

**FILED**

NOV 15, 2013

Court of Appeals  
Division III  
State of Washington

No. 31682-3-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ULISES RAMIREZ,

Appellant.

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

The Honorable Robert G. Swisher

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BRIEF OF APPELLANT

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A. SUMMARY OF APPEAL

The court must reverse Mr. Ramirez's convictions because the elements of the charging statutes were not met beyond a reasonable doubt. The state failed to offer sufficient evidence that Mr. Ramirez actually or constructively possessed the controlled substances. Because the findings made by the court and the evidence presented by the State was not sufficient, the conviction must be reversed.

B. ASSIGNMENTS OF ERROR

1. In absence of sufficient evidence, the court erred when it entered conclusion of law 1, finding dominion and control over the room and constructive possession "of all items contained in the room." CP 22; RP 142.

2. In absence of sufficient evidence, the court erred when it entered conclusion of law 2 to the effect that the Mr. Ramirez possessed drugs and had an intent to deliver. CP 22.

3. In absence of sufficient evidence, the court erred when it entered conclusion of law 3 that the evidence established possession by Mr. Ramirez. CP 22.

4. In absence of sufficient evidence, the court erred when it entered conclusion of law 4, concluding the State proved charges beyond a reasonable doubt. CP 22.

5. The court erred when it found Mr. Ramirez guilty beyond a reasonable doubt. RP 143.

6. The court erred when it denied Mr. Ramirez's motion to dismiss at the close of the State's case for insufficient evidence. RP 128.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Under RCW 69.50.401(1) and RCW 69.50.4013 was there sufficient evidence to convict Mr. Ramirez for counts I through IV when 1) controlled substances were not found on Mr. Ramirez's person; 2) none of the items in the room had Mr. Ramirez's identifying information on them; 3) all of the claimed items were Mr. Leon's; 4) Mr. Leon rented the room; and 5) Mr. Ramirez did not have a key to the room? (Assignments of error 1-6)

D. STATEMENT OF THE CASE

On January 30, 2013, Detectives Jones and Pettitjohn were looking for people with warrants, and Mr. Ulises Ramirez (Mr. Ramirez) happened to be on their list. RP 22, 42. The officers saw Mr.

Ramirez go in and out of a Motel 6 room. RP 22, 42-43. The officers were unable to see what, if anything, was happening inside of the room. RP 62. The room was rented by Miguel Leon (Mr. Leon), and only Mr. Leon possessed a key to the room. RP 83, 85. Upon seeing Mr. Ramirez, the detectives called Sergeant Monroe for assistance. RP 22. The detectives then knocked on the motel door and announced they were there to arrest on the warrant. RP 26. Mr. Ramirez followed the detectives command and appeared at the door. RP 26.

When Mr. Ramirez was searched incident to his arrest on the warrant, the detectives found nothing illegal. RP 37. While arresting Mr. Ramirez, the detectives noticed Mr. Leon was also in the room. RP 46. Detective Jones testified that he asked Mr. Leon and not Mr. Ramirez if he could “look through the room for bodies.” RP 95, 96. According to testimony by Detectives Pettitjohn and Jones, Mr. Ramirez heard this request and told Mr. Leon to let the officers search the bathroom for bodies. RP 46, 95. However, Sergeant Monroe testified that he did not hear Mr. Ramirez make any statements. RP 29.

After requesting to search the room and smelling what smelled like Marijuana, the detectives applied for a search warrant for the motel room. 38,46, 107. The search warrant only listed Mr. Leon’s name on

it because he was the person responsible for the room. RP 107. During the search, the officers found two wallets that belonged to Mr. Leon. RP 31-32. Mr. Leon's black wallet contained his Washington Identification card. RP 32. Mr. Leon's brown wallet contained \$2,964, the Motel 6 room key, lists of phone numbers and a Quest card. RP 33-34.<sup>1</sup> In addition to Mr. Leon's wallets, the detectives also discovered narcotics, scales, baggies, a pipe, and clothes. RP 48-59. This evidence was discovered in a closet area that was outside the bathroom and for the most part was inside of bags, containers, or clothing. RP 48-59. A black backpack that contained Mr. Leon's identification was found next to the other bags that contained the evidence; in Mr. Leon's bag there was cocaine, other narcotics, and packaging materials. RP 52-53. The officers also discovered cocaine in the toilet bowl, and marijuana in Mr. Leon's pants. RP 51,58. Additionally, four cellphones were seized but not searched, RP 59, 61, and one of the cell phones was Mr. Leon's. RP 67.

