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State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

ELRICH PAUL CARDA NELSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 17-1-00376-8

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BRIEF OF RESPONDENT

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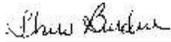
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**I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the state failed to prove a mens rea element in a prosecution for possession of controlled substance?

a. Whether there is a knowingly element in a charge of possession of controlled substance charge under RCW 69.50.4013?

2. Whether the state committed prosecutorial misconduct in argument to the jury?

**II. STATEMENT OF THE CASE**

**A. PROCEDURAL HISTORY**

Elrich Paul Carda Nelson was charged by information filed in Kitsap County Superior Court with Possession of controlled substance [methamphetamine]. CP 1.

At trial, Nelson requested and was granted an instruction on the defense of unwitting possession. CP 28 (instruction no. 8).

The jury found Nelson guilty as charged. CP 34. The present appeal was timely filed. CP 54.

**B. FACTS**

Bainbridge Island Police Department Officer Michael Tovar was working a patrol officer when he came into contact with Nelson. RP 27-

28. Tovar had been advised that Nelson was in the area and had a warrant for his arrest. RP 29. Officer Tovar saw Nelson on the side of the road, pulled his patrol car close, and called out to Nelson. RP 30. Nelson complied with officer Tovar's requests. Id.

Nelson was advised of the warrant and detained. RP 30. Dispatch confirmed the warrant. RP 31. Officer Tovar began to search Nelson incident to arrest. Id. Nelson was wearing multiple layers of clothing—three coats, full-length hip waders, and some clothing under the hip waders. RP 32. Officer Tovar began by searching the outer layer and thence to each successive layer. RP 32-33. In the third most inner coat, narcotics and pipes were discovered in the left front pocket. RP 33.

Specifically, Officer Tovar found a clear plastic baggie with a white crystal-like substance which the officer recognized as methamphetamine. RP 33. He found a two glass smoking pipes and a brass pipe. Id.

Witness Janice Wu is a forensic scientist at the Washington State Patrol Crime Laboratory. RP 45. She tested the baggie contents and one of the glass pipes that officer Tovar found in Nelson's pocket. RP 49. Both of these items contained methamphetamine. RP 52.

### III. ARGUMENT

#### A. THE STATE DID NOT FAIL TO PROVE A KNOWINGLY ELEMENT BECAUSE THERE IS NO KNOWINGLY ELEMENT IN A PROSECUTION UNDER RCW 69.50.4013.

Nelson argues that the state produced insufficient evidence to prove beyond a reasonable doubt that he knowingly possessed methamphetamine. This claim is without merit because there is no mens rea element, knowingly or otherwise, in the law of unlawful possession of a controlled substance. Moreover, the properly instructed jury rejected Nelson's unwitting possession defense wherein it was his burden to prove the absence of knowledge by a preponderance of the evidence.

First, the state concedes that it must prove every element of a crime beyond a reasonable doubt. Second, the state concedes that Nelson is correct that "possession is defined in terms of personal custody or dominion and control" and that "the state may establish that possession is either actual or constructive." Brief at 6, *citing State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Third, the state agrees with Nelson that a person charged with possession of controlled substance may assert an unwitting possession defense which places the burden upon that person to prove by a preponderance of the evidence that she did not know either the fact of possession or the nature of the substance possessed. Brief at 7, *citing State v. Deer*, 175 Wn.2d 725, 735, 287 P.3d 539 (2012).

The state further agrees that on an allegation of insufficient evidence the standard of review is taking the evidence in the light most favorable to the state could any rational trier of fact have found the essential elements of the crime beyond a reasonable doubt. Brief at 6, citing *State v. Johnson*, 188 Wn.2d 742, 751, 399 P.3d 507 (2017). Thus the parties agree with regard to the applicable legal rules. However, the state does not agree that it had any duty to prove that Nelson knowingly possessed methamphetamine. There is no such element.

