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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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 OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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A. SUMMARY OF ARGUMENT.

After arresting Wallace Van Hudson for buying six boxes of Sudafed in one afternoon, when the legal limit is two boxes per 24-hour period, the State charged him with possession of pseudoephedrine with the intent to manufacture methamphetamine. The State's evidence of intent to manufacture rested solely on his possession of Sudafed. Because Washington courts have expressly ruled that possession of several boxes of Sudafed alone does not establish the intent to manufacture methamphetamine, there was legally insufficient evidence to prove Hudson committed this offense. His conviction was further tainted by an array of prosecutorial misconduct.

B. ASSIGNMENTS OF ERROR.

1. There was insufficient evidence to prove Hudson committed the offense of possession of pseudoephedrine with the intent to manufacture methamphetamine.

2. The prosecutor impermissibly elicited testimony commenting on Hudson's right to remain silent when arrested.

3. The prosecutor improperly relied on evidence not admitted at trial in his closing argument, over Hudson's objection.

4. The prosecutor elicited opinion testimony on the central issue in the case, over Hudson's objection and in violation of Article I, sections 21 and 22.

5. The prosecutor misrepresented the legal requirements for possession with intent to manufacture.

6. The cumulative prejudice from the prosecutorial misconduct denied Hudson a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Bare possession of pseudoephedrine does not establish a *prime facie* case of possession with the intent to manufacture methamphetamine. Where no other evidence established Hudson's intent, did the State fail to prove Hudson intended to manufacture methamphetamine?

2. A prosecutor may not use improper means to secure a conviction. The prosecutor told the jury that its role was to weigh equal scales of justice to decide whether one stone tipped in favor of either party, a misstatement of the State's burden of proof. He argued Hudson was a drug user when that accusation was not admitted as evidence. He asked a police officer to state his opinion of Hudson's intent to manufacture methamphetamine, and elicited testimony that Hudson did not explain his innocence when

arrested. Did the prosecutor use improper tactics to influence the jury's deliberations?

D. STATEMENT OF THE CASE.

Wallace Van Hudson joined with two friends and drove from Oregon to Walla Walla to go shopping. RP 99.¹ They stopped at several second hand shops, ate lunch, got ice cream, and bought candy. RP 100-07. Hudson went into a Rite Aid, Safeway, WalMart, and Shopko. RP 39-41, 101-06. By the end of the day, Hudson had bought a total of six boxes of Sudafed from four different stores. RP 48-49.

Due to legal restrictions on purchases of pseudoephedrine, each pharmacy required Hudson to show a photographic identification and provide his name, date of birth, and address, which was duly recorded in a pharmacist's log in each store. RP 68, 74, 80, 86. In Oregon, pharmacists do not sell pseudoephedrine without a prescription. RP 70.

Hudson's friend Diane Paine owned the car and drove Hudson, along with her nephew, to Walla Walla. RP 97, 99. Paine did not know what Hudson purchased and the only item she heard

¹ The verbatim report of proceedings (RP) from the trial and sentencing consists of a single volume of consecutively paginated transcripts.

him talk about getting was razors. RP 102, 105. Paine knew that Hudson suffered from bad allergy attacks. RP 118.

When Walla Walla police officers arrested Hudson due to his purchase of more than the legally allowed amount of Sudafed, they thoroughly searched Paine's car. RP 52. They did not locate any other items associated with manufacturing or using methamphetamine. RP 54.

Detective Gary Bolster was an experienced narcotics investigator who was aware that Sudafed was a favorite medicine of methamphetamine manufacturers because of its high pseudoephedrine content. RP 32-34. Bolster saw Hudson buy two boxes of Sudafed and followed him to other stores, where Bolster and other officers documented Hudson's pseudoephedrine purchases. RP 40-42. While pseudoephedrine is an ingredient of methamphetamine, many other items and tools are needed to make methamphetamine. The manufacturing process also involves items such as the metal from lithium batteries, coffee filters, anhydrous ammonia, mason jars, and an acid such as muriatic acid or sulfuric acid. RP 35-37.

Even though Hudson did not have any other ingredients or tools for manufacturing methamphetamine, the State charged

Hudson with both possession of an illegal quantity of pseudoephedrine, a gross misdemeanor, and possession of pseudoephedrine with the intent to manufacture methamphetamine, a class B felony. CP 4-7. Hudson was convicted of both offenses after a jury trial and received a standard range sentence of 51 months in prison. CP 33; RP 180.

