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STATE OF WASHINGTON
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No. 37553-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Corinne Dixon,

Appellant.

Thurston County Superior Court

Cause No. 07-1-01511-0

The Honorable Judge Gary R. Tabor

Appellant's Opening Brief

Manek R. Mistry
Jodi R. Backlund
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (866) 499-7475

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ASSIGNMENTS OF ERROR

1. The conviction for bail jumping was based on insufficient evidence.
2. The trial judge erred by entering judgment on the bail jumping charge.
3. The state failed to prove that Ms. Dixon was required to appear in court on January 2, 2008.
4. The state failed to prove that Ms. Dixon knew that she was required to appear in court on January 2, 2008.
5. Although the state proved that Ms. Dixon was required to appear in court on December 31, 2007, it did not prove that she failed to appear on that date.
6. The prosecutor committed misconduct by shifting the burden of proof.
7. The prosecutor committed misconduct by arguing that Ms. Dixon should have presented the testimony of her passenger.
8. The prosecutor committed misconduct by suggesting that Ms. Dixon should have testified to deny possession of the drugs.
9. The prosecutor committed misconduct by commenting on Ms. Dixon's right to remain silent.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To convict Ms. Dixon of bail jumping, the prosecutor had to prove that she was required to appear in court on January 2, 2008, that she knew of the requirement to appear on that date, and that she failed to appear on that date. The prosecutor did not prove that Ms. Dixon was required to appear on January 2, 2008 or that she knew she was required to appear on that date. Was her conviction for bail jumping based on insufficient evidence?
Assignments of Error Nos. 1-5.

2. A prosecutor commits reversible misconduct by shifting the burden of proof. The prosecutor in this case shifted the burden of proof by arguing that Ms. Dixon should have presented the testimony of her passenger, and should have testified herself. Must the conviction be reversed because the prosecutor unconstitutionally shifted the burden of proof during closing arguments?
Assignments of Error Nos. 6-9.

3. A prosecutor commits reversible misconduct by commenting on an accused person's constitutional right to remain silent. The prosecutor in this case commented on Ms. Dixon's right to remain silent by pointing out that she had not denied possession of the drugs (by accusing her passenger of planting them in her purse during her arrest). Must the conviction be reversed because the prosecutor unconstitutionally commented on Ms. Dixon's right to remain silent?
Assignments of Error Nos. 6, 8-9.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Corinne Dixon was stopped by police, who suspected her of driving with a suspended license. RP (3/12/08) 17-19. She was arrested, her passenger was released, and the car was searched. RP (3/12/08) 19-20, 22. The deputy did not record the name of the passenger because he was new to the job. RP (3/12/08) 23, 24. Methamphetamine and marijuana were found in the car. RP (3/12/08) 20-22.

Ms. Dixon was charged with Possession of Methamphetamine, Possession of Marijuana, and Driving While License Suspended in the Third Degree. CP 2-3. She was told to be at court for various hearings as the case progressed, including for trial on December 31, 2007. Supp. CP, Exhibit 6. She had checked in with pretrial services, at the Thurston County courthouse complex, in person, on December 31, 2007. Supp. CP, Memo. The case was called for trial on January 2, 2008, and Ms. Dixon was not in the courtroom. RP (3/12/08) 36-37. The court issued a warrant, and Ms. Dixon was charged with Bail Jumping. RP (3/12/08) 37; CP 2-3.

Prior to trial, Ms. Dixon entered a plea of guilty to the two misdemeanor counts. RP (3/12/08) 9-12. The state presented evidence that Ms. Dixon was ordered to be present for trial on December 31, 2007, and

that she was not present in court on January 2, 2008. RP (3/12/08) 35-42.

Ms. Dixon did not present any evidence. RP (3/12/08) 42.

In closing argument, Ms. Dixon argued, among other things, that the possession wasn't proven since the passenger could have been responsible for the drugs found in the car. RP (3/12/08) 63-64. The state asked the jury:

Why didn't the defendant bring that passenger to testify for her? She knew who he was. He was her friend, that's what Deputy Stewart said. ... And if that passenger had anything at all to say, don't you think this defendant would have contacted him? She knew who he was. He was in her car. She didn't call him...

Did the defendant make any statement that "he put that in my purse"? No. We didn't hear any of that testimony. There's nothing, absolutely nothing that indicates that that passenger had anything to do with this.

RP (3/12/08) 69-70.

She was convicted on both counts, and then timely appealed. CP 4-12, 12-20.

ARGUMENT

I. MS. DIXON'S BAIL JUMPING CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). On review, evidence is not sufficient to

support a conviction unless, after viewing the evidence in the light most favorable to the state, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842 at 849, 72 P.3d 748 (2003).

