

NO. 48215-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

TWINN CALDWELL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable KITTY-ANN van DOORNINCK, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

1. The state failed to prove beyond a reasonable doubt that Caldwell possessed the two guns he never fired.

2. The state failed to prove beyond a reasonable doubt that Caldwell's temporary possession of the two guns he fired was not out of necessity.

3. The state failed to prove beyond a reasonable doubt possession of methamphetamine.

4. The state failed to prove beyond a reasonable doubt reckless endangerment.

5. Counsel was ineffective for failing to request an unwitting possession instruction.

6. The prosecutor committed reversible misconduct in closing argument by arguing that the defendant failed to offer testimony to exonerate himself, which impermissibly shifted the burden of proof by arguing that the defendant did not testify to who owned the gun, and commented on Caldwell's right to silence.

7. The prosecutor committed reversible misconduct in rebuttal closing by vouching for the credibility of the state.

8. The prosecutor in closing argument argued facts not in evidence.

Issue Presented on Appeal

1. Did the state fail to prove beyond a reasonable doubt that Caldwell possessed the two guns he knew were in the garage and outside, but never fired?

2. Did the state fail to prove beyond a reasonable doubt that Caldwell's temporary possession of two guns which he fired to protect himself and his son amounted to possession rather than necessity?

3. Did the state fail to prove beyond a reasonable doubt possession of methamphetamine that was found upstairs in one of two bedrooms that was never identified as Caldwell's bedroom?

4. Did the state fail to prove beyond a reasonable doubt reckless endangerment where the evidence established that Caldwell's two year old son was with him when he shot into the attic fearing strangers were going to attack himself and his son?

5. Was Counsel ineffective for failing to request an unwitting possession instruction where the evidence suggested that Caldwell was unaware of the methamphetamine in one of the upstairs bedrooms?

6. Was Counsel ineffective for failing to request an unwitting possession instruction where the evidence suggested that Caldwell discovered the guns while cleaning the house but never actually possessed them?

7. Did the prosecutor commit reversible misconduct in closing argument by arguing that the defendant failed to offer testimony to exonerate himself, which impermissibly shifted the burden of proof?

8. Did the prosecutor commit reversible misconduct in rebuttal closing by vouching for the credibility of the state by arguing that there were many more police witnesses that the state could have called in support of the state's case?

9. Did the prosecutor in closing impermissibly comment on Caldwell's Fifth Amendment right to silence when he argued that Caldwell failed to identify the owner of the guns?

10. Did the prosecutor in closing impermissibly argue facts not in evidence when he argued that there were receipts from a gun shop?

B. STATEMENT OF THE CASE

a. Substantive Facts

Twinn Caldwell and his two year old son moved into a friend's mother's home for a week after she died. The friend was called "big brother".

RP 182-84. Caldwell planned to stay only for a short time to help his friend clean before leaving for Texas. Id. The friend's residence is a duplex, Unit "A" that is attached to three other duplexes that all share a common attic space. RP 188, 219.

During the days prior to the incident, Caldwell heard people in the attic crawl space talking about harming his son. RP 188-91. On the day of the shootings someone emerged from the crawl space and fought with Caldwell. Id. The landlady too had been advised that someone had accessed the crawl space in one of the adjacent units, "C". RP 219. Caldwell had previously attempted to set up noise makes in the attic with cans on strings so that he would be alerted if someone tried to access the attic again. RP 188.

The day before the incident while helping his friend clean up, Caldwell discovered two rifles in the garage wedged between two mattresses and a pistol was in the house. RP 185-86. Caldwell did not own these guns and did not handle them until he again heard noises in the attic, feared for himself and his son, and ran into the garage, retrieved a rifle and shot into the attic. RP 191, 200-04. Caldwell found the Springfield pistol outside and fired it inside. RP 200-01.

Caldwell and his son sometimes slept upstairs and sometimes downstairs. RP 183-84. At some point Caldwell moved the mattress downstairs but did not indicate that he and his son actually slept on the only mattress in the house. Id. There were bullets all over the house, a pistol in a red knapsack that contained adult and children's clothes, methamphetamine on a dresser in one of the bedrooms that also had baby toys. RP 77, 118, 163, 185-86. The big brother had a roommate that also lived in the duplex and had his own children. RP 193-95. Caldwell was not on the lease. RP 182-83.

b. Defense Closing/IAC

“So what do we know happened? The police come and a lot of lease [sic] police came. Most of the police officers didn't even testify in this case, that were there. How do we know that? Well we know because we have only had a couple. And we know that other officers have been mentioned, They found a lot of evidence, they just didn't testify.