E. ARGUMENT.

1. THERE WAS LEGALLY INSUFFICIENT EVIDENCE OF INTENT TO MANUFACTURE METHAMPHETAMINE BASED ON POSSESSION OF SUDAFED ALONE

Hudson went to four stores and bought Sudafed, which contains pseudoephedrine, a precursor ingredient used to make methamphetamine. During those trips to various stores, Hudson never bought any other ingredients needed to make methamphetamine and he had no other implements for manufacturing in his car. Because possession of pseudoephedrine alone does not establish the intent to manufacture methamphetamine, there was insufficient evidence to convict Hudson of the felony offense of possession of pseudoephedrine with the intent to manufacture.

a. The intent to manufacture methamphetamine requires evidence beyond the possession of a single item that could be used in manufacturing. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in Article I, section 3 of the Washington Constitution² and the 14th Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

² Art. I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). Speculation and conjecture are not a valid basis for upholding a jury's guilty verdict. State v. Prestegard, 108 Wn.App. 14, 23, 28 P.3d 817 (2001).

The State charged Hudson with possession of pseudoephedrine with the intent to manufacture methamphetamine. CP 4-5; RCW 69.50.440(1). “[B]are possession of a controlled substance is not enough to support a conviction of possession with intent to manufacture.” State v. Missiuer, 140 Wn.App. 181, 185, 165 P.3d 381 (2007). There must be at least one other factoring demonstrating the individual's intent. Id.

The possession of multiple boxes of cold medicine containing pseudoephedrine, in excess of the legal limit, does not prove the intent to manufacture. State v. Whalen, 131 Wn.App. 58, 64, 126 P.3d 55 (2005). In Whalen, the defendant was caught stealing seven boxes of a nasal decongestant that contained pseudoephedrine. Id. at 60. The State argued that because

Whalen purchased this excessive amount of pseudoephedrine, the jury could infer the intent to manufacture methamphetamine. But the Whalen Court rejected this claim.

Buying more than the legally allowed amount of pseudoephedrine is a gross misdemeanor. Committing this gross misdemeanor offense does not simultaneously establish the felony of possession of pseudoephedrine with the intent to manufacture. Id. at 64-65. The court held that Whalen's possession of more than the legal daily limit of pseudoephedrine could not, by itself, establish a *prima facie* case of possession with the intent to manufacture. Id. at 63; see also Missieur, 140 Wn.App. at 187 (“Under Whalen, Missieur's possession of as many as 78 stolen boxes of pseudoephedrine would arguably not, by itself, be enough to sustain the charge of possession with intent to manufacture.”).

The Supreme Court agreed with Whalen in State v. Brockob, 159 Wn.2d 311, 331, 150 P.3d 59 (2006). Brockob shoplifted a large quantity of Sudafed and took much of it out of its packaging. He admitted that he planned to take the Sudafed to someone else who would make methamphetamine. Id. at 319. The Brockob Court held that possession of these multiple Sudafed tablets alone could not establish the *prima facie* case necessary for the

prosecution to use his statement against him under the corpus delicti doctrine. The court noted that Brockob “did not have any coffee filters or other equipment used in the manufacturing process. In short, nothing pointed to Brockob's intent to manufacture rather than merely possess Sudafed.” Brockob, 159 Wn.2d at 338-39.

The holdings of Whalen and Brockob dictate the result in Hudson's case. Hudson purchased six boxes of Sudafed, which is more than allowed in a 24-hour period. He did not take the pills out of their packaging. He did not have coffee filters, lithium batteries, or any tools of manufacturing. RP 52-54. He did not have methamphetamine residue, methamphetamine as a finished product, or paraphernalia for using methamphetamine. He did not appropriate the Sudafed surreptitiously, but rather used his name and identification when buying it from the pharmacists. He did not give statements indicating an illicit intent. Bare possession of an illegal amount of Sudafed does not establish the intent to do anything other than possess Sudafed. The State must present additional evidence of Hudson's intent to manufacture methamphetamine, beyond the possession of Sudafed, and its failure to do so requires reversal.

b. The possibility of taking Sudafed to a manufacturer does not establish the intent to manufacture. The prosecution theorized that Hudson could simply find a “cook” who would make the methamphetamine, give him the purchased Sudafed, and thus the mere possession of even one box of Sudafed could satisfy the elements of possession with intent to manufacture. RP 151-52,168. The prosecutor argued in closing, “the law doesn’t require that we have to prove that he was going to manufacture methamphetamine from the pseudoephedrine. RP 152. Instead, the State’s burden of proof was “[j]ust that he intended the pseudoephedrine was going to be manufactured into methamphetamine.” RP 152.

The specific intent to manufacture methamphetamine is an essential element of possession with intent to manufacture. RCW 69.50.440(1). The statute states in pertinent part:

It is unlawful for any person to possess . . . pseudoephedrine or any of its salts or isomers, . . . with intent to manufacture methamphetamine, including its salts, isomers and salts of isomers.

Id.

In the similar context of interpreting the intent required for possession of a controlled substance with intent to deliver, the

court held that “specific intent to deliver a controlled substance is a statutory element of the crime of possession with intent to deliver.” State v. Hernandez, 95 Wn.App. 480, 484, 976 P.2d 165 (1999); see also State v. Brown, 68 Wn.App. 480, 485, 843 P.2d 1098 (1993) (“Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession.”).

In Missieur, the court recognized that the statute criminalizing possession of precursor materials with the intent to manufacture requires the individual’s personal involvement in manufacturing, as opposed to simply supplying one ingredient to someone else. 140 Wn.App. at 188.

Missieur noted that federal courts similarly construe a statute outlawing possession of precursors with intent to manufacture, requiring evidence the possessor personally intended to manufacture, “rather than supplying someone else who would likely manufacture methamphetamine.” United States v. Weston, 4 F.3d 672, 675 (8th Cir. 1993) (finding insufficient evidence of intent to manufacture where defendant possessed only single precursor); see also State v. Tresdell, 679 N.W. 2d 611, 618 (Iowa 2004) (statute requiring “intent to use the product to manufacture” not

satisfied by evidence that possessor knew or believed that the product would “be used” to manufacture).

Detective Bolster testified that it would be possible for a person to take pseudoephedrine to another person who possessed all the tools of manufacturing methamphetamine. RP 57-58. Long-time drug user Diane Paine also said that she had heard of “cooks” who receive pseudoephedrine from others, although she had not personally seen anyone doing that. RP 115. No one testified that Hudson was involved in any such relationship.

Hudson was prosecuted and convicted of the gross misdemeanor statute penalizing the possession of too much methamphetamine. CP 4-5, 33; RCW 69.43.110.³ The existence of this statute, and its less severe penalty, indicates the Legislature intended to differently punish a person who suspiciously gathers a large quantity of a methamphetamine precursor from someone who personally participates in the manufacturing of methamphetamine. Whalen, 131 Wn.App. at 64-65.

³ RCW 69.43.110(2) provides:

It is unlawful for a person who is not a manufacturer, wholesaler, pharmacy, practitioner, shopkeeper, or itinerant vendor licensed by or registered with the department of health under chapter 18.64 RCW to purchase or acquire more than 3.6 grams in any twenty-four hour period, or more than a total of nine grams in any thirty-day period, of the substances specified in subsection (1) of this section.

In any event, there was no evidence of Hudson's involvement in manufacturing methamphetamine. He bought the Sudafed in his name, showing his photographic identification and having it recorded in a pharmacist's log. He did not shoplift. He did not pick up coffee filters, lithium batteries, or other tools that would be available at the WalMart, Safeway, and Rite Aid stores where he bought Sudafed. The prosecution's claim that the jury could infer the intent to manufacture from the possibility that Hudson could take the Sudafed to some person and that person could use the Sudafed to manufacture methamphetamine does not establish Hudson's intent to manufacture. The speculative notion that he could take that Sudafed to someone who could make methamphetamine does not present even a *prima facie* case of possession with the intent to manufacture methamphetamine. Brockob, 159 Wn.2d at 338-39; Whalen, 131 Wn.App. at 65.

c. Hudson's conviction for possession of pseudoephedrine with the intent to manufacture must be reversed and dismissed. The prosecution failed to prove Hudson possessed pseudoephedrine with the intent to manufacture methamphetamine. Absent proof of every essential element, the

conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. THE PROSECUTOR'S BLATANT
MISREPRESENTATION OF THE LAW AND
THE FACTS OF THE CASE DENIED
HUDSON A FAIR TRIAL

a. The prosecution's targeted efforts to discourage the jury from applying the law deprives the accused person of a fair trial. A prosecutor's misleading and inflammatory arguments may violate a defendant's due process right to a fair trial. Darden v. Wainwright, 477 U.S. 168, 181-82, 106 S.Ct. 2464, 91 L.Ed.3d 144 (1986); U.S. Const. amend. 14; Wash. Const. Art. I, §§ 3, 22. It is a manifest constitutional error for the prosecution to misstate the governing law, incorrectly convey to the jury its proper role, and shift the burden of proof. State v. Fleming, 83 Wn.App. 209, 213, 921 P.2d 1076, rev. denied, 131 Wn.2d 1018 (1997); State v. Davenport, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984). A prosecutor's misstatement of the law is misconduct which is a "serious irregularity" having "grave potential to mislead the jury." Davenport, 100 Wn.2d at 763.