The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *DeVries*, at 849. The reasonable doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *DeVries*, at 849.

Although a claim of insufficiency admits the truth of the state's evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. In the end, the evidence must be sufficient to convince a rational jury beyond a reasonable doubt. *Devries, supra*.

Since the reasonable doubt standard is the highest standard of proof, review is more stringent than in civil cases. In other words, the proof must be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at

391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005). It also must be more than clear, cogent and convincing evidence, which is described as evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” *In re A.V.D.*, 62 Wn.App. 562 at 568, 815 P.2d 277 (1991), *citation omitted*.

Where the evidence is insufficient to support a conviction, the double jeopardy clause requires reversal and dismissal with prejudice. *State v. Brown*, 137 Wn. App. 587 at 592, 131 P.3d 905 (2007).

Under RCW 9A.76.170(1), “Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state... who fails to appear... as required is guilty of bail jumping.” Bail Jumping is a class C felony if the person’s original charge is a class C felony. RCW 9A.76.170(3).

The evidence in this case is insufficient to sustain Ms. Dixon’s Bail Jumping charge. Ms. Dixon was released pursuant to a court order on September 24, 2007. Exhibit 5, Supp. CP. The order releasing her did not include a requirement that she subsequently appear in court on a specific date. Exhibit 5, Supp. CP. An order of continuance required her to appear for trial scheduled for “12-31-7.” Exhibit 6, Supp. CP.

The state presented no evidence that Ms. Dixon failed to appear on December 31 for trial. In fact, the evidence suggests that she did appear on that date, and checked in with pretrial services. Memo dated December 31, 2007, Supp. CP.

The state did present evidence that Ms. Dixon failed to appear on January 2, 2008. RP (3/12/08) 36-42. This was consistent with the charging document and with the court's "to convict" instruction. CP 2; Instruction No. 13, Supp. CP. But the state failed to present any evidence that she was required by the court to appear on that date, or that she had knowledge of any such requirement.¹ RP (3/12/08) 15-42.

Accordingly, the Bail Jumping conviction was based on insufficient evidence. *DeVries, supra*. The charge must be reversed and dismissed with prejudice. *Brown, supra*.

II. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT REQUIRING REVERSAL OF THE POSSESSION CONVICTION.

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511 at 518, 111 P. 3d 899 (2005). Prosecutorial misconduct

¹ Thurston County apparently still uses a trial calendaring and notification system where an accused is required to appear the "week of" trial, but is not specifically notified of the particular date on which appearance is required. RP (3/12/08) 41. This Court rejected such an approach in *State v. Liden*, 118 Wn. App. 734, 77 P.3d 668 (2003).

requires reversal whenever the prosecutor's improper actions prejudice the accused's right to a fair trial. *Boehning, supra*, at 518. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed.² *See, e.g., State v. Easter*, 130 Wn.2d 228 at 242, 922 P.2d 1285 (1996).

A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204 at 222, 181 P.3d 1 (2008). Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *State v. Henderson*, 100 Wn.App. 794 at 804-805, 998 P.2d 907 (2000).

A. The prosecuting attorney unconstitutionally shifted the burden of proof.

Criminal defendants have a constitutional right to be presumed innocent and to have the government prove guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 at 362, 90 S. Ct. 1068, 25 L. Ed. 2d

² Misconduct may be reviewed absent an objection from defense counsel if it creates a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Perez-Mejia*, 134 Wn. App. 907 at 920 n. 11, 143 P.3d 838 (2006); *See also State v. Belgarde*, 110 Wn.2d 504 at 510-12, 755 P.2d 174 (1988).

368 (1970). A prosecuting attorney commits misconduct by making a closing argument that shifts the burden of proof. *United States v. Perlaza*, 439 F.3d 1149 at 1171 (9th Cir., 2006). Such misconduct affects a constitutional right and requires reversal of the conviction unless the error is harmless beyond a reasonable doubt. *State v. Moreno*, 132 Wn. App. 663 at 672, 132 P.3d 1137 (2006); *see also Perlaza*, at 1171.

Due process limits use of the ‘missing witness’ doctrine in criminal cases. *State v. Montgomery*, 163 Wn.2d 577 at ___, 183 P.3d 267 (2008). The doctrine applies only if (1) the potential testimony is material and not cumulative, (2) the missing witness is particularly under the control of the accused, (3) the witness's absence is not satisfactorily explained. *Montgomery*, at ___.

In addition, the argument may not be used under circumstances where it shifts the burden of proof. *Montgomery*, at ___. Finally, “[t]he missing witness doctrine must be raised early enough in the proceedings to provide an opportunity for rebuttal or explanation.” *Montgomery*, at ___.

