

OFFICE OF THE CLERK
OF THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

CR150025-25 12:08

No. 37501-0-II

STATE OF WASHINGTON
BY: [Signature]

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LANGE,

Appellant.

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

The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-01653-1

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. RESPONDENT’S ASSIGNMENT OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

C. STATEMENT OF THE CASE 1

D. ARGUMENT 2

 1. Lange not only failed to prove unwitting possession by a preponderance of the evidence, there was insufficient evidence to entitle him to the jury instruction for that defense 2

 2. Because forgetfulness is not the same as unwitting possession, the prosecutor's argument was correct and there was no error. 6

 3. It was not improper for the prosecutor, in closing argument, to pose a hypothetical question about the ramifications of accepting Lange's "I forgot" defense, and therefore there was no ground for a mistrial..... 9

 4. There were no errors, and thus no cumulative error..... 12

E. CONCLUSION..... 12

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

<u>State v. Brown,</u> 132 Wn.2d 529, 940 P.2d 546 (1997)	7
<u>State v. Camarillo,</u> 115 Wn.2d 60, 794 P.2d 850 (1990)	3
<u>State v. Cleppe,</u> 96 Wn.2d 373, 635 P.2d 435 (1981)	2, 7
<u>State v. Hoffman,</u> 116 Wn.2d 51, 804 P.2d 577 (1991)	6
<u>State v. Hughes,</u> 106 Wn.2d 176, 721 P.2d 902 (1986)	6
<u>State v. Johnson,</u> 124 Wn.2d 57, 873 P.2d 514 (1994)	10
<u>State v. Morris,</u> 70 Wn.2d 27, 422 P.2d 27 (1966)	2
<u>State v. Reed,</u> 102 Wn.2d 140, 684 P.2d 699 (1984)	8
<u>State v. Roberts,</u> 142 Wn.2d 471, 14 P.3d 713 (2000)	10
<u>State v. Russell,</u> 125 Wn.2d 24, 882 P.2d 747 (1994)	8
<u>State v. Staley,</u> 123 Wn.2d 794, 872 P.2d 502 (1994)	2, 3, 4, 5, 6

Decisions Of The Court Of Appeals

<u>San Juan County v. Ayer,</u> 24 Wn. App. 852, 604 P.2d 1304 (1979).....	2
<u>State v. Balzer,</u> 91 Wn. App. 44, 954 P.2d 931 (1998).....	2
<u>State v. Carver,</u> 122 Wn. App. 300, 93 P.3d 947 (2004).....	5
<u>State v. Coleman,</u> 74 Wn. App. 835, 876 P.2d 458 (1994).....	11
<u>State v. James,</u> 104 Wn. App. 25, 15 P.3d 1041 (2000).....	8
<u>State v. Walton,</u> 64 Wn. App. 410, 824 P.2d 533 (1992).....	3

Statutes and Rules

WPIC 52.01.....	4
-----------------	---

A. RESPONDENT'S ASSIGNMENT OF ERROR.

1. The trial court erred in giving the unwitting possession instruction to the jury.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

APPELLANT'S ISSUES

1. Whether Lange proved unwitting possession by a preponderance of the evidence.

2. Whether it was improper for the prosecutor to argue to the jury that forgetfulness does not constitute unwitting possession, and if the prosecutor's argument was improper, whether it was so flagrant and ill-intentioned that a curative instruction would have been useless.

3. Whether it was improper for the prosecutor to argue in closing, "What would happen if everybody that possessed drugs just said, 'Oh, I forgot I had it. I forgot about it.' That's ridiculous", and if the prosecutor's argument was improper, whether Lange was prejudiced so as to warrant a mistrial.

4. Whether there occurred an accumulation of otherwise non-reversible errors such as to require reversal of Lange's conviction.

RESPONDENT'S ISSUE

1. Whether Lange produced sufficient evidence to be entitled to the unwitting possession jury instruction.

C. STATEMENT OF THE CASE

The State accepts Lange's statement of the substantive and procedural facts of the case.

