

No. 41209-8- II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ENGLISH,

Appellant.

---

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

The Honorable Diane Woolard

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. In Timothy English's trial on a charge of possession of methamphetamine, the trial court erred in concluding that his testimony "opened the door."

2. The trial court unwittingly commented on the evidence in violation of the state constitution.

3. The prosecutor committed flagrant misconduct in closing argument.

4. Cumulative error denied the defendant a fair trial.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court abuse its discretion in ruling, over objection, that the defendant's denial that he was familiar with the plastic bag of methamphetamine powder he was accused of possessing, "opened the door" to cross-examination showing that he had an existing familiarity with packaged methamphetamine?

2. Did the trial court comment on the evidence when, over objection, it instructed the jury that even a small amount of methamphetamine constituted possession, where the instruction was unnecessary and unwarranted, and effectively conveyed the court's view dismissing the worthiness of Mr. English's defense that the substance was only belatedly found in a police evidence bag after his

arrest, and therefore had not been proved beyond a reasonable doubt to have been in the defendant's possession?

3. Did the prosecutor commit flagrant misconduct in closing argument by referring to his own past experience working at the police station and dismissing mistakes in police evidence procedure as not affecting the defendant's guilt?

4. Did the cumulative prejudice of the errors effectively remove Mr. English's presumption of innocence and deny him a fair trial?

### **C. STATEMENT OF THE CASE**

Battle Ground police officer Richard Kelly arrested Timothy English on a warrant for failure to pay legal financial obligations and transported him to the police station.<sup>1</sup> CP 1.

At the time of arrest, the police collected Mr. English's personal effects after searching him at the scene. 9/13/10RP at 72-75. The arresting officer placed the defendant's personal items "in a pile" on the trunk of his patrol car while trying to find out if another officer had a sack in which to store them, and then lifted open the trunk of his own

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<sup>1</sup> Mr. English had also been arrested for violation of a court order, but that charge was dismissed following a defense motion arguing that the order had been entered with an invalid signature of the defendant, after a hearing by closed-circuit television which rendered it impossible that Mr. English could have actually signed the document. CP 3, CP 26; 9/13/10RP at 14.

vehicle to search for one. 9/13/10RP at 73-75, 105. Eventually another officer “scooped” the loose personal effects into a sack, which was a brown paper bag that had been found. 9/13/10RP at 75, 105.

Some hours later, at the Battle Ground police station, a property officer dumped the sack’s contents – described by the officer as Mr. English’s “wallet, keys, et cetera, whatnot” -- onto a counter. 9/13/10RP at 72-74, 78, 109-10. This officer claimed that there was a small plastic-bagged amount of methamphetamine in amongst these contents. The methamphetamine powder was contained inside a large plastic bag, that was itself folded, and had been inserted into another, smaller plastic bag. 9/13/10RP at 77-78, 122.

After the drugs were observed, Officer Kelly was called back to the police station, where he interrogated the defendant about the plastic bags. 9/13/10RP at 77. Officer Kelly apparently first showed Mr. English the outer bag, questioned him about it, and then showed him the inner bag which contained the drugs. 9/13/10RP at 85-87; 9/14/10RP at 162-64. He claimed that Mr. English admitted to him that the outer bag was “his.” 9/13/10RP at 85-87.

The defense established through the police witnesses that Mr. English, and his personal effects, were subjected to a thorough search at the scene incident to his arrest, which always includes a search for

weapons, contraband and controlled substances. 9/13/10RP at 89-92. The police looked through Mr. English's wallet and located a few additional coins, and examined the defendant's "Goofy" lighter to make sure no drugs were hidden inside its workings. 9/13/10RP at 91-92. No bags or drugs were located. 9/13/10RP at 91-92.

The defense also established that the activity at the police station that evening was busy, that the defendant's property was coming in for processing during a change of shift, and that less than due care had been taken to record which of various different persons responsible had processed, and had access to, Mr. English's seized property. 9/13/10RP at 115; 9/14/10RP at 145-47, 152, 200.

Officer Kelly also admitted in cross-examination that property sacks and evidence bags are in fact sometimes re-used by officers at the police department. 9/13/10RP at 93.

When Mr. English took the stand, the prosecutor alleged that he had told Officer Kelly a lie by denying knowledge of the second type of plastic bag containing the drugs. 9/14/10RP at 173. Mr. English repeatedly testified that when the officer showed him the bag with the powder in it, he denied having any awareness of it or its contents, because he had not possessed the drugs, and Officer Kelly

was clearly arguing at him that they were his. See, e.g., 9/14/10RP at 173, and Part D.1, infra. The prosecutor then stated:

Q: Okay. So you're telling me you're -- you are not familiar with a plastic bag with a white crystal substance in it?

