916660-8

THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

CORY A. SUNDBERG, APPELLANT

PETITION FOR REVIEW

Court of Appeals No. 45081-0-II
Appeal from the Superior Court of Mason County
The Honorable Toni Sheldon
No. 12-1-00236-3

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A. IDENTITY OF PETITIONER

The State of Washington, the respondent below, petitions this Court to review the Court of Appeals decision reversing the trial court conviction.

B. DECISION OF COURT OF APPEALS

The State of Washington requests this court to review the Court of Appeal's February 10, 2015, unpublished opinion in case number 45081-0-II, which reversed a Mason County Superior Court jury's verdict finding Cory Sundberg guilty of possession of a controlled substance in case number 12-1-00236-3. The State filed a motion for reconsideration, which the Court of Appeals denied on April 9, 2015. A copy of the opinion (Appendix A) and the order denying reconsideration (Appendix B) are attached.

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C. ISSUE PRESENTED FOR REVIEW

1) Whether the Court of Appeals erred when it found that the prosecutor committed misconduct by commenting on the defendant's failure to call a witness to corroborate defendant's testimony regarding his affirmative defense of unwitting possession, for which defendant bore the burden of proof.

2) Whether Division Two of the Court of Appeals' unpublished decision in the instant case is in conflict with the published decision of *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991) in Division One of the Court of Appeals.

3) Whether this Court should declare a rule that would require pretrial disclosure of witnesses and evidence to support an affirmative defense for which the defendant bears the burden of proof and a rule that, whenever a defendant asserts the existence of a witness who could corroborate an affirmative defense for which the defendant bears the burden of proof, would require the defendant to make some good faith attempt to present the witness to the court and allow or require the witness to assert the 5th Amendment outside the presence of the jury rather than to

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assume in all cases that all witnesses whose testimony may be self-incriminating will always assert the 5th Amendment.

3) Whether this Court should declare a rule that distinguishes the term of art "prosecutorial misconduct" from mere prosecutorial error. Or, in the alternative, to hold that the prosecutor did not commit misconduct in the instant case.

D. STATEMENT OF THE CASE

To assist in reducing the length of this petition and focusing on the substantive issues for which the State seeks review, the State defers to the summary of facts presented in the Court of Appeals decision in this case (except that the State maintains that the factual assertion regarding whether Sundberg actually lent his pants to another person was a question for the jury and remains in dispute).

Officers went to Sunberg's home to arrest him on a DOC warrant. Appendix A at 1-2. When they arrested him, he was wearing a pair of coveralls. *Id.* When he was booked into the jail, officers found

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methamphetamine in one of the pockets in the coveralls. *Id.* The State charged Sundberg with possession of a controlled substance. *Id.*

At the start of trial, the trial court judge asked Sundberg's attorney whether, with the possible exception of the defendant, there were any witnesses, other than those listed by the State, who may be called to testify. Appendix C (RP 60). Sundberg's attorney answered "no." *Id.* The trial court judge then asked Sundberg's attorney whether there was anyone whose name will come up who he was not planning to call as a witness. *Id.* Sundberg's attorney answered, "not that I'm aware of." *Id.*

When trial began, Sundberg then presented for the first time the affirmative defense of unwitting possession. Appendix C (RP 72, 79, 84). In opening statement, Sundberg told the jury that "Wes" would testify. Appendix C (RP 96). During trial, Sundberg testified and for the first time said that he had lent his coveralls to "[a] guy by the name of Paul Wood." Appendix C (RP 121, 122). When the trial court later questioned Sundberg's failure to disclose his witness or Paul Wood's name, Sundberg explained that he had not duty to disclose the defendant's testimony. Appendix C (RP 216).

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During the State's initial closing argument, which was very short, no mention was made of Paul Wood. Appendix C (RP 182-83).

During Sundberg's closing argument, his attorney mentioned Paul Wood on several occasions. Appendix C (RP 184, 185, 189). In the prosecutor's final closing, the prosecutor argued that Sundberg had the burden of proof on this affirmative defense and that Sundberg had implied that Paul Wood had put methamphetamine in Sundberg's pants. Appendix C (RP 193, 195). The prosecutor asked rhetorically, "[w]hy isn't he here testifying?" Appendix C (RP 195). The prosecutor then continued: "It's their burden. He's not here. There's no evidence." Appendix C (RP 195). The prosecutor later argued, "[a]nd again, it was his burden. He didn't bring in Paul Wood." Appendix C (RP 195).

Sundberg objected to the prosecutor's argument and asked the trial court for a curative instruction. Appendix C (RP 198). The prosecutor argued that the missing witness doctrine did not apply because Sundberg bore the burden of proof on his affirmative defense and because he did not argue that there was any inference to be drawn from Sundberg's failure to call Wood as a witness; instead, the only argument was that Sundberg had failed to meet his burden of proof on the affirmative defense of unwitting

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possession. Appendix C (RP 200-01). The trial court overruled Sundberg's objection and declined to give a curative instruction. Appendix C (RP 201).

The jury returned a finding Sundberg guilty of possession of a controlled substance. Sundberg then moved for a new trial, alleging that the prosecutor committed misconduct. The trial court denied Sundberg's motion for a new trial. On appeal, Sundberg's appellate counsel raised two assignments of error, as follows:

> 1. Appellant Cory Sundberg's constitutional right to due process was violated when the prosecutor improperly shifted the burden of proof in his closing argument.
>
> 2. The trial court erred in denying Mr. Sundberg's motion for new trial due to prosecutorial misconduct.

Brief of Appellant at 1. (Appendix D).

Sundberg's sole argument on appeal was that the prosecutor improperly shifted the burden of proof by commenting that Paul Wood had not testified to corroborate Sundberg's testimony that he had lent his coveralls to him. *Id.* But at trial, the prosecutor's argument on this point was relevant only to the affirmative defense of unwitting possession for which Sundberg bore the burden of proof. Thus, because Sundberg

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already had the burden of proof on his affirmative defense of unwitting possession, there could no burden shifting, and the prosecutor did not shift the burden.

In Part II of its opinion, the Court of Appeals agreed that there was no burden-shifting error because Sundberg bore the burden of proof for his affirmative defense of unwitting possession. Appendix A at p. 5. To support its decision, the court in the instant case (Division Two of the Court of Appeals) cited *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209 (1991), a Division One case. Appendix A at p. 6.

State v. Barrow is substantively substantially similar to the instant case, except that in *Barrow* there was no discussion of the missing witness doctrine. Instead, in *Barrow* the sole issue that is relevant to the issue in the instant case was whether the prosecutor shifted the burden of proof and thereby committed misconduct by presenting argument about the defendant's failure to call a witness to corroborate his affirmative defense of unwitting possession. Arguably, the witness in *Barrow* necessarily would have incriminated himself had he testified favorably to the defendant, but the Court of Appeals in *Barrow* did not find error, finding only that there was no improper shifting of the burden of proof, and that

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"[n]othing in the record indicates that his brother [the non-testifying witness] could not be produced to testify." *Barrow*, at 873.

