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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	**No. 46053-2018**
Plaintiff-Respondent,	)	
	)	**Ada County Case No.**
v.	)	**CR01-2016-41584**
	)	
MAXINE JEAN DEARING,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

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

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District Judge

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STATEMENT OF THE CASE

Nature Of The Case

Maxine Jean Dearing appeals from the judgment entered after a jury convicted Dearing of trafficking marijuana and possession of marijuana hash oil. Dearing argues that the state presented insufficient evidence to prove she possessed the marijuana hash oil, that the prosecutor committed misconduct amounting to fundamental error in voir dire and closing argument, and that the district court abused its sentencing discretion.

Statement Of The Facts And Course Of The Proceedings

On November 21, 2016, Maxine Jean Dearing paid a $56.49 fee and a $100 cash deposit to stay one night in a one bedroom hotel room in Boise, Idaho. (State's Ex. 2.) She provided the front desk with a copy of her identification card and signed a hotel registration that stated "[a]ny illegal activity . . . will be charged a fee." (State's Exs. 1, 2.) After Dearing checked in, the hotel started receiving "a lot of complaints from guests and other staff as well of a smell of marijuana." (Tr., p.152, Ls.2-9.) But the hotel employees "couldn't pinpoint [the smell] because it was so strong." (Tr., p.152, Ls.14-18.)

On the morning of November 22, 2016, Dearing came back into the hotel lobby and paid cash for an additional night in the hotel. (Tr., p.151, Ls.18-22, p.152, L.25 – p.153, L.23.) The associate at the front desk could smell marijuana on Dearing. (Tr., p.153, Ls.17-20.) She called the police to report the smell. (Tr., p.154, Ls.5-8.)

Officers Miner and Hickam from the Ada County Sheriff's Office responded to the call. (Tr., p.162, Ls.12-17, p.169, Ls.6-18, p.170, Ls.17-19.) Both officers could smell marijuana immediately after getting out of their car in the hotel parking lot. (Tr., p.170, Ls.5-16.) The front desk associate provided the officers with Dearing's hotel registration

and a copy of Dearing's identification. (Tr., p.170, L.20 – p.171, L.5.) She also told the officers that Dearing was in room 121. (Tr., p.171, Ls.6-8.)

As the officers approached room 121, they saw Dearing and a man subsequently identified as Lucas Graham come out of room 121. (Tr., p.171, Ls.9-17, p.173, Ls.13-18, p.176, Ls.16-18.) Dearing was carrying a cardboard box. (Tr., p.173, L.21 – p.174, L.1.) Officer Miner called out to Dearing asking her to stop and telling her that he needed to speak with her. (Tr., p.174, L.23 – p.175, L.4.) Dearing and Graham stopped. (Tr., p.174, L.23 – p.175, L.4.) Officer Miner told Dearing to put the cardboard box down, and Dearing did so. (Tr., p.180, L.18 – p.181, L.11.) The officers "smelled . . . marijuana, and it was very, very, very strong." (Tr., p.175, Ls.14-25.) They tried to ask Dearing about the marijuana but she was "pretty evasive" and "didn't answer the questions [Officer Miner] was asking." (Tr., p.175, Ls.7-25.) Dearing stated that she wanted to leave and come back later to deal with the problem. (Tr., p.175, Ls.7-13.)

As the officers spoke with Dearing and Graham, Officer Miner saw the curtains in room 121 open and "figured there was a third person that was inside." (Tr., p.176, Ls.1-9.) Officer Miner also noticed that Dearing kept putting things on top of the cardboard box she had been carrying, such as her coat and her purse, in a manner that suggested Dearing was trying to hide the box. (Tr., p.180, L.18 – p.181, L.16.)

Officer Miner explained to Dearing and Graham that they would need to leave the hotel and assured them that, "if there was small amounts of marijuana . . . [the officers] would try to facilitate them not going to jail for that kind of thing." (Tr., p.176, L.25 – p.177, L.7.) He told them that "they needed to get [their] items out of the room." (Tr., p.176, L.25 – p.177, L.7.) Dearing agreed to retrieve her items from the room and

repeatedly tried to open the door with her keycard, but the door would not open. (Tr., p.177, L.8 – p.178, L.4.)

Officer Hickam walked with Dearing to the front office of the hotel to get a new keycard while Officer Miner waited outside of room 121. (Tr., p.178, L.20 – p.179, L.3, p.206, Ls.9-13.) Officer Hickam told Dearing she "reek[ed] of weed" and asked if she had any marijuana on her. (Tr., p.206, Ls.14-24.) Dearing denied having weed on her and told Officer Hickman that there was no weed in the hotel room. (Tr., p.206, L.14 – p.207, L.4.)

The officers and Dearing tried multiple electronic keys to open the door to the hotel room, but none of the keys worked. (Tr., p.207, Ls.5-10.) They had to have the hotel manager come with a master key to open the door. (Tr., p.207, Ls.5-12.) The door opened slightly but got stuck on "the lock that prevents it from opening more than a couple inches." (Tr., p.207, Ls.13-19.) The individual still in the room, later identified as James Rhodes, threatened to hurt himself if the officers came in the room. (Tr., p.207, Ls.13-22.) Additional officers, including a negotiator for the SWAT team, responded to the scene. (Tr., p.183, Ls.4-11.)

