

70926-7

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NO. 70926-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM NELSON,

Appellant.

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

The Honorable Joseph P. Wilson, Judge
The Honorable Thomas J. Wynne, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting a court summons and two bail bond receipts as exhibits in appellant's trial.

2. The trial court failed to give an adequate limiting instruction when it admitted a court summons and two bail bond receipts.

3. The trial court violated appellant's constitutional rights under article 4, § 16 of the Washington Constitution by improperly commenting on the summons and bail bond receipt evidence.

4. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

Appellant was charged with possession of heroin with intent to deliver after police executed a search warrant at the home where he was staying and found 25 grams of heroin. Appellant denied the drugs were his, and at trial presented evidence that he did not live at the home searched, that he only told police where the heroin was after they indicated his girlfriend would not have to go to jail, and presented testimony from one of the home's residents admitting he had signed an affidavit admitting the heroin was his, not appellant's, but who recanted at trial.

1. Did the trial court commit reversible error by admitting a court summons bearing appellant's name and the address of the home searched, and bail bond receipts bearing appellant's name, when there was

other evidence to link appellant to the home, and where these documents revealed appellant had other pending criminal matters at the time of the search thereby creating the specter that the jury would employed the forbidden inference that because of past criminal behavior, appellant was more likely guilty of the currently charge offense?

2. Evidence of the court summons and bail bonds were admitted in photographic form and documentary form. After the photographic form of the evidence was admitted, the court gave a limiting instruction that informed the jury it was not allowed to employ the forbidden inference. When the documentary form of the evidence was admitted, however, no such limiting instruction was given. Was this reversible error because without such an admonishment there is a reasonable probability the jury convicted appellant by employing the forbidden inference as to the documentary form of the evidence.

3 Did the trial court violated appellant's constitutional rights under article 4, § 16 of the Washington Constitution when it was admonishing the jury not to employ the forbidden inference as to the court summons and bail bond receipts, when its admonishment specifically told the jury the documents pertain to appellant, rather than allowing the jury to decide if the person named in the documents was the same as the person on trial?

4. Did the cumulative effect of these errors deprive appellant of a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor charged appellant William Nelson with possession of heroin with intent to deliver. CP 147-48. Nelson was convicted by a jury. CP 21; 4RP-5RP.¹ A standard range sentence was imposed and Nelson appealed. CP 1, 8-19; 6RP 22.

2. Substantive Facts

a. Execution of the Warrant and Trial

On December 30, 2011, City of Everett police officers executed a search warrant at 3902 Rucker Avenue. 4RP 40; 5RP 105. The warrant was obtained based on probable cause associated with Nelson's alleged involvement with methamphetamine at that home. 4RP 76-77.

During execution of the warrant police encounter at least four people in the home, including Nelson, Nelson's girlfriend Zedna Hester,

¹ There are six volumes of verbatim report of proceedings referenced as follows: 1RP - 11/16/12 (CrR 3.5 hearing before the Honorable Thomas J. Wynne); 2RP - 4/15/13 (pretrial); 3RP - 8/15/13 (pretrial); 4RP - 9/9/13 (trial); 5RP - 9/10-11/13; and 6RP - 9/19/13 (sentencing).

Daniel Olds and another male.² 4RP 45. A search of Nelson's person uncovered no incriminating evidence. 4RP 72-73.

One of the officers involved in the execution of the warrant, Officer Duane Wantland, interviewed Nelson while the search was underway. 4RP 47. According to Wantland, after waiving his rights, Nelson told Wantland that he was on unemployment and had been living in the home and sharing a bedroom with Hester for about a month. 4RP 48-49. When asked about his involvement in drugs, Nelson conceded drug paraphernalia would be found in the house, but claimed he was currently "dry," meaning he was out of product to sell, but that he might be get more as soon as that evening from "Steve." 4RP 49-51.

At one point Nelson expressed concern to Wantland about the possibility of his girlfriend Hester going to jail. 4RP 53-54. When Wantland told him that absent a pending arrest warrant she did not have to go to jail, Nelson told him they would find heroin hidden in a pool cue case in the closet of the room he shared with Hester. 4RP 54.

