

NO. 34471-8-II

COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent

vs.

RICHARD M. JONES, JR.,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Paula Casey, Judge
Cause No. 04-1-02370-3

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing the prosecutor to play a portion of the bodywire recording that it had excluded pursuant to ER 404(b).
2. The trial court erred in denying Jones's motion for a mistrial based on the prosecutor's misconduct in playing an excluded portion of the bodywire recording by holding that this error was not prejudicial.
3. The trial court erred in allowing the prosecutor, over Jones's objection, to elicit irrelevant testimony that the CI was not testifying because he was frightened the implication being the CI's fear was caused by the defendant where Jones was charged with neither tampering nor intimidation of a witness.
4. The trial court erred in allowing the prosecutor, over Jones's objection, to improperly argue in closing that the CI had not testified because of Jones and in mischaracterizing the evidence to argue facts not in evidence.
5. The trial court erred in allowing the prosecutor, over Jones's objection, to bolster the non-testifying CI's credibility during closing argument.
6. The trial court erred in failing to dismiss Jones's case where the cumulative effect of the claimed errors involving prosecutorial misconduct materially affected the outcome of the trial.
7. The trial court erred in not taking the case from the jury for lack of sufficient evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the State committed prosecutorial misconduct in trying this matter, which deprived Jones of a fair trial? [Assignments of Error Nos. 1-6].

2. Whether there was sufficient evidence to uphold Jones's conviction for unlawful delivery of a controlled substance? [Assignment of Error No. 7].

C. STATEMENT OF THE CASE

1. Procedure

Richard M. Jones, Jr. (Jones) was charged by first amended information filed in Thurston County Superior Court with one count of unlawful delivery of a controlled substance including a school bus route stop sentence enhancement. [CP 10].

No pretrial motions regarding CrR 3.5 or 3.6 were made or heard. However, Jones did move pre-trial to exclude the recording of the wire worn by the confidential informant (CI) or in the alternative to redact portions of the recording as it included statements in violation of ER 404(b). [2-21-06 RP 4-19]. The court granted Jones's motion in part by excluding portions of the recording as it did in fact violate ER 404(b). [2-21-06 RP 19-21]. Jones was tried by a jury, the Honorable Paula Casey presiding. Jones had no objections and took no exceptions to the Court's Instructions to the Jury. [2-22-06 RP 23]. The jury found Jones guilty of unlawful delivery of a controlled substance and entered a special verdict finding that the delivery took place within 1000 feet of a school bus route stop. [CP 36, 37; 2-22-06 RP 57-51].

The court sentenced Jones to a standard range sentence of 60-months (36-months for the underlying offense and 24-months for the sentence enhancement) based on an offender score of 5. [CP 38-46, 47-48; 3-8-06 RP 8-11].

Timely notice of appeal was filed on March 8, 2006. [CP 49-58]. This appeal follows.

2. Facts

On August 12, 2004, the Thurston County Narcotics Task Force set up a drug buy using a confidential informant (CI) based on his tip, which targeted Jones for selling cocaine. [2-21-06 RP 23, 27-32, 65-66, 82-83]. The CI arranged the buy from Jones. [2-21-06 RP 32-34]. Prior to going to the buy, the CI was searched, the CI was equipped with a court authorized bodywire to record the transaction, his car was searched, and the police gave him buy money (\$850). [2-21-06 RP 32-41, 66-70, 83-88]. The police also set up video surveillance at the buy location. [2-21-06 RP 34-35]. Just prior to Jones's arrival, another person contacted the CI, but there was no hand-to-hand contact between this person or an exchange of anything. [2-21-06 RP 41]. Thereafter, as arranged by the CI, Jones arrived at the appointed location and a transaction occurred. [2-21-06 RP 41-47, 70-75]. After the transaction, the CI met with the police, his vehicle was again searched, and turned over suspected cocaine that he

had obtained from Jones for \$850. [2-21-06 RP 47-50, 69, 75-76]. Tami Kee, a forensic scientist with the Washington State Patrol Crime Lab, tested the suspected cocaine and confirmed that it was in fact cocaine. [2-22-06 RP 3-9]. Testimony at trial established that the location of the transaction was approximately 800 feet from a school bus route stop. [2-22-06 RP 10-17, 17-21]. The video surveillance recording of the transaction and the recording of the bodywire were played to the jury. [2-21-06 RP 55, 58]. Neither the CI nor Jones testified at trial.

D. ARGUMENT

(1) THE STATE COMMITTED PROSECUTORIAL MISCONDUCT IN TRYING THIS MATTER, WHICH DEPRIVED JONES OF A FAIR TRIAL.

