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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	NO. 46053
Plaintiff-Respondent,)	
)	ADA COUNTY NO. CR01-16-41584
v.)	
)	
MAXINE JEAN DEARING,)	APPELLANT'S BRIEF
)	
Defendant-Appellant.)	
_____)	

BRIEF OF APPELLANT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

HONORABLE JASON D. SCOTT
District Judge

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STATEMENT OF THE CASE

Nature of the Case

Maxine Dearing was outside a hotel room picking up her friend to take him to a medical appointment when law enforcement responded to a report that the hotel room smelled of marijuana. Officers followed Ms. Dearing and her friend, and, upon entering the hotel room, discovered over 45 pounds of marijuana. A jury convicted Ms. Dearing of one count of trafficking in marijuana over 25 pounds and one count of possession of marijuana hash oil. She received a unified sentence of seven years, with five years fixed, for trafficking and credit for time served (231 days) for the misdemeanor possession of marijuana hash oil.

Ms. Dearing asserts three errors on appeal. First, she contends the evidence was insufficient to establish either constructive or actual possession of the marijuana “hash oil” found in the refrigerator. Second, she asserts that the prosecutor committed misconduct by lowering the State’s burden of proof when she defined possession by telling the jury that a television in a house is possessed by everyone in the house; thus, the marijuana in the hotel room was possessed by everyone inside the room. Due to these errors, Ms. Dearing respectfully requests this Court vacate the district court’s judgment of conviction and remand this case for a new trial.

Ms. Dearing also contends that her sentence represents an abuse of the district court’s discretion, as it is excessive given any view of the facts.

Statement of the Facts and Course of Proceedings

Two school resource officers¹ responded to a hotel regarding a complaint that one of the rooms smelled of marijuana. (Trial Tr.,² p.169, Ls.1-15.) After speaking to the front desk clerk

¹ The two resource officers were asked to cover Boise City that day, because many of the regular officers were attending a dog funeral. (Trial Tr., p.168, Ls.10-23; p.201, Ls.1-10.)

who contacted the authorities, the officers approached Room 121. (Trial Tr., p.171, Ls.1-10; p.202, Ls.8-12.) As they approached, they saw a male and female walking down the hallway, and saw the door to Room 121 shutting. (Trial Tr., p.172, L.19 – p.173, L.6; p.204, Ls.16-21; p.212, Ls.1-6.) They were able to identify the female as Maxine Dearing, based on the photograph of the driver’s license of the person who paid for the hotel room. (Trial Tr., p.173, Ls.7-8.) They followed the male and Maxine Dearing, who was carrying a cardboard box.³ (Trial Tr., p.173, L.1 – p.174, L.14.) Ms. Dearing told the officers that they were headed to a medical appointment. (Trial Tr., p.182, Ls.16-25; p.196, Ls.4-6.) Ms. Dearing agreed to get the storage tub containing her belongings out of the room,⁴ but her entry was blocked by a person inside the room—a man who yelled that he was going to hurt himself. (Trial Tr., p.177, L.8 – p.179, L.12.) The officers had Ms. Dearing and the male go sit in his rental car for about 20 minutes, while they dealt with the man in the room. (Trial Tr., p.183, L.22 – p.184, L.9.) Once the man in the room allowed the officers to enter, they observed marijuana in black garbage bags, totes, and glass jars. (Trial Tr., p.185, L.16 – p.187, L.6.) There was also a Wal-Mart bag containing some solid marijuana extract in the refrigerator. (Trial Tr., p.338, Ls.3-6; p.344, L.10 – p.345, L.18; p.358, Ls.1-3; p.385, Ls.3-9; p.392, L.4 – p.393, L.11; State’s Exhs. D3 4; 24A; 24B; 24C; 24D; 51B.) The aggregate amount of marijuana was found to weigh over 45 pounds. (Trial Tr., p.394, Ls.2-7.)

² Because the pagination for the three-day trial is continuous, Ms. Dearing will refer to the trial transcript as “Trial Tr.” All other hearings will be designated to the date that the hearing took place.

³ The box Ms. Dearing was carrying contained two ziplock bags of marijuana. (2/12/18 Tr., p.182, Ls.1-12.)

⁴ Because Ms. Dearing was homeless at the time, she had a storage bin inside the room containing her personal items. (Trial Tr., p.220, Ls.10-15; p.319, Ls.3-18; p.322, Ls.10-24; State’s Exh. 7b.)

