime, the reviewing court must reverse the conviction. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005); *State v. Irby*, 187 Wn. App. 183, 204, 347 P.3d 1103 (2015).

To convict Bartlett of violation of the uniform controlled substance act, the State had to prove that she possessed a controlled substance that was not obtained directly from, or pursuant to, a valid prescription. RCW 59.60.4013(1). Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); *Turner*, 103 Wn. App. at 520.

Actual possession occurs when the goods are in the actual physical possession of the defendant. *State v. Spruell*, 57 Wn. App. 383, 385, 788 P.2d 21 (1990). A defendant is in constructive possession if he or she has dominion and control over either the drug, or the premises where the drug is found, *Callahan*, 77 Wn.2d at 29; *State v. Davis*, 16 Wn. App. 657, 659, 558 P.2d 263 (1977). But, close proximity alone is not enough to establish constructive possession. *Turner*, 103 Wn. App. at 521.

To determine whether a defendant exercised dominion and

control over the drugs, the court considers the totality of the circumstances. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001); *Turner*, 103 Wn. App. at 521. The Court considers facts including the defendant's motive to possess the item; the quality, nature, and duration of the possession and why it terminated; whether another person claimed ownership of the item; and the defendant's dominion and control over the premises. *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994); *Callahan*, 77 Wn.2d at 30-31.

In *Callahan*, police found drugs near the defendant while searching a houseboat where he was a guest, and the defendant admitted to handling the drugs earlier that day. *Callahan*, 77 Wn.2d at 28. Our Supreme Court held that the defendant's admission alone was not sufficient to demonstrate actual possession "since possession entails actual control, not a passing control which is only a momentary handling." *Callahan*, 77 Wn.2d at 29.

When reviewing the totality of the circumstances to determine whether the defendant had dominion and control, the Court in *Callahan* considered evidence that he had stayed on the houseboat for a few days, that he had some personal belongings on the

houseboat, that police found him sitting near the drugs, and that he admitted to handling the drugs earlier that day. *Callahan*, 77 Wn.2d at 31.

“*Callahan* appears to hold that where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession.” *Spruell*, 57 Wn. App. at 388; *Callahan*, 77 Wn.2d 27. In Bartlett’s case, there was no evidence that she had dominion and control over the premises and no evidence that she ever handled the methamphetamine.

In *Spruell*, 57 Wn. App. at 384, the police found Spruell sitting at a table with drugs and drug paraphernalia. The Court refused to find constructive possession even though Hill’s fingerprints were on a plate containing cocaine residue. *Spruell*, 57 Wn. App at 388-89. Similarly, in *Cote*, the Court found the evidence insufficient to establish dominion and control where a passenger in a vehicle left fingerprints on a jar containing contraband. *State v. Cote*, 123 Wn. App. 546, 550, 96 P.3d 410 (2004).

These cases are legally controlling, but here, the facts are

even more compelling in favor of Bartlett than in *Callahan, Spruell* and *Cote*. In Bartlett's case, unlike these cases, there were no fingerprints, there was no evidence that Bartlett stayed at the residence for a few days, she did not admit to handling the methamphetamine, and there was no evidence that she had her possessions in the garage bedroom. In short, there was very little evidence connecting Bartlett to the premises where the methamphetamine was located. Moreover, Bartlett was not named on the search warrant; she was just a visitor who happened to be present during the execution of a search warrant unrelated to her.

Similar to *Callahan, Spruell* and *Cote*, Bartlett's presence during the execution of a search warrant for another person, and her name on a hospital bracelet found in a suitcase under the bed does not establish under the totality of circumstances that Bartlett had actual or constructive possession over the premises or the methamphetamine. Rather, viewed in the light most favorable to the State, the evidence merely supported an inference that Bartlett was a casual visitor.

"Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." *State v.*

Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (quoting *State v. Hardesty*, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Therefore, this Court must reverse Bartlett's conviction and remand for dismissal with prejudice.

2. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT WHEN SHE RELIED ON IMPROPER AND PREJUDICIAL REMARKS DURING CLOSING ARGUMENT.

Bartlett's right to a fair trial was violated when the prosecutor argued facts not in evidence that the police found women's clothing in the room where Bartlett was located during the execution of the search warrant. Counsel did not object to the misconduct, but this issue may be raised for the first time on appeal because it is an issue of constitutional magnitude. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

To establish the prosecuting attorney committed prejudicial misconduct during closing argument, the defendant must prove that the prosecuting attorney's remarks were both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). "Prejudice means a substantial likelihood that the misconduct affected the jury verdict." *State v. Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). This Court must reverse a conviction

when there is a substantial likelihood that the alleged prosecutorial misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 704.

A prosecutor commits misconduct when he or she makes arguments unsupported by the admitted evidence. *In re Yates*, 177 Wn. 2d 1, 58, 296 P.3d 872 (2013). Because a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence, and to express those inference to the jury, a “prosecutor’s conduct is reviewed in its full context.” *Yates*, 177 Wn. 2d at 58. A defendant who fails to object to an improper remark waives the right to assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes an incurable prejudice. *Glasmann*, 175 Wn.2d at 704.

