

NO. 47844-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAMES HENDERSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable G. Helen Whitener

No. 14-1-02906-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was the prosecutor's closing argument not improper where he merely argued that the evidence admitted at trial established constructive possession beyond a reasonable doubt?

2. Was the jury properly instructed regarding the burden of proof where the court used the approved language from WPIC 4.01?

B. STATEMENT OF THE CASE.

1. Procedure

On July 24, 2014, the defendant was originally charged via information with one count of unlawful possession of a controlled substance with intent to deliver. CP 61. On April 10, 2015, an amended information was filed, charging the defendant with one count of unlawful possession of a controlled substance with intent to deliver, and one count of unlawful delivery of a controlled substance. CP 1-2.

On April 14, 2015, a jury trial commenced before the Hon. G. Helen Whitener, Judge of the Pierce County Superior Court. I RP 4. The charge of unlawful delivery of a controlled substance was dismissed without prejudice on April 20, 2015. CP 12-13. Closing arguments took place on April 22, 2015, regarding the remaining count of unlawful possession of a controlled substance with intent to deliver. IV RP 274 et

seq. A verdict was returned the same day. IV RP 325. The defendant was found guilty of the lesser included crime of unlawful possession of a controlled substance. IV RP 325; CP 38.

2. Facts

The defendant was the subject of a controlled substance investigation by the Lakewood Police Department. II RP 94-95. Law enforcement arrested the defendant and executed a search warrant on his residence. II RP 95, 102. The defendant shared his residence with his adult daughter. II RP 120. After being arrested, the defendant told officers that there was crack cocaine on a plate above the stove in his kitchen. II RP 102-03. Law enforcement searched the home and found the crack cocaine where the defendant said it would be. II RP 103. Law enforcement also found two digital scales in the home and \$110 in cash on the defendant's person. II RP 109.

C. ARGUMENT.

1. THE PROSECUTOR'S CLOSING ARGUMENT WAS NOT IMPROPER BECAUSE HE MERELY ARGUED THAT THE EVIDENCE ADMITTED AT TRIAL ESTABLISHED CONSTRUCTIVE POSSESSION BEYOND A REASONABLE DOUBT.

The prosecutor's closing argument was not improper because he merely argued that the evidence admitted at trial established the elements of constructive possession beyond a reasonable doubt.

To establish prosecutorial misconduct, the defendant must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where ““there is a substantial likelihood the instances of misconduct affected the jury's verdict.”” *Dhaliwal*, 150 Wn.2d at 578, 79 P.3d 432 (quoting *State v. Pirtle*, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 116 S. Ct. 2568, 135 L. Ed. 2d 1084 (1996)).

A prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. *State v. Hoffman*, 116 Wn.2d 51, 94–95, 804 P.2d 577 (1991). Circumstantial evidence is sufficient to support a verdict of guilty so long as the jury is convinced of a defendant's guilt beyond a reasonable doubt. *State v. Thompson*, 153 Wn. App. 325, 334, 223 P.3d 1165 (2009) (citing *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999)). *See also* WPIC 5.01 (“The law does not distinguish between direct and circumstantial evidence”); CP 53.

A defendant who fails to object to an allegedly improper argument waives the right to assert prosecutorial misconduct unless the argument was so “flagrant and ill intentioned” that it caused enduring and resulting prejudice that a curative instruction could not have remedied. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005) (citing *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), *cert. denied*, 514 U.S.

1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995)). In determining whether the misconduct warrants reversal, the appellate court considers its prejudicial nature and its cumulative effect. *Boehning*, 127 Wn. App. at 518 (citing *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994)).

At trial, the defendant did not object to the prosecutor's allegedly improper argument and did not request a curative instruction. IV RP 275. On appeal, the defendant takes a few sentences of the prosecutor's argument out of context.

It is important to view the allegedly improper comment in its proper context. The prosecutor began his closing argument by asserting that not all of the elements of the crime were at issue, *e.g.*, that the events took place in the State of Washington. II RP 275-76. He asserted that the only real issue was whether the defendant intended to also deliver or sell the drugs he possessed. II RP 276. It was in this context, beginning his argument with a discussion of the elements of the crime, that the prosecutor said:

Before the search began at the defendant's residence, the defendant was taken into custody and the defendant made some statements. He said, "You're going to find crack cocaine. You're going to find marijuana in my residence." He gave specific locations for both. He said, "You'll find the crack cocaine on a plate above my stove in my kitchen." He said, "You'll find marijuana in my bedroom closet." Only the crack cocaine was found.

