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Court of Appeals
Division II
State of Washington
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NO. 50639-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

ELRICH NELSON,
Appellant.

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

The Honorable Sally F. Olsen, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove that Mr. Nelson knowingly possessed methamphetamine.

2. The prosecutor committed prejudicial misconduct in closing argument by expressing her personal opinion that Mr. Nelson was lying and by disparaging the defense.

Issues Presented on Appeal

1. Did the state fail to prove that Mr. Nelson knowingly possessed methamphetamine, when he testified that he was soaking wet when he grabbed two jackets from a clothing donation bin and was unaware, under his many layers of clothing that one of these donated jackets contained methamphetamine?

2. Did the prosecutor commit prejudicial misconduct in closing argument by arguing to the jury that “the defendant is trying to sell you a bridge here with his testimony”?

3. Did the prosecutor commit prejudicial misconduct in closing argument by arguing facts not in evidence by arguing that Mr. Nelson did not provide evidence that he was unaware of the drugs in the jackets, when in fact, that is precisely what Mr. Nelson testified to?

4. Did the prosecutor's argument that Mr. Nelson was selling the jury a bridge an impermissible attempt to appeal to the passions and prejudices of the jury by invoking an age old reference to con men?

B. STATEMENT OF THE CASE

The state charged Mr. Nelson with one count of felony possession of methamphetamine on March 7, 2017. CP 1-5. Mr. Nelson raised an unwitting possession defense. RP 61-78. Mr. Nelson was convicted as charged. RP 120-122; CP 40-50.

This timely appeal follows. CP 54-65.

a. Relevant Trial Facts

Officer Tovar of the Bainbridge Island Police Department arrested Mr. Nelson on an outstanding warrant. RP 6-16, 38. After Officer Tovar confirmed Mr. Nelson's felony warrant, Officer Tovar began searching Mr. Nelson. RP 31. Officer Tovar asked Mr. Nelson twice if he had anything on him that he shouldn't, to which Mr. Nelson replied, "No". RP 32. When the officer found the suspected methamphetamine in Mr. Nelson's coat pocket he said, "I thought you said you didn't have anything on you", to which Mr. Nelson replied, "Oh, I forgot it was there". RP 33. Mr. Nelson

denied informing the police officer that he said that he “forgot” about the methamphetamine in his pockets, but rather said he forgot to check his pockets. RP 78, 83-84.

Mr. Nelson is homeless and lives in a tent under a tarp on the northern side of the Agate Pass Bridge on Bainbridge Island. RP 61. Approximately two hours before the arrest, Mr. Nelson visited the local food and clothing bank, Helpline House, on Bainbridge Island to get food and donated clothing that is left in the donation boxes. RP 62-63. People drop off clothing left in boxes that is not inspected by Helpline House. RP 62-63, 70-71.

Mr. Nelson picked up a pair of jackets the day of his arrest, about 2 hours before his encounter with the police. RP 64, 77. Mr. Nelson was cold and soaking wet when he put on the jackets without inspecting them. RP 63-67, 73. Unbeknown to Mr. Nelson, the second to outer layer black fleece jacket from Helpline House contained pipes and methamphetamine that did not belong to Mr. Nelson. RP 66, 71, 74-75. Mr. Nelson was also wearing a fleece vest underneath his other jackets, in addition to six other layers of clothing for a total on nine layers of clothing. RP 68-71. Mr. Nelson described his clothing the day of the arrest as follows:

I was wearing the tank top and then a white T-shirt, and then I had on the fleece vest. On top of that, I had the hoodie that you showed me, and on top of that, I had another hoodie, and on top of that, I had the Northern Face jacket. On top of all of that, I had the hip waders covering everything else and then the two jackets, first the black fleece and then the reversible jacket, the gray, shiny one

RP 70-71.

Officer Tovar found several pipes and the methamphetamine in the second to the most outer black fleece jacket that Mr. Nelson retrieved from the Helpline House several hours before his arrest.

