

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36100

STATE OF IDAHO,	)	2011 Unpublished Opinion No. 464
	)	
<b>Plaintiff-Respondent,</b>	)	<b>Filed: May 9, 2011</b>
	)	
v.	)	<b>Stephen W. Kenyon, Clerk</b>
	)	
<b>KYLE BENJAMIN PATTON,</b>	)	<b>THIS IS AN UNPUBLISHED</b>
	)	<b>OPINION AND SHALL NOT</b>
<b>Defendant-Appellant.</b>	)	<b>BE CITED AS AUTHORITY</b>
	)	

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Appeal from the District Court of the First Judicial District, State of Idaho, Bonner County. Hon. John P. Luster, District Judge.

Judgment of conviction for possession of a controlled substance with intent to deliver and possession of a controlled substance, affirmed.

Molly J. Huskey, State Appellate Public Defender; Sarah E. Tompkins, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

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MELANSON, Judge

Kyle Benjamin Patton appeals from his judgment of conviction for possession of a controlled substance with intent to deliver and possession of a controlled substance. For the reasons set forth below, we affirm.

**I.**  
**FACTS AND PROCEDURE**

In September 2007, police officers conducted surveillance of Patton’s home in order to execute a warrant that had been issued for Patton’s arrest. After watching several people enter the residence and stay for only a short period of time, one of the officers knocked on the door which was opened by Patton. The officer identified himself as a police officer and stated that he had a warrant for Patton’s arrest. Patton attempted to close the door and struggled briefly with the officer. During the struggle, Patton and the officer entered the house. Once inside, Patton

was arrested, and the officer observed drugs and drug paraphernalia in plain sight on a coffee table. Patton's roommate was also present in the room.

The officers called a magistrate to obtain a search warrant for the rest of Patton's house. After receiving a telephonic warrant, the officers searched the home and discovered, among other items, seven baggies of marijuana, a digital scale, a finger scale, and a marijuana grinder. The officers also discovered a cutting board with two snort tubes and a razor blade under the couch in the living room and an additional snort tube containing white residue in one of the bedrooms. In the bedroom where the snort tube was found, the officers found Patton's wallet with his identification and a tax form with Patton's name on it.

Patton was charged with possession of marijuana with intent to deliver, I.C. § 37-2732(a)(1)(B), and possession of methamphetamine, I.C. § 37-2732(c)(1). A jury found Patton guilty of both counts. Patton was sentenced to concurrent unified terms of five years, with minimum periods of confinement of two years, and the district court retained jurisdiction. After successfully completing his rider, Patton was released on probation for a period of three years. Patton appeals.

## **II.**

### **ANALYSIS**

Patton makes two arguments on appeal. First, Patton argues there was insufficient evidence to sustain the jury's finding of guilt for possession of marijuana with intent to deliver and possession of methamphetamine. Second, Patton argues the prosecutor committed misconduct rising to the level of fundamental error when the prosecutor made remarks in closing argument that affirmatively misstated and reduced the state's burden of proof.

#### **A. Sufficiency of Evidence**

Patton argues the state presented insufficient evidence to sustain the jury's finding of guilt for possession of marijuana with intent to deliver and possession of methamphetamine. Specifically, Patton argues that the state did not demonstrate constructive possession of the controlled substances because the state failed to demonstrate that the controlled substances were in the possession of Patton and not his roommate. Patton argues that the marijuana was found in a common area to which his roommate had access and in which his roommate was actually present when the marijuana was seized. Patton also argues that there was insufficient evidence to prove that the bedroom where the snort tube was found was his.

Appellate review of the sufficiency of the evidence is limited in scope. A finding of guilt will not be overturned on appeal where there is substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. *State v. Herrera-Brito*, 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998); *State v. Knutson*, 121 Idaho 101, 104, 822 P.2d 998, 1001 (Ct. App. 1991). We will not substitute our view for that of the trier of fact as to the credibility of the witnesses, the weight to be given to the testimony, and the reasonable inferences to be drawn from the evidence. *Knutson*, 121 Idaho at 104, 822 P.2d at 1001; *State v. Decker*, 108 Idaho 683, 684, 701 P.2d 303, 304 (Ct. App. 1985). Moreover, we will consider the evidence in the light most favorable to the prosecution. *Herrera-Brito*, 131 Idaho at 385, 957 P.2d at 1101; *Knutson*, 121 Idaho at 104, 822 P.2d at 1001.