The State bears the entire burden of proving each element of its case. State v. Traweck, 43 Wn.App. 99, 107, 715 P.2d 1148,

rev. denied, 106 Wn.2d 1007 (1980). Flagrant attempts to circumvent an accused's basic constitutional rights and the prosecution's fundamental burden of proof are reviewable on appeal regardless of whether a contemporaneous objection was lodged below. Fleming, 83 Wn.App. at 216; RAP 2.5(a).

In Davenport, the prosecutor argued to the jury the defendant was guilty as an accomplice, although he was not charged as an accomplice and the court did not instruct the jury on accomplice liability. 100 Wn.2d at 760. The reviewing court found the prosecutor's remarks improperly distracting to the jury, dissuading them from properly reviewing the law as instructed by the trial court and encouraging them to find Davenport guilty based on improper legal arguments. Id. at 762.

Here, the prosecutor presented improper argument by encouraging the jury to decide the case based on incorrect statements of the law and mischaracterizing the nature of its burden of proof, as explained below. The prosecutor "has no right to mislead the jury." (Emphasis in original). Id. (quoting State v. Reeder, 46 Wn.2d 888, 892, 285 P.2d 884 (1955)). Such arguments, made by a quasi-judicial officer invested with the prestige generally accorded to the prosecutor's office, are

substantially likely to taint the jury's verdict. Id.; Fleming, 83 Wn.App. at 215.

b. The prosecutor described its burden of proof as equal with the defense. The prosecutor drew the jury's attention to the scales of justice. RP 164. He explained that when the goddess of justice holds the scales, "you notice" that the scales "are straight. They're not tilted depending on whatever type of case is being addressed." RP 164-65. Even in a criminal law book, "it's always straight." RP 165. He added, "these scales with the lady of justice or scales of justice are even for a reason. They're not weighted for either party." Id.

Thus, the prosecutor explained, the jury's role is to decide "is one stone enough to tip the scales?" RP 165. He continued, telling the jurors that they would have to look at the different pieces of evidence, similarly to the stones that may tip the scales, and decide whether Hudson was violating the law. Id.

Contrary to the "equally weighted scales" depicted in this closing argument, the prosecution bears the heavy burden of proving its case, and the accused is presumed innocent. The State's notion of one mere stone "tipping the scales" grossly distorts the State's burden in a criminal case. State v. Warren, 165

Wn.2d 17, 27, 195 P.3d 940 (2008) (holding that prosecutor diminishes burden of proof by telling jurors they do not “give the defendant the benefit of the doubt”). The presumption of innocence and the State’s burden of proof are the “bedrock upon which the criminal justice system stands.” State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The presumption of innocence cannot be overcome unless the State proves every element of the offense beyond a reasonable doubt. Winship, 397 U.S. at 364.

A prosecutor’s misstatement of the law is a particularly serious error with a “grave potential to mislead the jury.” Davenport, 100 Wn2d. at 763. Prosecutors exercise a great deal of influence over jurors and presumably intend to influence the jury by their closing argument. State v. Reed, 102 Wn.2d 140, 146, 684 P.2d 699 (1984). Otherwise, there would be no point to making these arguments.

The prosecutor’s remarks were an intentionally calculated focal point of a lengthy discussion of the equally weighted scales of justice. RP 164-65. They were designed to minimize the jury’s perception of the State’s fundamental burden of proof.

c. The prosecution elicited highly prejudicial opinion testimony from the police detective. It is well-established that a prosecutor may not elicit a police officer's opinion that the accused person acted with the intent to commit the charged offense. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (opinions as to the guilt of the accused, the intent of the accused, or the veracity of witnesses are "clearly inappropriate" opinion testimony); U.S. Const. amends. 6 & 14; Wash. Const. art. I, §§ 21, 22.

In Montgomery, the defendants bought various items that could be used to manufacture methamphetamine, and a police officer testified that he believed this was the defendants' intent. Id. at 588. He said this opinion was based on his training and experience. Id.

The Montgomery Court held that the officer offered an improper opinion on guilt. Id. at 594. "[T]he opinions in this case went to the core issue and the only disputed element, Montgomery's intent." Id. Furthermore, "the police officers' testimony carries an 'aura of reliability,'" and is likely to be given far greater weight than it should. Id. (citing State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). For future cases, the Court

provided detailed instruction to prosecutors as to the proper procedures for eliciting opinion testimony and the importance of preparing witnesses so they do not inject opinion testimony that should not be placed before the jury. Id. at 591-94.

Detective Bolster was a fact witness. He was not qualified as an expert although he spoke from his experience as an officer. RP 32, 57-59. As a police officer, the jury would accord his opinion an aura of reliability. Demery, 144 Wn.2d. at 765.

Bolster testified that in his experience, “people buying multiple boxes at various pharmacies have one intent in mind and that’s to manufacture methamphetamine.” RP 58-59. The court sustained the defense objection to this opinion testimony. Id.

Notwithstanding the court’s ruling sustaining the objection, the prosecutor rested its case on this precise theory. While the jury is presumed to follow the court’s instructions, the jury is not presumed capable of mental gymnastics or superhuman abilities to disregard persuasive testimony.⁴ The State echoed Bolster’s testimony in its closing argument, claiming that once someone buys

more of a methamphetamine ingredient than is legally allowed, the person's intent is to make methamphetamine. RP 152, 168.

Eliciting testimony from the detective that Hudson had "one intent in mind, and that's to manufacture methamphetamine," was an effort to sway the jury by improper means, particularly when this opinion served as the core theory of the prosecution. See Montgomery, 163 Wn.2d at 596 n.9 (noting that where there is evidence that "improper opinions influenced the jury's verdict, we would not hesitate to find actual prejudice and manifest constitutional error" without regard to whether anyone objected).

d. The prosecution argued that Hudson was a drug user even though this allegation was not evidence in the case. The prosecutor tried to elicit testimony that Hudson was a drug user during the trial, but the court sustained the defense objection when he asked Paine whether Hudson used drugs. RP 111. Undeterred, the prosecutor argued to the jury that Paine "knows" Hudson was a drug user. RP 148.

⁴ An instruction to disregard inculpatory evidence is the equivalent of asking a jury to perform, "a mental gymnastic which is beyond, not only their powers, but anybody's else." Bruton v. United States, 391 U.S. 123, 133 n.8, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968); see also Dunn v. United States, 307 F.2d 883, 887 (5th Cir. 1962) ("If you throw a skunk in the jury box, you cannot instruct the jury not to smell it.").

Hudson objected to this mischaracterization of evidence. RP 153. In response, the prosecutor insisted Paine had testified that Hudson was a drug user. RP 153. Rather than sustain the objection, the court told the jury to rely on its memory. RP 153. Even though the jury had been told that statements of a prosecutor was not evidence, the court also instructed the jury that the purpose of closing arguments was for the lawyers to help the jurors understand the evidence. CP 13 (Instruction 1).

The jury would expect the prosecutor to have information not in the record, and it is misconduct for the prosecutor to refer or allude to such information. State v. Boehning, 127 Wn.App. 511, 521-22, 111 P.3d 899 (2005); State v. Alexander, 63 Wn.App. 147, 155, 822 P.2d 1250 (1992). The prosecutor explicitly drew upon facts not in the record in his closing argument, when he admitted he had not introduced any evidence on the distance between Hudson's home in Oregon, Walla Walla, and the Tri Cities, but nonetheless explained that Walla Walla was close or closer than other cities. RP 148. By referring to facts not on the record, the prosecutor endorsed the jury's expectation that the prosecutor had relevant knowledge that had not been introduced at trial.

The State's claim that Paine "knows" Hudson was a drug user was an effort to unfairly tarnish Hudson, and encourage the jury to speculate that Hudson must have intended to manufacture methamphetamine because that is what drug users do. RP 57-59, 153. This argument rested on facts not in evidence, and facts that the jury would presume the prosecutor knew, and thus it was particularly prejudicial and ill-intentioned.

e. The prosecutor erroneously told the jury that simple possession of Sudafed was enough to imply Hudson's intent to manufacture. The prosecutor conceded, as he had to, that the evidence in the case was limited: "all we have is Sudafed." RP 151. He also admitted that count 2, the possession with intent to manufacture charge, "may be more difficult for" for the jury to find the State proved. RP 146.

