

FILED

DEC 16 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28951-6-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

WALLACE VAN HUDSON,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



by: Teresa Chen, WSBA 31762
Deputy Prosecuting Attorney

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Soap Lake, Washington 98851
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Is there sufficient evidence that the Defendant had the intent to manufacture methamphetamine when he purchased 10 grams of pseudoephedrine from four different stores in one afternoon far from his home, in the company of methamphetamine users, with the acquaintance of meth cooks, while hiding his purchases from one of his companions, and where his friend told police that his intent to manufacture was obvious to her?
2. Did the prosecutor commit error by describing the justice system as a level playing field and by describing the jury's role as weighing the evidence? Did the detective's factual statement that he had never come across any other reason for excessive purchases, a statement which was not responsive to the prosecutor's question and which was

stricken immediately, either error or substantially likely to have prejudiced the jury verdict? Was the prosecutor's error in remembering the testimony, an error which the defendant challenged in front of the jury, substantially likelihood to affect the verdict where the jury was instructed to rely on their own memory as to the testimony and not on the lawyers' arguments? Did the prosecutor misstate law simply by summarizing Ms. Paine's testimony? Was the prosecutor's error in asking if the defendant told police he had allergies so flagrant and ill-intentioned as to be incurable by the judge's instruction?

IV. STATEMENT OF THE CASE

Methamphetamine is made from pseudoephedrine, which is found in cold medicine like Sudafed. RP 33-37, 58. The law requires that products with pseudoephedrine hydrochloride be kept behind the counter and that pharmacies maintain a log of the names of the people purchasing these products. RP 34, 38, 67-68, 74, 79-80, 86. Police review those records to determine if individuals have purchased a legally excessive amount of product. RP 39. Because pseudoephedrine is a precursor drug (69.43 RCW), it is a gross misdemeanor to purchase or acquire more than 3.6 grams of

pseudoephedrine in a 24 hour period or more than 9 grams in a 30 day period. RCW 69.43.110(2). It is felony to possess pseudoephedrine with intent to manufacture methamphetamine. RCW 69.50.440(1).

On March 12, 2010, Sergeant Bolster observed the Defendant Wallace Van Hudson purchase Sudafed at the ShopKo in Walla Walla County. RP 38-40, 51. The sergeant followed Mr. Hudson to a nearby WalMart where he observed Mr. Hudson attempt to purchase more Sudafed. RP 40. The pharmacist told Mr. Hudson that the store was out of the 24-hour time release Sudafed, and he left. RP 41. The pharmacist informed the sergeant that Mr. Hudson had tried only an hour previously to buy Sudafed at WalMart. RP 41. Assisting the sergeant, Detective Harris found the car Mr. Hudson had been using parked at the Safeway parking lot. RP 91. He observed Mr. Hudson purchase Sudafed at the Safeway pharmacy. RP 92. Police detained Mr. Hudson, Debbie Paine, and Edward Savage in their car. RP 45-46, 50, 102. Police found more boxes of pseudoephedrine hydrochloride in the trunk with receipts from Walgreens, Rite Aid, and Shopko. RP 46-49. Police retrieved the pharmacy logs from all four pharmacies. RP 50.

The Defendant acquired 2.8 grams of pseudoephedrine from Walgreens, 2.4 grams from Rite-Aid, 2.4 grams from Shopko, and 2.4 grams

from Safeway for a total of 10 grams in one afternoon. RP 48-49.

After the Defendant was arrested, police asked Ms. Paine why they were buying so much Sudafed. RP 51. The sergeant asked if they were purchasing it to manufacture methamphetamine. RP 51. She responded, “duh, isn’t it kind of obvious?” RP 51.

Ms. Paine testified at Mr. Hudson’s trial, explaining that, as the driver, she had been charged for her complicity with Mr. Hudson’s offense and was negotiating a guilty plea. RP 117, 119, 121.

Ms. Paine and her nephew Mr. Savage were very familiar with Mr. Hudson. Mr. Savage is in a relationship with Mr. Hudson. RP 114. Ms. Paine herself has known Mr. Hudson for four to five years, seeing him on a weekly basis. RP 97, 122. They “interacted socially” and she knew where he lived and with whom. RP 98. She knew him well enough to have loaned him her car on multiple occasions. RP 99.