Based on these facts, the State filed an Information alleging Ms. Dearing committed the crimes of trafficking in marijuana and misdemeanor possession of marijuana hash oil. (R., pp.37-38; 145-146.)

In its closing statement, the State argued to the jury that Ms. Dearing possessed the marijuana hash oil, referring back to the example it gave during voir dire, when the prosecutor told the jury that a television was possessed by all of the occupants of the house. During voir dire, the prosecutor reminded the jurors that the State was required to prove possession, not ownership. (Trial Tr., p.101, L.3 – p.102, L.14.) She told the potential jurors that anyone who resides in the home has possession of a television in the home; whomever has the remote control possesses the television; and, whomever is watching the television possesses it. (Trial Tr., p.102, L.14 - p.104, L.5.) The jury was not instructed on actual and/or constructive possession.

The jury found Ms. Dearing guilty as charged. (Trial Tr., p.487, L.13 – p.488, L.8; R., p.218.) At sentencing, the State recommended a sentence of fifteen years, with six years fixed. (3/16/18 Tr., p.497, Ls.14-15.) The defense recommended five years fixed, consistent with the statutory mandatory minimum. (4/13/18 Tr., p.499, Ls.21-24.) The district court sentenced Ms. Dearing to a unified term of seven years, with five years fixed.⁵ (4/13/18 Tr., p.503, L.18 – p.504, L.14; R., pp.224-227.) Ms. Dearing filed a Notice of Appeal timely from the district court's judgment of conviction. (R., pp.230-232, 238-243.)

⁵ Ms. Dearing was sentenced to credit for time served (231 days) on the possession of hash oil conviction. (4/13/18 Tr., p.504, Ls.9-14.)

ISSUES

- I. Was there sufficient evidence that Ms. Dearing possessed marijuana hash oil?
- II. Did the State commit misconduct by lowering the State's burden to prove Ms. Dearing guilty of possession of marijuana?
- III. Did the district court abuse its discretion by imposing an excessive sentence?

ARGUMENT

I.

The State Did Not Present Sufficient Evidence To Prove Beyond A Reasonable Doubt That Ms. Dearing Possessed The Marijuana Hash Oil

A. Introduction

The State failed to prove beyond a reasonable doubt Ms. Dearing had actual or constructive possession of the marijuana hash oil in the hotel room refrigerator. Specifically, the State failed to prove Ms. Dearing knowingly possessed the marijuana hash oil.

B. Standard Of Review

In *State v. Southwick*, 158 Idaho 173 (Ct. App. 2014), the Court of Appeals outlined the appellate standard of review for sufficiency of the evidence:

Appellate review of the sufficiency of the evidence is limited in scope. A finding of guilt will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera–Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct.App.1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct.App.1991). We will not substitute our view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct.App.1985). Moreover, we will consider the evidence in the light most favorable to the prosecution. *Herrera–Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001. Substantial evidence may exist even when the evidence presented is solely circumstantial or when there is conflicting evidence. *State v. Severson*, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009); *State v. Stevens*, 93 Idaho 48, 50–51, 454 P.2d 945, 947–48 (1969). In fact, even when circumstantial evidence could be interpreted consistently with a finding of innocence, it will be sufficient to uphold a guilty verdict when it also gives rise to reasonable inferences of guilt. *Severson*, 147 Idaho at 712, 215 P.3d at 432; *State v. Slawson*, 124 Idaho 753, 757, 864 P.2d 199, 203 (Ct.App.1993).

158 Idaho at 177-78.

C. The Evidence Was Insufficient To Prove Possession Because The State Failed To Prove Ms. Dearing Knowingly Possessed The Marijuana Hash Oil In The Refrigerator

To prove possession of a controlled substance, the State must show the act of possession and “the knowledge that one is in possession of the substance.” *State v. Fox*, 124 Idaho 924, 926 (1993). “Possession of a controlled substance may be actual or constructive. When the accused is not in actual physical possession the State must show that he had such knowledge and control of the substance as to establish constructive possession.” *State v. Gomez*, 126 Idaho 700, 706 (Ct. App. 1994). Moreover, “[w]here joint occupancy is involved,” “substantial evidence must exist establishing the guilt of each defendant, not merely the collective guilt of both.” *State v. Garza*, 112 Idaho 778, 784 (Ct. App. 1987). “Proximity alone will not suffice as proof of possession.” *Id.* 112 Idaho at 784–85. “[C]onstructive possession exists where a nexus between the accused and the controlled substance is sufficiently proven so as to give rise to the reasonable inference that the accused was not simply a bystander but, rather, had the power and the intent to exercise dominion or control over the marijuana.” *Id.* 112 Idaho at 784.