RP 71-72. Mr. Nelson was unaware that these items were in the jacket retrieved from the donation box. RP 76-77.

b. Prosecutorial Misconduct

During closing argument, the prosecutor argued as follows:

Is it reasonable to believe that someone is going to leave this valuable substance laying around in a coat pocket just to give it away in a donation box? **No, it's not. Ladies and gentlemen, the defendant is trying to sell you a bridge here with his testimony.**

(Emphasis added) RP 109. The prosecutor also argued that Mr. Nelson did not provide any evidence that he was unaware of the methamphetamine:

What has not been proved to you by a preponderance

of the evidence is that the defendant did not know. He did not meet that burden. There's been no evidence.

RP 110. Mr. Nelson testified that he did not know the donated jackets contained methamphetamine and pipes. RP 66, 71, 74-75.

C. ARGUMENT

1. THE STATE FAILED TO PROVE THAT
MR. NELSON KNOWINGLY
POSSESSED METHAMPHETAMINE.

The state failed to prove that Mr. Nelson knowingly possessed methamphetamine. Mr. Nelson was soaking wet when he grabbed two jackets from a clothing donation bin and was unaware, under his many layers of clothing, that one of these donated jackets contained methamphetamine. RP 76-77.

Both the federal and state constitutional due process clauses require that the state prove every element of a crime beyond a reasonable doubt. U.S. Const. Amend. XIV; Wash. Const. art. 1 § 3; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Johnson*, 188 Wn.2d 742, 750, 399 P.3d 507 (2017); *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016); *State v. Hundley*, 126 Wn.2d 418, 421, 895 P.2d 403 (1995).

This Court views the evidence in the light most favorable to the state to determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Johnson*, 188 Wd.2d at 751 (quoting, *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion)).

The state is required to establish beyond a reasonable doubt both the nature of the substance and the fact of possession by the defendant. RCW 69.50.401. “Possession is defined in terms of personal custody or dominion and control.” *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). “The state may establish that possession is either actual or constructive.” *Staley*, 123 Wn.2d at 798.

A defendant charged with possession of a controlled substance under RCW 69.50.4013, may assert as an affirmative defense that he unwittingly possessed the substance, either because he did not know he possessed it or because he was unaware of the nature of the substance. *City of Kennewick v. Day*, 142 Wn.2d 1, 11, 11 P.3d 304 (2000); *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981). If the defendant affirmatively establishes that “his ‘possession’ was unwitting, then he had no

possession for which the law will convict". *Cleppe*, 96 Wn.2d at 381.

If one is an "unwitting" possessor, it will ordinarily make no difference how long the drugs were in the defendant's possession since, under this theory, the defendant is permitted to "explain" that the drugs were possessed either without knowledge of their existence or the nature of the substance. *Cleppe*, 96 Wn.2d at 381.

A defendant who asserts he did not know the substance was in his possession or did not know the nature of the substance must prove this by a preponderance of the evidence. *State v. Deer*, 175 Wn.2d 725, 735, 287 P.3d 539 (2012) (explaining burden of proof in unwitting possession of controlled substance). *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). "The burden properly falls on the defendant because unwitting possession does not negate the fact of possession. Rather, as this court explained, "[t]his affirmative defense ameliorates the harshness of a strict liability crime.". *Bradshaw*, 152 Wn.2d at 538.

In *Hundley*, the defendant was charged with possession of cocaine and heroin and raised an unwitting possession defense. *Hundley*, 126 Wn.2d at 419. The evidence presented at trial

included a negative field test for heroin, a negative lab test for marijuana, a lab test indicating trace amounts of heroin and cocaine, and four additional negative lab tests for heroin and cocaine. *Hundley*, 126 Wn.2d at 420-21. Our Supreme Court reversed Hundley's conviction, stating, “[t]his welter of conflicting evidence does not amount to proof beyond a reasonable doubt.” *Hundley*, 126 Wn.2d at 421

In this case, the state failed to prove that Mr. Nelson knowingly possessed methamphetamine. Mr. Nelson was homeless at the time of this incident and spent the night before his arrest sleeping outdoors under a tarp. RP 61. He slept in seven layers of clothing to stay warm. RP 68-69. Walking around the next day in the rain and cold, he was soaking wet when he arrived at the community food and clothing bank in hopes of finding a meal and dry clothing. RP 63-67, 73.

