

County Criminal Court: CRIMINAL PROCEDURE—Prosecutorial Comment. Prosecutorial comments made during closing arguments created a reasonable likelihood that the comments influenced the jury and deprived defendant of a fair trial. Reversed and remanded. *Jose Luis Sanchez v. State of Florida*, No. 13-CF-6046-ES (Fla. 6th Cir. App. Ct. December 18, 2014).

NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

**IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT
OF THE STATE OF FLORIDA, IN AND FOR PASCO COUNTY
APPELLATE DIVISION**

**JOSE LUIS SANCHEZ,
Appellant,**

v.

**STATE OF FLORIDA,
Appellee.**

**UCN: 512013CF006046A000ES
Case No: CRC1306046CFAES
Lower No: 13-2220-MM-ES**

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Appeal from Pasco County Court,

Honorable Candy VanDercar,

Thomas McLaughlin, Esq.
for Appellant.

ORDER AND OPINION

We find the cumulative effect of several prosecutor comments made during closing arguments in this case went directly to Appellant's main defense at trial, and created a reasonable likelihood that the jury was influenced by these comments, thereby depriving Appellant of a fair and impartial trial. The order of the trial court is therefore reversed and remanded for further proceedings consistent with this opinion.

STATEMENT OF THE CASE AND FACTS

Appellant was a passenger in a vehicle driven by his cousin, when the vehicle was pulled over for a traffic stop. The Deputy stated that she noticed a smell of marijuana upon approaching the vehicle, and ordered the parties out of the vehicle.

Once other deputies arrived, a search of the vehicle produced a bag of marijuana found in the vehicle's center console. Appellant initially denied the marijuana belonged to him, but claims the Deputy threatened to have the truck towed if neither party admitted to ownership of the marijuana, a claim which the Deputy denied at trial, and that out of concern for the truck, which belonged to Appellant's aunt, and upon repeated questions by the Deputies, Appellant stated that the marijuana belonged to him, whereas Appellant's cousin denied ownership. Appellant was charged with one count of misdemeanor possession of marijuana, in violation of § 893.13(6)(b), Fla. Stat. A trial was had on September 11, 2013. At trial, Appellant testified that he knew the marijuana was in the truck because he was with his cousin when he obtained the marijuana from a friend's house. Appellant's cousin testified at trial and admitted that he owned the marijuana, and not Appellant.¹ (Trial Tr. at 148) Prior to testifying, Appellant's cousin was informed by the trial court that if he intended to testify and admit to a crime, the State may file charges against him as well, and that he could not be forced to implicate himself in a crime. (Trial Tr. at 142) Appellant's cousin later testified that the marijuana belonged to him.

During closing arguments, defense counsel objected to statements made by the prosecutor including that Appellant's cousin did not corroborate Appellant's statements, and that Appellant's cousin testified that the marijuana did not belong to him. (Trial Tr. at 184) The prosecutor went on to comment that if the marijuana was found in Appellant's vehicle, and the only other occupant of that vehicle denied ownership, the cousin's testimony favored the prosecution, rather than the defense, and that Appellant's testimony that the marijuana was not his was "completely at odds with what his cousin said on the stand." (Trial Tr. at 184-85) The trial court overruled the objection, stating that the jurors would rely on their own recollection of evidence presented. (Trial Tr. at 186) When defense counsel then stated during closing arguments that Appellant's cousin admitted to ownership of the marijuana during his testimony, the prosecutor objected to this statement, claiming that Appellant's cousin never stated in testimony

¹ After the prosecutor's objection to defense counsel restating this testimony during closing, the prosecution argued that the witness never admitted ownership, and the trial court made statements which indicate the court may not have recalled this admission. (Trial Tr. at 189)

that the marijuana was his. (Trial Tr. at 189) The trial court overruled the objection, but gave a curative instruction to the jury that “what the attorneys say is not evidence,” and that the jury should rely on personal recollections of the testimony presented at trial. Appellant was found guilty and sentenced to 30 days in Pasco County Jail. Appellant filed a timely notice of appeal. Appellant’s main contention of error is based on alleged improper prosecutorial comments which mischaracterized the testimony of Appellant’s cousin as having denied ownership of the marijuana.