The officers had Dearing and Graham sit in a rental car that Dearing and Graham identified as "their" car while the officers tried to convince Rhodes to come out of the hotel room. (Tr., p.208, Ls.1-10.) An officer was assigned to stay with Dearing and Graham. (Tr., p.217, Ls.18-25.) An odor of marijuana "was just hammering" the officer. (Tr., p.220, L.20 – p.221, L.2.) He asked how much marijuana they had in the vehicle, and Dearing responded that "sometimes [the odor] lingers" and "that there was a small box on the sidewalk" that the officer could have been smelling. (Tr., p.221, Ls.3-9.) Dearing also told the officer that all of her belongings were in the hotel room and confirmed that the

hotel room was registered in her name. (Tr., p.221, Ls.14-22.) At some point, Officer Miner looked inside of the cardboard box that Dearing had been carrying and found two Ziploc bags that contained "probably about a pound worth of marijuana." (Tr., p.181, L.24 – p.182, L.12, State's Ex. 4b.)

After fifteen or twenty minutes, the officers were able to convince Rhodes to leave the hotel room. (Tr., p.184, Ls.4-9.) The officers then conducted a safety sweep of the room to check for additional people. (Tr., p.208, L.20 – p.209, L.1.) The officers saw "multiple black trash bags . . . full trash bags." (Tr., p.209, Ls.4-8.) They could also see "pieces of green leafy plant material on the floor." (Tr., p.240, Ls.3-13.) And the room "smelled like marijuana, a lot of marijuana." (Tr., p.209, Ls.9-12.)

Detective Roberson with the Ada County Sheriff's Office asked Dearing if he could search the hotel room for illegal or hazardous material, and Dearing consented. (Tr., p.241, L.12 – p.242, L.4, p.242, Ls.17-19.) A search of the room confirmed that the trash bags were full of marijuana plants. (Tr., p.209, Ls.4-8.) The officers also found numerous mason jars full of marijuana buds, some of which were labeled "Max"[1] (Tr., p.245, Ls.1-11; State's Ex. 8b); two pruning shears with green residue on them (Tr., p.245, Ls.1-11; State's Ex. 18); four pairs of scissors with green residue on them (Tr., p.245, Ls.1-11; State's Ex. 18); a "Mean Green Trimming Machine" that can be used "to help trim larger quantities of marijuana bud" (Tr., p.260, L.24 – p.261, L.4; State's Ex. 6); a cardboard box full of "marijuana stems or stalks that the bud or the flower of marijuana has been stripped away from" (Tr., p.344, Ls.1-6; State's Ex. 23a); a digital scale (Tr., p.267, Ls.14-19;

[1] Dearing's first name is Maxine (State's Ex. 1), and she, at least occasionally, goes by Max (State's Ex. 65 at 02:32 – 02:49).

State's Ex. 10); and, in the refrigerator, a Walmart bag containing approximately seventy grams of marijuana hash oil (Tr., p.344, L.10 – p.345, L.15; State's Ex. 24d). A forensic scientist totaled the amount of marijuana at "over 45 pounds." (Tr., p.394, Ls.2-7.)

The police arrested Dearing. (Tr., p.320, Ls.11-15.) Dearing made a recorded telephone call from the jail. (State's Ex. 65.) When the recipient of the call asked why Dearing was in the hotel, she said: "It wasn't the kind of meeting that I would want to have at my family's home." (State's Ex. 65 at 01:52 – 02:30.) The individual acted surprised when Dearing told him that the police alleged she had fifty pounds of marijuana, and Dearing responded, "if you're going to do it, do it right." (State's Ex. 65 at 03:55 – 04:07.)

The state charged Dearing with trafficking marijuana and with possession of marijuana hash oil. (R., pp.37-38.) At trial, in addition to the evidence described above, the state presented the jury with testimony regarding the manufacturing of marijuana and marijuana hash oil. (Tr., p.228, L.8 – p.233, L.15.) Specifically, Detective Roberson testified that manufacturing marijuana requires "cutting and taking the bud . . . from the plant itself" and then taking the bud, "the usable portion of the plant for smoking," and cutting it to make it neater using pruners or a machine designed to trim the bud. (Tr., p.229, Ls.6-19.) The stems of the marijuana plant from which the buds were retrieved can then be used to make marijuana hash oil. (Tr., p.231, L.4 – p.232, L.6.)

The jury convicted Dearing on both counts. (R., p.218.) The district court imposed a seven-year sentence with five years fixed for trafficking marijuana and a 231-day sentence for possession of the marijuana hash oil. (R., p.225.) The district court applied 231 days of credit for time served to both sentences. (R., p.225.)

Dearing timely appealed. (R., pp.230-32.)

ISSUES

Dearing states the issues on appeal as:

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?

(Appellant's brief, p.4.)

The state rephrases the issues as:

I. Has Dearing failed to show that the state presented insufficient evidence that Dearing possessed the marijuana hash oil?

II. Has Dearing failed to show the prosecutor committed misconduct in her voir dire and closing argument that rose to the level of fundamental error?

III. Has Dearing failed to show that the district court abused its discretion by imposing an excessive sentence?

ARGUMENT

I.
Dearing Has Failed To Show That The State Did Not Present Sufficient Evidence That Dearing Possessed The Marijuana Hash Oil

A. Introduction

The jury's finding that Dearing possessed the marijuana hash oil was supported by substantial evidence. To prove possession, the state had to prove a nexus between Dearing and the marijuana hash oil such that a reasonable juror could infer that Dearing was not just a bystander but had knowledge of the marijuana hash oil and the power and intent to control it. The state established that nexus by presenting evidence that (1) Dearing played a primary role in manufacturing marijuana in her hotel room and (2) the marijuana hash oil, which was also found in Dearing's small hotel room, was part of Dearing's marijuana manufacturing enterprise.