But when deciding the instant case, the Court of Appeals in Part III of its opinion went further and expanded its ruling to include an analysis of the missing witness doctrine. On appeal, Sundberg mentioned the phrase, "missing witness doctrine," but he did not cite any authority or attempt to describe its elements. Instead, his argument was devoted entirely to his burden-shifting allegation and his assertion that the State bore the burden of proof on his affirmative defense of unwitting possession. The non-testifying witness Paul Wood was irrelevant to the State's burden of proving that Sundberg possessed a controlled substance. Paul Wood's only relevance was to whether Sundberg's possession of the controlled substance was unwitting.

The prosecutor in this case did not ask for a missing witness instruction, and he did not argue that because Sundberg did not call Wood to testify the jury could, or should, infer that his testimony would have been unfavorable to Sundberg. Instead, the prosecutor's only argument was that Sundberg had not met his burden of proof or persuasion regarding his affirmative defense of unwitting possession.

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There was no evidence in this case to suggest that Paul Wood would have asserted the 5th Amendment if called to testify. It is possible that he would have waived that privilege and testified. A witness has the right to waive that privilege, and it is not certain that he would not have opted to take responsibility for the contraband in order to protect an innocent man.

But more importantly, the prosecutor did not attempt to obtain the powerful advantage of an inference, such as would normally be obtained from a missing witness instruction. Instead, the prosecutor merely pointed out that Sundberg had not met his burden of proof on his affirmative defense. The Court of Appeals wrote that on the facts of this case "the missing witness doctrine did not apply and the prosecutor was not entitled to invoke it." Appendix A at 8. But the prosecutor did not invoke the missing witness doctrine; nor was the jury instructed that it could infer that the witness's testimony would be unfavorable to the defendant.

To support its holding that the prosecutor committed misconduct by noting that Paul Wood did not corroborate Sundberg's affirmative defense, the Court of Appeals wrote as follows:

> In general, the State may not comment on the defendant's lack of evidence, because the defendant has no duty to present

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> evidence. [Citation omitted]. The missing witness doctrine is an exception: it applies where a party has failed to produce evidence within its control, including the testimony of a potential witness. [Citation omitted]."

Appendix A at 6. But here, the State did not have the burden of proof on Sundberg's affirmative defense of unwitting possession. Therefore, the State did not need an exception to the prohibition on commenting on the defendant's lack of evidence, and the State did not ask for, or argue, an inference that Paul Wood's testimony would not favor Sundberg; instead, the State merely pointed out that Sundberg had not met his burden of proof and persuasion on his affirmative defense of unwitting possession.

After a diligent search, no case was located where it is held that a prosecutor may not comment on a defendant's failure to present evidence, in this case a witness, to corroborate the defendant's assertion of an affirmative defense for which he or she bears the burden of proof. Instead, the closest case to these facts is *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991), which found no error on facts very similar to those of the instant case.

The prosecutor in the instant case was forced to contend with the tribulations of trial, where the defendant surprised the prosecutor and the

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court with the assertion of the existence of a potential witness, the existence of whom had been concealed until disclosed to the jury during the trial itself. The prosecutor, who was forced to deal with this event without any opportunity for prior planning or reflection, did what he could and argued that Sundberg did not meet his burden of proof and persuasion on his affirmative defense. The trial court overruled the defense objection, denied the defense request for a limiting instruction, and then denied a motion for a new trial. But the Court of Appeals nevertheless found that the prosecutor committed "misconduct." Appendix C.

The use of the term "misconduct" implies something sinister, unprofessional, evil, or unethical. But the prosecutor's action here, at the very worst, was a mere mistake. A mistake based upon reliance on *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991).

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

RAP 13.4(b) sets forth four considerations for the Court to weigh when deciding whether to accept review of a Court of Appeals Decision.

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The State contends that subsection (2) applies in the instant case because Division Two's opinion in this case conflicts with the Division One opinion in *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991). It is admittedly clear that *Barrow* did not rule on the applicability of the missing witness doctrine to affirmative defenses for which the defendant bears the burden of proof, as in the instant case, but the facts of *Barrow* are very similar, substantively, to the instant case. And in *Barrow*, Division One of the Court of Appeals did not find error. The cases are at least in conflict because the court in *Barrow* found that there was no evidence that the relevant witness could not testify (*Barrow*, at 873), whereas on nearly identical substantive facts the instant court assumes that the witness's testimony is necessarily unavailable due to a presumed, but unproved, assertion of the 5th Amendment right to remain silent.

Secondly, the State contends that this Court should accept review because the instant case presents issues that are "of substantial public interest that should be determined by the Supreme Court." RAP 13.4(d).

First, the State contends that the Court should declare a clear rule regarding the defendant's duties of disclosure of witnesses and other discovery in support of an affirmative defense for which the defendant

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bears the burden of proof. The result of the current case would be to invite every defendant charged with possession of a controlled substance to keep the existence of an affirmative defense witness secret until the trial and to then surprise the court and the prosecutor with the defense. Instead, the State urges the Court to declare a rule that requires the defendant to attempt to subpoena the witness and, whenever the witness desires to assert the 5th Amendment, a rule that requires the witness to actually do so, outside the presence of the jury, rather than to assume that every witness will assert the privilege in all cases.

Secondly, the State urges the Court to declare a clear rule settling whether the missing witness rule applies to the affirmative defense of unwitting possession, for which the defendant bears the burden of proof, or where there is no argument of an inference, or both. A diligent search of authorities has thus far revealed no case holding that the missing witness rule would apply to a defendant's assertion of an affirmative defense for which he or she bears the burden of proof. Still more, no authority was located holding that a prosecutor's mere mention of the defendant's failure to call a witness to corroborate an affirmative defense constitutes error or misconduct. Application of the missing witness

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doctrine – in the State's case in chief, where the State bears the burden of proof – gives the State the advantage of an instruction from the trial court, instructing the jury that it may infer the missing witness's testimony would have been unfavorable to the defense. But the powerful effects this doctrine is not involved where, as in the instant case, the prosecutor merely comments that the defendant has failed to present evidence, in this case a witness, to corroborate an affirmative defense for which the defendant bears the burden of proof.

Finally, the State urges the Court to declare a rule that distinguishes between "prosecutorial misconduct" and mere error. Reasonable minds can, and did, disagree below regarding whether the missing witness doctrine even applied in this case. Even if this Court would ultimately find that the missing witness doctrine should apply, or if this court were to declare a rule holding that the failure to call a witness may never be mentioned unless the missing witness doctrine does apply, it is unfair to characterize the prosecutor's conduct in the instant case as "misconduct." At the very worst, it was a mistake. A mistake perpetuated by reliance on *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991) and validated by the trial court.

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F. CONCLUSION

For resolution of the issues raised above, the State urges the Court to accept review of this case.

Respectfully submitted this 8th day of May, 2015.