A number of Idaho cases have addressed what constitutes constructive possession of drugs or other contraband. In order to be found guilty under a constructive possession theory, the State must prove that the defendant had both knowledge of, and control over, the contraband. *See Garza*, 112 Idaho at 778 (“Where, as here, the question is one of constructive possession, the state must prove that the defendant had both knowledge and control of the drugs.”); *State v. Vinton*, 110 Idaho 832, 834 (Ct. App. 1986) (holding that, although the State “established the existence of cultivated marijuana and the status of the Vintons as joint owners of the property . . . [t]hat, in our view does not constitute substantial evidence to uphold the conviction of either defendant individually.”).

Here, the State failed to present any evidence Ms. Dearing had knowledge and control over the marijuana hash oil found in the hotel room refrigerator. In *State v. Burnside*, 115 Idaho 882 (Ct. App. 1989), the Court of Appeals had to determine, *inter alia*, whether there was substantial evidence to support the jury's guilty verdict on a charge of possession of psilocybin mushrooms with the intent to deliver. *Id.* at 885. The case began when the police, armed with a warrant to search Burnside's car for evidence of methamphetamine dealing, approached him and a passenger while they were eating in a restaurant. During the search of the car, the police discovered both methamphetamine and psilocybin mushrooms. Burnside was charged with, and convicted of, possession of psilocybin mushrooms with intent to deliver and possession of methamphetamine. *Id.* at 883.

The Court of Appeals noted that, in order to prove that Burnside possessed the psilocybin mushrooms, the State had to establish that he was "aware the mushrooms were in his car and that he exercised dominion or control over them." *Id.* at 885. It noted that "the jury could not infer constructive possession from the mere fact that Burnside occupied, with a passenger, the automobile in which the drugs were seized." *Id.* (citing *State v. Warden*, 97 Idaho 752 (1976)). The Court of Appeals explained that, "in order to prevail, the state had to offer evidence which established that Burnside, individually, knew of the illegal drugs and that he exercised dominion over them." *Burnside*, 115 Idaho at 885.

In concluding that the State had not met its burden, the Court of Appeals analyzed the relevant facts:

The mushrooms were discovered in a black vinyl bag in Burnside's automobile. When the police began their search of the car, Burnside told the officers that the bag was not his. At trial, Burnside's passenger, Redd, repeatedly declared that he, and not Burnside, owned the mushrooms. Evidence suggested that Burnside may have sold the mushrooms to Redd, several hours earlier, in a motel room. The mushrooms later were packaged for delivery. However, Redd claimed at trial,

that he, and not Burnside, had packaged the mushrooms. When asked if he had packaged the mushrooms for Burnside, Redd stated that he could not remember.

The evidence does not establish that Burnside exercised dominion and control over the mushrooms, when in the car. The state failed to rebut Redd's claim of sole ownership . . . Burnside's remark to the police, that the black bag was not his, suggests he probably knew the drugs were in his car. The motel sale also indicates Burnside's knowledge. However, neither piece of evidence establishes control. We find an absence of evidence on this element of the offense.

Id. at 885-86.

Because the marijuana hash oil was found in the refrigerator and not in Ms. Dearing's actual possession, Idaho law required the State to establish constructive possession—specifically, that Ms. Dearing knew of the hash oil and had the power and intention to control it. *State v. Blake*, 133 Idaho 237, 242 (1999). In other words, constructive possession of a controlled substance exists where a nexus between the accused and the substance is sufficiently proven so as to give rise to the reasonable inference that the accused was not simply a bystander, but rather, had the power and intent to exercise dominion and control over the substance. *State v. Rogerson*, 132 Idaho 53, 58 (Ct. App. 1998). Knowledge of the controlled substance and physical control of the controlled substance must be independently proven beyond a reasonable doubt, by either circumstantial or direct evidence. *Id.*