D. ARGUMENT.

1. Lange not only failed to prove unwitting possession by a preponderance of the evidence, there was insufficient evidence to entitle him to the jury instruction for that defense.

Unwitting possession of a controlled substance is a defense to a possession charge, State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981), but the defendant must prove it by a preponderance of the evidence. Id.; State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931 (1998).

Once the State establishes prima facie evidence of possession, the defendant may, nevertheless, affirmatively assert that his possession of the drug was “unwitting, or authorized by law, or acquired by lawful means in a lawful manner, or was otherwise excusable under the statute.”

State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994), *citing to* State v. Morris, 70 Wn.2d 27, 34, 422 P.2d 27 (1966). “Preponderance of the evidence” is a “more likely than not” standard. San Juan County v. Ayer, 24 Wn. App. 852, 860, 604 P.2d 1304 (1979).

When Lange was searched incident to his arrest for driving with a suspended license, the arresting deputy found a small case containing a smoking pipe with methamphetamine residue and two plastic baggies. [RP 16, 35] The evidence of unwitting possession

presented to the jury consisted solely of Lange's statement to the arresting deputy that he had forgotten the items were in his pocket [RP 17] and his testimony on the stand that "it was plausible" that he put the pipe in his pocket four or five days earlier but he had forgotten about it at the time he was arrested. [RP 52] At best, his claim shows forgetful, not unwitting possession.

It is the task of the jury to weigh evidence and determine credibility. Such determinations are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). A reviewing court defers to the jury on issues of conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). Here, the jury did not accept Lange's claim of unwitting possession, and this court should not disturb that decision.

Even if the jury believed him, forgetfulness is not the same as unwitting possession. The claim of unwitting possession is appropriate when possession is proven, but the defendant is unaware of how the drugs ended up in his possession or that he did not know the nature of the substance that he was aware he was possessing. Staley, *supra*, at 799. In Staley, the defendant made a

similar “I forgot” argument, and in a footnote, the Staley court made this observation:

In fact, the court did instruct on “unwitting” possession in the language of WPIC 52.01 based on Staley’s argument that he had forgotten that the drugs were in his possession. While we question whether possession can become “unwitting” merely by memory lapse, the trial court’s generosity in giving this instruction is not challenged.

Staley, *supra*, at 800, fn. 3.

Here, the State is challenging the giving of this instruction. Lange admitted that he had used the pipe several days earlier, put the pipe in his pocket, and when asked by the deputy what the substance in the pipe and baggies would test as, he replied, “Meth.” [RP 17] Even assuming he had genuinely forgotten that the pipe was in his pocket, this is not the “unwitting possession” contemplated by the jury instruction. That instruction, WPIC 52.01, as given to this jury, reads:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded,

considering all of the evidence in this case, that it is more probably true than not true.

[CP 37]

If the “I forgot” excuse truly constituted unwitting possession, the defense would simply be unworkable. Under Lange’s theory, every time he forgot he had drugs in his pocket he would be immune from prosecution but every time he remembered they were there, he would not. That is a test that is impossible to administer.

In order to prove simple possession of a controlled substance, the State is not required to prove either intent to possess or knowledge as to the nature of the substance. Staley, *supra*, at 799. Similarly, bail jumping, RCW 9A.76.170, does not require the State to prove intent or continuous knowledge. State v. Carver, 122 Wn. App. 300, 93 P.3d 947 (2004). In that case, Carver had defended a bail jumping charge by asserting that he forgot that he had a court date. The court said: “[W]e expressly hold that the State must prove only that Carver was given notice of his court date—not that he had knowledge of this date every day thereafter—and that “I forgot” is not a defense to the crime of bail jumping.” Id., at 306.

