

FILED

JAN 20 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

No. 28951-6-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

WALLACE VAN HUDSON,

Appellant.

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

APPELLANT'S REPLY BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT.

1. THIS COURT SHOULD DISREGARD THE STATE'S CLAIM THAT HUDSON'S INTENT TO MANUFACTURE DRUGS SHOULD BE JUDGED "BY THE COMPANY HE KEEPS"

The prosecution concedes, as it must, that a plethora of cases dictate the impropriety of inferring proof of a person's intent to manufacture methamphetamine from the possession of one precursor material that could be used to make methamphetamine. In Brockob,¹ Whalen,² Missieur,³ and Moles,⁴ the Supreme Court and Court of Appeals have held that possession of a precursor substance that could be used to manufacture methamphetamine, such as Sudafed, did not establish the intent to manufacture methamphetamine. There is no dispute that Hudson possessed no ingredients or tools for manufacturing methamphetamine other than the six boxes containing Sudafed he purchased. These purchases do not prove he possessed this substance with the intent to manufacture methamphetamine.

¹ State v. Brockob, 159 Wn.2d 311, 331, 150 P.3d 59 (2006).

² State v. Whalen, 131 Wn.App. 58, 64, 126 P.3d 55 (2005).

³ State v. Missieur, 140 Wn.App. 181, 185, 165 P.3d 381 (2007) ("[B]are possession of a controlled substance is not enough to support a conviction of possession with intent to manufacture.").

⁴ State v. Moles, 130 Wn.App. 461, 466, 123 P.3d 132 (2005).

The prosecution scrambles for another factor establishing the necessary specific intent to manufacture methamphetamine by insisting that Hudson used "secrecy" because he traveled to another city to make his purchases and told his acquaintances he was looking for a razor. Response Brief at 9-10. The claim of "secrecy" is illogical. It ignores the fact that Hudson provided his government issued identification, which was duly recorded by each pharmacy, each time he purchased the Sudafed. RP 68, 74, 80, 86. His purchases were most certainly not secret.

The claim that Hudson's failure to tell his friends what he was buying does not further the prosecution's argument. Even if it showed he had a "guilty mind," as the prosecution asserts, it does not indicate the required intent to manufacture methamphetamine. Even if Hudson was aware that he was improperly buying Sudafed, that awareness would not show he intended to make methamphetamine with his Sudafed.

The prosecution expends most of its energy arguing that Hudson is guilty under a theory that, "We are judged by the company we keep." Response Brief at 10. Not surprisingly, the State supplies no citations to legal authority for its claim that by being "in the company of methamphetamine users," Hudson

demonstrated the intent to manufacture methamphetamine. Id. This gross distortion of accomplice liability, in a case in which no complicity theory was charged or proven, lends itself to ludicrous application.⁵ It begs far more questions than it answers: Is a drug addict judged guilty of selling drugs because he keeps “company” with drug sellers? Does the victim of domestic violence intend to be abused because she keeps company with a person who tends to be assaultive? Is there a separate law of knowledge and intent that applies to methamphetamine users, because they must know people who supply and presumably make controlled substances?

The prosecution’s extension of accomplice liability is not only absurd, it is irrelevant and demonstrates the sheer speculation at the root of the prosecution’s defense of its case. In its Response Brief, the prosecution paints Hudson as “acting in concert” to purchase methamphetamine. Response Brief at 9. But he was not accused of acting in concert with anybody. The State does not explain with whom he “acted in concert.” Id. The only non-police witness, Debbie Paine, denied having any idea Hudson was buying

⁵ Accomplice liability requires aiding or agreeing to aid another in the commission of a crime with knowledge it will promote or facilitate the commission of that crime. RCW 9A.08.020(3). The jury was not asked to consider whether Hudson acted in concert with any other person for either charge. CP 20, 26.

Sudafed and did not describe any intent or knowledge on her own part to assist him with either buying the pills or using it to make methamphetamine. RP 102-05.

The prosecution also cites heavily from Paine's testimony, as if her own drug use established Hudson's intent to manufacture methamphetamine. Paine admitted to having a long history of drug use, but her problems do not equate with Hudson's intent to manufacture methamphetamine. RP 110-11. Paine insisted she had no knowledge of Hudson's purchases that day, and there were no drugs, paraphernalia, or tools in her car. RP 111. Paine's testimony about her own practices and problems cannot prove Hudson's intent and the State offers no explanation of how the jury could properly deduce Hudson's intent to make methamphetamine from Paine's drug use.

In Brockob, the defendant stole "a large quantity" of Sudafed, and "did not come into possession innocently," since he shoplifted it. 159 Wn.2d at 330-31. The Supreme Court held, "[t]hat evidence is sufficient only to support the logical and reasonable inference that Brockob intended to *steal* Sudafed." Id. at 331 (italics in original). The Supreme Court concluded, "the mere assertion that Sudafed is *known to be used* to manufacture

methamphetamine does not necessarily lead to the logical inference that Brockob intended to do so, without more.” *Id.* at 331-32 (italics in original).

Likewise, Hudson had no other tools, implements, or controlled substances with him. His possession of Sudafed while in the presence of methamphetamine users who had no idea that he was buying methamphetamine cannot supply the missing evidence of intent to manufacture methamphetamine. See Missieur, 140 Wn.App. at 187 (rule of “pseudoephedrine possession plus” requires proof of intent based on additional evidence linked to manufacturing).

Hudson’s association with other people who used methamphetamine does not supply the evidence missing from Brockob or that present in Missieur. Neither Paine nor her nephew was involved in manufacturing methamphetamine. Hudson cannot be found guilty based on the company he keeps, especially when that “company” was simply people who used methamphetamine on occasion. Because there was no evidence that Hudson intended to manufacture methamphetamine, and he had no tools for it other than the Sudafed, there is insufficient evidence to support his conviction.

2. THE PROSECUTION'S ARRAY OF
IMPROPER TACTICS CONTRIBUTED TO
THE VERDICT

The prosecution argues that the misconduct that occurred during the trial, and discussed in detail in Hudson's opening brief, was not prejudicial. However, as explained above, there was no evidence that Hudson intended to manufacture methamphetamine beyond sheer speculation. The prosecutor speaks with an aura of reliability and his arguments are accorded great weight, as the jury assumes he speaks based on out-of-court knowledge and experience. State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997). A prosecutor's misstatement of the law is misconduct which is a "serious irregularity" having "grave potential to mislead the jury." State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). By misrepresenting critical evidence, eliciting improper opinions, and misrepresenting the legal requirements of proving the intent to manufacture, the prosecution's misconduct affected the outcome of the trial and should lead to reversal of Hudson's conviction for possession of Sudafed with intent to manufacture

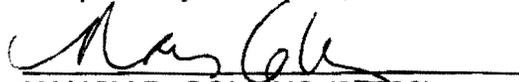
methamphetamine. See State v. Jerrels, 83 Wn.App. 503, 508, 925 P.2d 209 (1996).

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Mr. Hudson respectfully requests this Court reverse his conviction for insufficient evidence, or alternatively, order a new trial.

DATED this 18th day of January 2011.

Respectfully submitted,



NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

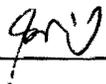
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 28951-6-III
)	
WALLACE VAN HUDSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF JANUARY, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF JANUARY, 2011.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
☎(206) 587-2711