

NO. 38643-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FILED
APR 11 2011
CLERK OF COURT
COURT OF APPEALS
DIVISION II
SEATTLE, WA

STATE OF WASHINGTON, Respondent,

v.

JASON SILVA WILLIAMS, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The trial court erred by denying the motion to suppress evidence obtained during the warrantless search of the vehicle.
2. The trial court erred when it found that Williams had no standing to contest the search of the bag.
3. The trial court erred by finding without sufficient evidence that Rambo picked up the laptop bag and handed it to Officer Brown.
4. The trial court erred by finding without sufficient evidence that Rambo was arrested prior to the search of the truck and that the truck was searched, in part, incident to Rambo's arrest.
5. Defense counsel was ineffective for failing to object to the hearsay statement of Rambo that the laptop bag containing the oxycodone belonged to Williams.
6. The trial court erred by convicting Williams of possession of a controlled substance, methamphetamine, without sufficient evidence to prove possession beyond a reasonable doubt.
7. The trial court erred by convicting Williams of possession of a controlled substance, Oxycodone, without sufficient evidence to prove possession beyond a reasonable doubt.
8. The trial court erred by denying Williams' motion to dismiss.

9. Defense counsel was ineffective for failing to propose a jury instruction on proximity.
10. Defense counsel was ineffective for failing to propose a jury instruction on unwitting possession.
11. The prosecutor committed prosecutorial misconduct when she argued to the jury that proximity alone was sufficient under the law to prove dominion and control.
12. The cumulative effect of the errors deprived Williams of a fair trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court erred by denying the motion to suppress evidence obtained during the warrantless search of a bag from inside the vehicle where the person arrested was already handcuffed and secure, in the patrol car at the time of the search.
2. The conviction for unlawful possession of methamphetamine was not supported by substantial evidence where the only evidence of constructive possession was mere proximity.
3. Defense counsel was ineffective for failing to object to the hearsay statement of Rambo that the laptop bag belonged to Williams.

4. The conviction for unlawful possession of Oxycodone was not supported by substantial evidence where the only evidence of possession was proximity and the co-defendant's self-serving statement.
5. Defense counsel was ineffective for failing to propose jury instructions that would have informed the jury that legally, "mere proximity" does not establish constructive possession, and of the legal concept of "unwitting possession."
6. The prosecutor committed prosecutorial misconduct when she argued to the jury that proximity alone was sufficient under the law to prove dominion and control.
7. The cumulative effect of the errors made during trial, including the erroneously admitted evidence, ineffective assistance of counsel, and prosecutorial misconduct, deprived Williams of due process and therefore his convictions should be reversed.

III. STATEMENT OF THE CASE

On March 26, 2008, Officer Shelly Brown observed a truck parked legally by the side of the road with two people sitting inside. RPII 33, 35. She saw the driver exit the vehicle and pull a gas can from the back. RPII 40. Although she did not observe any criminal activity, she decided to investigate, approached the truck, and asked the driver if everything was allright. RP 7/30/08 20, RPII 41.

Robert Rambo told her that he ran out of gas and was waiting for a ride. RPII 41. Officer Brown looked at the dash and observed that the gage did not show an empty tank. RPII 42. She asked Rambo for identification, which he provided. RPII 42. Officer Brown wrote down Rambo's information and then returned his ID. RPII 42. Then, she asked the passenger, Jason Williams, for his identification, wrote his information down, and returned his ID. RPII 42-44.

Officer Brown returned to her patrol car and ran Rambo and Williams through the police computer. RPII 44. Williams' name came up associated with an outstanding misdemeanor warrant for driving under the influence. RPII 44. Officer Brown advised her partner, Officer Michael Johnson, that Williams should be placed under arrest on the outstanding warrant. RPII 44.

Officer Johnson returned to Williams, who was standing beside the truck, arrested, handcuffed, and placed him in the patrol car. RPII 45.

After Williams was arrested, Officer Brown returned to the truck and advised Rambo, who was standing beside the truck, that she was arresting Williams. RPII 45. Officer Brown testified that Rambo then pointed to a bag sitting in the center of the bench seat between the driver and passenger and said that bag belonged to Williams. RPII 45, 63. Officer Brown picked up the bag, unzipped it, and found sealed in a plastic bag, coffee filters with methamphetamine residue, Oxycodone pills in a unlabeled container, and unspent ammunition. RPII 46, 47, 50.