STANDARD OF REVIEW

A trial court’s “rulings concerning prosecutorial comments are subject to an abuse of discretion standard of review.” *Taylor v. State*, 640 So. 2d 1127, 1133 (Fla. 1st DCA 1994). Reversal is appropriate if the comments “deprive the defendant of a fair and impartial trial, materially contribute to the conviction,” are “so harmful or fundamentally tainted as to require a new trial, or . . . so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.” *Spencer v. State*, 645 So. 2d 377, 383 (Fla. 1994).

LAW AND ANALYSIS

Appellant contends the conviction should be overturned due to the improper comments made during closing arguments which mischaracterized testimony at trial which was essential to Appellant’s defense. Appellant contends that allowing the prosecutor to misstate the witness testimony in closing arguments amounted to a misrepresentation of the evidence to the jury which gave the indication that the prosecutor’s version of the facts was correct, when in fact the testimony from the witness was that he, and not Appellant owned the marijuana. Appellant claims these statements were detrimental to Appellant’s defense at trial, which was that the marijuana belonged to his cousin and not to him.

The latitude permitted in closing arguments does not extend to allowing improper arguments. *Johnson v. State*, 917 So. 2d 226, 234 (Fla. 3d DCA 2005). It is improper for the prosecutor in a case to argue facts which are not in evidence. *Fenster v. State*, 944 So. 2d 477, 479-80 (Fla. 4th DCA 2006). Although the prosecutor may inform the jury it

could disregard any testimony based on credibility, it was improper to inform the jury that the witness testified to facts that are not supported by the record, by stating that Appellant's cousin denied ownership of the contraband, when the record demonstrates the contrary. See *Miller v. State*, 782 So. 2d 426, 431-32 (Fla. 2d DCA 2001) (finding fundamental error based on the cumulative impact of prosecutorial comments which incorrectly characterized witness testimony as expert testimony, and misrepresented the testimony of another witness which "impermissibly boosted the strength and credibility of" one witness, "while, at the same time, impermissibly and severely damaging the credibility" of another, and that without this "evidence, the jury could not have returned a verdict of guilty"). See also *Robinson v. State*, 989 So. 2d 747, 750 (Fla. 2d DCA 2008) (finding error when the prosecutor made "a false characterization of the testimony when there was no competent evidence to prove that [the witness] said any such thing," and the improper statement "materially contributed to the conviction such that [the defendant] was deprived of a fair and impartial trial").

In *Robinson*, the Court found that in the absence of the improper prosecutorial statements, only circumstantial evidence supported the defendant's conviction, and that the mischaracterization had gone "directly to the heart of [the defendant's] defense." See *id.* at 751. In this case, although the prosecutorial comments were improper and went directly to the heart of Appellant's defense, there was more than circumstantial evidence in the record to support Appellant's conviction absent the improper comments. We examine the impact of the improper comments made in this case applying the holdings from *Robinson* and *Miller*, *supra*.

"Constructive possession exists where it is shown that the accused knows of the presence of the contraband and has the ability to maintain control over it or reduce it to his possession, even though he does not have it in his physical possession." *Byers v. State*, 17 So. 3d 825, 827 (Fla. 2d DCA 2009) (citing *State v. Snyder*, 635 So. 2d 1057, 1058 (Fla. 2d DCA 1994)).² "To establish constructive possession, the state must prove dominion and control over the contraband, knowledge of the contraband's presence,

² The jury was instructed on both actual and constructive possession, and that "actual possession" includes proximity to a substance if it is under the defendant's control, and that possession may be joint, meaning that two or more persons possess an article and exercise control over it. (Trial Tr. at 198-99).