Dearing argues that the state presented insufficient evidence because Dearing was in nonexclusive possession of the hotel room where police found the marijuana hash oil. But Dearing's nonexclusive possession of the hotel room does not preclude the jury from inferring that Dearing possessed the marijuana hash oil. Instead, the state simply had to present evidence in addition to Dearing's nonexclusive possession of the hotel room such that a reasonable juror could infer that Dearing possessed the marijuana hash oil. The state presented that additional evidence by establishing a connection between Dearing's marijuana manufacturing activities and the marijuana hash oil.

B. Standard Of Review

"This Court 'will uphold a judgment of conviction entered upon a jury verdict so long as there is substantial evidence upon which a rational trier of fact could conclude that

the prosecution proved all essential elements of the crime beyond a reasonable doubt.'" State v. Kralovec, 161 Idaho 569, 572, 388 P.3d 583, 586 (2017) (quoting State v. Severson, 147 Idaho 694, 712, 215 P.3d 414, 432 (2009)). This Court "view[s] the evidence in the light most favorable to the prosecution in determining whether substantial evidence exists" and "will not substitute [its] own judgment for that of the jury on matters such as the credibility of witnesses, the weight to be given to certain evidence, and the 'reasonable inferences to be drawn from the evidence.'" Severson, 147 Idaho at 712, 215 P.3d at 432 (quoting State v. Sheahan, 139 Idaho 267, 285, 77 P.3d 956, 974 (2003)).

"Evidence is substantial if a 'reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven.'" Id. (quoting State v. Mitchell, 130 Idaho 134, 135, 937 P.2d 960, 961 (Ct. App. 1997) (brackets omitted)). "Substantial evidence may exist even when the evidence presented is solely circumstantial or when there is conflicting evidence." State v. Southwick, 158 Idaho 173, 178, 345 P.3d 232, 237 (Ct. App. 2014). "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." Id.

C. The State Presented Substantial Evidence Upon Which A Rational Trier Of Fact Could Find Dearing Possessed The Marijuana Hash Oil

The state presented sufficient evidence for a reasonable juror to conclude that Dearing possessed the marijuana hash oil. Under Idaho law, "[a] person has possession of something if the person knows of its presence and . . . has the power and intention to control it." State v. Seitter, 127 Idaho 356, 360, 900 P.2d 1367, 1371 (1995) (quoting ICJI 421). "[P]ossession 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. Southwick, 158 Idaho 173, 178, 345 P.3d 232, 237 (Ct. App. 2014).

Here, the "nexus" between Dearing and the marijuana hash oil was the marijuana manufacturing operation in the hotel room. The jury could reasonably infer that Dearing possessed the marijuana hash oil based on two facts: (1) Dearing played a primary role in the marijuana manufacturing that occurred in the hotel room and (2) the marijuana hash oil was part of Dearing's marijuana manufacturing. Both facts were supported by substantial evidence at trial.

1. The State Presented Overwhelming Evidence That Dearing Played A Primary Role In The Marijuana Manufacturing Process

The state presented overwhelming evidence that Dearing used her hotel room to manufacture marijuana. The police found a veritable marijuana factory in Dearing's hotel room, complete with a "Mean Green Trimming Machine" used to trim large amounts of marijuana. (Tr., p.260, L.24 – p.261, L.4.) The police found garbage bags full of marijuana plants, trimmings from marijuana on the floor of the hotel room, marijuana buds packaged in Ziploc bags and mason jars, and trimmed marijuana stems collected in a large cardboard box. (State's Exs. 8a, 8b, 9a, 9b, 12d, 16a, 23a; Tr., p.240, Ls.3-13.) Scissors and shears recovered from the hotel room still had residue from the marijuana plants on them at the time of the search, indicating they had been used to trim the marijuana plants. (Tr., p.348, L.15 – p.349, L.10; State's Ex. 18.) All in all, the police seized nearly fifty pounds of marijuana from Dearing's "300 to 400 square" foot hotel room. (Tr., p.246, Ls.7-17; see Tr., p.385, Ls.14-17.)

Although three individuals were present in the hotel room, the state presented overwhelming evidence that Dearing played a primary role in the marijuana manufacturing process. First, Dearing paid and signed for the hotel room where the manufacturing took place. (State's Ex. 2.) Second, Dearing confessed to the officers that she had stayed in the hotel room the previous night. (Tr., p.320, Ls.8-10.) Third, Dearing was walking out of the hotel room carrying approximately one pound of marijuana when the police first arrived. (Tr., p.181, L.24 – p.182, L.12, p.203, Ls.21-25.) Fourth, Dearing tried to hide the box holding the marijuana under her coat and purse as she talked to Officer Miner and was "pretty evasive" when answering his questions. (Tr., p.175, Ls.7-13, p.181, Ls.12-20.) Fifth, Dearing "reek[ed] of weed." (Tr., p.206, Ls.14-24.) Sixth, Dearing tried to escape criminal liability by asking the officers to leave for thirty minutes and saying she and her visitors "would be gone" by the time the officers came back. (Tr., p.182, Ls.16-25.) Seventh, a number of the marijuana-filled mason jars recovered from the hotel room were labeled "Max" on the lid—a name used by *Max*ine Dearing. (State's Ex. 22a; State's Ex. 65 at 2:42-2:56.) Eighth, of the three individuals present, Dearing was the only woman, and a search of the hotel room produced a purple tote that contained a woman's belongings and a mason jar, the type of container in which many of the marijuana buds had been stored. (State's Ex. 7b.)

