

IN THE SUPREME COURT OF THE STATE OF DELAWARE

LINWOOD ELEY,	§	
	§	No. 261, 2009
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
v.	§	for Sussex County
	§	
STATE OF DELAWARE,	§	ID No. 0809019890
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: October 20, 2010
Decided: December 28, 2010

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

ORDER

This 28th day of December 2010, it appears to the Court that:

(1) Defendant-Below/Appellant, Linwood Eley, appeals from his Superior Court convictions for two counts of possession of a deadly weapon by a person prohibited (“PDWPP”). Eley raises two arguments on appeal. First, Eley contends that the trial judge erred in denying his motion for judgment of acquittal because the State did not present sufficient evidence of constructive possession. Second, Eley contends that his convictions should be reversed due to an incorrect statement of the law to the jury by the prosecutor -- upheld by the trial judge -- regarding the doctrine of constructive possession. We find no merit to Eley’s first argument. As to his second argument, we must reverse the PDWPP convictions

because of the inconsistent definitions of constructive possession provided to the jury.

(2) In 2008, police conducted a lawful search of a dwelling shared by Eley, Holly Richardson, and Juan Carlos Diaz. Police found drugs in the kitchen and controlled substances in Eley's bedroom. While searching Diaz's bedroom, police looked between the mattress and the box spring of a bed and found a gun and two magazines loaded with hollow-point rounds. Eley told police that the gun and ammunition belonged to his sister, Sophia. Eley also told police that he allowed Sophia to store the gun in the house after Sophia's young son found it in Sophia's house. Sophia corroborated Eley's account.

(3) Eley was charged by indictment with two counts of PDWPP, maintaining a dwelling for the keeping of controlled substances, conspiracy second degree, possession of cocaine, and possession of drug paraphernalia.¹ At the close of the State's case, Eley moved for acquittal of the PDWPP counts on the ground that the State did not present sufficient evidence of constructive possession. The trial judge denied the motion.

(4) Throughout the trial, the record reveals that the prosecutor and defense counsel debated whether the State had to prove intent to establish

¹ Eley also was charged with two additional PDWPP counts and possession of hydrocodone, but the State *nolle prossed* those charges.

constructive possession.² The defense prevailed on that debate on the initial jury instruction. Prior to closing arguments, the trial judge instructed the jury on constructive possession as follows:³

Constructive possession means that the deadly weapon was within the defendant's reasonable control. That is, it was about his person, premises, belongings, or vehicle. In other words, the defendant had constructive possession over the deadly weapon if he had both the power and the intention, at a given time, to exercise control over the deadly weapon, either directly or through another person.⁴

During the State's rebuttal closing argument thereafter, the following exchange occurred:

PROSECUTOR: Accordingly, the State doesn't have to prove that he intended to exercise control of the gun just that he could because it was there. In other words --

² For example, during Eley's closing argument, the following exchange occurred at a sidebar conference:

PROSECUTOR: He just told the jury that they have to look through the evidence and find intent There is no intention that the State needs to prove here.

ELEY'S COUNSEL: That is ridiculous here. This is an intent crime.

PROSECUTOR: . . . The State does not need to prove that he intended to get the gun, only that it's there. . . .

THE COURT: Then you can argue that. You can argue that.

³ The Superior Court Criminal Rules of Procedure permit this practice. *See* Super. Ct. Crim. R. 30 ("The court may instruct the jury before or after the arguments are completed or at both times.").

⁴ After the State's closing argument but before its rebuttal closing argument, the trial judge reiterated to the jury: "[T]he defendant had constructive possession over the deadly weapon if he had both the power and the intention, at a given time, to exercise control over the deadly weapon, either directly or through another person. What that sentence is basically saying is if, at any given time, he intended to obtain control of the gun, he had the power to do so."

ELEY'S COUNSEL: Objection, Your Honor, that was a misstatement of what you just said.

