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NO. 37148-4-III

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

STATE OF WASHINGTON,
Respondent,

v.

JASMINE SABOURIN,
Appellant.

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

The Honorable Randall C. Krog, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove beyond a reasonable doubt that the defendant had possession of the firearm in count one.
2. The state failed to prove beyond a reasonable doubt the defendant possessed a controlled substance in count two.
3. The prosecutor committed prejudicial misconduct by improperly defining “reasonable doubt” contrary to the law.
4. The prosecutor committed prejudicial misconduct by improperly defining “constructive possession” contrary to the law.

Issues Presented on Appeal

1. By itself, dominion and control over premises does not establish constructive possession of contraband found within. Did the prosecutor commit misconduct by telling jurors they could find Sabourin guilty of possession merely because she had dominion and control over the premises where drugs were found?
2. The presumption of innocence is the “bedrock” a upon

which our criminal justice system stands, equating reasonable doubt under the due process clause to what a person would do in a self-defense situation trivializes and lowers the state's burden of proof. Did the prosecutor commit misconduct by telling jurors that reasonable doubt for due process was the same as what a reasonable person would do in a self-defense scenario?

3. Did the state failed to prove beyond a reasonable doubt that the defendant had possession of the firearm in count one, where the state only produced evidence that the defendant was asleep in the blue tent for one night?

4. Did the state failed to prove beyond a reasonable doubt that the defendant had possession of the pills in the red tent where the state only produced evidence that the defendant was asleep in the blue tent that was 10-15 feet away from the red tent?

B. STATEMENT OF THE CASE

Jasmine Sabourin was charged and convicted by jury of one count of unlawful possession of a firearm, and one count of possession of oxycodone. CP 1-2; 60-61; RP 146. This timely

appeal follows. CP 80-92.

Deputy Dwayne Matulovich explored a remote area in Klickitat County after complaints that there was a homeless encampment in the area. RP 66. Matulovich discovered a campsite in a remote area with a blue and a red tent situated 10-15 feet apart. RP 71. After seeing vomit outside the blue tent, Matulovich asked if everyone was ok. RP 71. Inside the blue tent, Cody Brock identified himself and said he was fine. Matulovich knew that Brock was associated with Jasmine Sabourin and that both had active warrants. RP 71-72.

Matulovich called for backup suspecting that Sabourin was with Brock. RP 75-76. After obtaining a warrant, Matulovich entered the blue tent and discovered Sabourin whom he recognized from a photo he was shown the day before. RP 21, 72-77. Matulovich saw a holster attached to a pair of Arizona pants for an unknown gender at the end of the sleeping area where Sabourin and Brock slept the night before. RP 76, 91. Matulovich could not determine who owned the pants. RP 92. Matulovich also discovered a revolver with 4-5 rounds under the sleeping area where both Brock and Sabourin had been sleeping. RP 77-79, 97.

Sabourin put on a different pair of pants and when asked to explain to Matulovich the holster was for a previously owned BB gun that she no longer possessed. RP 23, 25-26. Matulovich searched the empty red tent that was 10-15 feet away from the blue tent where he found paperwork that identified Sabourin, a backpack and a jacket, Matulovich testified was a women's jacket, with blue pills. RP 80-82, 96. Inside the backpack, Matulovich discovered drug paraphernalia and two .41 rounds. RP 86.

The forensic scientist identified the 4 blue pills as oxycodone and 1 acetaminophen. RP 104-06.

For the following argument section, relevant parts of the prosecutor's closing argument are as follows:

Prosecutor's closing on reasonable doubt in part:

And reasonable is a word that's thrown about in the law quite a bit and reasonable is decided by you. You know we say that what would a reasonable person do in these circumstances, in self-defense, would a reasonable person knowing what the defendant know, act in this manner.

And, I would suggest for you to ask yourself two questions. Do I have a doubt? And, is it a reasonable doubt? Now, you know you can say well, you know they're up in the woods, big foot could have snuck in and dropped the oxy's down in her jacket, but is that really reasonable?

RP 130.

Constructive possession:

And constructive possession occurs when there is no actual physical possession, but there is dominion and control over the item. An example would be you're a convicted felon, you're at work and from some circumstances that I can't tell you right now, police are looking in your locked closet and you've got a firearm. You're in constructive possession of that firearm. If you have a firearm at home as you sit here today, you have constructive possession of that firearm.

RP 132-33

So, she had the immediate ability to take actual custody or possession of the gun. Whether the defendant had the capacity to exclude others from possession of the gun. Again, yes she did. This -- she was in there with her boyfriend, Mr. Brock. Any other person that came into the tent she could say no Cops have to get a warrant. Whether the defendant had dominion and control over the premises where the item was located. Again, as far as the law is concerned, that tent was her home. She had dominion and control over it.