Officer Brown then searched the rest of the vehicle and found on the driver's side of the bench seat a small pouch with a scale and one gram of methamphetamine. RPII 53, 54, 56, 63.

At some point, Rambo was also arrested. RPII 68. Rambo pled guilty before trial to possession of a controlled substance, methamphetamine. RPII 99, CP 43.

Williams was charged with unlawful possession of a controlled substance with intent to deliver, methamphetamine, and unlawful possession of a controlled substance, Oxycodone. CP 1-2.

Prior to trial, Williams moved to suppress the evidence obtained in the search of the interior of the truck. CP 3-35. That motion was denied. RP 7/30/08 34-35.

The jury convicted Williams of the lesser-included offense of unlawful possession of a controlled substance, methamphetamine, and a second count of unlawful possession of a controlled substance for the oxycodone. CP 68-70.

The parties agreed to Williams' prior history and offender score. RPV 4., CP 71-73. Williams was sentenced to 18 months. RPV 7-8.

This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE TRIAL COURT ERRED BY DENYING THE MOTION TO SUPPRESS EVIDENCE OBTAINED DURING THE WARRANTLESS SEARCH OF A BAG FROM INSIDE THE VEHICLE WHERE THE PERSON ARRESTED WAS ALREADY HANDCUFFED AND SECURE, IN THE PATROL CAR AT THE TIME OF THE SEARCH.

A warrantless search is per se unreasonable under article I, section 7 of the Washington Constitution and the Fourth Amendment. *State v. White*, 135 Wn.2d 761, 769, 958 P.2d 982 (1998); *Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996); *Arizona v. Gant*, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485, ___ U.S. ___ (2009). Exceptions to this requirement are narrowly drawn. *White*, 135 Wash.2d at 768-69, 958 P.2d 982; *Hendrickson*, 129 Wn.2d at 71, 917 P.2d 563. The State bears a

heavy burden in showing that the search falls within one of the exceptions. *See State v. Johnson*, 128 Wn.2d 431, 447, 909 P.2d 293 (1996).

One such exception is the search incident to arrest, which arises from interests in officer safety and evidence preservation. *See U.S. v. Robinson*, 414 U.S. 218, 230-34, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). The search incident to arrest is limited to “the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

The United States Supreme Court recently held that police may search the passenger compartment of a vehicle incident to arrest only if the arrested occupant is “unsecured and within reaching distance of the passenger compartment at the time of the search.” *Gant*, 129 S.Ct. at 1719. Furthermore, the warrantless search of the passenger compartment of a vehicle incident to arrest is constitutional ONLY “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’” *Gant*, at 1719 (*quoting Thornton v. United States*, 541 U.S. 615, 632, 124 S.Ct. 2127, 158 L.Ed.2d 905 (2004)). In *Gant*, the Court held the search unreasonable where the arrestee was handcuffed in the patrol vehicle at the time of search and the arrest was for driving on a

suspended license, making it unreasonable to suppose that evidence relating to that offense would be found. *Gant*, 129 S.Ct. at 1719.

In this case, Williams was arrested on a misdemeanor driving under the influence warrant. RP 7/30/08 17, RP2 44. At that point, the officer arrested Williams, handcuffed him, and placed him in the patrol vehicle. RP 7/30/08 18. Then, the officer returned to the vehicle, where the unarrested driver, Rambo, was standing alongside. RP 7/30/08 18. As she approached the vehicle, Rambo pointed to a bag inside the truck on the bench seat and said it belonged to Williams. RP 7/30/08 18. She asked Williams if it was his bag—he said it was not.¹ RPII 46. The officer reached inside the vehicle, took out the bag, unzipped it, and searched the contents. RP 7/30/08 18. Inside that bag, the officer found what was later identified as oxycodone pills, coffee filters with methamphetamine residue, and unspent ammunition. RP 7/30/08 18-19. The officer then searched the entire vehicle, finding on the driver’s side of the bench seat, a small pouch that contained a small amount of methamphetamine. RP2 53, 56.

Williams made a motion to suppress the evidence obtained from the warrantless search of the truck, arguing that the arrest was unlawful.