By the same reasoning, forgetfulness should not constitute unwitting possession. Lange had notice that the drugs were in his pocket—he put them there—and he knew what they were. He told the deputy that they would test as meth, and, indeed, the residue tested as meth. Had he wanted to use that pipe again, he surely would have had no difficulty recalling where it was.

Because Lange did not produce any evidence of unwitting possession, it was error for the trial court to give this instruction to the jury. “A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). However, he is not entitled to an instruction which inaccurately represents the law or for which there is no evidentiary support. State v. Hoffman, 116 Wn.2d 51, 110-11, 804 P.2d 577 (1991).” Staley, *supra*, at 803. Lange did not produce the necessary evidentiary support.

2. Because forgetfulness is not the same as unwitting possession, the prosecutor’s argument was correct and there was no error.

Lange is correct in his argument that the State has the burden of proving each element of the offense beyond a reasonable doubt. [Appellant’s brief, page 9] However, the burden

is on the defendant to prove the defense of unwitting possession. State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981).

The remarks of the prosecutor, to which Lange objects, were made in her rebuttal argument: "I'll make it simple. Unwitting substance possession is not forgetting you have drugs. . . . It's not about people who forget about it. It doesn't apply in this case. Even if it did, he didn't present a preponderance of the evidence that it was unwitting possession, and again I ask you to find this defendant guilty beyond a reasonable doubt." [RP 91]

Contrary to Lange's argument, the prosecutor did not misstate the law or relieve the State of its burden of proof. Instead, she correctly stated the law and brought to the attention of the jury the fact that Lange had failed to carry his burden of proving his defense by a preponderance of the evidence. Because there was no error, there was no prejudice.

Where prosecutorial misconduct is claimed, the defendant bears the burden of establishing the impropriety of the prosecutor's comments as well as their prejudicial effect. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). A prosecuting attorney's allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in

the argument, and the instructions given to the jury. State v. Russell, 125 Wn.2d 24, 86-86, 882 P.2d 747 (1994) In determining whether prosecutorial misconduct occurred, a reviewing court must first evaluate whether the remarks were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If the statements were improper , then the court considers whether there was a substantial likelihood they affected the jury. Id.

The challenged remarks here were made in rebuttal argument. The prosecutor is an advocate and entitled to make a response to defense counsel's argument. Russell, *supra*, at 87. A prosecutor has a public duty to advocate against an individual. State v. James, 104 Wn. App. 25, 34, 15 P.3d 1041 (2000). Even if the remarks had been improper, they would not be grounds for reversal where they were invited or provoked by defense counsel, unless they were not pertinent or so prejudicial that a curative instruction would be ineffective. Russell, *supra*, at 86.

Lange's objection to the challenged remarks was correctly overruled. Even had the prosecutor's statements been improper, a curative instruction could have reminded the jury that they were to follow the law as conveyed in the jury instructions. Lange incorrectly characterizes the prosecutor's statements as an attempt

to mislead the jury. That simply is not the case. The statements were correct, they were made in the context of rebuttal argument, and if they prejudiced Lange it was only because his argument was erroneous.

3. It was not improper for the prosecutor, in closing argument, to pose a hypothetical question about the ramifications of accepting Lange's "I forgot" defense, and therefore there was no ground for a mistrial.

Lange objects to these comments by the prosecutor, made in closing argument:

Not knowing and forgetting are two different things. What would happen if everybody that possessed drugs just said, "Oh, I forgot I had it. I forgot about it. That's ridiculous.

[RP 82] Lange objected, a sidebar was held, and the prosecutor continued her argument without returning to that particular subject.

[RP 82-83] After the jury was excused to deliberate, a record was made of the sidebar conference. Lange argued that the State was asking the jury to make a decision "on society in general", and moved for a mistrial. [RP 92] The court denied the motion, finding "I don't think she's asking them to make a comment on society or anything. I did not feel that it went to the point of a mistrial. She went on." [RP 93]

A trial court's denial of a motion for a mistrial is reviewed for abuse of discretion. "A trial court 'should grant a mistrial only when the defendant has been so prejudiced that nothing short of a new trial can insure that the defendant will be tried fairly.'" State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000) (citing to State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996)). In determining whether the trial court abused its discretion in denying a motion for mistrial, a reviewing court will find abuse only when no reasonable judge would have reached the same conclusion. State v. Johnson, 124 Wn.2d 57, 76, 873 P.2d 514 (1994).