Ninth, the evidence strongly implied that Dearing provided all of the marijuana plants. Dearing is from Placerville, California. (Tr., p.319, Ls.19-22.) The police found in the hotel room hand-drawn sketches of the floorplan of a house located next to Highway 49, which runs through Placerville. (Tr., p.369, L.14 – p.372, L.4.) One of the sketches had "[w]eed storage totes" written on the top corner of the floorplan. (Tr., p.372, Ls.1-4.)

Consistent with that notation, the garbage bags of marijuana plants found in the hotel room were stored in totes. (Tr., p.372, Ls.5-9.) In addition, Dearing and Graham's rental car from Boise had been driven "around 1,266 miles" in the five days prior to the search (Tr., p.311, Ls.5-16), and a trip to Placerville from Boise is "almost 1100 [miles] if you just drove down and back" (Tr., p.367, L.7 – p.368, L.2).

Tenth, the jury heard a tape recorded conversation in which Dearing stated that she did not want to say on a recorded call why she was at the hotel room but that it "wasn't the kind of meeting that [she] would want to have at [her] family's home." (State's Ex. 65 at 1:52-2:30.) Eleventh, Dearing essentially confessed when the caller on the other end of the recorded telephone call expressed surprise at the police alleging Dearing had fifty pounds of marijuana in her hotel room by responding, "if you're going to do it, do it right." (State's Ex. 65 at 3:55-4:08.)

2. The State Presented Substantial Evidence That The Marijuana Hash Oil Was Part Of Dearing's Marijuana Manufacturing Enterprise

In addition to presenting overwhelming evidence that Dearing played a primary role in the marijuana manufacturing, the state also presented substantial evidence that the marijuana hash oil was part of Dearing's marijuana manufacturing enterprise. First, the marijuana hash oil was found in the refrigerator in Dearing's small hotel room along with all of the other marijuana manufacturing supplies. (Tr., p.254, Ls.9-12.) Second, the jury heard undisputed testimony that marijuana hash oil is made by first trimming the buds off of marijuana plants (Tr., p.228, L.8 – p.233, L.15), and evidence in the hotel room indicated Dearing had been doing exactly that (State's Exs. 8a, 8b, 9a, 9b, 12d, 16a, 23a; Tr., p.240, Ls.3-13). Third, Dearing and her marijuana manufacturing team were collecting the

marijuana plant stems—the part of the plant needed to make marijuana hash oil—in a large cardboard box in the hotel room. (State's Ex. 23a.)

Fourth, the marijuana hash oil was found in a bag that matched other bags found in the hotel room that were part of Dearing's marijuana manufacturing process. Specifically, the marijuana hash oil bag and other bags in the hotel room were Ziploc brand bags with numbers written on the front in black marker indicating the weight of the substance inside of the bag. (State's Exs. 11a, 15b, 24c; see Tr., p.295, Ls.1-5; Tr., p.344, L.22 – p.345, L.12.)

Fifth, Detective Roberson walked the jury through the notebook recovered from the hotel room to explain how, based on his knowledge and experience, he concluded that the notebook was a ledger for Dearing's marijuana manufacturing team and contained what could be prices for marijuana bud and marijuana hash oil. (Tr., p.295, L.20 – p.300, L.24; see State's Ex. 21i.) Based on the overwhelming evidence that Dearing played a key role in manufacturing marijuana in her hotel room and the substantial evidence that the marijuana hash oil was part of Dearing's marijuana manufacturing process, a reasonable juror could infer that Dearing knew of the marijuana hash oil found in her hotel room and had the power and intent to control it.

Dearing argues that the state presented insufficient evidence of Dearing's possession of the marijuana hash oil because Dearing was in nonexclusive possession of the hotel room. (Appellant's brief, pp.6-9.) But a defendant's nonexclusive possession of the premises where contraband is found is not a bar to finding possession of the contraband. Rather, where the defendant has nonexclusive possession of the premises where the contraband is found, the state simply needs to present some additional evidence that would

support the inference of possession. See State v. Garza, 112 Idaho 778, 784-85, 735 P.2d 1089, 1095-96 (Ct. App. 1987).

For example, in Garza, the court found sufficient evidence of possession based on the defendant's "nonexclusive control of the property, combined with his knowledge of the marijuana and the evidence adduced at trial." Id. at 785, 735 P.2d at 1096. The police had searched the defendant's home, which he shared with his wife, and found marijuana and drug paraphernalia. Id. at 780, 735 P.2d at 1091. In holding the state had presented sufficient evidence that the defendant had possessed the marijuana, the court pointed to the defendant's nonexclusive control of the property, the marijuana and paraphernalia "dispersed throughout the house in common areas to which [the defendant] and [his wife] had individual access," and evidence that the defendant had sent more than $5,400 to individuals known to deal in marijuana. Id. at 785, 735 P.2d at 1096.