After the officers searched the room, Detective Jones interrogated Mr. Leon, RP 104. During the interrogation, Detective Jones did most of the talking and the questioning and the questions

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<sup>1</sup> Sergeant Monroe testified that the amount of money found in Mr. Leon's wallet was consistent drug dealing. RP 33.

were leading. RP 112. Mr. Leon's answers vacillated between saying Mr. Ramirez was involved in dealing drugs to saying Mr. Ramirez was not involved in dealing drugs. RP 110-111. Further, when Detective Jones asked if Mr. Leon was "[leaving] a bunch of stuff out . . . to protect [himself]," Mr. Leon nodded "yes". RP 114.

After the search, Mr. Ramirez was charged with Unlawful Possession of a controlled substance with intent to deliver cocaine (count I FB), methamphetamine (count II FB), marijuana (count II FC) under RCW 69.50.401(1). CP 6. He was also charged with unlawful possession of a controlled substance, Psilocyn (count IV, FC) under RCW 69.50.4013 on May 22, 2013. CP 7, 16. Mr. Leon was also charged, and he pled guilty to unlawful possession of controlled substances with intent to deliver. RP 77.

At trial, Mr. Leon testified for the State, and he said he rented the room. RP 90. Mr. Leon also admitted he lied to the detective when he asserted a bag of clothing was Mr. Ramirez's. RP 80-81. He also testified that items in the room were his: all of the bags containing controlled substances, the clothes, and the cocaine he tried to flush in the toilet were his. RP 80-82. Further, he testified that Mr. Ramirez was not aware he was selling drugs and that he did not sell the drugs or

handle money in front of Mr. Ramirez. RP 86. Finally, he testified that none of the drugs in the room belonged to Mr. Ramirez. RP 87, 88.

Detectives Pettitjohn and Jones also testified about the evidence at trial. Detective Pettitjohn testified that he did not have any personal knowledge linking Mr. Ramirez to the seized items, and that all of the items were connected to Mr. Leon. RP 66, 68, 74. Detective Jones testified that nothing linked Mr. Ramirez to the bathroom, that “no items of dominion in the room [belonged] to Mr. Ramirez,” and that there were items that belonged to Mr. Leon. RP 107-08.

At the close of the State’s case, defense counsel made a motion to dismiss because the evidence was not sufficient to prove that Mr. Ramirez possessed drugs or that he possessed them with intent to deliver. RP 124. The court denied the defenses motion to dismiss. RP 128. The Court also found Mr. Ramirez guilty beyond a reasonable doubt when looking at the totality of the evidence. CP 22. The evidence it relied on was that the room was small, and there was a large quantity of controlled substances, cash, packaging materials, scales, and testimony and statements from Mr. Leon. CP 22. However, the court found Mr. Leon’s testimony and statements were not credible. CP 21, RP. 142.

At sentencing, Mr. Ramirez received a standard range sentence.

CP 13. Mr. Ramirez timely appealed. CP 4.

E. ARGUMENT

THE COURT MUST REVERSE MR. RAMIREZ'S  
CONVICTIONS BECAUSE THE EVIDENCE WAS  
INSUFFICIENT TO ESTABLISH MR. RAMIREZ'S  
POSSESSION OF THE DRUGS.

There was not sufficient evidence to convict Mr. Ramirez of any of the counts for which he was charged. To uphold Mr. Ramirez's convictions the Court must find that a "rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Gutierrez*, 50 Wn. App. 583, 593, 749 P.2d 213 (1988)(citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628(1980)). When there was not sufficient evidence to convict a person for the charged crime, the appellate court must reverse the conviction. *Burks v. U.S.*, 437 U.S. 1, 18, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1981); *State v. Callahan*, 77 Wn.2d 27, 32, 459 P.2d 400 (1969).