A: I'm not familiar with it.

(Emphasis added.) 9/14/10RP at 173. The trial court ruled that Mr. English had opened the door to questioning about his prior drug knowledge, and allowed the prosecutor to ask:

Q: Mr. English, I'm showing you this larger bag again with the white crystalline powder like substance in it.

And isn't it true that you'd recognize a substance such as that to potentially be an illegal controlled substance?

9/14/10RP at 179.

Mr. English was found guilty and was sentenced to 20 months incarceration. CP 25, CP 26. He appeals. CP 40.

## D. ARGUMENT

1. THE DEFENDANT'S TESTIMONY THAT HE WAS NOT FAMILIAR WITH THE BAG OF DRUGS HE WAS ACCUSED OF POSSESSING DID NOT "OPEN THE DOOR" TO THE STATE'S DESIGN THAT THE JURY WOULD LEARN THAT MR. ENGLISH HAD AN EXISTING FAMILIARITY WITH BAGS OF ILLEGAL METHAMPHETAMINE.
  - a. In the context of Mr. English's drug prosecution, the door would be opened to questioning about whether the defendant had an existing familiarity with illegal methamphetamine only if he had falsely portrayed himself as a non-drug user or as a person without a drug history or drug familiarity.

*(i). Inadmissible evidence may become admissible if a defendant "opens the door."* A defendant on trial for possession of illegal drugs who claims in his testimony to be a non-drug user, or claims he is unfamiliar with illegal drugs, is subjecting himself to cross-examination about prior drug involvement or drug conviction, even where such inquiry is otherwise prohibited. This is because such a claim creates a false impression that the prosecution in a criminal case is entitled, in fairness, to lay bare. See, e.g., State v. Gefeller, 76 Wn.2d 449, 454-55, 458 P.2d 17 (1969).

On the other hand, absent such trial assertions by the defendant that "open the door" to this sort of evidence, a prosecutor's improper introduction of prior bad acts or crimes, or of character or

propensity evidence to commit the crime charged, is error. See, e.g., State v. Wade, 98 Wn. App. 328, 337, 989 P.2d 576 (1999) (error where trial court admitted evidence of accused's prior sales of cocaine to show he sold cocaine as charged); Karl B. Tegland, 5 Washington Practice 41 (3rd ed. 1989). Unless some exception to the rule barring propensity evidence applies,

ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime. This forbidden inference is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence.

(Emphasis added.) State v. Wade, 98 Wn. App. at 336.

Therefore, the rule is that otherwise inadmissible evidence, such as ER 404(b) evidence of prior conduct showing a propensity to engage in the crime charged, may become "admissible" by reference to the prior conduct on cross-examination if the witness "opens the door" and the evidence is relevant to some issue at trial. State v. Fisher, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998); see also United States v. Sine, 493 F.3d 1021, 1037 (9th Cir. 2007).

Critically, however, there is no "opening [of any] door" in this context unless the witness by his testimony creates a "false

impression" of absence of prior bad conduct, by claiming, for example, that he is not a drug user and therefore would not possess drugs as alleged. Fisher, 165 Wn.2d at 750; Sine, 493 F.3d at 1037.

It is also true that "a passing reference" by the testifying defendant does not open the door for cross-examination about prior misconduct. Stockton, 91 Wn. App. at 40. However, in this case, Mr. English did not in any degree claim, hint or suggest during his testimony that he was a person unfamiliar with illegal drugs, and no door was opened, even by just a crack.

The court below properly prevented the prosecutor from raising Mr. English's actual prior drug convictions on cross-examination. However, the court's ruling was incomplete. It should have also barred the State's almost equally as prejudicial questioning about Mr. English's existing familiarity with methamphetamine packaged in bags. Either the door was opened, or it was not. Here, it was not.

When Mr. English testified at trial, he denied having had any drugs in his possession, and he further denied that he had said to Officer Kelly during the interrogation that either bag, including the

outer bag, was his, or had been in his possession.<sup>2</sup> 9/14/10RP at 161-62.

Rather, Mr. English had merely told Officer Kelly that the small outer bag that the officer was showing to him was familiar, because it had a "Superman" logo on it, and Mr. English had seen plastic bags like that before. 9/14/10RP at 162-63.

The prosecutor, however, insisted to Mr. English while cross-examining him that he had effectively told Officer Kelly that he "recognize[d]" the outer bag. 9/14/10RP at 165. Mr. English again answered that the officer had asked him if the outer bag was familiar to him, and he simply responded that he had seen bags like the one with the Superman logo before. 9/14/10RP at 165-66.

