

64187-5

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COA No. 64187-5

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ANDREW BRANCH,

Appellant.

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FILED
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JULIA M. HARRIS

ON APPEAL FROM THE SUPERIOR COURT OF KING COUNTY
OF THE STATE OF WASHINGTON

The Honorable Mary I. Yu

REPLY BRIEF

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A. REPLY ARGUMENT

1. THE JURY INSTRUCTIONS DID NOT ALLOW FOR CONVICTION PREMISED ON THE LEGAL TERM OF ART OF "CONSTRUCTIVE POSSESSION" AND MR. BRANCH'S CONVICTIONS FAIL BECAUSE THERE WAS NO PROOF HE ACTUALLY POSSESSED ANY OF THE CONTRABAND.

a. The jury instructions say what they say, irrespective of the Respondent's argument regarding internal

inconsistencies in the *Pattern Instructions*. Every crime charged against Andrew Branch in this case required proof of an essential element of "possession." See, e.g., *State v. Leyda*, 157 Wn.2d 335, 345, 138 P.3d 610 (2006) (possession is element of identity theft). The jury was so instructed on the offenses and counts. See CP 88, 105, 110.

And the trial prosecutor elected to prove solely "possession" of identification or financial information, and no other means of identity theft was pursued. 7/15/09RP at 26.

In this case, with regard to the charge of possession of a controlled substance, the jury was given a definition of possession that included the term of art "constructive" possession, in addition to actual possession, but only in the context of possession of a

“substance.” CP 121. Thus the instruction that added the theory of “constructive” possession plainly by its clear terms applied only to the controlled substance count. This was the law of the case, as argued with cited authority in the Appellant’s Opening Brief. See Appellant’s Opening Brief, at pp. 6-10. The State was required to prove that Mr. Branch actually possessed the contraband related to the possessory crimes charged. State v. Hickman, 135 Wn.2d 97, 103-04, 954 P.2d 900 (1998); State v. Salas, 127 Wn.2d 173, 182, 897 P.2d 1246 (1995) (if “no exception is taken to jury instructions, those instructions become the law of the case”).

The State describes Mr. Branch’s law of the case argument as a novel or a “new application” of the law of the case doctrine (see Brief of Respondent, at p. 14) – although the Respondent in fact never actually disputes that the law of the case directly applies in this circumstance. Admittedly, this application of the doctrine has tremendous ramifications in the present case, involving multiple counts, all premised on possession, a somewhat novel occurrence. But the law of the case doctrine clearly states that the prosecution must prove the crime as it is defined for the jury in the instructions of law, even if it turns out that the crime was defined in a way that increased the burden of what the State was required to

prove beyond the statutory definition's and the crimes' traditional proof requirements. (The reverse of course, is not true). There is nothing novel in that straightforward application of the law of the case doctrine to the jury instructions and the proof below.

Appellant first wishes to point out that the Respondent's description of the pivotal jury instruction as having nothing in it that limited its use to the drug count (Brief of Respondent, at p. 11) simply ignores the fact that the plain understanding of this jury instruction's use of the word "substance" (as opposed to identity theft documents or computer equipment) indicates that this special concept of "constructive" possession applied to the drug charge only ("possession of a controlled substance").

The lay jurors were not told to apply this special theory (of how a person can "constructively possess" something) to the crimes not involving controlled substances. The law of the case applies.

The State also contends after the fact that the Pattern Instructions' commentary regarding the use or non-use of this definition of possession is not rational or consistent, see Brief of Respondent, at pp. 12-13, but this was the State's proposed jury instruction, and the State could have modified the language from

the Pattern Instruction if it had then desired to do so. See CP 121; see also Supp. CP ____, Sub # 39 (State's proposed jury instructions, citing WPIC 50.03); see also 11 Washington Practice: Washington Pattern Jury Instructions: Criminal (3d ed. 2008) (WPIC 50.03). It is too late to now change what the jury instructions said.

The Respondent's last contention -- that the Defense should have proposed more or additional or different instructions if it felt the instructions needed to be "clarified" -- dramatically misapprehends the role of defense counsel. Mr. Branch's lawyer was not required to search through the jury instructions for instances in which the State, in submitting its proposed packet of various instructions, might have created the more rare circumstance of overstating the burden required to convict the defendant. See Brief of Respondent, at p. 15.

Finally, the definition of theft also did not somehow and could not ever 'transfer' the legal theory of constructive possession into the jury's consideration of the identity or stolen computer equipment counts. See Brief of Respondent, at p. 13.

b. Reversal is required. The State was required below under the law of the case doctrine to prove actual possession, and it did not do so.

2. ACCOMPLICE LIABILITY FAILS TO SAVE THE CONVICTIONS AS IT REQUIRES CONDUCT WITH THE PURPOSE TO PROMOTE OR ASSIST ANOTHER IN COMMITTING THE CRIMES.

Mr. Branch fully relies on the extensive arguments in his Appellant's Opening Brief on assignments of error 3 and 4, which more than address the brief attention given to this issue by the Respondent. There was simply no proof of the requisite mental state required for conviction, including as to the identity documents, and because essential elements of identity theft, including under an accomplice theory, was lacking, the convictions on these counts must be reversed. U.S. Const. amend. 14.

3. IN A CLOSE IF NOT INSUFFICIENT EVIDENTIARY CASE, THE PROSECUTOR FAULTED THE DEFENDANT REPEATEDLY FOR NOT PROVIDING AN "INNOCENT EXPLANATION" FOR THE ITEMS IN THE APARTMENT.