When Mr. Nelson found two jackets in the donation box, he did not check the pockets before putting them on since he was wet and cold and only interested in getting warm. RP 65, 78. Mr. Nelson was unaware that the jackets contained contraband because he was wet and freezing cold, and already wearing seven layers of

clothing, making it impossible to feel anything in the pockets of the newly retrieved jackets. RP 65-66, 70-71, 74-75.

The Helpline House does not go through the items dropped off and left outside of its building. RP 64. The contents of the jacket pocket consisted only of a little clear plastic baggie and three small smoking pipes which would constitute an insignificant weight or volume relative to Mr. Nelson's own seven layers of clothing and the two newly acquired jackets. RP 33.

The state failed to present sufficient evidence that Mr. Nelson knew there was contraband in the jackets during the brief one –two hours that Mr. Nelson wore the donated jackets. Despite the officer testifying that Mr. Nelson said he “forgot it was there,” Mr. Nelson denied informing the officer that he said that he “forgot” about the methamphetamine in his pocket, but rather said he forgot to check his pockets. RP 78, 83-84.

Mr. Nelson proved by a preponderance of evidence that his possession was unwitting. *Deer*, 175 Wn.2d at 735; *Bradshaw*, 152 Wn.2d at 538 (defendants failed to establish unwitting possession). Similar to the result in

Hundley, viewing the evidence in the light most favorable to the defense, the state failed to present sufficient evidence to support Mr. Nelson's conviction because, Mr. Nelson established that the possession was unwitting. *Hundley*, 126 Wn.2d at 421; *Cleppe*, 96 Wn.2d at 635. The remedy is to reverse the conviction and dismiss the charge with prejudice. *Hundley*, 126 Wn.2d at 422.

2. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN CLOSING ARGUMENT BY IMPLYING NELSON WAS A LIAR, DISPARAGING HIS DEFENSE, AND MISSTATING THE FACTS.

The prosecutor committed prejudicial misconduct which denied Mr. Nelson his right to a fair trial by misstating the facts and by making disparaging comments about Mr. Nelson's veracity and his defense. Specifically, the prosecutor argued to the jury that Mr. Nelson did not provide testimony that he was unaware of the methamphetamine and that "the defendant is trying to sell you a bridge here with his testimony." RP 109-10.

The Sixth and Fourteenth Amendments to the United States Constitution and article I, § 22 of the Washington Constitution guarantee the right to a fair trial. *In re the Personal Restraint of Glasmann*, 175 Wn.2d 696, 703, 286 P.3d 673 (2012). This means

in part that a prosecutor has a duty to see that justice is done. *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed.1314 (1935); *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011). This duty includes an obligation to prosecute a defendant impartially and to seek a verdict free from prejudice and based upon reason. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978).

To establish a claim of prosecutorial misconduct, Mr. Nelson must demonstrate that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial. *Glasmann*, 175 Wn.2d at 704.

Prosecutorial misconduct requires reversal if there is a substantial likelihood that the misconduct affected the verdict. *Glasmann*, 175 Wn.2d at 714. Because Mr. Nelson did not object at trial, his arguments are waived unless he can establish that the misconduct was so flagrant and ill-intentioned that an instruction would not have cured the prejudice. *Id.* This Court reviews allegations of prosecutorial misconduct under an abuse of discretion standard. *State v. Lindsay*, 180 Wn.2d 423, 430, 326 P.3d 125 (2014).

a. The Prosecutor Committed
Misconduct that was Flagrant and
Ill-Intentioned.

Even absent an objection, error may be reviewed if it is “so flagrant and ill-intentioned that an instruction would not have cured the prejudice.” *Glasmann*, 175 Wn.2d at 704. Prosecutorial misconduct may be argued for the first time on appeal if it is a manifest error that affects a constitutional right. Where prosecutorial misconduct infringes a constitutional right, prejudice is presumed. *State v. Toth*, 152 Wn. App. 610, 615, 217 P.3d 377 (2009).