Mr. English explained on re-direct examination that when the officer showed him the second bag (containing the drugs), he could see that there was a powder in it. Mr. English realized at that point that Officer Kelly had pulled him out of his holding cell to allege that this apparent contraband was his. 9/14/10RP at 170-71.

Mr. English further explained that he was, of course, familiar with plastic bags in general. However, during his interrogation, he

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<sup>2</sup> Officer Keith Jones confirmed that Mr. English told Officer Kelly that he had not possessed the methamphetamine and that it was not his. 9/13/10RP at 114.

was not going to answer the officer's question of whether he was familiar with plastic bags *like the second one being waved in front of him*, because he could plainly see what was in this second bag and realized that Officer Kelly was accusing him of possessing it.

9/14/10RP at 172.

At this point the prosecutor accused Mr. English of telling Officer Kelly a lie, by saying he was not familiar with plastic bags such as the second type of bag containing the drugs. 9/14/10RP at 173.

The defendant repeated, yet again, that he had simply said "no" to everything the officer asked him about that bag, because he could see what was in it, and he was not guilty of possessing the drugs.

9/14/10RP at 173. Apparently finding this answer unsatisfactory, the prosecutor continued his cross-examination with the following question:

Q: Okay. So you're telling me you're -- you are not familiar with a plastic bag with a white crystal substance in it?

A: I'm not familiar with it.

(Emphasis added.) 9/14/10RP at 173. The State immediately asked that the jury be excused. 9/14/10RP at 173.<sup>3</sup>

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<sup>3</sup> The parties had agreed prior to trial that Mr. English's credibility could be impeached by reference only to his prior convictions for forgery and possession of stolen property, which are *per se* crimes of dishonesty under ER 609. 9/13/10RP at 47; 9/14/10RP at 142-43; see State v. Saunders, 91 Wn. App. 575, 579, 958 P.2d

**(ii). The State's argument that the door was opened must fail.** With the jury out, the State argued that a door had been opened allowing the prosecutor to ask Mr. English in front of the jury about his prior multiple methamphetamine drug convictions. In the course of so arguing, the prosecutor mischaracterized the defendant's testimony:

Your Honor, I believe that Mr. English has opened the door based on his statements and my clarification through him of those statements, that the reason he answered he was not familiar with that bag is because there was a white crystal substance in it and he's not familiar with that. I believe that I'm – should be able to question Mr. English if he's – Isn't it true that you've been convicted of possession of methamphetamine one, two, three, four, five separate occasions? And you are, in fact, familiar with that type of a bag with a white crustal substance in it.

9/14/10RP at 174. Mr. English's counsel immediately rejoined, correctly, that Mr. English had simply said, "I'm not familiar with this bag." (Emphasis added.) 9/14/10RP at 174.

The court, however, reasoned that the door had been opened, since the defendant testified that he had denied being connected with the bag of drugs because "he didn't want to go there right off when he saw the bag with the white powdery substance." 9/14/10RP at 176.

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364 (1998) (drug convictions are not considered relevant to a defendant's credibility or character for truthfulness). The State appeared to concede that its wish to introduce the defendant's "one, two, three, four, five" prior drug convictions, similar to the crime charged, would be impermissible unless a door was opened. 9/14/10RP at 163-69, 172-80.

The court did not allow the State to question the defendant about his prior drug convictions. 9/14/10RP at 176. However, the court allowed the State to ask the following question, which the prosecutor did while holding the drugs in front of the witness, and with a gusto reflected in the transcriptionist's verbatim report:

Q: Mr. English, I'm showing you this larger bag again with the white crystalline powder like substance in it.

And isn't it true that you'd recognize a substance such as that to potentially be an illegal controlled substance?

A: Yes, I do.

Q: Okay.

MR: GASPERINO: No further questions, Your Honor.

9/14/10RP at 179.

Allowing this questioning was error, and its grave prejudice (resulting in part because of the defendant's honest and forthright answer) becomes clear in the context of the case.

Mr. English, throughout his examination, never -- including by his statement that he was not familiar with the bag of drugs the officer was trying to connect him with -- ever claimed that he was a person who 'didn't recognize illegal drugs.'

Quite to the contrary. Mr. English testified that he could see that the plastic bag Officer Kelly was waving in front of his face had white powder in it. He further realized the officer was accusing him of

being the owner of these apparent drugs. 9/14/10RP at 172. For that reason, he had declined to say to the officer (as he had said with respect to the outer bag with the Superman-imprinted logo) that he had seen or was familiar with plastic bags of such design as the inner bag. 9/14/10RP at 173. As he clearly testified, he was not the owner or possessor of the drugs, and therefore he decided he would not give the officer even the seemingly innocuous statement that he was also familiar with plain non-logoed plastic bags.<sup>4</sup> 9/14/10RP at 172-73.

