

65561-2

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No. 65561-2-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

DEREK LEE WHITE, Appellant.

BRIEF OF RESPONDENT

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2011 FEB 23 10:00 AM
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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court erred denying White's motion to suppress evidence found in his vehicle in a search incident to his arrest for driving while under the influence of drugs when the search was conducted contemporaneous to White's arrest and the arresting trooper reasonably suspected there would be evidence related to the crime of arrest in the car that would be lost, destroyed or concealed without the search.
2. Whether there is sufficient evidence in the record to support White's conviction for possession of marijuana where the state did not present scientific analysis but did present testimony from the arresting officer who was trained in detecting and identifying controlled substances that the substance found was identifiable as marijuana.
3. Whether any potential prejudice arising from alleged improper statement made during closing argument was cured by the trial court's reminder to the jury that they were to decide the case based on the evidence presented at trial.

C. FACTS

1. Procedural Facts

Derek White was charged with unlawful possession of a controlled substance, heroin and unlawful possession of less than 40 grams of marijuana. CP 45-46. Prior to trial, White moved to suppress the heroin and marijuana found in his vehicle in a search incident to his arrest for driving while under the influence of drugs. CP 93-99. White stipulated to

Washington State Trooper Maupin's police report for purposes of this motion. *Id.*, RP 3 (3/24/10). After reviewing the stipulated facts and hearing argument, the trial court denied White's motion concluding the officer had authority to search the passenger compartment of White's vehicle contemporaneous to his arrest for evidence related to the crime of arrest due to concerns that evidence would otherwise be concealed or destroyed. CP 65-66. At trial, the trooper testified he did not notice the strong odor of marijuana in White's vehicle until he recontacted the vehicle after White's arrest. RP 68, 89, 90. White renewed his motion to suppress based on this testimony. RP 103. The police report White stipulated to did not clarify the exact moment Maupin noticed the odor of marijuana coming from White's vehicle and White asserted this clarification required the court to suppress evidence found in the vehicle search. RP 93-99. The court again denied White's motion, concluding the search was lawful notwithstanding this fact because the search was conducted contemporaneous with White's arrest, the officer reasonably expected to find evidence related to the crime of arrest in the passenger compartment and such evidence would otherwise be lost or destroyed because the vehicle was being recovered by a third party. RP 112-114. Following a jury trial, White was convicted as charged and given a 60 day

sentence on each count to be served concurrently. CP 13-20. White timely appeals. CP 3-12.

2. Substantive Facts

On January 30th, 2009 at approximately 9 a.m. Washington State Patrol Trooper Maupin was advised of a possible DUI travelling northbound I-5 towards Whatcom County. CP 86, 65-67, FF 1. Dispatch advised that a black mustang vehicle was reportedly swerving on and off the roadway nearly striking the guard rail and other vehicles. Id. Trooper Maupin located the vehicle parked in the gore point of the Nulle Road entrance ramp off of I-5. CP 65-57, FF3. Two other vehicles were parked beside and in front of White's mustang. CP 86.

White was sitting in the driver's seat of his vehicle with his legs outside of the car on the ground. Id, FF 4. When asked if he was alright, White informed the trooper he was falling asleep and also informed the trooper he was on his way to work. CP 65-67, FF 5. Trooper Maupin noticed White appeared very lethargic, his gaze was fixed and his speech slurred. CP 86. Trooper Maupin suspected White was under the influence of drugs. Id., CP 65-57, FF 6. White denied consuming alcohol or drugs but admitted taking a quarter pill of subuxone. CP 86. When asked to step away from the vehicle, White slowly exited his vehicle using his car for support. CP 86. White had difficulty zipping his sweatshirt and

swayed as he stood. *Id.* After giving White several field sobriety tests and a portable breath test, Trooper Maupin concluded White was operating his vehicle under the influence of drugs and arrested him. FF 6, 7.

A search of White's person revealed several orange colored broken pills and a blue pill. CP 65-67, FF 7. When Trooper Maupin recontacted White's vehicle he noticed a strong odor of marijuana and an open roll of aluminum foil. CP 65-67, FF 8. A subsequent search of the passenger compartment revealed two glass smoking pipes in the center console. One of the pipes had burnt green vegetable matter inside and the other had what appeared to be burnt marijuana residue. CP 86, RP 68. In the glove box, Trooper Maupin found a piece of aluminum foil folded. *Id.* Inside, there were burnt lines and a glob of sticky black residue that appeared to be heroin. *Id.*, CP 65, FF 9. White, who was handcuffed and secured in the patrol car at the time of the search, subsequently denied smoking marijuana because he had no money but said that historically he smoked it as much as he could. RP 67, 71.