and knowledge of the illicit nature of the contraband.” *Smith v. State*, 687 So. 2d 875, 878 (Fla. 2d DCA 1997) (citing *Hampton v. State*, 662 So. 2d 992 (Fla. 2d DCA 1995)). When “the contraband is found in a vehicle over which the accused has joint possession, the accused’s knowledge of the presence of the contraband and her ability to control it will not be inferred but must be established by independent proof” beyond a reasonable doubt. *Id.* (citing *Moffatt v. State*, 583 So. 2d 779 (Fla. 1st DCA 1991). See *Rangel v. State*, 110 So. 3d 41 (Fla. 2d DCA 2013); *K.A.K. v. State*, 885 So. 2d 405 (Fla. 2d DCA 2004); *D.M.C. v. State*, 869 So. 2d 575, 576-78 (Fla. 2d DCA 2003).

In *Byers v. State*, 17 So. 3d 825 (Fla. 2d DCA 2009), the defendant was arrested for carrying a concealed weapon while standing outside a motel room. Defendant consented to a search of his vehicle where the officers found a black bag containing methamphetamine. The defendant admitted he knew the methamphetamine was in the car, that he drove to the motel with the knowledge that his passenger intended to sell the methamphetamine and defendant would receive a small amount of the drug in exchange for his help. The court found that although defendant’s statements were sufficient to prove knowledge of the presence and illicit nature of the drug, they were insufficient to allow an inference as to defendant’s ability to exercise dominion and control over the drug. *Id.* at 827 (defendant’s “ability to exercise dominion and control” over contraband “found in a location that was accessible to more than one person” cannot be inferred but “must be established by independent proof”). In the absence of anything other than circumstantial evidence as to an essential element of proof of constructive possession, dominion and control could not be inferred unless the evidence was “inconsistent with any reasonable hypothesis of innocence.” *Id.* at 828. Therefore, the independent proof in the form of defendant’s admissions would not permit an inference that defendant also had control over the drug. *Id.* at 827 (“Whether an individual had dominion and control is generally a fact issue for the jury; however, a judgment of acquittal is proper when the State does not adduce evidence from which dominion and control can be inferred”). Although the evidence in *Byers* may have supported a permissible inference that defendant had dominion and control over the contraband, the State did not eliminate a reasonable hypothesis of innocence that the drugs belonged exclusively to the passenger of the car, and the order was reversed on

this basis. *Id.* at 828 (cited with approval in *M.A.F. v. State*, 80 So. 3d 1088 (Fla. 2d DCA 2012)). Appellant claims that State failed to eliminate any reasonable hypothesis of innocence in this case, and therefore the verdict must be reversed.

State failed to file an Answer Brief in this matter, despite notice provided that the Court would proceed without a response from the State. Nevertheless, the decision of the trial court is presumed correct and Appellant has the burden of demonstrating reversible error. See *Goodwin v. State*, 751 So. 2d 537 (Fla. 1999). We find Appellant has demonstrated a reasonable likelihood that the improper prosecutorial comments made in this case went directly to the heart of the main defense, which was that the contraband belonged to Appellant's cousin. Appellant's cousin testified at the hearing that the contraband belonged to him, and not to Appellant; however, the prosecutor in this case mischaracterized Appellant's cousin as having testified that the contraband was not his and belonged to Appellant. This was a mischaracterization that goes directly to the heart of Appellant's defense, and was indeed improper. See *Robinson*, 989 So. 2d at 750-51.

It is appropriately a question for the jury as to whether the State met the burden of demonstrating Appellant had the ability to exercise dominion and control over the contraband, without consideration of improper statements made during closing arguments that Appellant's cousin denied ownership, when the witness admitted ownership during testimony, which would tend to rebut the necessary element of dominion and control. Although the evidence does not eliminate any reasonable hypothesis of innocence due to the cousin's testimony claiming ownership of the contraband, Appellant's post-Miranda, pretrial statements to the officer admitting ownership of the marijuana, introduced into evidence by the officer's testimony and police report, would constitute direct evidence from which a jury could find dominion and control without the necessity of an inference based on circumstantial evidence. See *Santiago v. State*, 991 So. 2d 439, 442 (Fla. 2d DCA 2008) ("Generally, independent proof can be established by the admission into evidence of a pretrial statement made by an accused, by witness testimony, or by scientific evidence.").