Mr. English did not open any door, and the prosecutor's questioning should not have been allowed. A trial court's decision that a witness has opened the door to certain otherwise impermissible questioning is reviewed for abuse of discretion. State v. Warren, 134 Wn. App. 44, 65, 138 P.3d 1081 (2006).

However, here, Mr. English's testimony had not created, much less was he trying to create, some false impression of himself as an innocent in the world of drugs. Fisher, 165 Wn.2d at 750 (rationale of "open door" doctrine is that the State must be allowed to rebut a "false impression" created by a defendant's testimony untruthfully portraying

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<sup>4</sup> This was a wise decision. At least according to Mr. English, Officer Kelly had taken his prior statement that he was "familiar" with Superman logo bags, and had transformed it into false testimony against him at his felony trial that he had confessed to that bag being "his." 9/13/10RP at 85-86; 9/14/10RP at 161-62.

himself as not the sort of person would commit the crime); Tegland, 5 Washington Practice, supra, at 41.

Here, Mr. English stated he was familiar with plastic bags, but he denied that the bag which was full of drugs was his, denied that it had been on his person, and denied that he had in any way otherwise possessed the drugs. None of this opened the door to questions about prior drug use or familiarity with drugs. See also State v. Avendano-Lopez, 79 Wn. App. 706, 715, 904 P.2d 324 (1995) (defendant's reference to his release from jail did not open the floodgates to questions about his prior heroin sales).

The Stockton case is helpful. There, the defendant was charged with unlawful possession of a firearm. Stockton, 91 Wn. App. at 37. The defendant testified that he had been attacked by a group of men who had tried to sell him drugs, and he had found it necessary to grab one of their guns in self-defense. Stockton, at 39. He also testified that he "was not interested" in buying drugs from the men. The State argued that this statement opened the door to the prosecutor's question, "So you have some knowledge of how to purchase drugs on the street?" Stockton, at 39.

The Court of Appeals disagreed, stating, "Stockton's testimony that he thought the men were trying to sell him drugs was no more

than a passing reference to any knowledge he may have had about drugs [and as] such, it did not open the door to testimony about his prior drug use." Stockton, at 40.

Although the Court in the Stockton case was likely also concerned about impeachment on a collateral matter, the similarity between that case and the present one is significant. In both cases, the defendant was simply making a factual assertion about the incident at hand. Mr. English in this case was not trying to create a dishonest portrayal of himself as pure and free from any involvement with drugs. He was asked whether the drugs being shown to him in the interrogation room were his. He told Officer Kelly they were not his and he told the prosecutor the same thing at trial. There was no false or misleading impression being made by the defendant that he was a non-drug user or that he had no familiarity with drugs, and thus there was nothing for the State "in fairness" to rebut, much less by dredging up damaging propensity evidence.

An accused's simple denial of guilt on the crime charged is not an "opening of the door" to character and propensity evidence. Because Mr. English's testimony did not in any way open the door to questioning about his prior drug convictions or his general familiarity with white powdered drugs in bags, the trial court ruled in an

untenable manner under the facts and the case law, and thus abused its discretion, because “no reasonable person would take the view adopted by the trial court.” State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997).

**b. Reversal is required.**

Erroneous introduction of evidence showing the defendant has prior illegal drug involvement is prejudicial in general, and specifically, may improperly persuade the jury that he has a propensity to commit crimes. State v. Hardy, 133 Wn.2d 701, 706, 713, 946 P.2d 1175 (1997); Saunders, 91 Wn. App. at 580. The danger and unfair prejudice of such propensity reasoning, which a lay jury is inclined to engage in, is surely magnified in a case where the charge at hand is also a drug offense. See State v. Wade, supra, 98 Wn. App. at 337.

Here, the prosecutor’s effort to interject the evidence of drug use and propensity into the jury’s assessment of the case is a reflection of the State’s own estimation of its ability to powerfully affect the outcome. Under the standard that evidentiary error requires reversal where it is reasonably probable the trial’s outcome was materially affected, the verdict in this case should be reversed. State v. Everybodytalksabout, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002). In this uncomplex case where one witness testified that drugs were

found in Mr. English's police property bag, while another, Mr. English, denied ever possessing them, the jury was at least "probably" affected in its decision by this evidence. Into this stalemate of police officer versus defendant, the prosecutor was able to interject that Mr. English had some special sort of past familiarity with bagged methamphetamine that an innocent citizen would not possess.