Trooper Maupin explained at trial he was specifically trained to detect and identify both marijuana and heroin. RP 60-61, 165. Based on Maupin's training and experience, Trooper Maupin testified he believed the substance found in the glass pipes was marijuana. RP 160-166. White objected to Maupin's testimony asserting it lacked foundation and that he

was not on notice pursuant to CrR 4.7 that the trooper would be testifying as an expert witness. RP 164, 5. The trial court overruled White's objection. Id.

During closing argument the prosecutor argued the substance found in the glass pipe was marijuana based on Trooper Maupin's testimony. The prosecutor argued "And you get to look at this, you get to decide, yup, that's marijuana. If based on the testimony and evidence that was presented, you as a juror say, well, let's have a peek here. Let's see. We have in evidence a pipe. So, here's this pipe with black stuff in here, and this is just to keep track, this is plaintiff's exhibit 4, and then what we have under plaintiff's exhibit 3 is another pipe with residue in here that the trooper said based on the smell and his training is marijuana. If you look at this and say yup this is marijuana, that's marijuana, or you take the evidence and you believe the witness that this is marijuana....." RP 195-97. White objected and the trial court advised the jury as follows:

I think the jury has been instructed and will be instructed that they're to decide on the evidence that they've heard.

RP 197. Following deliberations, White was convicted as charged. CP 22.

D. ARGUMENT

1. The search of White's vehicle incident and contemporaneous to his arrest was lawful for preservation of evidence of White's crime of arrest.

White asserts that pursuant to Arizona v. Gant, 566 U.S. ___, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), and State v. Patton, 167 Wn.2d 379, 385, 219 P.3d 651 (2009) and State v. Valdez, 167 Wn.2d 761, 767, 224 P.2d 751(2009), the warrantless search of his automobile was invalid under the Fourth Amendment and pursuant to Article 1, §7 of the Washington State Constitution because he was handcuffed and secured in a patrol car when the trooper searched the passenger compartment of his vehicle following his arrest for driving while under the influence of drugs. Br. of App. at 15. White consequently claims the trial court erred failing to suppress evidence below. White's constitutional rights were not violated by Trooper Maupin's search of the passenger compartment of his vehicle however because contrary to Valdez and Patton, he was arrested for driving while under the influence of drugs, the trooper reasonably expected to find evidence relating to the crime of arrest in the car and this evidence would otherwise have been destroyed or lost if the trooper did not search the vehicle contemporaneously to White's arrest.

A trial court's findings of fact in a suppression hearing are reviewed on appeal to determine if substantial evidence in the record supports those findings. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. State v. Valdez, 167 Wn.2d at 767. Questions of law are reviewed de novo. *Id.*

The Fourth Amendment provides “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures....” U.S. Const. Amend. IV. A warrantless search of an area in which the defendant has a privacy interest is therefore considered unreasonable under the Fourth Amendment unless the search falls within “a few specifically established and well-delineated exceptions.” Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 567 (1967).

In Gant, the U.S. Supreme Court clarified and narrowed the search incident to arrest exception to the Fourth Amendment as defined in Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) and as applied in New York v. Belton, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981) and held “Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” Gant, 129

S.Ct. at 1723. Where these reasons are absent, “a search of an arrestee’s vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.” Gant, 129 S.Ct. at 1723-24.

In Gant, police searched the defendant’s vehicle incident to arrest following the defendant’s arrest for driving with a suspended license after the defendant was handcuffed and placed in a patrol car. The Court held this search violated the Fourth Amendment because Gant was not within reaching distance of the passenger compartment at the time of the search and therefore did not pose a safety threat and because, officers could not have reasonably expected to find evidence of the crime he was arrested for within his vehicle. Gant at 1719.