In *State v. Jungers*, 125 Wn. App. 895, 898, 905, 106 P.3d 827 (2005), Jungers confessed to possessing methamphetamine police discovered pursuant to a residential search warrant for Michael Hodgkins. *Jungers*, 125 Wn. App. at 898-99. The methamphetamine was located under Hodgkins’ mattress. *Jungers*, 125 Wn. App. at 898-99. During trial, Jungers testified that she only confessed because she knew Hodgkins would go to jail if the officers thought the drugs belonged to him. *Jungers*, 125 Wn. App. at 899-

900.

In an attempt to undermine Jungers' credibility to convince the jury that Jungers did possess the methamphetamine, the state unsuccessfully attempted to obtain the police opinion that Jungers' confession was truthful and not pressured. The trial court suppressed the police testimony. *Jungers*, 125 Wn. App. at 900.

In closing, the prosecutor referenced the officer's previously stricken testimony and included comments about the officers' beliefs in a demonstrative chart which listed the facts of the case. The first page displayed a list of facts, including the phrase "admission real." The second page included the words "three officers believed." *Jungers*, 125 Wn. App. at 900. The trial court denied the defense motion for a mistrial, indicating that, the jury would follow the instructions to disregard any argument not supported by the evidence. *Jungers*, 125 Wn. App. at 900.

The Court of Appeals disagreed and held that the prosecutor's comments regarding the police opinions on Jungers credibility was too prejudicial in that case because Jungers credibility was a central issue. *Jungers*, 125 Wn. App. at 901. The Court of Appeals reversed and remanded for a new trial holding that nothing short of a new trial

could undo the taint from the prosecutor's improper remarks. *Jungers*, 125 Wn. App. at 901.

Here, as in *Jungers*, the prosecutor referenced critical and prejudicial facts not in evidence: female clothes in the dresser. The impact of the prosecutor's remarks in Bartlett's case is indistinguishable from the impact of the prosecutor's improper reference to stricken testimony in *Jungers* because in both cases, the prosecutor referenced critical matters in weak cases that were likely to affect the verdict.

The central issue in this case was Bartlett's dominion and control of the methamphetamine. The State's case against Bartlett relied exclusively on a theory of constructive possession, but there was nothing other than a medical bracelet found in the briefcase under the bed with the methamphetamine in it, to connect Bartlett to the premises or the methamphetamine. RP 61. This evidence was insufficient to establish constructive possession. The introduction of women's clothing in the dresser in the bedroom strengthened the state's theory. As a matter of law, without this inadmissible evidence, the state could not prove constructive possession of the methamphetamine. *Spruell*, 57 Wn. App. at 388-89; *Callahan*, 77

Wn.2d 27.

Therefore, the prosecutor's argument that the jury could infer Bartlett had dominion and control based on facts outside the evidence presented, likely affected the jury verdict. Because the jury could have inferred Bartlett was guilty of crimes not supported by trial testimony, the prosecutor's remarks were improper and incurable. *Jungers*, 125 Wn. App. at 902.

This Court must reverse and remand for a new trial because the prosecutor's improper conduct violated Bartlett's right to a fair trial. *State v. Thierry*, 190 Wn. App. 680, 691, 360 P.3d 940 (2015).

3. BARTLETT WAS DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER ATTORNEY FAILED TO OBJECT TO THE PROSECUTOR'S PREJUDICIAL MISCONDUCT DURING CLOSING ARGUMENT AND WHEN DEFENSE COUNSEL TOO REFERENCED FACTS NOT IN EVIDENCE.

The Sixth Amendment to the United States Constitution and Wash. Const. art. I, § 22 guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. Amend. VI; *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). The Court reviews ineffective assistance of counsel claims de novo. *State v. Wooten*,

178 Wn.2d 890, 895, 312 P.3d 41 (2013).

The right to effective assistance extends to closing arguments. *Yarborough v. Gentry*, 540 U.S. 1, 5, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003). Failure to object during closing argument does not constitute ineffective assistance unless the prosecutor makes egregious misstatements. *Zapata v. Vasquez*, 788 F.3d 1106, 1115 (9th Cir. 2015) (citing *Cunningham v. Wong*, 704 F.3d 1143, 1159 (9th Cir. 2013); *In re Cross*, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) ("If a prosecutor's remark is improper and prejudicial, failure to object may be deficient performance.").

To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's representation was deficient and that the deficient representation was prejudicial. *Grier*, 171 Wn.2d at 32-33. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness, and there is "a strong presumption that counsel's performance was reasonable." *Grier*, 171 Wn.2d at 33 (quoting *Kyllo*, 166 Wn.2d at 862). Counsel's performance is not

deficient if it can be characterized as legitimate trial strategy. *Grier*, 171 Wn.2d at 33. To establish actual prejudice, Bartlett must show there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different. *Grier*, 171 Wn.2d at 34.

State v. Hall, 158 Wn. App. 1006, 2010 WL 3945114 (2010)¹ an unpublished opinion is on point. In *Hall*, the defendant was charged with two counts of felony violation of a domestic violence no-contact order against J.E., the mother of his child. *Hall*, 2010 WL 3945114 at 1. At trial, the State presented medical records containing J.E.'s statements Hall caused her injuries, but no witnesses observed Hall with J.E. and neither J.E. nor Hall testified. *Hall*, 2010 WL 3945114 at *3.

