Supreme Court No. 91660-8
Court of Appeals No. 45081-0-II

SUPREME COURT OF THE STATE OF WASHINGTON

Filed
Washington State Supreme Court
NOV - 5 2015
Ronald R. Carpenter
Clerk

STATE OF WASHINGTON,

Petitioner,

v.

CORY A. SUNDBERG,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER – STATE OF WASHINGTON (AMENDED)

MICHAEL DORCY
Mason County Prosecuting Attorney

By
TIM HIGGS
Deputy Prosecuting Attorney
WSBA #25919

521 N. Fourth Street
PO Box 639
Shelton, WA 98584
PH: (360) 427-9670 ext. 417

ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. STATEMENT OF THE ISSUES 1

III. STATEMENT OF FACTS RELEVANT TO ISSUES 2

IV. ARGUMENT.....2

1) Whether the Court of Appeals erred when it found that the prosecutor committed misconduct by commenting on the defendant's failure to call a witness to corroborate defendant's testimony regarding his affirmative defense of unwitting possession, for which defendant bore the burden of proof.....2

2) Whether Division Two of the Court of Appeals' unpublished decision in the instant case is in conflict with the published decision of *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991) in Division One of the Court of Appeals.....10

3) Whether this Court should declare a rule that would require pretrial disclosure of witnesses and evidence to support an affirmative defense for which the defendant bears the burden of proof and a rule that, whenever a defendant asserts the existence of a witness who could corroborate an affirmative defense for which the defendant bears the burden of proof, would require the defendant to make some good faith attempt to present the witness to the court and allow or require the witness to assert the 5th Amendment outside the presence of the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

jury rather than to assume in all cases that all witnesses whose testimony may be self-incriminating will always assert the 5th Amendment.....13

4) Whether this Court should declare a rule that distinguishes the term of art "prosecutorial misconduct" from mere prosecutorial error. Or, in the alternative, to hold that the prosecutor did not commit misconduct in the instant case.....17

V. CONCLUSION.....20

TABLE OF AUTHORITIES

State Cases

State v. Balzer,
91 Wn. App. 44, 954 P.2d 931 (1998).....3

State v. Barrow,
60 Wn. App. 869, 809 P.2d 209 .....passim

State v. Berube,
171 Wn. App. 103, 286 P.3d 402 (2012).....5, 18

State v. Blair,
117 Wn.2d 479, 816 P.2d 718 (1991).....passim

State v. Bradshaw,
152 Wn.2d 528, 98 P.3d 1190 (2004).....3

State v. Buford,
93 Wn. App. 149, 967 P.2d 548 (1998).....3

State v. Cheatham,
150 Wn.2d 626, 91 P.3d 830 (2003).....4, 20

State v. Cleppe,
96 Wn.2d 373, 635 P.2d 435 (1981).....3

State v. Contreras,
57 Wn. App 471, 788 P.2d 1114 (1990).....6, 11, 12

State v. Dixon,
150 Wn. App. 46, 207 P.3d 459 (2009).....4, 5, 6

State v. Dykstra,
127 Wn. App. 1, 110 P.3d 758 (2005).....9

State v. Fish,
99 Wn. App. 86, 992 P.2d 505 (1999).....13

State v. Francisco,
148 Wn. App. 168, 199 P.3d 478 (2009).....9

State v. Gant,
6 Wn. App. 263, 792 P.2d (1971).....18

State v. Levy,
156 Wn.2d 709, 132 P.3d 1076 (2006).....14

State v. Lougin,
50 Wn. App. 376, 749 P.2d 173 (1988).....13

State v. Maupin,
128 Wn.2d 918, 913 P.2d 808 (1996).....13

State v. Montgomery,
163 Wn.2d 577, 183 P.3d 267 (2008).....4, 5, 18, 20

State v. Staley,
123 Wn.2d 794, 872 P.2d 502 (1994).....3

State v. Thorgerson,
172 Wn.2d 438, 258 P.3d 43 (2011).....19

U.S Supreme Court Cases

Graves v. United States,
150 U.S. 118, 14 S. Ct. 40, 37 L. Ed. 1021 (1893).....3

Miranda v. Arizona,
384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).....14, 16, 17

Federal Cases

Bowles v. United States,
439 F.2d 536 (D.C. Cir. 1970).....14, 15

United States v Espinoza,
578 F2d 224 (9th Cir. 1978).....14

United States v La Couture,
495 F2d 1237 (5th Cir. 1974) 15

United States v Licavoli,
604 F2d 613 (9th Cir. 1979) 14

United States v Martin,
526 F2d 485 (10th Cir. 1975) 14

United States v. Moore,
682 F.2d 853 (9th Cir.1982) 14

United States v Reese,
561 F2d 894 (D.C. Cir. 1977) 14

Other States' Cases

People v. Richardson,
43 Cal. 4th 959, 183 P.3d 1146, 77 Cal. Rptr. 3d 163 (2008) 15

People v. Thomas,
51 N.Y.2d 466, 415 N.E.2d 931, 434 N.Y.S.2d 941 (1980) 14

State v. Herbert,
234 W. Va. 576, 767 S.E.2d 471 (2014) 15

Constitutions

U.S. Const. amend. V ..... passim

U.S. Const. amend. VI 13

Statutes

RCW 69.50.4013(1) 3

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

I. INTRODUCTION

This supplemental brief expands upon arguments contained in the brief of respondent and the petition for supreme court discretionary review. The State's decision not to address certain issues in this supplemental brief should not be considered as a concession, but should be interpreted as the State's determination that the unaddressed issues are adequately discussed in its other briefs.