Certainly, it would have been even more unfairly prejudicial for the prosecutor to ask Mr. English specifically about prior drug convictions. However, the error is not saved by the fact that it could have been worse. The prosecutor's interrogation, with which he pointedly concluded his cross-examination, very effectively made the desired point of argument to the jury – Mr. English was a person with past experience with illegal, packaged methamphetamine, just like the drugs he is now charged with possessing, and this jury should reject his claim that the drugs were mistakenly attributed to him by some irrelevant administrative mistake in the police property room.

The prosecutor's inquiry, which elicited Mr. English's honest answer to the question, for all practical purposes removed the defendant's presumption of innocence, which is supposed to remain intact until and if the jury's deliberations find him guilty. See State v.

Venegas, 155 Wn. App. 507, 524-25, 228 P.3d 813 (2010). This Court should reverse his drug conviction.

**2. THE TRIAL COURT UNWITTINGLY COMMENTED ON THE EVIDENCE BY INCLUDING AN UNNECESSARY JURY INSTRUCTION WHICH CONVEYED TO THE JURORS THE COURT'S APPARENT VIEW OF THE MERITS OF THE CASE.**

In this case, the central and sharply disputed issue at trial was whether the defendant actually had possessed the bag of methamphetamine, or whether there was reasonable doubt on that question, arising because of the drugs' belated, mysterious "discovery" in the police property room.

In these circumstances, the trial court commented on the evidence by giving the following instruction, which focused on a matter not at issue and, in the jury's eyes, appeared to presume that the defendant was guilty of having the bag of methamphetamine in his possession:

The law does not require that a minimum amount of drug be possessed, but possession of any amount is sufficient to support a conviction.

9/14/10RP at 184-87; CP 8 (Jury instruction no. 12).

This instruction cannot be found in the WPIC pattern jury instructions, see 11 Washington Pattern Jury Instructions sec. 50.01

to 55.06 (2008), although it is a correct statement of the *substantive* law.<sup>5</sup>

However, the bases for the defense objection were that the instruction was unnecessary given the other, standard instructions of law in a drug possession case, and further, that the instruction contained a “comment on the evidence” by the trial court, which was forbidden by the Washington Constitution, Wash. Const. art. 4, § 16. 9/14/10RP at 184-87. Mr. English may appeal.<sup>6</sup> CrR 6.15(c), RAP 2.5(a).

In addition, Mr. English properly countered the State’s argument that his counsel had somehow “invited” the instruction during trial. 9/14/10RP at 186; see Part D.2.a, infra.

**a. The trial court must not comment on the evidence by implication or inference.**

Trial courts rarely, if ever, comment *expressly* on the evidence, nor do they intentionally make statements or include jury instructions

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<sup>5</sup> Possession of any amount of a controlled substance will support a conviction under RCW 69.50.401. State v. Malone, 72 Wn. App. 429, 439, 864 P.2d 990 (1994) (possession of cocaine residue); State v. Larkins, 79 Wn.2d 392, 394, 486 P.2d 95 (1971), review denied, 118 Wn.2d 1019 (1992) (possession of cocaine residue in crack pipe bowl).

<sup>6</sup> It is also a reflection of the seriousness of the matter that a comment on the evidence by the trial court is an error of constitutional magnitude which may be raised for the first time on appeal. State v. Levy, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006); see RAP 2.5(a)(3).

which appear to expressly convey a view of the court on the merits of the case. However, a judge need not expressly communicate his or her personal belief on a disputed matter of fact; rather, merely implying what would appear to the jury to be such a belief is enough to violate the constitutional proscription. Levy, 156 Wn.2d at 721.

The complete lack of necessity of the instruction is part of the reason why it served as a comment on the evidence. Contrary to the State's contention, Mr. English's counsel had not "invited" a need for this instruction by somehow suggesting during trial, or intimating that he would argue in closing argument, that the jury should acquit based on the amount of the drug being small.

Defense counsel did not contend that possession of a small amount of controlled substance warranted acquittal. The forensic scientist from the Washington State Patrol Crime Laboratory had testified on direct examination that gas chromatograph mass spectrometry testing of controlled substances requires a "weighable" amount of material to be accurately conducted, since a partial portion of the evidence is dissolved in solvent during the procedure. 9/13/10RP at 123-24. Counsel therefore engaged in brief, routine cross-examination regarding the fact that the testing that was conducted had to be done on the tenth of a gram amount of the

substance, and in so doing counsel in passing had simply asked the witness how many grams were in a pound. 9/14/10RP at 133-34.

The defense questioning was plainly directed toward factors that might affect the accuracy of the testing procedure, since the State was required to prove that the substance is the particular controlled substance, methamphetamine. RCW 69.50.4013.