1. The State was required to prove Mr. Ramirez knowingly possessed the drugs.

Under RCW 69.50.401(1), the state must prove that a defendant unlawfully possessed a controlled substance and had the intent to deliver the controlled substance. RCW 69.50.401(1).<sup>2</sup> Under RCW 69.50.4013, the state must prove the person unlawfully possessed a controlled substance. RCW 69.50.4013(1).<sup>3</sup> Possession may either be actual possession or constructive possession. *Callahan*, 77 Wn.2d at 29. Actual possession exists when the person has personal custody of the controlled substance. *Id.* at 29. Constructive possession exists when the person has dominion and control over the controlled substance but he does not have actual possession of the controlled substance. *Id.* at 29 (citing *State v. Walcott*, 72 Wn.2d 959, 435 P.2d 994 (1967)). In this case, there was no question Mr. Ramirez did not have actual possession. The trial court found Mr. Ramirez had constructive possession over the substances. CP 22.

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<sup>2</sup>“(1)Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver or possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1)

<sup>3</sup>“(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.” RCW 69.50.4013(1)

2. Evidence of constructive possession was inadequate.

Although constructive possession can be proven with circumstantial evidence, it must be substantial evidence. *Gutierrez*, 50 Wn. App. at 592 (citing *State v. Talley*, 14 Wn. App. 484, 487, 543 P.2d 348 (1975)(quoting *State v. Sanders*, 7 Wn. App. 891, 892-93, 503 P.2d 467 (1972))). However, mere proximity is not sufficient to prove constructive possession, if dominion and control over the premises is not found as well. *Gutierrez*, 50 Wn. App. at 592-93 (citing *Callahan*, 77 Wn.2d at 27). Finally, dominion and control over a premises does not mean the defendant had dominion and control over the controlled substance on the premises, it is merely a circumstance that can be considered. *State v. Shumaker*, 142 Wn. App. 330, 331, 174 P.3d 1214 (2007).

Mr. Ramirez did not have dominion and control over the premises or the controlled substances in absence of credible evidence that Mr. Ramirez was staying in the room, and that any of the items in the room were identified as his, coupled with the undisputed evidence Mr. Leon rented the room, and Mr. Ramirez did not have a key.

The evidence that Mr. Ramirez constructively possessed the drugs is even weaker than the evidence in those cases in which the

court held the defendants did not have constructive possession of the controlled substances. In *Shumaker*, marijuana was found on the passenger side of the defendant's car. *Shumaker*, 142 Wn. App. at 331, 334 (holding that showing dominion and control over the premises was not sufficient; the state had to show constructive possession over the drugs themselves). In *Davis*, the defendant was found asleep in a house, his possessions were neatly stacked on one side of the room, and he was temporarily staying at the house, his car was parked outside the house, he kept a sleeping bag at the house, and no drugs were found on his person. *State v. Davis*, 16 Wn. App. 657, 658-59, 558 P.2d 263 (1977)(holding the court the defendant's mere presence in the house was not enough to establish constructive possession because he did not have dominion and control over the premises and he did not have actual control of the drugs). Finally, in *Callahan*, the defendant admitted he had been staying on a houseboat for a few days, scales that were found on the houseboat were his, he handled the drugs earlier in the day, he was sitting at a desk covered with pills and hypodermic syringes, and he was sitting next to a box of drugs. *Callahan*, 77 Wn.2d at 28, 31-32 (holding there was insufficient evidence to show the defendant possessed drugs).

Because the evidence is much weaker than *Shumaker*, *Davis*, and *Callahan*, and constructive possession was not found in those cases, no reasonable finder of fact could have found constructive possession in Mr. Ramirez case. First, the motel room in this case was much smaller than the car in *Shumaker*, and the court in *Shumaker* held that dominion and control over the car and proximity to the drugs were not sufficient to establish constructive possession of the drugs.