The law in Washington is clear, prosecutors are held to the highest professional standards. A prosecuting attorney, here the State, is a quasi-judicial officer. *See State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). The State Supreme Court has characterized the duties and responsibilities of a prosecuting attorney as follows:

He represents the State, and in the interest of justice must act impartially. His trial behavior must be worthy of the office, for his misconduct may deprive the defendant of a fair trial. Only a fair trial is a constitutional trial. *State v. Case*, 49 Wn.2d 66, 298 P.2d 500 (1956),

We do not condemn vigor, only its misuse. When the prosecutor is satisfied on the question of guilt, he should use every legitimate honorable weapon in his arsenal to convict. No prejudicial

instrument, however, will be permitted. His zealousness should be directed to the introduction of competent evidence. He must seek a verdict free of prejudice and based on reason.

State v. Coles, 28 Wn. App. 563, 573, 625 P.2d 713 (1981), *citing* State v. Huson, 73 Wn.2d 660, 440 P.2d 192 (1968).

A prosecutor has a duty as an officer of the court to seek justice as opposed to merely obtaining a conviction. Id. In cases of professional misconduct, the touchstone of due process analysis is fairness, i.e., whether the misconduct prejudiced the jury, thereby denying the defendant a fair trial guaranteed by the due process clause. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). If the prosecutor lays aside that impartiality to seek a conviction through appeals to passion, fear, or resentment, then he or she ceases to properly represent the public interest. State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984).

a. Overview Of What Occurred

Prior to trial, the court ordered that the bodywire recording could be played to the jury, but it could not include any reference to future heroin buys. [2-21-06 RP 19-21]. The State played the recording to the jury, and despite the court's pretrial ruling, included the portion where the CI requested heroin. [Exhibit No. 8; 2-21-06 RP 58]. Jones immediately objected and moved for a mistrial, which the court denied finding that the State had erred but the error was not prejudicial. [2-21-06 RP 58, 96-98].

During trial, the State questioned Dale Elliott (Elliott), a Thurston County Narcotics Task Force Officer, as to why the CI, Wayne, had not testified and elicited over Jones's objection that the CI was "frightened." [2-21-06 RP 94-95]. Jones was not charged with intimidating or tampering with a witness.

Finally, during the State's closing argument the following occurred:

State: And how much sense does it make to you that Detective Elliott or any narcotics detective would put their own reputation on the line? Their own credibility? Their own integrity of their own investigations? Their very livelihood on the line for one silly person who is duping or snookering them somehow?

They are smart individuals. They too are not fools. If they believe for a second, one second Wayne wasn't up to par, that he was under the influence or that he couldn't be trusted, do you think they would have continued to use him? I submit to you they would not.

Now, where is Wayne? There's lots of discussion of where is Wayne today. You know, when you were sitting over there as prospective jurors, we had a discussion about if an informant doesn't show up. Are there are reasons for that? One issue came out, that well, it could be in the hospital. Another—I used juror 12 at the time and said, he, you know, maybe he's not going to testify because his identity would be revealed.

Defense: Your Honor, I would ask that counsel not ask the jury to speculate as to matters that aren't in evidence.

The Court: You may make your argument about this issue from the evidence.

State: Now, what do we know from the evidence? We know there is a reason why Wayne isn't here. You heard Detective Elliott tell you all of the attempts he made of this 15-year relationship he's had with Wayne. He knows Wayne. He knows where he lives. He knows his family. He knows what he does. He knows Wayne well. They started out as friends before he ever started helping the police catch drug dealers.

Where is Wayne? Why wouldn't Wayne show up? We heard from Detective Elliott that Wayne was frightened. We heard he was afraid to appear. Why do we know he was afraid? Well, we heard from Detective Elliott that is the case they know each other well. In addition to that, this was only one drug deal. The first of a planned many, right? The first. Well, what does that tell you?

You can infer from what you hear that the CI, or informant, was afraid. Why would he be afraid?

Defense: Your Honor, I'm going to make the same request that we not ask the jury to speculate as to matters not in evidence.

State: It's a reasonable inference from the evidence.

The Court: You may complete your argument.

State: So what do we infer from the evidence before us? We can infer that, well, we had one deal with Ricky, and that Wayne was discovered.

And why would he be frightened and not want to testify in this particular trial? Because he's afraid of the defendant. Well that makes sense now, doesn't it? Somebody who has a 15-year history of being around, and all of a sudden he's afraid to come and testify.

Told you he got paid for a reason. It's because he placed his life in danger. This is not easy work. It's scary work. It's dangerous work.

Ricky gets his haircut at the barber shop where Wayne works. That's how they know each other. Who else works there?

