

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

STATE OF WASHINGTON

Respondent,

v.

JESSICA COLPITT

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY _____

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE
WASHINGTON, THURSTON COUNTY

The Honorable, Chris Wickham, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in ruling that Colpitt could not present a common law medical necessity defense based upon her use of marijuana.
2. The prosecutor committed misconduct in presenting facts that he knew to be untrue.
3. The prosecutor committed misconduct in telling the jury that it was their job to protect the innocent children of the community.
4. The prosecutor committed misconduct when he asked Colpitt if she was going to call certain witnesses in her defense and suggested that her failure to do so meant that she was lying during her testimony.

Issues Pertaining to the Assignments of Error

1. Is *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005), wrongly decided and should this court overrule it?
2. Assuming *Butler* is reversed, did Colpitt present evidence of the common law defense sufficient to submit the issue to the trier of fact?
3. Did the prosecutor commit misconduct when he successfully moved to exclude evidence that a doctor had approved medical marijuana for Colpitt, but later argued that Colpitt's testimony that

she used marijuana for medicinal purposes was untrue because “she did not have a note from her doctor”?

4. Did the prosecutor commit misconduct when he argued that the jury’s job was to protect innocent children in the community?

B. STATEMENT OF THE CASE

On August 29, 2003, Jessica Colpitt was charged with one count of possession with intent to deliver marijuana in a school zone. CP 3. Prior to trial, the State moved in limine to prevent her from presenting evidence that she used marijuana for medical reasons. RP 25-26. She submitted an offer of proof from Dr. Carter that the symptoms of her HIV were alleviated by the ingestion of marijuana. CP 67-70; RP 26-27. He had examined Colpitt and rendered his opinion based upon his expertise. RP 27. By the time of trial, Dr. Carter had provided Colpitt with a medical marijuana authorization pursuant to state law. CP 105.

The trial judge ruled that he was bound by this Court’s decision in *State v. Butler, supra*, and thus, the evidence would not be admitted. RP 28.

Ms. Colpitt testified that she was 28 years old and HIV positive. RP 171. Because of her condition, she took two powerful drugs, Viracept and Combivir. RP 172. The side effects of these medications for her were

nausea, vomiting, diarrhea, night sweats, neuropathy and headaches. RP 173. The drugs could also cause insomnia and depression. Id. In particular, Colpitt suffered severe diarrhea. RP 174. She took Lopermin to help control the diarrhea. Id. She also took an anti-depressant. Id.

In 2000 Colpitt was losing weight and could not sleep, so she began using marijuana. RP 176. She had learned about the therapeutic benefits of marijuana from an organization called Green Cross. Id. The drug helped her eliminate her nausea and brought her neuropathy under control. RP 177. At the time of her arrest, she was smoking 2.5 to 3 grams of marijuana a day. RP 178.

Colpitt testified that she did not sell or distribute any of her medicinal marijuana. RP 186. She also stated that she never had more than a 60-day supply. RP 187.

During cross-examination of Colpitt, the prosecutor asked twice if she intended to call certain witnesses in her case. RP 213, 214-15. Defense counsel objected to this line of questioning, but was overruled. RP 215.

In closing, the prosecutor told the jury that Colpitt could not “avail herself” of a medical marijuana defense. RP 261. He also twice pointed out that Colpitt had not called two potential defense witnesses. RP 269, 292-93. The prosecutor also insinuated that Colpitt was lying about her

medical use of marijuana. He suggested that Colpitt could have anticipated that the police would investigate her and that “it would be a good thing” to say that “I use it for ... medical purposes, although I don’t have a note from my doctor.” RP 295. Later he said: “If she is using it for medicinal purposes, why won’t her doctor give her a note?” RP 298. Finally, in urging the jury to convict Colpitt the prosecutor stated:

. . . you are also here to protect the innocent, the people of our community, including the kids.

RP 303.

The jury found Colpitt guilty of the lesser-included offense, misdemeanor possession of marijuana. RP 317. The trial judge imposed 90 days in jail. This timely appeal followed.

C. ARGUMENT

1. *Is State v. Butler wrongly decided and should this court overrule it?*

Division III of this Court recognized that “necessity” could be a defense to a prosecution for possession of marijuana in 1979. *State v. Diana*, 24 Wn. App. 908, 604 P.2d 1312 (1979). In that case, the defendant claimed that marijuana had an ameliorative effect on his symptoms of multiple sclerosis. That Court said:

To summarize, medical necessity exists in this case if the court finds that (1) the defendant reasonably believed his use of marijuana was necessary to minimize the effects of multiple sclerosis; (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and (3) no drug is as effective in minimizing the effects of the disease. To support the defendant's assertions that he reasonably believed his actions were necessary to protect his health, corroborating medical testimony is required. In reaching its decision, the court must balance the defendant's interest in preserving his health against the State's interest in regulating the drug involved. Defendant bears the burden of proving the existence of necessity, an affirmative defense, by a preponderance of the evidence.