Ms. Paine testified that she had an ongoing fifteen-year methamphetamine habit and that her nephew Mr. Savage was also using methamphetamine. RP 110-11. While not permitted to testify about Mr. Hudson’s use, Ms. Paine testified that Mr. Hudson knew people who could manufacture methamphetamine. RP 111, 114. She knew that people purchased pseudoephedrine from multiple stores in order to provide a

sufficient quantity to another person to manufacture methamphetamine. RP 115. Ms. Paine and her nephew were aware that Mr. Hudson had been buying pseudoephedrine and were concerned that police may be watching. RP 112-14. She testified that she told police that, based on her own experience, when a person buys a significant amount of pseudoephedrine, it is for the purpose of cooking methamphetamine. RP 116.

Although Ms. Paine testified that Mr. Hudson was only looking for a razor, he did not purchase a razor at any of the five stores. RP 102, 124. Nor did he or his partner have any apparent need for cold medicine. RP 121, 123.

The Defendant Wallace Van Hudson was charged with possessing an illegal quantity of pseudoephedrine and possessing pseudoephedrine with intent to manufacture methamphetamine. CP 4-7. He was convicted of both charges by a jury. CP 33.

V. ARGUMENT

A. THERE IS SUFFICIENT EVIDENCE FOR THE DEFENDANT'S CONVICTION OF POSSESSION WITH INTENT TO MANUFACTURE.

The Defendant challenges the sufficiency of the evidence for his conviction of possessing ephedrine with intent to manufacture methamphetamine.

As the Defendant acknowledges, the standard of review for such a challenge is whether, after viewing evidence in the light most favorable to the state, any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt. *State v. Elmi*, 166 Wn.2d 209, 214, 207 P.3d 439 (2009); *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The standard admits the truth of the state's evidence *and* all inferences that can reasonably be drawn from this evidence in the state's favor and interpreted most strongly against the defendant. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005); *State v. Schelin*, 147 Wn.2d 562, 573, 55 P.2d 632 (2002); *Jackson v. Virginia*, 443 U.S. at 319, 99 S.Ct. at 2789.

To establish that defendant[] possess[] pseudoephedrine with intent to manufacture methamphetamine, the State [has] to prove that [he]: (1) possessed pseudoephedrine; and (2) intended to use the pseudoephedrine to manufacture methamphetamine. RCW 69.50.440.

State v. Moles, 130 Wn. App. at 465. In addition to possession of a controlled substance, ***only one additional factor suggestive of intent*** need be present to support an intent to manufacture conviction. *State v. Moles*, 130 Wn. App. at 466, *citing State v. McPherson*, 111 Wn. App. 747, 759, 46 P.3d 284 (2002). *See also State v. Missieur*, 140 Wn. App. 181, 185-86, 165 P.3d 381 (2007).

A person who knowingly plays a role in the manufacturing process can be guilty of manufacturing, even if someone else completes the process. *Davis*, 117 Wash.App. at 708, 72 P.3d 1134.

State v. Moles, 130 Wn. App. at 466.

In *State v. Moles*, the court of appeals held that the fact that 440 pills had been removed from the blister packs “leads to the only plausible inference: that the defendants were in the process of preparing the pseudoephedrine for the first stage of the manufacturing process” and, therefore, the removal from the blister packs “alone is sufficient to support the jury’s finding of intent to manufacture.” *State v. Moles*, 130 Wn. App. at 466. Another fact that was suggestive of intent to manufacture was the defendant *acting in concert* with others “to purchase the *maximum allowable amount* of cold pills containing pseudoephedrine *from various stores over a short period of time.*” *Id.* (emphasis added).

The Defendant relies on *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59 (2006) and *State v. Whalen*, 131 Wn. App. 58, 126 P.3d 55 (2005). Appellant’s Opening Brief at 9 (arguing that these cases “dictate the result in Hudson’s case”). It should be noted that both these cases regard corpus delicti for the defendants’ admissions, *not* sufficient evidence for conviction. However, these cases, while similar to each other, are not similar to the facts

here.