² A man with the last name "Thompson" lived at the home, but was never specifically identified as one of the individual present when the search warrant was executed. Compare 5RP 74 (refers to "Grant Thompson") with 5RP 81 (refers to "Brent Thompson").

Officer Lance Uhden was assigned to search the room Nelson said he shared with Hester. 5RP 17-18. Uhden found 25 grams of heroin where Nelson said they would. 4RP 55; 5RP 43-44, 52-53.

In the same room Uhden found four digital scales, lots of Ziploc baggies commonly used for packaging drugs, a baggie of suspected marijuana, drug-user paraphernalia, over \$800 in cash and three purses. 5RP 18-19, 27-29. One of the purses, which was pink, contained the over \$800 in cash, some marijuana, and two bail bond documents bearing Nelson's name. 5RP 25, 61, 72-73; Exs. 5B, 5C, 62 & 64. A court summons bearing Nelson's name and the address of the home searched was also discovered in the room. 5RP 73; Exs. 5A & 65. These documentary exhibits were admitted over defense pretrial objection. 2RP 55-61, 69; 4RP 1-6.³

According to one of the home's residents, Daniel Olds, Nelson never actually lived at the home, but would stay with Hester two to three times a month. 5RP 104-05. Olds admitted at trial that approximately six months after the search of the home, he wrote a letter to Nelson's attorney confessing that the heroin was his, not Nelson's. 5RP 106-09. Olds later gave a recorded interview and signed a sworn affidavit attesting to the

³ Copies of exhibits 5A, 5B, 5C, 62, 64 and 65 are attached as an appendix.

same. 5RP 107-09. Olds recanted his confession by the time of trial, however, claiming he only made it because he thought Nelson was facing 30 years in prison. 1RP 106, 110-12, 116.

During closing arguments the prosecution argued the bail bonds and court summons were proof Nelson actually lived at the home because the bail bonds bore his name and the summons bore both his name and the address of the home searched. 5RP 144-45. Defense counsel suggested in the alternative that the reason the bail bonds were found in the pink purse was because his girlfriend Hester, who lived at the home, likely bailed Nelson out of jail. 5RP 155-57.

b. Pretrial Ruling and Introduction of the Bail Bond and Summons Evidence.

Officer Uhden testified he found a "bail receipt" from a bail bonding company in the pink purse that was "basically, for bonding out of jail for a past offense." 5RP 25. Although a defense objection was sustained, copies and photographs of the bail bonds bearing Nelson's name and a court summons bearing Nelson's name and the address of the house searched were admitted as trial exhibits. 5RP 26, 39; Exs. 5A, 5B, 5C, 62, 64 & 65; Appendix.

Pretrial, the defense argued these documents should not be admitted to link Nelson to the home searched. Counsel argued police

should instead simply testify they found documents bearing Nelson's name and the address of the house searched, and that admitting the bail bond receipts and summons unnecessarily revealed Nelson had other criminal matters pending and would therefore be unfairly prejudicial. 2RP 55-58. Although the court deferred its ruling, it noted the documents would help the prosecution refute Nelson's claim that he did not live at the home and only visited his girlfriend there, and would thereby provide a basis to question "the rest of his story[.]" 2RP 58, 69.

When the issue was again raised on the first day of trial, defense counsel renewed the request, suggesting that prosecution witnesses should be allowed to testify they found "official documents" bearing Nelson's name and the address of the home searched, but that the documents themselves should not be admitted because they constituted prior bad act evidence, which is presumptively inadmissible under ER 404(b). 4RP 1-2, 4, 6. The court concluded that because they were "court documents", they were particularly relevant to the issue of whether Nelson actually lived at the home, and denied their complete exclusion, ordering only that the exact charge be redacted from the summons. 4RP 6-7. The court also offered to give a limiting instruction, which the defense accepted. Id.