¹ Interestingly, this fact did not come out during the suppression hearing, but the judge refers to it during her ruling. RP 7/30/08 34.

CP 3-35. The court also considered whether the search of the zippered bag itself was permissible. RP 7/30/08 30-32. The defense argued at the hearing that the warrantless search of the bag and the vehicle was unconstitutional. RP 7/30/08 32. The court reasoned that because the driver was eventually arrested, the vehicle search was then retroactively permissible. RP 7/30/08 33. The court also ruled that Williams had no standing to contest the search of the bag because he denied ownership. RP 7/30/08 34-5. The court then ruled that the search of the bag was constitutional and the bag and its contents were admissible. RP 7/30/08 34.

The court's written findings contain two factual findings that are not supported by the record. First, the court found that Rambo "picked up a laptop bag and handed it to Officer Brown." CP 108. In fact, Officer Brown testified that Rambo told her the bag was Williams' and that she then reached in and "lifted it up" to examine it. RP 7/30/08 18. There is no testimony to support a finding that Rambo removed the bag from the car and handed it to Officer Brown.

The trial court also found that Officer Brown arrested Rambo prior to searching the vehicle and that the search was incident to Rambo's arrest, as well as incident to Williams' arrest. CP 108. The record for the suppression hearing contains no testimony as to the timing of Rambo's

arrest or even the ground for arrest. There is therefore not sufficient evidence to support the court's finding that he was arrested prior to the search, nor is there any evidence that the search was incident to his arrest. *See* RP 7/30/08.

The trial court erred when it found that Williams had no standing to contest the search of the bag. Under the Washington constitution, a defendant has automatic standing to contest the seizure of evidence that is later used against him. *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002).

To assert automatic standing, a defendant (1) must be charged with an offense that involves possession as an essential element; and (2) must be in possession of the subject matter at the time of the search or seizure.

Jones, 146 Wn.2d at 332 (citing *State v. Simpson*, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980)). Thus, under Washington law, Williams had standing to contest the search of both the bag and the vehicle, because these searches led to evidence that was later used against him at trial (oxycodone tablets from the bag and methamphetamine from the pouch) as evidence in two possessory offenses.

Under *Gant*, the warrantless search of the truck in this case violated the Fourth Amendment because Williams was handcuffed and secured in the police car at the time of the search and the officers could

not reasonably hope to obtain any evidence relating to the crime of his arrest—an outstanding warrant for driving under the influence.

“The federal constitution provides the minimum protection afforded citizens against unreasonable searches by the government.” *State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994), (citing *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984)). Consequently, because the 4th Amendment is violated by the search in this case, Art. 1, Sect. 7, is also violated. Therefore, because Williams had standing to contest this search under Art. 1, Sect. 7, and the search of both the bag and the pouch violated his constitutional rights under both the 4th Amendment and art. 1, sect. 7, the trial court erred by failing to suppress the fruits of the illegal searches.

ISSUE 2: THE CONVICTION FOR UNLAWFUL POSSESSION OF METHAMPHETAMINE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE WHERE THE ONLY EVIDENCE OF CONSTRUCTIVE POSSESSION WAS MERE PROXIMITY.

To convict a person of possession of a controlled substance, the prosecution must prove that the defendant had either actual or constructive possession of the controlled substance. *State v. Spruell*, 57 Wn. App. 383, 385, 788 P.2d 21 (1990). Constructive possession can be established by showing the defendant had dominion and control over the drugs. *Spruell*, at 385. In general, “[d]ominion and control means that the object may be reduced to actual possession immediately.” *State v. Jones*, 146 Wn.2d

328, 333, 45 P.3d 1062 (2002). However, proximity to a substance is not enough, standing alone, to prove dominion and control. *Spruel*, at 389.

In this case, the evidence on count one is one gram of methamphetamine was found in a pouch on the bench seat between the driver and passenger, closest to the driver. RPII 45, 63. Williams was only a passenger in this car. RPII 45. There is no evidence he owned this pouch or had any knowledge of its contents. In fact, Rambo identified only the other bag as belonging to Williams and Rambo himself pled guilty to possession of methamphetamine. RPII 45, 63. The ONLY evidence the prosecution had of possession of methamphetamine was Williams' proximity to the pouch. Consequently, this conviction was not supported by sufficient evidence and must be reversed. *See Spruell*, at 389.