In *Whalen*, the defendant attempted to shoplift seven boxes of nasal decongestant containing pseudoephedrine by concealing the drugs in his shirt. *State v. Whalen*, 131 Wn. App. at 60. When store security tried to stop him, he ran and was tackled and detained. The court held that the fact of amount and the short timeframe did not show an intent to manufacture, because this only demonstrated the lesser crime of possessing an illegal quantity of the drug, RCW 69.43.120. *State v. Whalen*, 131 Wn. App. at 64. Nor did his theft show intent to manufacture, but only an attempt to circumvent RCW 69.43.120. *State v. Whalen*, 131 Wn. App. at 65, n.6.

In *Brockob*, the defendant attempted to shoplift large amounts of cold medicine. *State v. Brockob*, 159 Wn.2d at 318. He hid the drugs in his pockets after removing them from their boxes. *Id.* Unlike the facts of *State v. Moles*, Brockob did not remove the individual pills from the blister pack so as to use all the pills immediately, but only removed the blister packs from the boxes in order to more easily hide them on his person. As in *Whalen*, the court held that the theft was not enough to infer an intent to manufacture. *State v. Brockob*, 159 Wn.2d at 331-32.

Mr. Hudson did not steal the pseudoephedrine, therefore, the State does not rely on any theft as an additional factor suggestive of intent. The

additional factors to his possession of an excessive amount of pseudoephedrine are the following: his acting in concert to purchase the maximum allowable amount of pills from various stores over a short period of time (*cf. State v. Moles*, 130 Wn. App. at 466); his secrecy as evidenced by his traveling to a distant location for his purchases and his covering up of the purchases with a story about looking for a razor; his keeping very familiar company with methamphetamine users; and one of those users' opinion of his intent.

Admittedly, there is some similarity between the first factor and *Brockob* and *Whalen*. Simply possessing in excess of the maximum allowable amount of pseudoephedrine would only demonstrate the lesser crime. However, his *acting in concert* with others who are *regular methamphetamine users* is highly suggestive of how he intended to use the medicine.

Moreover, the decision to make these multiple purchases far from home is significant. While Mr. Hudson could not have purchased Sudafed without a prescription in Oregon, there were closer towns in Washington to Hermiston than Walla Walla. Hermiston is fairly directly south of the Tri-Cities.

If Mr. Hudson was buying the drug for a proper purpose, he would

have no reason to hide the purchases from Ms. Paine. Instead, he told her only that he was looking for razors in pharmacy after pharmacy. RP 112. He never actually bought a razor. RP 124. Ms. Paine only learned of Mr. Hudson's actual purchases from her nephew. RP 113-14.

This attempt to hide his purchases from Ms. Paine and from people closer to home indicates a guilty mind and improper purpose.

That Mr. Hudson was in the company of methamphetamine users is another factor suggestive of his intent. We are judged by the company we keep. It is our context, our frame of reference, and our basis of knowledge. Mr. Hudson was in a relationship with a methamphetamine user. This suggests that he is not judgmental of drug users or perhaps uses drugs himself. We tend to know what our friends, particularly our close friends, know. Meth users know how to acquire the meth they use. They may cook the drug themselves or acquire it from another source. Their source is another acquaintance or "company they keep." Users who do not cook the drug themselves may provide the precursor to the cook. And the law provides that a person who knowingly plays a role in the manufacturing process (such as acquiring the precursor) is as guilty as the person who completes the process. *State v. Davis*, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003), *review denied* 151 Wn.2d 1007, 87 P.3d 1185 (2004). Ms. Paine

testified that, in fact, Mr. Hudson was familiar with meth cooks. RP 114. In other words, he knew people who could manufacture methamphetamine from the pseudoephedrine he was acquiring. RP 114.

Ms. Paine's opinion is highly probative and is itself based on other facts. She had known Mr. Hudson for four to five years, seeing him on a weekly basis. RP 97, 122. They "interacted socially" and she knew where he lived and with whom. RP 98. Her nephew Mr. Savage was in a relationship with Mr. Hudson. RP 114. She knew Mr. Hudson well enough to have loaned him her car for out of town trips on multiple occasions. RP 99. Therefore, her opinion is based on what she knows of his habits, past history, and character. She knew that Mr. Hudson knew people who could manufacture methamphetamine. RP 114. She knew that people purchased pseudoephedrine from multiple stores in order to provide a sufficient quantity to another person to manufacture methamphetamine. RP 115.