After the exhibits 62, 64 and 65 were admitted, the court gave the following limiting instruction:

Ladies and gentlemen, Exhibits Number 62, this one here, Exhibit 64 and 65 have all been admitted. However, I'm going to give you what's called a limiting instruction on these. These exhibits and the documents they represent that are admitted relate to other court cases in regards to Mr. Nelson. These cases are not before you today and you should not infer anything against Mr. Nelson nor should you make any assumptions about Mr. Nelson based upon these three exhibits being admitted. In other words, you are not to prejudice Mr. Nelson about the existence or content of these three documents in regard to other court cases. You're not to make any assumptions that because this references other court cases, therefore it's more than likely he's doing something here.

Do you understand that? Do you understand that issue about no prejudice should be taken from these documents? All right, thank you.

5RP 26. The court did not give such an instruction, however, when exhibits 5A, 5B and 5C were admitted. 5RP 39.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY ADMITTING EVIDENCE REVEALING NELSON HAD CRIMINAL COURT MATTERS PENDING WHEN HE WAS ARRESTED FOR THE CURRENT CHARGE.

ER 404 (b) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

The purpose of ER 404(b) is to prevent consideration of prior bad acts evidence as proof of a general propensity for criminal conduct. State v. Halstien, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

Admission of evidence under this rule is reviewed for an abuse of discretion. State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). The court abused its discretion in Nelson's case.

Before admitting evidence under ER 404 (b), the trial court must engage in a three-part analysis. First, the court must identify the purpose for which the evidence is being admitted. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

Second, the court must determine that the proffered evidence is logically relevant to an issue. The test is whether the evidence is relevant and necessary to prove an element of the charged crime. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). Evidence is logically relevant if it tends to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401.

Third, assuming the evidence is logically relevant, the court must then determine whether its probative value outweighs any potential

prejudice.⁴ Saltarelli, 98 Wn.2d at 362-63. "Evidence of prior misconduct is likely to be highly prejudicial, and should be admitted only for a proper purpose and then only when its probative value clearly outweighs its prejudicial effect." State v. Lough, 125 Wn.2d 847, 862, 889 P.2d 487 (1995)(emphasis added). "The availability of other means of proof is a factor in deciding whether to exclude prejudicial evidence." State v. Johnson, 90 Wn. App. 54, 62, 950 P.2d 981 (1998).

In a doubtful case, [t]he scale must tip in favor of the defendant and the exclusion of the evidence." State v. Myers, 49 Wn. App. 243, 247, 742 P.2d 180 (1987); State v. Bennett, 36 Wn. App. 176, 180, 672 P.2d 772 (1983). The prosecution's burden when attempting to introduce evidence of other bad acts under one of the exceptions to ER 404 (b) is "substantial." State v. DeVincentis, 150 Wn.2d 11, 17, 20, 74 P.3d 119 (2003).

Here, the trial court admitted the summons and bail bond receipt evidence on the basis that it helped the prosecution link Nelson to the home searched. 4RP 6-7. To the extent this reason comports with one of the exceptions in ER 404 (b), "identity" is the most logical because the

⁴ Similarly, ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury"

documents arguably identified Nelson as one of the home's regular residents.

Evidence of prior misconduct is admissible to prove identity only if identity is actually at issue. State v. Mutchler, 53 Wn. App. 898, 902-03, 771 P.2d 1168, review denied, 113 Wn.2d 1002 (1989). Moreover, to be admissible under ER 404 (b), the prior misconduct must link the defendant to the crime charged. State v. Sanford, 128 Wn. App. 280, 286, 115 P.3d 368 (2005).

The summons and bail bond receipts did neither. Identity was not at issue. Nelson was undeniably one of the people present when the search warrant was executed and the heroin discovered. See Sanford, 128 Wn. App. at 287 (because Sanford admitted he had been in altercation with complainant, "his identity was not in issue at trial, and the booking photo was totally unnecessary to link Sanford with the charged assault."). To the extent identity may be characterized as being at issue, it was with regard to the identity of owner of the money in the pink purse, not the heroin. See 4RP 5 (trial court notes the fact that the bail bond receipts were with the over \$800 found in the pink purse means the money was more likely Nelson's).

