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COURT OF APPEALS
DIVISION II

NO. 41209-8-II

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

STATE OF WASHINGTON
BY DM
DEPUTY

STATE OF WASHINGTON, Respondent

v.

TIMOTHY ROBERT ENGLISH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01167-6

CORRECTED BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ABIGAIL E. BARTLETT, WSBA #36937
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

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I. STATEMENT OF FACTS

The defendant was charged with one count of Possession of Controlled Substance – Methamphetamine. The possession of the drugs occurred on or about July 15, 2010. (CP 4 – Information). At jury trial the defendant was found guilty of that crime.

The prosecution called Officer Richard Kelly from Battle Ground Police Department as its first witness. (RP 68). He testified that they were dispatched concerning a violation of a court order regarding the defendant. (RP 70). They were also advised that the defendant had a felony warrant out on him. They found the defendant hiding under a laundry room table in an apartment and took him into custody. (RP 71). The officer testified that he removed from the defendant a large pocket knife when he searched him after being handcuffed. (RP 71). He also removed other items from the defendant including lighters, money, and loose change. He believes he also had a wallet with him. (RP 73). The dollar bills that he removed from the defendant were folded up and he did not unfold the dollar bills to check each one of them. (RP 73).

The items were placed in property /evidence bags and travelled with the defendant directly to the jail. (RP 76). Once he arrived at the jail the officer removed the property bag from the trunk of his squad car and,

with the property bag in hand, walked the defendant into booking. He remembers placing the property bag on the counter in front of booking where they were going to do further inspections. He indicated that he didn't do anything else concerning the property bag. (RP 76).

Officer Kelly indicated that he left the jail and was almost back to Battle Ground when he was called by dispatch who requested that he call the jail. When he called the jail they told him that they had found some methamphetamine in the defendant's property bag. At that point the officer returned to the jail. (RP 77).

Once he arrived back at booking he contacted a custody officer who had found a small baggie, which contained methamphetamine. The custody officer showed Officer Kelly a small blue Ziploc baggie. The indications were that the small baggie was found in the bottom of the property bag that had been left with the custody staff. (RP 78). The officer then described how he packaged up the methamphetamine for sending off for additional testing. (RP 80-81). The officer showed to the jury the various items that had been removed from the defendant and that had also been sent on for testing. He described that there was a bag inside the smaller blue bag and all of this packaging had been sent on to the State Crime Lab. (RP 82-83).

The officer had an opportunity to talk to the defendant concerning these matters. He indicated that he explained to the defendant that the custody staff had found the small bag and that this bag was inside another bag. The defendant indicated that one of the bags was his but one of them was not. (RP 86).

On re-direct the officer made clear to the trier of fact that the evidence bag was empty before he placed the defendant's items into it.

QUESTION (Deputy Prosecutor): Okay. And, now, this evidence bag that -- that you used or this property/evidence bag, you had indicated you took that from your seat bag; right?

ANSWER (Officer Kelly): Correct.

QUESTION: You didn't just pull it out of your trunk --

ANSWER: Correct.

QUESTION: --where someone had left it.

ANSWER: Right, I have a seat bag that has my -- my evidence folders, my evidence envelopes, it has paperwork and things like that, miscellaneous forms that I use throughout the day.

QUESTION: Okay. And so do you know that that bag coming out of your seat bag was unused at that point?

ANSWER: Yes, sir.

QUESTION: Okay. And you actually looked in it prior to using it?

ANSWER: Yes, sir, I popped it open and --

QUESTION: Okay. And you also said that you at some point worked for Clark County. Did you ever work in the jail?

ANSWER: Yes, sir.

QUESTION: Okay. And you've brought people to jail in your capacity as a police officer; correct?

ANSWER: Yes, sir.

QUESTION: Okay. And in your experience is it uncommon to find a controlled substance on a person at the jail after they've been brought there by the –

MR. SOWDER (Defense Counsel): Objection.

MR. GASPERINO (Deputy Prosecutor): - officer?

MR. SOWDER: It's outside the scope of direct and it's – calls for an opinion and not relevant to this –

THE COURT: Overruled.

MR. GASPERINO: Thank you, Your Honor.

