

Original

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

NO. 35895-6-II

STATE OF WASHINGTON

Respondent,

vs.

**Richard Hurn**

Appellant.

STATE OF WASHINGTON  
BY: *mm*  
COURT REPORTER  
RECEIVED  
AUG 23 2007

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ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF WASHINGTON  
FOR JEFFERSON COUNTY  
Cause Number: 06-1-00179-1

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**BRIEF OF RESPONDENT**

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Date: August 22, 2007

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## STATEMENT OF THE CASE

### **I Restatement of Issues Presented**

Defendant's appeal presents two issues:

- A. The trial court instructed the jury on reasonable doubt using a pattern instruction this court approved in *State v. Bennett*, 131 Wn. App. 319, 328, 126 P.3d 836 (2006). Mr. Hurn argues that the instruction, based on a pattern instruction from the Federal Judicial Center, misstates the law on reasonable doubt. Was this court mistaken in *Bennett* when it upheld use of the instruction?
  
- B. Did the prosecutor's statements during trial prejudice Mr. Hurn's right to a fair trial?
  1. Did the prosecutor introduce and argue inadmissible propensity evidence?
  2. Did the prosecutor prejudice the trial by introducing personal opinion, vouching for the testimony of officers, or exposing the jury to facts not in evidence?
  3. Was Mr. Hurn denied effective assistance of counsel when his attorney did not object or request a curative instruction for prosecutor's statements?

## **II Statement of Facts**

On October 28, 2006, at approximately 6:53 p.m., Port Townsend police observed a vehicle turning onto South Jacob Miller Road from Discovery Road. A check of the vehicle registration revealed the registered owner, Mr. Hurn, was suspended in the third degree and had two misdemeanor warrants. RP 90-91. The police stopped the vehicle.

When the officer approached the driver side door, he observed the male driver was wearing a full-brimmed hat and had a blue bandanna covering the lower part of his face. RP 92. The officer also observed a large-frame revolver near the driver. RP 93. The officer explained to the driver that the registered owner had his driver's license suspended and he needed to determine the driver's identity. The police officer asked the driver to exit the vehicle and to show some identification. RP 96.

The driver did not provide any identification and adopted a combative stance. RP 98. The police handcuffed the driver and again asked for identification. RP 98-99. The driver eventually identified himself as Richard Hurn and was arrested. RP 100. Richard Hurn was charged with Driving While License Suspended in the third degree and Obstructing a Law Enforcement Officer. Mr. Hurn was transported to jail where a small amount of methamphetamine was discovered in his clothing. RP 172. Mr. Hurn was additionally charged with Possession of a Controlled Substance (methamphetamine). Supp. CP, Information.

### **III Procedural History**

On October 28, 2006, Richard Dean Hurn was arrested for Obstructing an Officer and Driving While License Suspended in the third degree. At the jail, Mr. Hurn was charged with Possession of a Controlled Substance (methamphetamine). Supp. CP, Information.

The Obstructing charge was amended to Refusal to Give Information. CP 3.

Mr. Hurn moved to suppress all evidence after he requested an attorney, and the court denied the motion. RP 29-64.

Mr. Hurn pleaded guilty to DWLS 3, and the remaining two charges proceeded to jury trial beginning January 29, 2007. RP 86, 74.

A verdict of guilty was returned on January 30, 2007. RP 285.

Mr. Hurn was sentenced on February 2, 2007, and the sentence was stayed pending this appeal. RP 292-302

Mr. Hurn filed a notice of Appeal on February 16, 2007.

## Argument

### IV The Court's reasonable doubt instruction was proper

This court reviews challenges to jury instructions de novo. *State v. Bennett*, 131 Wn. App. 319, 324, 126 P.3d 836 (2006). “We review a challenged jury instruction de novo, examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portion in the context of all instructions given.”

At the close of trial the court instructed the jury on reasonable doubt using Washington pattern instruction 4.01A, an instruction first proposed by the Federal Judicial Center. *State v. Castle*, 86 Wn. App. 48, 55-56, 935 P.2d 656 (1997). The instruction reads as follows:

Proof beyond a reasonable doubt is proof that leaves you *firmly convinced* of the defendant's guilt. There are very few things in this world that we know with *absolute certainty*, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the *benefit of the doubt* and find him not guilty.

