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NO. 51705-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

EARNEST ROTH,
Appellant.

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

Lewis County Cause No. 18-1-00143-3

The Honorable James W. Lawler Judge

BRIEF OF APPELLANT

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ISSUES AND ASSIGNMENTS OF ERROR

1. Insufficient evidence supports Mr. Roth's conviction for drug possession.
2. No rational jury could have found beyond a reasonable doubt that Mr. Roth exercised dominion and control over his wife's marijuana.

ISSUE 1: Evidence that the accused had dominion and control over the premises where contraband is found is insufficient, standing alone, to demonstrate that s/he has constructive possession of the contraband itself. Did the state present insufficient evidence to convict Mr. Roth of marijuana possession when the evidence demonstrated only that the marijuana was found at a trailer that he lives in with his wife?

3. Prosecutorial misconduct deprived Mr. Roth of his Sixth and Fourteenth Amendment right to a fair trial.
4. Prosecutorial misconduct deprived Mr. Roth of his Wash. Const. art. I, § 22 right to a fair trial
5. The prosecutor committed misconduct by mischaracterizing the law regarding constructive possession during closing argument.
6. Mr. Roth was prejudiced by the prosecutor's improper arguments.
7. The prosecutor's improper arguments were flagrant and ill-intentioned.

ISSUE 2: A prosecutor commits misconduct by mischaracterizing the law to the jury during closing argument. Did the prosecutor commits misconduct at Mr. Roth's trial by telling the jury repeatedly that evidence that Mr. Roth had dominion and control over the residence was sufficient to prove that he had possession of the marijuana found growing outside?

8. The trial court erred by denying Mr. Roth's motion to redact exhibit 4 under ER 402.
9. Mr. Roth was prejudiced by the improper admission of the narrative portion of exhibit 4.

ISSUE 3: Irrelevant evidence – which does not tend to prove or disprove the existence of any fact relevant to the outcome of

the case – is inadmissible. Did the trial court err by denying Mr. Roth’s motion to redact the narrative portion of his statement to the police regarding a wholly separate incident when that narrative undermined the credibility of one of the key defense witnesses and indicated that Mr. Roth had previously possessed marijuana?

10. Mr. Roth was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
11. Mr. Roth was deprived of his art. I, § 22 right to the effective assistance of counsel.
12. Mr. Roth’s attorney provided ineffective assistance of counsel by unreasonably failing to object to the narrative portion of exhibit 4 under ER 403.
13. Mr. Roth’s attorney provided ineffective assistance of counsel by unreasonably failing to object to the narrative portion of exhibit 4 under ER 404(b).
14. Mr. Roth was prejudiced by his attorney’s deficient performance.

ISSUE 4: Defense counsel provides ineffective assistance by unreasonably waiving a valid objection to evidence that prejudices his/her client’s case. Did Mr. Roth’s attorney provide ineffective assistance of counsel by objecting to the narrative portion of exhibit 4 only under ER 402 when that evidence was also inadmissible under ER 403 and ER 404(b)?

15. The trial court erred by ordering Mr. Roth to pay a \$200 criminal filing fee.

ISSUE 5: The recent amendments to the statutes addressing legal financial obligations (LFOs) apply prospectively to all cases on direct appeal. Those amendments prohibit the imposition of a filing fee upon indigent criminal defendants. Must this court vacate the trial court order requiring Mr. Roth, who is indigent, to pay a \$200 criminal filing fee?

16. The trial court erred by ordering Mr. Roth to pay \$2100 in fees for his court-appointed attorney

ISSUE 6: The recent amendments to the statutes addressing legal financial obligations (LFOs) apply prospectively to all cases on direct appeal. Those amendments prohibit the imposition of discretionary LFOs upon indigent criminal defendants. Must this court vacate the trial court order requiring Mr. Roth, who is indigent, to pay \$2100 in attorney's fees?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Earnest Roth's wife uses marijuana for medical reasons. RP 86.¹ Mr. Roth does not use it himself. RP 100. Believing it was legal to do so, Ms. Roth planted two marijuana plants in the front yard of the couple's trailer in the town of Pe Ell. RP 87. At the time, Mr. and Ms. Roth were in the process of moving to Pe Ell from the Portland area. RP 99.

