

NO. 46349-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC K. BOSCOVICH

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

The Honorable Gordon Godfrey, Judge

BRIEF OF APPELLANT

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ASSIGNMENTS OF ERROR

1. The prosecuting attorney committed misconduct requiring reversal.
2. The prosecuting attorney improperly injected his personal opinion into the proceedings.
3. The prosecuting attorney unconstitutionally relieved the state of its burden of proof.
4. The prosecuting attorney unconstitutionally misstated the law by informing the jury they could not find Mr. Boscovich not guilty.
5. The prosecuting attorney unconstitutionally eroded the presumption of innocence.
6. The prosecutor unconstitutionally vouched for the credibility of the WSP crime lab.
7. The state failed to establish an unbroken chain of custody for the methamphetamine seized.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecuting attorney commits misconduct by injecting his or her personal opinion into the proceedings. Here, the prosecutor injected his personal opinion into the proceedings by telling the jury that the officer Saunders could not have made up his testimony. Did the prosecutor commit reversible misconduct? Assignments of Error Nos. 1-6.

2. The state may not vouch for the credibility of a state witness. Here the prosecutor informed the jury that the scales at the WSP in Seattle were more accurate than the scales in Westport. . Did the prosecutor commit reversible misconduct? Assignments of Error Nos. 1-6.
3. The state may not relieve the state of its the burden of proof during closing argument. The prosecutor here told the jury that they could not find Mr. Boscovich not guilty. Did the prosecutor's argument unconstitutionally shift the burden of proof? Assignments of Error Nos. 1-6.
4. The state may not misstate the law in closing argument. Here, the prosecutor told the jury that they could not find Mr. Boscovich not guilty. Did the prosecutor's argument unconstitutionally misstate the law? Assignments of Error Nos. 1-6.
5. The state may not erode the presumption of innocence by informing the jury that they may could not find the Mr. Boscovich not guilty. Did the prosecutor's argument unconstitutionally? Assignments of Error Nos. 1-6.
6. The state failed may not introduce into evidence contraband that does not have an unbroken chain of custody from seizure to submission for analysis in a crime lab. Here, there were 6-7 people possessed the contraband after it was seized and before it was submitted to the WSP lab in Seattle but at least five of those people did not testify as to an unbroken chain of custody. Did the state fail to establish an unbroken chain of custody? Assignments of Error Nos. 7.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Eric K. Boscovich was charged and convicted by a jury of illegal possession of methamphetamines. CP 1-2, 38, 45-53. Officer Saunders arrested Boscovich on a misdemeanor arrest warrant and searched Boscovich incident to arrest. RP 42, 65. During the search, Saunders found a pipe he believed contained methamphetamine. RP 42. According to Saunders, Boscovich consented to search the backpack Boscovich had on a shoulder. RP 44. Boscovich consented to the search because he believed the back pack was his and knew he did not have drugs inside. Boscovich learned however that the backpack belonged to his friend Tobias Casey, the person whose house he left just prior to being arrested. RP 62-65, 69. Pursuant to that search, Saunders discovered a baggie containing 22-23 grams of methamphetamine. RP 44, 51-52. There was nothing in the backpack with Boscovich's identification. RP 62.

Boscovich denied telling Sounder's that the baggie contained crystals that could be held up to see though the light to see colors. RP 70. Saunders did not put this in his police report but over a year after the incident testified that Boscovich made this statement. RP 60. The police knew about Casey but never interviewed or investigated Casey. RP 72.

Boscovich objected to the admission of the forensic scientist testimony about the methamphetamine on grounds that the state could not

establish that the methamphetamine had not been tampered with and could not establish an unbroken chain of custody. RP 54. The court overruled the objection. RP 54-59. The testimony revealed that when Saunders seized the methamphetamine it weighed 23.34 grams including the plastic baggy container and at the lab the methamphetamine alone weighed only 22 grams. RP 51-52. Saunders agreed that the difference of more than one gram was significant and (Id) Wilson also testified that it was not that unusual for there to be some sort of difference between the weights with and without packaging but did not specifically address the 1.24 gram difference in this case. RP 30-31. Donna Wilson the WSP forensic scientist also testified that she could not detect any tampering but she had no knowledge of the six other people and their handling of the evidence before it was received at the WSP. RP 37.

This timely appeal follows. CP 57-58.