THE COURT: I don't think so, Counsel.⁵

(5) Prior to jury deliberations, Eley moved for a mistrial on the ground that the prosecutor misstated the law of constructive possession during the State's rebuttal closing argument. The trial judge denied the motion and provided the jury with a copy of the instructions for its deliberation. The trial judge also decided to give a supplemental jury instruction, but changed his mind and did not do so after defense counsel objected. The supplemental jury instruction would have provided:

If you find beyond a reasonable doubt that Mr. Eley intentionally or knowingly permitted a firearm and/or ammunition to be kept in his home, and the defendant knew he had the power and ability to lay his hands on the firearm and/or ammunition, then the element of constructive possession has been proven.

(6) The trial judge explained his reasoning for not giving the supplemental instruction in two ways. First, he noted in his handwriting on the supplemental instruction sheet: "Not given [because] defendant said [it] undermined argument [], so State left w[ith] higher burden." He also explained to defense counsel on the record:

⁵ During a sidebar conference thereafter, the trial judge stated: "This is what the case comes down to in my mind. If you find beyond a reasonable doubt that he intentionally and knowingly permitted a firearm and/or ammunition to be introduced into his home and that the defendant knew the firearm and ammunition was accessible to him, *i.e.*, could take control of the firearm and ammunition, constructive possession has been proven."

I think that yesterday if I had the same case law, . . . what I gave them would have been different as to [the PDWPP counts]. So I accepted your argument this morning that by giving them that new instruction I may have pulled the rug out from under your argument. So, you actually got the better instruction with a higher burden perhaps than the law sets. . . . I don't like that language with intent in it, and I think that language is more driven by the drug cases than anything else. It is similar to that designee or those cases for somebody to be convicted they have to have an interest, basically, an interest in the drugs. That's what you are coming down to. The bottom line is not just knowing that they are there. In these types of cases, you have to have -- all you need is the gun. You know you got the gun. It's available to you. And you know the reasonable access is even debatable because that is the kind of language that goes back to the weapon during the commission. So I think that instruction probably has to be reworked completely, at least in my mind.

(7) With a written instruction on the higher burden and the prosecutor's argument -- upheld by the trial judge -- for a lesser burden having been given on constructive possession, the jury convicted Eley of two counts of PDWPP, maintaining a dwelling for the keeping of controlled substances, and conspiracy second degree.⁶ Thereafter, the trial judge sentenced Eley to three years at level V incarceration for one of the PDWPP counts; and eight years at level V for the other PDWPP count, suspended after three years and completion of a drug treatment program. The trial judge sentenced Eley to probation for the maintaining a

⁶ A mistrial was declared as to the possession of cocaine and drug paraphernalia charges because the jury was unable to reach a unanimous verdict.

dwelling for the keeping of controlled substances and conspiracy second degree convictions. This appeal followed.⁷

(8) Eley argues that the PDWPP convictions should be reversed due to the incorrect statement of the law regarding the doctrine of constructive possession. We review *de novo* a trial judge's decision to overrule a defense objection to remarks made during closing argument.⁸

(9) Title 11, section 1448(b) of the Delaware Code provides that a felon “who knowingly possesses, purchases, owns or controls a deadly weapon or ammunition . . . while so prohibited shall be guilty of [PDWPP].” In *Lecates v. State*,⁹ we explained that sufficient evidence of constructive possession is adequate to support a PDWPP conviction.¹⁰ We also articulated the State's burden in proving constructive possession as follows:

[T]he State need[s] to present sufficient evidence that [a defendant]: (1) knew the location of the gun; (2) had the ability to exercise dominion and control over the gun; and (3) intended to guide the destiny of the gun. Although “mere proximity to, or awareness of [contraband] is not sufficient to establish constructive possession,” it is well established that circumstantial evidence may prove constructive possession.¹¹

⁷ Eley appeals his PDWPP convictions, but does not challenge his convictions for maintaining a dwelling for the keeping of controlled substances and conspiracy second degree.