RP 133-34.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT CONSTRUCTIVE POSSESSION IN BOTH THE FIREARM AND THE NARCOTIC CHARGES

In a criminal case, the state bears the burden of presenting sufficient evidence to prove every element of the charged crime

beyond a reasonable doubt. *State v. Phuong*, 174 Wn. App. 494, 502, 299 P.3d 37 (2013) (citing *Jackson v. Virginia*, 433 U.S. 307, 317-18, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In evaluating the sufficiency of the evidence in a criminal case, the appellate court must determine “whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt.” *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)).

To convict a defendant of possessing a controlled substance with the intent to deliver, the state must prove beyond a reasonable doubt that the defendant (1) possessed a controlled substance, RCW 69.50.401. The state failed to prove beyond a reasonable doubt that Sabourin possessed oxycodone.

To convict a defendant of unlawfully possessing a firearm, the state must prove beyond a reasonable doubt that the defendant (1) was a felon, (2) in possession of a firearm. RCW 9.41.040(1)(a). The state failed to prove beyond a reasonable doubt that Sabourin possessed a firearm.

To determine whether sufficient evidence supports a conviction, the reviewing Court views the evidence in the light most

favorable to the prosecution and determines whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *Homan*, 181 Wn.2d at 105-06.

To prove unlawful possession of a controlled substance or of a firearm, the state must prove either actual or constructive possession. RCW 9.41.040(1)(a); RCW 69.50.401. *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014); *State v. Summers*, 107 Wn. App. 373, 383, n. 7, 28 P.3d 780 (2001);¹ *State v. Bowen*, 157 Wn. App. 821, 827-28, 239 P.3d 1114 (2010); *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001).

To determine constructive possession the court examines whether, under the totality of the circumstances, the defendant exercised dominion and control over the item in question. *Davis*, 182 Wn.2d at 234 (citing *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977), *overruled on other grounds by State v.*

1

Callahan and the cases that interpret it all concern possession of controlled substances, rather than firearms. The laws of possession for controlled substances and firearms, however, are practically identical, compare WPIC 50.03 (controlled substances) with WPIC 133.52 (firearm), and courts often consider the law of possession for controlled substances to define possession for firearms. See, e.g., *State v. Simonson*, 91 Wn. App. 874, 881 & nn.12-13, 960 P.2d 955 (1998), *review denied*, 137 Wn.2d 1016, 978 P.2d 1098 (1999).

Lyons, 174 Wn.2d 354, 275 P.3d 314 (2012)); *Alvarez*, 105 Wn. App. at 221.

The ability to immediately take actual possession, of an item can, even jointly with another person, in some circumstances establish dominion and control, but mere proximity to the item by itself cannot. *Davis*, 182 Wn.2d at 234; *State v. Turner*, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). *Cf. State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002); *State v. Spruell*, 57 Wn. App. 383, 387, 788 P.2d 21 (1990).

Factors supporting dominion and control include ownership of the item and, in some circumstances, ownership of the premises. But, having dominion and control over the premises containing the item does not, by itself, prove constructive possession. *Davis*, 182 Wn.2d at 234 (citing *State v. Tadeo–Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997)).

For an apartment, the state may be able to establish constructive possession by showing the defendant paid rent, by producing a lease, by producing letters addressed to the defendant at the specific address, or telephone calls to the address asking for the defendant. *Alvarez*, 105 Wn. App. at 221-222. “Evidence of

temporary residence or the mere presence of personal possessions on the premises is, however, not enough.” *Alvarez*, 105 Wn. App. at 222 (citing *State v. Callahan*, 77 Wn.2d 27, 31, 459 P.2d 400 (1969) (two books, two guns and a broken scale belonging to the defendant, plus evidence the defendant had been staying on the premises for two or three days was not enough)).

In *Alvarez*, the court did not make a definitive finding that any person had dominion and control over the room in the apartment. Rather, it determined Mr. Alvarez was the most likely candidate based on locating Alvarez’s savings account deposit books, some books, and pictures and newspaper articles featuring him or people he was connected with. *Alvarez*, 105 Wn. App. at 223. There was some evidence he resided elsewhere. *Id.*

Here, we are dealing with a tent which is inherently a temporary place to sleep, not a residence. It is rarely if ever a permanent lodging; it is certainly not an apartment. The tent Sabourin was sleeping in contained the firearm but not the contraband. RP 78-82, 85. There was no specific finding that Sabourin had dominion and control over the tent, rather she was

merely in proximity to the gun that was located under the area where she and Crocker slept. RP 78-79, 97.