Id. at 916.

This Division adopted the reasoning of *Diana* in 1994 in *State v. Cole*, 74 Wn. App. 571, 874 P.2d 878 (1994). In that case, the defendant testified that he had suffered from intractable back pain for years. Although he had asked many doctors about medications including marijuana, he did not obtain a declaration from a doctor supporting his use of the drug until after his arrest. *Id.* at 574-75. For that reason, the trial judge questioned the doctor's credibility and forbid Cole from presenting the necessity defense to a jury. This Court reversed the trial court and found that, because Cole had presented some evidence to establish each of the elements of the necessity defense, he should have been allowed to present that defense to a jury. *Id.* at 578-79. This Court stated:

As noted in *Diana*, Cole's interest in preserving his health must be balanced against the State's interest in regulating the drug involved. It is for the trier of fact to determine by a preponderance of the evidence whether Cole's actions were justified by medical necessity.

Id. at 580.

Division I has not directly addressed the question. But, in *State v. Pittman*, 88 Wn. App. 188, 943 P.2d 713 (1997), the trial court gave a necessity instruction after Pittman presented evidence that she supplied marijuana to another person who used it to treat his glaucoma. The defense was presented to the jury, but the jury rejected it. Pittman appealed and argued that the trial court's necessity instruction did not correctly state the law. The Court declined to reverse but had no quarrel with the opinion in *Diana*, *supra*.

In 1997, the Supreme Court decided *Seeley v. State*, 132 Wn.2d 776, 940 P.2d 604 (1997). In that case, Seeley, a very ill cancer patient, filed a declaratory judgment action to challenge the Washington statute that placed marijuana on Schedule 1 of the Controlled Substances Act. *Id.* at 785. Seeley was affected by that decision because, by placing marijuana on Schedule 1, doctors could not prescribe him marijuana. He framed his challenge under the state privileges and immunities clause and the state equal protection clause. The Supreme Court ultimately concluded only that:

The challenged legislation involves conclusions concerning a myriad of complicated medical, psychological and moral issues of considerable controversy. We are not prepared on this limited record to conclude that the legislature could not reasonably conclude that marijuana should be placed in schedule I of controlled substances. It is clear not only from the record in this case but also from the long history of marijuana's treatment under the law that disagreement persists concerning the health effects of marijuana use and its effectiveness as a medicinal drug. The evidence presented by the Respondent is insufficient to convince this court that it should interfere with the broad judicially recognized prerogative of the legislature.

Id. at 805.

Following *Seeley*, this Court decided *State v. Williams*, 93 Wn. App. 340, 968 P.2d 26 (1998). In that case, this Court determined that classification of marijuana as a Schedule I drug meant that it had “no accepted medical use.” *Id.* at 347. Thus, its use could never form the basis of a medical marijuana defense. *Id.*

In 1998, however, the people passed Initiative 692, which authorized patients with terminal or debilitating illnesses to use marijuana for medical purposes based upon their treating physician’s professional opinions. That Initiative is now codified at RCW 69.51A. The statute specifically states:

The People of Washington State find that some patients with terminal or debilitating illnesses, under their physician's care, may benefit from the medical use of marijuana. Some of the illnesses for which marijuana appears to be beneficial include chemotherapy-related

nausea and vomiting in cancer patients; AIDS wasting syndrome; severe muscle spasms associated with multiple sclerosis and other spasticity disorders; epilepsy; acute or chronic glaucoma; and some forms of intractable pain.

The People find that humanitarian compassion necessitates that the decision to authorize the medical use of marijuana by patients with terminal or debilitating illnesses is a personal, individual decision, based upon their physician's professional medical judgment and discretion.

Therefore, The people of the state of Washington intend that:

Qualifying patients with terminal or debilitating illnesses who, in the judgment of their physicians, would benefit from the medical use of marijuana, shall not be found guilty of a crime under state law for their possession and limited use of marijuana;

Persons who act as primary caregivers to such patients shall also not be found guilty of a crime under state law for assisting with the medical use of marijuana; and

Physicians also be excepted from liability and prosecution for the authorization of marijuana use to qualifying patients for whom, in the physician's professional judgment, medical marijuana may prove beneficial.

