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Court of Appeals
Division III
State of Washington
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NO. 36624-3-III

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY JOHN SCHLANGEN,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

- 1. The prosecution correctly concedes Mr. Schlangen was denied a fair trial by his counsel's proposed burden-shifting instruction and reversal is required.**

Unlawful firearm possession charges require the government to prove the element of knowledge beyond a reasonable doubt. *State v. Anderson*, 141 Wn.2d 357, 359, 366, 5 P.3d 1247 (2000). Here, defense counsel proposed an unwitting possession instruction requiring the Mr. Schlangen to prove he lacked knowledge. RP 166-67. The court provided this instruction to the jury, reducing the prosecutor's burden to prove every element beyond a reasonable doubt. CP 37; *see State v. Kylo*, 166 Wn.2d 856, 863-64, 215 P.3d 177 (2009).

The prosecution concedes that use of an unwitting possession instruction was error in a case where knowledge was an essential element, as the instruction improperly shifted the burden of proof. Brief of Respondent 3-4; *see State v. W.R., Jr.*, 181 Wn.2d 757, 765, 336 P.3d 1134 (2014); *State v. Carter*, 127 Wn. App. 713, 718, 112 P.3d 561 (2005).

Further, the prosecution concedes that defense counsel's performance was ineffective in proposing the burden-shifting instruction and that this was prejudicial to Mr. Schlangen. Brief of Respondent 4; *see Kyllö*, 166 Wn.2d at 871; *Carter*, 127 Wn. App. at 718.

Finally, given the ineffective assistance of defense counsel and the resulting prejudice, Mr. Schlangen "is entitled to a new trial with new counsel." *Carter*, 127 Wn. App. at 718 (citing *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980)). He requests both these remedies of this Court. *See id.*

The government has joined Mr. Schlangen in his request for reversal and remand for a new trial. Brief of Respondent 4. This Court should accept the parties' agreement, reverse Mr. Schlangen's conviction, and order the superior court to provide new counsel if the government wishes to retry this case. *See Carter*, 127 Wn. App. at 718.

2. Prosecutorial misconduct prejudiced Mr. Schlangen's right to a fair trial.

The prosecutor deliberately misled the jurors by stating a potential defense witness was absent because she would not corroborate Mr. Schlangen's defense. *See* RP 184, 188-89. The prosecutor repeatedly implied that Mr. Schlangen was lying by claiming his aunt could corroborate his explanation of events and that Mr. Schlangen chose not to call her to testify. *See* RP 184, 188, 189. However, the prosecutor knew the real reason for the witness's absence was that the court would arrest her on her warrants if she appeared. *See* RP 14, 35-36.

It is improper for a prosecutor to misrepresent issues to the jury; the government has a "special duty not to impede the truth." *U.S. v. Reyes*, 577 F.3d 1069, 1077 (9th Cir. 2009). The prosecutor's repeated and baseless implication that Mr. Schlangen was lying because he did not present his aunt's testimony was ill intentioned and flagrant misconduct. *See In re Personal Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); *State v. Monday*, 171 Wn.2d 667, 676-67, 257 P.3d 551 (2011).

Mr. Schlangen's attorney failed to object to the State's deliberate deception, but this Court must still protect Mr. Schlangen's right to a fair trial. *See State v. Walker*, 182 Wn.2d 463, 477, 341 P.3d 976 (2015).

The prosecution argues Mr. Schlangen's second argument seems to be moot, given the prosecution's concession of the first argument. However, this issue is likely to recur and this Court may provide effective relief to Mr. Schlangen to prevent the misconduct's recurrence. *See Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 52 n.6, 272 P.3d 227, 233 (2012); *State v. Pierce*, 169 Wn. App. 533, 543-59, 280 P.3d 1158 (2012).

In *Pierce*, the Court found two reasons to reverse: denial of access to counsel and prosecutorial misconduct. *Pierce*, 169 Wn. App. at 543-58. It did not decline to address the misconduct simply because it found another reason to reverse, and neither should the Court here. *See id.*

Further, an issue is not moot when the appellate "court can provide any effective relief." *Mukilteo Citizens for Simple*

Gov't v. City of Mukilteo, 174 Wn.2d 41, 52 n.6, 272 P.3d 227, 233 (2012) (emphasis added) (quoting *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983)). The *Pierce* Court addressed a third issue not requiring reversal because it was likely to recur on remand. *Pierce*, 169 Wn. App. at 559.

This Court can provide effective relief by directing the prosecutor not to make misleading arguments in Mr. Schlangen's retrial. *Mukilteo Citizens*, 174 Wn.2d at 52 n.6; *Walker*, 182 Wn.2d at 477; see *Reyes*, 577 F.3d at 1077. While the government is not certain to repeat such arguments, it is likely to do so on remand if not admonished here.

Alternatively, if this Court deems the issue moot, it should still direct the prosecutor not to mislead the jury about the reason for a witness's failure to testify. See *State v. Henderson*, 180 Wn. App. 138, 149 n.4, 321 P.3d 298 (2014). In *Henderson*, the Court found an evidentiary issue to be moot but did advise the trial court that "the best practice" differed from the procedure employed at trial. *Id.* The *Pierce* Court, while not discussing mootness, directed that additional

improper prosecutorial arguments not requiring reversal “not be repeated on retrial.” *Pierce*, 169 Wn. App. at 557, 558.

B. CONCLUSION

Mr. Schlangen’s trial was prejudiced by his burden-shifting ineffective counsel. He is entitled to a new trial with a new attorney. This Court should accept the concession and reverse Mr. Schlangen’s conviction, directing the trial court to provide him new counsel.

Further, given the likelihood that the government’s misleading arguments will recur on remand if this Court does not address them, this Court should review this issue and direct to prosecutor not to repeat such arguments.

Submitted this 4th day of February 2020.



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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	NO. 36624-3-III
v.)	
)	
TIMOTHY SCHLANGEN,)	
)	
APPELLANT.)	

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