ISSUE 3: DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE HEARSAY STATEMENT OF RAMBO THAT THE LAPTOP BAG BELONGED TO WILLIAMS.

Effective assistance of counsel is guaranteed by both U.S. Const. 4th Amendment, and Wash. Const. art. I, § 22 (amend. X). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove: (1) that the attorney's performance was deficient, i.e., that the representation fell

below an objective standard of reasonableness under the prevailing professional norms; and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." *Strickland*, 466 U.S. at 693. Where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the appellant must also show that the trial court would have sustained an objection to the evidence. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

In this case, defense counsel failed to object to Officer Brown's testimony that Rambo told her the laptop bag containing the Oxycodone belonged to Williams. RPII 45. Further, defense counsel elicited this same testimony during cross-examination of Officer Brown. RPII 63. Other than proximity, Rambo's hearsay statement was the only evidence that connected Williams to the oxycodone.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay evidence is inadmissible unless an exception applies. ER 802, 803. Rambo's statement was hearsay and was offered by the State to prove a material fact—that Williams owned the laptop bag that contained Oxycodone. There is no hearsay exception that applies to Rambo's self-serving hearsay statement. In fact, the circumstances of that statement serve to challenge its reliability, rather than bolster it (because Rambo volunteers this statement to the Officer as though he knows what is inside the bag and wants to disassociate himself from it).

Furthermore, use of this hearsay statement without the opportunity of cross-examination likely violates the confrontation clause, under *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The confrontation clause prohibits the admission of testimonial hearsay unless the defendant has an opportunity to cross-examine the declarant. *State v. Shafer*, 156 Wn.2d 381, 388, 128 P.3d 87, cert. denied, 549 U.S. 1019, 127 S.Ct. 553, 166 L.Ed.2d 409 (2006) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). A statement is testimonial if a reasonable person in the declarant's position would anticipate that his statement would be used against the accused in investigating or prosecuting a crime. *Shafer*, 156

Wn.2d at 389, 128 P.3d 87. Therefore, had defense counsel objected, the trial court would likely have sustained the objection and suppressed the hearsay statement.

Failing to object to hearsay testimony can be ineffective assistance of counsel if there is no legitimate trial strategy for the omission and if there is a reasonable probability that the error affected the outcome of the trial. *See State v. Hendrickson*, 128 Wn. App. 827, 833, 158 P.3d 1257 (2007).

In this case, there is no legitimate strategic reason for defense counsel to fail object to this hearsay. Rambo's hearsay statement was all that the prosecution had to support its claim that Williams had possession of the oxycodone. The prosecution argued only proximity and Rambo's statement as evidence in closing. RPIII 175-76. And there is more than a reasonable probability that without this hearsay being erroneously admitted, the outcome of the trial would have been different. Williams was merely a passenger in this vehicle and his mere proximity to the drugs he was charged with possessing, was insufficient, alone, to support his convictions. Further, even though Rambo's statement related only to the laptop bag, it likely influenced the jury's verdict on the possession of methamphetamine charge as well. Therefore, counsel's omission requires that Williams' conviction for possession of oxycodone be reversed.

ISSUE 4: THE CONVICTION FOR UNLAWFUL POSSESSION OF OXYCODONE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE WHERE THE ONLY EVIDENCE OF POSSESSION WAS PROXIMITY AND THE CO-DEFENDANT’S SELF-SERVING STATEMENT.

As stated above, proximity alone is not sufficient to establish possession. Relating to the charge of possession of oxycodone, the only evidence was that it was contained in the laptop bag found on the seat between the driver and passenger and Rambo’s hearsay statement that the bag belonged to Williams. Because Rambo’s statement was improperly admitted hearsay, it should not have been considered. That leaves only Williams’ proximity to the bag as evidence of his possession—that it is insufficient. *See Spruell*, at 389. Furthermore, Rambo’s self-serving statement is hardly compelling evidence and is not sufficient to raise up the proximity evidence above the threshold where a reasonable jury would find beyond a reasonable doubt that Williams was in possession of the oxycodone. Therefore, there was insufficient evidence to support count two and it should also be reversed.