Mr. Branch contends strongly that the State failed to prove actual possession as required, and alternatively that the evidence

supporting constructive possession and intent or mental state was insufficient to support conviction, even under accomplice liability.

Without conceding those arguments that the evidence was constitutionally inadequate, he also argues that if this prosecution was supported by thin evidence, the State's flagrant misconduct in closing was pivotal to obtaining conviction in a close case.

It is in this context that Mr. Branch argues that the prosecutor committed flagrant misconduct in closing argument when he told the jury that the defendant had a burden of, and had failed at, providing an "innocent explanation" for the multiple items of contraband present in the apartment.

The Respondent contends that the prosecutor's remark was isolated and was, in any event, a "fair response" to an argument by defense counsel. See Brief of Respondent, at pp. 24-25. This after the fact justification is inadequate.

The State – remarkably -- contends that the prosecutor "merely" told the jury that the defendant must be guilty because he had failed to come up with an innocent explanation for the presence of the large number of documents, whereas he might not be faulted for failing to come up with an innocent explanation for

the presence of one or two of the documents. Brief of Respondent, at p. 25 (citing closing argument, 7/15/09RP at pp. 64-65).

The State is absolutely correct that the defense argued in closing that each count of possession of identity theft documents (each based on possession of certain papers or documentation) needed to be proved by the State beyond a reasonable doubt, arguing that the jury instructions directed that

proof of one charge isn't proof of another charge. So for all these ID thefts [possession of identity document counts] you've got to look at each individual count, each individual charge and see what evidence there is and see if the State has met their burden.

7/15/09RP at 40. This routine, standard defense argument manifestly did not permit the State to repeatedly tell the jury that Mr. Branch had failed to come up with an "innocent explanation" for the presence of the central disputed contraband (the documents) in the case, whether the deputy prosecutor's reference was to one item or all of them, or one count, or all of the counts. After telling the jury that there might be an "innocent explanation" for the presence of any one piece of identification or other contraband in the apartment, the State further contended as follows:

So the question is there an innocent explanation for any one thing becomes suddenly much greater when this innocent explanation needs to cover all of this.

7/15/09RP at 65. These multiple references to the defendant's failure to prove his innocence are misconduct. The Respondent's vivisection of the prosecutor's comments and the creative description of the comments as only arguing about the sum of the evidence (as opposed to individual pieces of evidence) makes no matter. It is simply improper for the prosecutor to engage in closing argument that misstates the burden of proof. State v. Traweek, 43 Wn. App. 99, 106-08, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986).

Notably, the Respondent contends the remark was isolated, Brief of Respondent, at p. 24, but the State repeatedly in closing argument continued by this same theme to fault Mr. Branch for failing to come up with an innocent explanation, further referencing "the complete lack of innocent explanation for this much stuff." 7/15/09RP at 69-70. The State engaged in misconduct in closing argument.

Finally, Traweek is the correct standard for reversal. The prosecutor in this case improperly faulted Mr. Branch for not coming up with an innocent explanation for the presence of contraband in the apartment, an improper argument as argued. State v. Cleveland, 58 Wn. App. 634, 647-49, 794 P.2d 546, review

denied, 115 Wn.2d 1029, 803 P.2d 324 (1990) (error for prosecutor to imply defendant had duty to present any favorable evidence in existence). This was flagrant misconduct as argued in the Appellant's Opening Brief.

The remarks require reversal. A prosecutor's comments in closing argument that improperly suggest that the defendant has a duty to prove his innocence must be shown to be harmless beyond a reasonable doubt. Traweek, 43 Wn. App. at 107. The State's contention that the constitutional harmless error standard does not apply to such misconduct shifting the burden of proof is based on a disagreement with the Traweek decision that is for the Supreme Court to review if presented to it. See Brief of Respondent, at p. 33.

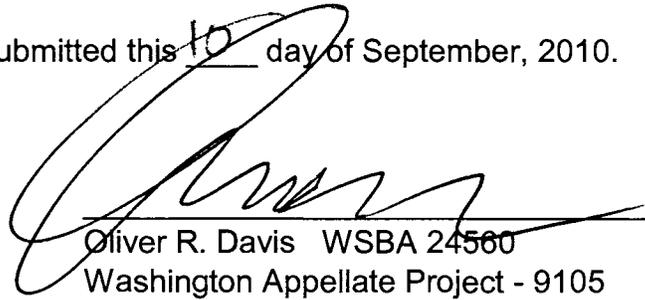
And in any event, Mr. Branch agrees with the Respondent, as argued in the Appellant's Opening Brief, that to prevail on the claim of misconduct, the defendant must generally show that the improper conduct prejudiced the outcome of his trial. State v. Weber, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 551 U.S.1137, 127 S.Ct. 2986, 168 L.Ed.2d 714 (2007). As argued, in this close case, the prejudice of the harmful, multiple remarks is clear. The implication that Mr. Branch was required to

provide witness testimony and other evidence establishing his innocence, could only lead the jury to conclude he had failed to make some basic showing necessary to succeed in gaining acquittal, when in fact in law the defense could be successful merely if the jury did not believe the State's evidence. The burden of proof was misstated.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Branch respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 10 day of September, 2010.



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STATE OF WASHINGTON,)	
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)	NO. 64187-5-I
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)	
ANDREW BRANCH,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF SEPTEMBER, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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APPELLATE UNIT	()	_____
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SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 10TH DAY OF SEPTEMBER, 2010.

X _____ 

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