RCW 69.50.4013(1) provides

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

The statute does not contain the requirement that the controlled substance be knowingly possessed; the statute rather famously creates a strict liability offense. See *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004), cert. denied 544 U.S. 922. There, our Supreme Court rejected a claim that simple possession statute should have a mens rea element implied by the court. The Supreme Court reached that conclusion after a thorough *de novo* review of the legislative history. 152 Wn.2d at 532-534. The Supreme Court concluded

The legislative history of the mere possession statute is clear. The legislature omitted the “knowingly or intentionally” language from

the Uniform Controlled Substances Act. The *Cleppe* court relied on this legislative history when it refused to imply a mens rea element into the mere possession statute. The legislature has amended RCW 69.50.401 seven times since *Cleppe* and has not added a mens rea element. Given that the legislative history is so clear, we refuse to imply a mens rea element.

152 Wn.2d at 537. The court noted that the state's burden on mere possession cases is to prove two elements—the nature of the substance and the fact of possession. *Id.* at 538.

In this case, the jury was properly charged on those two necessary elements. CP 30 (instruction no. 10). Neither that 'to convict' instruction nor any other in the case required a finding of knowledge because the law does not so require. This issue has no merit.

**B. ONE MINIMALLY IMPROPER COMMENT, REGARDING THE LACK OF EVIDENCE, WAS NOT FLAGRANT AND ILL-INTENTIONED AND COULD NOT HAVE CAUSED ENDURING PREJUDICE WHILE THE OTHER COMMENT, ABOUT SELLING THE JURY A BRIDGE, WAS NOT IMPROPER.**

Nelson next claims that the prosecutor committed misconduct with flagrant and ill-intentioned arguments in closing. This claim is without merit because Nelson did not object to the prosecutor's comments and does not show that those comments were flagrant or ill-intentioned such that the remarks caused enduring prejudice in the presentation of his defense.

To warrant a finding of misconduct, a prosecutor's conduct must be both improper and prejudicial. *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011). The alleged misconduct is reviewed in context, "including the evidence presented, the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury." *Monday*, 171 Wn.2d at 675 (internal quotation omitted). The bar to establish prejudice is very high: "only where there is a *substantial likelihood* the misconduct affected the jury's verdict." *Id.* (internal citation omitted; emphasis by the court).

Further, Nelson did not object to any of the prosecutor's remarks in closing. First, a failure to object to improper remarks is "strongly suggests" that the remark did not appear critically prejudicial in the context of the trial. *Monday*, 171 Wn.2d at 680, citing *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (En banc). Failure to object to alleged improper remarks constitutes waiver of the issue unless the remarks were so flagrant and ill-intentioned that they cause an enduring and resulting prejudice that could not be cured by an instruction to the jury. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011). The height of this standard is important to obviate sandbagging by the defense. *Swan*, 114 Wn.2d at 661. To avoid waiver, a defendant must show that "(1) 'no curative instruction would have obviated any prejudicial effect on

the jury’ and (2) the misconduct resulted in prejudice that ‘had a substantial likelihood of affecting the jury verdict.’” *State v. Emery*, 174 Wn.2d 741, 761, 278 P.3d 653 (2012), quoting *Thorgerson, supra*. Herein, Nelson fails in his burden to show flagrant and ill-intentioned conduct that left an enduring prejudice in the case.

Factually, it is important that based on his own testimony, Nelson convinced the trial court to instruct the jury on the affirmative defense of unwitting possession. He claimed under oath that he did not know that the drugs and paraphernalia were in his coat pocket. Thus the prosecution’s closing argument had a dual purpose: argue that the state’s affirmative case was proven and argue that the defendant’s affirmative defense was not proven. On the latter purpose, since the entirety of the defense rested on Nelson’s own testimony, challenging his credibility is an obvious and not improper rebuttal of the defense.