BY MR. GASPERINO (Continuing)

QUESTION: Not – not – not – and I don't want your opinion. Like I said in my question, in your experience have you personally known in either one of your capacities as a custody officer or as a law enforcement officer, that a controlled substance has been found on a person after they've been dropped off at the jail by the officer and the officer's done with them?

ANSWER: Yes, sir. I – I know for a fact that that has happened.

-(RP 97, L25 – 99, L19)

The prosecution called Officer Edward Michael, a police officer with the City of Battle Ground (RP 103) who indicated that he assisted Officer Kelly in making the arrest of the defendant and in also bagging and preserving the personal effects that were recovered from the person of the defendant. (RP 104-106).

The State called Keith Jones, the custody officer for the Clark County Sheriff's Office. (RP 107). He described his duties to the jury and indicated that he did come in contact with the defendant on the date of the arrest. He described the processing of the defendant's property.

QUESTION (Deputy Prosecutor): First, do you recognize both of these plastic bags?

ANSWER (Keith Jones): I do.

QUESTION: And how do you recognize them?

ANSWER: I recognize them because they were in his property items and those were the bags that I opened up to – to see if the – the white substance was methamphetamine.

QUESTION: Okay. Now, you see again, like I said, there's a larger plastic baggie here with the white crystal substance in it, and, again, it does have this evidence tape on it (indicating).

Can you describe the relationship between the larger bag with the white crystal substance and the small – the smaller blue baggie when you found them? How were – you know, what was their interaction?

ANSWER: The blue bag contained the larger white bag. The larger white bag was folder up inside the blue bag, which I found the blue bag in his property.

QUESTION: Okay. And when you say in his property, do you recall how – how that comes in – how that came in on that day?

ANSWER: The arresting officer collects all that, all their property, and they usually put it into a bag. This time it was in a manila folder, labeled with their name on it along with their booking sheet and all the booking information.

QUESTION: And were you the one that actually emptied that manila folder out to –

ANSWER: Yeah, I'm –

QUESTION: - examine?

ANSWER: - I'm the one that opened the manila folder and emptied it onto the counter to search the contents, to sort things out and to inventory the contents.

QUESTION: Okay. And did you ever, I guess, lose sight of the contents of that bag after you had emptied it between the time you emptied it and found that – those plastic baggies?

ANSWER: No, I kept in contact with his property.

QUESTION: Okay.

-(RP 109, L14 – 111, L2)

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the trial court violated the defendant's rights by allowing testimony that he was familiar with the packaging of drugs. The State's position, and the court concurred, that the defense had opened the door to this questioning by some of the defendant's responses.

Prior to the defendant testifying the parties had an opportunity to discuss the defendant's criminal history outside the presence of the jury. The prosecutor indicated to the court that he had multiple convictions for possession of controlled substance. The Deputy Prosecutor indicated that he was not asking that those matters be admitted, "unless somehow during the questioning of Mr. English, you know, he opens the door, and at that point I would ask for a recess to make an offer of proof just to give the court a heads up why I may be asking for a recess." (RP 142, L21 – 143, L1).

The questioning of the defendant was back and forth on the issue of whether or not he identified the bags that the drugs were contained in. When he was in re-cross examination by the prosecution, the State submits, that he opened the door for further information to be given to the trier of fact because it appeared that the defendant was attempting to mislead the jury.

QUESTION (Deputy Prosecutor): Okay. And yet that's different than what you told Officer Kelly on that day, is it not?

ANSWER (Defendant): Well, I said no because I – just exactly what I said, no.

QUESTION: Okay. So your answer is different today than it was to –

ANSWER: Yes.

QUESTION: - Officer Kelly on that day?

ANSWER: I was confused.

QUESTION: You were confused with what, Mr. English?

ANSWER: With when he held it up there, I said no right off the bat because I saw what was in it.

QUESTION: Okay.

ANSWER: And what his question was, was answer – I said no both of 'em.

And, yes, if he would ask – if the bag – and if it was empty, okay, the question would have been yes, I am familiar with those kind of bags, I've seen them before.

But when he had the – the substance was in it, my – my answer's gonna be no.

QUESTION: Okay. So you're telling me you're – you are not familiar with a plastic baggie with a white crystal substance in it.