The jury was instructed that, to find Patton guilty of possession of marijuana with the intent to deliver, the prosecution must prove that Patton possessed any amount of marijuana, knew that it was marijuana or believed it was a controlled substance, and intended to deliver the substance to another. The jury instructions provided that possession of a controlled substance in multiple packages was, by itself, insufficient to prove intent to deliver and provided that the state must prove one or more additional circumstances from which the jury could infer intent to deliver. The additional circumstances could include possession in quantities greater than would be kept for personal use; the existence of items used to weigh, package, or process controlled substances; or the existence of money or records which indicated sales or deliveries. The jury was instructed that, to find Patton guilty of possession of methamphetamine, the state must prove that Patton possessed any amount of methamphetamine and he knew it was methamphetamine or believed it was a controlled substance. The jury was instructed that a person has possession of something if he or she knows of its presence and has physical control of it or the power and intention to control it. The jury was also instructed that more than one person can be in possession of something if each knows of its presence and has power and intention to use it. Patton does not assert on appeal that these instructions were erroneous.

At trial, the prosecution presented evidence that, while conducting surveillance of Patton's residence, the officers noted three or four people enter the residence and stay for only a short period of time. The prosecution also entered into evidence seven individually-packaged baggies of marijuana, each weighing approximately four grams; a set of digital scales; finger

scales; and a marijuana grinder. The prosecution called a forensic scientist from the state laboratory who testified that he conducted tests on the substance found in the baggies and determined that the substance was marijuana. The officer who conducted the search of Patton's house testified that the seven individually-packaged baggies and the digital scales were items normally associated with the resale of marijuana and were not commonly used by persons who were engaged only in individual consumption of marijuana. The officer also testified the marijuana-related items were found in plain sight on a coffee table where Patton would certainly have seen them.

In addition, the prosecution entered into evidence a snort tube with white residue in it. The forensic scientist from the state laboratory testified that he conducted tests on the residue found in the snort tube and determined that the substance was methamphetamine. An officer testified that Patton's wallet, identification, and tax forms with Patton's name on them were found in the room with the snort tube. The officer also testified there were no similar items in the room which would indicate that the bedroom belonged to Patton's roommate.

Based on the evidence adduced at trial, a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of possession of marijuana with intent to deliver and possession of methamphetamine. Thus, Patton's claim that there was insufficient evidence to support the jury's finding of guilt fails.

#### **B. Prosecutorial Misconduct**

Patton argues that the prosecutor committed misconduct during closing argument. Specifically, Patton argues that the prosecutor made two statements which affirmatively misstated the state's burden of proof with regard to the charges in his case. Patton made no contemporaneous objection to the prosecutor's statements at trial. While our system of criminal justice is adversarial in nature, and the prosecutor is expected to be diligent and leave no stone unturned, he or she is nevertheless expected and required to be fair. *State v. Field*, 144 Idaho 559, 571, 165 P.3d 273, 285 (2007). However, in reviewing allegations of prosecutorial misconduct we must keep in mind the realities of trial. *Id.* A fair trial is not necessarily a perfect trial. *Id.*

In *State v. Perry*, 150 Idaho 209, 226, 245 P.3d 961, 978 (2010), the Idaho Supreme Court clarified the fundamental error doctrine as it applies to allegations of prosecutorial misconduct. If the alleged misconduct was not followed by a contemporaneous objection it is

reviewed under Idaho's fundamental error doctrine. The *Perry* Court held that an appellate court should reverse for an unobjected-to error when the defendant persuades the court that the alleged error: (1) violates one or more of the defendant's unwaived constitutional rights; (2) the error is clear or obvious without the need for reference to any additional information not contained in the appellate record; and (3) the error affected the outcome of the trial proceedings. *Id.*

Closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. *State v. Gross*, 146 Idaho 15, 18, 189 P.3d 477, 480 (Ct. App. 2008); *State v. Timmons*, 145 Idaho 279, 288, 178 P.3d 644, 653 (Ct. App. 2007). Its purpose is to enlighten the jury and to help the jurors remember and interpret the evidence. *Gross*, 146 Idaho at 18, 189 P.3d at 480. Both sides have traditionally been afforded considerable latitude in closing argument to the jury and are entitled to discuss fully, from their respective standpoints, the evidence and the inferences to be drawn therefrom. *State v. Sheahan*, 139 Idaho 267, 280, 77 P.3d 956, 969 (2003); *Gross*, 146 Idaho at 18, 189 P.3d at 480. This includes the right to express how, from each party's perspective, the evidence confirms or calls into doubt the credibility of particular witnesses. *Sheahan*, 139 Idaho at 280, 77 P.3d at 969. It is improper for a party to present closing argument that misrepresents or mischaracterizes the evidence. *State v. Troutman*, 148 Idaho 904, 911, 231 P.3d 549, 556 (Ct. App. 2010); *State v. Beebe*, 145 Idaho 570, 575, 181 P.3d 496, 501 (Ct. App. 2007). In addition, it constitutes misconduct for a prosecutor to place before the jury facts not in evidence. *State v. Gerardo*, 147 Idaho 22, 26, 205 P.3d 671, 675 (Ct. App. 2009); *State v. Phillips*, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). Statements are not misconduct when it is apparent from the context in which the challenged statements were made that the prosecutor was analyzing the evidence and stating the conclusions that he or she urged the jury to draw from the evidence. *State v. Felder*, 150 Idaho 269, 275, 245 P.3d 1021, 1027 (Ct. App. 2010).

Patton argues that the prosecutor misstated the proper standard of evidence required to show possession and control where drugs are located in an area where there is joint access by two or more people. Patton also argues that the prosecutor's statements constituted an improper appeal to the prestige of his office. In support of this assertion, Patton cites to the following statement by the prosecutor:

The marijuana charge--oh, but if you are thinking, well, what about [the roommate]? Maybe one of these, the roommate, maybe it was [the roommate's].

No, it was Mr. Patton's. Mr. Patton is here on trial today, not [the roommate]. We're helped out by the law on this one, too.

If you go back to [jury instruction] Number 13, what does that tell us? It's the law telling us exactly what our common sense already tells us. More than one person can be in possession of something. You don't just blame it on somebody else and say, it was him; not me. More than one person can be guilty of a crime.

The prosecutor's statement addressed the evidence presented at trial. The prosecutor referred to a jury instruction and stated a conclusion that he was urging the jury to draw from the evidence--that Patton was in possession of the marijuana even though it was found in a common area and could also have been within the knowledge and control of Patton's roommate. The prosecutor's statements merely analyzed the evidence presented and stated a conclusion which the prosecution was urging the jury to draw from the evidence. In addition, this statement does not demonstrate that the prosecutor was appealing to the prestige of his office. Therefore, these statements were not prosecutorial misconduct.

Patton also asserts that the prosecutor committed misconduct by arguing a reduced burden of proof with regard to the element of intent on the delivery of marijuana charge. Patton argues that the prosecutor's statement implied that the multiple packages of marijuana, plus one other fact, created a presumption that Patton had the intent to deliver. In support of this assertion, Patton cites to the following statement by the prosecutor:

What the law says is we have to prove two things. Multiple packaging, which we've got, State's Exhibit 1, seven baggies, and one other circumstance. What's the other circumstance? The scale. That's it.

This statement must, however, be taken within the larger context of the prosecutor's closing statement. Earlier in his closing statement, the prosecutor noted that possession of a controlled substance in multiple packaging was not sufficient, by itself, to prove intent to deliver. The prosecutor went on to note that additional evidence was necessary to show an intent to deliver. The prosecutor noted that the police found a digital scale and a finger scale in Patton's residence--devices commonly used to weigh and package a controlled substance. The prosecutor also reminded the jury about the officer's testimony that several people visited Patton's residence during the evening and stayed for a short period of time and asked them to draw reasonable inferences from this circumstance. Thus, the larger context reveals that the prosecutor was not urging a reduced burden of proof with regard to the element of intent to deliver.

Patton has failed to demonstrate, under the first prong of *Perry*, that there was a violation of his unwaived constitutional right because Patton has not shown that the prosecutor's statements during closing arguments constituted prosecutorial misconduct. Therefore, we will not further address this argument on appeal.

**III.**  
**CONCLUSION**

Patton's claim that there was insufficient evidence to support the jury's finding of guilt fails because, based on the evidence presented at trial, a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of possession of marijuana with intent to deliver and possession of methamphetamine. Patton has also failed, under the first prong of *Perry*, to demonstrate a violation of his unwaived constitutional right because the prosecutor's statements during closing arguments did not constitute prosecutorial misconduct. Accordingly, Patton's judgment of conviction for possession of a controlled substance with intent to deliver and possession of a controlled substance is affirmed.

Chief Judge GRATTON and Judge GUTIERREZ, **CONCUR.**