CP 257-58.

c. Prosecutor's Closing

There's a gun receipt. The gun receipts is Welcher's Gun Shop, right on the floor, right next to the ammunition

RP 248.

d. Prosecutor's Rebuttal Closing.

[Defense] tells you that the guns belong to other people who lived at the residence. He told you that. The guns didn't belong to my client. They belong to the other people. And there was no proof that he could exclude those other people from the guns. He said that Did anyone testify""? Think about that: When the defendant testified, did he say who the guns belong too? No, he did not. And the officers don't know. Ms. Edwards doesn't know. Steve Mell, the forensics specialist, doesn't know. But we do know one thing: Who knew where the guns were? Mr. Caldwell. Who knew how to operate the guns? Mr. Caldwell. Who shot the guns? Mr. Caldwell.

What he says is not evidence and I would ask you not to consider that...

RP 267-68. This timely appeal follows. CP 165.

C. ARGUMENT

1. THE STATE FAILED TO PROVE UNLAWFUL POSSESSION OF TWO OF THE GUNS.

Knowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession. *State v. Hystad*, 36 Wn.App. 42, 49, 671 P.2d 793 (1983). Here, the state merely proved knowledge of the presence of the guns. Accordingly, the state failed to prove unlawful possession of the guns.

When determining questions of insufficient evidence to establish a

crime, the appellate Court reviews the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Asaeli*, 150 Wn. App. 543, 567, 208 P.3d 1136 (2009). This rule follows from the *Winship* doctrine which requires the government prove every element of a crime beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct.1068, 25 L.Ed.2d 368 (1977).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “In determining the sufficiency of the evidence, circumstantial evidence is as reliable as direct evidence.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The appellate Court defers to the trier of fact on any issue that involves “conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

a. Possession of a Firearm.

A person is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his possession, or has in his control

any firearm after having previously been convicted of any serious offense as defined in this chapter. RCW 9.41.040. The issue in this case is the possession. RCW 9.41.040. Caldwell stipulated to having a prior serious felony. CP 84-85.

Possession may be actual or constructive. *State v. Raleigh*, 157 Wn.App. 728, 737, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029, 249 P.3d 624 (2011). A person actually possesses something that is in his or her physical custody, and constructively possesses something that is not in his or her physical custody, but is still within his or her “dominion and control.” *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); *State v. Murphy*, 98 Wn.App. 42, 46, 988 P.2d 1018 (1999), *review denied*, 140 Wn.2d 1018, 5 P.3d 10 (2000).

b. Constructive Possession

For either actual or constructive possession, the prosecution must prove more than a passing control. *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994). Mere proximity to the firearm is insufficient to show dominion and control. *Raleigh*, 157 Wn.App. at 737. “[T]he ability to reduce an object to actual possession” is an aspect of dominion and control, but “other aspects such as physical proximity” should be considered as well.

State v. Hagen, 55 Wn.App. 494, 499, 781 P.2d 892 (1989).

Recently, the state Supreme Court in *State v. Davis*, 182 Wn.2d 222, 340 P.3d 820 (2014), reversed the conviction for unlawful possession of a firearm where the defendant handled a gun and put in a bag for the shooter. *Davis*, 182 Wn.2d at 227-28. Fifteen minutes later, just before leaving, the shooter Clemmons asked Davis, “Where’s the gun?” “Id. Davis responded that the gun was in a bag and handed the bag to the shooter. Id. The Court reasoned that Davis did not exercise dominion and control over the firearm, because there was nothing to suggest the shooter ever intended to transfer possession or control of the gun. *Davis*, 182 Wn.2d at 237. Davis’s actions amounted to “mere proximity to and momentary handling” of the contraband. *Davis*, 182 Wn.2d at 235.

Just as mere proximity and momentary handling are insufficient to establish dominion and control in a residence, the same applies to a passenger in an automobile. *State v. Chouinard*, 169 Wn.App. 895, 900, 282 P.3d 117 (2012); *State v. George*, 146 Wn.App. 906, 923, 193 P.3d 693 (2008). In *George*, Division One reversed a trial court where the state did not prove George’s constructive possession of the contraband based on his being a backseat passenger. *George*, 146 Wn.App. at 912-13. The police found a

glass pipe with burnt marijuana inside, as well as empty beer cans and bottles on the floorboard behind the driver's seat where George had been sitting. *George*, 146 Wn.App. at 912-13. The Court of Appeals reversed all counts for insufficient evidence, holding that George's mere proximity to the pipe and drugs, and knowledge of its presence, was insufficient to convict George of constructive possession. *George*, 146 Wn.App. at 923.