ANSWER: I'm not familiar with it.

-(RP 173, L1-25)

Based on that, the prosecution requested the jury exit the courtroom (which they did) and the offer of proof was made by the prosecution. The court listened to the argument of counsel and indicated that it wanted to be careful with what it did:

MR. GASPERINO (Deputy Prosecutor): I think in – in some form or fashion we need to be able to tell the jury that, in fact, Mr. English, you are familiar with this white powdery substance in a baggie.

MR. SOWDER (Defense Counsel): Well, I think he said that but he said, I've disavowed all connection with it.

THE COURT: He indicated –

THE DEFENDANT: Can I say anything?

THE COURT: - that he didn't want to go there right off when he saw the baggie with the white powdery substance.

So I think the door is opened. However, I want to be careful with that.

MR. SOWDER: I don't – okay, I'm listening.

THE COURT: And – and certainly it is prejudicial, which is why I want to make sure that we have some limitations on where we're going, and I don't know if we can fashion an instruction to the jury, because (inaudible) precisely on – on the point of whether or not that his – he knew what it was, a baggie with possibly drugs in it, and didn't want to claim any ownership of it.

MR. GASPERINO: So, Your Honor, I guess what if I asked Mr. English, Isn't it true that you are, in fact, familiar with the white crystalline substance in this baggie?

MR. SOWDER: Nnnn – well. I – are you looking for comments now, or --?

THE COURT: (No audible response.)

MR. SOWDER: Well, that's tantamount to saying that's his.

THE COURT: Yeah, that's – I think – I think – rephrase your – your question in terms of – of what it might, not with what it is.

MR. SOWDER: I mean, we're – what he'll be trying to get to is that he recognizes methamphetamine, knows what it looks like.

THE COURT: It would be illegal drugs of some kind.

MR. GASPERINO: That's fine. I mean, I guess I could ask, Isn't it true that you can recognize methamphetamine?

MR. SOWDER: Or illegal drugs, I guess that might be – I don't know that I want to split the hairs between methamphetamine and cocaine and other crystalline subjects (sic).

THE COURT: Right.

-(RP 176, L4 – 177, L25)

The jury was then brought back into the courtroom and the question which had been tailored by the parties was asked and answered as follows:

QUESTION (Deputy Prosecutor): 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?

ANSWER: Yes, I do.

-(RP 179, L20-25)

The State submits that the defendant was attempting to mislead the jury testifying that he didn't know anything about white substances in packages of that nature, et cetera. Under the open door rule, a party may examine a witness within the scope of the opposing party's previous examination. State v. Jones, 26 Wn. App. 1, 8, 612 P.2d 404 (1980). The introduction of evidence that would be inadmissible if offered by the opposing party "opens the door" to otherwise inadmissible evidence and improper cross examination to explain or contradict the initial evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995). The rules will permit cross-examination within the scope of the examination in which a subject matter is first introduced. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969). A party may introduce inadmissible evidence if the opposing party has no objection, or may choose to introduce evidence that would be inadmissible if offered by the opposing party . The introduction of inadmissible evidence is often said to "open the door" both to cross-examination that would normally be improper and to the introduction of normally inadmissible evidence to

explain or contradict the initial evidence. The doctrine is intended to preserve fairness: "It would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other party from all further inquiries about it." Gefeller, 76 Wn.2d at 455.

A trial court's decision to allow cross-examination under the open-door rule is reviewed for abuse of discretion. State v. Wilson, 20 Wn. App. 592, 594, 581 P.2d 592 (1978). A party's introduction of evidence that would be inadmissible if offered by the opposing party "opens the door" to explanation or contradiction of that evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995). However, mere passing reference to a prohibited topic does not open the door for cross examination about prior misconduct. State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998). Doors open in two situations: when a party puts on inadmissible evidence without objection, and when a party puts on admissible evidence that would be inadmissible if offered by the opposing party. Avendano-Lopez, 79 Wn. App. at 714; 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice, §103.14, at 52 (4th ed. 1999).