Here, the prosecutor (1) argued that Ms. Dixon should have brought the missing passenger to court to testify and (2) suggested that Ms. Dixon should have testified and denied possession of the drugs on the theory that the passenger had put the drugs in her purse. RP (3/12/08) 69.

These comments constituted misconduct and unconstitutionally shifted the burden of proof.

The state failed to establish the requirements of the missing witness doctrine. First, the state did not show that the missing witness was particularly under Ms. Dixon's control. The only testimony on the subject was that (a) he was a passenger in a vehicle she drove, and (b) the arresting officer (who did not record the passenger's name) "gathered" that the two were friends. RP (3/12/08) 26. Second, Ms. Dixon did have an explanation for the passenger's absence. Her attorney was unable to locate the passenger prior to trial. RP (12/26/07) 3. In addition, any testimony that could have helped Ms. Dixon would have incriminated the passenger. *See Montgomery, at ___* ("if testimony would incriminate the witness, the absence is explained and no instruction or argument is permitted.") Third, the state did not raise the missing witness argument until after both parties had rested; this denied Ms. Dixon an opportunity to explain or rebut the argument. RP (3/12/08) 69.

The state bore the burden to establish possession by proof beyond a reasonable doubt. *Winship, supra*. Ms. Dixon's strategy was to suggest a reasonable doubt on the issue of possession. The passenger was alone with (and had access to) her purse following her arrest. RP (3/12/08) 22-26. If the passenger put drugs into the purse after Ms. Dixon's possession

ended, the state would not be able to show that she possessed the drugs. By arguing that Ms. Dixon should have called the passenger to testify (or should have testified herself) on the issue of possession, the prosecutor shifted the burden of proof.

The prosecutor's misconduct went to the heart of and undermined Ms. Dixon's sole defense. Because of this, the error cannot be shown to be harmless beyond a reasonable doubt. The conviction must be reversed and the case remanded for a new trial. *Montgomery, supra*.

B. The prosecuting attorney commented on Ms. Dixon's constitutional privilege against self-incrimination.

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 9; *Easter*, at 238. A prosecutor's comment on an accused person's right to remain silent violates the Fifth Amendment. *State v. Holmes*, 122 Wn.App. 438 at 445, 93 P.3d 212 (2004); *State v. MacDonald*, 122 Wn. App. 804 at 812, 95 P.3d 1248 (2004).

Error of this type is prejudicial and requires reversal unless the state establishes beyond a reasonable doubt that the error is harmless; to meet this standard, the state must show beyond a reasonable doubt that "any reasonable jury would reach the same result absent the error, [and

that] the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *Easter*, at 242.

The prosecutor commented on Ms. Dixon’s silence by pointing out that she had not said that her passenger had put the drugs in her purse. RP (3/12/08) 69-70. Whether this was meant to be a comment on her post-arrest silence or on her failure to testify, it violated her Fifth Amendment privilege. *Holmes, supra*. The comment went directly to Ms. Dixon’s strategy of suggesting that there was a reasonable doubt on the issue of possession, due to the passenger’s proximity to and access to her purse after her arrest.

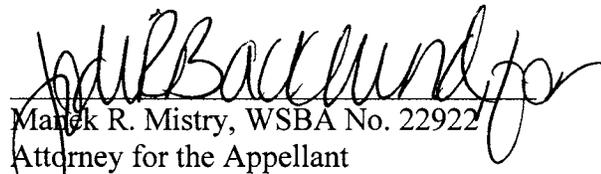
Because of this, the error cannot be harmless. The conviction for Possession of a Controlled Substance must be reversed and the case remanded for a new trial. *Holmes, supra*.

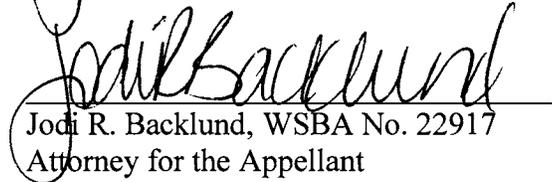
CONCLUSION

Ms. Dixon's bail jumping conviction must be reversed for insufficient evidence, and the charge dismissed with prejudice. Her possession conviction must be reversed and remanded for a new trial, based on the prosecutor's prejudicial misconduct during closing.

Respectfully submitted on August 19, 2008.

BACKLUND AND MISTRY


Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant


Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Corinne Dixon
201 2nd Place SE, #1-B
Pacific, WA 98047

and to:

Thurston Co Prosecuting Attorney
2000 Lakeridge Dr. S.W., Building 2
Olympia, WA 98502

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All postage prepaid, on August 19, 2008.

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

Signed at Olympia, Washington on August 19, 2008.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant