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Division II
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NO. 50760-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

RONALD CRITCHFIELD,

Appellant.

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

The Honorable Erik Rohrer, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The trial judge commented on the evidence and denied appellant a fair trial.

Issues Pertaining to Assignment of Error

1. Appellant was charged with possession of methamphetamine. When the prosecution moved for admission of the alleged methamphetamine, the trial judge made a comment indicating the substance was dangerous and should be handled with care. Did this improper judicial comment on the evidence – which helped establish that the substance was indeed methamphetamine – deny appellant a fair trial?

2. Did the trial court err when it denied a defense motion for mistrial?

B. STATEMENT OF THE CASE

The Clallam County Prosecutor's Office charged Ronald Critchfield with Possession of a Controlled Substance (methamphetamine) and Attempted Theft in the Third Degree. CP 47-48. The case was tried before the Honorable Erik Rohrer. RP 1.

Evidence at trial established that, on the morning of April 22, 2017, Port Angeles resident Timothy Fry received a call from a

neighbor – Shavik¹ Pearson – alerting him to “something odd going on outside” Fry’s home. RP 56-57. Fry’s wife called 911 while he went outside to investigate. RP 57.

Fry found Critchfield attempting to remove a battery from the front of his trailer using a wrench. RP 58. When confronted, Critchfield indicated he was merely “taking a piss.” RP 58. Fry told Critchfield he needed to stay put. Pearson and Fry then watched Critchfield until police arrived. RP 58-59. Port Angeles Police Officer Zachary Moore and Corporal Bruce Fernie arrived in a car and, as they subsequently approached Fry on foot, Fry began reaching into a front pants pocket. Both officers drew their weapons and instructed Fry to remove his hand from his pocket. RP 59, 63-65, 91-92.

What happened next varied by witness. According to Fry, when Critchfield pulled his hand from his pocket, Fry saw “what appeared to be a small plastic baggy fall out of his pocket.” RP 59. According to Officer Moore, Critchfield “pulled his hand out of his pocket, clutched, put it underneath his chest and then he finally complied with our orders” and put his hands out. RP 65.

¹ The Motion for Determination of Probable Cause indicates Mr. Pearson’s first name is Shavik. CP 50. The verbatim report of proceedings indicates it is Chipike. RP 43, 64, 93.

According to Corporal Fernie, Critchfield “had something clinched in his hand, we couldn’t see what that was specifically and then he put his hand, his right hand underneath his chest” RP 93. When officers restrained Critchfield and pulled him to his feet, they found a baggy underneath him that appeared to contain methamphetamine. RP 66, 93-94. Officers did not see Critchfield throw or drop a baggy; nor did they see a baggy fall from his pocket. RP 76, 80, 103.

Critchfield testified and, consistent with what he told officers at the time of his arrest,² indicated he had been reaching in his pocket for “his meth pipe,” but had been unsuccessful in removing it as officers approached. RP 74, 125-128. He denied any knowledge whatsoever of the baggy found on the ground or its contents. RP 74, 95, 124.

A search of Critchfield incident to arrest revealed that he was in possession of several tools. He also had a marijuana pipe, marijuana, a meth pipe, and a syringe. RP 66-69. Critchfield admitted trying to steal the battery attached to Fry’s trailer, hoping it could serve as a replacement for batteries someone had stolen from

² Critchfield’s statements to officers were found admissible following a CrR 3.5 hearing. See RP 23-24.

his own trailer. RP 74, 81, 120-124. He was very remorseful, upset that he had tried to take Fry's property, and wanted to apologize to Fry. RP 75, 81, 123-124.

A photo of the baggy containing suspected methamphetamine was admitted at trial as exhibit 4. RP 70. Corporal Fernie testified that, based on his experience, the substance inside the baggy appeared to be methamphetamine. RP 94. He also testified that a field test of the substance provided an indication that the substance was methamphetamine. RP 94.

The actual baggy and its contents were admitted as trial exhibit 1. RP 96-97, 108-109. Before handing exhibit 1 to Corporal Fernie, the prosecutor suggested that Fernie put on a pair of latex gloves. RP 96. The prosecutor did the same while examining Forensic Scientist Van Wyk. RP 109. After Wyk testified that the substance inside the baggy contained methamphetamine, RP 111, the prosecutor moved for admission of exhibit 1, leading to the following exchange:

Prosecutor: And finally, Your Honor, the State moves to admit Exhibit No. 1.