Here, the prosecutor’s argument was flagrant and ill-intentioned.

b. Prosecutor’s Prejudicial
Expression of Personal Opinion
on Guilt.

In *Glasmann*, the Court reversed the conviction where the prosecutor expressed his personal opinion of the defendant’s veracity and guilt during closing argument by showing defendant’s booking photos with captions questioning the defendant’s veracity and implying his guilt to the jury. *Glasmann*, Wn.2d at 706-710. The court stated that “[p]rejudicial imagery may become all the more

problematic when displayed in the closing arguments of a trial, when the jury members may be particularly aware of, and susceptible to, the arguments being presented.” *Glasmann*, Wn.2d at 708-709.

The court further held that the prosecutor’s misconduct was flagrant and ill-intentioned and so pervasive that the cumulative effect of repetitive prejudicial prosecutorial misconduct could not be erased with an instruction. *Glasmann*, Wn.2d at 709-10.

Here too, the prosecutor used prejudicial imagery in the form of an age old reference to swindlers in times past who sold the Brooklyn Bridge to unsuspecting buyers. *U.S. v. Spain*, 536 F.2d 170, 175 (7th Cir. 1976). References to selling a bridge imply the seller is a liar. *State v. Allen*, 128 Mont. 306, 310, 275 P.2d 200 (1954).

Common it was, at the time, to read in the newspapers how some New York slicker had sold the Brooklyn bridge or the city hall to some up-state ‘hayseed,’ a wisp of timothy hay between his teeth, a telescope valise or carpet bag in one hand, while the other hand pressed the pocket, filled with long green. About the same time the Iowa ‘Jay’ with hog dust on his shoes and corn silk behind his ears, was buying a ‘gold brick’ from a Chicago slicker.

The city slicker did more than gain the confidence of his victim and make false statements to him; he

showed him the Brooklyn bridge and the gold brick. This constituted a part or step in the confidence or bunco game.

Allen, 128 Mont. at 310.

In *Spain*, the prosecutor told the jury several times that the defendant was attempting “to sell you the Brooklyn Bridge.” “It should be unnecessary for us to say that this hackneyed metaphor had no place in the courtroom.” *Spain*, 536 F.2d at 175. In *State v. Smith*, 85 Conn. App. 96, 111, 856 A.2d 466 (2004), the Court analogized the defendant’s unbelievable version of events to “anecdotes about ownership of the Brooklyn Bridge”. *Id.*

In *People v. Moore*, 495 N.Y.S. 719, 720, 111 A.D.2d 495 (1985), the prosecutor committed misconduct by telling the jury not to “buy” the defendants argument stating that if they did, “I also want to speak to [you] afterwards because there is a certain bridge I’d like to sell you and it goes from Brooklyn to Manhattan.” *Id.* See also, *People v. Bartholomew*, 963 N.Y.S. 630, 105 A.D.2d 613 (2013) (The dissent referenced that the defendant presented a story that would be credible only to the sort of person who could be persuaded to buy the Brooklyn Bridge).

These cases all demonstrate that reference to a person

selling a bridge means the person is untrustworthy, a swindler, a cheat, a liar. Here, the prosecutor used the bridge analogy to express her personal opinion that Mr. Nelson was a guilty, liar when she argued Mr. Nelson was trying to sell the jury a bridge. Case law and professional standards firmly establish that in doing so, the prosecutor engages in misconduct. *Spain*, 536 F.2d at 175; *Moore*, 495 N.Y.S. at 720.

Here, the prosecutor committed misconduct like that in *Glasmann*, *Spain* and *Moore*, by using an age old image to immediately and irrefutably express her personal opinion that Mr. Nelson was a con man.

“Is it reasonable to think that he wouldn’t notice all of those items in the pocket of the jacket before he put it on? No. It’s not reasonable ... Is it reasonable to believe that someone is going to leave this valuable substance laying around in a coat pocket just to give it away in a donation box? No, it is not. Ladies and gentlemen, the defendant his trying to sell you a bridge here with his testimony.”

RP 108-109.