Here, like in Garza, the state presented sufficient evidence of possession because it did not rely solely on Dearing's nonexclusive control of the hotel room. Like the marijuana in Garza that was found in common areas to which the defendant and his wife had individual access, the marijuana hash oil here was found in the refrigerator in Dearing's small hotel room to which Dearing and her visitors indisputably had individual access. (See State's Exs. 2, 5g.) And, as explained above, the state presented substantial evidence that Dearing herself played a primary role in manufacturing marijuana in the hotel room and that the marijuana hash oil was part of Dearing's marijuana manufacturing enterprise. That is sufficient to prove Dearing possessed the marijuana hash oil.

Put differently, the state's position is not that Dearing's nonexclusive control of the hotel room, standing alone, was sufficient to prove possession. If, for example, the

evidence had shown that Dearing and her guests were innocently using her hotel room only as a place to sleep and the police found marijuana hash oil inside of a bag in the refrigerator, the jury would not have been able to reasonably infer from Dearing's nonexclusive control of the hotel room alone that Dearing possessed the marijuana hash oil. See State v. Warden, 97 Idaho 752, 754, 554 P.2d 684, 686 (1976) ("[W]here as here 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."). Likewise, if the police had found a different substance in the refrigerator that had no apparent connection to the marijuana manufacturing, such as heroin, it might be a stretch to say that the jury could infer that Dearing possessed the heroin based on her intimate involvement in the marijuana manufacturing. But see State v. Clayton, 101 Idaho 15, 16, 607 P.2d 1069, 1070 (1980) (holding the fact "that [the defendant] knew of the presence of marijuana, another controlled substance, in his home . . . buttress[ed] the inference that [the defendant] knew that the heroin was hidden in his home").

Here, however, the state presented overwhelming evidence that Dearing played a primary role in a large-scale operation trimming fifty pounds of marijuana and collecting the stems (i.e., necessary steps to create marijuana hash oil) in the very room where the police found marijuana hash oil that was readily accessible in the refrigerator and packaged in a Ziploc bag with numbers written on the front in black marker just like other bags found out in the open in the hotel room. A reasonable juror could infer from this evidence that, as a primary participant in the marijuana manufacturing, Dearing possessed the marijuana hash oil found in her hotel room.

Dearing relies on State v. Burnside, 115 Idaho 882, 771 P.2d 546 (Ct. App. 1989), to argue that the state did not present sufficient evidence that Dearing possessed the marijuana hash oil because there were multiple people in the hotel room. (Appellant's brief, pp.7-9.) Burnside, however, was a much a different case: Burnside and a passenger were in Burnside's car when the police told Burnside they had a warrant to search his car. Id. at 883, 771 P.2d at 547. The police found psilocybin mushrooms inside of the car. Id. "At trial, Burnside's passenger . . . repeatedly declared that he, and not Burnside, owned the mushrooms." Id. And "[e]vidence suggested that Burnside may have sold the mushrooms to [the passenger], several hours earlier, in a motel room." Id. The Idaho Court of Appeals found Burnside's ownership of and presence in the car insufficient to show Burnside possessed the mushrooms because "[t]he state failed to rebut [the passenger]'s claim of sole ownership" and the evidence that Burnside had previously sold the mushrooms to the passenger meant "Burnside would have surrendered his right of possession upon receiving payment." Id. at 885-86, 771 P.2d at 549-50.

Burnside does not apply here because neither of the facts on which the court based its decision are present: someone other than Dearing did not claim sole ownership of the marijuana hash oil at trial and no evidence suggested that Dearing had surrendered her right of possession of the marijuana hash oil. See State v. Southwick, 158 Idaho 173, 180, 345 P.3d 232, 239 (Ct. App. 2014) (finding Burnside inapplicable where "no such exculpatory testimony occurred"). Furthermore, unlike in Burnside where the state relied exclusively on Burnside's proximity to the mushrooms and ownership of the vehicle to prove control over the mushrooms, here, as explained above, the state presented substantial evidence of a nexus between Dearing and the marijuana hash oil *in addition* to the facts that Dearing

paid for, signed for, and stayed in the small hotel room in which the police found the marijuana hash oil.

Dearing also points to the fact that "Rhodes remained in the hotel room alone for 15-20 minutes" prior to the police gaining access. (Appellant's brief, p.9.) Presumably, Dearing is suggesting that Rhodes could have had the marijuana hash oil hidden on his person, unbeknownst to Dearing, and then transferred it to the refrigerator while he was in the hotel room alone. Even if the jury could have drawn that inference from the evidence, the state did not have to disprove every possible inference that was inconsistent with Dearing's guilt. See State v. Humpherys, 134 Idaho 657, 660-662, 8 P.3d 652, 655-57 (2000) (discontinuing "the requirement that circumstantial evidence must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt"). The jury, as fact finder, could determine which reasonable inferences to draw based on the evidence presented, "and the reviewing court is precluded from substituting its judgment for that of the jury as to . . . the reasonable inferences to be drawn from the evidence." State v. Wilson, No. 45193, slip op. at 3 (Idaho Mar. 28, 2019). Based on all of the evidence presented by the state, a reasonable jury could have—and did—find that Dearing possessed the marijuana hash oil.