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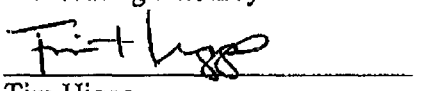

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Appendix A

Court of Appeals Decision

State v. Sundberg, No. 45081-0-II, Feb. 10, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CORY SUNDBERG, Appellant.	No. 45081-0-II UNPUBLISHED OPINION

WORSWICK, J. — Cory Sundberg appeals his conviction for unlawful possession of a controlled substance. He argues that the prosecutor committed misconduct by shifting the burden of proof in closing argument, and by arguing that Sundberg should have called a witness. Holding that the prosecutor committed misconduct, we reverse Sundberg's conviction and remand.[1]

FACTS

A. *Arrest*

Sundberg lived with his elderly foster father, Wes Rider, and worked on maintenance projects around their mobile home. Sundberg said he employed a neighbor named Paul Wood to help with maintenance projects. To protect his clothing, Wood borrowed a pair of Sundberg's

[1] Sundberg also argues that the trial court erred in denying his motion for a new trial. Because we reverse Sundberg's conviction on other grounds, we do not address this issue.

bib overalls to perform work under a shed. The day before Sundberg's arrest, Wood left the jobsite and did not return the following day or any day thereafter.

A law enforcement officer came to the mobile home and arrested Sundberg on an outstanding warrant. On the day of his arrest, Sundberg was pressure washing the mobile home and was wearing the overalls he had previously lent to Wood.

During the arrest, Sundberg requested permission to change clothing. Sundberg said the reason for the request was that his overalls were wet up to the knee from power washing, and that the officers had disconnected the shoulder straps of the overalls, leaving them hanging below his waist. The arresting officer declined Sundberg's request to change clothing.

Officers performed an inventory search of Sundberg's clothing at the jail, which revealed a small "baggie" of methamphetamine in the bib pocket of his overalls. The State charged Sundberg in an amended information with one count of unlawful possession of a controlled substance, methamphetamine.[2]

B. *Trial*

Sundberg argued an unwitting possession defense, claiming he did not know there was methamphetamine in the overalls.[3] The methamphetamine was in a narrow pocket on the bib of

[2] RCW 69.50.4013(1).

[3] The jury instructions included an instruction on unwitting possession, which read: "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 his possession, or did not know the nature of the substance. The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly.

the overalls, which Sundberg testified that he did not use. He argued that it was impossible to know whether Sundberg's employee Paul Wood, who had borrowed the overalls, was the true source of the methamphetamine, but that in any event Sundberg did not know it was there.

In closing argument, Sundberg argued that it was reasonable to believe that Sundberg did not know about the methamphetamine in his bib pocket, because of the narrow width of the pocket and the small size of the "baggie" of methamphetamine. He also reminded the jury that Wood had been helping Sundberg, and, "We know very little about Paul Wood." Verbatim Report of Proceedings (VRP) at 184. However, he did not explicitly argue that Wood had put the methamphetamine in the overalls.

In rebuttal closing, the State argued that Sundberg's story about Wood borrowing the overalls did not make sense: it was summer, so Wood would not have needed the extra layer of clothing for warmth. Nor should someone doing manual labor need to borrow his employer's work clothes. The State also argued that it did not make sense that a methamphetamine addict would leave methamphetamine in someone else's clothing. The State reminded the jury of the State's burden to prove each element beyond a reasonable doubt. Then it argued that Sundberg had not carried his burden of proving the affirmative defense of unwitting possession by a preponderance of the evidence:

> Now it's the defendant's burden — and this is the reason I asked the defendant these questions. I asked him okay, tell us about Paul Wood; describe him for us, do you know him, how do you know him. He says he sees him about twice a

---

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." CP at 93.

> week. He says he can get a hold of him. Why isn't he here testifying? It's their burden. He's not here. There's no evidence . . . that he . . . even exists.

VRP at 195. Sundberg objected. The court overruled the objection without comment. The State continued, arguing:

> Sundberg is also inherently biased. He has a stake in the outcome. That gives him bias to lie. His testimony was obviously self-serving. It was obviously designed to tell a story to corroborate his defense. And again, it was his burden. *He didn't bring in Paul Wood.*

VRP at 195-96 (emphasis added).

Outside the presence of the jury, Sundberg requested an instruction telling the jury to disregard the State's argument that Sundberg should have called Paul Wood to testify. The court denied the request for a curative instruction, finding that there was neither prosecutorial misconduct nor basis in the case law for a curative instruction.

C. *Motion for New Trial*

The jury found Sundberg guilty of unlawful possession of a controlled substance. Sundberg moved for a new trial based on prosecutorial misconduct. The trial court denied Sundberg's motion for a new trial, finding that there had been no prosecutorial misconduct.

ANALYSIS

Sundberg argues that the prosecutor's closing argument constituted misconduct because it shifted the burden of proof by misapplying the missing witness doctrine. We disagree that the prosecutor's argument shifted the burden of proof, because Sundberg had the burden of proving his affirmative defense of unwitting possession. However, we agree that the prosecutor's argument improperly invoking the missing witness doctrine constituted misconduct.

I. STANDARD OF REVIEW

To prevail on a claim of prosecutorial misconduct the defendant must establish that the prosecutor's conduct was both improper and prejudicial. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999) (plurality opinion). The defendant must demonstrate a substantial likelihood that the misconduct affected the verdict in order to receive a new trial. 137 Wn.2d at 839.

We review a prosecutor's allegedly improper conduct in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A prosecutor has wide latitude in making arguments to the jury and may draw reasonable inferences from the evidence. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011).

II. NO BURDEN SHIFTING

The State generally may not comment on the defendant's lack of evidence, because the defendant has no duty to present evidence. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003); *State v. Fleming*, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). It is misconduct to imply that the defendant is required to provide evidence, or that the jury should convict the defendant because he has presented little evidence. *State v. Jackson*, 150 Wn. App. 877, 885-86, 209 P.3d 553 (2009). But the State is entitled to show that an exculpatory theory the defendant raises lacks evidentiary support. A "prosecutor can question a defendant's failure to provide corroborative evidence if the defendant testified about an exculpatory theory that could have

been corroborated by an available witness." *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209 (1991).

Defendants are required to prove affirmative defenses by a preponderance of the evidence. *State v. Lively*, 130 Wn.2d 1, 13, 921 P.2d 1035 (1996). It does not shift the burden of proof to require a defendant who raises the unwitting possession defense to prove that defense by a preponderance of the evidence. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

Here, Sundberg claims that the State's rebuttal argument shifted the burden of proof. But Sundberg had the burden of proving his affirmative defense of unwitting possession by a preponderance of the evidence. *Bradshaw*, 152 Wn.2d at 538. Thus, his argument fails.