Similarly, in *Chouinard*, the state presented insufficient evidence to establish dominion and control where Chouinard was a passenger in the vehicle where the firearm was found. *Chouinard*, 169 Wn.App. at 902. This Court held that the fact that Chouinard rode as a backseat passenger where the firearm was located near his seat, did not establish ownership or use of the firearm, or dominion and control. *Chouinard*, 169 Wn.App. at 902-03. The State demonstrated Chouinard's mere proximity to the gun and knowledge of its presence in the vehicle, but that evidence alone, did not prove constructive possession of a firearm. *Id.*

Davis establishes that temporary possession does not establish possession adequate to sustain a conviction for unlawful possession of a firearm. *George* and *Chouinard* establish that mere proximity, and knowledge does not establish possession adequate to sustain a conviction for

unlawful possession of contraband.

Here, Caldwell was a guest at the residence which is analogous to being a passenger in a vehicle. The state established that Caldwell and others lived in the residence, there were guns in the garage and a pistol in the house, in one of back packs upstairs that also contained a letter with Caldwell's name on it, and there were different bullets strewn about the house. RP 77, 118, 163, 183-86, 193-95. Caldwell did not have dominion and control over any part of the residence, he could not exclude any one from the residence, two other people lived in the residence and one had children. *Id.* The fact that Caldwell knew the guns were present from his cleaning the day before did not establish constructive possession of at least the two firearms he never touched. RP 182-85. *Davis*, 182 Wn.2d at 227-28; *George*, 146 Wn.App. at 923.

Caldwell heard noises in the crawl space and had seen someone in the crawl space and previously heard people talking about harming his 2 year old son. RP 197-191. The land lady Kim Edwards confirmed that there were four townhouses with connected attics and that earlier in the day someone had broken into the attic. RP 219-222. Edwards also confirmed that there was damage to the crawl space in Unit A where Caldwell was temporarily staying

which indicated that someone had accessed the attic space. RP 221-22.

Caldwell had momentary possession of the Springer .45 and the short barreled rifle, both of which he picked up and shot to protect himself and his son from intruders in the attic. RP 193-95, 200. This evidence was insufficient to establish that Caldwell had more than temporary possession of the Springer and the short barrel rifle, and there was no evidence Caldwell ever touched the other guns.

The state established that the day before the shooting, Caldwell knew there were guns in the residence. The state established that Caldwell sometimes slept upstairs and sometimes downstairs and that he moved a mattress upstairs. RP 183-84. The state did not establish that Caldwell slept on the mattress at any time. *Id.*

There was no evidence that Caldwell touched the other rifle in between the mattresses or that he touched or was aware of the other pistol in the red back pack. RP 185-86. 196, 201. Under *Davis*, and *George*, the state proved Caldwell knew of some of the guns, and was in some proximity to them, but the state failed to prove possession. Accordingly, this Court must reverse and remand for dismissal with prejudice Count IV involving the .308 Savage Rifle and Count II involving the Springfield pistol. *Davis*, 182 Wn.2d

at 227-28; *George*, 146 Wn.App. at 923.

c. Necessity Defense.

Caldwell established that his temporary possession of the firearms was based on necessity. Washington recognizes the defense of necessity for unlawful possession of a firearm. *State v. Jeffrey*, 77 Wn.App. 222, 225-26, 889 P.2d 956 (1995). To establish necessity, the defendant must show “(1) he was under unlawful and present threat of death or serious injury, (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, (3) he had no reasonable alternative, and (4) there was a direct causal relationship between the criminal action and the avoidance of the threatened harm”. *State v. Stockton*, 91 Wn.App. 35, 43-44, 955 P.2d 805 (1998). Accordingly, when self-defense is most urgent, courts have recognized that use of a firearm may be defensible. *State v. Jorgenson*, 179 Wn.App. 145, 158 n.5, 312 P.3d 960 (2013).