The State submits that the trial court properly exercised its discretion in allowing this evidence and information to go to the jury.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the trial court commented on evidence by the inclusion of jury instruction number 12 (Court's Instructions to the Jury, CP 23, Instruction No. 12). That instruction reads as follows:

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

The State submits that this is a correct statement of the law in the State of Washington and, further, does not reflect the Judge's opinion one way or the other, concerning guilt or innocence of the defendant. Further, this instruction is not duplicative of any other instructions given by the court. Instruction No. 8 defines the crime of Possession of a Controlled Substance; Instruction No. 9 indicates that methamphetamine is a controlled substance; Instruction No. 10 is the elements instruction discussing possession of a controlled substance – methamphetamine; and Instruction No. 11 deals with the concepts of possession of this controlled substance.

When the parties were discussing the jury instructions this instruction was raised by the defense. The prosecution made the following comments which were incorporated by the trial court:

(Deputy Prosecutor): So because Mr. Sowder is – was making an issue of it being a small amount or a residue amount, I believe the State is – should be allowed to make sure and clarify with the jury according to our state courts that the law does not require that there be a minimum amount and that the amount is irrelevant, it's whether or not there was a controlled substance present.

THE COURT: Okay.

MR. SOWDER: I don't think there's any lack of clarity here. And my statements did not invite the instruction.

THE COURT: All right. Well, I indicated that I would put that instruction in for the reasons indicated by the State. I try and head off jury instructions in terms of being clear with the jury about what we're talking about, and – and we've had some discussion about the small amount that all of the witnesses have, so I believe that we need to give that discussion (sic) and it's allowed in State v. Malone, that was cited by Defense Counsel.

So objections and exceptions are so noted.

-(RP 186, L10 – 187, L6)

It's interesting to note that the defendant, in his appellate brief, indicates that the instruction is a correct statement of the law in the State of Washington and cites State v. Malone, 72, Wn. App. 429, 439, 864 P.2d 990 (1994); State v. Larkins, 79 Wn.2d 392, 394, 486 P.2d 95 (1971), review denied, 118 Wn.2d 1019 (1992). (Appellant's Brief, page 18-19).

Article 4, section 16 of the Washington State Constitution provides: "Judges shall not charge juries with respect to matters of fact,

nor comment thereon, but shall declare the law." This section prevents the jury "from being influenced by knowledge conveyed to it by the trial judge as to his opinion of the evidence submitted," and it "forbids only those words or actions which have the effect of conveying to the jury a personal opinion of the trial judge regarding the credibility, weight or sufficiency of some evidence introduced at the trial." State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). Washington courts apply a two-step analysis when deciding whether reversal is required as a result of an impermissible judicial comment on the evidence in violation of Article IV, Section 16. Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted. State v. Lane, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995); State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968); 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). Such comments, if they do not reveal the trial court's attitude toward the evidence, will not be treated as an improper comment on the evidence. State v. Pastrana, 94 Wn. App. 463, 480, 972 P.2d 557 (1999) (citing State v. Nesteby, 17 Wn. App. 18, 22, 560 P.2d 364 (1977)).

Washington courts have concluded that judicial comments were harmless in at least two cases. State v. Lane, 125 Wn.2d 825, 840, 889 P.2d 929 (1995) (a judicial comment regarding the credibility of a witness did not prejudice one of the defendants because there was overwhelming untainted evidence supporting his conviction); State v. Holt, 56 Wn. App. 99, 106, 783 P.2d 87 (1989) (to convict instructions that specified the material alleged to be lewd were harmless beyond a reasonable doubt because other instructions provided a definition of "lewd"). An impermissible comment conveys to the jury a judge's personal attitudes toward the case merits or permits the jury to infer from what the judge said or did not say what the judge believed or disbelieved about the questioned topic. Hamilton v. Dep't of Labor & Indus., 111 Wn.2d 569, 571, 761 P.2d 618 (1988). An instruction doing no more than accurately stating the law does not constitute an impermissible comment. State v. Ciskie, 110 Wn.2d 263, 282-83, 751 P.2d 1165 (1988) (*citing* City of Seattle v. Smiley, 41 Wn. App. 189, 192, 702 P.2d 1206 (1985)).

The State submits that there has been no showing by the defense that this is a comment on the evidence by the trial court nor is it improper instructions of law to provide to the jury.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defense is a claim that the prosecuting attorney committed “flagrant misconduct in closing argument,” when he expressed his personal opinion. (Appellant’s Opening Brief, p.28-29). For the reasons set forth below, this assignment of error is without merit.