Wayne's family does, his dad, his mom. It's a family-owned shop. He has every reason to be afraid because his whole family has been discovered now. Ladies and gentlemen, put your thinking caps on—

Defense: Your Honor, I'm sorry, but I have to make the same objection.

The Court: You do need to move on in your argument.

State: Use your common sense.

[2-22-06 RP 54-57].

- b. The Prosecutor Committed Misconduct In Playing Portions Of The Bodywire The Trial Court Had Excluded And The Trial Court Exacerbated This Error By Denying Jones's Motion For Mistrial By Holding That This Was Error But Not Prejudicial.

Noncompliance with court orders constitutes misconduct. *See State v. Stephans*, 47 Wn. App. 600, 604, 736 P.2d 302 (1987). Here, pre-trial the court ruled that portions of the bodywire recording could not be played to the jury under ER 404(b). [2-21-06 RP 19-21]. The State, apparently in compliance with the court's order prior to playing those admissible portions of the bodywire recording, took the time to redact the transcript of the bodywire recording the jury was allowed to use to follow when the bodywire recording was played. [Exhibit No. 8; 2-21-06 RP 57]. The State then played the bodywire recording, presumably "dubbing" the bodywire recording to exclude those portions ruled inadmissible by the court, then inexplicably played portions of the bodywire recording ruled

inadmissible by the court. [2-21-06 RP 58, 96-98]. Jones immediately objected and moved for a mistrial. [2-21-06 RP 58, 96-98]. The State committed misconduct by failing to abide by the court's pre-trial ruling.

The court exacerbated the State's misconduct in denying Jones's motion for mistrial. The court denied Jones's motion for mistrial stating:

Well, I had excluded those last couple of lines which apparently were played to the jury when the tape of the wire conversation was played....I'm going to determine that there is no prejudicial error and there is no mistrial.

[2-21-06 RP 98]. While the court has discretion in determining whether to grant a mistrial or not, in this case, given that the CI did not testify (the bodywire recording was the only time his voice was heard during trial), and given the State's subsequent misconduct, it is inexplicable as to why the court would condone the State's flagrant disregard of its pre-trial ruling.

- c. While Ultimately The Trial Court's Error, The Prosecutor Committed Misconduct, Over Jones's Objection ,By Eliciting Irrelevant Testimony That The CI Was Not Testifying Because He Was Frightened The Implication Being The CI's Fear Was Caused By The Defendant Where Jones Was Charged With Neither Tampering Nor Intimidation Of A Witness.

Evidence is admissible when relevant, provided other rules do not preclude its admission. State v. Clark, 78 Wn. App. at 477; *see also* State

v. Austin, 59 Wn. App. 186, 194-95, 796 P.2d 746 (1990). ER 401

provides:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Furthermore ER 402 provides:

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the court of this state. Evidence which is not relevant is not admissible.

[Emphasis added].

The only evidence relevant to the instant case was evidence establishing that Jones had in fact delivered cocaine. Testimony regarding why the State failed to call the CI or why the CI did not testify was irrelevant and inadmissible.

Here, the State, committing another act of misconduct, over Jones’s objection, was allowed to elicit from Elliott that the CI did not testify because he was “frightened.” [2-21-06 RP 94-95]. While ultimately this was the trial court’s error in allowing the same, the State still was the party to present this evidence and should have known that it was inadmissible as being irrelevant to the issue presented at trial—whether Jones was guilty of delivery of a controlled substance. Jones was not charged with intimidating or tampering with a witness. The only

purpose for eliciting this testimony was to improperly imply, on an irrelevant issue, that Jones was a “bad” or “dangerous” person and the jury should infer the same from this testimony and convict Jones. The State’s purpose in this regard is further demonstrated by its misconduct in closing argument as set forth below.

- d. The Prosecutor Committed Misconduct, Over Jones’s Objection, To Improperly Argue In Closing That The CI Had Not Testified Because Of Jones And In Mischaracterizing The Evidence To Argue Facts Not In Evidence.

A criminal defendant's right to a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury’s verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93,804 P.2d 577 (1991). Appeals to a jury’s passion and prejudice are improper. State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985). Moreover, comments which encourage a jury to render a verdict on facts not in evidence are improper. State v. Stover, 67 Wn. App. 228, 230-231, 834 P.2d 671 (1992).