III. PROSECUTOR VIOLATED MISSING WITNESS DOCTRINE

A. *Missing Witness Doctrine Inapplicable*

In general, the State may not comment on the defendant's lack of evidence, because the defendant has no duty to present evidence. *Cheatam*, 150 Wn.2d at 652. The missing witness doctrine is an exception: it applies where a party has failed to produce evidence within its control, including the testimony of a potential witness. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991). Where it applies, the doctrine permits the jury to infer that the missing evidence or testimony would have been unfavorable to the party who failed to produce it. 117 Wn.2d at 485-86. Therefore, it permits a prosecutor to comment on the defense's failure to produce exculpatory evidence in limited circumstances. "There are, however, limitations on the doctrine which are particularly important when a criminal defendant's failure to call particular witnesses is the subject of prosecutorial comment." 117 Wn.2d at 488.

The missing witness doctrine allows the State to comment on a criminal defendant's failure to produce a witness only where: (1) the absent witness is particularly within the defense's ability to produce, (2) the missing testimony is not merely cumulative, (3) the witness's absence is not otherwise explained, (4) the witness is not incompetent or his testimony privileged, and (5) the testimony does not infringe on the defendant's constitutional rights. *Cheatam*, 150 Wn.2d at 652-53. The doctrine does not apply where the missing witness's testimony, if favorable to the party who would naturally have called the witness, would necessarily be self-incriminatory. *Blair*, 117 Wn.2d at 490-91. Finally, the State may comment on the defendant's failure to call a witness only where the defendant has unequivocally implied that the missing witness would have corroborated his theory of the case. *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990).

Here, the missing witness doctrine did not apply for two reasons. First, Wood's testimony could only have been favorable to Sundberg if Wood testified that he was the source of the methamphetamine. Said another way, Wood's testimony would have been favorable to Sundberg only if Wood testified that he committed the crime of unlawful possession of a controlled substance by possessing the methamphetamine and placing it in Sundberg's pocket. Thus, his testimony would have been necessarily self-incriminatory and privileged. *Blair*, 117 Wn.2d at 490-91; *State v. Dixon*, 150 Wn. App. 46, 55, 207 P.3d 459 (2009). Second, Sundberg had not unequivocally implied that Wood would have corroborated his testimony. *Contreras*, 57 Wn. App. at 476. Sundberg explicitly said it was impossible to know whether Wood was the

source of the methamphetamine. For these reasons, the missing witness doctrine did not apply and the prosecutor was not entitled to invoke it.

The prosecutor's argument called for the jury to infer that Wood would have contradicted Sundberg's defense if Sundberg had called him. The prosecutor said that Sundberg "says he sees [Wood] about twice a week. He says he can get a hold of him. Why isn't [Wood] here testifying? It's their burden. He's not here." VRP at 195. This argument implied that Sundberg would have called Wood had his testimony favored Sundberg. The prosecutor continued, arguing that Sundberg "is also inherently biased. He has a stake in the outcome. That gives him bias to lie. His testimony was obviously self-serving. It was obviously designed to tell a story to corroborate his defense. And again, it was his burden. He didn't bring in Paul Wood." VRP at 195-96. With this argument, the prosecutor implied that Sundberg's biased testimony would not have been corroborated by Wood's testimony.

Taken as a whole, this argument improperly invoked the missing witness doctrine. It asked the jury to infer that the missing testimony would have been unfavorable to Sundberg. *Blair*, 117 Wn.2d at 485-86. The prosecutor was not entitled to argue this inference. *Blair*, 117 Wn.2d at 489-91; *Dixon*, 150 Wn. App. at 55; *Contreras*, 57 Wn. App. at 476.

B. *Violation of Missing Witness Doctrine Constituted Misconduct*

A prosecutor commits misconduct by violating the missing witness doctrine. *State v. Carter*, 74 Wn. App. 320, 332, 875 P.2d 1 (1994). To prevail on a claim of prosecutorial misconduct where, as here, the appellant objected to the conduct, an appellant must show that the conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653

(2012). Prejudice in this context is a substantial likelihood that the misconduct affected the verdict. *Finch*, 137 Wn.2d at 839. Even improper prosecutorial remarks in direct response to defense counsel's arguments are not grounds for reversal where they do not go beyond what is necessary to respond to the defense, and neither bring before the jury matters not in the record, nor create incurable prejudice. *State v. Francisco*, 148 Wn. App. 168, 178-79, 199 P.3d 478 (2009). Here, the prosecutor's invocation of the missing witness doctrine was improper. *See Carter*, 74 Wn. App. at 332. The prosecutor's argument was not in direct response to Sundberg's argument. *Francisco*, 148 Wn. App. at 178-79.

In addition, there is a substantial likelihood that the improper invocation of the missing witness doctrine affected the verdict. The State presented strong evidence that Sundberg possessed methamphetamine: an inventory search of the overalls he wore revealed methamphetamine. But Sundberg's possession of the methamphetamine was not the issue in dispute, because Sundberg argued the affirmative defense of unwitting possession. This defense relied heavily on Sundberg's testimony that Paul Wood had worn the overalls in the days prior to Sundberg's arrest, suggesting that the overalls had been out of his control and he did not know they contained methamphetamine. Despite the fact that Wood was not an available witness under the missing witness doctrine, the prosecutor improperly urged the jury to infer that Wood would contradict Sundberg's defense. This suggestion so fundamentally compromised Sundberg's unwitting possession defense that there is a substantial likelihood the prosecutor's misconduct affected the verdict. There is a substantial likelihood the jury rejected Sundberg's unwitting possession defense based on the improper inference the prosecutor invoked.

Because the prosecutor committed misconduct by improperly invoking the missing witness doctrine, and because there is a substantial likelihood that this improper argument affected the verdict, we reverse Sundberg's conviction and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Bjorgen, A.C.J.
Bjorgen, A.C.J.

Melnick, J.
Melnick, J.

Appendix B

Order Denying Motion for Reconsideration

State v. Sundberg, No. 45081-0-II, April 9, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CORY A. SUNDBERG,

Appellant.

No. 45081-0-II

ORDER DENYING MOTION FOR RECONSIDERATION

RESPONDENT moves for reconsideration of the Court's **February 10, 2015,** opinion.

Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bjorgen, Worswick, Melnick

DATED this 9th day of April, 2015.

FOR THE COURT:

Bjorgen, A.C.J.
ACTING CHIEF JUDGE

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Appendix C

Excerpts of Trial Transcript

State v. Sundberg

Mason County Superior Court Case No. 12-1-00236-3

MR. SIGMAR: She's a Mason County Sheriff's -- either a deputy or a sergeant. I think she's a sergeant now.

THE COURT: Thank you. Mr. Finlay, any additional witnesses other than perhaps your client from the list that I just reviewed?

MR. FINLAY: No, your Honor.

THE COURT: Anyone whose name you know will come up that is not planned to be a witness?

MR. FINLAY: Not that I'm aware of.

MR. SIGMAR: And your Honor, if I could change that. You know, I had a few cases set for today, so I'm getting a little confused. It wasn't Kelly LaFrance, if you could strike that name. And if I could give you a couple other names? Colby Carlson from the Department of Corrections, and John Tulloch, T-U-L-L-O-C-H, from the Department of Corrections.

THE COURT: Any stipulations that the parties have come to?