Following the Gant opinion, our State Supreme Court in State v. Patton, 167 Wn.2d 379, 385, 219 P.3d 651 (2009) held pursuant to Article 1, §7 of the Washington State Constitution, “the search of a vehicle incident to arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.” Patton, 167 Wn.2d at 394-95. The search of a vehicle incident to arrest “requires a nexus between the arrestee, the vehicle, and the crime of arrest,

implicating safety concerns or concern for the destruction of evidence of the crime of arrest.” *Id.* at 384. *See also, State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009),

In Patton, police arrested the defendant on an outstanding felony warrant while he was standing next to his parked vehicle. After arresting, handcuffing and placing Patton in the back of a patrol vehicle, police then searched his vehicle incident to his arrest and found methamphetamine and cash under the driver’s seat. The court determined this search violated Article 1, §7 because Patton was not a driver or recent occupant of the vehicle, Patton was secure in the patrol car at the time of the search and officers could not expect to find evidence of the crime for which Patton was arrested in the vehicle. *Id.*

Following Patton, the State Supreme Court in State v. Valdez, invalidated another vehicle search made incident to the arrest because the defendant was secured in the back of a patrol car at the time of the search, there was no officer safety concerns and there was no basis to reasonably believe evidence related to the underlying crime could be found in the vehicle because Valdez was arrested on an outstanding warrant. Valdez, 167 Wn.2d at 778.

Unlike Gant, Patton, and Valdez, the trooper in this case arrested White for driving while under the influence of drugs, and based on the

circumstances of the stop, reasonably expected to find evidence related to White's arrest in the vehicle and was concerned that evidence could be lost, destroyed or concealed without a contemporaneous search. CP 65. White does not assign error or challenge any of the trial court's findings of fact on appeal. They are, for purposes of examining the legal issues presented herein, verities on appeal.

The unchallenged findings of fact establish a clear connection between White, his crime of arrest and the search of his car. White was the driver and sole occupant of the car. Trooper Maupin had probable cause to believe White was driving while under the influence of drugs based on the White's physical condition, his performance on road side field tests and his location-sitting in the driver's seat of the vehicle pulled over on the side of an entrance ramp off of the freeway. Additionally, Trooper Maupin found White sitting in the driver's seat of his vehicle with the driver's door open and his feet sitting out of the car which diminished any reasonable expectation of privacy he may have had to the interior compartment of his vehicle. Moreover, based on the facts that presented themselves, Maupin reasonably believed there was evidence related to the crime for which White was arrested in the passenger compartment of the vehicle. CP 65-67. When Maupin recontacted White's vehicle following his arrest, he immediately noticed an odor of marijuana. FF 8. This

information further confirmed to Maupin there was evidence in the car related to White's arrest that if not found would be lost or destroyed. Therefore, the search of the passenger compartment made contemporaneous to White's arrest did not violate either the Fourth Amendment or Article 1, §7 of our state constitution, in contrast to the searches invalidated in Gant, Patton and Valdez. Even if the stipulated facts included the fact that marijuana was not detected until after trooper recontacted White's vehicle-the trooper's intrusion of opening White's vehicle was minimal and the odor of marijuana at that point gave Maupin reasonable basis to then search the passenger compartment for evidence related to White's arrest to avoid loss or destruction of that evidence.

White argues nonetheless, citing State v. Chesley, 158 Wn.App. 36, 239 P.3d 1160 (2010), that Patton requires the arrestee be within reaching distance of the passenger compartment at the time of the search **and** that the search is necessary for officer safety or to secure evidence of the crime of arrest that could be destroyed. See, Br. of App. at 17, 19. In Chesley, Division II of this Court held the warrantless search of the defendant's vehicle was unlawful pursuant to his arrest for vehicle prowl. The defendant was observed initially standing beside a 'bait' car when officers arrived, but then got into an adjacent car just prior to his arrest. Officer could see that the 'bait' car's lock had been punched out and

observed burglary tools in the car Chesley got into. Division II invalidated the vehicle search nonetheless reasoning “nothing in the record indicates that Officer Sapinoso searched Chesley’s car to prevent destruction or concealment of evidence.” Chesley, 158 Wn.App. 36, 239 P.3d at 1166 (2010).

In contrast to Chesley, the nature and circumstances of White’s crime of arrest, as reflected in the findings, demonstrate Trooper Maupin reasonably expected and was concerned there would be evidence related to White’s arrest in the vehicle and that this evidence would likely be destroyed, lost or concealed if a search of the passenger compartment was not completed contemporaneous to White’s arrest. Maupin’s suspicions were confirmed when he initially noticed a strong odor of burning marijuana and subsequently found the glass pipes with marijuana residue and, the heroin residue in the aluminum foil in the glove box. Based on facts of this case, Maupin reasonably determined a search of the passenger compartment of White’s vehicle was reasonable or would aid in preventing the loss or destruction of relevant evidence. *See, Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1998) (law enforcement officers may offend due process by failing to collect and preserve potentially useful evidence in bad faith), *see also, State v. Wittenbarger*, 124 Wn.2d 467, 477, 880 P.2d 517 (1994).