One day, Mr. and Ms. Roth were driving to work in Vancouver, WA when they received a call from a sheriff's deputy in Pe Ell. RP 98. Mr. Roth answered the phone. RP 98. Mr. Roth admitted that the trailer belonged to his wife and him. RP 100. The deputy asked him about the plants and Mr. Roth said that they belonged to his wife. RP 99. The deputy could hear a woman's voice in the background, but never asked to speak with Ms. Roth. RP 104-05.

The state charged Mr. Roth with felony possession of marijuana. CP 1-2.²

At trial, the court denied the state's motion *in limine* to permit impeachment of Mr. Roth's wife based on a police witness statement

¹ Unless otherwise noted, all citations to the Verbatim Report of Proceedings refer to the chronologically-numbered volumes detailing the events of 3/12/18 through 3/20/18.

² Mr. Roth's original charge was dismissed without prejudice because the prosecutor realized on the day of trial that he would be unable to present independent evidence to establish the *corpus delicti* of the offense. See RP (1/29/18). The state later re-charged Mr. Roth with the same offense.

indicating that she had stolen items from Mr. Roth at one point. RP 15.

The court agreed with Mr. Roth's argument that the impeachment was improper absent any evidence that she had been convicted of theft. RP 18.

During trial, however, the state offered that same witness statement as evidence that Mr. Roth lived at the trailer because he had listed the address on the form.³ RP 63. The statement (exhibit 4) contained the entire narrative of the wife's alleged theft, which the court had previously excluded. Ex. 4. The exhibit also contained an admission that Mr. Roth had previously possessed marijuana, which his wife took during the alleged theft incident. Ex. 4, p. 2.

Mr. Roth's defense attorney moved to redact the narrative portion out of the witness statement, arguing that it was irrelevant. RP 77. But the court denied the motion and admitted exhibit 4 in its entirety. RP 77-78.

The police still had not contacted Mr. Roth's wife at the time of trial. RP 104. They had never conducted any investigation into his claims that the plants belonged to her. RP 104-05.

The state was unable to offer any evidence tying Mr. Roth to the marijuana plants other than the fact of his residence at the trailer and his admission on the phone to knowing about the plants. *See* RP 79, 81, 100.

³ The form actually said that Mr. Roth lived on South Main Street but an officer testified that it was a mistake and should have said North Main Street, which was where the marijuana plants were found. Ex 4, p. 1; RP 80.

No witness claimed to have ever seen Mr. Roth tending to the plants, touching the plants, or using marijuana. *See RP generally.*

Mr. Roth's wife testified at trial and said that the plants belonged to her, not to her husband. RP 86. She testified that Mr. Roth did not smoke marijuana and had never helped her care for the plants. RP 88. Mr. Roth also called two other witnesses who testified that he did not use marijuana, but that his wife smoked it for medical purposes. *See RP 92-97.*

Mr. Roth also testified and said that the plants belonged solely to his wife. RP 98-100. On cross-examination, the prosecutor got Mr. Roth to admit that he would have been upset if someone had walked up to the plants and kicked them over or tried to take them. RP 101-02. On redirect, however, Mr. Roth clarified that he would have been upset because the plants belonged to his wife and he would have helped to protect her property. RP 102.

In closing, the prosecutor argued that the fact that Mr. Roth would have been upset if someone damaged the plants demonstrated that he had dominion and control over them:

And I asked him, well, what would you do if I went up there and I hit the pot. He said he would be upset. Well, that's because he has control over the pot.
RP 134-35.

The prosecutor also attempted to equate dominion and control over the property with constructive possession of the plants, themselves:

He testified on the stand that he had control over the area where the marijuana was located. So he constructively possessed the marijuana.
RP 135

That is why it is so important that Mr. Roth told you he had dominion and control over the area where the marijuana was found. You know that because his other belongings were there. It was approximately 8 feet from his trailer. He had dominion and control over the item.
RP 156.

