No. 45081-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

CORY SUNDBERG, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon

No. 12-1-00236-3

BRIEF OF RESPONDENT

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

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A. STATE'S RESTATEMENT OF APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant Cory Sundberg's constitutional right to due process was violated when the prosecutor improperly shifted the burden of proof in his closing argument.

2. The trial court erred in denying Mr. Sundberg's motion for new trial due to prosecutorial misconduct.

B. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

Because Sundberg chose to present and argue the affirmative defense of unwitting possession, he assumed the burden of proving the defense by a preponderance of evidence. Therefore, the prosecution did not commit misconduct by commenting in closing argument that Sundberg failed to call a witness who could have corroborated his affirmative defense.

C. FACTS AND STATEMENT OF THE CASE

On June 6, 2012, Detective Steve Valley arrested the defendant, Cory Sundberg, in Mason County on an outstanding warrant. RP 105-07. At the time of the arrest, Sundberg was wearing a pair of overalls. RP 100-01, 107. Sundberg asked Detective Valley to allow him to change out of the overalls before transferring him to jail, but Detective Valley refused; so, Sundberg arrived at the jail while still wearing the overalls. RP 100-01, 107.

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When Sundberg arrived at the jail, he and his clothing were searched as part of the booking process. RP 99-101. During the search, an officer found a small packet of methamphetamine in the bib pocket of Sundberg's overalls. RP 101, 103, 112, 116, 118-19.

The State charged Sundberg with possession of a controlled substance – methamphetamine. CP 121-22, 131. At trial, Sundberg testified that "[a] guy named Paul Wood" had been helping with some pressure-washing and other work around his house. RP 121. Sundberg testified that he did know there was methamphetamine in his pocket. RP 125. Sundberg said that "Paul" wore his coveralls when he did work under a shed. RP 125, 133. Sundberg testified that Paul Wood had borrowed Sundberg's overalls four out of six days and that, before his arrest, the last time Sundberg had worn the overalls was about a week prior to his arrest. RP 126. On cross examination Sundberg testified that Paul Wood lived about a mile and a half from him and that he sees him two or three times a week. RP 135-36.

At the close of trial, Sundberg proposed an unwitting possession jury instruction. RP 164, 169. The court provided the unwitting possession instruction to the jury. RP 179; CP 93 (Jury Instruction No. 10).

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The prosecutor's initial closing argument was very brief, and there was no mention of Paul Wood or Sundberg's failure to call him as a witness during the prosecutor's initial closing argument. RP 182-83.

During the defense closing argument, the defense referred to "Paul Wood" and argued that he had worn Sundberg's overall. RP 184-85. Sundberg denied any knowledge that there was methamphetamine in the pocket of his overalls. RP 187. Acknowledging that Sundberg bore the burden of proof in regard to the defense of unwitting possession (RP 187), the defense argued to jury as follows:

> But how do we go about proving that in a case like this? There aren't any witnesses. The only person that would know whether there is meth in the pocket is the person wearing the clothes that day. That would be Cory himself, unless there was some other evidence which we don't have in this case. We've got absolutely nothing one way or the other, other than Cory's word on that.

RP 190.

In rebuttal closing argument, which covers about five pages of transcript (RP 192-97), the prosecutor argued briefly in regard to Paul Wood, as follows:

> Now it's the defendant's burden – and this is the reason I asked the defendant these questions. I asked him okay, tell us about Paul Wood: describe him for us, do you know him, how do you know him. He says he sees him about twice a week. He says he can get a hold of him. Why isn't he here testifying? It's their burden. He's not here. There's no evidence…

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

> Now let's go to the defendant. The defendant is also inherently biased. He has a stake in the outcome. That gives him bias to lie. His testimony was obviously self-serving. It was obviously designed to tell a story to corroborate his defense. And again, it was his burden. He didn't bring in Paul Wood.

RP 195-96.

After deliberations, the jury found Sundberg guilty of the crime of possession of a controlled substance. RP 209; CP 79.

D. ARGUMENT

> Because Sundberg chose to present and argue the affirmative defense of unwitting possession, he assumed the burden of proving the defense by a preponderance of evidence. Therefore, the prosecution did not commit misconduct by commenting in closing argument that Sundberg failed to call a witness who could have corroborated his affirmative defense.