ARGUMENT

I. THE PROSECUTING ATTORNEY COMMITTED MISCONDUCT REQUIRING REVERSAL.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and article 1, section 22 of the Washington State Constitution. *State v. Glasmann*, 175 Wn.2d 696, 704-06, 286 P.3d 673 (2012). “ A [f]air trial certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office ... and the expression of his own belief of guilt into the scales against the accused.” *State v. Monday*, 171

Wn.2d 667, 257 P.3d 551 (2011).

A prosecuting attorney is a quasi-judicial officer, charged with the duty of ensuring that an accused receives a fair trial. *State v. Boehning*, 127 Wn. App. 511 at 518, 111 P. 3d 899 (2005). Prosecutorial misconduct requires reversal whenever the prosecutor's improper actions prejudice the accused person's right to a fair trial. *Boehning, supra*, at 518. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. ¹*See, e.g., State v. Easter*, 130 Wn.2d 228 at 242, 922 P.2d 1285 (1996). To overcome the presumption, the state must establish beyond a reasonable doubt that the error was trivial, formal, or merely academic, that it did not prejudice the accused, and that it in no way affected the final outcome of the case. *State v. Gonzales Flores*, 64 Wn.2d 1, 186 P.3d 1038 (2008). The state must show that any reasonable jury would reach the same result absent the error and that the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. *State v. Burke*, 163 Wn.2d 204 at 222, 181 P.3d 1 (2008).

Where prosecutorial misconduct does not create a manifest error affecting a constitutional right, the accused person must show both improper conduct and prejudicial effect. *Glasmann*, 175 Wn.2d at 704; *State v. Henderson*, 100 Wn. App. 794 at 800, 998 P.2d 907 (2000). Prejudice is established by when there is a substantial likelihood that the

¹ Misconduct may be reviewed absent an objection from defense counsel if it creates a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Perez-Mejia*, 134 Wn. App. 907 at 920 n. 11, 143 P.3d 838 (2006); *See also State v. Belgarde*, 110 Wn.2d 504 at 510-12, 755 P.2d 174 (1988).

misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 704; *Henderson*, at 800. In the absence of an objection, the court will review misconduct only if it is “so flagrant and ill-intentioned” that no curative instruction would have negated the misconduct’s prejudicial effect. *Henderson*, at 80.

- A. The prosecuting attorney committed misconduct by conveying his personal opinion on the officer’s credibility and the reliability of the Seattle WSP Crime Lab..

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wn.App. 909 at 921, 68 P.3d 1145 (2003). Misconduct occurs when it is clear that counsel is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Price*, 126 Wn.App. 617 at 653, 109 P.3d 27 (2005); *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990). The Supreme Court and RPC 3.4(e) expressly prohibits a lawyer from vouching for any witness’s credibility or stating a personal opinion “on the guilt or innocence of an accused.” *State v. Hecht*, 179 Wn.App. 497, 504, 319 P.3d 836 (2014) (*citing*, *Glasmann*, 175 Wn.2d at 704-06).

Here, the prosecutor expressed a clear personal opinion on the credibility of the officer by arguing to the jury that (1) officer Saunders “can’t make this stuff up. If the officer was going to, he would do a better job than that” (RP 95); (2) “you cannot have a reasonable doubt” (RP 84); and (3) the prosecutor also argued that the WSP crime lab scales are higher tech than the scales at the Westport police Department. RP 82. By expressing his personal opinion that “you cannot have reasonable

doubt” and “can’t make this stuff up”, the prosecutor telegraphed to the jury that he knew that Saunder’s was telling the truth and accurately reported Boscovich’s comments about the methamphetamine and backpack.

Similarly, the prosecutor committed misconduct by expressing his personal opinion that WSP crime lab scales are higher tech than the scales at the Westport police department, because this comment vouched for the credibility of the WSP to imply that they could not make a mistake.

Even though Boscovich objected to the misconduct related to the reliability of the WSP scales, but not the vouching for Saunders and statement that “you cannot find reasonable doubt”, this misconduct prejudiced Boscovich, and was so flagrant and ill-intentioned that no curative instruction would have eliminated its effect. The primary issues at trial were first, whether the back pack belonged to Casey or Boscovich which boiled down to a credibility contest between Saunders and Boscovich. *Henderson, supra, at 804*. And second, whether the WSP crime lab received untainted evidence.

