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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.

STEPHEN W. GATES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 18-1-00127-05

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BRIEF OF RESPONDENT

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MARK B. NICHOLS  
Prosecuting Attorney

JESSE ESPINOZA  
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11  
Port Angeles, WA 98362-301

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

I. COUNTERSTATEMENT OF THE ISSUES ..... 1

II. STATEMENT OF THE CASE ..... 1

III. ARGUMENT ..... 5

    A. GATES WAIVED THE CLAIM OF PROSECUTORIAL MISCONDUCT BY FAILING TO OBJECT AT TRIAL AND FAILING TO SHOW THAT THE STATE’S CROSS EXAMINATION AND ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED. .. 5

        1. The prosecutor properly elicited testimony from Gates that the State’s witness was mistaken without eliciting testimony regarding the veracity of the State’s witness. .... 7

        2. The prosecutor’s argument questioning what evidence Gates presented was not improper because Gates had the burden to prove unwitting possession..... 8

    B. THE ORDER FOR COMPLIANCE MONITORING SHOULD BE VACATED BECAUSE THE COURT DID NOT FIND THAT A CHEMICAL DEPENDENCY CONTRIBUTED TO THE OFFENSE AND BECAUSE THE COURT DID NOT ORDER THE CONDITION IN THE JUDGMENT AND SENTENCE. .... 12

IV. CONCLUSION ..... 13

    CERTIFICATE OF DELIVERY ..... 15

## TABLE OF AUTHORITIES

### Cases

<i>State v. Brett</i> , 126 Wn.2d 136, 174 892 P.2d 29 (1995) .....	6
<i>State v. Cheatham</i> , 150 Wn.2d 626, 652, 81 P.3d 830 (2003).....	10
<i>State v. Cleppe</i> , 96 Wn.2d 373, 635 P.2d 435 (1981).....	8, 9
<i>State v. Frost</i> , 160 Wn.2d 765, 773, 161 P.3d 361 (2007) .....	8
<i>State v. Fry</i> , 168 Wn.2d 1, 7, 228 P.3d 1 (2010) .....	9
<i>State v. Huckins</i> , 5 Wn. App.2d 457, 469–70, 426 P.3d 797 (2018) .....	13
<i>State v. Knapp</i> , 54 Wn. App. 314, 322, 773 P.2d 134 (1989).....	8
<i>State v. Riker</i> , 123 Wn.2d 351, 366–67, 869 P.2d 43 (1994) .....	8
<i>State v. Thorgerson</i> , 172 Wn.2d 438, 442, 258 P.3d 43 (2011) .....	5, 6
<i>State v. W.R., Jr.</i> , 181 Wn.2d 757, 764, 336 P.3d 1134 (2014) .....	9
<i>State v. Warnock</i> , 174 Wn. App. 608, 609, 299 P.3d 1173 (2013).....	12
<i>State v. Wright</i> , 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), <i>superseded by statute on other grounds by RCW 9.94A.360(6)</i> .....	7

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether Gates waived his claim of prosecutorial misconduct because he failed to object at trial and he failed to show that the conduct alleged was flagrant and ill-intentioned because the prosecutor properly held the defense to their burden of establishing an affirmative defense and the prosecutor only prompted Gates to explain a discrepancy between his testimony and Deputy Dixon's rather than attempting to get Gates to state Dixon was lying?
2. Whether the trial court had authority to impose the condition that Gates obtain a chemical dependency evaluation and follow recommended treatment when it declined to find that a chemical dependency contributed to the offense?

## **II. STATEMENT OF THE CASE**

The State charged Stephen Gates, the defendant, with Possession of a Controlled Substance, Methamphetamine, after he was seen on video at a casino dropping a baggie his pocket which later was determined to contain methamphetamine. CP 55, 58. The matter went to trial and Gates argued the affirmative defense of unwitting possession. RP 217–20.

The court instructed the jury that the defense had the burden to prove the affirmative defense of unwitting possession by a preponderance of the evidence. RP 199, 205–06 (Instruction no. 9).

At trial, the State questioned Deputy Dixon, Clallam County

Sheriff's Office (CCSO), about the nature of the substance that he found:

Q So when you first made contact with Mr. Gates, what did you tell him?

A I told him that he was being detained and that he was not under arrest.

Q What else did you tell him?

A I told him that I was detaining him because I had seen a crystal like, I'd see crystal, a bag of a crystal substance fall from him.

Q How did Mr. Gates' respond?

A He told me initially that he didn't do drugs and then he said it might have been his medication.

Q What did you say next,

[A] I told him that it looked like crystal methamphetamine, it looked like methamphetamine to me.

Q How did Mr. Gates respond to that?

A He told me he didn't do drugs but he said he did smoke marijuana.

Q Did he say anything else?

A Oh, yes, he said he didn't know what was in his pockets.

RP 103-04.

During direct testimony for the defense, Gates testified as follows:

Q So Deputy Dixon approached you that night?

A Correct.

Q And what did he say? What did he do?

A I need you – he bent over and started talking to me and he was saying words I was not really grasping. He said, "I need you to come with me", he said did you, "did you (inaudible) a bag of dope". And I said, "well I'd like to see that I know I left my marijuana in my

truck, I know”.

Q Okay. And did he place you in handcuffs at that time?

A Yes he did and he was kind about it. I had two blown out shoulders so he got his ones to tie me in the front.

RP 163.

During the State’s cross examination of Gates, the prosecutor questioned Gates about Deputy Dixon’s testimony:

Q Now your testimony said Deputy Dixon said dope.

A Correct.

Q And you heard his testimony where he said methamphetamine.

A Exactly. I’m not saying that he’s changed his story I’m just saying he’s mistaken because he told me dope, I figured marijuana.

Q So you’re certain of that?

A Certain of it.

RP 181.

The State followed later with a similar line of questioning:

[Q] Just to clarify, you’re still convinced that he said dope and that he’s wrong?

A He’s mistaken.

[Q] I don’t have anything further, Your Honor.

RP 184.

During closing argument, the State argued as follows:

Now the State has mentioned before that it has its burden. The burden on the State is the highest one. That is beyond a reasonable doubt. The State has to prove both elements 1 and 2 beyond a reasonable doubt and the defense has not. The defense has not had that burden.

The defense only has the burden when it comes to their defense, unwitting possession and that's not a tie breaker as the defense said. That is simply you must be persuaded considering all the evidence in the case is more probably true than not.

This is what the State brought you for this burden. The State brought you six witnesses, surveillance video, laboratory analysis by a forensic scientist who was subject to question, business records, everything else you saw and heard today. Evidence that will go back with you to your room as well as exhibits that will not.

What has the defense offered to prove its case? The testimony of the defendant period and what was the testimony? To be honest it's almost difficult to know where it starts but the State simply would refer you back to the Jury Instructions.

RP 226–27.

The jury returned a verdict of guilty of Possession of a Controlled Substance, Methamphetamine. CP 39. At sentencing, the prosecutor asked the trial court to make a finding that a chemical dependency contributed to the offense. RP 240.

The trial court struck, from the judgment and sentence, a finding, requested by the prosecution, that the defendant has a chemical dependency that contributed to the offense. CP 19. The trial court explained: "I can't really make a finding of chemical dependency because

there's nothing in front of me to say that you have a chemical dependence but I think as part of a sentence in a drug case I can still at least require you to get an evaluation and follow [ ] recommendations on treatment.” RP 248. However, in the judgment and sentence, the condition that Gates obtain a chemical dependence evaluation and follow recommended treatment appears to have been stricken with the entire paragraph 4.2. CP 22.

Accordingly, the court entered an order, separate from the judgment and sentence, involving Friendship Diversion Services in order to ensure compliance with the chemical dependency treatment. CP 64, RP 253. The order requires that Gates pay the fees and costs required and follow the rules and guidelines of the relevant Friendship Diversion program. CP 63.

### **III. ARGUMENT**

#### **A. GATES WAIVED THE CLAIM OF PROSECUTORIAL MISCONDUCT BY FAILING TO OBJECT AT TRIAL AND FAILING TO SHOW THAT THE STATE'S CROSS EXAMINATION AND ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.**

“To prevail on a claim of prosecutorial misconduct, the defendant must establish ‘that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at

trial.” *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

“The burden to establish prejudice requires the defendant to prove that ‘there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.’” *Thorgerson*, 172 Wn.2d at 442–43 (quoting *Magers*, 164 Wn.2d at 191).

“Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.” *State v. Brett*, 126 Wn.2d 136, 174 892 P.2d 29 (1995) (citing *State v. Hughes*, 106 Wn.2d 176, 195, 721 P.2d 902 (1986)).

“The ‘failure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.’” *Thorgerson*, 172 Wn.2d at 443 (quoting *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

Here, Gates argues that the State improperly cross-examined Gates by eliciting testimony from Gates that Deputy Dixon was mistaken in his testimony. Additionally, Gates asserts that during closing argument the State improperly shifted the burden of proof to the defendant by arguing that Gates did not present any evidence except his own testimony.

During trial, the defense did not object to either the cross examination or argument described above. Further, the cross examination of Gates resulting in Gates claiming that the officer was mistaken or got it wrong was not improper under the circumstances. Finally, Gates had the burden to establish his affirmative defense and it was not improper for the prosecution to argue Gates failed to meet that burden.

**1. The prosecutor properly elicited testimony from Gates that the State’s witness was mistaken without eliciting testimony regarding the veracity of the State’s witness.**

Gates argues that the prosecutor cross-examined him about the veracity of the other witnesses. Br. of Appellant at 8. More specifically, Gates argues that the prosecutor asked questions to lead Gates to testify that Deputy Dixon<sup>1</sup> was lying. *Id.*

It is not improper to ask a defendant to explain the discrepancy between his or her and another witness’s testimony as long as the prosecutor is not illiciting the defendant’s opinion on the other witness’s veracity. *State v. Wright*, 76 Wn. App. 811, 826, 888 P.2d 1214 (1995), *superseded by statute on other grounds by* RCW 9.94A.360(6). Moreover, it is not improper to illicit testimony from the defendant that the State’s witness got it wrong. *Id.*

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<sup>1</sup> Assuming that the prosecutor and Gates were referring to Deputy Dixon’s use of the word “dope” at RP 184 rather than Deputy Tomco. *See* RP 181.

Here, the prosecutor was highlighting the difference between Deputy Dixon's testimony referring the substance at issue as methamphetamine and Gates testimony that Dixon referred to the substance as dope. The prosecutor did not ask Gates about his opinion on Deputy Dixon's veracity. Rather, the prosecutor asked Gates whether he believed the discrepancy was because Deputy Dixon got it wrong or was mistaken. RP 181, 184. This is not an improper line of questioning. *Wright*, 76 Wn. App. at 826.

Therefore, prosecutor's line of questioning during cross-examination of Gates was not flagrant or ill-intentioned.

**2. The prosecutor's argument questioning what evidence Gates presented was not improper because Gates had the burden to prove unwitting possession.**

The defendant has the burden of proof to establish the affirmative defense of unwitting possession. *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981); *State v. Knapp*, 54 Wn. App. 314, 322, 773 P.2d 134 (1989) ("We conclude the court did not err in requiring Mr. Knapp to prove unwitting possession by a preponderance of the evidence."); *State v. Frost*, 160 Wn.2d 765, 773, 161 P.3d 361 (2007); *State v. Riker*, 123 Wn.2d 351, 366–67, 869 P.2d 43 (1994) (citing *State v. Knapp*, 54 Wn. App. 314, 320–22, 773 P.2d 134 *review denied*, 113 Wn.2d 1022, 781 P.2d 1323 (1989) (other citations omitted) ("Normally, affirmative

defenses must be proved by the defendant by a preponderance of the evidence.”)).

“This is so because generally, affirmative defenses are uniquely within the defendant's knowledge and ability to establish.” *Knapp*, 54 Wn. App. at 320–22.

“An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so.” *State v. Fry*, 168 Wn.2d 1, 7, 228 P.3d 1 (2010) (citing *State v. Votava*, 149 Wn.2d 178, 187–88, 66 P.3d 1050 (2003) (citing *State v. Riker*, 123 Wn.2d at 367–68)).

It is well established that the unwitting possession defense does not negate an element of the offense of possession of a controlled substance because there is no knowledge or intent element. *Cleppe*, 96 Wn.2d at 380. Rather the defense simply excuses otherwise criminal conduct: “If the defendant can affirmatively establish his “possession” was unwitting, then he had no possession for which the law will convict.” *Id.* at 381.

“[T]he State may burden a defendant with proving an affirmative defense that excuses otherwise criminal conduct . . . .” *State v. W.R., Jr.*, 181 Wn.2d 757, 764, 336 P.3d 1134 (2014) (citing *Martin v. Ohio*, 480 U.S. 228, 237, 107 S.Ct. 1098, 94 L.Ed.2d 267 (1987) (Powell, J., dissenting); *Dixon v. United States*, 548 U.S. 1, 6, 126 S.Ct. 2437, 165 L.Ed.2d 299 (2006)).

Here, Gates asserted the affirmative defense of unwitting possession. Because a claim of unwitting possession merely excuses otherwise criminal conduct rather than negating an element of the offense, Gates had the burden to prove it by a preponderance of the evidence.

Therefore, the State did not improperly shift the burden by arguing that the defendant failed to present any evidence except for Gates' own testimony to prove their affirmative defense.

Gates cites to *State v. Cheatham*, in support of his argument that it is prosecutorial misconduct to comment on the failure of the defense to call a potential witness. 150 Wn.2d 626, 652, 81 P.3d 830 (2003).