MR. FINLAY: None.

THE COURT: Any questions of a general nature that you would like the Court to ask the venire panel?

MR. SIGMAR: No, your Honor.

MR. FINLAY: None from the defense.

THE COURT: All right. The Court now has the additional documents that were referenced before. And I do have an order denying defendant's motion to dismiss, granting defendant's motion

MR. SIGMAR: Yes, your Honor, there are. If I may begin, there was a disclosure to me from one of my witnesses, specifically Detective Steve Valley who's a listed witness yesterday morning, so on the 7th of January, that he was told by the defendant on the date of the arrest for this incident that he wanted to change out of -- defendant requested to change out of his overalls. And Steve Valley told him no, put him in the police car.

This is relevant because defense counsel has raised an unwitting possession defense. And I know full well that one of the -- one of the issues that comes up in an unwitting possession defense is not in my pants defense. And also suggests that he's trying to get rid of something that's in his pants -- or in his pants because something's in his pants. So obviously it's relevant.

I immediately, in fact within approximately ten minutes, informed defense counsel. I called him up on the phone and -- and told him about the disclosure. And this morning in speaking with Detective Valley he disclosed a separate incident. On the day of the arrest, he observed a -- what he through his training and experience recognized as a methamphetamine pipe in plain view in or near a shed that the defendant was either working on or in just prior to his arrest.

And because Detective Valley with all the other members of law enforcement were there to execute a DOC warrant, and not to conduct an investigation, he had the defendant actually pick up the

probative value with respect to having a methamphetamine pipe. And however, it would be unduly prejudicial. So the Court is not going to allow in the testimony from Detective Valley or Officer Valley, or any other person on behalf of the State regarding the methamphetamine pipe.

With regard to the statement allegedly made by the defendant that he wanted to change out of his overalls, the Court will allow that that proceed under its normal course. And that would be we need a 3.5 hearing to determine where, and when, and in what manner that statement was made. And if it was needing to have Miranda rights, whether Miranda rights were given. So we will have a 3.5 about that.

I find that that statement would be very probative in this particular case. And that it's probative value is not in any way outweighed by an undue prejudicial effect.

The concern that I have is that when I prepped for this case when we started, I looked at the omnibus applications and I saw on July 23rd the defendant's omnibus application noted that the defense would be general denial. And when Mr. Finlay handed up the proposed instruction on unwitting possession, I just assumed that while I wasn't on the bench, maybe Commissioner Sauerlender heard the case and unwitting possession was added to the potential defenses. So I didn't take the time to go back through the minutes to see where that occurred. But now I'm hearing from the State that unwitting possession was unknown to them as well.

THE COURT: All right. What is the anticipated length of the 3.5 hearing?

MR. SIGMAR: I wouldn't anticipate that it would take longer than 30 minutes, your Honor. And -- and I -- I would ask for -- there was a -- there was a two-parter there. I'm asking the Court to reconsider the Court's previous ruling excluding the State from delving in to the surrounding circumstances of the defendant's apprehension which I think are relevant in light of the unwitting possession defense, which was dropped on the State on the day of trial.

THE COURT: All right. And I indicated as I started out that I wasn't going to take them in the order that they were given. So I did say that I'm not revisiting those rulings.

You did indicate also that you had some other preliminary matters. So if we could perhaps let the jury go until 11:00. They're welcome to stay, but if they have an errand or something, they also may go until 11:00.

BAILIFF: Okay, thank you.

MR. FINLAY: Oh, I did have one other thing. Were you done, I'm sorry.

THE COURT: I think, Mr. Sigmar, you said that you had other matters. And I said let's take these two or three first. Do you have something other?

MR. SIGMAR: I do.

THE COURT: Go ahead.

some vinyl flooring, very heavy vinyl tiles in the shed, that were so heavy they caused the shed to start sinking into the ground. So Cory was working on that, and had been for the previous week, jacking up the shed, and leveling it, and shoring it up so it would stay. This is what he was doing on this day, and he had been doing for about a week prior to that.

He was wearing a pair of bib overalls, standard brown colored bib overalls. He had no idea that there was anything unlawful in the pocket. It turns out there was just a little bit in one of the chest pockets on the bibs. But it wasn't Cory's and he had no idea it was there at any time.

Now the State in his opening statement said that Detective Valley will testify that Cory asked to change out of his clothes when they arrested him, which is true. Cory agrees with that. In fact he agrees with almost everything that was said here. But he asked to change out of his clothes because he was wet, because he had been pressure washing the roof of Wes's house. And Wes will come in and tell you that that is exactly what was going on.

Now there had been a guy helping Cory throughout the course of the week who Cory had eventually fired the day, or a couple of days before this, because the guy just wasn't showing up for work when he was supposed to show up and help. So Cory told him don't come back. This guy had worn the bib overalls a couple of times during this week when he had crawled underneath the house to excavate and help shore the thing up. I -- we don't have any evidence that this

A Most definitely, yes.
Q All right. And what else were you doing? You said you were cleaning the house. What'd you mean by that?
A Well we started -- I -- I started pressure washing the roof and the sides of the mobile home 'cause that's what it is, a modular -- it's not a modular home, it's actually a mobile home, to get it ready for winter for the rains and stuff so that it had a sealed roof.
Q Okay. So on the date you were arrested were you using a pressure washer?
A Yes, I was.
Q And we heard testimony from Detective Valley here that you said you wanted to change your clothes.
A I just wanted to shed my coveralls 'cause they were -- they were pretty wet.
Q From the pressure washing?
A Yes.
Q All right. How long had this work been going on on the shed and the pressure washing of the mobile home?
A A little over a week, about a week-and-a-half or so.
Q And had you done all the work yourself, or did you have some help?
A I had some help.
Q Who did you have help you out there?
A A guy by the name of Paul Wood.

Q How did that come about? How did you happen to --

A Through --

Q -- get in touch with him to help you?

A Through some other acquaintances that I know through the -- through the neighborhood. And he was -- I was told that he was in -- in need of some work and some money, so I was willing to give him a hand -- some help.

Q Okay. Did you know him before that?

A Not really, no.

Q Okay. Sometime during the job -- strike that. How did Mr. Wood perform?

A At first he was -- he was pretty good and was willing to work. He -- he --

Q Then what?

A Then gradually he kind of got lax and kind of laid back and just wasn't -- wasn't producing the way he was at first. Lost interest, I guess you'd say.

Q All right, fair enough. On the day that the police showed up, was he there?

A No.

Q Why not?

A 'Cause the day before I went -- had an appointment to look at another job. And I left about 11:00 or so, and I was -- didn't tell him when I was coming back. And when I came back, he was gone.

At this time we will have the opportunity to listen to the closing arguments by counsel. And I would first ask that you turn your attention to Mr. Sigmar for closing argument on behalf of the State.

MR. SIGMAR: Thank you, your Honor, counsel, ladies and gentlemen. Thank you for your patience. This is really a common sense case. The defendant was taken into custody, he was picked up on a warrant, and he had methamphetamine on his person. That's actual possession. It doesn't get more obvious than that. That's overt, actual possession of a controlled substance.