In closing, the State asked the jury to have the strength to compensate J.E. and to convict Hall to end J.E.'s toxic cycle. *Hall*, 2010 WL 3945114 at *2. The "strength to compensate" comment "improperly urged the jury to find that the charges had been proved

1 Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. See GR 14.1.

on grounds beyond just the evidence of the crimes.” *Hall*, 2010 WL 3945114 at *3.

The State’s evidence against Hall was weak and therefore “vulnerable to prejudicial comments unfairly tipping the jury in favor of the State.” *Hall*, 2010 WL 3945114 at *4. Defense counsel’s failure to object to the flagrant abuses impliedly sanctioned the prosecutor’s comments. Therefore, defense counsel was ineffective when he failed to object to the State’s improper closing. *Hall*, 2010 WL 3945114 at *4.

The facts here are indistinguishable from *Hall*. The State did not present sufficient evidence to connect Bartlett to the premises where the drugs were found. The hospital bracelet found in a suitcase under the bed is inadequate under *Spruell* to sustain a conviction for possession of drugs found in the premises because it only establishes that someone placed Bartlett’s hospital bracelet, a throw-away item, in a suitcase. It does not establish that Bartlett owned or had control over the premises, the suitcase, or the drugs. *Spruell*, 57 Wn. App at 388-89; *Cote*, 123 Wn. App. at 550.

Just as in *Hall*, the State’s evidence against Bartlett was weak. The facts introduced in trial did not establish dominion and control

over the premises or constructive possession of the methamphetamine. The improper argument that there were female clothes in the dresser, was likely sufficient to convince the jury that Bartlett had constructive possession over the drugs. In this case Bartlett establishes that there is a substantial likelihood the misconduct affected the verdict. *Spruell*, 57 Wn. App at 388-89; *Cote*, 123 Wn. App. at 550.

The Ninth Circuit applied this same reasoning in *Zapata*, 788 F.3d at 1115. In *Zapata*, the defendant was charged with first degree murder for killing Juan Trigueros, a Mexican immigrant student who wore a Los Angeles Lakers hat with a number 8 on it. A Mexican gang, called the Eighth Street gang, used the number 8 to signal membership. *Zapata*, 788 F.3d at 1108. Zapata was a member of the Eighth Street's rival gang, the Outside Posse. *Zapata*, 788 F.3d at 1108-09.

During trial, there was no evidence that the shooter made any comments. No witness testified hearing the shooter say anything. *Zapata*, 788 F.3d at 1109. However, during rebuttal closing argument, the prosecutor argued to the jury a fictional and highly emotional account of what Trigueros heard Zapata say before

Trigueros was shot. The prosecutor told the jury to imagine Zapata hurling inflammatory racial slurs, such as "wetback" and "scrap" and to imagine Trigueros cowering in fear. *Zapata*, 788 F.3d at 1110. Defense counsel did not object to the prosecutor arguing facts not in evidence.

The Ninth Circuit held defense counsel was ineffective for failing to object because the jury may have perceived counsel's silence as acquiescence. This was especially true when the prosecutor made the remarks during rebuttal and the only way to challenge the misstatements was to object and request a curative instruction. *Zapata*, 788 F.3d at 1116.

Here, as in *Zapata*, the prosecutor had a weak case in which she created facts not in evidence to convince the jury to convict. Similarly, here, the jury may have perceived counsel's failure to object as acquiescence, thus lending unintended weight to the prosecutor's improper argument.

There was no legitimate reason for defense counsel's failure to object to the prosecutor's reference to the female clothes. Even worse, defense counsel compounded the misconduct by also referencing the female clothes not in evidence. Given the State's

weak evidence, and defense counsel's implied acquiescence, there is a substantial likelihood the misconduct affected the verdict. Accordingly, Bartlett was prejudiced by counsel's failure to object to the prosecutor's prejudicial misconduct.

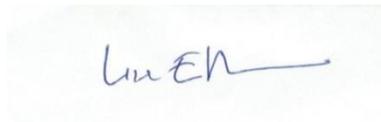
The remedy is to reverse and remand for a new trial. *Zapata*, 788 F.3d at 1124; *Hall*, 2010 WL 3945114 at *4.

E. CONCLUSION

Shylee Bartlett respectfully requests this Court reverse her conviction and remand for dismissal with prejudice based on insufficient evidence. In the alternative, Ms. Bartlett, requests remand for a new trial based on prejudicial prosecutorial misconduct and prejudicial ineffective assistance of counsel.

DATED this 12th day of March 2018.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Cowlitz County Prosecutor's Office appeals@co.cowlitz.wa.us and Shylee Bartlett, 3525 Columbia Heights Road, Longview, WA98632 a true copy of the document to which this certificate is affixed on March 12, 2018. Service was made by electronically to the prosecutor and Shylee Bartlett by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light blue rectangular background.

Signature

LAW OFFICES OF LISE ELLNER

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