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

STATE OF WASHINGTON, Respondent, v. ROBERT THOMAS DRISCOLL Appellant.	No. 42849-1-II STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

I, Robert Thomas Driscoll, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief.

I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

ADDITIONAL GROUND 1

Driscoll contends that the evidence presented at trial was insufficient to uphold his convictions for first degree unlawful possession of a firearm and unlawful possession of a controlled substance with the intent to deliver.

Possession of property may be either actual or constructive. *State*

v. Escheverria, 85 WN. App. 777, 783, 934 P.2d 1214 (1997) . Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in the actual, physical possession, but that the person charged with possession has dominion and control over the goods. *State v. Callahan, 77 Wn. 2d 27, 29, 459 P.2d 400 (1969).*

The state must prove actual control, not merely a momentary handling that amounts to passing control. *State v. Staley, 123 Wn. 2d 794, 801, 872 P.2d 502 (1994).* Toestablish constructive possession of a controlled substance, we look at the totality of the circumstances to determine if there is substantial evidence from which the fact finder can reasonably infer that the defendant had dominion and control of the drugs and, thus, constructive possession. *State v. Porter, 58 Wn. App. 57, 60, 791 P.2d 905 (1990).*

A fact finder may infer that a defendant has constructive possession if the defendant has dominion and control over the premises where the item is located. *Turner, 103 Wn. App. at 524.* Constructive possession may not be conclusively established soley upon evidence of dominion and control over a premises. *State v. Cantrabana, 83 Wn. App. 204, 207-208, 921 P.2d 572 (1996).* It is not a crime to have dominion and control over a premises where a controlled substance is found. *State v.*

Olivarez, 63 Wn. App. 484, 486, 820 P.2d 66 (1991).

Exclusive control is not necessary to establish dominion and control, but mere proximity to the contraband is insufficient. *State v. Davis, 117 Wn. App. 702, 708-09, 72 P.3d 1134 (2003).* We determine whether a person has dominion and control over an item by considering the totality of the circumstances . *State v. Alvarez, 105 Wn. App. 215, 221, 19 P.3d 485 (2001).* We consider facts including the defendant's motive to possess the item; the nature, and duration of the possession and why it terminated; whether another person claimed ownership of the item; and the defendants dominion and control over the premises. See, e.g. *Staley 123 Wn.2d at 801; State v. Callahan, 77 Wn. 2d at 30-31; State v. Summers, 107 Wn. App. 373, 386, 28 p.3d 780 (2001); State v. Bowman, Wn. App. 148, 153, 504 P.2d 1148 (1972); State v. Werry, 6 Wn. App. 540, 548, 494 P.2d 1002 (1972).* Dominion and control need not be exclusive but we are reluctant to conclude that one person has constructive possession based on circumstantial evidence "when undisputed dire*ct proof places exclusive possession in some other person" Callahan, 77 Wn.2d at 31-32.*

It is undisputed by the state that Driscoll was not in actual possession of the drugs and firearm. Consideration must be given to the ownership of the drugs as ownership can carry with it the right of

dominion and control. A Danielle Neill testified that the car was given to her as a gift by Driscoll on February 1st, that she had just not transferred the title yet, that she had purchased the gun from Corey Ballard. That it belonged to her, and that the drugs belonged to someone she had given a ride to (whom she identified as Jeremy Garretson) and they were left in the car accidentally. That she not Driscoll placed the drugs with the firearm together underneath the hood of the car where they were later discovered by DOC officials. That she not Driscoll had sole control over them at all times that Driscoll was unaware of the presence of the contraband , as it was placed under the hood in efforts to conceal them from Driscoll. [VRP 142-144][VRP 175-176]. This testimony was substantiated by others. Juanita Peabody testified that Danielle Neill was at her house showing her, her new car when the drugs and the firearm were secreted under the hood of the car, she even testified to the fact that it was her idea to place them there because she didn't want the bag containing the illegal contraband left at her house while Danielle left to give Driscoll a ride. [VRP 173-174]

> Q. I believe we left off with the questioning about the Discussion with Danielle, okay, the discussion about the gun and the drugs. Did you advise her anything about that?
> A. Yeah, I did.
> Q. What was that advice?
> A. To hide it underneath the hood for he doesn't see it

because he was going to be in the car soon.
Q. Was Rob present at this time?
A. No, she was at my house.