II.
Dearing Has Failed To Show That The Prosecutor Committed Misconduct That Rose To The Level Of Fundamental Error

A. Introduction

The prosecutor did not commit misconduct that rose to the level of fundamental error in voir dire or in closing argument. Dearing has failed to carry her burden on any of the three fundamental-error prongs. First, the prosecutor did not violate an unwaived

constitutional right because, when read in context, the prosecutor's statements did not misstate the law. Second, no error plainly exists because Dearing has failed to point to any evidence in the record showing that her counsel's omitted objections were not tactical. Third, Dearing has failed to show that any error was not harmless given the district court's proper instructions to the jury.

B. Standard Of Review

Where, as here, an "alleged error was not followed by a contemporaneous objection, it shall only be reviewed by an appellate court under Idaho's fundamental error doctrine." State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010).

C. The Prosecutor Did Not Commit Misconduct That Rose To The Level Of Fundamental Error

The prosecutor did not commit prosecutorial misconduct amounting to fundamental error in voir dire or closing argument. "[I]n reviewing allegations of prosecutorial misconduct, this Court 'must keep in mind the realities of trial.'" State v. Alwin, 164 Idaho 160, ___, 426 P.3d 1260, 1269 (2018) (quoting State v. Field, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007)). Closing arguments "are seldom carefully constructed in toto before the event; improvisation frequently results in syntax left imperfect and meaning less than crystal clear." Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974). "[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." Id. "A fair trial is not necessarily a perfect trial." Alwin, 164 Idaho at ___, 426 P.3d at 1269.

"Where [alleged] 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, 245 P.3d at 979. Fundamental error "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 as to whether the failure to object was a tactical decision); and (3) was not harmless." Id. at 228, 245 P.3d at 980. Dearing cannot satisfy her burden on any prong.

First, Dearing has not shown that the prosecutor's description of possession violated an unwaived constitutional right. Although "[i]t is prosecutorial misconduct for a prosecutor to misstate the law in closing arguments," the prosecutor's statements should be viewed in context. State v. Iverson, 155 Idaho 766, 772, 316 P.3d 682, 688 (Ct. App. 2014) (finding prosecutor's statements "were not erroneous statements of the law" when viewed "in the context of the prosecutor's argument").

Here, when read in context, the prosecutor's description of possession in her closing argument did not misstate the law. The prosecutor correctly stated that "possession" depends on "whether someone had knowledge and power and intent to control the marijuana." (Tr., p.465, Ls.13-15); see Southwick, 158 Idaho at 178, 345 P.3d at 237 (explaining that possession requires proof of knowledge and the power and intent to control). She also explained that the jury could infer Dearing possessed the marijuana hash oil based on the evidence that connected the marijuana manufacturing to the marijuana hash oil. (Tr., p.464, Ls.14-21.) The prosecutor then correctly explained that the jury could

consider Dearing's access to the marijuana hash oil in deciding whether Dearing possessed the marijuana hash oil. (Tr., p.465, L.16 – p.466, L.3 (arguing the marijuana hash oil was "free game for anyone in that room")); see State v. Greene, 100 Idaho 464, 466, 600 P.2d 140, 142 (1979) (holding the defendant's access to locations where marijuana and various drug-related paraphernalia were found supported finding of possession).

Dearing reads the prosecutor's argument to say that the jury had to conclude *only* that Dearing had access to the marijuana hash oil to find Dearing possessed it. (Appellant's brief, pp.14-15.) But that is not the most reasonable reading of the prosecutor's argument:

> The [marijuana hash oil] is found in the fridge, right down there in the 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 everyone has access to it. That is possession.

(Tr., p.465, L.25 – p.466, L.9 (emphasis added).) Dearing's interpretation of the prosecutor's argument reads out the correct statement of the law in which the prosecutor expressly told the jury that they had to find "knowledge and the power and intent to control [the marijuana hash oil]." (Tr., p.466, Ls.3-5.)

Similarly, the prosecutor's statements during voir dire did not misstate the law when read in context. The prosecutor told the jury that "more than one person can be in possession of drugs if they have knowledge of the drugs and they have power and intention to control those drugs." (Tr., p.99, Ls.20-25.) That is a correct statement of the law. See Southwick, 158 Idaho at 177-78, 345 P.3d at 236-37. The prosecutor then asked a series of questions related to a television to emphasize the point that more than one individual can be in possession of an object at the same time. (Tr., p.102, L.12 – p.104, L.4.)

Although some of the questions, when read in isolation, might suggest an improper definition of possession, reading the questions together and in context shows the prosecutor did not misstate the law. (Tr., p.102, L.12 – p.104, L.4.)

For example, Dearing claims that the prosecutor "told the potential jurors that anyone who resides in the home has possession of a television in the home." (Appellant's brief, p.12 n.6.) Presumably, Dearing is relying on this exchange:

> [PROSECUTOR:] So Juror No. 17, you have a television.
> JUROR 17: Yes.
> [PROSECUTOR]: And somebody else lives in your house.
> JUROR 17: Yes.
> [PROSECUTOR]: Who has possession of that television?
> JUROR 17: I suppose it would be both of our possession that resides in the home with us.
> [PROSECUTOR]: Certainly. . . .

(Tr., p.102, L.23 – p.103, L.6.) But the prosecutor then continued:

> [PROSECUTOR:] And why is that?
> JUROR 17: Because we're both aware it is there. It's in the home that we own. It would be an item that is under both of our possessions.
> [PROSECUTOR]: Thank you.