The judge here did not interpret the prosecutor's remarks to be an exhortation to the jury to protect society against defendants who offered the unwitting possession defense, nor could it reasonably be construed as such. The context of her remarks appears to be, although she was cut short, an attempt to show that the forgetfulness excuse would be unworkable, as explained above. A defendant could always claim he or she forgot, and, if Lange's argument were correct, it would always excuse possession of contraband. This argument is directed at the jury's reason, not their emotion. An unworkable defense would not be permitted under the law.

In State v. Coleman, 74 Wn. App. 835, 876 P.2d 458 (1994), the defense challenged a statement made by the prosecutor in argument. The court said:

[T]he trial judge was still in the best position to assess whether the prosecutor was attempting to threaten the jury. We do not have the benefit of observing either the prosecutor's tone of voice or demeanor. The trial judge did.

Id., at 841. The same applies here. The judge did not interpret the prosecutor's remarks as Lange did, and the trial court's interpretation is entitled to great weight.

Lange's assignment of error is especially tenuous because the prosecutor never got to finish her line of argument, and the jury certainly never heard anything that could be remotely construed as a plea to convict Lange in an attempt to protect society from drug users in general. This one comment, even if it had been improper, taken in context, would not be grounds for a mistrial.

Lange has not shown that he was prejudiced by this comment, i.e., that the outcome of the trial would have been different had the remarks not been made. Based upon the entire record, it is most likely that the jury agreed that forgetfulness is not the same as unwitting possession, and quite likely that they didn't

believe that he had forgotten he possessed the pipe. The court was correct in denying the mistrial and there was no error.

4. There were no errors, and thus no cumulative error.

Lange correctly cites to the law regarding cumulative error, but nothing in the facts of this case supports an argument for cumulative error. The only error committed was the trial court's instructing the jury on the defense of unwitting possession, and that in no way prejudiced the defendant because he asked for the instruction and vigorously argued for the defense. He was convicted because he was clearly in possession of methamphetamine, and the facts did not support a defense of unwitting possession. Even from the State's perspective the error was harmless; the jury found Lange guilty even though the instruction was erroneously given.

E. CONCLUSION.

Under the facts of this case, Lange was not entitled to the jury instruction defining unwitting possession, although it was harmless error; the jury found him guilty of possession of methamphetamine. There was no error or misconduct in the prosecutor's closing or rebuttal arguments, nor was there

cumulative error. The State respectfully asks this court to affirm Lange's conviction.

Respectfully submitted this 29^d day of December, 2008.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent 37501-0-II,
on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

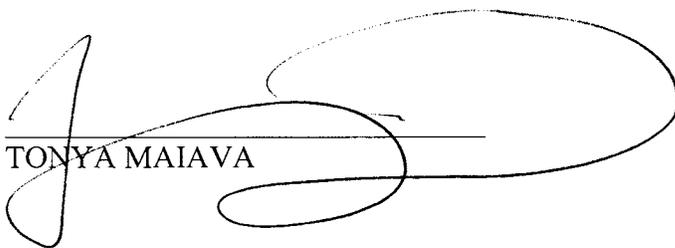
TO:

THOMAS EDWARD DOYLE
ATTORNEY AT LAW
PO BOX 510
HANSVILLE WA 98340-0510

COPIES OF THIS DOCUMENT
RECORDED
02 DEC 28 PM 12:11
STATE OF WASHINGTON
BY DEPUTY

I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 23rd day of December, 2008, at Olympia, Washington.


TONYA MAIAVA