Second, even if identity was at issue, existence of the summons and bail bond receipts did not connect Nelson to crime, which involved

the heroin found in the pool cue case, not the money in the pink purse. Not properly, anyway: jurors would likely have drawn an inference that Nelson was more likely the owner of the heroin because he was a "criminal type." See State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (gang evidence portrayed Ra and companions as inherently bad persons, therefore inviting jury to make the "'forbidden inference'" underlying ER 404 (b) that Ra's prior bad acts showed his propensity to commit the crimes charged), review denied, 164 Wn.2d 1016 (2008).

Finally, whatever probative value the evidence may have had did not outweigh its prejudicial effect. The trial court did not balance the probative value of the evidence against its prejudicial effect. Instead, the court focused solely on the probative value, opining, "isn't it more probative that his legal documents are in this bag surrounded by money?" and "Somebody is more likely to keep court documents with them than any other documents or birth certificate or something like that, right?" 4RP 5-6.

Nelson's counsel made clear the prejudicial effect of the documents would be to inform the jury that Nelson had been in criminal trouble earlier in the same month⁵ the search warrant was executed, and that this

⁵ The contested exhibits are all dated in early December 2011. Exs. 5A, 5B, 5C, 62, 64 & 65; Appendix.

would give rise to the forbidden inference. 4RP 1-2, 4. Moreover, counsel noted the prosecution could connect Nelson to the money in the pink purse by simply allowing Officer Uhden to testify he found "official documents" addressed to Nelson in the purse. 4RP 6. The trial court seemed to agree with this to a certain extent when it stated that the significance of the documents was that they were "court documents." 4RP 6. As such, the probative value could have been relayed to the jury by allowing testimony that "official documents" or even "court documents" addressed to Nelson at the home searched were found in the pink purse. The court likely would have reached this same conclusion had it conducted a proper balancing test.

"Without such balancing and a conscious determination made by the court on the record, the evidence is not properly admitted." State v. Tharp, 96 Wn.2d 591, 597, 637 P.2d 961 (1981). Failure to engage in this balancing process is error. State v. Carleton, 82 Wn. App. 680, 685, 919 P.2d 128 (1996).

The error may nevertheless be harmless if (1) the record is sufficient for this Court to determine the trial court would have admitted the evidence had it conducted a proper balancing; or (2) this Court can conclude the verdict would have been the same even without the evidence. Carleton, 82 Wn. App. at 686-87.

The prosecution cannot satisfy either test here. First, the record does not show the trial court would have admitted the documents after conducting a proper balancing test. To the contrary, as noted, had the court conducted the proper balancing test it likely would have recognized that testimony about finding "official documents" or "court documents" was sufficient and completed avoided the prospect of jurors employing the forbidden inference by revealing Nelson's other pending criminal matters.

At the very least, the court would likely have admitted only the redacted summons, which was the only one that bore both Nelson's name and the address of the home searched. Exs. 5A, 64 & 65. Unlike the bail bond receipts, which revealed Nelson must have been jailed on a criminal charge, the redacted summons could have been the result of a non-criminal matter, as the prosecutor pointed out during pretrial discussions. 2RP 55-56 (prosecutor notes summons is similar to what one might get for contesting a parking ticket).

Nor can this Court conclude the outcome of the trial would have been the same without the contested evidence. The prosecution's case was not overwhelming. The jury was aware that police searched the home expecting to discover methamphetamine, not heroin. 4RP 76. It was Nelson who directed them to where the heroin was hidden, but he also claimed he was personally out of product to sell, and told them where the

heroin was only after gaining some assurance that his girlfriend would not go to jail. 4RP 53-54, 74. Also deterring from the strength of the prosecution's case was Olds' sworn statement that the heroin was his, not Nelson. 5RP 107-08.

Given the weaknesses in the prosecution's proof, admission of the summons and bail bond receipts was not harmless. There was an ample basis for jurors to find reasonable doubt. Unnecessarily informing the jury that Nelson had been the subject of criminal proceedings shortly before being arrested for heroin possession likely tipped the scale against reasonable doubt and in favor of conviction. The summons and bail bond receipt evidence was unfairly prejudicial, and this Court should reverse.

2. EVEN IF THE SUMMONS AND BAIL BOND RECEIPT EVIDENCE WAS PROPERLY ADMITTED, THE TRIAL COURT FAILED TO GIVE ADEQUATE LIMITING INSTRUCTIONS.