And in response -- well let me before I mention the defense's defense -- the State has the burden to prove beyond a reasonable doubt the elements of a crime, as the Judge has just read. And those really aren't in dispute. On June 6, 2012, in the State of Washington, the defendant possessed methamphetamine. We know that to be true. That's proved beyond a reasonable doubt. It's proved beyond all doubt.

And so in response to that we get instruction number 10, which is the defense. And I expect counsel to hold this up and read this to you. This is an unwitting possession defense. And I ask you to keep three things in mind in regards to this defense. First it's the defendant's burden, not the State's burden, to prove this. Second, it's by a preponderance of the evidence. And third, you're only to consider this -- not in isolation based on the evidence that they presented; that would be the defendant's testimony and

Mr. Rider's testimony -- but you're to consider it based on all of the evidence taken together.

So you might ask what is a preponderance of the evidence. That's just another way of saying on a more probable than not basis. Is it more probable that you would know what is in your pocket, or is it less probable. It is more probable that if you had methamphetamine in your pocket you would be aware of that. Is it more probable that the defendant having methamphetamine in his pocket, under the circumstances that we talked about in the course of the trial, when he was asked to shed his overalls when he was taken into custody -- is it more probable that he knew it was there and knew what it was. That's the question for the unwitting possession defense.

And you're asking that question in terms of all the evidence taken together, not in isolation just based on the evidence presented by the defense. Not just based on the defendant's self-serving testimony and the testimony of Mr. Rider, which conflicts in some areas with the defendant's testimony.

So again I'll -- I'll finish where I began. This is a common sense case. Clearly the defendant was in possession of methamphetamine. I'm asking you to hold him accountable. And you do that by upholding the law in this case. Thank you.

THE COURT: Members of the jury, if you'll turn your attention now to Mr. Finlay for closing argument on behalf of defense.

MR. FINLAY: Thank you, your Honor. Well there's not a lot to respond to there on Mr. Sigmar's argument. So I'll tell you how we see this from Cory's viewpoint.

The -- in a criminal case, because the State has the burden of proving the case beyond a reasonable doubt, the State has to convince you beyond a reasonable doubt that he's guilty or not -- well that he's guilty, I guess, from the State's viewpoint. The State has the first argument, then the defense argues, then the State has the last word. He said almost nothing from which to respond in his opening statement. So I surmise that he's saving his real arguments for the last one so I cannot respond to them. That's probably a reasonable, or acceptable tactic. But keep it in mind with what is going on here.

What is the evidence that we have seen? Well, we know that Cory was working on Wes's property, that he was pressure washing the roof and working on the shed, jacking it up and shoring it up because it was sinking into the dirt because of some work Wes had done -- some flooring Wes had put in without Cory's knowledge. We know that Cory took it upon himself to do that. Wes didn't ask him to do it, which really doesn't have much to do with the ultimate issue here. But these are the facts that came out and were proved.

We know that Cory worked on this for a week, week-and-a-half, maybe a little longer. And that he had a man named Paul Wood help him on that job. We know very little about Paul Wood, other than he's not a skilled craftsman, he's a laborer basically. He was

reputed to be a good worker, and he started off that way. But over the week or so that he worked there he went downhill, wasn't doing what he was supposed to do. Then on the day before when Cory had to leave to go check on another job and Paul was supposed to stay and work, Cory came back and Paul wasn't there. Paul eventually showed up, Cory had words with him; why'd you take off, why aren't you here working, and he didn't have a good excuse. The next day, which was the day Cory got arrested, Paul didn't show up for work at all.

So we also have the overalls that Cory was wearing on the day he was arrested, and that were used on the job by both Cory and by Paul Wood. These are them. These are the -- the same overalls. You can see that these are clearly work overalls, just exactly like Cory said. Something you would wear to work in dirty conditions to protect your regular clothes and keep yourself as clean as possible underneath the overalls. Obviously it's not something you'd go to a movie in, or you'd go to town in or anything else. They're just work overalls which clearly supports everything Cory said that he was doing that day.

Now the substance was found in one of these two pockets. I think Detective Valley said -- or the jail officer, Officer Hernandez said he thought it was in the left pocket, if I remember correctly. I don't think which one really matters. But you can see that these pockets are very narrow. I don't have big hands, but I can't quite reach to the bottom of that pocket.

remember whether the clothes were wet or not, which strongly suggests that Cory's telling the truth, his clothes were wet.

Through cross examination the State tried to suggest, or imply, that Cory actually wasn't pressure washing the roof, and he wasn't doing this work, there wasn't anybody named Paul Wood, and Wes Rider was -- everything he said was lying just to cover up for his foster son of 34 years. Well okay, that's great. I suppose that's the State's job to do that. But is there any evidence to support any of that? There's not a shred, there's not a scrap.

I think the -- the bottom line here that I'd like you to consider is, as Mr. Sigmar said, what is the common sense here based upon the evidence that we actually have. Benjamin Franklin said it is worse to convict an innocent man than to let ten guilty men go free. In other words, he'd rather let ten times as many guilty men go free than he would to convict an innocent man. That is the reason the burden of proof in a criminal case is what it is, beyond a reasonable doubt, any doubt for which a reason can be given. That's been said in different -- in different ways. Over a thousand years ago, a famous Greek, and I -- I can't remember which one, I'm sorry. He said a thousand -- better to acquit a thousand guilty men than to convict one innocent man. Anyway, it is what it is. And it is the burden of proof.

The State -- in other words, to find a person guilty of a crime there are, of course, serious consequences to the person. And that's why we have this burden of proof. And that's why the State

defense. And instead we get not my pants defense. Really it's not that actually, it's a little bit more complicated. It's I wore pants, I lent my pants to this other guy, he put methamphetamine in them, I took them back, I didn't know there was methamphetamine in the pants. That's the defense. And really, that defense doesn't pass the smell test.

When you picture coming home from work, you're tired, you open up the fridge, you have some old take-out in the fridge or some leftovers, you lift open the cellophane or the tinfoil and you smell. If it smells bad, it doesn't pass the smell test. It's a test based on common sense. And based on your common sense, you know that the defense theory of the case doesn't hold water.

Let me give you a common sense concept that might help you here. Their theory is that this man, 20 year old, 40 year old, depending on who you believe between the two -- two defense witnesses, comes over and he borrows these overalls to do some work. Now these overalls have obviously been washed. But can you imagine these gross overalls, someone borrowing these to do work? And by the way, if you're being hired to do some dirty work underneath the house, you're going to be prepared for that. It's not like he was cold. It was in the summer time.

And the idea that he's going to borrow these pants and leave methamphetamine behind in the pants is ridiculous. You know, people who use methamphetamine, who are addicted to methamphetamine, they may be absent minded at times, and depending

And the testimony suggests from the defendant that he was wet head to toe, and so that's why he asked the police officer to take off his overalls. We know that's not true because the defendant later testified towards the end of his testimony that he was just wet from his knees down. So that doesn't hold any water and is inconsistent.

