

No. 47844-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

James Henderson,

Appellant.

Pierce County Superior Court Cause No. 14-1-02906-5

The Honorable Judge G. Helen Whitener

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Prosecutorial misconduct deprived Mr. Henderson of his Fourteenth Amendment right to a fair trial.
2. The prosecutor committed flagrant and ill-intentioned misconduct by misstating the law of constructive possession in closing argument.

ISSUE 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 Mr. Henderson guilty of possession merely because he had dominion and control over the premises where drugs were found?

3. The trial court erred by giving Instruction No. 3.
4. The trial court's reasonable doubt instruction violated Mr. Henderson's right to due process under the Fourteenth Amendment and Wash. Const. art. I, § 3.
5. The trial court's reasonable doubt instruction violated Mr. Henderson's right to a jury trial under the Sixth and Fourteenth Amendments and Wash. Const. art. I, §§ 21 and 22.
6. The trial court's reasonable doubt instruction unconstitutionally shifted the burden of proof and undermined the presumption of innocence.
7. The trial court's instruction improperly focused jurors on "the truth of the charge" rather than the reasonableness of their doubts.

ISSUE 2: A criminal trial is not a search for the truth. By equating proof beyond a reasonable doubt with "an abiding belief in the truth of the charge," did the trial court undermine the presumption of innocence, impermissibly shift the burden of proof, and violate Mr. Henderson's constitutional right to a jury trial?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

James Henderson was arrested away from his home. Police had search and arrest warrants, and they brought Mr. Henderson home and conducted the search. RP 95-97, 102. Mr. Henderson shared the home with his grown daughter. RP 120.

Police found a small amount of crack cocaine in the kitchen, and charged Mr. Henderson.¹ RP 103-105. The issue at trial was whether the state proved that Mr. Henderson had dominion and control over the drugs in the kitchen. The prosecutor said this to the jury during closing arguments:

Did the defendant possess the controlled substances found in his residence? I submit to you that element has been satisfied as well, that not only was this the defendant's residence -- there's no dispute over that -- you have a jury instruction, a separate jury instruction, that notes what possession is, that under Jury Instruction No. 11, it tells you that dominion and control establishes possession.

Now, no single one of these factors necessarily controls your decision, but you, as members of the jury, are not asked to leave your common sense at the courtroom door. You bring that with you.

Does it make sense that if someone owns a residence that they have dominion and control over that residence? That answer is yes. I submit to you that Element No. 1 has been established. RP 276-277.

¹The state originally charged Mr. Henderson with possession of a controlled substance for a pill that was in his pocket when he was arrested. Since the pill was not tested by the time of trial, that charge was dismissed. CP 9; RP 86.

The court instructed the jury as to reasonable doubt, including that proof beyond a reasonable doubt is satisfied “[i]f, from such consideration, you have an abiding belief in the truth of the charge”. CP 21. The court also gave the standard instruction defining possession and dominion and control. CP 30.

The state had originally charged Mr. Henderson with possession of the crack cocaine with intent to deliver, adding on a school zone enhancement allegation. But the jury didn’t convict Mr. Johnson as charged; instead he was found guilty only of possession of cocaine. CP 14-16.

After sentencing, Mr. Henderson timely appealed. CP 58.

ARGUMENT

I. PROSECUTORIAL MISCONDUCT DEPRIVED MR. HENDERSON OF A FAIR TRIAL.

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-704, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor’s misconduct warrants reversal, the court looks 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 proof of constructive possession. RP 276-277.

Dominion and control over premises containing contraband is insufficient, by itself, to prove constructive possession. *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014)²; *See also State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). Rather, control over the premises is only one factor in determining whether a person has constructively possessed items found therein. *Tadeo-Mares*, 86 Wn. App. at 816.

² *Davis* was a plurality opinion. The majority’s decision regarding the constructive possession issue was announced in Justice Stephens’s dissent, which is cited here.

Here, the prosecutor improperly argued that dominion and control over premises establishes possession:³

[Y]ou, as members of the jury, are not asked to leave your common sense at the courtroom door. You bring that with you. Does it make sense that if someone owns a residence that they have dominion and control over that residence? That answer is yes. I submit to you that Element No. 1 [possession] has been established.
RP 276-277.

But a jury finding that the residence was under Mr. Henderson's control was not sufficient to prove constructive possession of the drugs. The prosecutor committed misconduct by misstating the law on a critical issue in Mr. Henderson's case.