⁸ See *Briscoe v. State*, 905 A.2d 746, 2006 WL 2190581, at *3 (Del. 2006) (TABLE) (citing *Chapman v. State*, 821 A.2d 867, 870 (Del. 2003)).

⁹ 987 A.2d 413 (Del. 2009).

¹⁰ See *id.* at 421.

¹¹ *Id.* at 426.

Thereafter, in *State v. Clayton*,¹² we clarified our holding in *Lecates*. In *Clayton* -- a case arising after this one -- we accepted a certified question from the trial judge, who also tried this case, as follows:

[Is] the phrase “intention to guide the gun’s destiny” [] a required element of the constructive possession jury instruction or [may] the phrase [] be construed to explain how the defendant’s intention, at a given time, to exercise dominion and control over a firearm might be shown?

We concluded:

The phrase “intended to guide the destiny of the gun” is not a required element of the constructive possession jury instruction when a defendant is charged with [PDWPP]. *That phrase is properly regarded as one way to explain how the State can establish the defendant’s intention, at a given time, to exercise dominion and control over a deadly weapon.*¹³

(10) Here, in his oral instructions before and during closing arguments and in the written copy provided to the jury thereafter, the trial judge explained that “the defendant had constructive possession over the deadly weapon if he had both the power and the intention, at a given time, to exercise control over the deadly weapon, either directly or through another person.” This is an accurate statement of the law. But the prosecutor directly contradicted the instruction during his rebuttal closing argument: “the State doesn’t have to prove that he intended to exercise control of the gun just that he could because it was there.” After Eley objected to that remark as a misstatement of the law, the trial judge replied, “I

¹² 988 A.2d 935 (Del. 2010).

¹³ *Id.* at 936 (emphasis added).

don't think so, Counsel.” The prosecutor's remark -- upheld by the trial judge -- was inconsistent with the earlier jury instruction and the argument defense counsel made in reliance upon them. The jury should have been told to disregard the prosecutor's argument based upon that inconsistent definition. We have explained that defendants “enjoy the ‘unqualified right’ to a correct statement of the law.”¹⁴ Given the conflicting definitions of constructive possession that were provided to the jury, we cannot conclude with confidence that the jury applied the correct definition of constructive possession in reaching its verdicts on the PDWPP counts.

(11) In *Hughes v. State*,¹⁵ we articulated a test to determine “whether an improper prosecutorial remark required the reversal of a conviction on the basis that the remark prejudicially affected the substantial rights of the accused.”¹⁶ We are required to examine: (1) the centrality of the issue affected by the alleged error; (2) the closeness of the case; and (3) the steps taken to mitigate the effects of the alleged error.¹⁷ The constructive possession issue was central in this close case. The trial judge agreed with the prosecutor's misstatement, instead of telling the jury to disregard it. The exchange that occurred during the State's rebuttal closing argument created an inconsistency that “undermine[s] . . . our confidence in [the

¹⁴ *Comer v. State*, 977 A.2d 334, 342 (Del. 2009) (citing *Banther v. State*, 884 A.2d 487, 492–93 (Del. 2005)).

¹⁵ 437 A.2d 559 (Del. 1981).

¹⁶ *Briscoe*, 2006 WL 2190581, at *3 (citing *Hughes*, 437 A.2d at 571).

¹⁷ *See id.*

jury's] ability to [reach a verdict] fairly under the circumstances.”¹⁸ Because we may not disregard the prosecutor's remark as harmless error,¹⁹ Eley is entitled to a new trial on the PDWPP counts.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court on the PDWPP counts are **REVERSED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

¹⁸ See *Comer*, 977 A.2d at 342–43 (citing *Brown v. State*, 967 A.2d 1250, 1255 (Del. 2009)).

¹⁹ An error, defect, irregularity or variance that affects a substantial right of a defendant shall not be disregarded as harmless error. See *Burroughs v. State*, 988 A.2d 445, 449 (Del. 2010) (citing *Taylor v. State*, 685 A.2d 349, 350 (Del. 1996)).