

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 67164-2-I
Respondent,)	
)	DIVISION ONE
v.)	
)	
MIRANDA ROSE THOMAN,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: July 25, 2011
)	
_____)	

Becker, J. — A defendant has the burden of proving unwitting possession when the charge is simply possession of a controlled substance. However, when the charge is possession of a controlled substance with intent to deliver, the State has the burden of proving intent, which includes the burden of proving that the defendant had knowledge of the controlled substances. The State’s closing argument erroneously stated it was the defendant’s burden to prove unwitting possession as to the charge of possession with intent. Because there is a substantial likelihood the error affected the verdict, we reverse and remand for a new trial.

Miranda Thoman was driving a car in the city of Centralia. Her boyfriend, Leonard Young, was in the passenger seat. Two children were in the backseat.

Police officer Douglas Lowrey pulled Thoman over near Washington Elementary School after observing a traffic violation. Upon discovering that Thoman's license was suspended, Officer Lowrey detained her and placed her in the back of his police car.

Officer Mike Smerer arrived on the scene. He "overheard dispatch mention something about a protection order" in favor of Thoman against a male. He went to the passenger side of the car and asked Thoman's boyfriend what his name was. Young lied and said his name was "Daniel Kaloosh" (phonetic). When asked to spell his last name, Young was unable to. The officers asked him to step out of the vehicle. After Young got out, Officer Lowrey noticed on the passenger side floor a pipe identifiable as a type used for smoking methamphetamine.

Young admitted the pipe was his. He was arrested and searched. The officers found "a significant amount of currency" on Young. He was not, however, subject to the protection order as they had suspected.

Thoman was cited and released. The car was impounded. Police obtained a warrant to search it. In the trunk, they found two backpacks belonging to Thoman. No drugs or contraband were found in the backpacks. Hidden in the car jack compartment in the trunk were methamphetamine, pipes, and a scale. Also in the trunk were some small empty ziplock bags with Batman logos.

Four days later, Thoman called the police about picking up her

belongings from the car. Officer Smerer invited her to come down to the station. When she did, Officer Smerer arrested her. Thoman denied knowing that methamphetamine was in the car trunk.

The State charged Thoman with possession with intent to deliver and sought a school zone enhancement. At trial, Young testified that the methamphetamine was his and Thoman did not know about it.

A jury convicted Thoman as charged and answered “yes” to a special verdict form asking if the crime occurred in a school zone. Based on an offender score of 10 and the enhancement, the court sentenced Thoman to eight years of confinement.

JURY INSTRUCTIONS

Thoman argues that the “unwitting possession” instruction relieved the State of its burden to prove the possession with intent to deliver charge.

The State proposed the jury instructions in this case. Thoman did not propose or object to any instructions. We may refuse to address an unpreserved claim of error unless the claimed error is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. Schaler, 169 Wn.2d 274, 282, 236 P.3d 858 (2010). An instruction that erroneously shifts the burden of proof is manifest constitutional error. See State v. O’Hara, 167 Wn.2d 91, 100, 217 P.3d 756 (2009). Thus, we review Thoman’s alleged error.

Thoman was charged with possession with intent to deliver. The crime was defined in jury instruction 3: “It is a crime for any person to possess with

intent to deliver a controlled substance.” Instruction 4, the “to-convict” instruction, laid out the three elements that the jury was required to find to return a guilty verdict:

To convict the defendant of the crime of Possession of a Controlled Substance with Intent to Deliver, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 3rd day of December, 2009, the defendant possessed a controlled substance, to Wit:

Methamphetamine;

(2) That the defendant possessed the substance with the intent to deliver a controlled substance;

(3) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Thoman was not charged with simple possession. Instruction 5, however, instructed the jury to consider the lesser crime of possession if the jury was not satisfied beyond a reasonable doubt that Thoman was guilty of possession with intent to deliver:

The defendant is charged with Possession of a Controlled Substance with Intent to Deliver. If, after full and careful deliberation on this charge, you are not satisfied beyond a reasonable doubt that the defendant is guilty, then you will consider whether the defendant is guilty of the lesser crime of Possession of a Controlled Substance.

When a crime has been proved against a person, and there exists a reasonable doubt as to which of the two crimes that person is guilty, he or she shall be convicted only of the lowest crime.

Instruction 6, the “to-convict” instruction, laid out the two elements that the jury was required to find to return a guilty verdict on the lesser crime:

To convict the defendant of the crime of Possession of a

Controlled Substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 3rd day of December, 2009, the defendant possessed a controlled substance, to Wit:

Methamphetamine;

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Instruction 7 defined the crime of possession: “It is a crime for any person to possess a controlled substance except as authorized by law.”

Instruction 8 told the jury that “Methamphetamine is a controlled substance.”

Instruction 9 defined possession and distinguished between actual possession and constructive possession:

Possession means having a substance in one’s custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to establish constructive possession.