Here, the prosecutor misstated the law by telling the jury that evidence that Mr. Hernandez had control over the residence was enough to find him guilty of possession. The prosecutor committed misconduct by mischaracterizing the law for the jury. *Id.*; *Tadeo-Mares*, 86 Wn. App. at 816.

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.

³ While the prosecutor did say that ownership of a residence proves dominion and control, the state had presented no proof that Mr. Henderson actually owned the location at issue.

Here, Mr. Henderson was prejudiced by the prosecutor's improper arguments. *Id.* Mr. Henderson was not in actual control of the drugs, and he shared the residence with another person. RP 120. The prosecutor chose to deal with the state's evidentiary shortcomings by telling the jury that evidence of dominion and control over the premises was sufficient to prove constructive possession. 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 Mr. Henderson's case. *Glasmann*, 175 Wn.2d at 704.

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.

Here, the prosecutor had access to long-standing caselaw prohibiting him from mischaracterizing the law in closing argument. *See e.g. Evans*, 163 Wn. App. at 643. Likewise, the rule that control over premises is insufficient, standing alone, to prove constructive possession

was well-established. *See e.g. Davis*, 182 Wn.2d at 234; *Tadeo-Mares*, 86 Wn. App. at 816. The prosecutor’s improper argument was flagrant and ill-intentioned. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed flagrant, ill-intentioned, prejudicial misconduct by mischaracterizing the law during closing argument. *Evans*, 163 Wn. App. at 643. Mr. Henderson’s conviction must be reversed. *Id.*

II. THE COURT’S “REASONABLE DOUBT” INSTRUCTION INFRINGED MR. HENDERSON’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE IT IMPROPERLY FOCUSED THE JURY ON A SEARCH FOR “THE TRUTH.”

A jury’s role is not to search for the truth. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). Here, over objection, the trial court instructed the jury that proof beyond a reasonable doubt means having “an abiding belief in the truth of the charge.” CP 21; RP 204.⁴

Rather than determining the truth, a jury’s task “is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” *Emery*, 174 Wn.2d at 760. In this case, the court undermined its otherwise clear reasonable doubt instruction by directing jurors to consider “the truth of the charge.” CP 21.

⁴ Although defense counsel objected to the “abiding belief” sentence, he did not specifically note an objection to the “truth” language. RP 204.

A jury instruction misstating the reasonable doubt standard “is subject to automatic reversal without any showing of prejudice.” *Id.* at 757 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 281–82, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993)). Here, by equating proof beyond a reasonable doubt with a “belief in the truth of the charge,” the court confused the critical role of the jury. CP 21.

The court’s instruction impermissibly encouraged the jury to undertake a search for the truth, inviting the error identified in *Emery*. The problem here is greater than that presented in *Emery*. In that case, the error stemmed from a prosecutor’s misconduct. Here, the prohibited language reached the jury in the form of an instruction from the court. CP 21. Jurors were obligated to follow the instruction.

The presumption of innocence can be “diluted and even washed away” by confusing jury instructions. *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). Courts must vigilantly protect the presumption of innocence by ensuring that the appropriate standard is clearly articulated.⁵ *Id.*

Improper instruction on the reasonable doubt standard is structural error. *Sullivan*, 508 U.S. at 281-82. By equating that standard with “belief

⁵ Although the *Bennett* court approved WPIC 4.01, the court was not faced with a challenge to the “truth” language in that instruction. *Id.*

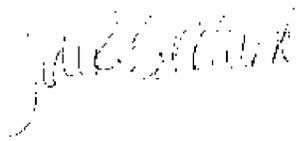
in the truth of the charge” the court misstated the prosecution’s burden of proof, confused the jury’s role, and denied Mr. Henderson his constitutional right to a jury trial. Mr. Henderson’s conviction must be reversed. The case must be remanded for a new trial with proper instructions. *Id.*

CONCLUSION

Prosecutorial misconduct and a problem with the court’s reasonable doubt instruction require reversal of Mr. Henderson’s conviction. The case must be remanded to the trial court for a new trial.

Respectfully submitted on January 22, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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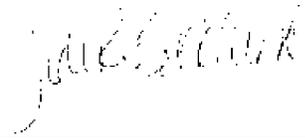
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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

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

Signed at Olympia, Washington on January 22, 2016.



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