Caldwell established necessity because: (1) he was afraid for his own life and his son’s life; (2) he did not recklessly place himself in a situation where he would be forced to engage in criminal conduct, because he was in his residence as an invitee. RP 182-84. (3) Caldwell had no reasonable alternative in the moment of fear; and (4) there was a direct causal

relationship between the possession of the guns and the avoidance of the threatened harm. RP 188-192; *Stockton*, 91 Wn.App. at 43-44.

Accordingly, this Court must vacate the firearm convictions involving the Springer in Count II and the short barrel 30-06 rifle in count V and remand for dismissal with prejudice.

2. THE STATE FAILED TO PROVE
POSSESSION OF METHAMPHETAMINES.

Possession of narcotics like unlawful possession of a firearm requires more than mere proximity to the contraband. *State v. Cote*, 123 Wn.App. 546, 550, 96 P.3d 410, (2004). In *Cote*, inside a vehicle, the police found a syringe and components of a methamphetamine lab, including Mason jars containing chemicals. *Cote*, 123 Wn.App.at 548. The State established that Cote was a passenger in the truck and his fingerprints were on the on the Mason jars. *Id.*

The Court reversed the unlawful possession of methamphetamine case because Cote was a passenger in someone else's vehicle and the evidence only established that Cote was "at one point in proximity to the contraband and touched it. But ... this is insufficient to establish dominion and control." *Cote*, 123 Wn.App.at 550.

The same reasoning applies in this case to defeat the possession of methamphetamine charge. As established in the previously section, the state was only able to establish that Caldwell lived in the same residence where the methamphetamine was located on the floor in bedroom number 1. RP 156-79. There was no evidence that Caldwell touched the methamphetamine or knew of its existence. Caldwell's mere proximity to the methamphetamine as a temporary resident did not establish constructive possession. Accordingly, this Court must reverse and dismiss with prejudice because the state failed to prove Caldwell possessed the methamphetamine.

3. THE STATE FAILED TO PROVE
RECKLESS ENDANGERMENT BEYOND
A REASONABLE DOUBT.

A person is guilty of reckless endangerment when he recklessly engages in conduct not amounting to drive-by shooting but that creates a substantial risk of death or serious physical injury to another person. RCW 9A.36.050(1). To convict a defendant of reckless endangerment, the State must prove beyond a reasonable doubt that the defendant knew of and disregarded a considerable risk, not a certainty, of death or serious physical pain or injury that her conduct posed, and that his behavior constituted a

gross deviation from how a reasonable person would have acted based on the known facts. *State v. Rich*, 184 Wn.2d 897, 904-05, 365 P.3d 746 (2016).

In *Rich* the Supreme Court held that neither intoxication alone or speeding alone was sufficient to prove the elements of reckless endangerment. *Rich*, 184 Wn.2d at 905-06. However, *Rich* had a young child in the car, she knew she was intoxicated and she was speeding. Together these facts established that *Rich* created a subjectively and objectively unreasonable and substantial risk of death or serious physical injury to another. *Rich*, 184 Wn.2d at 908-09.

Unlike in *Rich*, here there was insufficient evidence of reckless endangerment. The only facts presented in this case regarding reckless endangerment came from Caldwell who simply testified that his son was in the house when he shot the guns. RP 200. The state did not present any evidence that Caldwell was holding his gun when he fired or that his son was in the same room or in any danger. Moreover, the state did not prove that Caldwell knew of and disregarded a considerable risk, of death or serious physical pain or injury to his son or that Caldwell's behavior constituted a gross deviation from how a reasonable person would have acted based on the known facts. *Rich*, 184 Wn.2d at 904.

This evidence falls far short of what is required to establish the elements of reckless endangerment beyond a reasonable doubt. Accordingly, this Court must reverse the conviction for dismissal with prejudice.

4. APPELLANT WAS DENIED HIS
CONSTITUTIONAL RIGHT TO THE
EFFECTIVE ASSISTANCE OF COUNSEL.

a. Unwitting Possession.

Trial counsel was ineffective for failing to request an unwitting possession jury instruction for the possession of the methamphetamine charge. To prove ineffective assistance of counsel, Caldwell must show that counsel's performance was so deficient that it "fell below an objective standard of reasonableness" and that the deficient performance prejudiced Caldwell. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984))).

Performance is not deficient if counsel's conduct can be characterized as a legitimate trial strategy. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). To establish prejudice, the defendant must show a reasonable probability that the deficient performance affected the outcome of the trial. *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 964) "A

reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 964. This Court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

b. Deficient Performance.

