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IN THE SUPREME COURT OF THE STATE OF IDAHO

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

REPLY 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. Finally, 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.

This Reply Brief is necessary to address the State’s contention that Ms. Dearing’s knowledge of the marijuana in the hotel room automatically proves she also possessed a different substance in the hotel room refrigerator. (Respondent’s Brief, pp.12-16.) Ms. Dearing also acknowledges new controlling authority which governs those cases in which an appellant asserts fundamental error.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Ms. Dearing's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

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?¹

¹ Ms. Dearing fully set forth her sentencing issue in her initial Appellant's Brief, and a response to the State's argument is not necessary.

ARGUMENT

I.

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

At trial, the State failed to present sufficient evidence supporting the jury's finding that Ms. Dearing had knowledge of, and the power and intent to control, the marijuana hash oil she was convicted of possessing. *See State v. Seitter*, 127 Idaho 356, 360 (1995) (approving jury instruction defining "possession" as "a person has possession of something if the person knows of its presence and has physical control of it, or has the power and intention to control it.") The State claims that it proved Ms. Dearing possessed the marijuana hash oil because (1) Ms. Dearing had a primary role in marijuana manufacturing in the hotel room and (2) the marijuana hash oil was part of Ms. Dearing's marijuana manufacturing. (Respondent's Brief, p.9.) The State's arguments both fail.

The State attempts to portray Ms. Dearing as the mastermind of the entire marijuana processing operation; however, the facts it identifies which supposedly support this contention merely establish that Ms. Dearing may have been involved in the marijuana processing, but was by no means the leader of the gang. (Respondent's Brief, pp.10-11.) For example, in support of its proposition that it was Ms. Dearing's processing operation, the State claims that she signed paperwork to rent the room, she was holding a cardboard box containing marijuana, she was evasive when answering police questions, she tried to convince the officers to let she and her friends leave, a couple of the jars containing marijuana had her name on them, she was the only woman and a tub holding her belongings contained a mason jar (some of the marijuana was in mason jars), and there was a sketch of a house which contained "weed storage totes" and which was located on the same highway as Placerville, California, where Ms. Dearing was from.

(Respondent's Brief, p.10.) Further, the rental vehicle had been driven approximate the distance from Boise to Placerville. (Respondent's Brief, p.11.) The State also believes the fact that Ms. Dearing did not want to say, over the jail telephone, why she was in the hotel room, despite telling the caller regarding the 50 pounds of marijuana in the room, "if you're going to do it, do it right," establishes that she played a primary role in the process. (Respondent's Brief, p.11.) However, none of the facts the State believes support its argument, even when added together, establish that Ms. Dearing planned or orchestrated or lead the individuals involved in the marijuana processing in the hotel room.

The thrust of the State's argument is that because Ms. Dearing played a "key role" in the processing, and that it presented substantial evidence that the marijuana hash oil was part of "Dearing's marijuana manufacturing process," therefore, "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." (Respondent's Brief, p.12.)

This theory does not hold water and is based on a hyperbolic version of the testimony at trial. Detective James Roberson testified as to the process by which hash oil was extracted from marijuana. (Tr., p.231, L.4 – p.232, L.24.) He did not testify that the marijuana hash oil in the hotel refrigerator was "part of Ms. Dearing's marijuana manufacturing process." (Trial Tr., p.222, L.10 – p.274, L.12; p.292, L.1 – p.323, L.7.) Further, there was no testimony or evidence put forth by the State that the marijuana hash oil in the refrigerator matched or was related to the plants found in the room, or that it was prepared in the hotel room. (Trial Tr., p.162, L.1 – p.274, L.12; p.292, L.9 – p.394, L.16.) Detective Roberson testified that creating the hash oil requires a solvent such as a butane oil or a butane gas (Trial Tr., p.231, L.23 – p.232, L.1); however, there was no testimony or evidence that butane was found in the hotel

room. (Trial Tr., p.162, L.1 – p.274, L.12; p.292, L.9 – p.394, L.16; State’s Exhibits 1-65.) Further, there was no testimony or evidence of the presence of a glass baking dish, another item used to prepare hash oil (Trial Tr., p.232, Ls.9-17). (Trial Tr., p.162, L.1 – p.274, L.12; p.292, L.9 – p.394, L.16; State’s Exhibits 1-65.)