Here, the State during its closing argument, the pertinent portion is set forth in its entirety above, over Jones’s repeated objections, improperly

argued that the CI had not testified because he was “frightened” of Jones because he would harm not only the CI but the CI’s family. There is nothing in the record establishing, as argued by the State, that Jones had ever threatened either the CI or his family. For the State to focus the jury’s attention on why the CI had not testified (as argued above totally irrelevant to the issue presented in this case), was improper in that it directed the jury to convict Jones merely because he was “dangerous.” *See e.g. State v. Reed*, 102 Wn.2d 140, 146, 684 P.2d 699 (1984) (less egregious than the instant case the prosecutor repeatedly calling defendant a liar, did not have a case, and defendant was clearly guilty of murder two constituted prosecutorial misconduct). These appeals by the State to the jury’s fears or prejudices based on facts not established by admissible evidence should not be condoned by this court.

e. The Prosecutor Committed Misconduct, Over Jones’s Objection, To Bolster The Non-testifying CI’s Credibility During Closing Argument.

It is improper for a prosecutor to vouch for or against the credibility of a witness. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003); *see also State v. Kirkman*, Slip Opinion No. 76833-1 (filed April 5, 2007) (testimony relating indirectly to credibility, if not objected to at trial, does not necessarily give rise to a “manifest” constitutional error).

Here, the misconduct in the State's closing argument (pertinent portions set forth in its entirety above) is especially egregious. Not only did the CI not testify as a witness, but the State vouched for or bolstered the non-testifying CI's credibility by arguing that Detective Elliott, who did testify, had a 15-year relationship with the CI and why would he jeopardize his reputation/career for this CI, that the CI had provided a service to the public by engaging in the "dangerous" activity of acting as a drug informant, and that this non-testifying witness was beyond reproach. This argument was improper and constituted misconduct.

f. The Cumulative Effect Of The Errors Of Prosecutorial Misconduct Claimed Herein Materially Affected The Outcome Of Jones's Trial And Requires Reversal Of His Conviction.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, for the reasons argued in the preceding sections of this brief, even if any one of the issues presented standing alone does not warrant reversal of Jones's conviction, the cumulative effect of these errors materially affected the outcome of his trial, and his conviction

should be reversed, even if each error examined on its own would otherwise be considered harmless. State v. Coe, 101 Wn.2d at 789; State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

g. Conclusion.

Trained and experienced prosecutors presumably do not risk appellate reversal of a hard fought conviction by engaging in improper trial tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case. State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). Sadly, this is what has occurred in the instant case. The only issue involved in the instant case was whether Jones had delivered a controlled substance. Instead of focusing on presenting evidence of this issue, the State by its misconduct focused the jury on the fact that Jones was a “bad” or “dangerous” person in order to improperly obtain a conviction. The State did this by violating the court’s pre-trial order, presenting irrelevant evidence and arguing the same in closing argument, arguing in closing facts not in evidence, and vouching for/bolstering the non-testifying CI’s credibility in closing argument. It cannot be said based on the totality of this record that the jury rendered a verdict based solely on the evidence given that the State’s misconduct has tainted and permeated every aspect of this trial.

(2) THERE WAS INSUFFICIENT EVIDENCE ELICITED AT TRIAL TO PROVE BEYOND A REASONABLE DOUBT THAT JONES WAS GUILTY OF UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of a crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

Here, the State charged and Jones was convicted of unlawful delivery of a controlled substance. [CP 10, 36]. The State bore the burden of establishing beyond a reasonable doubt that it was in fact Jones who delivered the controlled substance. This is a burden the State cannot sustain.

The Sum of the State's evidence against Jones included the video surveillance recording, the bodywire recording, and the fact that the CI, who had been searched before meeting Jones, had no controlled substances on his person or in his car and had been given \$850 in buy money, and after meeting Jones the CI did not have the buy money but did have cocaine. However, the officers conducting the surveillance did not see any exchange between the CI and Jones. In fact, another person came up to the CI before he met with Jones. This person could have given the CI the cocaine despite the fact that Elliot testified he did not see any hand-to-hand exchange between Jones and this unknown person—much the same as the CI's encounter with Jones. Finally, the CI did not testify at trial to provide evidence as to which of these two persons (Jones or the unknown man) he bought the cocaine from. Absent this evidence it cannot be said beyond a reasonable doubt that it was Jones who delivered the controlled substance. This court should reverse and dismiss Jones's conviction.

E. CONCLUSION

Based on the above, Jones respectfully requests this court to reverse and dismiss his conviction.

DATED this 26th day of April 2007.

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CERTIFICATE OF SERVICE

07 APR 27 PM 1:00

Patricia A. Pethick hereby certifies under penalty of perjury under
the laws of the State of Washington that on the 26th day of April 2007, I
delivered a true and correct copy of the Petition for Review to which this
certificate is attached by United States Mail, to the following:

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(and the transcript)

Signed at Tacoma, Washington this 26th day of April 2007.

Patricia A. Pethick
Patricia A. Pethick