*(Italics added for emphasis.)*

Mr. Hurn asserts that first, the words “firmly convinced” cannot be used to clarify the meaning of “real possibility,” and “possible doubt;” second, that the instruction’s declaration that proof need not provide “absolute certainty” does not provide sufficient distinction between

“beyond a reasonable doubt” and other, lesser standards; and third, that the phrase “benefit of the doubt” conveys a lesser standard of guilt to the jury.

In Washington all three divisions of the Court of Appeals have upheld this instruction. *State v. Castle*, 86 Wn. App. 48, 935 P.2d 656 (1997), *review denied* 133 Wn.2d 1014 (1997), *State v. Hunt*, 128 Wn. App. 535, 116 P.3d 450 (2005), *State v. Bennett*, 131 Wn. App. 319, 126 P.3d 836 (2006).

In *Bennett supra*, the court did not just look at individual phrases in the instruction, but also at the meaning of the entire instruction. They stated:

Looking at the whole language of [the reasonable doubt] instruction here, we hold that it clearly instructed the jury that it was the state’s burden to establish guilt beyond a reasonable doubt and that the defendant is presumed innocent unless that burden is overcome. Merely stating the standard in the negative did not shift the burden of proof to the defense. Additionally, we conclude that the “possible doubt” language merely emphasized that a reasonable doubt is one based on a real possibility of innocence founded on reason and evidence, as opposed to any possibility of innocence, however far fetched...

Accordingly, we adopt *Castle*, and we hold that the reasonable doubt instruction did not relieve the State of its burden of proof.

*Bennett, supra*. See *State v. Dykstra*, 127 Wash. App. 1, 9-11, 110 P.3d 758 (2005); see also *State v. Kuhn*, 139 Idaho 710, 85 P.3d 1109, 1111 (2003) (citing *State v. Sheahan*, 139 Idaho 267, 77 P.3d 956 (2003)).

Other courts have also approved similar instructions. See e.g., *Victor v. Nebraska*, 511 U.S. 1, 6, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994) (*Ginsburg, J., concurring*); *United States v. Conway*, 73 F.3d 975, 980 (10th Cir.1995).

Defendant's arguments are inapposite of all three divisions of the Court of Appeals. Because the court analyzed and upheld the entire pattern instruction, rather than just examining a few phrases standing alone, defendant's arguments for overruling the precedent are unpersuasive. The defendant's conviction should be affirmed.

**V The prosecutor's statements during trial did not prejudice Mr. Hurn's right to a fair trial**

The court reviews allegations of prosecutorial misconduct for an abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) ("trial court rulings based on allegations of procedural misconduct are reviewed under an abuse of discretion standard").

"To prove prosecutorial misconduct, the defendant bears the burden of proving that the prosecuting attorney's conduct was both improper and prejudicial." *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006), cert. denied, 127 S.Ct. 2986 (2007). "Here, ... because [defendant] did not object to alleged misconduct at trial, he waives the issue of prosecutorial misconduct on appeal unless the misconduct was "so

flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

Although Mr. Hurn argues some of the prosecutor’s actions constitute misconduct, the record shows no misconduct occurred, but even if it had, no objection was made at trial. Additionally, none of the conduct objected to rises to such a level of flagrant or ill-intentioned that a jury instruction would have been necessary to cure it.

**A. Inadmissible evidence was not introduced**

We review a trial court's decision to admit evidence for an abuse of discretion. *State v. Vreen*, 143 Wash.2d 923, 932, 26 P.3d 236 (2001). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State v. Wade*, 138 Wash.2d 460, 464, 979 P.2d 850 (1999) (citing *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 482 P.2d 775 (1971)).

Mr. Hurn asserts that the prosecutor elicited several items of information from witnesses that are inadmissible under ER 402, ER 403, and ER 404(b):

First, that Mr. Hurn’s gun was loaded when he was arrested. During the testimony of Officer Krysinski, the following exchange occurred:

Prosecutor: I've handed you State's exhibit number one. Do you recognize it?

Officer Krysinski: Yes, ma'am. I do.

Prosecutor: How are you able to do so?

Officer Krysinski: It's- It was the firearm that I recovered from the holster that – Mr. Hurn's car.

Prosecutor: And, has it been altered in any way?

Officer Krysinski: It does not appear to- so. Other than the zip-tie tag going through the cylinder to keep it from securing.

Prosecutor: And, when you first saw it [the gun], was it safe and secure? Was it loaded?