The forensic scientist indicated that the amount of methamphetamine was approximately a tenth of a gram. 9/14/10RP at 133-34. The cases in which it has (unsuccessfully) been contended that a *de minimis* amount of the drug should be legally insufficient for conviction have involved “residue” of methamphetamine detected in smoking or other ingestion devices. See note 5, supra, and cases cited therein. This was not one of those cases involving a very small amount of the substance, wherein such an argument by counsel could have been colorably advanced, and in any event defense counsel did not advance it.

Furthermore, even if counsel had intimated or argued that Mr. English should be acquitted based on some extraordinarily small amount of the substance, the proper State’s response to such an argument would have been an argument in closing, made by the State’s counsel, in reliance on the undisputed forensic evidence, and

based on the existing, utilized, standard WPIC instructions. See WPIC 50.01, WPIC 50.02, WPIC 50.03, and CP 8 (Jury instructions 7, 8, 9, 10, 11). Jury instructions in a criminal case are sufficient when they allow the party to argue its theory of the case, State v. White, 137 Wn. App. 227, 230, 152 P.3d 364 (2007), and the instructions in this case did so, if it was necessary to argue that even a small amount of drug established guilt, which it was not.

If defense counsel had argued for acquittal on the basis of the amount of the drug, the above options – reliance on the given instructions, and closing argument -- were the available and fully adequate bases of reliance for a responsive prosecution argument, in addition of course to any proper contemporaneous objection by the prosecutor if the defendant's lawyer misstated the law. See, e.g., State v. Davenport, 100 Wn.2d 757, 765, 675 P.2d 1213 (1984). The State was not entitled to demand that the jury instructions should also include some issuance by the judge of written language duplicating and therefore emphasizing a legal point for the prosecutor.

More importantly, the prosecutor is not entitled to any jury instruction that addresses a matter in a way that presumes resolution of a disputed issue of fact in a manner that would appear to the jury to reflect a view of the facts held by the judge.

Jury instruction no. 12 was an implicit endorsement of the argument of a party. By unnecessarily emphasizing to the jury that it should not acquit Mr. English simply because the amount of drugs he possessed was “small,” the court subtly and therefore powerfully conveyed an apparent view that the defendant probably did possess the plastic bag of drugs. If the jury is able to “infer” from the trial court's comments that he or she personally believes or disbelieves evidence relative to a disputed issue, the constitutional rule is violated. Jankelson v. Cisel, 3 Wn. App. 139, 145, 473 P.2d 202 (1970), review denied, 78 Wn.2d 996 (1971).

Thus, in State v. Dewey, 93 Wn. App. 50, 58-59, 966 P.2d 414 (1998), the trial court instructed the jurors that they would hear evidence regarding a prior “incident” for the purpose of determining whether Dewey acted “under a common scheme or plan.” Dewey, 93 Wn. App. at 54. At the conclusion of the case, however, a written jury instruction described the “incident” as a “rape,” stating: “Evidence has been introduced in this case, on the subject of the rape of [victim] in June of 1994, for the limited purpose of . . . .” Dewey, 93 Wn. App. at 58.

The Court of Appeals held that because the “incident” would properly be categorized as a “rape” only if the victim's testimony was

believed, the instruction “allowed the jury to infer that the judge accepted [the victim's] testimony as true.” Dewey, 93 Wn. App. at 59. Thus, the instruction constituted an impermissible comment on the evidence.

For similar reasons, jury instruction no. 12 was a violation of our state constitution. Article IV, § 16 of the Washington Constitution directs that “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon[.]” (Emphasis added.) State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). An instruction improperly comments on the evidence if it implies resolution of a disputed issue of fact that should have been left to the jury. State v. Becker, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997).

Put another way, a statement by the court constitutes a “comment on the evidence” if the court's seeming attitude toward the merits of the case, or the court's evaluation relative to a disputed issue, is inferable from the statement. Lane, 125 Wn.2d at 838; State v. Hansen, 46 Wn. App. 292, 300, 730 P.2d 706, 737 P.2d 670 (1986).

Thus in State v. Lane, the Supreme Court held that the trial court commented on the evidence where a significant issue was whether a jailhouse informant had been released early because of his cooperation with police. The trial court gave an oral instruction to the jury that stated

that the court “accepted” the State’s version of events, i.e., that the informant/witness had not received his early release in exchange for his cooperation, but instead for treatment reasons. Lane, 125 Wn.2d at 839.

The Lane Court stated:

By making the statement regarding Blake's treatment, the trial judge charged the jury with a fact and expressly conveyed his opinion regarding the evidence. Consequently, we agree with the Court of Appeals that the trial court's instruction regarding Blake's early release constituted an impermissible comment on the evidence.