However, the standard is different when the question is whether to reverse the jury verdict based on improper prosecutorial comments rather than the sufficiency of the evidence. The comments “must either deprive the defendant of a fair and impartial trial, materially contribute to the conviction, be so harmful or fundamentally tainted as to require a new trial, or be so inflammatory that they might have influenced the jury to reach a more severe verdict than that it would have otherwise.” *Robinson*, 989 So. 2d at 750 (citing *Spencer*, 645 So. 2d at 383). See *Delhall v. State*, 95 So. 3d 134 (Fla. 2012). In *Robinson*, absent the improper prosecutorial mischaracterization of the evidence, the jury was left only with circumstantial evidence from which to infer an essential element of the crime, and therefore the court concluded the statements materially contributed to the conviction such that the defendant was deprived of a fair and impartial trial. *Id.* at 750-51.

In *Robinson*, the Court based its conclusion on the fact that the State had mischaracterized evidence in closing by giving an incorrect impression that the evidence supporting an element of the crime was direct, rather than circumstantial, by misstating witness testimony. On that basis, the Court concluded that although circumstantial evidence supported the prosecutor’s general statement, “it was hardly the same force as the ersatz ‘evidence’ argued in closing.” *Id.* at 750-51. Further, the “improper argument went directly to the heart of” the defense. *Id.* at 751. Therefore the court found it could “only conclude that it materially contributed to the conviction such that [defendant] was deprived of a fair and impartial trial.” *Id.* In this case, the prosecutor not only misstated the evidence, but the statements made during closing were the opposite of the actual witness testimony, and went directly to the heart of Appellant’s defense, that the marijuana belonged to Appellant’s cousin and Appellant lacked an essential element of possession, dominion and control over the contraband. The *Robinson* Court appears to have focused on the mischaracterization, coupled with its direct detrimental effect on the main argument of the defense.

Although it is possible the jury in this case could have found the element of control was proven by Appellant’s pre-trial statements admitting ownership of the contraband without reliance on the improper statements during closing, based on the holding in *Robinson*, this Court cannot conclude that a mischaracterization of such a

nature as occurred in this case, which goes directly to the main defense at trial, did not materially contribute to the conviction and deprive Appellant of a fair and impartial trial. See *State v. DiGuilio*, 491 So. 2d 1129, 1138 (Fla. 1986) (citing *Chapman v. California*, 386 U.S. 18 (1967) (finding that the State must demonstrate “there is no reasonable possibility that the error contributed to the conviction”)). There is a reasonable likelihood that the comments contributed to Appellant’s conviction by discrediting Appellant’s defense and impermissibly bolstering the State’s argument. The cause is therefore reversed and remanded for further proceedings on this basis. This holding is limited to the particular facts of this case, based on the holding in *Robinson* and the fact that the comments made in this case went directly to Appellant’s main defense at trial.

CONCLUSION

The cumulative effect of the improper prosecutor comments in this case, which went directly to Appellant’s main defense at trial, created a reasonable likelihood that the comments contributed to Appellant’s conviction. We therefore reverse the order of the trial court and remand the cause for further proceedings.

It is ORDERED AND ADJUDGED that the cause is hereby REVERSED AND REMANDED for further proceedings consistent with this Opinion.

DONE AND ORDERED in Chambers at New Port Richey, Pasco County, Florida this 18th day of December, 2014.

Original order entered on December 18, 2014 by Circuit Judges Stanley R. Mills, Shawn Crane and Daniel D. Diskey.