(Tr., p.103, Ls.7-11.) Thus, when placed in context, the prosecutor actually told the jury that an individual possesses a television in a home when she "resides in" and "own[s]" the home and is "aware [the television] is there." (Tr., p.102, L.23 – p.103, L.11.) While perhaps imperfect, the prosecutor's example is not necessarily a misstatement of the law, see, e.g., State v. Randles, 117 Idaho 344, 346-47, 787 P.2d 1152, 1154-55 (1990) ("[C]onstructive possession may be established by evidence that defendants had knowledge of the drugs, and had control over the premises on which they were found."),[2] especially when read together with the prosecutor's correct statement that possession

[2] Overruled on other grounds by State v. Humpherys, 134 Idaho 657, 8 P.3d 652 (2000).

requires knowledge and the power and intent to control (Tr., p.99, Ls.20-25). Accordingly, Dearing has failed to show that the prosecutor violated an unwaived constitutional right by misstating the law.

Second, Dearing has failed to point to any evidence in the record showing that the alleged error plainly exists. See State v. Miller, No. 46517, slip op. at 3 (Idaho March 15, 2019) (holding second Perry prong requires defendant to show that the record "contain[s] evidence as to whether or not trial counsel made a tactical decision in failing to object"). Dearing offers only her appellate counsel's opinion that "[t]here is simply no strategic advantage that can possibly be gained by failing to object." (Appellant's brief, p.17.) That is insufficient on its face. See Miller, No. 46517, slip op. at 3 (holding that appellate counsel's opinion that "failing to object could not have benefitted the defendant" is insufficient to show an error plainly exists).

Furthermore, the claim that "[t]here is simply no strategic advantage that can possibly be gained by failing to object" is incorrect. (Appellant's brief, p.17.) In the portion of the prosecutor's closing argument to which Dearing claims her trial counsel should have objected, the prosecutor was emphasizing that the marijuana hash oil was "free game for anyone *in that room*." (Tr., p.466, L.3 (emphasis added).) But Dearing's defense at trial was that she was never in the hotel room at all. (Tr., p.146, Ls.13-14 ("The evidence is going to show that Maxine was never inside the room."); Tr., p.467, L.22 – p.468, L.4 ("[T]he only people that were inside the room were James . . . and Lucas.").) Dearing's trial counsel could have made the tactical decision not to object to the prosecutor's argument that "anyone in that room" had access to the marijuana hash oil for fear that the jury would view the objection as a contradiction of Dearing's position that Dearing was

never inside the hotel room. Cf. State v. Osborne, 130 Idaho 365, 373, 941 P.2d 337, 345 (Ct. App. 1997) ("[T]he decision to pursue one of two mutually inconsistent defenses was strategic.").

Third, Dearing has failed to show that the alleged error was not harmless. "[T]he third prong of *Perry* requires that the defendant demonstrate that the clear error in the record . . . *actually* affected the outcome of the trial proceedings." Miller, No. 46517, slip op. at 4 (emphasis added). Here, nothing in the record suggests that the alleged error actually affected the outcome of the trial—quite the opposite, in fact. The district court properly instructed the jury on the definition of possession (R., p.203), and expressly instructed the jury that, "[i]f anyone states a rule of law different from any I tell you, it is my instruction you must follow" (R., p.199).[3] This Court "presume[s] that the jury followed the jury instructions." State v. Carson, 151 Idaho 713, 718, 264 P.3d 54, 59 (2011) (finding any error in prosecutor's remarks on reasonable doubt standard harmless because district court properly instructed the jury); see State v. Dunlap, 155 Idaho 345, 369, 313 P.3d 1, 25 (2013) (finding any error in prosecutor's comment during voir dire questioning regarding the reasonable doubt standard harmless because the district court properly instructed the jury); Iverson, 155 Idaho at 775-76; 316 P.3d at 691-92 (finding prosecutor's misstatement of the law harmless where district court properly instructed the jury). Because the record demonstrates any error in the prosecutor's description of possession was harmless, Dearing failed to carry her burden on the third prong of Perry.

[3] The district court also gave a number of other similar instructions. (R., p.191 ("[Y]ou must follow my instructions regardless of . . . what either side may state the law to be."); R., p.199 ("You must follow all the rules as I explain them to you."); R., p.212 ("I have outlined for you the rules of law applicable to this case . . . .").)

III.

Dearing Has Failed To Show That The District Court Abused Its Sentencing Discretion

A. Introduction

Dearing asserts the sentence imposed by the district court is excessive in light of her rehabilitative potential, her work history, her substance abuse problem, and her remorse. (Appellant's brief, pp.18-21.) The record supports the sentence imposed.

B. Standard Of Review

When evaluating whether a sentence is excessive, the court considers the entire length of the sentence under an abuse of discretion standard. State v. McIntosh, 160 Idaho 1, 8, 368 P.3d 621, 628 (2016); State v. Stevens, 146 Idaho 139, 148, 191 P.3d 217, 226 (2008).