The jury found Mr. Roth guilty of possessing the plants. CP 33.

The sentencing court ordered him to pay a \$200 criminal filing fee and \$2100 in attorney's fees. RP 38. This is true even though the court found Mr. Roth indigent at both the beginning and the end of proceedings in trial court. CP 58-59; Order Appointing Attorney, Supp. DCP.

ARGUMENT

I. NO RATIONAL JURY COULD HAVE FOUND BEYOND A REASONABLE DOUBT THAT MR. ROTH HAD CONSTRUCTIVE POSSESSION OF THE MARIJUANA PLANTS. THE STATE'S EVIDENCE THAT MR. ROTH HAD DOMINION AND CONTROL OVER THE RESIDENCE WAS INSUFFICIENT TO DEMONSTRATE THAT HE CONSTRUCTIVELY POSSESSED THE MARIJUANA, ITSELF.

A conviction must be reversed for insufficient evidence if, taking the evidence in the light most favorable to the state, no rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Chouinard*,

169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

Drug possession can be either actual or constructive. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Actual possession requires proof that the accused had the contraband in his/her “actual physical custody.” *Id.* Constructive possession requires proof of “dominion and control” over a substance. *Id.*

But mere proximity to contraband insufficient to demonstrate dominion and control. *Chouinard*, 169 Wn. App. at 899. This is true even if the accused knows that the contraband is there. *Id.*

Additionally, dominion and control over the premises where contraband is found is, likewise, insufficient to prove that the accused has dominion and control over the contraband, itself. *See State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014) (Stephens, J. dissenting, for a majority of the court on this issue) (“...having dominion and control over the premises containing the item does not, by itself, prove constructive possession”)⁴; *State v. Shumaker*, 142 Wn. App. 330, 334–35, 174 P.3d

⁴ The question of whether proof of dominion and control over the premises where contraband is found creates a presumption of constructive possession of the contraband had been the subject of some disagreement among the Courts of Appeals. *See e.g. State v. Ponce*, 79 Wn. App. 651, 904 P.2d 322 (1995) (holding that the trial court did not err by instructing the jury that dominion and control over the premises create a presumption of dominion and control over the drugs found inside); *Tadeo-Mares*, 86 Wn. App. at 816 (holding that

(Continued)

1214 (2007), *as amended on denial of reconsideration* (Feb. 26, 2008); *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997); *State v. Olivarez*, 63 Wn. App. 484, 486, 820 P.2d 66 (1991). Rather, the state must prove that the accused exercised dominion and control over the drugs, themselves. *Shumaker*, 142 Wn. App. at 334–35.

In this case, the state proved, at most, that Mr. Roth had dominion and control over the trailer and surrounding property. But it is not a crime to possess the premises on which drugs are found. *Davis*, 182 Wn.2d at 234; *Tadeo-Mares*, 86 Wn. App. at 816. There was no evidence that he had ever handled, tended to, or used the plants in any way. The prosecution was unable to present any evidence that Mr. Roth exercised dominion and control over the marijuana plants, themselves.

No rational jury could have found beyond a reasonable doubt that Mr. Roth had constructive possession of his wife’s marijuana plants. *Chouinard*, 169 Wn. App. at 899. His case must be reversed for insufficient evidence. *Id.*

evidence of dominion and control over the premises where drugs are found is insufficient to prove possession of the drugs).

But the Supreme Court settled the issue in *Davis*, in which Judge Stephens (writing for a majority of the court on the issue) explicitly held that it is not a crime to have dominion and control over the premises where drugs are found. *Davis*, 182 Wn.2d at 234.

The *Davis* rule rests on sound policy footing. Otherwise, cohabitating family members of Washingtonians struggling with drug addiction would all be criminally liable for possession of their loved ones’ drugs unless they could prove the affirmative defense of unwitting possession.