Here, the State charged Caldwell with unlawful possession of a controlled substance. Had counsel requested the unwitting possession instruction, the jury would have been able to acquit Caldwell based on the fact that he did not know the methamphetamine was in the backpack, rather than simply following the state’s argument that it did not need to prove knowledge. RP 241-42.

In *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004), the State Supreme Court clarified that unlawful possession of a controlled substance does not have a knowledge element. *Bradshaw*, 152 Wn.2d at 538. Rather, unwitting possession is an affirmative defense to possession which addresses the harshness of this strict liability crime. *Bradshaw*, 152 Wn.2d at 538. “ To establish unwitting possession, the defendant must prove, by a preponderance of the evidence, that ... his possession of the controlled substance was unwitting. *State v. Buford*, 93 Wn.App. 149, 152, 967 P.2d

548 (1998). When used as a defense to possession, the unwitting possession instruction does not shift the burden of proof. *Bradford*, 152 Wn.2d at 538.

Here, the jury was given a “to convict” instruction for unlawful possession which instructed that the State had the burden to prove every element beyond a reasonable doubt. The state did not have to prove knowledge or intent. If Caldwell’s counsel had requested an unwitting possession instruction the court would have given it because Caldwell proved unwitting possession by a preponderance of evidence by establishing that he did not know the other occupants in the house, the back pack had clothes from other people, the other roommate too had children whose clothes were in the pack that he could not exclude anyone from any part of the residence. RP 261-62.

If counsel had requested the unwitting possession instruction, the jury could have acquitted on this basis because there was no evidence that Caldwell knew of the methamphetamine or had actual or constructive possession of it. Caldwell was denied effective assistance of counsel because there was no tactical reason not to offer this instruction.

c. Prejudice.

The deficient performance was prejudicial because without the

instruction, the jury could not acquit on this basis. In *Thomas*, the State Supreme Court held that counsel's failure to request a diminished capacity defense where Thomas presented sufficient evidence of intoxication was prejudicial because the instruction would have permitted the jury to find that Thomas's intoxication negated the element of willful and wanton disregard. *Thomas*, 109 Wn.2d at 229.

The Court further held that it could not determine that the outcome of the trial would have been the same with the instruction and that a reasonably competent attorney would have proposed an instruction. *Thomas*, 109 Wn.2d at 229.

Here, as in *Thomas*, Caldwell presented sufficient evidence of unwitting possession. *Thomas*, 109 Wn.2d at 229. This instruction like the diminished capacity instruction would have permitted the jury to acquit and a reasonably competent attorney would have proposed the instruction. *Id.* Accordingly, under *Thomas* and *Strickland*, this Court must reverse the methamphetamine charge and remand for a new trial.

d. Failure to Object to Prosecutor's Closing Argument.

A failure to object to prosecutor misconduct constitutes ineffective

assistance of counsel when counsel has no valid tactical reason to waive the objection. *State v. Hendrickson*, 138 Wn.App. 827, 833, 158 P.3d 1257 (2007). Here, counsel had no valid tactical reasons to fail to object to the prosecutor shifting the burden of proof, commenting on Caldwell's right to remain silence, vouching for the state and arguing facts not in evidence. *Hendrickson*, 138 Wn.App. at 833. Counsel's failure to object constituted deficient performance that prejudiced Caldwell. *Kyllo*, 166 Wn.2d at 862. Accordingly, this Court must reversal and remand for a new trial. *Id.*

5. THE PROSECUTOR COMMITTED REVERSIBLE MISCONDUCT BY ARGUING THAT THE DEFENSE FAILED TO PRESENT EVIDENCE WHICH IMPERMISSIBLY SHIFTED THE BURDEN OF PROOF, BY ARGUING THAT THE STATE HAD MORE POLICE EVIDENCE THAT IT COULD HAVE OFFERED IN SUPPORT OF ITS CASE, A FORM OF VOUCHING FOR THE CREDIBILITY OF THE STATE, AND BY ARGUING FACTS NOT IN EVIDENCE.

- a. Standard of Review

An appellant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. Emery*, 174 Wn2d 741, 759-61, 278 P.3d 653 (2012); *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d

221 (2006). Prejudice exists where there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003); *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); *State v. Dixon*, 150 Wn.App. 46, 53, 207 P.3d 459 (2009).