By vouching for the credibility of Saunder’s, the prosecutor improperly influenced the jury to decide that Boscovich was not telling the truth based on the improper consideration of a police officer touted to be impervious to telling a lie. By vouching for the credibility of the WSP crime lab, the prosecutor improperly influenced the jury to decide that the WSP lab was accurate and therefore any discrepancies in the weight or processing of the methamphetamine should be disregarded. And finally by

informing the jury that they could not find reasonable doubt, the prosecutor vouched for the infallibility of his own office. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Glasman; Henderson*.

- B. The prosecuting attorney unconstitutionally relieved the state of its burden of proof.

Criminal defendants have a constitutional right to be presumed innocent and to have the government prove guilt beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 at 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). A prosecuting attorney commits misconduct by making a closing argument that shifts the burden of proof. *United States v. Perlaza*, 439 F.3d 1149 at 1171 (9th Cir., 2006). Such misconduct affects a constitutional right and requires reversal of the conviction unless the error is harmless beyond a reasonable doubt. *State v. Moreno*, 132 Wn. App. 663 at 672, 132 P.3d 1137 (2006); *see also Perlaza*, at 1171.

Here, the prosecuting attorney relieved the state of its burden of proof. Instead of discussing the state's burden to prove each element beyond a reasonable doubt, the prosecutor twice informed the jury that "you cannot have reasonable doubt". RP 84. The prosecutor essentially informed the informed the jury that Boscovich was guilty rather than arguing the weight of the evidence.

This error was not trivial, formal, or merely academic. *State v. Gonzales Flores*, 1674 Wn.2d 1, 25, 25, 186 P.3d 1038 (2008). This case revolved around a credibility contest between Saunders and Boscovich.

Boscovich mistakenly believed the backpack was his and consented to the search because he did not have drugs. When Saunder's discovered methamphetamine Boscovich realize the back was Tobias Casey's and Boscovich had mistakenly believed it was his own. Boscovich explained that the back pack containing the methamphetamine was not his; and Saunders testified that Boscovich admitted the back pack was his but nonetheless, against Boscovich's own penal interest, Boscovich consented to the search of that pack. This conflicting evidence required the jury to weigh the credibility of both Saunders and Boscovich.

Additionally the evidence that at least 6-7 other people had custody of the methamphetamine before it was sent to the Seattle WSP crime lab, but these custodians never testified, further eroded the reliability of the state's case. RP 29, 36-37, 51-52.

The prosecutor's arguments that (1) reasonable doubt did not exist; (2) that Saunder's could not have made up his testimony; and (3) vouching for the reliability of the WSP scales, individually and cumulatively relieved the state of its burden of proof by making it more likely that the jury would improperly vote to convict Boscovich by simply believing that the state had successfully met its burden of proof without any need for the jury to analyze and weight the evidence. Because the state's evidence was not overwhelming, the constitutional error was not harmless beyond a reasonable doubt. *Monday*, 171 Wn.2d at 557-558.

- C. The prosecuting attorney unconstitutionally misstated the law.

A criminal defendant has a constitutional right to be presumed innocent until proven guilty beyond a reasonable doubt. *Winship*, 397 U.S. at 362; *Estelle v. Williams*, 425 U.S., 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); Const. Amend. XIV; Wash. Const. Article I, Section 22; *State v. Walker*, __P.3d__ (January 22, 2015)(Westlaw p. 8); *Easter*, 130 Wn.2d at 238. A prosecutor's comment on an accused person's presumption of innocence violates the Sixth Amendment when it relieves the state of its burden of proof. *State v. Holmes*, 122 Wn.App. 438 at 445, 93 P.3d 212 (2004); *State v. MacDonald*, 122 Wn. App. 804 at 812, 95 P.3d 1248 (2004). Error of this type is prejudicial and requires reversal unless the state establishes beyond a reasonable doubt that the error is harmless; to meet this standard, the state must show beyond a reasonable doubt that "any reasonable jury would reach the same result absent the error, [and that] the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." *Easter*, 130 Wn.2d at 242.

The presumption of innocence is destroyed when the jury is no longer required to find guilt beyond a reasonable doubt. Contrary to the prosecutor's exhortations to the jury, the presumption of innocence continues throughout the entire trial and may only be overcome, if at all, during deliberations. *State v. Evans*, 163 Wn.App. 635, 260 P.3d 934 (20011); *State v. Venegas*, 155 Wn.App. 507, 524, 228 P.3d 813, *review denied*, 170 Wn.2d 1003, 245 P.3d 226 (2010) (quoting 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4.01 (3d ed.