II. THE PROSECUTOR COMMITTED MISCONDUCT BY MISREPRESENTING THE LAW REGARDING CONSTRUCTIVE POSSESSION TO THE JURY.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected.

Glasmann, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Even absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct during argument can be particularly prejudicial because of the risk that the jury will lend it special weight "not only because of the prestige associated with the prosecutor's office but also because of the fact-finding facilities presumably available to the office." Commentary to the *American Bar Association Standards for Criminal Justice* std. 3-5.8 (cited by *Glasmann*, 175 Wn.2d at 706).

A prosecutor commits misconduct by misstating the law to the jury during closing argument. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

As outlined above, dominion and control over the premises where drugs are found is insufficient to prove constructive and possession of the drugs. *Davis*, 182 Wn.2d at 234; *Tadeo-Mares*, 86 Wn. App. at 816. Likewise, there is no authority holding that the way the accused would feel if a stranger attempted to damage a piece of property is relevant to his/her constructive possession of that property.

But, during closing argument at trial, the prosecutor argued to the jury that Mr. Roth's admission to having dominion and control over the premises established his guilt of drug possession: "He testified on the stand that he had control over the area where the marijuana was located. So he constructively possessed the marijuana." RP 135; *see also* RP 134, 156.

The prosecutor also told the jury that Mr. Roth had dominion and control over the plants because he would have been upset if someone had tried to damage them. RP 134-35.

The prosecutor misstated the law by directly mischaracterizing the law to the jury. RP 134-35, 156. The prosecutor's arguments were improper. *Allen*, 182 Wn.2d at 373.

There is a substantial likelihood that the prosecutor's misconduct affected the verdict in Mr. Roth's case. *Glasmann*, 175 Wn.2d at 704. Mr. Roth admitted on the stand that the trailer belonged to him and his wife. RP 100. He also admitted that he would have been upset if someone had tried to damage his wife's plants. RP 101-02. His entire defense was that, notwithstanding his joint control of the premises, the marijuana plants were not his because they belonged exclusively to his wife. *See* RP 85-102. But the prosecutor's mischaracterization of the law misinformed the jury that Mr. Roth was guilty of drug possession even if all the state had proved was that he had possession of the property on which the plants were found. RP 134-35, 156. The argument encouraged the jury to convict Mr. Roth – based on a misunderstanding of the meaning of constructive possession -- even if they believed the defense theory to be true. Mr. Roth was prejudiced by the prosecutor's improper arguments. *Id.*

Prosecutorial misconduct is flagrant and ill-intentioned if it violates case law that was available to the prosecutor at the time of the argument. *Glasmann*, 175 Wn.2d at 707. The Supreme Court held that dominion and control over the premises where contraband is found is insufficient to prove constructive possession almost four years before Mr. Roth's trial. *Davis*, 182 Wn.2d at 234. The prosecutor's misconduct was flagrant and ill-intentioned. *Id.*; *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant and ill-intentioned, prejudicial misconduct by mischaracterizing the law regarding constructive possession during closing argument. *Id.*; *Allen*, 182 Wn.2d at 373; *Davis*, 182 Wn.2d at 234. Mr. Roth’s conviction must be reversed. *Id.*

III. THE TRIAL COURT ERRED BY DENYING MR. ROTH’S MOTION TO REDACT IRRELEVANT AND HIGHLY-PREJUDICIAL MATERIAL FROM EXHIBIT 4.

The trial court denied the state’s motion *in limine* to impeach Mr. Roth’s wife with a statement Mr. Roth once gave to the police, alleging that she had stolen from him. RP 15, 18.

Even so, the court admitted that statement, in its entirety, when offered by the state as evidence of Mr. Roth’s address. RP 77-78; Ex. 4. At the same time, the court denied Mr. Roth’s motion to redact the statement to exclude the narrative portion, which consisted exclusively of the allegations against Ms. Roth. RP 77-78; Ex. 4. The narrative portion also included a statement that Ms. Roth had taken “marijuana (weed)” that Mr. Roth had in the trailer. Ex. 4, p. 2.