Where evidence of other misconduct is admitted at trial, upon request, the trial court must provide a limiting instruction directing the jury to disregard its propensity aspect and focus solely on its proper purpose. ER 105⁶; State v. Russell, 171 Wn.2d 118, 123, 249 P.3d 604

⁶ ER 105 provides:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall

(2011); State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); see also State v. Aaron, 57 Wn. App. 277, 281, 787 P.2d 949 (1990) (pointing out "vital importance" of instruction to stress limited purpose of evidence). In fact, in the context of ER 404 (b), "once a criminal defendant requests a limiting instruction, the trial court has a duty to correctly instruct the jury, notwithstanding defense counsel's failure to propose a correct instruction." State v. Gresham, 173 Wn.2d 405, 424, 269 P.3d 207 (2012).

A limiting instruction was requested by Nelson after the trial court ruled it would admit the summons and bail bond receipt evidence. 4RP 7. And a limiting instruction was given, but only as to exhibits 62, 64 and 65, the photographs showing the summons and bail bond receipts. 5RP 26. When copies of the documents depicted in the photographs were admitted, exhibits 5A, 5B and 5C, no such instruction was given. 5RP 39.

The failure to give an ER 404 (b) limiting instruction is harmless only if, within reasonable probabilities, it did not materially affect the outcome at trial. Gresham, 173 Wn.2d at 425. Jurors would have properly recognized that the only limiting instruction they received pertained solely to exhibits 62, 64 and 65 because those were the only ones before them with the instruction was given, and the instruction given

restrict the evidence to its proper scope and instruct the jury accordingly.

specifically referred to "these three exhibits." 5RP 26. In contrast, they would have felt free, and been free, to use exhibits 5A, 5B and 5C however they chose, including as evidence of Nelson's propensity to commit criminal acts.

As already noted, the prosecution's case was not overwhelming. The police searched the home expecting to discover methamphetamine, not heroin. 4RP 76. Nelson directed them to heroin, but he also made clear he was personally out of drugs, and told them where the heroin was only to prevent his girlfriend from going to jail. 4RP 53-54, 74. And Olds' sworn confession the heroin was his, not Nelson, further weakened the prosecution's case. 5RP 107-08.

Given the weaknesses in the prosecution's proof, allowing the jury unlimited use of exhibits 5A, 5B and 5C was not harmless. There was ample basis for jurors to find reasonable doubt. Being allowed to improperly consider Nelson's apparent criminal propensity likely tipped the scale against reasonable doubt and in favor of conviction. Failure to limit the jury's use of these three exhibits was not harmless because there is a reasonable probabilities they *did* materially affect the outcome at trial, and therefore this Court should reverse. Gresham, 173 Wn.2d at 425.

3. IMPROPER JUDICIAL COMMENT ON THE EVIDENCE REQUIRES REVERSAL OF NELSON'S CONVICTION.

Even if it was not error to admit the summons and bail bond receipt evidence, and even if the limiting instruction given with regard to the evidence can be viewed as applying to all six of the exhibit associated with that evidence, reversal is still necessary because the trial court conveyed to the jury that it believed the criminal matters referenced in those documents pertained to the Nelson on trial rather than to anyone else with the same name. 5RP 26. Because the prosecution cannot show this error was harmless beyond a reasonable doubt, reversal is required.

Washington's constitution states, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Wash. Const. art. 4, § 16. It is thus error for a judge to instruct the jury that matters of fact have been established as a matter of law. State v. Baxter, 134 Wn. App. 587, 592-93, 141 P.3d 92 (2006). The court's personal feelings need not be expressly conveyed to the jury; it is sufficient if they are merely implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). The prohibition forbids comments that permit the jury to infer whether the judge believed or disbelieved certain testimony. State v. Eaker, 113 Wn. App. 111, 117, 53 P.3d 37 (2002). Whether a

comment on the evidence is improper depends on the facts and circumstances in each case. Eaker at 117-18.

Judicial comments are presumed prejudicial. The burden is on the prosecution to show the record affirmatively shows no prejudice could have resulted. Levy, at 723.