ISSUE 5: DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE JURY INSTRUCTIONS THAT WOULD HAVE INFORMED THE JURY THAT LEGALLY, “MERE PROXIMITY” DOES NOT ESTABLISH CONSTRUCTIVE POSSESSION, AND OF THE LEGAL CONCEPT OF “UNWITTING POSSESSION.”

An attorney's failure to propose an appropriate jury instruction can constitute ineffective assistance. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). But to establish ineffectiveness on this

basis, the defendant must show that he or she was entitled to the instruction. *State v. Johnston*, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007). A defendant is entitled to have the jury instructed on his theory of the case if there is evidence to support the theory. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997); *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986).

Although a specific instruction is not always necessary, it is reversible error to fail to give a more specific instruction where a general one does not provide the defendant “a satisfactory opportunity to argue his theory to the jury. *State v. Hackett*, 64 Wn. App. 780, 787, 827 P.2d 1013 (1992).

In this case, defense counsel was ineffective for failing to propose a jury instruction stating that mere proximity to drugs is insufficient to establish constructive possession, as well as an instruction stating that unwitting possession could be a defense. These instructions were necessary to support Williams’ defense that his mere proximity to the drugs in the truck did not give him dominion and control over him and that, at most, he may have unwittingly possessed them.

The trial court instructed the jury:

Possession means having a substance in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual

physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.

CP 58. Dominion and control is not defined. The defense attorney did not propose any instructions of her own, but rather agreed to all the State's proposed instructions. RPII 133.

In closing argument, the defense attorney argued that the jury should use "common sense" to conclude that one does not necessarily possess something found near them. RPIII 158. She goes on to tell the jury that "One of the things I want you to seriously consider is that mere proximity is not enough for the possession of drugs . . ." because "that doesn't make sense." RPIII 160. The jury has only jury instructions that do not tell them that the law says that mere proximity does not prove dominion and control. And the defense cannot make its argument to the jury without the jury knowing that this is the law. It is not a legitimate trial tactic to fail to propose this instruction and then try to make this legal argument couched in terms of "common sense." That is ineffective assistance of counsel.

Counsel's failure likely did affect the result of this trial because both convictions were largely based on proximity. The methamphetamine conviction is solely based on proximity (see above), and the oxycodone

conviction is proximity bolstered only by Rambo's self-serving hearsay statement. In the totality of the circumstances here, it cannot be said that counsel's error did not affect the verdict.

ISSUE 6: THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT WHEN SHE ARGUED TO THE JURY THAT PROXIMITY ALONE WAS SUFFICIENT UNDER THE LAW TO PROVE DOMINION AND CONTROL.

The court will review prosecutorial misconduct to determine whether improper conduct prejudiced the defendant. *State v. Thomas*, 142 Wn.App. 589, 593, 174 P.3d 1264, *review denied*, 164 Wn.2d 1026, 195 P.3d 958 (2008). Prejudice occurs where there is "a substantial likelihood that the misconduct affected the jury's verdict." *Thomas*, 142 Wn.App. at 593, 174 P.3d 1264. Possible prejudice is measured by weighing the strength of the State's case and the court will reverse if there is a substantial likelihood that the misconduct affected the jury's verdict. *State v. Avendano-Lopez*, 79 Wn.App. 706, 712, 904 P.2d 324 (1995).

Where a defendant fails to object below, he waives the issue unless the misconduct was "so flagrant or ill-intentioned" that it caused prejudice that could not be cured by the trial court's admonishment. *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997). Because in this case, defense counsel did not object to the State's closing argument, the appellant must now show that the State's statements constituted misconduct, caused

prejudice, and that an admonishment from the trial court could not have cured any prejudice. *Stenson*, 132 Wn.2d at 719, 940 P.2d 1239.

In this case, the prosecutor committed prosecutorial misconduct by repeatedly telling the jury that Williams' proximity to the drugs he was charged with possessing was sufficient, alone, to show he exercised dominion and control. This argument is contrary to the law. As is argued in detail above, proximity to a substance is not enough, standing alone, to prove dominion and control. *Spruel*, at 389.