“[W]here the defendant has nonexclusive possession of the premises where contraband is found, the state simply needs to present some additional evidence that would support the inference of possession”—this it did not do. (Respondent’s Brief, pp.12-13 (citing *State v. Garza*, 112 Idaho 778, 784-85 (Ct. App. 1987)).) The State believes it “presented substantial evidence of a nexus between Dearing and the marijuana hash oil.” (Respondent’s Brief, p.15.) This is incorrect. Hash oil is a different substance. The State posits that, had “the police found a different substance in the refrigerator,” such as heroin, it would be a stretch to say that the jury could infer that Dearing possessed the heroin. (Respondent’s Brief, p.14.) However, that is exactly what is happening here. Knowledge of the large quantity of marijuana in the hotel room does not automatically prove her possession of a small, opaque shopping bag containing a different substance in the room refrigerator. (Respondent’s Brief, pp.12-16.) This argument fails in light of the facts of Ms. Dearing’s case and controlling precedent.

Absent actual possession of the controlled substance, the State must establish constructive possession by showing the defendant knew of the substance and had the power and intention to control it. *State v. Blake*, 133 Idaho 237, 242 (1999); *State v. Betancourt*, 151 Idaho 635, 638 (Ct. App. 2011). Constructive possession exists where there is a sufficient nexus between the defendant and the controlled substance to show the defendant had the power and the intent to exercise dominion or control over the substance. *State v. Garza*, 112 Idaho 778, 784 (Ct. App. 1987). Constructive possession may be “joint or exclusive.” *Blake*, 133 Idaho at 242.

A jury may infer knowledge of the substance where a defendant is in control of the premises, but additional circumstances showing knowledge are necessary when the control is not exclusive.

Id.

While the jury may have concluded that there was evidence that Ms. Dearing had been in the room where the marijuana was being processed, her physical proximity (to the extent her nearness to the hash oil in an opaque bag in the closed refrigerator constitutes proximity) does not establish proof of possession, *Garza*, 112 Idaho at 784, and neither does her presence in the room, where she is not exclusively in possession of the premises. *Blake*, 133 Idaho at 242. Although Ms. Dearing signed the paperwork to rent the hotel room, there was testimony that Ms. Dearing had driven to the hotel with Lucas Graham and James Rhoades, and “that they were all in the motel room together.” (Tr., p.220, Ls.6-19.) Indeed, “[w]here joint occupancy is involved, substantial evidence must exist establishing the guilt of each defendant, not merely the collective guilt of both;” “[p]roximity alone will not suffice as proof of possession.” *Garza*, 112 Idaho at 784-85.

Ms. Dearing’s case is similar to *State v. Vinton*, 110 Idaho 832 (Ct. App. 1986), a case in which the Idaho Court of Appeals vacated convictions for manufacturing marijuana by a husband and wife because the State did not present sufficient evidence that either one had individually exercised control over the marijuana. *Id.* at 834. Another Court of Appeals case, *State v. Maland*, 124 Idaho 537 (Ct. App. 1993), involved an underage man being charged with possession of alcohol after beer was found next to him in the back seat of a car with two other individuals in the front seats. The Idaho Court of Appeals held that proximity to the beer alone was not enough, and the State had not presented sufficient evidence that he had control over the beer so as to establish constructive possession. *Id.* at 542.

Because the State presented no evidence Ms. Dearing possessed the hash oil, the State failed to prove beyond a reasonable doubt Ms. Dearing had actual or constructive possession of the hash oil in the hotel room refrigerator.

II.