[T]he burden is not carried, and the error therefore prejudicial, where the jury conceivably could have determined the element was not met had the court not made the comment.

134 Wn. App. at 593 (emphasis added).

A violation of Wash. Const. art. 4, § 16 may be raised for the first time on appeal. The failure to object or to move for mistrial does not preclude review. Levy, 156 Wn.2d at 719-720; State v. Becker, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997); State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968).

Here, in admonishing the jury regarding the limited purpose for which it could consider exhibits 62, 64 and 65, the court made clear it considered the documents depicted in the exhibits were associated with the same "Nelson" on trial and thereby eliminated the possibility that one or more jurors might find the prosecution failed to prove the person listed on the documents was the same person on trial for heroin possession;

Ladies and gentlemen, Exhibits Number 62, this one here, Exhibit 64 and 65 have all been admitted.

However, I'm going to give you what's called a limiting instruction on these. These exhibits and the documents they represent that are admitted relate to other court cases in regards to Mr. Nelson. These cases are not before you today . . .

SRP 26 (emphasis added).

By commenting in front of the jury that the court cases referred to in the exhibits involved Nelson, the court was improperly informing the jury that they could not be in reference to someone else with Nelson's name. This improper comment is similar to the one discussed in Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971).

The Arensmeyer Court deemed the trial court's interruption of counsel during closing argument -- to say counsel was mistaken as to the evidence -- an unconstitutional comment on the evidence. 6 Wn. App. at 120. This Court found that while the trial court was duty-bound to restrict counsel's argument to the facts in evidence, "[t]he court cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical." Id. Thus, when the trial court interrupted, it commented on the evidence by revealing to the jury what it believed the evidence to mean. Id.

Similar to Arensmeyer, here the trial court wrongly commented on the already hotly contested evidence. More importantly, however, the trial

court made it clear that Nelson was involved in the criminal legal system before ever being charged with the current offense.

Similarly, in State v. James, 63 Wn.2d 71, 385 P.2d 558 (1963), the Court held the defendant was deprived of a fair trial when the trial court commented on the credibility of a witness. Two defendants, William James and Richard Topper, were charged for three separate crimes and tried in the same trial. During the course of the trial, Topper pled guilty and became the State's key witness. The jury was informed by the court that Topper was being discharged from the trial to be a witness for the State "providing that he testify fully as to all material matters within his knowledge[.]" Id. 74. The appellate court found that this inferential statement by the trial court was significant to the jury:

The die was cast when Topper left the courtroom; his counsel took no further part in the trial, and the court, in its final instructions, reiterated that Topper had been discharged. The jury could draw only one conclusion; the court was satisfied that Topper had testified fully as to all material matters within his knowledge. We conclude...that the court's remarks constituted a comment upon the evidence and an approval of the credibility of the witness[.]

63 Wn.2d at 76.

Here, as in James, once the trial court made clear the criminal legal proceedings referenced in the contested exhibits involved the Nelson on trial, the jury likely did not question further the link between Nelson, the

\$800+ found in the pink purse, and consequently, the heroin. The court's admonishment made clear there was a link, and as such constituted a comment on the evidence.

Finally, in State v. Vaughn, 167 Wash. 420, 9 P.2d 355 (1932), the court held the defendant was deprived of a fair trial because the trial court commented on the credibility of a witness. Two defendants, William Vaughn and George Miller, were charged with grand larceny and were tried in the same trial. During trial, Miller testified against Vaughn and received a suspended sentence. Vaughn suspected a secret agreement was made between the prosecuting attorney and Miller. Vaughn's counsel called the prosecuting attorney as a witness to prove the alleged secret agreement. The prosecutor, after he was examined by the Vaughn's counsel, stated:

Prosecutor: "I will ask myself a question on cross examination."

Trial Court: "You needn't ask the question, [prosecutor] Foley."

Vaughn's Counsel: "Just wait a minute. Ask yourself the question first."

Prosecutor: "His Honor said I didn't need to."

Vaughn's Counsel: "Well, he has got to ask his question if he wants to answer it. I want to know what he is going to state."