A prosecutor is entitled to point out the improbability or lack of evidentiary support for the defense theory of the case. *State v. Russell*, 125 Wn.2d 24, 87, 882P.2d 747 (1994). “Moreover, remarks of the deputy prosecuting attorney that would otherwise be improper are not grounds for reversal where they are in reply to defense counsel’s statements unless the remarks are so prejudicial that an instruction would not cure them.” *Swan*, 114 Wn.2d at 663; see also *In re Caldellis*, 187

Wn.2d 127, 143, 385 P.3d 135 (“The state is ... entitled to make a fair response to the defense attorney’s arguments.”). Similarly, “when a defendant advances a theory exculpating [her], the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence.” *State v. Vassar*, 188 Wn. App. 251, 260, 352 P.3d 856 (2015), quoting *State v. Contreras*, 57 Wash.App. 471, 476, 788 P.2d 1114 (1990).

Beginning with a proper statement that Nelson has the burden to show by a preponderance of the evidence that he unwittingly possessed the substance, the prosecutor correctly noted that Nelson’s credibility was essential to establishing the defense. RP 106. The prosecutor breached the present issue by correctly noting that Nelson is presumed to be innocent but not presumed to be credible. *Id.* She correctly argued to the jury that they, the jurors, are the sole judges of credibility. *Id.*

The prosecutor argued that many aspects of Nelson’s testimony were not reasonable. RP 107-09. The prosecutor argued that it was not reasonable for someone to leave a significant amount of methamphetamine in a coat pocket and then donate the coat. RP 109. She submitted that Nelson’s story was an attempt by Nelson to “sell you a bridge.” *Id.* She concluded her first argument by asserting that Nelson

had failed to meet his burden, saying “there’s been no evidence.” RP 110.

The defense closed with an argument that Nelson’s story was in fact reasonable. The defense conceded that it knew that if Nelson testified, his credibility would be called into question. RP 112. The defense asked the jury to find that Nelson’s possession was unwitting. RP 115.

Thus the context of the prosecution’s alleged misconduct belies any assertion of flagrancy or ill-intention. It is technically incorrect to say that there was “no evidence” of unwitting possession since Nelson’s testimony is some evidence of it. But placing that remark in context shows that what was being argued is that the evidence asserted on the point, Nelson’s testimony, was not credible and there was, truly, no other evidence to support the testimony. “But a prosecutor commits reversible misconduct by urging the jury to decide a case based on evidence outside the record.” *State v. Pierce*, 169 Wn. App. 533, 553, 280 P.3d 1158 (2012). The state argued that there was no evidence in the case, not that evidence from outside the case supports conviction. And the defense argued the unwitting possession instruction at length, having no other defense. The jury simply did not find Nelson’s story to be credible. After all, he had the drugs in his pocket.

Similarly, nothing shows that the remark about Nelson trying to

sell the jury a bridge could have or did cause enduring prejudice to Nelson's case. The rhetorical point being made, as seen by the argument that the story has no credibility, is that the jurors should not believe his story. This is merely straight forward argument and no attempt to improperly prejudice Nelson's case or impugn anything but his not credible testimony. See *Williams v. Borg*, 139 F.3d 737, 745 (9<sup>th</sup> Cir. 1998) (Where prosecutor called the defense argument "trash" no due process violation because "He did not say the man was "trash"; he said the argument was. A lawyer is entitled to characterize an argument with an epithet as well as a rebuttal."). A prosecutor has wide latitude to comment on the evidence introduced at trial and to draw reasonable inferences from the evidence, *State v. Thorgerson*, 172 Wn.2d 438,448, 258 P.3d 43 (2011), "including inferences as to witness credibility." *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

Further, the trial court instructed the jury that they are the sole judges of credibility. CP 20. The jury was also instructed that the attorney's remarks, statement, and arguments are not evidence and that they should disregard remarks that are not supported by the evidence or the law. CP 20. Juries are presumed to follow the court's instructions. *State v. Prado*, 144 Wn. App. 227, 252, 181 P.3d 901 (2008).