Mr. Rider testified that the -- this enigmas, mysterious mystery man named Paul Wood -- he might as well be called John Doe -- shows up at the house and he's in his 20's. But that's inconsistent with what the defendant said. He said he was in his 40's.

Now it's the defendant's burden -- and this is the reason I asked the defendant these questions. I asked him okay, tell us about Paul Wood; describe him for us, do you know him, how do you know him. He says he sees him about twice a week. He says he can get a hold of him. Why isn't he here testifying? It's their burden. He's not here. There's no evidence --

MR. FINLAY: Judge, I'll object --

MR. SIGMAR: -- that he --

MR. FINLAY: -- to that argument.

MR. SIGMAR: -- even exists.

THE COURT: Overruled.

MR. SIGMAR: Now let's go to the defendant. The defendant is also inherently biased. He has a stake in the outcome. That gives him bias to lie. His testimony was obviously self-serving.

Jury excused to begin their deliberations at 10:51 a.m.

THE COURT: Counsel, if you will come up to the clerk's desk and check that we have all of the admitted Exhibits. My notes indicate that the Court admitted numbers 1, 2 and 3. And our clerk nods that that's what she believes as well.

MR. FINLAY: Your Honor, I have a request for the record. Would request that a jury instruction, an additional instruction at this point, that the jury is to disregard Mr. Sigmar's argument that Cory could have brought Paul Wood in here. I don't remember exactly how he worded that because --

THE COURT: All right. I'm going to let you make that record. I do want you to look at the Exhibits first --

MR. FINLAY: Okay.

THE COURT: -- so that when our bailiff comes back out she may take them without further delay.

MR. FINLAY: 1, 2 and 3 is my -- that's what I have.

THE COURT: All right. With regard to number 3, do we have a plastic bag to put number 3 in?

MR. FINLAY: There is a bag.

COURT CLERK: No.

THE COURT: Do you have a clear plastic bag? Okay, then it'll just go the way it is.

All right. Then you may be seated if you wish, and we will take argument with regard to Mr. Finlay's request. I am going to

THE COURT: Please be seated. Mr. Sigmar, any response? We heard from Mr. Finlay requesting a curative, I guess, instruction.

MR. SIGMAR: Well I -- I'm going to object. I -- I think -- I think counsel is asking for an instruction in light of the fact that, according to him, there's a case out there that says when the State -- or when a party does not request a missing witness instruction, that they're not allowed to make the same argument that's made in the missing witness instruction.

But in looking at the missing witness instruction, it permits -- allows the argument, or permits the jury to infer that the missing witness would come in and testify, contrary to -- to the offering party's theory of the case.

I didn't make that argument, so I don't -- even if -- I -- I've never seen that case. Even if that case existed and it said just that, it wouldn't apply in this case 'cause I never asked the jury to draw a negative inference. I just made the argument that the defendant has to prove by a preponderance of the evidence that the possession was unwitting. And he had access to this guy and the guy's not here. You know, that's -- that's my only argument I made to the jury.

THE COURT: Mr. Finlay.

MR. FINLAY: Well he -- I think he did ask the jury -- or he certainly implied to them that they should draw a negative or unfavorable inference from that. Otherwise there's no relevance whatsoever to the -- to arguing to the jury why isn't the guy here. And so that is the implication to the jury.

And I -- Judge I -- in the WPICs I didn't find the case that was even close. My -- I'm going from memory here. I can't cite a case for the Court. I'm not 100% positive. And just relying on memory alone, and sometimes I am wrong. My memory tells me there's a case that says you can't make that argument unless you ask for the missing witness instruction.

THE COURT: Court will deny the request to give a curative instruction at this point for two reasons. One is the Court does not find that there has been prosecutorial misconduct in the closing argument of the State with respect to this issue. And secondly, without something to look at that would advise the Court that there is such a case out there, I have no basis. So the Court will deny the request.

MR. FINLAY: We have one other similar issue.

THE COURT: Okay.

MR. FINLAY: We made a motion in limine -- limine at the beginning of the trial to exclude certain matters, including that there was a warrant for Cory's arrest. The Court granted that in part, and limited the State to one officer stating there was a warrant.

THE COURT: Well, we'll say it in open court then, that's true. I had to figuratively hold my breath in this case for a good part of the trial because we only had 12 jurors. We didn't pick an alternate because the Court did find that it was mathematically not possible to give both counsel strikes as to that alternate position.

But when I advised the jury, the whole panel, at the beginning of who were going to be the anticipated witnesses, and whose names may come up during the course of the testimony, I didn't receive the name of Paul Wood. And had there been a juror in our 12 who knew Paul Wood and brought that to the bailiff's attention, which is usually what happens, we would have had a mistrial if it occurred that that person, after we talked with them individually couldn't remain fair.

So as I said, I held my breath during a good part of the trial. And I just want to make you aware of how important it is for the Court to know who not only are the potential witnesses, but whose names may come up during the course of the testimony. So it's just a heads-up.

MR. FINLAY: Your Honor, that did not come up because the only way that was going to come in originally was through Mr. Sundberg's testimony, which we don't disclose, and have no duty to disclose. We weren't going to call Mr. Rider at all until Detective Valley's testimony came out the day before trial that

Appendix D

Brief of Appellant

State v. Sundberg, No. 45081-0-II

NO. 45081-0-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

CORY SUNDBERG,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR MASON COUNTY

The Honorable Toni A. Sheldon, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

A. ASSIGNMENTS OF ERROR

1. Appellant Cory Sundberg's constitutional right to due process was violated when the prosecutor improperly shifted the burden of proof in his closing argument.

2. The trial court erred in denying Mr. Sundberg's motion for new trial due to prosecutorial misconduct.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Mr. Sundberg was accused of possession of methamphetamine found in a pocket of his work overalls. He stated that the overalls were borrowed at a jobsite by a temporary employee Mr. Sundberg hired. The employee did not testify at trial. Due process prohibits a prosecutor from referring to a missing witness when the reference serves to shift the burden of proof by implying a defendant has a burden of producing evidence. Here, in closing argument the prosecutor suggested Mr. Sundberg should have called his employee, who frequently borrowed the overalls while working on the job site, to corroborate his testimony regarding unwitting possession of methamphetamine. Did this argument improperly shift the burden of proof from the State to Mr. Sundberg, in violation of his right to due process? Assignment of Error 1.

2. Did the trial court err in denying Mr. Sundberg's motion for

a new trial based on prosecutorial misconduct? Assignment of Error 2.

C. STATEMENT OF THE CASE

1. Procedural history:

The Mason County Prosecutor's Office charged Cory Sundberg with possession of a controlled substance (methamphetamine), contrary to RCW 69.50.4013(1). Clerk's Papers (CP) 131. The State amended the information in December, 2012 to add one count of bail jumping, contrary to RCW 9A.76.170. CP 121-22. The bail jumping charge was subsequently severed from the drug possession charge and was ultimately dismissed by the court. Report of Proceedings (RP) at 48, 51, 55, 296.[1]

Mr. Sundberg was tried by a jury on January 4, 2013, the Honorable Toni A. Sheldon presiding. RP at 51-217. He was convicted of possession of methamphetamine as charged. RP at 209. CP 79.