Recently, Division I of this Court considered application of Article 1, §7 in State v. Wright, 155 Wn.App. 537, 230 P.3d 1063, *review granted*, ___ P.3d ___ (2010) in a search of a vehicle incident to the arrest of the driver. In Wright, police stopped the vehicle for a traffic infraction and then smelled a strong odor of marijuana coming from the vehicle, a large roll of money in the glove box and furtive movements by the Wright. Wright was arrested for possession of marijuana, handcuffed and placed in the back of a patrol car. Police subsequently searched the passenger compartment of Wright's vehicle after a K-9 unit alerted to the presence of drugs in Wright's vehicle. The court in Wright upheld the search; distinguishing it from the automobile searches conducted in Patton and Valdez where "a search after a traffic stop leads to the fortuitous discovery of evidence of an unrelated crime." State v. Wright, 155 Wn.App. 555. The court in Wright determined the officer lawfully arrested him for a drug crime and that the facts of that arrest provided the necessary nexus between Wright and the contemporaneous search of his vehicle.¹ Similarly to Wright, the nature of White's arrest and circumstances of the stop provided the necessary nexus between White's arrest and the

¹ Review has been granted in Wright, and State v. Snapp, 153 Wn.App. 485, 219 P.3d 971 (2009), review granted, ___ P.3d ___ (2010) as to the following issue: Whether under the Washington Constitution police may conduct a warrantless search of a car for evidence of the crime for which the driver was arrested after the driver is secured in a patrol car.

contemporaneous search of his vehicle notwithstanding the fact that White was safely secured in the patrol car at the time of the search. The trial court therefore did not err denying White's request to suppress evidence below. White's convictions should be affirmed or alternatively this matter should be stayed pending the decisions in State v. Wright, 155 Wn.App. 537, 230 P.3d 1063, *review granted*, ___ P.3d ___ (2010), State v. Snapp, 153 Wn.App. 485, 219 P.3d 971 (2009), *review granted*, ___ P.3d ___ (2010) scheduled to be argued in the State Supreme Court May 2011.

2. Trooper Maupin's testimony was sufficient to support the jury determination that the substance found in the glass pipe in White's vehicle was marijuana.

White challenges the sufficiency of evidence to support the jury's finding that he possessed marijuana. Specifically, he asserts trooper Maupin's testimony was insufficient, standing alone, to identify the substance found in a glass pipe found in his car as marijuana.

Under a sufficiency of the evidence analysis, the test is "whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). In applying this test, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly

against the defendant.” *Id.* at 339. Such a challenge admits the truth of the State’s evidence and all reasonable inferences therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “Circumstantial evidence is equally reliable as direct evidence.” State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). The appellate court defers to the trier of fact on issues of credibility of witnesses and persuasiveness of evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989).

The jury was instructed as follows:

(1) That on or about January 30th, 2010, the defendant possessed marijuana;

and

(2) That this act occurred in the State of Washington.

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

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

CP 26-43 (Inst. No.9).

White asserts that without the chemical analysis, the State’s evidence-trooper Maupin’s testimony was insufficient to establish that the controlled substance in the glass smoking pipes was marijuana.

Expert chemical analysis is not essential to prove the nature of a controlled substance beyond a reasonable doubt. State v. Eddie, 40 Wn. App. 717, 720, 700 P.2d 751 (1985). Lay testimony and circumstantial evidence can be sufficient to prove the identity of a controlled substance. State v. Hernandez, 85 Wn. App. 672, 675. A witness with expertise acquired through experience or training may give an opinion as to the identity of a controlled substance. *Id.* at 676, *citing* State v. Hutton, 7 Wn.App. 726, 731, 502 P.2d 1037 (1972).