Here, the State failed to establish Ms. Dearing had knowledge or control of the marijuana hash oil in the refrigerator. The baggie in which the marijuana hash oil was found was a non-descript, opaque plastic Wal-Mart bag. (*See* State's Exh. 5g, 14a, 14b, 24a-24d.) Even someone accessing the refrigerator for pizza would have no reason to believe there was marijuana hash oil or another controlled substance in the bag. (*See* State's Exh. D4 3.) Further, although fingerprints were taken from the Wal-Mart bag and several of the items in the room and analyzed, no evidence that Ms. Dearing's fingerprints were found on anything in the room,

including the hash oil bag, was admitted at her trial. (*See* PSI, pp.117-120.) Unlike the facts in *Rogerson*, 132 Idaho at 58-59 (noting the fact that the drugs and paraphernalia were found in the defendant's garage in plain view support a finding the defendant knew of their existence), the hash oil was not in plain view like the raw marijuana found inside the hotel room, but was in an opaque bag, inside the hotel refrigerator. (*See* Exh. D4 3.) Further, there were three people who had been in the hotel room, and James Rhodes remained in the hotel room alone for 15-20 minutes. (Trial Tr., p.182, L.16 – p.185, L.15.) The State failed to establish that Ms. Dearing had knowledge of or control over the substance. Therefore, the State failed to present sufficient evidence of Ms. Dearing's "power and intent to exercise dominion and control" over the marijuana hash oil in the refrigerator. *Southwick*, 158 Idaho at 178.

Due to the insufficient evidence of possession of marijuana hash oil, the jury verdict is invalid. The insufficient evidence of possession requires that the judgment of conviction be vacated and this case remanded for a new trial.

II.

The Prosecutor Committed Misconduct By Misrepresenting The Law And The State's Burden Of Proof

A. Introduction

Ms. Dearing asserts that her right to a fair trial, guaranteed by the Fifth and the Fourteenth Amendments to the United States Constitution, and Article I, § 13 of the Idaho Constitution, was violated when the prosecutor, during voir dire and closing arguments, misrepresented the State's burden of proof and misrepresented the law when she distorted the definition of "possession" by telling the jury that any person in a room is in possession of a

television in that room. Ms. Dearing asserts that the prosecutor's improper voir dire and closing arguments lowered the State's burden of proof, which requires reversal of her convictions.

B. Standard Of Review

A conviction will be set aside for unobjected-to prosecutorial misconduct only if the misconduct is sufficiently egregious to constitute fundamental error. *State v. Parker*, 157 Idaho 132, 141 (2014). To prove an error is fundamental, a defendant bears the burden of proving: (1) the error violated one or more of the defendant's unwaived constitutional rights; (2) the error is obvious from the existing record; and (3) the error was not harmless. *Id.*; *State v. Perry*, 150 Idaho 209, 226 (2010). If a defendant demonstrates one of his unwaived constitutional rights was plainly violated, this Court applies the harmless error test to determine whether the defendant has shown there is a reasonable possibility the error affected the outcome of the trial. *Perry*, 150 Idaho at 226. If so, the conviction is vacated and the case remanded for a new trial. *Id.* at 228. Ms. Dearing acknowledges that she did not contemporaneously object to the prosecutor's statements and thus the statements must be evaluated as fundamental error.

C. The Prosecutor Committed Misconduct In Closing Arguments By Misstating The Law Thereby Reducing The State's Burden Of Proof

"[I]t [is] the duty of the Government to establish . . . guilt beyond a reasonable doubt. This notion—basic in our law and rightly one of the boasts of a free society—is a requirement and a safeguard of due process of law in the historic, procedural content of 'due process.'" *Leland v. Oregon*, 343 U.S. 790, 802-803 (1952) (Frankfurter, J., dissenting). The Fifth Amendment to the United States Constitution states that, "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. V. Similarly, the Fourteenth Amendment states, "[n]o state shall . . . deprive any person of life, liberty, or

property, without due process of law. . . .” U.S. Const. amend. XIV, § 1. Additionally, the Idaho Constitution guarantees that, “[n]o person shall be . . . deprived of life, liberty or property without due process of law.” Idaho Const. art. I, § 13. Due process requires criminal trials to be fundamentally fair. *Schwartzmiller v. Winters*, 99 Idaho 18, 19 (1978). Prosecutorial misconduct may so unfairly contaminate the trial as to make the resulting conviction a denial of due process. *Greer v. Miller*, 483 U.S. 756, 765 (1987); *State v. Sanchez*, 142 Idaho 309, 318 (Ct. App. 2005). In order to constitute a due process violation, the prosecutorial misconduct must be of sufficient consequence to result in the denial of the defendant’s right to a fair trial. The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor. *Smith v. Phillips*, 455 U.S. 209, 219 (1982). The aim of due process is not the punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused. *Id.*