The police saw a pair of pants with a holster but never identified to whom the pants belonged. RP 92. The pills were located in a jacket in an entirely separate red tent about 10-15 feet from the tent Sabourin was sleeping in. RP 96. The red tent had “some paperwork that identified Ms. Sabourin that was in there”. RP 80.

There were no letters addressed to this tent, there were very few articles of clothing or anything else connecting Sabourin to the tent, and all the state produced was that Sabourin was asleep in a tent at the moment they arrived. RP 76. There was no evidence that she had been in the tent for days, and in fact, the evidence presented during the 3.5 hearing suggested she had just spent the prior night in the tent. RP 21- 22.

This evidence does not establish constructive possession by dominion and control, or by any other means. It merely establishes rough proximity which is insufficient to establish possession. *Callahan*, 77 Wn.2d at 31; *Alvarez*, 105 Wn. App. at 222. For this

reason, this Court must reverse and remand the convictions for insufficient evidence of possession.

2. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT BY ANALOGIZING REASONABLE DOUBT TO A SELF-DEFENSE SCENARIO 'REASONABLE PERSON' STANDARD, WHICH LOWERED THE STATE'S BURDEN OF PROOF

Analogizing the reasonable doubt standard of proof to what a reasonable person would do in a self-defense scenario violated Sabourin's constitutional right to due process.

a. Due Process

A defendant has a fundamental right to a fair trial under the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 22 of the Washington Constitution. *State v. Chacon*, 192 Wn.2d 454, 459, 431 P.3d 477 (2018) (quoting *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012).

b. Prosecutorial Misconduct

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-704; U.S. Const. Amends. VI,

XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks to its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

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 mischaracterizing the law to the jury. *State v. Evans*, 163 Wn. App. 635, 643, 260 P.3d 934 (2011). In this case, the prosecutor misstated the law regarding the reasonable doubt standard and proof of constructive possession. RP 130-34.

The Court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432

(2003).

c. Reasonable Doubt

The right to a fair trial includes, as its most important element, the right to have the jury, determine guilt or innocence based on the fundamental Due Process Clause requirement that the “prosecution bears the burden of proving all elements of the offense charged and must persuade the factfinder ‘beyond a reasonable doubt’ of the facts necessary to establish each of those elements.” *Sullivan v. Louisiana*, 508 U.S. 275, 277-78, 113 S.Ct. 2078 (1993) (citing *Sparf v. United States*, 156 U.S. 51, 105-06, 15 S.Ct. 273, 39 L.Ed. 343 (1895)); *Chacon*, 192 Wn.2d at 549 (citing U.S. Const. Amend. XIV; *Jackson*, 443 U.S. at 315-16; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)).

The beyond a reasonable doubt standard is required for due process, but the constitution does not prohibit courts from defining reasonable doubt nor does it require them to do so. *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). However, a prosecutor may not define reasonable doubt to the jury during closing in a manner that lowers the state’s burden of

proof. *State v. Anderson*, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009).

In stating the relevant law to the jury, a prosecutor may not exceed boundaries of the jury's instructions. *State v. Walker*, 164 Wn. App. 724, 736, 265 P.3d 191 (2011). A prosecutor who misstates the law commits a “serious irregularity” with “grave potential to mislead the jury.” *Walker*, 164 Wn. App. at 736.

In *Anderson*, the prosecutor argued to the jury that “in order to find the defendant not guilty, you have to say ‘I don’t believe the defendant is guilty because,’ and then you have to fill in the blank.” 153 Wn. App. at 431. The Court held that the argument was improper because it subverted the presumption of innocence by implying that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him. *Anderson*, 153 Wn. App. at 431.

The prosecutor’s arguments in *Anderson* also discussed the reasonable doubt standard in the context of everyday decision making, such as choosing to have elective surgery, leaving children with a babysitter, and changing lanes on the freeway. *Anderson*, 153 Wn. App. at 425. The Court held that those

arguments were improper because they “trivialized and ultimately failed to convey the gravity of the State’s burden and the jury’s role in assessing” the state’s case against the defendant and because they implied, by “focusing on the degree of certainty the jurors would have to have to be *willing* to act, rather than that which would cause them to *hesitate* to act,” that the jury should convict the defendant unless it found a reason not to do so. *Anderson*, 153 Wn. App. at 431–32.