RCW 69.51A.005. Thus, this legislation expressly adopted the fact that marijuana does have accepted medical uses, effectively overturned the *Williams* decision and should have revived the medical necessity defense with regard to marijuana.

In 2005, however, this Court disagreed. In *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005), this Court was asked to review a trial

court order denying Butler funds for an expert regarding his use of medical marijuana. Citing *Williams*, this Court was of the view that “Washington does not recognize a common law defense of medical necessity for the use of marijuana.” *Id.* at 496. Paradoxically, this Court also concluded that the Medical Marijuana Act was inconsistent with the common law and, thus, superceded the common law defense of medical necessity. *Id.* at 750. The Court held that enactment of the Initiative meant that the *only* avenue for raising a medical marijuana defense was via the statute. Because Butler had not strictly complied with the Act, he could not raise the defense and was not entitled to funds to hire an expert.

Butler is incorrect in its conclusion that Washington does not recognize a common law defense of medical necessity for the use of marijuana. As discussed above, for many years Washington did recognize a common law medical marijuana defense. See *Diana, Cole* and *Pittman*, *supra*. The *Williams* court did not disagree. It simply held that after *Seeley*, no one could establish such a defense because the Legislature had determined that marijuana had no medicinal value.

The Medical Marijuana Act did not supercede the common law as described in *Diana, Cole* and *Pittman*. It actually reaffirmed the law by making it clear *legislatively* that marijuana has medicinal value. Thus, it

not only revived the common law, it provided another statutory defense that is entirely consistent with that common law.

There is simply no reason why the statutory defense and common law defense cannot and do not co-exist. There is nothing in the statute that indicates the Initiative was designed to preempt the field. The Initiative was drafted and passed before this Court decided *Williams*. Thus, the common law defense was alive and well at the time. The drafters could have referenced the common law and superceded it had they intended to do so. But, they did not.

In short, this Court should reverse its *Butler* decision and hold that both the statutory and common law defenses co-exist.

2. *Assuming Butler is reversed, did Colpitt present some evidence of the common law defense?*

The State did not dispute in the trial court that Colpitt had sufficient evidence to go forward on the common law defense. The prosecutor did not dispute that: (1) Colpitt reasonably believed her use of marijuana was necessary to minimize her medical conditions; (2) the benefits derived from its use are greater than the harm sought to be prevented by the controlled substances law; and (3) no other drug was effective in minimizing the effects of her disease. Colpitt submitted an

offer of proof that demonstrates she had a qualified medical expert who would testify on her behalf. CP 67-70, 105.

Thus, the trial court erred in ordering that Colpitt was precluded from presenting this defense to the jury.

3. *Did the prosecutor commit misconduct when he successfully moved to exclude evidence that a doctor had approved medical marijuana for Colpitt but then later argued that Colpitt's testimony that she used marijuana for medicinal purposes was untrue because "she did not have a note from her doctor?"*

A criminal conviction obtained by the knowing use of false evidence violates the Fourteenth Amendment. "As long ago as *Mooney v. Holohan*, 294 U.S. 103, 112, 79 L. Ed. 791, 55 S. Ct. 340 (1935), [the Supreme Court] made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" *Giglio v. United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Prosecutorial misconduct that manipulates or misstates the evidence violates the defendant's right to a fair trial and to due process. *Paxton v. Ward*, 199 F.3d 1197, 1218 n.10 (10th Cir. 1999) (citing *Darden v. Wainwright*, 477 U.S. 168, 182, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)).

It follows that a prosecutor may not properly argue to the jury that particular inference would be correct where the prosecutor is aware that

the contrary is true. *United States v. Udechukwu*, 11 F.3d 1101 (1st Cir. 1993) (improper to imply reliance on a fact that the prosecutor knows to be untrue, or to question the existence of someone who is known by the prosecution to exist); *State v. Bass*, 121 N.C. App. 306, 465 S.E.2d 334 (1996) (regarding child sex abuse victim's precocious sexual knowledge, prosecutor may not argue that a child had no prior sexual experience when he knew that to be untrue). Such conduct violates the federal due process clause.

Here the prosecutor argued in closing that Ms. Colpitt did not have medical authorization to use marijuana. His implication was that she was lying about her medical conditions and her testimony that marijuana alleviated those symptoms. In fact, at the time of trial, the prosecutor knew that Colpitt had medical authorization to use marijuana. Moreover, he knew that Dr. Carter had provided evidence in support of her medical necessity defense. It might have been proper to argue that there were no jury instructions that permitted the jury to find her not guilty on the basis of her condition. But it was misconduct to suggest that Colpitt was lying about those conditions when the prosecutor knew or had reason to know that she was under a doctor's care and had his approval to use marijuana.