State v. Lane, 125 Wn.2d at 839. Here, the court’s instruction no. 12 by its very language presumed that the defendant had possessed the drugs. In addition, by unnecessarily emphasizing a matter not at issue, it even more effectively communicated to the jury a seeming view of the court that presumed the defendant possessed the bag, and suggesting that the defense claim of non-possession, and police mistake, was not believable. Where a trial court’s statement to the jury implies resolution of an element, the state constitution is violated. See State v. Trickel, 16 Wn. App. 18, 25, 553 P.2d 139 (1976), review denied, 88 Wn.2d 1004 (1977).

In this case, the court’s implicit rejection of any value or credibility in Mr. English’s defense based on the belated discovery of

the drugs, was a comment on the evidence. The subtle nature of the comment is what renders it both error, and harmful:

[I]t is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wn. 245, 250-51, 60 P. 403 (1900). Here, the trial court communicated to the jury its apparent view that there was little or no merit to the defense that there was reasonable doubt on the question of actual possession. This was a comment on the evidence of the sort that our Supreme Court has stated is highly likely to influence a jury.

**b. The State cannot overcome the presumption of reversible prejudice.**

The error warrants reversal. Washington cases “demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. art. 4, § 16.” Lane, 125 Wn.2d at 838. Once it has been demonstrated that a trial judge's conduct or remarks constituted a comment on the evidence, a reviewing court will presume the comments were prejudicial. State v. Bogner, 62 Wn.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, “the burden rests on the state to show that no prejudice resulted to the defendant unless it

affirmatively appears in the record that no prejudice could have resulted from the comment." Lane, 125 Wn.2d at 838-39 (citing State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974)).

For example, the Court in Lane reversed because the trial court commented on a matter of fact that went directly to the credibility of a witness's testimony. Lane, 125 Wn.2d at 839. Here, the trial court's comment was on an even more central matter. The court commented on the evidence in a way that gave the jury its seeming opinion of the defendant's claim that the bag of drugs only appeared in or near his property sack in the police station. In doing so, the court effectively discredited the underpinnings of Mr. English's "reasonable doubt" defense.

The burden is on the State to show that the defendant was not prejudiced, by pointing to those portions of the record that affirmatively show that no prejudice could have resulted. Lane, 125 Wn.2d at 838-39. That cannot be shown here. There was only one element at issue – possession-- and only a small number of witnesses. The revelation of Mr. English's past drug familiarity was tremendously impactful in this case where "that's not mine" was the defense, and "yes it is," was the state of the evidence, and that

allegation lacked convincing proof that the drugs were actually found on the defendant. No evidence can be pointed to that renders the error non-prejudicial or harmless. This Court should reverse Mr. English's conviction for possession of a controlled substance.

### **3. THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT IN CLOSING ARGUMENT.**

In determining whether prosecutorial misconduct occurred, the Court first evaluates whether the prosecuting attorney's comments were improper. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). If there was no objection, the defense waives a prosecutorial misconduct claim unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. State v. Charlton, 90 Wn.2d 657, 661, 585 P.2d 142 (1978).

The State is generally afforded wide latitude in making arguments to the jury. State v. Gregory, 158 Wn.2d 759, 860, 147 P.3d 1201 (2006). But a prosecuting attorney's expressions of personal opinion about the defendant's guilt or the witnesses' credibility are improper. State v. Dhaliwal, 150 Wash.2d 559, 577-78, 79 P.3d 432 (2003). In determining whether the prosecuting attorney expressed a personal opinion about a witness's credibility, the Court

views the comments in context. State v. McKenzie, 157 Wn.2d 44, 53, 134 P.3d 221 (2006).

Here, in arguing that it sometimes happens that a police officer misses something such as the presence of drugs on a person or in his affects, the prosecutor stated:

Well, you know, he missed something. And he admits that. Sometimes that happens.

In fact, when I was working in the jail prior to being a Battle Ground police officer, that happened. It – it's happened. It's not uncommon.

9/14/10RP at 205. This was an expression of a personal opinion, from personal experience, about the defendant's guilt, and regarding the competing claims of the officers and the defendant. The prosecutor was plainly vouching for the police claims by referring to his own experience working at the jail, and stating that mistakes happen which do not undermine the conclusion that the defendant actually possessed the drugs. The prosecutor openly expressed a personal opinion to persuade the jury, and worse, placed his own prestige as an officer of the court behind it.