Also, by a Corey Ballard, who identified the firearm at trial as the firearm he had sold to Danielle Neill a couple months prior to the incident.[VRP 128-129]

Q. Again tell the jury how you attempt to sell the gun.
A. Word of mouth.
Q. And Ms. Frost or Ms. Neill responded to this word of mouth advertising?
A. Yeah.
Q. You did sell the gun to her?
A. Yes.

This testimony was uncontradicted by the state. Evidence pointing to any dominion and control that Driscoll might have had over the firearm and drugs was purely circumstantial and is not within the rule of reasonable hypothesis to hold that proof of possession by defendant may not be established by circumstantial evidence when undisputed direct proof places exclusive possession in some other person. *State v. Charley, 48 Wn.2d 126, 291, P.2d 673 (1955).*

It is true that we have held that once possession is established, the burden shifts to the defendant to explain away the possession as unwitting, lawful, or otherwise excusable. *State v. Morris, 70 Wn.2d 27, 422 P.2d 27.* Such rule however cannot be used to furnish the element which the state

must first prove, namely, that the defendant was in possession of the proscribed goods.

Driscoll testified that he had touched the scale that was found with the drugs earlier that morning when he had gone out to the car to get a cigarette. He noticed what he thought was a cell phone and had momentarily picked it up realized that it was not a cell phone and put it back down. [VRP 189] Evidence is insufficient to support a conviction if when viewed in the light most favorable to the prosecution, any rational trier of fact can find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).* "A claim of insufficiency admits the truth of the state's evidence and all inferences that can be drawn therefrom." *State v. Salinas, 119 Wn.2d at 201.*

Since the drugs and firearm were not found on Driscoll, this is undisputed by the state, and there was no testimony or evidence offered by the state that Driscoll had been seen with the contraband or knew of their existence other than a fingerprint found on the outside cover of the scale and the fact that Driscoll identified the scale as the one he had seen in the vehicle and had mistaken it for a cell phone and momentarily handled it. Such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only momentary

handling. *See United States v. Landry, 257 F.2d 425, 431 (7th Cir. 1958)*

Where evidence is insufficient to support a jury verdict, we must reverse and dismiss the conviction. *State v. Stanton, 68 Wn. App. 855, 866-67, 845 P.2d 1365 (1993).*

ADDITIONAL GROUND 2

Did the court abuse its discretion when it denied defense motion for a continuance?

Court denied defenses motion for a continuance when trial counsel said that he was not prepared to go to trial that he had not had the opportunity to interview witnesses or to obtain certified copies of DMV records, which were later offered into evidence but denied because they were not certified copies. He said he had only become aware of these witnesses a week prior. That it was not Driscoll fault. That he had learned of these witnesses thru Ms. Neill and not thru the defendant. That interviewing them was vital for him to prepare his defense; He stated that he was not prepared at this time to continue. [VRP4-12]

The trial court denied this motion on the basis that "it costs thousands of dollars to have a jury here they are here and ready" [VRP 4-12] Every criminal defendant is guaranteed the right to effective assistance of counsel and the right to a fair trial under the 6th amendment of the United States Constitution and Article I, Section 22 of the Washington

State Constitution. For the trial court to deny defenses motion for a continuance so that counsel may interview witnesses and explore and investigate exculpatory evidence that could potentially exonerate Driscoll, severely deprived Driscoll these rights that are guaranteed to him. Had defense counsel had the opportunity to interview these witnesses he would have been able to present a defense more adequately, not having this opportunity to do so, even though witnesses testified, being unprepared severely was prejudicial to the defendant and these rights. Discretion is abused only if the trial court's decision is manifestly unreasonable or is based on untenable reasons or grounds. *State v. C.J., 148 Wn.2d 672, 686, 63 P.3d 765 (2003) (citing State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).*