White asserts, relying on State v. Castro, 39 Wn.App. 229, 692 P.2d 890 (1984), State v. Tretton, 1 Wn.App. 607, 611, 464 P.2d 438 (1969), State v. Potts, 1 Wn.App. 614, 464 P.2d 742 (1969) and State v. Harris, 12 Wn.App. 481, 496, 530 P.2d 646 (1975), that an officer may give his opinion identifying a controlled substance but only if it is accompanied by some sort of scientific testing. Br. of App. at 21. White misapprehends these cases. In fact in Castro, the court confirmed “Chemical proof is not legally required” to support the identification of a controlled substance. State v. Castro, 39 Wn.App. at 229. Contrary to White’s argument, the cases upon which he relies only confirm scientific testing was not necessary pre -Hernandez and that the trial court has wide discretion in determining if an officer can testify as an expert witness regarding testing and identification of a controlled substance.

Here, the uncontroverted testimony was that the substance found in the glass pipes was marijuana. Trooper Maupin repeatedly testified he was trained and educated to detect and identify drugs. RP 60-61. Trooper Maupin testified that he immediately recognized the substance in the glass smoking pipes recovered from White's vehicle as marijuana. RP 160-161. The substance both looked and smelled like burnt marijuana. RP 165. While White denied the marijuana or heroin found was his, he also told Trooper Maupin he would smoke marijuana everyday if he could. RP 71. Taken in the light most favorable to the State, the trooper's testimony was sufficient for a rational juror to conclude beyond a reasonable doubt that the substance found in the glass pipes in White's' vehicle was marijuana.

a. The trial court did not abuse its discretion by permitting trooper Maupin to testify over White's objection pursuant to an alleged CrR 4.7 violation.

Next, White argues Trooper Maupin's testimony was improper because he alleges the state failed to place him on notice that Maupin would be called as an expert witness to render his opinion as to the identification of the substance found in glass pipes discovered in White's vehicle. White contends this CrR4.7(7)(i) discovery violation deprived him of due process of law. Br. of App. at 25.

CrR 4.7 provides:

[T]he prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than omnibus hearing; The names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

CrR 4.7(a)(1)(i).

This rule required the state to place White on notice of the substance of Trooper Maupin's testimony, including that he would be testifying to the identification of marijuana. Trooper Maupin's police report placed White on notice that he recognized and identified the substance in the glass pipes as marijuana-his report inferred but did not detail Maupin's training and education in the detection of controlled substances. To the extent the State was required to detail this information, the State violated CrR 4.7.

White contends the trial court erred by failing to sanction the state by suppressing Maupin's testimony or offering a continuance. Br. of App. at 25. But White did not request a continuance, he merely objected to Trooper Maupin's testimony based on CrR 4.7 and foundation. RP 161-165. Exclusion of the trooper's testimony was not warranted.

Discovery violations based on CrR 4.7 are within the trial court's sound discretion. State v. Hutchinson, 135 Wn.2d 863, 882, 959 P.2d 1061 (1988). A trial court abuses its discretion when it makes decisions

based on untenable grounds or for untenable reasons. State v. Foxhoven, 161 Wn.2d 168, 174, 163 P.3d 786 (2007). While CrR 4.7(h)(7)(i) gives a trial court discretion to exclude a witness as a discovery sanction, excluding such testimony is an “extraordinary remedy” under CrR 4.7(h) that “should be applied narrowly.” State v. Hutchinson, 135 Wn.2d at 882-83. In determining whether exclusion is appropriate, court’s examine (1) the effectiveness of less severe sanctions; (2) the impact of witness preclusion on the evidence at trial and the outcome of the case;(3) the extent to which the witnesses testimony will surprise or prejudice the party; and (4) whether the violation was willful or in bad faith. *Id* at 882-3.

White was on notice that Maupin had identified one of the substances found in his car as marijuana-his report presupposes that Trooper Maupin was trained and educated in identifying controlled substances. Trooper Maupin’s testimony could not have been a surprise and certainly didn’t prejudice White when he previously expected a scientist to confirm through testing that the residue in the glass pipes was marijuana. The trial court therefore did not abuse its discretion by denying White’s request to suppress or exclude Maupin’s testimony.

White also asserts that this alleged discovery violation deprived him of due process of law. Br. of App. at 25. Under the due process

clause of the Fourteenth Amendment prosecution must comport with prevailing notions of fundamental fairness such that [the defendant] was afforded a meaningful opportunity to present a complete defense. State v. Lord, 117 Wn.2d 829, 867, 822 P.2d 177 (1991). A violation of a discovery rule can constitute a due process violation. State v. Bartholomew, 98 Wn.2d 173, 205, 654 P.2d 1170 (1982), *reversed on other grounds*, 463 U.S. 1203, 103 S.Ct. 3530, 77 L.Ed.2d 1383 (1983).