This went beyond the bounds of proper conduct. Our Supreme Court has stated,

It is not uncommon for statements to be made in final arguments which, standing alone, sound like an expression of personal opinion. However, when

judged in the light of the total argument, the issues in the case, the evidence discussed during the argument, and the court's instructions, it is usually apparent that counsel is trying to convince the jury of certain ultimate facts and conclusions to be drawn from the evidence. Prejudicial 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.

McKenzie, 157 Wash.2d at 53-54, 134 P.3d 221 (quoting State v. Papadopoulos, 34 Wn. App. 397, 400, 662 P.2d 59, review denied, 100 Wn.2d 1003 (1983)). Here, the prosecutor's expression of a personal opinion was clear and unmistakable misconduct, and it was flagrant and preserved for appeal – no jury could ignore the apparent ‘behind the scenes’ wisdom offered by the Deputy Prosecuting Attorney, based on his wide experience. This error requires reversal and aggravated the prejudice of the existing errors in the case.

#### **4. CUMULATIVE ERROR DENIED MR. ENGLISH A FAIR TRIAL.**

Criminal defendants charged with possession of drugs are entitled to a presumption of innocence at trial, even if, like Mr. English, they have a long history of similar crimes. U.S. Const. amend 14; In re Winship, 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This presumption of innocence “is the bedrock upon which the criminal justice system stands.” State v. Venegas, 155 Wn. App. at 523

(quoting State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007)).

Mr. English's trial should have turned on the disputed issue of whether he had actually possessed the drugs in question, or whether they were mistakenly attributed to him when they were later located in a police department property bag, hours after his transport to the police station. The defendant's trial could and should have been about this serious and important issue.

Instead, Mr. English was convicted because the prosecutor procured an erroneous ruling that he had "opened the door" to questioning about his familiarity with illegal drugs. But on review, it is clear that no door had been opened, and the court's ruling to the contrary allowed this injurious inquiry, and Mr. English's compelled, but honest and forthright "yes" answer, to be used against him as propensity and bad character evidence.

As a result of this serious error, the presumption of innocence was degraded before the jury even commenced deliberating, because the trial process was diverted from a proper focus on the question of whether there was reasonable doubt, in favor of a prosecution on the basis of the defendant's past character and propensity.

The prejudice of that error was aggravated when the trial court, although unintentionally, weighed in with a comment on the evidence by issuing a wholly unnecessary jury instruction. The trial court's comment materially damaged the defendant's presumption of innocence, because it communicated the apparent view of the court, effectively dismissing the defense claim of innocence as not worthy of the jury's focus.

Finally, these errors were aggravated, in turn, by the prosecutor's improper effort to use his personal experience to vouch for the police officer's version of events, and effectively sway the jury with his personal opinion of the defendant's guilt.

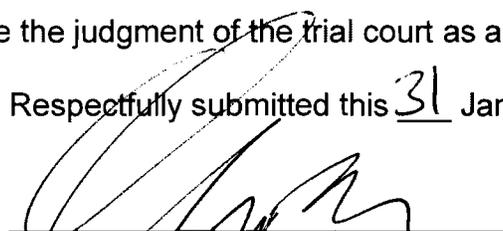
The cumulative effect of the above trial court errors requires reversal of Mr. English's drug conviction. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992). The presence of constitutional error -- as shown in the present case -- is more likely to contribute to cumulative error than non-constitutional errors. Russell, 125 Wn.2d at 94. In addition, importantly, this doctrine authorizes reversal based in part on any errors that were inadequately preserved for appeal, when the Court believes that all the errors had a cumulatively prejudicial effect that deprived the

defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Overall, this is a case where the prejudice from multiple errors went to the heart of the question of guilt beyond a reasonable doubt, and they require reversal individually, and if not individually, because of their combined prejudicial effect. Russell, 125 Wn.2d at 93-94. Mr. English therefore asks this Court in the alternative to determine that the cumulative effect of the multiple trial errors combined to deny him a fair, constitutional trial. Alexander, 64 Wn. App. at 150-51.

#### **E. CONCLUSION**

Based on the foregoing, Mr. English respectfully requests this Court reverse the judgment of the trial court as argued herein.

Respectfully submitted this 31 January, 2011.

  
Oliver R. Davis WSBA # 24560  
Attorney for Appellant  
Washington Appellate Project - 91052

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ENGLISH,

Appellant.

NO. 41209-8-II

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31<sup>ST</sup> DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> TIMOTHY ENGLISH 810858 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	<input checked="" type="checkbox"/> U.S. MAIL <input type="checkbox"/> HAND DELIVERY <input type="checkbox"/> _____

SIGNED IN SEATTLE, WASHINGTON THIS 31<sup>ST</sup> DAY OF JANUARY, 2011.

X \_\_\_\_\_  
*[Signature]*

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