Trial Court: "It seems to be a senseless procedure, Mitchell [Vaughn's counsel], to ask yourself a question. I dare say [the prosecutor] wouldn't answer anything that he shouldn't."

167 Wash. at 424.

The appellate court found the fact that prosecutor Foley

not only testified as a witness but was the attorney representing the State made it doubly important that no statement be made by the court calculated or which might result in influencing the jury. The court, in effect, vouched for the veracity and rectitude of the witness. The conclusion is irresistible that the statement of the learned trial court was clearly a comment upon the weight of the testimony and the credibility of the witness, and hence in violation of the Constitution.

167 Wash. at 426.

As in Vaughn, the trial court here improperly commented on the evidence and veracity of prosecution's evidence by stating the contest exhibits pertained to the Nelson on trial, and not some other Nelson. This violated Const. art. 4, § 16. "The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge conveyed to it by the court of what the court's opinion is on the testimony submitted." James, 63 Wn.2d at 75. That objective was defeated here.

The jury here was likely influenced by knowledge conveyed to it by the trial court. As in Vaughn, the conclusion here is irresistible that the trial court's comment went to the weight of the contested exhibits and therefore violated the constitution and depriving Nelson of a fair trial. Vaughn, 167 Wash. at 426. This Court should reverse.

4. CUMULATIVE ERROR DEPRIVED NELSON OF A FAIR TRIAL.

Even if the individual errors described above do not warrant reversal, Court should reverse because, taken cumulatively, they deprived Nelson of a fair trial. The combined effect of the improperly admitted exhibits, the insufficient limiting instruction and the trial court's comment on the evidence rendered the trial unfair.

Reversal is required when the cumulative effect of errors produces a trial that is fundamentally unfair. State v. Venegas, 155 Wn. App. 507, 520, 228 P.3d 813 (2011). Even errors that were unpreserved at trial may accumulate to render the trial unfair. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). This Court may exercise its discretion to review the claims, despite the failure to raise the issue in the trial court. *Id.*

In Alexander, the defense argued cumulative error required reversal because damaging hearsay was improperly admitted and an expert was permitted to opine regarding Alexander's guilt, thereby invading the province of the jury. 64 Wn. App. at 151-54. This Court reversed and remanded for a new trial, concluding, "the vouching and hearsay testimony of [the expert and the victim's mother], when combined with the

prosecutor s improper questions and closing remarks, prevented Alexander from obtaining a fair trial." Id. at 158.

A new trial is required here as well. Nelson's trial was tainted by improperly admitted exhibits that gave rise to the forbidden inference, an inadequate limiting instruction that left no limitation on how the jury used three of the six exhibits, and a judicial comment on the exhibits that rendered them more unfairly toxic than would otherwise have been the case. The scale upon which the jury weighed the evidence was not balanced. The multiple errs at trial placed a thumb on the prosecution's side of the scale of justice. Nelson requests this Court reverse his conviction because the cumulative effect of trial errors denied him a fair trial.

D. CONCLUSION

The trial court erred in admitting the evidence of the summons and bail bond receipts because they were unnecessary to the prosecution's case and extremely prejudicial. The trial court erred by failing to adequately instruct the jury on the limited use of the summons and bail bond receipt evidence, despite a defense request for such instruction. The trial court erred by telling the jury that the summons and bail bond receipts pertained to Nelson's other court cases. Finally, the cumulative effect of all these errors deprived Nelson of a fundamentally fair trial. Therefore, this Court should reverse his conviction.

DATED this 16th day of April 2014

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

APPENDIX



SUMMONS/BAIL NOTICE

EVERETT MUNICIPAL COURT
3028 WETMORE AVE.
EVERETT, WA 98201
(425) 257-8778

Case Assigned To:

Judge: ODELL, TIMOTHY B

Courtroom: Courtroom 1

X CITY OF EVER
vs. NELSON, WILLIAM THOMAS

DEFENDANT'S NAME	CITATION NO.	CITATION DATE	NOTICE DATE
NELSON, WILLIAM THOMAS	CR0095518 EPD	11/19/2010	12/08/2011

IN THE NAME OF THE STATE OF WASHINGTON, YOU ARE HEREBY SUMMONED AND REQUIRED TO APPEAR AT THIS MUNICIPAL COURT ON THE DATE AND TIME BELOW.