Second, the evidence is weaker than the evidence in *Shumaker*, *Davis*, and *Callahan*, because the defendant in *Shumaker* owned the car, and the defendants in *Davis* and *Callahan* were both found on the premise and admitted they stayed on the premise at times. Mr. Ramirez neither rented the room nor possessed a key, he did not admit he stayed in the motel room, and there is no credible testimony that he stayed in the motel room. RP 83, 85.

Third, Mr. Ramirez situation is similar to the situation of defendant in *Davis* who did not have any controlled substances on him and resided elsewhere because Mr. Ramirez did not have any controlled substances on his person, and he likely resided elsewhere because he was in a motel room. RP 37, 90.

Fourth, the evidence in Mr. Ramirez's case is weaker than the evidence in *Davis* and *Callahan*, because the defendant in *Davis* had clothes neatly stacked in the room, and the defendant in *Callahan* admitted the scales and other possession found on the houseboat were his. Here, none of the items in the room were identified as Mr. Ramirez's, Mr. Leon testified that the items were his, it is undisputed that the wallets and one of the bags of drugs were Mr. Leon's, and the Detectives testified that none of the items belonged to Mr. Ramirez. RP 31, 32, 53, 80-81,107.

Finally, unlike the defendant in *Callahan* who was found sitting at a table covered in hypodermic syringes and pill, and next to a box of drugs, Mr. Ramirez was found in a room where the majority of the evidence was in the closet area and was in black bags. RP 48-59.

3. Reversal of the convictions is required.

When a person is convicted and there is insufficient evidence to prove the elements beyond a reasonable doubt the Fourteenth Amendment is violated. *State v. DeVries*, 149 Wn.2d 842, 853, 72 P.3d 748 (2003). When the court of appeals reverses a conviction for insufficient evidence the defendant cannot be retried. *Burks*, 437 U.S. at 18; *DeVries*, 149 Wn.2d at 853 (citing *State v. Anderson*, 96 Wn.2d

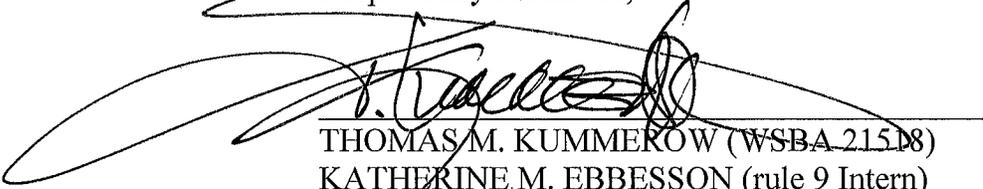
739, 742, 638 P.2d 1205 (1982)(citing *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981)). Because there was not sufficient evidence to prove all of the elements of RCW 69.50.401(1) or RCW 69.50.401 beyond a reasonable doubt, the court must reverse Mr. Ramirez conviction without retrial.

F. CONCLUSION

For the reasons stated above, Mr. Ramirez requests the court reverse his convictions.

DATED this 15<sup>th</sup> day of November 2013.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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|----------------------|---|-----------------|
| STATE OF WASHINGTON, | ) |                 |
|                      | ) |                 |
| RESPONDENT,          | ) |                 |
|                      | ) |                 |
| v.                   | ) | NO. 31682-3-III |
|                      | ) |                 |
| ULISES RAMIREZ,      | ) |                 |
|                      | ) |                 |
| APPELLANT.           | ) |                 |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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|------|---|-------------------|-------------------------------------|
| [X ] | SHAWN SANT, DPA<br>FRANKLIN COUNTY PROSECUTOR'S OFFICE<br>1016 N 4 <sup>TH</sup> AVE<br>PASCO, WA 99301 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X ] | ULISES RAMIREZ<br>354830<br>COYOTE RIDGE CORRECTIONS CENTER<br>PO BOX 769<br>CONNELL, WA 99326-0769     | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2013.

X \_\_\_\_\_ 