Officer Krysinski: Yes, ma'am. It was loaded. It was, like I said, the holster was unsnapped. It was inside that large holster. It was loaded with – It was ready to fire.

Prosecutor: And how far away from the defendant's hands was that holster?

Officer Krysinski: The way he was sitting, it would have been- his hand to the handle of the gun was less than six inches.

RP 94-95

This testimony was not objected to by Mr. Hurn and is clearly relevant to explain the behavior of the officers when approaching Mr. Hurn. Mr. Hurn made a motion in limine to exclude testimony about the gun. The prosecutor objected to the exclusion because the gun explained some of the arresting officer's actions. The trial judge denied the motion after deciding the gun was not prejudicial. RP 71-72. The gun being loaded or not is not prejudicial since the gun itself was not prejudicial.

Second, the defense asserts the prosecutor elicited information that Mr. Hurn had been convicted of Negligent Driving and DUI and implied he had other convictions for driving offenses more serious than DWLS 3. Mr. Hurn had already pled guilty to the DWLS 3 charge.

‘The long-standing rule in this state is that a criminal defendant who places his character in issue by testifying as to his own past good behavior may be cross-examined as to specific acts of misconduct unrelated to the crime charged.’ *State v. Brush*, 32 Wn. App. 445, 448, 648 P.2d 897 (1982), review denied, 98 Wn.2d 1017 (1983). When a witness ‘open{s} the door,’ the opposing party may introduce prior convictions to counter assertions of a law abiding past regardless of whether the conviction would have been admissible under ER 609. See *Brush*, 32 Wn.App. at 450.

During the defense attorney’s questioning of Mr. Hurn, Mr. Hurn implied he had not been arrested previously in the following testimony:

Defense: What happened as they came up on you?

•••

Mr. Hurn: Anyway, they come up both sides of my rig with their guns out. And I thought to myself, what if my mom was driving my truck home for me?

Defense: So- and how could you see them?

Mr. Hurn: I was looking in my mirrors. I looked in- My mirrors are set all the time, because I’ve been hauling a fifth wheel trailer behind me with a piece of equipment.

Defense: Uh-huh.

Mr. Hurn: And, of course, I was on guard.

Defense: Why?

Mr. Hurn: Well, it's scary when people come at you with their guns out. And really the only law I broke was I wasn't supposed to be driving.

Defense: Alright. So, they came up on you. What happened after you saw them in your mirrors?

Mr. Hurn: Well, Officer Krysinski came down this side, and he ordered me to roll my window down further. And I said, "Can you guys kind of take a big, deep breath, in through the nose and out through the mouth, 'cause you're starting to scare me. I'm not a threat to your community."

Defense: And what happened after that?

Mr. Hurn: And then he goes, "Partner, I've got a gun." And then both of them were pointing at me. And I'm going, oh, man. OK, I've been here before.

Defense: And so- And then what happened?

Mr. Hurn: They got me out of the truck, and I was moving very cautiously and slowly. And they made me put my hands behind my back with my fingers up like this, standing beside my vehicle. And I asked them if I was under arrest and what I done. They told me that I was- they tried to get me to answer questions, and I asked for an attorney.

Defense: Okay. Now, you said, in answer to my question, that you- oh boy, I've been here before. What do you mean?

Mr. Hurn: Well, law enforcement personnel are making random stops nowadays.

Prosecutor: Objection.

Mr. Hurn: Well, its –

The Court: Sustained, and I'll instruct-

Defense: Alright, so-

The Court: - instruct the jury to disregard that. Answer the question. You were asked “What did you mean by ‘I’d been here before?’”

Mr. Hurn: I got pulled over in a random stop by a state patrolman, and then next thing I know I was thrown up against my truck. That’s-

Defense: Is that what you were referring to?

Mr. Hurn: Yeah. That’s my last problem I’ve got to take care of...

RP 204-206

During his testimony, Mr. Hurn stated “And really the only law I broke was I wasn’t supposed to be driving.” At the time of trial Mr. Hurn had two outstanding misdemeanor warrants in Skagit County, so this statement was clearly testimony about his own past good behavior.