In this case, as in all criminal cases, the prosecution bore the burden of proving each element of the alleged offense beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Deer*, 175 Wn.2d 725, 731, 287 P.3d 539 (2012) *cert. denied*, 133 S. Ct. 991, 184 L. Ed. 2d 770 (U.S. 2013).

The State satisfied this burden in the instant case, where it presented evidence that on June 12, 2012, in Mason County, Washington,

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

the defendant, Cory Sundberg, possessed a controlled substance. RP 99-07, 112, 116, 118-19. A diligent search of the record reveals no instance where the State argued or suggested that Sundberg had any duty whatsoever to call a witness or to present other evidence, exculpatory or otherwise, to rebut the charge of unlawful possession of a controlled substance brought by the State.

But Sundberg chose to raise the defense of unwitting possession. RP 121, 125-26, 133, 164, 169, 179, 194-85, 187, 190; CP 93. Unwitting possession is an affirmative defense that the defendant must prove by a preponderance of evidence. *State v. Deer*, 175 Wn.2d 725, 731, 287 P.3d 539 (2012) *cert. denied*, 133 S. Ct. 991, 184 L. Ed. 2d 770 (U.S. 2013); *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). "This affirmative defense ameliorates the harshness of a strict liability crime. [Citation omitted]. It does not improperly shift the burden of proof." *Bradshaw* at 538. By choosing to raise this defense, Sundberg assumed the burden of proving the defense by a preponderance of the evidence. *State v. Johnson*, 158 Wn. App. 677, 683, 243 P.3d 936 (2010).

Sundberg contends that the prosecutor committed misconduct during closing argument by commenting on his failure to call Paul Wood as a witness in regard to his affirmative defense of unwitting possession.

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PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A defendant who alleges prosecutorial misconduct bears the burden of proving that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *In re Pers. Restraint of Glasmann,* 175 Wn.2d 696, 704, 286 P.3d 673 (2012). The State contends that on the facts of this case, Sundberg cannot show that the prosecutor's comments were improper.

On review, a prosecutor's allegedly improper conduct is considered in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal,* 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A prosecutor has "'wide latitude in making arguments to the jury'" and may "'draw reasonable inferences from the evidence.'" *State v. Fisher,* 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting *State v. Gregory,* 158 Wn.2d 759, 860, 147 P.3d 1201 (2006)).

A prosecutor has wide latitude to argue reasonable inferences from the evidence; but it is improper for the prosecutor to argue that the burden of proof rests with the defendant. *State v. Thorgerson,* 172 Wn.2d 438, 453, 258 P.3d 43 (2011). A prosecutor may commit misconduct if he mentions in closing argument that the defense failed to present witnesses or if he states that the jury should find the defendant guilty based simply

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

on the defendant's failure to present evidence to support his defense theory. *State v. Sells,* 166 Wn. App. 918, 930, 271 P.3d 952 (2012) (citing *State v. Jackson,* 150 Wn. App. 877, 885, 209 P.3d 553 (2009)), *review denied, 16* Wn.2d 1001 (2013). However, "'[t]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.' A prosecutor is entitled to point out a lack of evidentiary support for the defendant's theory of the case." *Sells,* 166 Wn. App. at 930 (alteration in original) (quoting *Jackson,* 150 Wn.App. at 885–86).

In the instant case, the prosecutor's comment was limited to pointing out Sundberg's failure to call a witness who could have corroborated the affirmative defense of unwitting possession (RP 195-96), for which Sundberg bore the burden of proof. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Unlike cases that hold that a prosecutor commits misconduct by commenting '"on the lack of defense evidence [that] the defendant has no duty present,'" here, because Sundberg bore the burden of proof in regard to the affirmative defense of unwitting possession, the prosecutor was appropriately commenting on Sundberg's failure to meet his burden of proof. *State v. Dixon,* 150 Wn. App. 46, 54, 207 P .3d 459 (2009) (quoting *State v. Cleveland,* 58 Wn.

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App. 634, 647, 794 P.2d 546 (1990)); *see also*, *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

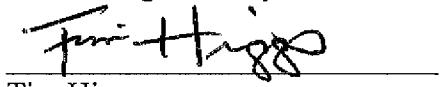
On these facts, the prosecutor did not commit misconduct.

E. CONCLUSION

For the reasons argued above, the State asks this Court to deny Sundberg's appeal to confirm the trial court conviction in this case.

DATED: April 29, 2014.

MICHAEL DORCY
Mason County
Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

MASON COUNTY PROSECUTOR

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