When the defendant failed to object to the improper comments at trial, the defendant must also show that the comments were “so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice.” *Emery*, 174 Wn.2d at 760-61. The true question is whether the resulting prejudice could have been cured, rather than the flagrant or ill-intentioned nature of the remarks. *Emery*, 174 Wn.2d at 761-62. Generally, inflammatory remarks cannot be cured with an instruction. *Emery*, 174 Wn.2d at 763.

This Court reviews misconduct in the full trial context, including the evidence presented, “ ‘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. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011), *citing, McKenzie*, 157 Wn.2d at 52, *quoting, Brown*, 132 Wn.2d at 561. The prosecutor's improper comments are prejudicial where “there is a substantial likelihood the misconduct affected the jury's verdict.” *Monday*, 171 Wn.2d at

676, quoting, *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007), quoting, *McKenzie*, 157 Wn.2d at 52, 134 P.3d 221, quoting, *Brown*, 132 Wn.2d at 561, 940 P.2d 546)

“Defendants are among the people the prosecutor represents. The prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated. “. *Monday*, 171 Wn.2d at 677, citing, *State v. Case*, 49 Wn.2d 66, 70–71, 298 P.2d 500 (1956), quoting *People v. Fielding*, 158 N.Y. 542, 547, 53 N.E. 497 (1899).

b. Burden Shifting

A prosecutor cannot comment on the lack of defense evidence because the defense has no duty to present evidence. *State v. McCreven*, 170 Wn.App. 444, 470-71, 284 P.3d 793 (2012) (reversible error to suggest that defendant must prove self-defense); *Dixon*, 150 Wn.App. at 54.

Here, the prosecutor committed misconduct when he commented on Caldwell’s failure to testify to the identity of the owner of the guns and by failing to call witnesses to inform the jury of the identity of the owner of the guns. RP 267. A prosecutor may not “comment on the defendant’s failure to call a witness” unless “it is clear the defendant was able to produce the witness and the defendant’s testimony unequivocally implies the uncalled

witness's ability to corroborate his theory of the case." *State v. Contreras*, 57 Wn.App. 471, 476, 788 P.2d 1114 (1009).

The prosecutor may argue that the missing witness doctrine applies, but it does not. The missing witness doctrine does not apply in this case because Caldwell did not "unequivocally impl[y]" that he had a witness to corroborate that he did not own the guns. There was also no evidence that Caldwell had any control over the roommate or that he knew the roommate's identity. RP 183-84, 193-95. Caldwell only stayed at the residence for a few days, Caldwell was not on the lease, his "big brother", who invited Caldwell to stay at the house was not on the lease, and there was no evidence that Caldwell knew the his "big brother" might not have had the right to reside in the residence. RP 182-84. In fact, Caldwell testified that his "big brother" invited him to stay in his mother's house because she had recently passed away and Caldwell was helping to clean the residence. RP182-84.

Of significance as well is the fact that there is a substantial likelihood that any testimony by the gun owner in Caldwell's favor could have incriminated that person if he was unable to lawfully possess firearms. Accordingly, the missing witness instruction was inapplicable in this case. *State v. Montgomery*, 163 Wn.2d 577, 599, 183 P.3d 267 (2008).

In sum, the prosecutor 's argument to the jury that Caldwell failed to produce exculpatory witnesses impermissibly shifted the burden of proof to Caldwell and impermissibly commented on Caldwell's right to silence when he argued that Caldwell should have presented evidence to support her defense. *Dixon*, 150 Wn.App. at 56-57.

c. The Comments Were Not Invited or Provoked.

When improper remarks by a prosecutor are in direct response to a defense argument, they are not grounds for reversal as long as the remarks do not "go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record, or be so prejudicial that an instruction cannot cure them." *Dixon*, 150 Wn.App. at 56 (quoting, *State v. Francisco*, 148 Wn.App. 168, 178-79, 199 P.3d 478 (2009) (quoting, *State v. Dykstra*, 127 Wn.App. 1, 8, 110 P.3d 758 (2005))).

During closing argument, defense counsel argued that there was no dominion or control and that Caldwell could not exclude the other people who lived at the residence. RP 261. Counsel suggested, "[i]f there were other people that resided in that not—and I would submit that there were—those were the people who those guns belong to. Not Mr. Caldwell. "RP 260-61.