Ms. Paine also knew that there was not an innocent purpose, such as a desire to possess the drug for legal use. She was familiar with Mr. Hudson's allergies. RP 118. But he was not suffering from allergies at the time of his purchases. RP 121-23. Nor was Mr. Savage ill. RP 123.

Ms. Paine concluded, based on her history with Mr. Hudson, that his intent was "obvious." RP 51. She was preparing to negotiate a guilty plea

for her own complicity.

To prove intent, the State need show only one additional factor on top of amount. The State has met that burden based on Mr. Hudson's acting in concert with methamphetamine users, his secretive manner of purchase, his purchase of close to the 3 gram limit at every store, his knowledge of methamphetamine production, the absence of any illness suggesting legal use, and the testimony of his friend as to his intent.

B. THE DEFENDANT WAS NOT PREJUDICED BY ANY IMPROPER CONDUCT BY THE PROSECUTOR.

The Defendant claims the prosecutor's conduct denied him a fair trial.

To prevail on a claim of prosecutorial error, the Appellant has the burden of establishing both improper conduct by the prosecutor and prejudicial effect. *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). Prejudice is established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981); *State v. Suarez-Bravo*, 72 Wn. App. 359, 366, 864 P.2d 426 (1994). When the defendant fails to make a timely objection to the prosecutor's argument, reversal is only required when the misconduct was so flagrant and ill intentioned that a curative instruction could not have obviated

the resulting prejudice. *State v. Suarez-Bravo*, 72 Wn. App at 367. See also *State v. Finch*, 137 Wn.2d 792, 839-42, 975 P.2d 967, cert. denied 528 U.S. 922, 120 S.Ct. 285, 145 L.Ed.2d 239 (1999); *State v. Ziegler*, 114 Wn.2d 533, 540, 789 P.2d 79 (1990); *State v. Belgarde*, 110 Wn.2d 504, 755 P.2d 174 (1988).

The Defendant makes several claims.

One: The Defendant argues that the prosecutor denied the true burden of proof. Appellant's Opening Brief at 16. The State's burden is, of course, proof beyond reasonable doubt. The court instructed the jury on the law immediately before the prosecutor's statement.

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The state is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

....

RP 136; CP 16. Under long-standing principle, the jury is presumed to follow the trial court's instruction. *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

This is also exactly what the prosecutor stated in his closing argument:

You know, the beyond a reasonable doubt standard

has been here since the beginning of our nation, so every criminal case that has gone to trial has had that particular standard applied. And literally, well, millions of cases have been tried with that standard here in the 200 plus years that our country has been here. You 12 now are going to decide whether or not the State has met that standard here.

RP 164.

The Defendant argues that the prosecutor's discussion of the scales of justice distorted the burden of proof and stated that "one mere stone" was enough to find the Defendant guilty. Appellant's Opening Brief at 16. This is not in any way an honest description of the prosecutor's statement.

The prosecutor fairly explained that the traditional image of justice as a blind-folded woman holding even scales demonstrates that our justice system endeavors to start all parties on an even playing field, free of corruption or cheating.

You know, she's blind-folded, on a pedestal, has her arms straight out with the scales. And you notice they're always straight. They're not tilted depending on whatever type of case is being addressed. And if you ever looked at a criminal law book or an anything like that, or social studies book, it's always straight. And for those of you history buffs, you may remember perhaps the origin of these scales of justice, because sometimes way back in, you know, way before our time, probably back in the Greek and Roman days or before then even, merchants had scales where they weighed the products to the people then who were buying the product. And often times, merchants were corrupt and they had what's called weighted scales. And some of you may have heard the term weighted scales. So these scales with the

lady of justice or scales of justice are even for a reason.
They're not weighted for either party.

RP 164-65. The prosecutor then told the jurors that it was up to them to weigh the evidence and decide what was "enough to tip the scales" or, in other words, enough to convince them beyond a reasonable doubt.

So what you decide is how, okay, is one stone enough to tip the scales? Well, you know, we don't deal with that. You know, we're looking at different pieces of evidence. Some mean something, some maybe don't mean as much. And you decide, okay, this testimony has play here and that testimony has a different play here.