The prosecutor’s argument was flagrant and ill-intentioned and could not have been cured by an objection because the prosecutor challenged the jury’s intelligence and argued that to

believe Mr. Nelson was to be a fool. The prosecutor's deliberate goal was to influence the jury to return a guilty verdict against Mr. Nelson based on the prosecutor's opinion rather than based on the facts. This argument constitutes prejudicial prosecutorial which requires reversal because there is a substantial likelihood that the misconduct affected the verdict. *Glasman*, 175 Wn.2d at 714.

c. Misstatement of Facts Not in Evidence Appeals To Passions and Prejudices of Jury.

Misstating the facts is essentially the same as arguing facts not in evidence because in both instances, the prosecutor recasts the factual portion of the case based on his or her beliefs rather than on the facts presented at trial. *Glasman*, 175 Wn.2d at 704-05; *State v. Pierce*, 169 Wn. App. 533, 554, 280 P.3d 1158 (2012).

In *Pierce* the prosecutor argued facts not in evidence by arguing in the first person from the perspective of the defendant and the victim, and fabricated descriptions of the murders. *Pierce*, 169 Wn. App. at 554. This Court reversed the convictions as a misstatement of facts that appealed to the passions and prejudices of the jury.

calculated to portray Pierce as an impatient, amoral drug addict who refused to work and

“want[ed][his] meth now,” as the prosecutor repeatedly put it. Such argument served no purpose but to inflame the jury's prejudice against Pierce.

Pierce, 169 Wn. App. at 554.

Officer Tovar testified under oath that he found the methamphetamine and pipes in Mr. Nelson's jacket pocket and that Mr. Nelson said he forgot they were there. Mr. Nelson testified under oath that he did not know there was methamphetamine and pipes in the jacket and that he did not tell Officer Tovar that he forgot the methamphetamine and pipes were in the jacket. RP 78, 83-84.

The prosecutor could have argued an inference based on the evidence but chose not to do so in favor of impermissibly misstating the facts. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Here similar to *Pierce*, the prosecutor argued that there was no evidence that Mr. Nelson did not know about the methamphetamines and pipes. RP 110. This argument was a misstatement of the facts because Mr. Nelson testified he did not know the donated jackets contained methamphetamine. RP 78, 83-84.

The prosecutor's disparaging remarks about selling the bridge, like those in *Pierce* and *Glasmann*, also unequivocally appealed to the passions and prejudice of the jury by directing the jury to disregard Mr. Nelson's defense because his testimony was so outrageous that it could not be believed.

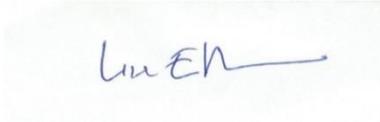
In sum, the prosecutor's arguments here like those in *Glasmann* and *Pierce*, misstated the facts, offered impermissible personal opinion and appealed to the passions and prejudice of the jury. This was reversible error despite Mr. Nelson's trial counsel's lack of objection because the misconduct was so flagrant and ill-intentioned that Mr. Nelson was denied his constitutional right to a fair trial. This Court must reverse and remand for new trial.

D. CONCLUSION

The state failed to prove beyond a reasonable doubt that that Mr. Nelson's possession was not unwitting. The prosecutor also committed prejudicial misconduct which denied Mr. Nelson a fair trial. For these reasons, Mr. Nelson respectfully requests this Court reverse the charge and remand for dismissal with prejudice or in the alternative remand for a new trial.

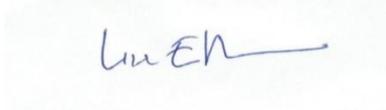
DATED this 12th day of January 2018.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is centered within a light blue rectangular box.

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office kcpa@co.kitsap.wa.us and Elrich Nelson, 626 Knetchel Drive NW, Bainbridge Island, WA 98110 a true copy of the document to which this certificate is affixed on January 12, 2018. Service was made by electronically to the prosecutor and Elrich Nelson by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink, appearing to read "Lise Ellner", is centered within a light blue rectangular box.

Signature

LAW OFFICES OF LISE ELLNER

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