In closing, the prosecutor told the jury that this case was "all about location . . . It's about the defendant's location within the truck and it's about the location of the duffle bag² and it's about the location of the black pouch." RPIII 141. That is a proximity argument. The prosecutor goes on to argue:

And what is the significance though of that location? I would like to turn your attention to Jury Instruction No. 11. Jury Instruction No. 11 gives you the definition of possession and what the evidence you have before you is that the defendant constructively possessed the items in that vehicle. He was in a bench truck and right next to him grazing his arm likely, is the duffle bag. . . .

In order for you to find the defendant possessed these items or constructively possessed these items, they would need to be within his dominion and control. That's a lot of legalize

² The prosecutor refers to the bag in which the oxycodone was found as a "duffle bag" during closing. The same bag is also referred to as a "laptop bag" throughout the trial.

[sic] for saying he can reach down; he has access to it. It's right there. He possesses it simply because—not just because it's near him but it's near him, he has access to it.

RPIII 143-44.

The prosecutor may say this is about “access,” but what she is arguing, again, is proximity. And she returns to this theme again and again:

[Prosecutor]: And now, the question is did the defendant possess it and as I explained before, the defendant had ready access to it. The defendant was right by it. The testimony of Officer Brown was if she would have been sitting in the truck her arm would have been grazing the duffle bag. The evidence that we have is that, yes, the defendant constructively possessed methamphetamine.

RPIII 150. And then again, in rebuttal, the prosecutor tells the jury:

The defendant possessed the duffle bag. He constructively possessed the duffle bag. He is in the vehicle for all practical purposes and we don't have any evidence that he was seen physically touching the bag or it was physically in [sic] him but the testimony we have from Officer Brown is that if she would have sat in the vehicle, the duffle bag would be grazing her arm . . . He has it readily available to him to unsnap, unzip and access the items inside. . . .”

RPIII 173-74.

If the court views the prosecutor's statements “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury,” *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118

S.Ct. 1192, 140 L.Ed.2d 322 (1998), it is clear that her entire argument is based on a legal lie—that mere proximity is sufficient to prove dominion and control. In short, the prosecutor’s argument was flagrant and ill-intentioned. She exploited the ineffectiveness of defense counsel in failing to propose a mere proximity instruction by essentially lying to the jury about the true state of the law. And, because this argument was repeated throughout the closing argument, it could not have been corrected with a limiting instruction. The damage of this misconduct is clear in the verdicts, which are based on evidence only of mere proximity. Therefore, prosecutorial misconduct also requires reversal in this case.

ISSUE 7: THE CUMULATIVE EFFECT OF THE ERRORS MADE DURING TRIAL, INCLUDING THE ERRONEOUSLY ADMITTED EVIDENCE, INEFFECTIVE ASSISTANCE OF COUNSEL, AND PROSECUTORIAL MISCONDUCT, DEPRIVED WILLIAMS OF DUE PROCESS AND THEREFORE HIS CONVICTIONS SHOULD BE REVERSED.

The combined effects of error may require a new trial even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).

In this case, all of the errors combined to enhance the unfair prejudice to the appellant, and his convictions should be reversed even if the court should find that the errors do not individually require reversal. In particular, the combination of counsel's ineffectiveness in failing to object to the hearsay statement of Rambo, and of failing to propose a mere proximity instruction, combined with the prosecutorial misconduct of arguing mere proximity is sufficient, all together made this trial inherently unfair to the defendant. Consequently, this court should reverse Williams' convictions.

V. CONCLUSION

Williams' convictions in this case must be reversed for many reasons. First, the search of the vehicle, which was conducted after Williams had been arrested and placed in the patrol car, violated the 4th Amendment and art. 1, sect. 7, which means that the trial court erred by denying the motion to suppress. Secondly, the defense counsel was ineffective for failing to object to Rambo's hearsay statement that the bag containing the oxycodone belonged to Williams and for failing to request an instruction for the jury telling them that mere proximity to a drug does not prove constructive possession. Thirdly, the prosecution committed prosecutorial misconduct when she argued to the jury that proximity alone

proved constructive possession. Fourth, the convictions were not supported by substantial evidence because evidence of mere proximity is insufficient to prove dominion and control. And, finally, the cumulative effect of the errors in this trial compromised due process, requiring the reversal of the convictions. For all of these reasons, the convictions in this case must be reversed.

DATED: July 28, 2009

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CERTIFICATE OF SERVICE

I certify that on July 28, 2009, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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