Prosecutors too often forget that they are a part of the machinery of the court, and that they occupy an official position, which necessarily leads jurors to give more credence to their statements, action, and conduct in the course of the trial and in the presence of the jury than they will give to counsel for the accused. *State v. Irwin*, 9 Idaho 35, ___, 71 P. 608, 611 (1903). The prosecutor’s duty is to see that the defendant has a fair trial by presenting only competent evidence and should avoid presenting evidence to prejudice the minds of the jury. *Id.*, 71 P. at 611. The prosecutor must refrain from deceiving the jury by use of inappropriate inferences. *Id.*, 71 P. at 611.

“Where a prosecutor attempts to secure a verdict on any factor other than the law as set forth in the jury instructions and the evidence admitted at trial, including reasonable inferences from that evidence, this impacts a defendant’s Fourteenth Amendment right to a fair trial.”

Perry, 150 Idaho at 227. “Indeed, the prosecutor has a duty to avoid misrepresentation of the facts and unnecessarily inflammatory tactics.” *State v. Moses*, 156 Idaho 855, 871 (2014) (internal punctuation marks omitted). “Appeals to emotion, passion or prejudice of the jury through use of inflammatory tactics are impermissible.” *State v. Gross*, 146 Idaho 15, 20 (Ct. App. 2008). Misrepresentations or diminishments of the State’s burden to prove the defendant’s guilt beyond a reasonable doubt are impermissible. *State v. Raudebaugh*, 124 Idaho 758, 769 (1993); *State v. Phillips*, 144 Idaho 82, 86 (Ct. App. 2007). “It is improper to misrepresent or mischaracterize the evidence in closing argument.” *Moses*, 156 Idaho at 871 (quoting *State v. Rothwell*, 154 Idaho 125, 133 (Ct. App. 2013)). Nor should closing argument include counsel’s personal opinion about the credibility of a witness or the guilt or innocence of the accused. *State v. Garcia*, 100 Idaho 108, 110-11 (1979).

In this case, in lieu of requiring the State to prove Ms. Dearing guilty beyond a reasonable doubt of possessing the marijuana, the prosecutor instead argued that possession can be shown by proving someone is in the same room as the item. (Trial Tr., p.102, L.14 - p.104, L.5; p.465, L.16 – p.466, L.9.) The prosecutor’s explanation of the meaning of “possess” is clearly wrong, and confused the jury as to what the State *did* have to prove.

During the prosecutor’s closing remarks, she misstated the State’s burden of proof by misstating the law—telling the jurors that anyone in the same room as a television possesses the television.⁶ The prosecutor said:

⁶ The prosecutor referred to her discussion of possession during the voir dire portion of the trial. During voir dire, the prosecutor reminded the jurors that the State was required to prove possession, not ownership. (Trial Tr., p.101, L.3 – p.102, L.14.) She told the potential jurors that anyone who resides in the home has possession of a television in the home; whomever has the remote control possess the television; and, whomever is watching the television possesses it. (Trial Tr., p.102, L.14 - p.104, L.5.)

So if you believe that she was in possession of the marijuana in that room, it's a no-brainer. She is also in possession of this more concentrated form of marijuana in that room. So let's talk briefly about the possession.

...

So she had all the product there available for the production of hash oil.

...

If you believe that she is guilty of Count 1, that she was also in possession of 25 pounds or more, she is also guilty of possessing the BHO. And why is that? Possession is not who owns the drug. Keep that in mind. The jury instructions don't say that the state has to prove to you who purchased the drugs, where they got them from, who the owner was. It's not about ownership. It's about possession, whether someone has knowledge and power and intent to control the marijuana.

BHO is like the leftover pizza in that refrigerator. Remember in jury selection when we talked about possession and the television example, about how more than one person in a household can be in possession of that television. Well, think about your refrigerator and leftovers in the refrigerator. They're free game to anyone in that house. They're free game to anyone in this room.