2008)).

In *Venegas*, the prosecutor stated that the presumption of innocence erodes every time the jury hears evidence of the defendant's guilt. The Court reversed holding that the prosecutor committed flagrant misconduct by making an improper argument with no basis in law. *Venegas*, 155 Wn.App. at 525. Similarly, in *Evans*, the prosecutor's comment that the presumption "kind of stops" also violated the presumption of innocence because the presumption of innocence "does not stop at the beginning of deliberations; rather, it persists until the jury, after considering all the evidence and the instructions, is satisfied the State has proved the charged crime beyond a reasonable doubt. " *Evans*, 163 Wn.App. at 643.

Whether a doubt exists and, if so, whether that doubt is reasonable is a the jury's decision in each case. However, it is an unassailable principle that the burden is on the State to prove every element and that the defendant is entitled to the benefit of the presumption of innocence and any reasonable doubt. It is error for the State to suggest otherwise.

The prosecutor in this case did more than merely suggest otherwise. He sought to undermine both the presumption of innocence and the state's burden of proof beyond a reasonable doubt. Informing the jury that "you cannot find reasonable doubt". This was simply improper. As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice. *See State v. Reed*, 102 Wn.2d 140, 147, 684 P.2d 699 (1984). The jury knows

that the prosecutor is an officer of the State. It is, therefore, particularly grievous that this prosecutor would so mislead the jury regarding the bedrock principle of the presumption of innocence, the foundation of our criminal justice system. *Walker*, __P.3d__ (January 22, 2015) (Westlaw p. 8) (quoting, *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007)).

Accordingly, the conviction must be reversed and the charges remanded for a new trial.

D. Cumulative misconduct requires reversal.

Multiple instances of misconduct may be considered cumulatively to determine the overall effect. *State v. Weber*, 159 Wn.2d 252, 279, 149 P.3d 646 (2006); *Henderson*, 100 Wn.App. at 804-805. In this case, the prosecutor committed numerous instances of misconduct. Two of the violations infringed Boscovich's constitutional rights; and the same two were so flagrant and ill-intentioned that they could not have been resolved through the use of curative instructions ("you cannot find reasonable doubt" and "you cannot make this stuff up..."). Considered together, the cumulative misconduct requires reversal, even if each instance were not sufficiently egregious to require reversal on its own. *Henderson, supra*. Accordingly, the convictions must be reversed and the cases remanded for a new trial.

II. THE STATE FAILED TO ESTABLISH A CHAIN OF CUSTODY FOR THE CONFISCATED METHAMPHETAMINE.

It is error to admit into evidence an item where the chain of

custody is broken and the state cannot establish that the item has not been tampered with. *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984); *State v. Picard*, 90 Wn.App. 890, 897, 954 P.2d 336 (1998).

Where the chain of custody is not unbroken, in determining admissibility, the court considers “ the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it “ .*Campbell*, 103 Wn.2d at 21 (citation omitted). While minor discrepancies or uncertainties will affect only the weight of the evidence, not its admissibility, more significant discrepancies, require suppression. *Campbell*, 103 Wn.2d at 21.

Here, Saunder’s agreed that the difference between his weighing the methamphetamine at 23.24 grams was a significant difference from the WSP lab’s measurement of the methamphetamine at 22grams. RP 51-52. Even though Wilson testified that the methamphetamine did not appear to have been tampered with she could not account for the 6-7 other people who handled the evidence and therefore had no idea what if any tampering occurred. Given that the one gram discrepancy was not minor, the trial court should not have admitted the evidence without an unbroken chain of custody.

CONCLUSION

For the foregoing reasons, Boscovich possession of methamphetamine charge must be dismissed and remanded for a new trial.

Dated February 16, 2015

Respectfully submitted,

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I, Lise Ellner, a person over the age of 18 years of age, served the Grays Harbor County Prosecutor's jwalker@co.grays-harbor.wa.us and Eric Boscovich C/O Grays Harbor County Jail P.O. Box 630 Montesano, WA. 98563 true copy of the document to which this certificate is affixed, on February 16, 2015. Service was made by electronically to the prosecutor and to Mr. Bass by depositing in the mails of the United States of America, properly stamped and addressed.

Lise Ellner

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