It is the defendant’s burden to establish prosecutorial misconduct. To meet this burden, the defendant must demonstrate that the prosecuting attorney’s comments were improper and that they had a prejudicial effect. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009) (*citing State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). When reviewing an allegation of prosecutorial misconduct, the court should consider “the prosecuting attorney’s allegedly improper remarks 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.” Anderson, 153 Wn. App. at 427 (*citing State v. Russell*, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994)). If the defendant neither objects to the prosecutor’s comment nor requests a proper curative instruction, the issue is waived. An exception to this rule arises only if the prosecutor’s comment is so flagrant or ill intentioned, an instruction could not have

cured the prejudice. Anderson, at 427 (*citing State v. Charlton*, 90 Wn.2d 657, 661, 585 P.2d 142 (1978)).

The defendant takes exception to the following statements made by the prosecuting attorney:

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 not uncommon.

- (Appellant’s Opening Brief, p. 29, RP 205).

The defendant claims “[t]he prosecutor was plainly vouching for the police claims by referring to his own experience working in the jail”. (Appellant’s Brief, p. 29). The defense did not object to the prosecuting attorney’s statements at trial and the defense did not request a curative instruction. Consequently, this issue has not been preserved for appeal.

Assuming *arguendo* this court agrees to review the defendant’s assignment of error, the court should find the defendant’s claim is without merit. A review of the evidence that was presented at trial, as well as a review of the context in which the prosecuting attorney’s statements were made, makes it clear the prosecuting attorney’s statements were not improper. This is the case because the prosecuting attorney was not expressing his personal opinion; rather, the he was simply summarizing

the evidence that was presented at trial. Specifically, he was recounting an officer's prior testimony.

The defendant was charged with one count of Possession of Controlled Substance – Methamphetamine. (CP 4 – Information). This charge stemmed from a custody officer in the booking unit at the Clark County jail discovering a small baggie of methamphetamine within the defendant's property, at the time he was booked into the jail. (RP 77-78). The arresting officer (Battle Ground Police Officer Richard Kelly) did not notice the baggie of methamphetamine when he collected the defendant's property and transported the defendant (and his property) to the booking unit at the Clark County jail. (RP 71, 73, 98-99).

Officer Kelly testified that he was previously employed as a custody officer. In that capacity, he worked in the booking unit of the jail. Officer Kelly testified, in his experience, it was not uncommon for an item, which was in the possession of the defendant all along, not to be discovered until the defendant was booked at the jail. The purpose of this testimony was to rebut any implication by the defendant that the drugs were "planted" into his property when he was booked at the jail. The following is an excerpt of the colloquy between the prosecuting attorney and Officer Kelly:

QUESTION: Okay. And you also said that you at some point worked for Clark County. Did you ever work in the jail?

ANSWER: Yes, sir.

QUESTION: Okay. And you've brought people to jail in your capacity as a police officer; correct?

ANSWER: Yes, sir.

QUESTION: Okay. And in your experience is it uncommon to find a controlled substance on a person at the jail after they've been brought there by the –

...

MR. GASPERINO (Deputy Prosecutor): - officer?

...

QUESTION: Not – not – not – and I don't want your opinion. Like I said in my question, in your experience have you personally known in either one of your capacities as a custody officer or as a law enforcement officer, that a controlled substance has been found on a person after they've been dropped off at the jail by the officer and the officer's done with them?

ANSWER: Yes, sir. I – I know for a fact that that has happened.

-(RP 98-99, L 17-25, L 1-19 (emphasis added))

Officer Kelly's testimony mirrored that which the prosecuting attorney recounted in his closing argument. The prosecuting attorney stated in closing, "[w]ell, you know, he missed something". (RP 205). Here, the prosecuting attorney recounted Officer Kelly's testimony that he did not discover the drugs on the defendant at the time of his arrest. (RP 71, 73, 98-99). The prosecuting attorney went on to state "[s]ometimes

that happens”. (RP 205). Here, the prosecuting attorney recounted Officer Kelly’s testimony that, in his experience, it was not uncommon for an item, which was in the possession of the defendant all along, to not be discovered until the defendant was booked into jail. (RP 98-99). Next, the prosecuting attorney stated “[i]n fact, when I was working in the jail prior to being a Battle Ground police officer, that happened.” (RP 205). Here the prosecuting attorney recounted Officer Kelly’s testimony that he was currently employed by the Battle Ground Police Department and he had previously been employed as a custody officer who worked in the jail. (RP 68, 98).