The trial court erred by refusing to redact the irrelevant narrative portion of the exhibit. In the alternative, Mr. Roth’s defense counsel provided ineffective assistance by failing to object under ER 403 and 404(b), in addition to under ER 402.

A. The court erred by denying Mr. Roth's motion to redact the narrative portion of Exhibit 4 on relevance grounds.

Evidence is not relevant unless it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Irrelevant evidence is inadmissible. ER 402.

To be relevant, evidence must: "(1) tend to prove or disprove the existence of a fact, and (2) that fact must be of consequence to the outcome of the case." *State v. Weaville*, 162 Wn. App. 801, 818, 256 P.3d 426 (2011) (quoting *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 573, 719 P.2d 569 (1986)). In a criminal case, this includes "facts which offer direct or circumstantial evidence of any element of a claim or defense." *Id.*

The narrative portion of exhibit 4 recounted a prior accusation by Mr. Roth against his wife, which did not tend to prove or disprove any element of the charge against him. *Id.* Indeed, the trial court had previously excluded those accusations against Ms. Roth by denying the state's motion *in limine*. RP 15-18. The narrative portion of the exhibit was inadmissible because it was irrelevant to the issues at trial. The trial court erred by denying Mr. Roth's motion to redact the exhibit. RP 401, 402; *Weaville*, 162 Wn. App. at 818.

Mr. Roth was prejudiced by the court's evidentiary error. As the state pointed out during its motion *in limine*, the accusations against Ms. Roth could have been used by the jury to impeach her credibility. But Ms. Roth's credibility was critical to Mr. Roth's defense because she testified and admitted that the marijuana plants belonged exclusively to her. RP 85-88.

The trial court committed prejudicial error by denying Mr. Roth's motion to redact the narrative portion of exhibit 4. RP 401, 402; *Weaville*, 162 Wn. App. at 818. Mr. Roth's conviction must be reversed. *Id.*

B. In the alternative, Mr. Roth's defense attorney provided ineffective assistance of counsel by failing to object to the narrative portion of Exhibit 4 under ER 403 and ER 404(b).

While Mr. Roth's defense attorney objected to the narrative portion of exhibit 4 on relevance grounds, that evidence was also inadmissible under ER 403 and ER 404(b) because it included a statement that Mr. Roth had previously had marijuana in his possession. *See* Ex 4, p. 2. In the alternative, defense counsel provided ineffective assistance by failing to object to the exhibit on those additional grounds.

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).⁵

In order to demonstrate ineffective assistance of counsel, the accused must show deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel’s deficient performance if there is a reasonable probability that counsel’s mistakes affected the outcome of the proceedings. *Id.*

A “reasonable probability” under the prejudice standard for ineffective assistance requires less than the preponderance of the evidence standard. *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). Rather, “it is a probability sufficient to undermine confidence in the outcome.” *Id.*; *see also Jones*, 183 Wn.2d at 339.

The presumption that a defense attorney has acted reasonably is rebutted if “no conceivable legitimate tactic explains counsel’s performance.” *State v. Fedoruk*, 184 Wn. App. 866, 880, 339 P.3d 233 (2014) (*quoting State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

⁵ Ineffective assistance of counsel claims are reviewed *de novo*. *Jones*, 183 Wn.2d at 338.

Defense counsel provides ineffective assistance by waiving a valid objection without any sound strategic reason. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). An attorney waives evidentiary objection by objecting on the incorrect grounds. *State v. Powell*, 166 Wn.2d 73, 82–83, 206 P.3d 321 (2009).

Here, Mr. Roth’s defense attorney provided ineffective assistance of counsel by objecting to the narrative portion of exhibit 4 only under relevance grounds, without raising ER 403 and ER 404(b). *Id.*

Under ER 404(b), “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” ER 404(b) must be read in conjunction with ER 403. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2015).