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

The State claims that the prosecutor's improper remarks were merely taken out of context, and were not what they appeared to be, which was telling the jury that "knowledge and the power and intent to control it" was the equivalent of "access to it." (Respondent's Brief, p.19.) When read in context, the remarks are precisely what Ms. Dearing asserted them to be, misrepresentations of the law which lowered the State's burden of proof.

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." *State v. Perry*, 150 Idaho 209, 227 (2010). 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 by the prosecutor's misrepresentation of the State's burden of proof and the law during voir dire and closing arguments.

With respect to the other two prongs of the fundamental error test, the State relies on the Idaho Supreme Court's recent opinion in *State v. Miller*, No. 46517, 2019 WL 1217673 (Idaho Mar. 15, 2019), which was issued after the Appellant's Brief was filed in this case. (Respondent's Brief, pp.21-22.) *Miller* changed the fundamental error analysis with respect to the second and third prongs of the test. Regarding the second prong—the requirement that the error be clear from the record—the Court wrote, “This means the record must contain evidence of the error and the record must also contain evidence as to whether or not trial counsel made a tactical decision in failing to object.” *Id.* at *2. It went on to state, “[W]e clarify that whether trial counsel made a tactical decision in failing to object is a claim that must be supported by evidence in the record.” *Id.*

In this case, the error is certainly clear from the prosecutor's statements. The prosecutor told the jurors of the location of the marijuana hash oil wrapped in the Walmart bag in the refrigerator:

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.466, Ls.3-9.)

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). Further, because the record reveals no objectively reasonable basis not to object to such a blatant distortion and diminution of the State’s burden, the record shows that trial counsel’s failure to object was not tactical. The State argues that because “Dearing’s defense at trial was that she was never in the hotel room at all,” her counsel “could have made the tactical decision not to object to the prosecutor’s argument that ‘anyone in the room’ had access to the marijuana hash oil” where that the argument would be contradictory to his theory of the case. (Respondent’s Brief, p.21.) This is absurd. No reasonable attorney would believe that correcting the prosecutor’s misstatements about the meaning of a crucial element of the crime could concede that his client was in the room. Such reasoning is completely illogical. Defense counsel can maintain that his client was never inside the hotel room without allowing the prosecutor to lower the State’s burden of proof by telling the jury that “possession” was the same as “access to it.” *Miller* also clarified the third prong of the fundamental error test as follows: “the third prong of *Perry* requires that the defendant demonstrate that the clear error in the record—*i.e.*, the error identified in the first and second prongs—actually affected the outcome of the trial proceedings.” *Id.* In other words, the error must be shown not to be harmless.

Here, the prosecutor misstated the meaning of the possession element of the crimes, thereby reducing the State’s burden of proof; therefore, the error cannot be harmless. In other words, the prosecutor’s misconduct in misrepresenting the meaning of possession affected the outcome of the trial because it allowed the jurors to render a verdict absent a finding that the State proved beyond a reasonable doubt that Ms. Dearing possessed marijuana. Indeed, where the prosecutor clearly told the jury that it only had to show that Ms. Dearing had *access* to the contraband, the finding of guilt shows that the error actually affected the outcome of the trial.

(Trial Tr., p.466, Ls.3-9.) Further, given the dearth of evidence upon which the jury could have relied to infer that Ms. Dearing had knowledge of, as well as the power and intent to control, the marijuana hash oil found in the hotel room (*see* Appellant’s Brief, pp.5-9), the guilty verdict showed that the State’s misrepresentation of the meaning of a crucial element of both crimes affected the outcome of the trial.

The State does not address this evidence. Instead, it claims “the record demonstrates any error in the prosecutor’s description of possession was harmless.” (Respondent’s Brief, p.22.) This is not true. The prosecutor talked about the instruction and *then* misrepresented what it meant to possess something. (Trial Tr., p.465, L.16 – p.466, L.9.) This amounted to fundamental error, and the State has failed to show that the prosecutor’s statements were harmless.

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 1st day of July, 2019.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of July, 2019, I caused a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, to be served as follows:

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SJC/eas