Undeterred by the lack of evidence, the prosecutor insisted that the jury could infer Hudson's intent to manufacture simply because he bought six boxes of Sudafed. RP 152. He claimed that police detective Bolster routinely relies on this very inference. RP 152-53. The prosecutor insisted that the reason Bolster looks at the pharmacists' logs on pseudoephedrine purchases was because it is the routine practice of "users of methamphetamine" to

then take the Sudafed to a cook and “that’s how they get the pseudoephedrine to start the methamphetamine manufacture.” RP 153.

Having already painted Hudson as a drug user, without evidence on which to base this claim, the prosecutor then insisted that it is routine for a drug user to pick up the pseudoephedrine and start the process of manufacturing methamphetamine. RP 153. These deductive leaps were not based on evidence properly connected to Hudson. By insisting that possession of Sudafed alone was a sound legal basis for a conviction, the prosecutor misrepresented the law, as dictated by Brockob and Whalen. He thereby urged the jury to convict Hudson on an untenable basis.

f. The prosecutor elicited evidence that Hudson remained silent when arrested. The prosecutor asked the arresting officer whether anyone at the scene of the arrest said they needed the Sudafed because had allergies. RP 50. The defense objected and the prosecutor rephrased the question, asking whether Hudson “made any comment about needing it because of his allergies?” RP 50. The detective responded that Hudson had not so commented. Id.

The defense objected later to this comment on Hudson's right to remain silent. RP 62-63. The court agreed that the question and answer were improper and instructed the jury to disregard the officer's statement about whether any of the three people said they had a cold. RP 64, 66.

The prohibition against a police officer commenting on a person's right to remain silent is well-established. The prosecutor's effort to elicit Hudson's silence, or failure to offer an excuse, at the time of his arrest is inexcusable and a flagrant violation of the Fifth Amendment and Article I, section 9 of the Washington Constitution. Miranda v. Arizona, 384 U.S. 436, 468 n.37, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) ("[t]he prosecution may not . . . use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation"); State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

The comment on Hudson's failure to exculpate himself at the time of his arrest was particularly prejudicial. Hudson's theory of defense was that it was perfectly reasonable for him to buy six boxes of Sudafed because he suffered from allergies and needed the medication, which was far harder to obtain in Oregon where he lived. RP 157-60. The detective's testimony that Hudson had not

provided the police with an innocent explanation upon his arrest should not have been placed before the jury and carried significant potential to undermine his defense.

g. The prosecution's repeated and rigorous efforts to improperly influence the jury require reversal. Comments on the right to silence are constitutionally prohibited and must be reviewed under the constitutional harmless error standard. Easter, 130 Wn.2d at 342. Further errors must be assessed cumulatively, based on the harmful affect on the jury's verdict when taken together. State v. Jerrels, 83 Wn.App. 503, 508, 925 P.2d 209 (1996). The constitutional harmless error test places the burden on the prosecution to prove the error did not affect the verdict beyond a reasonable doubt, while the nonconstitutional test requires flagrant misconduct that is substantially likely to have affected the verdict. Fisher, 165 Wn.2d at 747.

The prosecutor conceded the evidence of Hudson's intent to manufacture pseudoephedrine was minimal, as it solely derived from his possession of six boxes of pseudoephedrine. Yet he urged the jury to consider evidence that was never admitted – that Hudson was a drug user – and then infer that a drug user would know someone who could make methamphetamine with this

Sudafed. The caselaw rejects this leap in logic and the evidence does not support the inference against Hudson. The prosecutor's flagrantly improper tactics swayed the jury and require reversal of the convictions here. Fleming, 83 Wn.App. at 215-16.

F. CONCLUSION.

For the reasons stated above, Mr. Hudson respectfully asks this Court to reverse his conviction for possession of pseudoephedrine with the intent to manufacture methamphetamine as it was not supported by the evidence. Alternatively, he asks this Court to order a new trial due to the array of improper efforts to influence the jury.

DATED this 28th day of October 2010.

Respectfully submitted,



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

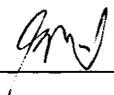
STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 28951-6-III
v.)	
)	
WALLACE VAN HUDSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF OCTOBER, 2010, I CAUSED THE ORIGINAL **OPENING 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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