ADDITIONAL GROUND 3

Driscoll contends that he received ineffective assistance of counsel when trial counsel failed to object to the trial court not allowing into evidence the title and bill of sale in as evidence for the jury to examine.[VRP 118-126] Also, for failing to object to the testimony of Dan Cochran when the prosecution elicited testimony about other items that were found in the car (i.e. handcuffs, keys, and a blue kojak light). He testified that these items were used by people who impersonated police officers and took people into custody and the keys were used to break into

and steal cars. [VRP 30-31]. Neither of these items is illegal and offered no evidence of guilt to the crimes Driscoll is being charged with, and is totally irrelevant. ``testimony that is not a direct comment on the defendant's guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences from the evidence is not improper opinion testimony." *City of Seattle v. Heatley, 70 Wn. App. 573, 578, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011 (1994).* This testimony was used and brought forth only to prejudice the jury against Driscoll. For trial counsel not to object to this testimony is plain and simple failure to actually defend Driscoll. Allowing this testimony in cannot be any tactical decision on counsel's part. This is deficient at its best.

To establish ineffective assistance of counsel, defendant must first show that his counsel's performance was deficient. Second, the defendant must show that such deficient performance prejudiced the defense. This requires a showing that counsel's errors were so egregious that the defendant was deprived of a fair trial and that the result is unreliable. *Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). See also State v. Jeffries, 105 Wn.2d 398, 717 P.2d 722, cert. denied, 479 U.S. 922, 93 L. Ed. 2d 301, 107 S. Ct. 328 (1986).* Courts apply a strong presumption of reasonableness in scrutinizing whether defense counsel's performance was ineffective. *State v. Thomas, 109*

Wn.2d 222, 743 P.2d 816 (1987). A criminal defendant has the right under the 6th amendment to effective assistance of counsel. *Strickland v. Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).* To establish ineffective assistance of counsel for failure to object, the defendant must show that the objection would likely have been sustained. *State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).* Had defense counsel objected to the irrelevant testimony given by Dan Cochran it is very likely that an objection would have been sustained by the trial court as this testimony offered no evidence of guilt for which Driscoll is on trial for. This testimony was so prejudicial that it is possible had the jury not heard the opinion of Cochran and the propensity towards criminal activity that these items represented to him, that the outcome of the trial may have been different.

ADDITIONAL GROUND 4

Driscoll contends that there was prosecutorial misconduct committed by the prosecutor during his cross examination of Danielle Neill when he suggested that she had a warrant for her arrest, when no warrant existed. This case turned on whether or not the jury believed the events the way witnesses for the defense brings forth the events in question or in the version that the state claims.

Credibility was a big issue and for the Prosecution to undermine

this is Prosecutorial misconduct and completely undermines the version of events that the defense witnesses present. A prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *Fisher, 165 Wn.2d at 746.* As a quasi-judicial officer, a prosecutor must subdue courtroom zeal for the sake of fairness to the defendant. In the case at bar this was not how the prosecution acted, the prosecutor was out to convict Driscoll at all costs, not to find the truth and the truth being that Driscoll did not have control over the drugs, gun and scale period. ``[A]lthough prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements not supported by the record." *State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006).* Courts review comments made by a prosecutor during closing argument in ``the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).*

ADDITIONAL GROUND 5

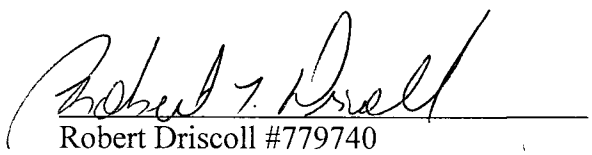
Even if none of the claimed errors set forth in this Statement of Additional Grounds and appellate counsel's opening brief by themselves require reversal, the cumulative error was so prejudicial as to require a new trial. *See Walker v. Engle, 703 F.2d 959, 963 (6th Cir.)*(Errors

cumulatively produce a trial that is fundamentally unfair), cert. denied, 464 U.S. 962 (1983). Driscoll's trial was unfair period, the record reflects this in numerous ways.

CONCLUSION

Based on the above mentioned grounds, Driscoll humbly requests that this court reverses and dismisses convictions or remands for new trial.

Dated this 27th day of June 2012.



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