This argument is very similar to the argument in *Dixon*, where Dixon was charged with unlawful possession of narcotics located in a purse in the car Dixon drove with a male passenger on board. *Dixon*, 150 Wn.App. at 51. During closing the prosecutor argued that Dixon should have had the male passenger testify on her behalf. *Dixon*, 150 Wn.App. at 52. The defense attorney argued “We don’t know enough about [the passenger’s] presence in the car to assume or to conclude that Ms. Dixon was in dominion and control of the substance that was in her purse.” *Dixon*, 150 Wn.App. at 56. This Court held that defense did not invite the prosecutor’s improper argument that it was Dixon’s responsibility to exonerate herself. *Dixon*, 150 Wn.App. at 56-57.

Here as in *Dixon*, Caldwell did not invite the improper argument because he did not have any control over the roommates; it is unclear if he even knew their names and counsel did not invite the improper argument by arguing that other people resided at the residence. RP 260-61.

d. Caldwell’s Right To Remain Silent

The prosecutor impermissibly commented on Caldwell’s constitutional privilege against self-incrimination,” thereby violating the Fifth Amendment of the U.S. Constitution. The prosecutor’s misconduct also

infringed on Caldwell's constitutional right to the presumption of innocence and violated the constitutional requirement that the prosecution bear the entire burden of proof" and that under RAP 2.5, such misconduct may be reviewed even absent an objection from defense counsel.

Under RAP 2.5, a defendant's failure to object to an improper remark on his constitutional right to silence does not waive the issue on appeal so long as the remark amounts to a manifest error. *Id.* The Court employs a two-prong test when the prosecutorial misconduct affects a constitutional right. First, whether the prosecutor's conduct was improper and second, whether there is a substantial likelihood that the misconduct affected the verdict. *State v. Gregory*, 158 Wn.App. 759, 809, 147 P.3d 1201 (2001).

In *Dixon*, the state conceded that the prosecutor's argument that Dixon should have testified was improper. *Id.* The misconduct here is very similar to the misconduct in *Dixon* because the prosecutor here argued that Caldwell should have provided exonerating testimony. RP 267-68. Accordingly, under *Dixon*, the prosecutor's comments here were misconduct.

The final issue is whether there is a substantial likelihood that the statement regarding Caldwell's failure to testify about the gun ownership affected the verdict. Here, the state's argument that the defense did not

provide evidence that Caldwell could not exclude the other residents from the guns and that he did not own the guns, improperly shifted the burden of proof and impermissibly commented on Caldwell's right to remain silent. RP 267-68.

Similarly, in *Dixon*, the prosecutor made the same type of arguments that Dixon should have testified or provided a witness to testify that she did not put the methamphetamine in her purse. *Dixon*, 150 Wn.App. at 57-59. This Court reversed and remanded for a new trial holding that there is a substantial likelihood that the prosecutor's comments affected the trial's outcome and that an instruction would not have cured the effect of the prosecutor's comments. *Id.*

Here, the evidence of Caldwell's guilt on the possession of the guns and methamphetamine was based solely on Caldwell's non-exclusive presence at the residence where he had no power to exclude the other residents from any portion of the residence. The testimony about shooting the gun was explained by his fear for himself and his child- a valid necessity defense.

The prosecutor's testimony that Caldwell should have identified the gun owner or presented the gun owner as a witness, was reversible error just

as it was in *Dixon* because it created a substantial likelihood that the prosecutor's comments affected the trial's outcome and that an instruction would not have cured the effect of the prosecutor's comments.

e. Improper Vouching

It is well established that a prosecutor cannot use his position of power and prestige to sway the jury and may not express an individual opinion of the defendant's guilt, independent of the evidence actually in the case. *In re Personal Restraint of Glassman*, 175 Wn.2d 696, 679, 286 P.3d 673 (2012) (reversed for prosecutor misconduct vouching for state's case, presenting evidence outside record).

Here, when the prosecutor argued that it had many other police witnesses it could have called, the prosecutor vouched for the credibility and power of its office and implied that its case was impenetrable. RP 265.

In *State v. Stith*, 71 Wn.App. 14, 17, 865 P.2d 415 (1993), the prosecutor argued that:

And this case, ladies and gentlemen, wouldn't be ... in court here today if there was any problem about the way Officer[s] Grady and Rossen acted. Our system has incredible safeguards that would not allow a case like this to come to court if somehow the police acted improperly. So the question of probable cause is something the judge has already determined before the case came before you today.