Moreover, Nelson's resort to *U.S. v. Spain* is misleading. The

United States Court of Appeals surely did disapprove of the prosecutor's reference to the defendant trying to sell the jury the Brooklyn Bridge. However, reversal of the conviction did not follow from that disapproval; the conviction was affirmed. 536 F.2d at 176. This decision followed from quite a lot more vitriol than just the bridge comment.

“In the case at bar the prosecutor repeatedly described the defense as “concocted,” “fabricated,” “contrived,” “tailored,” “perjured,” and “a lie.” The defendant was said to be “trying to . . . frame” the government by “bringing you this perjured testimony.” A defense witness was characterized as a “liar” and said to have given “lie testimony.”

536 F.2d at 175. The arguments of the prosecutor in the present case are not even close to the full-out assault on the defense case launched by the government's attorney in *Spain*. Nelson complains that the present prosecutor's bridge comment implies that he is a liar, but the *Spain* court affirmed when the government attorney called Spain and defense witnesses liars straight out and continued to accuse the defense of perjury. At bottom, the government's pointed argument did not support a finding of misconduct warranting reversal.

Nelson's reliance on a quote from *State v. Allen*, 128 Mon. 306, 275 P.2d 200 (1954), is similarly misleading. He quotes the case correctly but that quote is grossly out of context. There, the Montana Supreme Court was deciding whether a swindler had been prosecuted under the correct statute. The quote about the Brooklyn Bridge swindle was a story

told to show the reason that the Montana legislature enacted the particular statute. That case had nothing whatever to do with improper arguments by prosecutors.

Again, *People v. Moore*, 495 N.Y.S.2d 719, 115 A.D.2d 495 (1985), lends Nelson no support. There, the mid-level New York appellate court issued a one page decision in which the court found improper the prosecutor's argument that "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. It is right off Adams Street". 495 A.D.2d at 495 (alteration by the court). This was not a passing comment as in the present case. It was asserted against a pro se litigant. Further, the defendant had opened the door about a prior conviction but the prosecutor improperly argued that the defendant's story had not worked for the first jury because they "didn't buy it." *Id.* Finally, that case is distinguishable in that there the defense had objected, the trial court had promised a curative instruction, but no curative instruction was given. The rules are to be applied in the context of the trial before the appellate court, not in a vacuum.

Again, *People v. Bartholomew*, 963 N.Y.S.2d 630, 105 A.D.2d 613 (2013) has nothing in common with the present case. The decision is about the prosecutor's improper cross examination of the defendant

regarding the criminal history and gang membership of another and her own periods of unemployment. The bridge references found are the dissent accusing the majority of buying the defense argument, 105 A.D.2d at 616, and a characterization of the defendant's unbelievable testimony. That is, the court *sua sponte* used the bridge allusion to dishonesty as an apt characterization of the evidence.

Similarly, the prosecutor herein used it for the same purpose. The prosecutor referred to Nelson's argument, not his person. And, Nelson's attempt to inject unbinding authority from other jurisdictions is unavailing because the cases are either not on point or clearly distinguishable.

In this case, Nelson had the drugs and paraphernalia in his pocket. He baldly claimed that he did not know it was there in his pocket. He told the searching police officer that he had forgotten that it was there. It likely did not matter much what the prosecutor said since it is obvious that Nelson's story lacked credibility. There was no flagrant or ill-intentioned argument. Even if minimally improper, it is unlikely on this record that the prosecutor's remarks caused enduring prejudice. This issue fails.

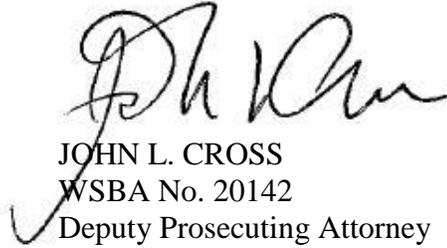
**IV. CONCLUSION**

For the foregoing reasons, Nelson's conviction and sentence should be affirmed.

DATED March 5, 2018.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

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