RP 163-65.

The Defendant's interpretation of the prosecutor's statement is implausible and inconsistent with the prosecutor's actual repetition of the beyond a reasonable doubt standard. RP 164. There was no error.

There was also no objection, therefore, the higher standard (so flagrant and ill intentioned that a curative instruction would not help) applies. Even were a juror to misinterpret the prosecutor's words as the Defendant does, the presumption that a jury follows the court's instructions dictates that the interpretation could not be prejudicial.

Two: The Defendant alleges that the prosecutor elicited improper opinion testimony. Appellant's Opening Brief at 19.

Q. Based on your training and experience is that unusual,

whether it's in a vehicle or in a home, under certain circumstances is it unusual to find only large amounts of pseudoephedrine without the other stuff and be able to follow-up with the investigation that ties it to a meth lab because of other factors, but all you find right now is just the pseudoephedrine? Does that make sense?

A. Correct. I've often found just pseudoephedrine hydrochloride in cold pills because that is the precursor. You have to start with that. So from my training and experience, if you have a cold you go up to Walgreens and you sign your sheet and you get your tablets and you go home and if your cold doesn't get any better maybe in four or five days you may get another box.

From my training and experience, people that are buying multiple boxes at various pharmacies have one intent in mind and that's to manufacture methamphetamine.

MR. WERNETTE: Your Honor, I'm going to object to that statement and ask to strike. There are two charges here, and one is just unlawful possession of too much basically Sudofed (sic), and what the detective just stated what his believe in the law is that that's enough to show intent to manufacture. And if that was the case we wouldn't have two charges.

THE COURT: I'm granting the motion to strike. The jury will disregard.

MR. ACOSTA: I'll rephrase the question.

RP 58-59.

The detective did *not* testify that he believed *the Defendant* intended to manufacture methamphetamine. He testified that, from his training and experience, he had come across only one reason for a person to buy multiple boxes of Sudafed from different pharmacies. This is not opinion testimony, but testimony about his own past experiences.

The detective's experience is apparently the same as the legislature's.

The legislature criminalized the possession of too much ephedrine (RCW 69.43.120) and the purchase of a certain amount of pseudoephedrine within a particular period of time (RCW 69.43.110(2)). These crimes are listed under the heading “Precursor Drugs.” 69.43 RCW. In other words, the reason these actions are criminalized is because the legislature understands that one only possesses this amount of ephedrine for the purpose of manufacturing methamphetamine.

It is important to note that the detective’s statement was not responsive to the prosecutor’s question. In other words, the prosecutor did not intentionally elicit the testimony. The prosecutor’s true question was a little complicated. And he seems to have admitted that he was not phrasing his question well. RP 58 (“Does that make sense?”); RP 59 (“I’ll rephrase ... well, I’ll strike it.”) The prosecutor asked if it ever happens that police initially find only the precursor without all the other ingredients or instruments of manufacture and still are able to determine intent to manufacture through other evidence. The prosecutor cannot be blamed when the witness’ response was not responsive to the true question.

In any case, there was an immediate objection – in fact, a speaking objection – and the court immediately struck the response. Based on this record, there is neither error nor prejudice.

Three: The Defendant complains that the prosecutor misremembered the evidence. Appellant's Opening Brief at 20. The witness Ms. Paine did not actually testify whether Mr. Hudson used methamphetamine.

Q. Do you know whether or not your nephew used methamphetamine?

A. Yes.

Q. And do you know whether or not Mr. Hudson used methamphetamine?

MR. WERNETTE: I object, Your Honor, to that question.

THE COURT: Sustained.

RP 111. However, the prosecutor argued:

What we have is she is an admitted drug user. She says she knows the defendant from, because of her nephew and that they're close friends, or at least they were close friends, and that *she knows Mr. Hudson also is a drug user*, and that she's been in this drug-using situation for the last 12, 15 years, and so has been part of that culture and knows some of the things that goes on with that culture.

RP 148 (emphasis added). Mr. Hudson certainly is a drug user, by his own admission. RP 178-79. So the prosecutor did not provide false information. However, the information was not part of the trial testimony.

