

No. 41209-8-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY ENGLISH,

Appellant.

BY _____
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COURT OF APPEALS
DIVISION TWO

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

The Honorable Diane Woolard

REPLY BRIEF

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A. REPLY ARGUMENT

1. THE DEFENDANT'S TESTIMONY WAS NOT MISLEADING AND DID NOT FALSELY PORTRAY HIMSELF AS UNFAMILIAR WITH PACKAGED POWDER DRUGS, AND THUS DID NOT "OPEN THE DOOR."

The parties to the present appeal have set forth the relevant portion of the record and it is for this Court of Appeals to conclude whether the State's characterization of the questioning and answers occurring below is in any way reasonable. Mr. English contends it is not. The State's argument in its Responsive Brief can be summed up by the following sentence at page 11:

The State submits that the defendant was attempting to mislead the jury [by] testifying that he didn't know anything about white substances in [plastic] packages of that nature, et cetera.

Brief of Respondent, at p. 11. But this is absolutely not what the defendant said, or even implied.

To the contrary, the defendant's answers on the witness stand in fact reveal a remarkable effort to honestly and carefully explain to the jury precisely why he gave the answers that he gave to the interrogating police officer. Mr. English explained that saw that the officer was holding up in front of him a plastic bag containing a white powder. Of course, anyone who has watched television knows that

such a thing is certainly some sort of illegal drug substance. Mr. English honestly and carefully explained to the jury that when he saw the obviously illegal powder, he decided that he would not give a “yes” answer to the officer’s question whether he was familiar with “those kinds of [plastic] bags” because, he believed (and not without good cause), that the clever officer was trying to accuse him of, and trying to trick him into admitting to, familiarity with that particular bag, or drug-carrying bags. 9/14/10RP at 165-70.

Now, certainly, everyone in the modern world is familiar with “plastic bags,” a common household item. Mr. English – again, attempting to be both honest and precise in his testimony – told the jury that he answered “no” to the officer’s question (even though he was of course familiar with everyday plastic bags in general, as everyone is) because he believed the officer was trying to trick him. 9/14/10RP at 169-72.

None of this testimony by Mr. English was an attempt to falsely portray himself as being unfamiliar with ‘packaged methamphetamine.’ If anything, the opposite is true – the defendant’s effort to be careful and precise in his testimony compelled him to admit to the jury that he recognized that the police officer was holding up a bag of apparent illegal drugs.

But this case was not about familiarity with plastic bags. It is unfathomable how the prosecutor convinced the trial court that a door was opened by the defendant's testimony recalling the past police interrogation and his answer that he was not familiar with the type of plastic bag the officer was holding up in front of him. The defendant never claimed on the witness stand that he was a person unfamiliar with plastic-bagged methamphetamine. He did not open the door to the State's dispositively prejudicial questioning – which the defendant then answered honestly, yet again. But the question should never have been asked.

The mechanics of what occurred in the trial court below are apparent from the record. The State's case was at risk of losing because the drugs had mysteriously only appeared in the evidence room. Therefore, the prosecutor determined to secure a guilty verdict by casting the defendant, in the jury's eyes, as a past drug user.

2. THE COURT'S COMMENT ON THE EVIDENCE IMPLIED TO THE JURY THAT GUILT HAD BEEN ESTABLISHED.

Appellant relies on the arguments in his Opening Brief.

Respondent's arguments should fail to dissuade this Court from concluding that jury instruction no. 12 operated as an implicit endorsement of the argument of a party, by the trial judge. 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. Respondent does not dispute the law -- 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 against comments on the evidence is violated. Jankelson v. Cisel, 3 Wn. App. 139, 145, 473 P.2d 202 (1970), review denied, 78 Wn.2d 996 (1971). It matters not that the trial court had no intent or purpose to violate this rule, which may be transgressed simply by the accidental or unnecessary insertion or wording of a jury instruction into the case, which nonetheless has grave repercussions of presenting the case to the jury in a final, instructional form that unfortunately biases the fact-finder in favor of one party's proof. This

error contributed mightily to the cumulative prejudice that renders the verdict severely undermined.

3. THE PROSECUTOR COMMITTED FLAGRANT MISCONDUCT IN CLOSING ARGUMENT.

The Respondent appears to claim that the prosecutor's use of the language "I" in the closing argument – clearly violating the rule against the prosecutor's interjection of his personal knowledge and outside evidence into closing argument – was merely an instance of the prosecutor recounting the evidence at trial. But the transcript fails to demonstrate that the prosecutor indicated in any manner that the sentences he uttered were meant to suddenly shift into the first person, as a rhetorical device, or to indicate that the prosecutor was "quoting" a witness's testimony.

The transcript represents the record of the case on appeal. Once the court reporter certifies that the transcript is a correct transcript of the testimony or proceedings, the transcript is "prima facie a correct statement." RCW 2.32.250. A party who objects to or proposes to amend a report of proceedings must do so within 10 days after receipt of the report of proceedings or receipt of notice of filing of the report of proceeding. RAP 9.5(c).

Additionally, extraneous affidavits, such as that submitted from the trial deputy, may not be considered as part of the record on direct appeal absent employment of a complex and rarely permitted procedure which the State has in any event not initiated. RAP 9.10; see State v. Murphy, 35 Wn. App. 658, 661-62, 669 P.2d 891 (1983).

Furthermore, the trial prosecutor's claims in the submitted affidavit simply do not jibe squarely with the existing record. And finally, neither does the State's claim on appeal that the jury, given the closing argument, would naturally understand that the prosecutor was not offering a matter of personal experience.

The prosecutor assured the jury, in closing argument, that he had worked with this police station, and that any error was and typically a result of mere oversight by the police. The transcript of trial, and closing argument viewed in its entirety, simply cannot be interpreted in any other manner.

The defendant's Opening Brief amply cites case law holding that such argument by a prosecutor is deeply improper for a constellation of reasons, and in this case it was flagrant misconduct.

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

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.

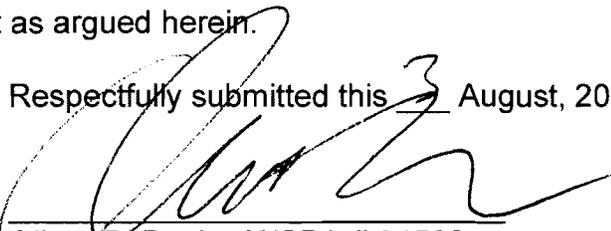
Finally, to any reasonable listener, the prosecutor in this trial certainly interjected a personal statement into closing argument that he had seen mistakes in handling evidence at police stations before, attempting to convince the jury that the mistake in this case (the central issue) was immaterial to the issue whether Mr. English was a drug-possessing person.

The cumulative effect of the above trial court errors – in any pair or combination -- require reversal of Mr. English's drug conviction, in the event that this Court declines to reverse for any individual error. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. English respectfully requests this Court reverse the judgment of the trial court as argued herein.

Respectfully submitted this 3 August, 2011.



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Respondent,)	
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)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 3RD DAY OF AUGUST, 2011, I CAUSED THE ORIGINAL **REPLY 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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