Before admitting misconduct evidence, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the

relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *Slocum*, 183 Wn. App. at 448. The court must conduct this inquiry on the record. *McCreven*, 170 Wn. App. at 458. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-178, 181 P.3d 887 (2008).

The narrative portion of exhibit 4 included a statement indicating that Mr. Roth had previously had marijuana in his possession, which was allegedly stolen by his wife. Ex. 4, p. 2. That evidence was inadmissible under ER 403 and ER 404(b) because the risk of unfair prejudice outweighed any probative effect and because it encouraged an improper propensity inference, risking the conclusion by the jury that Mr. Roth was more likely to have possessed the marijuana plants because he had possessed marijuana before. *Gunderson*, 181 Wn.2d at 923.

Defense counsel had no valid tactical reason to waive objection under ER 404(b). Indeed, counsel recognized the highly prejudicial effect of the drug evidence and moved for its redaction, albeit without raising all of the grounds under which the evidence was inadmissible. Mr. Roth's attorney provided deficient performance by failing to object to exhibit 4 under ER 403 and ER 404(b). *Powell*, 166 Wn.2d at 82–83.

There is a reasonable probability that defense counsel's error affected the outcome of Mr. Roth's trial. Mr. Roth's defense required the jury to apply the complex legal distinction between dominion and control over the premises and dominion and control over the contraband found therein. But Mr. Roth's admission to prior possession of marijuana in the narrative portion of exhibit 4 encouraged the jury to do away with that logic in favor of a simple propensity inference, resulting in a conviction on improper grounds. Mr. Roth was prejudiced by defense counsel's deficient performance. *Jones*, 183 Wn.2d at 339.

In the alternative, Mr. Roth's defense attorney provided ineffective assistance of counsel by failing to object to the narrative portion of exhibit 4 under ER 403 and ER 404(b). *Powell*, 166 Wn.2d at 82–83. Mr. Roth's conviction must be reversed. *Id.*

IV. THE TRIAL COURT EXCEEDED ITS AUTHORITY BY ORDERING MR. ROTH – WHO IS INDIGENT – TO PAY A \$200 CRIMINAL FILING FEE AND \$2100 IN FEES FOR HIS COURT-APPOINTED ATTORNEY.

On September 20, 2018, the Washington Supreme Court decided in *State v. Ramirez*, --- Wn.2d ---, 426 P.3d 714 (September 20, 2018), that the amendments to the Legal Financial Obligations (LFO) statutes passed as HB 1783 applies prospectively to all cases pending on direct appeal.

Ramirez, --- Wn.2d ---, 426 P.3d at 722.

Pursuant to those amendments, a trial court may no longer impose

discretionary LFOs upon indigent persons. RCW 10.01.160(3). Likewise, a sentencing court may no longer order an indigent person to pay the \$200 criminal filing fee. Laws of 2018, ch. 269, § 17; *Ramirez*, --- Wn.2d ---, 426 P.3d at 722.

Because he is indigent, the sentencing court is prohibited from ordering Mr. Roth to pay \$2100 in attorney's fees or a \$200 criminal filing fee under HB 1783. *Id.*

Ramirez applies prospectively to Mr. Roth's case, which is currently pending on direct appeal. *Id.* Accordingly, this Court must vacate the orders requiring Mr. Roth to pay \$2100 in attorney's fees and a \$200 criminal filing fee.

CONCLUSION

No rational jury could have found beyond a reasonable doubt that Mr. Roth had constructive possession of the marijuana plants. The prosecutor committed misconduct by misstating the law during closing argument. The trial court erred by admitting an irrelevant and highly-prejudicial exhibit over Mr. Roth's objection. Mr. Roth's conviction must be reversed.

In the alternative, the orders for Mr. Roth to pay \$2100 in attorney's fees and a \$200 filing fee must be vacated.

Respectfully submitted on November 21, 2018,



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

Earnest Roth
6673 Doral Drive S.
Salem, OR 97306

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov

I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on November 21, 2018.



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant

LAW OFFICE OF SKYLAR BRETT

November 21, 2018 - 12:04 PM

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