DATE 12/16/2011 AT 08:30 AM

NELSON, WILLIAM THOMAS
3902 RUCKER AVE
EVERETT WA 98201

FOR:

- ARRAIGNMENT*
- TRIAL
- SENTENCING
- HEARING
- * SEE REVERSE

FAILURE TO OBEY THIS SUMMONS MAY RESULT IN:
ISSUANCE OF A BENCH WARRANT FOR YOUR ARREST OR
SUSPENSION OF YOUR DRIVER'S LICENSE.

TRAENKENSCHUH, KATIE

JUDGE / COMMISSIONER / CLERK

DPI

Premium Receipt

Date 12-8-11

Defendant

William Nelson

Case Number(s)

CA 95518

Court(s)

EM

Bond Number(s)

AA 12635

Collateral?

Circle one YES NO

Collateral Receipt #

Amount Owed

\$ 1500

Amount Received

\$ 200

Received From

William Nelson Phone # 4-238-0858

Balance

\$ 1300

Cash / Credit

Non-Refundable

Out of Custody



Premium Receipt

Date 12-7-11

Defendant

~~WATSON~~ William T Nelson

Case Number(s)

CR0095518

Court(s)

EM

Bond Number(s)

AA 02635

Collateral?

Circle one YES NO

Collateral Receipt #

Amount Owed

\$ 1800

Amount Received

\$ 300

Received From

WILLIAM T NELSON Phone # 425-328-0858

Balance

\$ 1500

4-238-0858

Cash / Credit

Non-Refundable

Out of Custody



STATES EXHIBIT 62

1314

Brandon's Bail Bonds Inc.

Premium Receipt

Date 11-2-11

Defendant William Nelson

Case Number(s) CR 95518

Court(s) EM

Bond Number(s) AA 12 635

Collateral? YES NO

Collateral Receipt #

Amount Owed \$ 1500

Amount Received \$ 200

Received From William Nelson

Phone # 4238-0858

Balance \$ 1300

Balance

Out of Custody

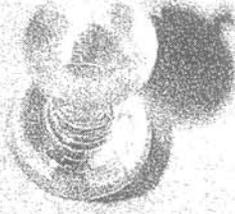
Non-Refundable

Cash / Credit



SUMMONS/BAIL NOTICE

EVERETT MUNICIPAL COURT
3028 WETMORE AVE.
EVERETT, WA 98201
(425) 257-8778



CITATION NO.	CITATION DATE	NOTICE DATE
CR0009551B EPD	11/19/2010	12/08/2011

IF WASHINGTON, YOU ARE HEREBY SUMMONED AND REQUIRED TO
COURT ON THE DATE AND TIME BELOW.

DATE 12/16/2011 AT 08:30 AM

FOR
ADD
SON, WILLIAM THOMAS



DEFENDANT'S NAME

WILLIAM THOMAS

CHIEF CLERK

NAME OF THE STATE OF WASHINGTON, YOU ARE HEREBY SUMMONED TO APPEAR AT THIS MUNICIPAL COURT ON THE DATE AND TIME BELOW

DATE

12/16/2011

NELSON, WILLIAM THOMAS
3902 RUCKER AVE
EVERETT WA 98201

IF YOU FAIL TO OBEY THIS SUMMONS MAY RESULT IN:
ISSUANCE OF A BENCH WARRANT FOR YOUR ARREST.
REVISION OF YOUR DRIVER'S LICENSE.

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

STATE OF WASHINGTON

Respondent,

v.

WILLIAM NELSON,

Appellant.

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COA NO. 70926-7-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF APRIL 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER AVENUE
EVERETT, WA 98201
Diane.Kremenich@co.snohomish.wa.us

[X] WILLIAM NELSON
DOC NO. 265341
COYOTE RIDGE CORRECTIONS CENTER
P.O. BOX 769
CONNELL, WA 99326

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF APRIL 2014.

x *Patrick Mayovsky*