C. The District Court Did Not Abuse Its Sentencing Discretion

The district court did not abuse its discretion when it imposed a unified seven-year sentence with five years fixed. It is presumed that the fixed portion of the sentence will be the defendant's probable term of confinement. State v. Oliver, 144 Idaho 722, 726, 170 P.3d 687, 391 (2007). Where a sentence is within statutory limits, the appellant bears the burden of demonstrating that it is a clear abuse of discretion. McIntosh, 160 Idaho at 8, 368 P.3d at 628 (citations omitted). To carry this burden the appellant must show the sentence is excessive under any reasonable view of the facts. Id. A sentence is reasonable if it appears necessary to accomplish the primary objective of protecting society and to achieve any or all of the related goals of deterrence, rehabilitation, or retribution. Id. The district court has the discretion to weigh those objectives and give them differing weights when deciding upon the sentence. Id. at 9, 368 P.3d at 629; State v. Moore, 131 Idaho 814,

825, 965 P.2d 174, 185 (1998) (holding district court did not abuse its discretion in concluding that the objectives of punishment, deterrence and protection of society outweighed the need for rehabilitation). "In deference to the trial judge, this Court will not substitute its view of a reasonable sentence where reasonable minds might differ." McIntosh, 160 Idaho at 8, 368 P.3d at 628 (quoting Stevens, 146 Idaho at 148-49, 191 P.3d at 226-27). Furthermore, "[a] sentence fixed within the limits prescribed by the statute will ordinarily not be considered an abuse of discretion by the trial court." Id. (quoting State v. Nice, 103 Idaho 89, 90, 645 P.2d 323, 324 (1982)).

Not only does Dearing's seven-year unified sentence fit within the statutory maximum of fifteen years, see I.C. § 37-2732B(a)(1)(D), the five-year fixed portion of Dearing's sentence is the mandatory minimum under Idaho law, see I.C. § 37-2732B(a)(1)(C). Consequently, Dearing challenges only the two-year indeterminate portion of her sentence as an abuse of the district court's discretion. It was not.

The district court recognized "the four objectives that Idaho law directs [it] to consider in every case, first and foremost among them is protection of the community; also rehabilitation, deterrence, and punishment." (Tr., p.501, Ls.2-9.) The district court observed that "Dearing has some amount of misdemeanor criminal history" and that "[s]ome portion of that is some misdemeanor drug crimes." (Tr., p.502, Ls.7-9.) The district court found that the five-year mandatory minimum "is plenty of front punishment," but that there was "some legitimate societal interest in some oversight on parole, at least for a limited period of time while the defendant serves, reacclimates to society once she is released." (Tr., p.502, L.15 – p.503, L.1.) Given Dearing's history of drug crimes and the legitimate societal interest expressed by the district court, the imposition of two

indeterminate years on top of the five-year mandatory minimum was not an abuse of discretion.

Dearing argues that the district court abused its discretion because it did not consider Dearing's rehabilitative potential as a productive member of society. (Appellant's brief, p.19.) But the district court expressly stated that it considered "rehabilitation" in making its sentencing decision. (Tr., p.501, Ls.2-9.)

Dearing's claim that she "has no problem maintaining steady employment" is belied by the record. (Appellant's brief, p.19.) According to her employment history, she did not have a job from June 2008 until September 2014 and again from the time she was laid off in September 2015 until June 2017. (PSI, pp.11-12.) More to the point, the record demonstrates that maintaining employment does not keep Dearing out of trouble: she was supposedly employed at the time of her arrest for the instant offense. (PSI, p.11.)

Dearing also argues that the district court should have considered Dearing's substance abuse problem. (Appellant's brief, pp.19-20.) But nothing in the record suggests Dearing has a substance abuse problem: Dearing herself "does not believe[] a drug treatment program is necessary for her at this time" and claims she only uses marijuana because "she has her medical marijuana license in California as treatment for her 'PTSD' and to help quit smoking tobacco." (PSI, pp.13-14.) The district court could not consider a nonexistent substance abuse problem as a mitigating factor.

Dearing's claim that she "expressed remorse for her acts" is flatly contradicted by the record. (Appellant's brief, p.20.) At the sentencing hearing, Dearing expressed through her attorney the same defense that she argued at trial. (Tr., p.498, L.6 – p.500, L.2.) The district court dismissed Dearing's continued defense that she "really wasn't a player

involved" as "not terribly credible." (Tr., p.501, L.24 – p.502, L.6.) Dearing herself echoed the sentiment expressed by her attorney and then insisted that the law in Idaho—rather than her own behavior—needs to change. (Tr., p.500, Ls.6-24 ("I would just hope that this state would open their eyes to the benefits [of marijuana] instead of just putting people in jail for long prison sentences.").)

Dearing points to one line in the PSI as evidence of her "remorse": "she felt 'full of regret for not asking questions & better knowing my surroundings.'" (Appellant's brief, p.20 (quoting PSI, p.4).) But just before making the quoted statement, Dearing said:

> It's all circumstantial. I was caught with a small box of pot. James had 48 pounds in the hotel room – I rented the room. I went to pick him up for a doctor's appointment and he asked me to hold a box. When we were walking away from the room, we got arrested.

(PSI, p.4.) When read in context, then, Dearing's statement of "regret" is, in fact, just part of her protestation of innocence. That is not remorse.

In short, the district court considered the appropriate factors before imposing a sentence well within the statutory maximum and just above the mandatory minimum. The attacks Dearing has levied against the district court's sentence find no support in the record. The district court did not abuse its sentencing discretion.

CONCLUSION

The state respectfully requests this Court affirm Dearing's convictions and the sentence imposed by the district court.

DATED this 29th day of April, 2019.

/s/ Jeff Nye
JEFF NYE
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 29th day of April, 2019, served a true and correct copy of the foregoing BRIEF OF RESPONDENT to the attorney listed below by means of iCourt File and Serve:

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JN/dd