Similarly, in *Venegas*, the prosecutor argued, “In order to find the defendant not guilty, you have to say to yourselves: ‘I doubt the defendant is guilty, and my reason is’—blank.” *State v. Venegas*, 155 Wn. App. 507, 523, 228 P.3d 813 (2010). The Court reiterated its holding that this argument was improper. *Venegas*, 155 Wn. App. at 523 n. 16.

The prosecutor in Sabourin’s case made similar arguments that lessened the burden of proof by requiring the jury and the defendant establish the reasons for doubt and if none-existed, the prosecutor implied that the jury had a duty to convict. “You know we say that what would a reasonable person do in these circumstances, in self-defense, would a reasonable person knowing

what the defendant know, act in this manner.” RP 130.

The prosecutor impermissibly focused on the degree of certainty the jurors would have to have to be *willing* to act (the reasonable person standard for self-defense), rather than focusing on what would cause the jury to *hesitate* to act. As in *Anderson*, this was reversible error because it both trivialized and lowered the burden of proof and impermissibly invited the jury to focus on the degree of certainty they needed to convict, implying that the jury should convict Sabourin unless it found a reason not to do so. *Venegas*, 155 Wn. App. at 523 n. 16; *Anderson*, 153 Wn. App. at 431–32.

d. Prosecutorial Misconduct-
Constructive Possession

Here, contrary to the law, the prosecutor improperly argued that dominion and control over premises establishes possession by providing a hypothetical that simply described the presence of a locked container in a home as sufficient to establish dominion and control and by extension constructive possession regardless of whether Sabourin knew of the presence of the contraband and gun, and regardless of whether she could exclude other’s access or not.

The prosecutor mislead the jury with this argument and by

failing to explain that if others had access to the home and locked container this hypothetical did not accurately describe constructive possession. RP 132-34. The prosecutor also informed the jury without evidence that the tent was Sabourin's home, rather than a place she slept the night before. RP 134.

This argument misstated the law because it informed the jury that the ability to reduce an object to actual possession establishes dominion and control, rather than this being one aspect of dominion and control. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). The state was required to prove that Sabourin had control over the tent, that she knew of the contraband and the jury was required to consider whether she had the ability to exclude others. *Tadeo-Mares*, 86 Wn. App. at 816; *State v. Edwards*, 9 Wn. App. 688, 690, 514 P.2d 192 (1973).

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. Here, Sabourin was prejudiced by the prosecutor's improper arguments. *Id.*

Sabourin was not in actual control of the drugs or the gun: she was only present in the blue tent with Crocker, a shared space. RP 77-79, 91, 97. There was no testimony that she was aware of the presence of the gun or the pills. The only evidence presented indicated that Sabourin slept in the blue tent, there were documents in the red tent identifying Sabourin, there was a jacket with pills and a weapon under the shared sleeping area. This was insufficient evidence that Sabourin had dominion and control or constructive possession.

The prosecutor chose to deal with the state's evidentiary shortcomings by telling the jury that Sabourin's presence in the tent essentially established constructive possession. A jury finding that the tent was under Sabourin's control was not sufficient to prove constructive possession of the gun in the blue tent or the pills in the red tent. The prosecutor committed misconduct by misstating the law on a critical issue in Sabourin's case.

The prosecutor mischaracterized the law rather than arguing that the state's evidence supported conviction. There is a substantial likelihood that the prosecutor's improper argument affected the outcome of Sabourin's case. *Glasmann*, 175 Wn.2d at

704.

e. Flagrant and Ill-Intentioned

Prosecutorial misconduct requires reversal, even absent an objection below, if it is so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice. *State v. Pierce*, 169 Wn. App. 533, 552, 280 P.3d 1158 (2012). Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707.

Following the holding in *Venegas*, in *Anderson*, the Court in *State v. Johnson*, 158 Wn. App. 677, 685-86, 243 P.3d 936 (2010), reiterated that that fill in the blank type arguments are flagrant and ill-intentioned and incurable even with an objection and curative instruction, because “[although the trial court’s instructions regarding the presumption of innocence may have minimized the negative impact on the jury, and we assume the jury followed these instructions, a misstatement about the law and the presumption of innocence due a defendant, the ‘bedrock upon which [our] criminal justice system stands, constitutes great prejudice because it reduces the State’s burden and undermines a defendant’s due

process rights.” *Johnson*, 158 Wn. App. at 685-86. (quoting *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)); *Anderson*, 153 Wn. App. at 432.

In *Johnson*, the Court reversed absent an objection because an instruction could not cure the “great prejudice” from the fill in the blank type argument. *Id.* Here, the prosecutor had access to long-standing case law prohibiting him from mischaracterizing the law in closing argument. *Johnson*, 158 Wn. App. at 685-86 ;See e.g. *Evans*, 163 Wn. App. at 643 (presumption of innocence continues until the jury reaches a verdict).