...

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.

IV RP 274-76.

The jury instruction referred to by the prosecutor, instruction number 11, defined the term “possession” as follows:

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.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the

defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP 27. This is the verbatim language of WPIC 50.03 and a proper statement of the law.

“[C]onstructive possession can be established by showing the defendant had dominion and control over the [contraband] or over the premises where the [contraband] was found.” *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). No single factor is dispositive in determining dominion and control; the totality of the circumstances must be considered. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). The ability to reduce an object to actual possession is an aspect of dominion and control. *Echeverria*, 85 Wn. App. at 783. Dominion and control does not have to be exclusive to establish constructive possession, *State v. Porter*, 58 Wn. App. 57, 63 n. 3, 791 P.2d 905 (1990), but close proximity alone is not enough to establish constructive possession, *State v. Spruell*, 57 Wn. App. 383, 388–89, 788 P.2d 21 (1990). “Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found.” *State v. Chouinard*, 169 Wn. App. 895, 899–900, 282 P.3d 117 (2012).

Of note from the court’s instruction regarding possession are the phrases, “Dominion and control need not be exclusive to support a finding

of constructive possession,” and, “No single one of these factors necessarily controls your decision.” Indeed, the prosecutor reminded the jury, “no single one of these factors necessarily controls your decision” when considering constructive possession. II RP 276.

Here, the fact that the defendant’s adult daughter also lived at the residence was not dispositive of the question of constructive possession because “Dominion and control need not be exclusive.” The prosecutor began his argument by reminding the jury that the defendant knew exactly where the crack cocaine was, which supported a finding of constructive possession. II RP 274. He then argued that, based on the defendant’s knowledge of the specific location of the drugs, the fact that the defendant resided at the home, and the proper definition of possession put forth in jury instruction 11, “Element No. 1 [possession] has been established.” II RP 276-77.

Therefore, based on the above, the prosecutor’s argument was not improper.

2. THE JURY PROPERLY WAS INSTRUCTED REGARDING THE BURDEN OF PROOF WHEN THE COURT USED THE STANDARD LANGUAGE FROM WPIC 4.01.

The jury was properly instructed regarding the presumption of innocence and the burden of proof when the court used the standard language from WPIC 4.01.

The defendant complains about the last sentence of the WPIC 4.01 instruction: “If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.” CP 18. The defendant argues that the instruction asks the jury to focus on an improper search for the truth rather than determining its verdict on the evidence presented in court and the burden of proof. However, this very argument was rejected in *State v. Federov*, 181 Wn. App. 187, 324 P.3d 784 (2014):

[The defendant] argues, “The ‘belief in the truth’ language encourages the jury to undertake an impermissible search for the truth.”

We disagree. *State v. Bennett*, and *State v. Pirtle* control. [The defendant] relies on *State v. Emery* to challenge the “abiding belief” language. He claims this language is similar to the impermissible “speak the truth” remarks made by the State during closing. *Emery* found the “speak the truth” argument improper because it misstated the jury's role. Here, read in context, the “belief in the truth” phrase accurately informs the jury its “job is to determine whether the State has proved the charged offenses beyond a reasonable doubt.” The reasonable doubt instruction accurately stated the law.

Federov, 181 Wn. App. at 199 (internal citations omitted) (citing *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012), *State v. Bennett*, 161 Wn.2d 303, 165 P.3d 1241 (2007), and *State v. Pirtle*, 127 Wn.2d 628, 904 P.2d 245 (1995)).

Therefore, the jury was properly instructed regarding the presumption of innocence and the burden of proof.

D. CONCLUSION.

The prosecutor's closing argument not improper because he merely argued that the evidence admitted at trial established constructive possession beyond a reasonable doubt. The jury properly was instructed regarding the burden of proof when the court used the standard language from WPIC 4.01. Accordingly, the defendant's conviction should be affirmed.

DATED: April 20, 2016.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-21-16 Sherris Kar
Date Signature

PIERCE COUNTY PROSECUTOR

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