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

Instruction 10, the central instruction at issue in this appeal, instructed the jury on the affirmative defense of “unwitting possession”:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in her possession.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

Instruction 11 informed the jury that “Deliver means the actual or constructive transfer of a controlled substance from one person to another.”

Instruction 12 defined “intent”: “A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime.”

Instruction 13 defined “knowledge”:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance or result when he or she is aware of that fact, circumstance or result. It is not necessary that the person know that the fact, circumstance or result is defined by law as being unlawful or an element of a crime.

If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

Thoman argues instruction 10, the unwitting possession instruction, was erroneous because the instructions did not make manifestly clear to the jury that the unwitting possession instruction applied only to the lesser crime of

possession, and not to the charge of possession with intent.

Thoman is correct that the unwitting possession defense applies only to possession, not the greater offense of possession with intent. While knowledge of the nature of the controlled substance is not an element of the offense of possession with intent to deliver, it is “impossible for a person to intend to manufacture or deliver a controlled substance without knowing what he or she is doing.” State v. Sims, 119 Wn.2d 138, 142, 829 P.2d 1075 (1992); State v. Sanders, 66 Wn. App. 380, 390, 832 P.2d 1326 (1992). Thus, guilty knowledge of the nature or presence of the substance is subsumed under the statutory requirement that the defendant intended to deliver a controlled substance. Sanders, 66 Wn. App. at 380. The State, not the defendant, has the burden of proving intent. It follows that if the State fails to prove that the defendant had knowledge of the controlled substances, the State has failed to prove intent.

Unlike the greater offense of possession with intent to deliver, mere possession does not have a mens rea element. State v. Bradshaw, 152 Wn.2d 528, 530, 98 P.3d 1190 (2004), cert. denied, 544 U.S. 922 (2005). Besides having to prove that the crime occurred in Washington, the State has to prove only a single element, possession, to obtain a conviction. A defendant may avoid conviction by proving the affirmative defense of unwitting possession. This defense ameliorates the harshness of a strict liability crime. Bradshaw, 152 Wn.2d at 538. The defendant has the burden of proving, by a preponderance of the evidence, that the possession was unwitting. State v. Balzer, 91 Wn. App.

44, 67, 954 P.2d 931, review denied, 136 Wn.2d 1022 (1998).

Thoman argues that the jury could have mistakenly applied the unwitting possession instruction to the crime of possession with intent to deliver, thereby relieving the State of its burden of proving the subsumed knowledge requirement of the intent element.

The instructions, per se, were not erroneous even though they could have been clearer. Thoman is right that the instructions did not explicitly say that the defendant's burden to prove unwitting possession applied only to the lesser crime of possession. And the affirmative defense instruction did not immediately follow the to-convict instruction for possession which would have provided the jury better context. But the language in instruction 10—"a person is not guilty of possession of a controlled substance if the possession is unwitting"—fairly implies that the instruction applied only to the lesser crime of possession and not to the greater offense. Without evidence that the jury may have been misled as to the applicability of the instructions, we cannot say the State's burden was shifted to Thoman.

PROSECUTORIAL MISCONDUCT

The jury, however, was not given the instructions in a vacuum. They heard closing argument referring to the instructions. Thoman argues that the prosecutor committed misconduct during closing argument by improperly using the unwitting possession instruction to argue that Thoman carried the burden to prove lack of knowledge in relation to intent to deliver charge. We agree.

Prosecutorial misconduct is grounds for reversal where there is a substantial likelihood that the improper conduct affected the jury. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In Fisher, the court observed that the term “prosecutorial misconduct” is “really a misnomer when applied to mistakes made by the prosecutor during trial.” Fisher, 165 Wn.2d at 740 n.1. But the court has declined to start drawing fine lines between prosecutorial “error” and “misconduct.” State v. Ish, 170 Wn.2d 189, 195 n.6, 241 P.3d 389 (2010). “If prosecutorial mistakes or actions are not harmless and deny a defendant fair trial, then the defendant should get a new one.” Fisher, 165 Wn.2d at 740 n.1.

In closing argument, the prosecutor first discussed the instruction on direct and circumstantial evidence. Then, referring to instruction 4, he went through the elements of possession with intent to deliver. The next topic was instruction 9, on constructive possession. The prosecutor then turned to instruction 10, what he considered to be “the pivotal instruction,” and related it to instruction 4, the to-convict instruction on the greater crime:

Let me ask you one more question, answer it to yourself. And this instruction, this element instruction, which is what the state has to prove, is the word knowing up there anywhere, do you see the word knowing. It is not there, and this is why. Once again, like Number 9, this next instruction, quite frankly, what the State considers to be the pivotal instruction of this entire case, it is Number 10. This one you have to look at very, very carefully.

(Emphasis added.) Without referring to the intervening instructions on the lesser crime of possession, the prosecutor emphasized that it was Thoman’s

burden to prove her possession was unwitting:

A person is not guilty of possession of a controlled substance if the possession is unwitting. They didn't know about it. But read further, possession of a controlled substance is unwitting if that person did not know the substance was in her possession, the second paragraph, the burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly.