Here, it has long been established that mere presence is insufficient to establish dominion and control over a premises, and control over premises is insufficient, standing alone, to prove constructive possession. See e.g. *Davis*, 182 Wn.2d at 234; *Tadeo-Mares*, 86 Wn. App. at 816.

Analogizing the reasonable doubt standard to what a reasonable person would do in a self-defense scenario trivialized the state’s burden and asked the jury to essentially fill in the blank with what a reasonable person might do. As in *Johnson*, this argument could not be cured with an instruction. *Johnson*, 158 Wn.

App. at 685-86. Reversal is required.

Here, the prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by mischaracterizing the law during closing argument regarding both reasonable doubt and constructive possession. *Evans*, 163 Wn. App. at 643. Sabourin's convictions must be reversed. *Id.*

3. APPELLANT WAS DENIED HER
CONSTITUTIONAL RIGHT TO
EFFECTIVE ASSISTANCE OF
COUNSEL BY COUNSEL'S FAILURE
TO OBJECT TO IMPROPER CLOSING
ARGUMENT

The failure to object during closing argument can constitute ineffective assistance of counsel when the prosecutor's conduct was both improper and prejudicial. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 721, 327 P.3d 660 (2014) (citing *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1105 (1995)). That is the case here. In the event this Court should find the prosecutorial misconduct issue was waived due to failure to object, this Court should nonetheless reverse due to counsel's ineffective assistance in failing to ensure his client received the full benefit of the presumption of innocence.

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

The constitutional right to effective assistance of counsel is violated when the attorney’s performance is unreasonably deficient and it is reasonably probable that deficiency affected the outcome of the trial. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Whether counsel provided ineffective assistance is a mixed question of fact and law reviewed de novo. *In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). The presumption of competent performance is overcome by demonstrating “the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” *State v. Crawford*, 159 Wn.2d 86, 98, 147 P.3d 1288 (2006). Failure to preserve error can also constitute ineffective assistance and

justifies examining the error on appeal. *State v. Ermert*, 94 Wn.2d 839, 848, 621 P.2d 121 (1980); see *State v. Allen*, 150 Wn. App. 300, 316-17, 207 P.3d 483 (2009) (addressing ineffective assistance claim where attorney failed to raise same criminal conduct issue during sentencing).

Counsel was ineffective in failing to object to the prosecutor's improper argument on proof beyond a reasonable doubt because the argument lowered the state's burden and trivialized the burden which improperly deprived Sabourin of the full benefit of the presumption of innocence. Without that argument, the jury would have been far more likely to find reasonable doubt. Instead, the jury was likely left with an impression of the law akin to the prosecutor's arguments in *Venegas*, *Anderson* and *Johnson*, that the presumption of innocence had already eroded, and the jury need not evaluate the evidence in light of this presumption. *Venegas*, 155 Wn. App. at 524.

The primary disputed issue in this case was whether Sabourin had possession of the gun and narcotics. This required the state to prove she knew the items were present and that she had dominion and control over these items. With no direct evidence

of these elements, incorrect application of the presumption of innocence was likely to play a decisive role in the outcome.

Because there was a reasonable likelihood the jury misapplied the presumption of innocence, the bedrock principle of the criminal justice system, this Court should reverse Sabourin's conviction. *See United States v. Doyle*, 130 F.3d 523, 539 (2d Cir. 1997) (presumption of innocence continues during deliberations; jury charge suggesting otherwise "creates a serious risk of undermining that vital protection"). Sabourin was prejudiced by her attorney's failure to object to argument misstating the presumption of innocence. Her conviction should, therefore, be reversed.

D. CONCLUSION

For the reasons discussed herein, this Court should reverse and remand for dismissal with prejudice for insufficient evidence. In the alternative this Court should reverse and remand for a new trial based on prejudicial prosecutorial misconduct.

DATED this 14th day of April 2020.

Respectfully submitted,



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Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Klickitat County Prosecutor's Office davidq@klickitatcounty.org and Jasmine Sabourin/DOC#411499, Mission Creek Corrections Center-Women, 3420 NE Sand Hill Road, Belfair, WA 98528 a true copy of the document to which this certificate is affixed on April 14, 2020. Service was made by electronically to the prosecutor and Jasmine Sabourin by depositing in the mails of the United States of America, properly stamped and addressed.



Signature

LAW OFFICES OF LISE ELLNER

April 14, 2020 - 3:02 PM

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