Mr. Sundberg filed a motion for a new trial pursuant to CrR 7.5 due to prosecutorial misconduct regarding a missing witness. CP 70-78; RP at 262-67. The court denied the motion, ruling that there was no prosecutorial misconduct pertaining to the missing witness and that the defense did not show there was a substantial likelihood the outcome of the trial would have

[1]The record of proceedings consists of the following:
RP --- August 20, 2012, August 22, October 16, December 17, December 24, December 31, 2012, January 2, January 4, January 8, January 9, January 28, February 19, February 22, March 18, March 20, April 1, April 8, April 15, April 18,and June 10, 2013.

been affected. RP at 267-68.

At sentencing the parties agreed that based on an offender score of "5" the standard range sentence was 6 to 18 months. CP 12-29. The court denied the defense's request to apply the Drug Offender Sentencing Alternative and imposed a sentence of 366 days. RP at 314, 321; CP 12-29.

Timely notice of appeal was filed April 19, 2013. CP 9-10. This appeal follows.

2. Testimony at trial:

Cory Sundberg was repairing a modular home in Mason County, Washington on June 6, 2012. He had been doing work on the structure for approximately a week and a half and was assisted by Paul Wood. RP at 121, 122. Mr. Sundberg stated that when Mr. Wood was on the job, he frequently wore Sundberg's bib overalls to crawl under the modular home because Mr. Wood did not have the proper clothing to go under the structure. RP at 126. Mr. Sundberg stated that Mr. Wood borrowed the overalls four days out of the six days that he was on the jobsite. RP at 126.

Mr. Sundberg was arrested on June 6, 2012, pursuant to a warrant. When arrested he was wearing the bib overalls that Mr. Wood had used. Mr. Wood lost interest in the job and was not at the job on June 6 when Mr. Sundberg was arrested. Mr. Sundberg was pressure washing the modular

home when he was arrested and his clothing was wet. RP at 121. Mr. Sundberg had not worn the overalls for a week until the time he was arrested. RP at 126, 127. He asked the arresting officer if he could change his wet clothes before being taken into custody but was told that he could not. RP at 107, 121, 122. He was taken to the Mason County Jail in Shelton, Washington, where he was initially patted down, and then subsequently issued jail clothing. RP at 99, 100, 107. At the jail, an officer conducted an inventory search of his clothing, including the pocket of the overalls. RP at 101. In the front pocket of the bib, an officer found a clear plastic baggie that contained a white crystal substance. RP at 101, 112. Defense counsel stipulated that the substance was .01 gram of methamphetamine. RP at 116. Paul Wood did not testify at trial.

3. Closing Argument:

During closing argument the prosecutor argued Mr. Sundberg should have subpoenaed Paul Wood, Mr. Sundberg's employee who borrowed his overalls several times while working on the modular home, to corroborate his testimony that the methamphetamine was not his. RP at 195. The defense objected to the argument on the ground that it shifted the burden of proof to the defense. RP at 195. The court denied the objection. RP at 195.

D. ARGUMENT

1. MR. SUNDBERG WAS ENTITLED TO A NEW TRIAL DUE TO PROSECUTORIAL MISCONDUCT

A criminal defendant's constitutional right to due process requires the State to prove every element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008).

A defendant has no duty to call a witness, and the absence of that duty is a "corollary of the State's burden to prove each element of the crime charged beyond a reasonable doubt." *State v. Contreras*, 57 Wn. App. 471, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014 (1990). It is misconduct for a prosecutor to argue that a defendant has a duty to present exculpatory evidence, as this shifts the prosecution's burden to prove its case onto the defendant - to *disprove* it. *See State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990), *review denied*, 15 Wn.2d 1029, *cert. denied*, 499 U.S. 948 (1991).

A prosecuting attorney's misconduct during closing argument can deny an accused his right to a fair trial as guaranteed by the Sixth Amendment and Const. art. I, § 22 (amend. 10); *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). A prosecutor is a quasi-judicial

officer, obligated to seek verdicts free of prejudice and based on reason. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978); *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096 (1969).

Consistent with their duties, prosecutors must not urge guilty verdicts on improper grounds. A prosecutor must always refrain from making statements that are not supported by the evidence. *Belgarde*, 110 Wn.2d at 507-08; *State v. Gibson*, 75 Wn.2d 174, 176, 449 P.2d 692 (1969), cert. denied, 396 U.S. 1019 (1970).

In the instant matter, misconduct occurred when, in rebuttal argument, the prosecutor was allowed to point out to the jury that Mr. Sundberg should have called Mr. Wood as a witness. The prosecutor argued:

> Mr. Rider testified that the–this enigmas—mysterious mystery man named Paul Wood—he might as well be called John Doe—shows up at the house and he's in his 20's. But that's inconsistent with what the defendant said. He said he was in his 40's.
>
> Now it's the defendant's burden—and this is the reason I asked the defendant these questions. I asked him okay, tell us about Paul Wood; describe him for us, do you know him, how do you know him. He says he sees him about twice a week. He says he can get a hold of him. Why isn't he here testifying? It's their burden. He's not here.

RP at 195. Defense counsel objected and was overruled. RP at

195. The State continued:

> Now let's go to the defendant. The defendant is also inherently biased. He has a stake in the outcome. That gives him bias to lie. The testimony was obviously self-serving, it was obviously designed to tell a story to corroborate his defense. And again, it was his burden. He didn't bring in Paul Wood.

RP at 195-96. This argument violated the limitations of the missing witness doctrine. First, the prosecutor's argument shifted the burden to Mr. Sundberg by suggesting that he was required to prove his innocence by presenting corroborating evidence.

Second, the argument was not raised until after the evidence had been presented and both parties had rested, at which time Mr. Sundberg had no opportunity for rebuttal or explanation.

Moreover the argument was improper because Mr. Wood was not available because he would have incriminated himself if he had testified that he had put the methamphetamine in Mr. Sundberg's overalls.

The prosecutor's improper use of the missing witness doctrine shifted the burden of proof in violation of Mr. Sundberg's constitutional right to due process and was not harmless beyond a reasonable doubt. Reversal is required.

E. CONCLUSION

Based on the above, Cory Sundberg respectfully requests this Court to reverse and dismiss his conviction.

DATED: February 28, 2014.

Respectfully submitted,
THE TILLER LAW FIRM

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CERTIFICATE OF SERVICE

The undersigned certifies that on February 28, 2014, that this Appellant's Opening Brief was sent by JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a true and correct copy was mailed by first class mail, postage prepaid to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on February 28, 2014.

PETER B. TILLER

MASON COUNTY PROSECUTOR

May 08, 2015 - 4:11 PM

Transmittal Letter

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