Stith, 71 Wn.App. at 17. The Court held that these comments concerning “incredible safeguards” and the court’s prior determination of probable cause “not only constituted ‘testimony’ as to facts not in evidence but also indicated to the jury that, if there were any question of the defendant’s guilt, the defendant would not even be in court. This was tantamount to arguing that guilt had already been determined.” *Stith*, 71 Wn.App. at 22. The trial court gave a strongly worded curative instruction. *Id.*

“Prosecutorial misconduct can be so prejudicial that it *cannot* be cured by objection and/or instruction. *Id.*, quoting, *State v. Powell*, 62 Wn.App. 914, 919, 816, P.2d 86 (1991), *review denied*, 118 Wn.2d 1013, 824 P.2d 491 (1992). The Court in *Stith*, characterized the statements as “clearly reflect[ing] the prosecutor’s personal assurances to the jury as to the defendant’s guilt. Taken together these comments not only implied that the trial was a useless formality because the real issues had already been determined”. *Stith*, 71 Wn.App. at 22.-23.

The Court of Appeals held both comments were flagrantly improper and prejudicial requiring reversal and remand for a new trial even though jurors are supposed to follow instructions. *Stith*, 71 Wn.App. at 22-23.

Here, counsel’s failure to object to the prosecutor’s argument that

there were many more police witnesses available was identical in its impact as the improper comments in *Stith* which implied that the trial was just a formality. *Stith*, 71 Wn.App. at 22.-23. Under *Stith*, this Court must remand for a new trial because no instruction could have cured the flagrant and ill-intended argument.

e. Arguing Facts Not in Evidence.

It is error to submit evidence to the jury that has not been admitted at trial. *Glassman*, 175 Wn.2d at 705 (citing, *State v. Pete*, 152 Wn.2d 546, 553-55, 98 P.3d 803 (2004)). “The ‘long-standing rule’ is that ‘consideration of any material by a jury not properly admitted as evidence vitiates a verdict when there is a reasonable ground to believe that the defendant may have been prejudiced.’”. *Glassman*, 175 Wn.2d at 705 (internal citations omitted) (reversible error when prosecutor altered booking photos with phrases asking jury to seek the truth).

A prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record. *State v. Pierce*, 169 Wn.App. 533, 552, 280 P.3d 1158 (2012). In *Pierce*, the prosecutor argued in the first person what he thought Pierce must have been thinking leading up to the crimes and the prosecutor fabricated description of the murders. *Pierce*,

169 Wn.App. at 553. This Court analogized the impropriety of arguing facts not in evidence to “the rule against pure appeals to passion and prejudice because appeals to the jury’s passion and prejudice are often based on matters outside the record. *Id.*

In *Pierce*, the prosecutor arguing what must have been inside Pierce’s mind was an argument about facts not in evidence. *Pierce*, 169 Wn.App. at 554-55. Similarly, arguing that the victims did not plan to be murdered that day taken and arguing a fabricated description of the murders were also outside matters outside the record. *Pierce*, 169 Wn.App. at 555-57.

This Court held that together, these arguments created “**more than**” a substantial likelihood that the arguments affected the verdict. *Id.* Here, the misconduct was not as extensive as in *Pierce*, but by arguing that there was a receipt for the gun was reversible error that created a substantial likelihood, rather than “more than” a substantial likelihood that it affected the verdict because there was no evidence of gun ownership presented during the trial.

The jury could easily have attached great significance to the gun shop receipt and attributed that to Caldwell rather than simply hearing that guns were present without any knowledge of a purchase. The argument about the gun shop receipt was analogous to the prosecutor’s argument about Pierce’s

thoughts.

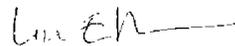
The multiple instances of misconduct here, like the multiple instances of misconduct in *Pierce*, were inflammatory and ill-intended and could not have been cured with an instruction. Accordingly, this Court must remand for a new trial.

D. CONCLUSION

Twinn Caldwell respectfully requests this Court reverse his conviction and dismiss with prejudice. In the alternative, Mr. Caldwell requests this Court reverse and remand for a new trial.

DATED this 29th day of , 2016.

Respectfully submitted,



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I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor's Office pcpatcecf@co.pierce.wa.us and Twinn Caldwell Twinn Caldwell, DOC # 800033 Washington State Penitentiary-WSU 1313 North 13th Avenue Walla Walla, WA 99362 true copy of the document to which this certificate is affixed on April 29, 2016. Service was made electronically.

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