Court: All right, any objection to Exhibit No. 1?

Defense: I don't believe so but just a moment, Your Honor, while I review my notes. No objection,

Your Honor.

Court: All right, I was expecting an objection that we're all afraid to touch it but I guess it's admitted.

RP 113 (emphasis added).

Following a brief recess, defense counsel moved for a mistrial, arguing that the court's remark "that we're all afraid to touch it" was an improper comment on the evidence because it expressed the court's view that the substance was in fact methamphetamine, causing everyone (including the judge) some distress about contact with the evidence. RP 114-117. Reasoning that the comment simply referred to "things that we all saw together," was not meant to be a comment on the evidence, and would not be perceived as one, the court denied the defense motion. RP 118.

Jurors convicted Critchfield as charged. CP 23-24. Judge Rohrer imposed concurrent 45-day terms (suspending 45 additional days for the attempted theft), and Critchfield timely filed his Notice of Appeal. CP 7, 12-13

C. ARGUMENT

THE TRIAL COURT COMMENTED ON THE EVIDENCE AND DENIED CRITCHFIELD A FAIR TRIAL.

Critchfield pleaded not guilty to the possession charge. CP 31. "That plea puts in issue every element of each crime charged."

CP 31. His plea also triggered the presumption of innocence, which continued unless “overcome by the evidence beyond a reasonable doubt.” CP 31.

To prove that Critchfield unlawfully possessed methamphetamine, the State was required to establish:

- (1) That on or about April 22, 2017, the defendant possessed a controlled substance, Methamphetamine; and
- (2) That this act occurred in the State of Washington.

CP 35.

Corporal Fernie testified that the substance in the baggy appeared consistent with methamphetamine and that a field test produced a positive result. Forensic Scientist Wik then testified that lab tests indicated the substance contained methamphetamine. But jurors were not bound by this testimony. See CP 26 (jurors’ duty to decide the facts); CP 27 (jurors the sole judges of witness credibility).

Unfortunately, however, Judge Rohrer weighed in on the content of the baggy when he noted that everyone was afraid to touch it. This was an improper judicial comment on the evidence because it suggested the court’s opinion that the substance was indeed methamphetamine, since methamphetamine would naturally

produce that fear. It helped prove that the substance was methamphetamine and denied Critchfield a fair trial.

Article 4, § 16 of the Washington Constitution provides, “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” The purpose of this constitutional prohibition “is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court’s opinion of the evidence submitted.” State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The prohibition is strictly applied. Seattle v. Arensmeyer, 6 Wn. App. 116, 120, 491 P.2d 1305 (1971). The court’s opinion need not be express to violate the prohibition; it can simply be implied. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

A comment in violation of article 4, § 16 is presumed prejudicial and the State bears the burden to show that no prejudice resulted. Levy, 156 Wn.2d at 723-25. That jurors were instructed to disregard such comments is not determinative. Lampshire, 74 Wn.2d at 892 (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice). Rather, in deciding whether a comment on the evidence is

harmless, the Washington Supreme Court has looked to whether it was directed at an important and disputed issue at trial. See Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997); Levy, 156 Wn.2d at 726.

Given Critchfield's not guilty plea, whether he had possessed a controlled substance was an important and disputed issue at trial. Critchfield never admitted to possessing the baggy or that it contained methamphetamine. Therefore, the State cannot demonstrate the comment on the evidence was harmless beyond a reasonable doubt, and it was an abuse of discretion not to grant the defense motion for mistrial. See State v. Gilchrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979) (mistrial necessary where nothing short of a new trial would ensure defendant is tried fairly).

While Judge Rohrer noted he did not intend to comment on the evidence (and there is every reason to believe this is true), intentionality is not a prerequisite to a violation. Moreover, while it is technically true that his comment referred to "things that we all saw together," this does not make it proper, either. It was the court's expressed opinion regarding what everyone had seen that violated the prohibition. Critchfield's possession conviction must be reversed.

D. CONCLUSION

Critchfield respectfully asks this Court to find that the trial judge's comment on the evidence tainted the proceedings and requires a new trial on the possession charge.

DATED this 15th day of December, 2017.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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Seattle, WA, 98122
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