The *Cheatham* Court pointed out that “[g]enerally, a prosecutor cannot comment on the lack of defense evidence because the defendant has no duty to present evidence.” *Cheatham*, 150 Wn.2d at 652 (citing *State v. Cleveland*, 58 Wn. App. 634, 647, 794 P.2d 546 (1990)). One exception is when the missing witness doctrine is properly invoked. *Cheatham*, 150 Wn.2d at 652.

Here, the State did not invoke the missing witness doctrine because it did not argue that the jury could infer that the missing witness' testimony would have been unfavorable to Gates. *See Id.* at 652 (citing *State v. Blair*, 117 Wn.2d 479, 485–86, 816 P.2d 718 (1991)).

Rather, the State simply argued that Gates did not support his affirmative defense with any evidence except his own testimony signaling that Gates put his own credibility at issue. RP 227. The State reminded the jury that it was the sole judge of Gate's credibility. RP 227; RP 199, 201 (Jury Instruction No. 1, factors to consider when considering a witness's credibility).

Therefore, the prosecutor's comment on Gate's failure to produce witnesses to support his defense was not improper and did not constitute prosecutorial misconduct.

### **Conclusion**

The State's cross-examination of Gates leading Gates to testify that Deputy Dixon was mistaken or got it wrong was not improper because the prosecution did not attempt to have Gates give his opinion regarding Deputy Dixon's veracity. Finally, Gates had the burden to establish his affirmative defense. Thus it was not improper for the prosecution to argue Gates failed to meet that burden.

Therefore, the defendant waived his claim of prosecutorial misconduct because he did not object at trial and he failed to establish conduct so flagrant and ill-intentioned that any resulting prejudice could not be neutralized by a curative instruction. The State requests this Court to affirm the conviction.

**B. THE ORDER FOR COMPLIANCE MONITORING SHOULD BE VACATED BECAUSE THE COURT DID NOT FIND THAT A CHEMICAL DEPENDENCY CONTRIBUTED TO THE OFFENSE.**

“The trial court has authority under RCW 9.94A.607(1) to order an offender, as a condition of community custody, to obtain a chemical dependency evaluation and to comply with recommended treatment only if it finds that the offender has a chemical dependency that contributed to his or her offense.” *State v. Warnock*, 174 Wn. App. 608, 609, 299 P.3d 1173 (2013). “If the court fails to make the required finding, it lacks statutory authority to impose the condition.” *Id.* at 612.<sup>2</sup>

Here, the court declined to find that a chemical dependency contributed to the offense and struck out the finding in the judgment and sentence. CP 22. Therefore, the trial court did not have authority to order the condition that the defendant obtain a chemical dependency evaluation and undergo recommended treatment.

Irrespective of whether the trial court lacked authority, the trial court, perhaps inadvertently, struck paragraph 4.2 from the judgment and sentence and, with it, the requirement to obtain a chemical dependency evaluation and complete recommended treatment. CP 22.

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<sup>2</sup> Alternatively, the court has authority under RCW 9.94A.703 to order chemical dependency treatment as a community custody condition when reasonably related to the circumstances of the offense. However, RCW 9.94A.703 does not apply because Gates was not sentenced to a term of community custody.

“Washington is a written order state.” *State v. Huckins*, 5 Wn. App.2d 457, 469–70, 426 P.3d 797 (2018) (citing *State v. Dailey*, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980)) (holding supervision fees were not part of the judgment and sentence “because the trial court did not order Huckins to pay supervision fees in its written judgment and sentence.”).

Therefore, only the order for compliance monitoring (CP 64; RP 250) for the chemical dependency evaluation and follow up treatment should be vacated as the condition was already stricken from the judgment and sentence.

#### **IV. CONCLUSION**

Gates waived his claim of prosecutorial misconduct because he did not object at trial and he has failed to establish the prosecutor’s conduct was flagrant and ill-intentioned. Therefore, the State requests this Court to affirm the conviction.

Additionally, the State concedes that the trial court lacked authority to enter an order for monitoring compliance with chemical dependency treatment because the court declined to find that chemical dependency contributed to commission of the offense. However, the treatment requirement was not entered in the judgment and sentence and thus only the order for compliance monitoring need be vacated. (CP 64).

Respectfully submitted this 9th day of September, 2019.

MARK B. NICHOLS  
Prosecuting Attorney

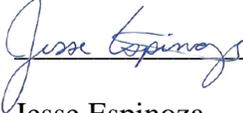
A handwritten signature in blue ink that reads "Jesse Espinoza". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

JESSE ESPINOZA  
WSBA No. 40240  
Deputy Prosecuting Attorney

**CERTIFICATE OF DELIVERY**

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Thomas E. Weaver, Jr., on Sept. 9, 2019.

MARK B. NICHOLS, Prosecutor

  
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Jesse Espinoza

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