The BHO is found in the fridge, right down there in that plastic sack next to the pizza boxes, next to those leftovers in that fringe [sic].

It's free game for anyone in that room. But what we're talking about is knowledge and the power and intent to control it, if anyone has access. It is not hidden. It is not locked in a safe where only one person has access to it. In the fridge with their leftovers where anyone has access to it. That is possession.

(Trial Tr., p.465, L.16 – p.466, L.9.)

In order for the State to establish constructive possession, it was required to prove beyond a reasonable doubt that Ms. Dearing knew of the marijuana and had the power and intention to control it. *Blake*, 133 Idaho at 242. While a possessory interest in the premises on which the controlled substances are found has often been used to infer knowledge, when the “defendant is in non-exclusive possession of the premises upon which drugs were found there can be no legitimate inference that he knew of the drugs and had control of them in the absence of other

circumstances such as incriminating statements which tend to support such inference.” *State v. Warden*, 97 Idaho 752, 754 (1976).

In *Warden*, the Idaho Supreme Court held:

[T]here was no showing that the defendant-appellant had actual possession of the substance nor is there any evidence whatsoever to support the inference merely because he was in a room where a controlled substance was later found that he is to be legitimately inferred to have been in constructive possession. In the absence of such evidence to support the inference, the verdict here must be held to have been based on nothing but speculation.

Id. 97 Idaho at 755.

The prosecutor’s assertion to the jury was incorrect where Idaho precedent holds that mere presence is insufficient. *C.f.*, *State v. Greene*, 100 Idaho 464, 465-66 (1979) (holding defendant’s statements that he knew about the marijuana, but not the heroin, in addition to his domicile at the residence, sufficiently established defendant’s constructive possession of the heroin); *see also State v. Randles*, 117 Idaho 344, 347 (1990) (overruled on other grounds by *State v. Humpherys*, 134 Idaho 657, 662 (2000)) (holding controlled substance was found in plain view in shared areas, indicating that both defendants were aware of its presence); *State v. Garza*, 112 Idaho 778, 784-785 (Ct. App. 1987) (holding that when there is joint occupancy, substantial evidence must exist to establish the guilt of each defendant, not merely the collective guilt of both—proximity alone will not suffice as proof of possession); *State v. Gomez*, 126 Idaho 700, 706-707 (Ct. App. 1994) (holding defendant’s conviction for possession of cocaine found in trash can was supported by substantial evidence where defendant, although in non-exclusive possession of the premises, acted suspiciously when police arrived by fleeing to the backyard but then acting nonchalant while standing five feet away from the trash can, his communication with the person who agreed to obtain cocaine for the informant, and his possession of the marked currency from informant).

The prosecutor's closing statements were an incorrect statement of the law and reduced the State's burden of proof. The prosecutor's directives to the jury eliminated its burden to prove all of the elements of possession of a controlled substance, i.e., knowledge and control, and invited the jury to convict Ms. Dearing simply because of her proximity to the hotel room.

1. The Prosecutor's Misconduct Constitutes Fundamental Error Requiring This Court To Vacate Ms. Dearing's Conviction

Ms. Dearing did not object to the prosecutor's improper arguments; however, she asserts that the prosecutor's argument amounts to fundamental error necessitating this Court to vacate his conviction. "Where prosecutorial misconduct was not objected to at trial, Idaho appellate courts may only order a reversal when the defendant demonstrates that the violation in question qualifies as fundamental error[.]" *Perry*, 150 Idaho at 227. "Such review includes a three-prong inquiry wherein the defendant bears the burden of persuading the appellate court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) plainly exists (without the need for any additional information not contained in the appellate record, including information as to whether the failure to object was a tactical decision); and (3) was not harmless." *Id.* at 228.

a. By Arguing That The Jurors Could Find Ms. Dearing Guilty Of Possessing The Marijuana Because She Had Been In The Room, The Prosecutor Misstated The Law And Attempted To Secure A Guilty Verdict By Improper Means, Thus Violating Ms. Dearing's Fourteenth Amendment Right To A Fair Trial

The United States Supreme Court has explicitly held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). "Where a prosecutor attempts to secure a verdict on any factor other than the law as

set forth in the jury instructions and the evidence admitted during trial, including reasonable inferences that may be drawn from that evidence, this impacts a defendant's Fourteenth Amendment right to a fair trial.” *Perry*, 150 Idaho at 227.