Preponderance of evidence means that you must be persuaded concerning all the evidence in the case it is more probably true than not true. This is one of the very few times in our jurisprudence system that the defendant has to prove anything. But in this case, it is the circumstance. Ask yourself did the defense prove to you by a preponderance that Ms. Thoman didn't know she had this in her car[?] . . .

The State submits to you all this evidence and where it was located and the circumstances of her possession of the vehicle and driving it all leads to the conclusion that she knew it was there. But, more importantly, it doesn't prove by a preponderance that she didn't know it was there. What makes sense[?] The State would simply ask you to take a hard look at Instruction Number 9, Instruction Number 10, and ask yourself those questions.

(Emphasis added.) At no point did the prosecutor refer the jury to the instruction that it should consider the lesser crime of possession only if the jury had a reasonable doubt as to the possession with intent charge. The prosecutor also did not refer to the instruction defining the crime of possession (instruction 7) or to the to-convict instruction describing the elements of possession (instruction 6).

On rebuttal, the prosecutor again emphasized the unwitting possession instruction, stating that it was "the instruction that this case hinges on":

The issue or the instruction that this case hinges on is this one, unwitting possession. Whose burden is that[?] [T]he defense. Take a look at all the evidence. Does the evidence point to the fact, does it lead you to believe more probably than not she didn't know it was there[?] State's convinced that simply is not a

reasonable inference from all the facts and all the evidence supplied to you.

The prosecutor continued to argue that Thoman had not met her burden, and at this point, the misleading argument became explicit. The prosecutor argued that because Thoman failed to carry her burden of proving unwitting possession, the jury should convict her of possession with intent to deliver:

State would ask you to go back and look at the evidence and use your common sense to determine the elements of the crime, and then take what you have seen and ask yourself, did the defense with some evidence prove that her possession was unwitting[?] State submits the only reasonable conclusion from all that is, no, they haven't proved that, and that your verdict should be guilty of possession with intent to deliver.

The prosecutor's arguments may have been proper if they were limited to the lesser offense of possession, but they were not. In fact, at no point during closing argument did the prosecutor refer to the other instructions exclusively related to possession. Instead, the prosecutor repeatedly linked the unwitting possession defense to the possession with intent charge.

It is an "unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of any reasonable doubt." State v. Warren, 165 Wn.2d 17, 26-27, 195 P.3d 940 (2008), cert. denied, 129 S. Ct. 2007 (2009). It is "error for the State to suggest otherwise." Warren, 165 Wn.2d at 27. Here, the State did more than just suggest it did not have to prove knowledge to establish possession with intent. The prosecutor explicitly argued that Thoman had failed to prove she did not know the methamphetamine was in the car, and therefore, the jury should convict her of

possession with intent to distribute. The prosecutor also incorrectly said the reason “knowledge” was not an element of possession with intent was because it was the defendant’s burden to prove lack of knowledge.

A prosecutor’s mischaracterization of the law can qualify as prosecutorial misconduct that will justify reversal. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984); State v. Gotcher, 52 Wn. App. 350, 759 P.2d 1216 (1988). However, a defendant’s failure to object to a prosecutor’s improper remark constitutes a waiver, unless the remark was so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice incurable by a jury instruction. State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006).

We do not characterize the prosecutor’s remarks as ill-intentioned. It seems that both counsel were simply unaware of the nuances of the law. But given the pervasive and highly misleading nature of the argument, in a case where the jury instructions did not explicitly say otherwise, it is unlikely that a hypothetical curative instruction such as telling the jury to reread their instructions would have ensured that the jury correctly understood the law. See Davenport, 100 Wn.2d at 763 (instructions insufficient to cure prosecutor’s erroneous comments that it could convict the defendant as a accomplice though there was no accomplice liability instruction); State v. Dixon, 150 Wn. App. 46, 58-59, 207 P.3d 459 (2009) (instruction would not have cured the burden shifting effect of prosecutor’s argument that defendant should have testified or called a witness).

Thus, even though Thoman did not object during closing argument, we conclude the prosecutor's remarks constituted reversible error. The law is clear that a defendant's burden to prove unwitting possession does not apply to a possession with intent charge. Sanders, 66 Wn. App. at 390. It is flagrant misconduct to shift the burden of proof to the defendant. State v. Miles, 139 Wn. App. 879, 890, 162 P.3d 1169 (2007). The prosecuting attorney misstating the law of the case to the jury "is a serious irregularity having the grave potential to mislead the jury." Davenport, 100 Wn.2d at 763.

The jury was likely left with a misunderstanding on the burden of proof. Whether Thoman knew the car she was driving had methamphetamine in the trunk was the central issue in the case. Thus, there was a substantial likelihood that the misconduct affected the jury's verdict.

Because this error justifies reversal, we decline to address the other issues raised by Thoman in her brief and statement of additional grounds.

Reversed and remanded for a new trial.

Becker, J.

WE CONCUR:

Dupre, C. J.

Leach, A. C. J.