4. *Did the prosecutor commit misconduct when he argued that the jury's job was to protect innocent children in the community?*

The prosecutor has a duty to see that an accused receives a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason. *Id.* at 664. A prosecutor may not ask jurors to find a defendant guilty as a means of promoting community values, maintaining order, or discouraging future crime. See *United States v. Severson*, 3 F.3d 1005, 1015 (7th Cir. 1993) (stating that any comment inviting conviction for reasons other than proof of guilt beyond a reasonable doubt is improper); *United States v. Monaghan*, 741 F.2d 1434, 1441 (D.C. Cir. 1984) (stating that appeals to jurors to deter future lawbreaking are improper), *cert. denied*, 470 U.S. 1085, 105 S.Ct. 1847, 85 L.Ed.2d 146 (1985).

On its face, the prosecutor's argument urged the jury to convict the defendant in order to protect others from drugs. That is improper argument. This was particularly true when the prosecutor argued that convicting Colpitt would "protect the kids."

5. *Did the prosecutor commit misconduct when he asked Colpitt if she intended to call certain witnesses in her defense?*

In *State v. Rupe*, 101 Wn.2d 664, 683 P. 2d 571 (1984), the Washington State Supreme Court ruled that the State may not act in a manner that would unnecessarily chill the exercise of a constitutional right, nor may the state draw unfavorable inferences from the exercise of a constitutional right. See also *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968); *Griffin v. California*, 380 U.S. 609, 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). Here, the prosecutor commented on Colpitt's right to remain silent by asking her if she intended to call certain witnesses in her defense when she had no obligation to do so. He pointed out her failure to call the witnesses in closing. This was misconduct.

6. *Can the State demonstrate that the prosecutor's misconduct was harmless beyond a reasonable doubt?*

Prosecutorial comments that directly infringe a specific constitutional right are analyzed under a more stringent standard than those that are merely improper. *Donnelly v. DeChristoforo*, 416 U.S. 637, 642-43, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974). In such cases, the conviction must be reversed unless the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (comment on failure to testify).

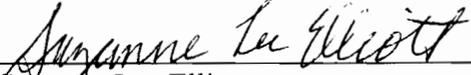
Here, the prosecutor's questioning directly infringed on Colpitt's Sixth Amendment right to remain silent. In addition, the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Donnelly v. DeChristoforo*, 416 U.S. 637 at 643. By asking if Colpitt intended to call certain witnesses, the prosecutor directly commented upon Colpitt's right to remain silent and not to present any defense at all.

Even when the misconduct does not clearly implicate a constitutional right, reversal is required if "there is substantial likelihood that it influenced the outcome of the trial." *State v. Casteneda-Perez*, 61 Wn. App. 354, 363, 810 P.2d 74, *rev. denied*, 118 Wn.2d 1007, 822 P.2d 287 (1991), citing *State v. Reed*, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Here, the prosecutor's comment regarding Colpitt's failure to call certain witnesses, combined with his argument of facts he knew were untrue and his improper call for the jury to convict Colpitt to "protect the community" (rather than basing their findings on the evidence) created a substantial likelihood that the prosecutor's improprieties influenced the outcome of the trial.

D. CONCLUSION

This Court should reverse Colpitt's conviction and remand for retrial.

Respectfully submitted this 12th day of October, 2006.



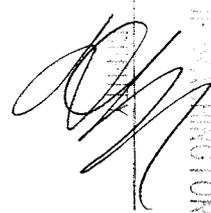
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CERTIFICATION OF SERVICE BY MAIL

I declare under penalty of perjury that on October 11, 2006, I placed a copy of this document in the U.S. Mail, postage prepaid, to Mr. David Soukup, Deputy Prosecuting Attorney, Thurston County Prosecutor's Office, 2000 Lakeridge Drive. SW, Bldg 2, Olympia, WA 98502-6001.

Signed in Seattle, WA this 12th day of October, 2006.

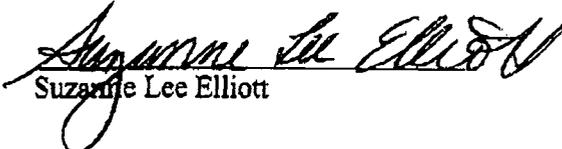

Suzanne Lee Elliott

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I declare under penalty of perjury that on October 18, 2006, I served a copy of Appellant's Opening Brief by U.S. Mail, postage prepaid, on Ms. Jessica Colpitt, 1309 Fern Street SW, Apt. R304, Olympia, WA 98502.

Signed in Seattle, WA this 18 day of October, 2006.


Suzanne Lee Elliott

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