Additionally, Mr. Hurn was asked what he meant by his statement that he thought “oh, man. OK, I’ve been here before” when the police discovered the gun in his vehicle. After some hesitation and being instructed to answer the question by the court, Mr. Hurn responded that he was stopped at random by a State Patrolman and thrown up against his truck. Asked to verify that is what his statement referred to, he replied “Yeah. That’s my last problem I’ve got to take care of...” These statements created a clear impression on the jury that Mr. Hurn had had only one previous “random” encounter with police, thus claiming a law-abiding past and opening him up to questioning on prior convictions.

Here, Mr. Hurn made two separate statements of his own past good behavior and opened himself up to questioning on past convictions. No misconduct occurred.

Third, Mr. Hurn objects that the prosecutor introduced evidence of Mr. Hurn's two outstanding arrest warrants which had been provisionally suppressed before trial.

This argument is moot and irrelevant because the motion to suppress was not granted and the prosecutor did not ask about the warrants. There was a motion in limine to suppress the two misdemeanor warrants. After discussion the court decides to wait and see what comes up in testimony. RP 71. While cross-examining Mr. Hurn the prosecutor did not ask about the warrants, but rather asked Mr. Hurn to talk about "...other reasons why you might be worried about the officers being behind you..." Mr. Hurn then testifies that "... There's two warrants out for my arrest in Skagit County." RP 232. No objection was made to the question. There was no misconduct here.

Mr. Hurn also objects to closing remarks referencing these items, but, since all were admissible, referencing them in closing is not improper.

Mr. Hurn's conviction should be affirmed.

## **B. Personal opinion was not given**

Mr. Hurn asserts that by attributing feelings to the state and by using “I” in her closing comments, the prosecutor expressed her personal opinion about Mr. Hurn’s credibility and guilt. The comment in question is:

...Defendant freely admits that that’s how he travels, and I think[.] [T]he state believes that the... RP 268.

Here, the prosecutor mistakenly said “I think” and immediately corrected herself to properly say “The state.” This is nothing more than a simple error which was immediately corrected and is the reason the defense did not object.

Alternatively, if the court believes the prosecutor’s statement was not self-identified as a misstatement and immediately corrected, See *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006) (“[p]rejudicial error does not occur until such time as it is clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion” ) (quoting *State v. Papadopoulos*, 34 Wn.App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983)). “Our review of the record shows that the prosecutor was arguing inferences from the evidence rather than interjecting his personal opinions.” *McKenzie*, 157 Wn.2d at 54. Similarly, the prosecutor here is drawing an inference from the

complete lack of evidence corroborating Mr. Hurn's allegation the police stole money and planted evidence on him.

Mr. Hurn never objected to any of these statements at trial and his conviction should be affirmed. See *State v. McKenzie*, 157 Wn.2d 44, 54, 134 P.3d 221 (2006).

**C. Defense counsel was not ineffective by failing to object to proper statements**

To prove ineffective assistance of counsel based on trial counsel's failure to object, the defendant must show that there was no legitimate strategic reason for failing to object, that an objection likely would have been sustained, and that the result of the trial likely would have been different. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). As shown above, there were no valid grounds to object on any of the issues raised. Thus, Mr. Hurn fails to show any of these factors. As a result, he fails to prove ineffective assistance of trial counsel. Mr. Hurn's conviction should be affirmed.

## CONCLUSION

The State respectfully requests that this Court affirm Appellant's sentence as determined by the trial court and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3,18.1 and RCW 10.73.

Respectfully submitted this 23th day of August, 2007

JUELANNE DALZELL, Jefferson County  
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2  
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4 DIVISION II

5 STATE OF WASHINGTON,

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Superior Court No.: 06-1-00179-1

DECLARATION OF MAILING

STATE OF WASHINGTON  
BY *CMW*  
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10 Janice N. Chadbourne declares:

11 That at all times mentioned herein I was over 18 years of age and a citizen of the United  
12 States; that on the <sup>23<sup>rd</sup></sup>22<sup>nd</sup> day of August, 2007, I mailed, postage prepaid, a copy of the State's

13 BRIEF OF RESPONDENT to the following:

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17 Richard Hurn  
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19 Joyce, WA 98343

20 I declare under penalty of perjury under the laws of the State of Washington that the  
21 foregoing declaration is true and correct.

22 Dated this <sup>23<sup>rd</sup></sup>22<sup>nd</sup> day of August, 2007, at Port Townsend, Washington.

23 *Janice N. Chadbourne*  
24 Janice N. Chadbourne  
25 Legal Assistant

26 DECLARATION OF MAILING  
27 Page 1

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