White fails to explain how the alleged discovery violation implicated the fundamental fairness of his trial. As previously noted, White was on notice that Maupin recognized the green leafy substance in the glass pipes as marijuana, based on Maupin's police report - a report provided to and relied on White prior to trial. See, CP 93-99 (Motion to Suppress predicated on trooper Maupin's police report). Moreover, the information provided in Maupin's report presupposes that Maupin was educated and trained in the detection of controlled substance since he readily identified both substances found in the car as having characteristics consistent with heroin and marijuana. Under these circumstances, White could not have been unfairly surprised and the testimony could not have affected White's ability to present a complete defense. White therefore has not and cannot demonstrate the alleged CrR 4.7 discovery violation resulted in a due process violation that warrants reversal of his conviction.

3. **The prosecutor's argument taken in context, were proper. Any potential prejudice arising from an alleged improper statement during argument was cured by the trial court's reminder to the jury that they were to decide the case based on the evidence presented at trial.**

Lastly, White complains that the prosecutor improperly invited the jury to conduct their own "test" of the alleged marijuana during deliberations. Br. of App. at 26.

Where prosecutorial misconduct is claimed, the appellant bears the burden of showing both the impropriety of the conduct and its prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert.*

denied, 523 U.S. 1007 (1998). Prejudicial effect is established only if there is a substantial likelihood that the misconduct affected the jury's verdict. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000).

Where a defendant objects on the basis of prosecutorial misconduct, a reviewing court defers to the trial court's ruling on the matter because the "trial court is in the best position to most effectively determine if prosecutorial misconduct prejudiced a defendant's right to a fair trial."

State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. den.*, 523 U.S. 1008 (1998); *see also*, State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006) (court gives deference to the trial court's ruling on

motion for mistrial “because the trial court is in the best position to evaluate whether the prosecutor’s comment prejudiced the defendant”).

A prosecutor’s comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). “Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request.”
Id.

During closing argument the prosecutor argued the substance found in the glass pipe was marijuana based on Trooper Maupin’s testimony. The prosecutor argued

And you get to look at this, you get to decide, yup, that’s marijuana. If based on the testimony and evidence that was presented, you as a juror say, well, let’s have a peek here. Let’s see. We have in evidence a pipe. So, here’s this pipe with black stuff in here, and this is just to keep track, this is plaintiff’s exhibit 4, and then what we have under plaintiff’s exhibit 3 is another pipe with residue in here that the trooper said based on the smell and his training is marijuana. If you look at this and say yup this is marijuana, that’s marijuana, or you take the evidence and you believe the witness that this is marijuana.....

RP 195-97. White objected and the trial court advised the jury as follows:

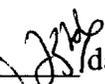
I think the jury has been instructed and will be instructed that they’re to decide on the evidence that they’ve heard.

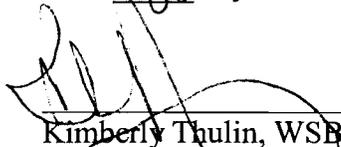
RP 197.

This argument, taken in context, asked the jury to conclude the evidence found in the glass pipe was marijuana based on Trooper Maupin's testimony, including but not limited to his education and training in the identification of controlled substance. This argument was proper. To the extent White argues the prosecutor invited the jury to examine and decide for themselves during deliberation whether the substance was marijuana, any potential concern was obviated by White's objection and the trial court's reminder to the jury it needed to predicate its decision based on the evidence presented at trial. The jury is presumed to follow the court's instruction. State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994). Under these circumstances, White cannot demonstrate this isolated statement during closing arguments could have resulted in the requisite prejudice. White's claim fails.

E. CONCLUSION

For the foregoing reasons, the State requests that White's appeal be denied and his convictions affirmed.

Respectfully submitted this  day of March, 2011.

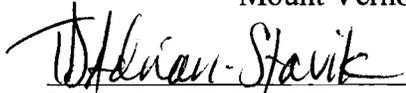


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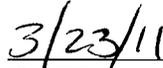
CERTIFICATE

I certify that on this date I placed in the United States mail a properly stamped and addressed envelope, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Appellant's attorney, Corbin Volluz, addressed as follows:

Corbin Volluz
Law Office of Corbin T. Volluz
1204 Cleveland Ave
Mount Vernon WA 98273-4810



LEGAL ASSISTANT



DATE