Fortunately, defense counsel noticed the error and addressed it quite clearly. RP 153-54. The court properly admonished the jurors to rely on their own memories for what the testimony was. RP 154. This is consistent with the jury instructions, which were read to the jury immediately before closing arguments began.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 13; RP 134. *See* WPIC 1.02.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

CP 31. *See* WPIC 151.00.

So while there was error, it was not prejudicial. The jurors heard the true evidence; they were advised to accept closing argument as argument only and not a substitute for the evidence or their own memories of the evidence, and the defense attorney drew their attention to the error. Consider also that while the Defendant's drug use was not part of the testimony, it was a fair inference. He was in a relationship with Mr. Savage and close with Mr. Savage's aunt Ms. Paine – both methamphetamine users. He was engaged in an activity (procuring Sudafed from various pharmacies in a short period of time) which gave rise to the inference of drug abuse. Even his own attorney argued at sentencing that drug addiction was "consistent with the evidence and the behavior of going to several pharmacies, getting the Sudofed (sic), and shopping around basically ... it's pretty clear that's what was going on."

RP 179. Given all this, there is not a substantial likelihood that the prosecutor's misstatement affected the jury's verdict.

The Defendant argues that, when the prosecutor discussed the relative locations of Hermiston and the Tri-Cities (facts well-known to Walla Walla jurors, but not discussed in testimony), he was cleverly creating an expectation that he was also trustworthy when he said that Ms. Paine knew Mr. Hudson to be a drug user. Appellant's Opening Brief at 21. This argument is not persuasive. The prosecutor's knowledge of nearby towns is not remarkable. This comment is not reasonably likely to have affected the jury's memory of the testimony or affected its verdict.

Four: The Defendant argues that the prosecutor stated the jury could infer intent to manufacture from the amount of Sudafed alone. Appellant's Opening Brief at 22. This is not the record. The prosecutor provided other evidence: the officer's observations, Ms. Paine's statements and testimony, the absence of any illness which would indicate the medicine was purchased for a proper use, etc. RP 152.

The Defendant declares that on RP 152 the prosecutor "insisted" the jury could infer intent from amount. Appellant's Opening Brief at 22. In fact, at this cite, the prosecutor summarized that *Ms. Paine* made that inference. RP 152. This claim is without factual basis.

Five: The Defendant complains that the prosecutor admitted evidence of Mr. Hudson's silence. Appellant's Opening Brief at 23. The prosecutor initially asked if any of the car's occupants told the police that they needed the Sudafed for allergies. RP 50. That was met with a hearsay objection, which the prosecutor cured by asking only as to the Defendant. ER 801(d)(2) (a party opponent's admissions are not hearsay). The Defendant did not immediately object, but upon reflection at the end of the day realized the new error: commenting on a defendant's right to remain silent. RP 62-63. The Defendant did not ask for a mistrial, but asked for a curative instruction. RP 63-64. The prosecutor acknowledged the error and agreed the testimony should be stricken. RP 63.

Defense counsel and the court discussed how to fashion the best instruction so as to cure the damage without re-emphasizing the testimony. RP 64-65. The court asked counsel to prepare an instruction to be read to the jury the next morning. RP 64. The court then instructed the jury:

...yesterday a question was asked of Detective Sergeant Bolster if any of the three parties in the car told him they had a cold. The Court has since ruled the question was improper and the answer has been stricken. You are instructed to disregard the answer to that question.

RP 66. Because the jury is presumed to follow the trial court's instruction, there can be no prejudicial effect on the jury's verdict. *State v. Warren*, 165

Wn.2d at 28.

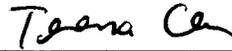
While the Defendant makes several claims of prosecutorial error, each is soundly met as either being not error, being cured by instruction, or being not prejudicial. The Defendant received a fair trial.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: December 15, 2010.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

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By _____

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

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

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the Appellant (Wallace Van Hudson, #339586, P.O. Box 1899, Airway Heights, WA 99001-1899) and to the attorney of record (Nancy P. Collins, Washington Appellate Project, 1511 3rd Avenue, Suite 701, Seattle, WA 98101-3635) for the Appellant containing a Respondent's Brief in the above entitled matter.

DATED: December 15, 2010.



Teresa Chen

DECLARATION OF MAILING