“[P]rosecutorial misconduct during closing arguments will constitute fundamental error only if the comments were so egregious or inflammatory that any consequent prejudice could not have been remedied by a ruling from the trial court informing the jury that the comments should be disregarded.” *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003) (alteration in original) (quoting *State v. Cortez*, 135 Idaho 561, 565 (Ct. App. 2001)); *State v. Parker*, 157 Idaho 132, 146 (2014) (holding that prosecutorial misconduct was not fundamental error where improper statements about nightmares or child suffering were not made or dwelled upon in support of a harsher punishment and did not misrepresent the evidence that was presented to the jury.) “It follows that a misstatement to a jury of the State's burden rises to the level of fundamental error because it goes to the foundation of the case and would take away from a defendant a right essential to his or her defense.” *State v. Erickson*, 148 Idaho 679, 685 (Ct. App. 2010) (holding the prosecutor's distortion of the State's burden of proof in closing argument was fundamental error and highly prejudicial).

In order to find Ms. Dearing guilty of possession of marijuana, the jury had to find the State proved that Ms. Dearing had both knowledge and the power and intention to control the marijuana. (R., pp.203, 206-207.) By misstating the burden of proof, including telling the jury that people in the room with a television “possesses” that television, the prosecution deprived Ms. Dearing of a right essential to her defense which goes to the foundation of the case. This was fundamental error. *See Erickson*, 148 Idaho at 685.

The prosecutor’s misconduct violated Ms. Dearing’s due process right to a fair trial.

b. The Prosecutorial Misconduct Is Plain On Its Face

The prosecutorial misconduct in this case is plain on its face, and there is no reason to believe that Ms. Dearing’s counsel was “sandbagging” the district court by failing to object to the prosecutor misstating the law and its burden of proof. The elements the State must prove in order for the jury to convict a defendant of possession of a controlled substance are well-established. *See State v. Burnside*, 115 Idaho 882, 885 (Ct. App. 1989). There is simply no strategic advantage that can possibly be gained by failing to object to, and to ask the court to correct, the prosecutor’s misstatement of the law or its burden of proof. Further, holding defense counsel to such a standard while permitting the prosecutor and the district court to remain silent and/or unaware of the law is patently unfair, especially where the defendant’s right to a fair trial is at stake. The prosecutorial misconduct is plain on its face.

c. The Prosecutorial Misconduct Is Not Harmless

Because Ms. Dearing did not object to the prosecutorial misconduct during trial, she bears “the burden of proving there is a reasonable possibility that the error affected the outcome of the trial.” *Perry*, 150 Idaho at 226. Ms. Dearing asserts that there is a reasonable possibility that the prosecutorial misconduct affected the outcome of her trial.

The State lowered its burden to prove Ms. Dearing’s “power and intent to exercise dominion and control” over the marijuana by telling the jury possession meant being on the same premises as the item, and the jury convicted Ms. Dearing of possession of marijuana.

Whether Ms. Dearing knew there was marijuana in the room *and* had the ability to control it was the central issue for the jury to decide. It is quite possible that the jurors believed that because Ms. Dearing had been in the room where the marijuana was found, she must have exercised dominion and control over the marijuana, just like the prosecutor’s television

example. In sum, there is a reasonable possibility that the jurors applied the wrong burden of proof in determining whether Ms. Dearing possessed the marijuana, and a reasonable possibility that, had they required the State to carry its burden to prove possession, the result of the proceeding would have been different. Therefore, the prosecutorial misconduct in this case was not harmless.

III.

The District Court Abused Its Discretion When It Sentenced Ms. Dearing To Seven Years, With Five Years Fixed, Following Her Trafficking Conviction

Ms. Dearing asserts that, given any view of the facts, her unified sentence of seven years, with five years fixed, is excessive. Where a defendant contends that the sentencing court imposed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771 (Ct. App. 1982). The Idaho Supreme Court has held that, “[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.” *State v. Jackson*, 130 Idaho 293, 294 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577 (1979)). In reviewing a trial court’s decision for an abuse of discretion, the relevant inquiry regards four factors:

Whether the trial court: (1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion; (3) acted consistently with the legal standards applicable to the specific choices available to it; and (4) reached its decision by the exercise of reason.