It is abundantly clear from the evidence that was presented at trial, and from the context in which the statements were made, that the prosecuting attorney was simply recounting Officer Kelly’s prior testimony.

The meaning of the prosecuting attorney’s words would have been clear to the jury. The jury watched and heard the prosecuting attorney as he spoke, they watched and heard the entirety of the prosecuting attorney’s argument, and they watched and heard the prior testimony of all witnesses.

The purpose of closing argument is to summarize the evidence that was presented at trial and to explain to the jury how that evidence satisfies

the elements of the crime. This is exactly what the prosecuting attorney did. The prosecuting attorney's statements were not improper and they did not prejudice the defendant. The prosecuting attorney was simply summarizing the evidence. There was no prosecutorial misconduct.

V. RESPONSE TO ASSIGNMENT OF ERROR NO. 4

The fourth assignment of error raised by the defendant is a claim of cumulative error.

The cumulative error doctrine applies when several errors occurred at the trial court level, but none alone warrants reversal. State v. Hodges, 118 Wn. App. 668, 673, 77 P.3d 375 (2003). Instead, the combined errors effectively denied the defendant a fair trial. Hodges, 118 Wn. App. at 673-74. But "absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial." State v. Saunders, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). It does not apply where the errors are few and have little or no effect on the outcome of the trial. State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000). For example, in Greiff, the prosecutor impermissibly failed to disclose that a witness would testify differently in a retrial than in the original trial, and the trial court erred in allowing the victim to testify that she was told there were no forensic rape results because the doctor performed the test incorrectly. Greiff, 141 Wn.2d at

917, 926. The Greiff court found that these were both errors, but that each had little or no effect on the outcome. Greiff, 141 Wn.2d at 929. A defendant may be entitled to a new trial when errors cumulatively produced at trial were fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835, clarified by, 123 Wn.2d 737, 870 P.2d 964 (1994) (*citing Walker v. Engle*, 703 F.2d 959, 963 (6th Cir. 1983)). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. Lord, 123 Wn.2d at 332.

The State submits that there have been no errors in this case, thus the cumulative error doctrine would not apply.

VI. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 15 day of July, 2011.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By:


ABIGAIL E. BARTLETT, WSBA#36937
Deputy Prosecuting Attorney

APPENDIX A

1 you're able to use that per these instructions in
2 deciding what weight or credibility to give the
3 defendant's statements.

4 And, again, you also saw the manner in which
5 each of these witnesses testified and how they
6 answered these questions.

7 And I would ask that you keep all of that
8 into consideration when you're determining what
9 weight to give each of these witnesses' testimony.

10 Now, keep in mind, ladies and gentlemen,
11 that Officer Kelly after he booked Mr. English on
12 what he told us he originally booked him on, he was
13 almost all the way back to Battle Ground when he
14 gets a call. Well, you know, he missed something.
15 And he admits that. Sometimes that happens.

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

19 Now, Deputy Jones or Custody Officer Jones
20 tells us, That property was in my view and never
21 left my sight from the time I emptied it out of
22 that property bag to when I found that
23 methamphetamine. Okay. I did not walk away, I did
24 not leave that property.

25 Now, you're gonna ask yourself how did that

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

STATE OF WASHINGTON,
Respondent,

v.

TIMOTHY ROBERT ENGLISH,
Appellant.

No. 41209-8-II

Clark Co. No. 10-1-01167-6

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On July 15, 2011, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO: David Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

David L Donnan
Attorney at Law
Washington Appellate Project
1511 3rd Ave Ste 701
Seattle WA 98101-3635

DOCUMENTS: Motion to Withdraw and Replace Response to Assignment of Error
No. 3 and Corrected Brief of Respondent

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

Jennifer Casey
Date: July 15, 2011.
Place: Vancouver, Washington.