Lunneborg v. My Fun Life, 163 Idaho 856, 863 (2018).

Ms. Dearing does not allege that her sentence exceeds the statutory maximum. Accordingly, in order to show the district court abused its discretion by failing to reach its

decision by the exercise of reason, Ms. Dearing must show that the sentence was excessive considering any view of the facts. *Id.* The governing criteria or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.*

In light of Ms. Dearing's rehabilitative potential, the district court abused its discretion in sentencing her excessively. The district court failed to consider the fact that Ms. Dearing could likely be successful in the community where Ms. Dearing has support within the community. Billie Roberts, Ms. Dearing's friend and landlord, wrote a letter of support for Ms. Dearing. (PSI, pp.22.) Ms. Roberts believes Ms. Dearing has a strong work ethic and will do what it takes to be a productive member of society. (PSI, p.22.)

Ms. Dearing does have a good work history. She has no problem maintaining steady employment. (PSI, p.12.) Idaho recognizes that good employment history should be considered a mitigating factor. *See State v. Nice*, 103 Idaho 89, 91 (1982); *see also State v. Shideler*, 103 Idaho 593, 595 (1982).

The Idaho Supreme Court has held that substance abuse should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89 (1982). In *Nice*, the Idaho Supreme Court reduced a sentence based on Nice's lack of prior record and the fact that "the trial court did not give proper consideration of the defendant's alcoholic problem, the part it played in causing the defendant to commit the crime and the suggested alternatives for treating the problem." *Id.* at 91. Additionally, the Idaho Supreme Court has ruled that ingestion of drugs and alcohol resulting in impaired capacity to appreciate criminality of conduct, could be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 414

(1981). At the time of this incident, Ms. Dearing was under the influence of marijuana. (PSI, p.4.) Ms. Dearing has a medical marijuana license in California, to treat her PTSD and to help her quit smoking tobacco. (PSI, p.13.) Ms. Dearing is well aware that she needs to stop using marijuana in Idaho and wants to stop using marijuana in Idaho. (PSI, p.14.)

Further, Ms. Dearing expressed remorse for her acts. Ms. Dearing told the presentence investigator that she felt “full of regret for not asking questions & better knowing my surroundings.” (PSI, p.4.) Idaho recognizes that some leniency is required when a defendant expresses remorse for her conduct and accepts responsibility for her acts. *State v. Shideler*, 103 Idaho 593, 595 (1982); *State v. Alberts*, 121 Idaho 204, 209 (Ct. App. 1991). For example, in *Alberts*, the Idaho Court of Appeals noted that some leniency is required when the defendant has expressed “remorse for his conduct, his recognition of his problem, his willingness to accept treatment and other positive attributes of his character.” *Alberts*, 121 Idaho at 209. In *Shideler*, Idaho Supreme Court ruled that the prospect of Shideler’s recovery from his poor mental and physical health, which included mood swings, violent outbursts, and drug abuse, coupled with his remorse for his actions, was so compelling that it outweighed the gravity of the crimes of armed robbery, assault with a deadly weapon, and possession of a firearm during the commission of a crime. *Shideler*, 103 Idaho at 594-95. Therefore, the court reduced Shideler’s sentence from an indeterminate term not to exceed twenty years to an indeterminate term not to exceed twelve years. *Id.* at 593. Ms. Dearing’s circumstances are somewhat similar to the facts of both *Alberts* and *Shideler* in that she was using marijuana and she showed remorse for her actions.

Based upon the above mitigating factors, Ms. Dearing asserts that the district court abused its discretion by imposing an excessive sentence upon her. The district court imposed more than the mandatory minimum for trafficking in marijuana. She asserts that had the district

court properly considered her support within the community, good work history, and remorse, it would have imposed a less severe sentence.

CONCLUSION

Ms. Dearing respectfully requests that this Court vacate her judgment of conviction and remand her case to the district court for further proceedings. Alternatively, she requests that this Court reduce her sentence as it deems appropriate.

DATED this 6th day of February, 2019.

/s/ Sally J. Cooley
SALLY J. COOLEY
Deputy State Appellate Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2019, I caused a true and correct copy of the foregoing APPELLANT’S BRIEF, to be served as follows:

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/s/ Evan A. Smith
EVAN A. SMITH
Administrative Assistant

SJC/eas