II. STATEMENT OF THE ISSUES

1) Whether the Court of Appeals erred when it found that the prosecutor committed misconduct by commenting on the defendant's failure to call a witness to corroborate defendant's testimony regarding his affirmative defense of unwitting possession, for which defendant bore the burden of proof.

2) Whether Division Two of the Court of Appeals' unpublished decision in the instant case is in conflict with the published decision of *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991) in Division One of the Court of Appeals.

3) Whether this Court should declare a rule that would require pretrial disclosure of witnesses and evidence to support an affirmative defense for which the defendant bears the burden of proof and a rule that, whenever a defendant asserts the existence of a witness who could corroborate an affirmative defense for which the defendant bears the burden of proof, would require the defendant to make some good faith attempt to present the witness to the court and allow or require the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

witness to assert the 5th Amendment outside the presence of the jury rather than to assume in all cases that all witnesses whose testimony may be self-incriminating will always assert the 5th Amendment.

4) Whether this Court should declare a rule that distinguishes the term of art "prosecutorial misconduct" from mere prosecutorial error. Or, in the alternative, to hold that the prosecutor did not commit misconduct in the instant case.

III. STATEMENT OF FACTS RELEVANT TO ISSUES

To avoid unnecessary repetition, the State respectfully relies upon and refers the Court to the recitation of facts contained in the State's other briefs in this case and to the Court of Appeals' decision in this case.

IV. ARGUMENT

1) Whether the Court of Appeals erred when it found that the prosecutor committed misconduct by commenting on the defendant's failure to call a witness to corroborate defendant's testimony regarding his affirmative defense of unwitting possession, for which defendant bore the burden of proof.

Possession of methamphetamine is prohibited by statute in Washington, as follows:

> It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

RCW 69.50.4013(1). The statute contains no mental element; thus, at least in essence, possession of a controlled substance is a strict liability offense. *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004). But the harshness of this strict liability element of this offense is ameliorated by the defense of "unwitting possession." *Id.* at 533. "'Unwitting possession is a judicially created affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute.'" *State v. Buford,* 93 Wn. App. 149, 151–52, 967 P.2d 548 (1998) (quoting *State v. Balzer,* 91 Wn. App. 44, 67, 954 P.2d 931 (1998)). To successfully assert the affirmative defense of unwitting possession in the instant case, the burden was on Sundberg to prove by a preponderance of the evidence that he did not know he was in possession of methamphetamine. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981).

By comparison, the missing witness rule, also, is a judicially created rule. *See, e.g., Graves v. United States*, 150 U.S. 118, 14 S. Ct. 40, 37 L. Ed. 1021 (1893); *State v. Blair*, 117 Wn.2d 479, 816 P.2d 718 (1991). When applied to criminal defendants in criminal cases, the

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

missing witness rule stands as an extraordinary exception to the rule that, because criminal defendants are constitutionally presumed innocent and have no duty to present evidence, the State is forbidden from commenting on the defendant's failure to present a witness or other evidence. *Id.* at 485-46. Historically, cases that discuss the missing witness rule do so in the context of the rule's application to the State's case in chief, where the State bears the burden of proof. *See, e.g., State v. Montgomery*, 163 Wn.2d 577, 597-98, 183 P.3d 267 (2008); *State v. Cheatham*, 150 Wn.2d 626, 652, 91 P.3d 830 (2003); *State v. Blair*, 117 Wn.2d at 491; *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009).

Under the missing witness rule,

> The State may point out the absence of a "natural witness" when it appears reasonable that the witness is under the defendant's control or peculiarly available to the defendant and the defendant would not have failed to produce the witness unless the testimony were unfavorable.

State v. Montgomery, 163 Wn.2d at 598 (citing *State v. Blair*, 117 Wn.2d at 485-86). The effect of the missing witness rule is powerful, because where it applies to criminal defendants, it leads to an instruction from the trial court informing the jury that it may infer that a witness who was not called to testify, and therefore did not testify at the trial, would have

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

provided testimony that contradicts the defendant's theory of the case. *See, e.g., State v. Blair*, 117 Wn.2d at 491; *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009); *State v. Montgomery*, 163 Wn.2d 577, 597-98, 183 P.3d 267 (2008).

In the instant case, however, the court did not instruct the jury that it may infer that the testimony of the missing witness, Paul Wood, would have been unfavorable to Sundberg if Sundberg had presented Wood as a witness. Still more, the prosecutor did not argue that Wood's testimony would have been unfavorable to Sundberg. RP 182-83, 192-97. Instead, the prosecutor argued only that, on the affirmative defense of unwitting possession, Sundberg bore the burden of proof by a preponderance of evidence (RP 194-96) and that because Sundberg had not called Paul Wood as a witness, "there's no evidence that he even exists." RP 195-96.

The prosecutor's argument here is the kind of argument that was approved of in *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). The *Berube* court reasoned that because the prosecutor in that case had not requested a missing witness instruction, "the test for justifying the instruction [was] not pertinent." *Id.* at 118. Likewise, in the instant case the prosecutor was not asking the jury to infer that Wood's testimony

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

would be unfavorable to Sundberg's defense; instead, the prosecutor was challenging whether Paul Wood even existed, and thus, whether Sundberg had satisfied his burden of proof on the unwitting possession defense. RP 195-96.

The Court of Appeals reasoned in the instant case, as follows:

> Here, the missing witness doctrine did not apply for two reasons. First, Wood's testimony could only have been favorable to Sundberg if Wood testified that he was the source of the methamphetamine. Said another way, Wood's testimony would have been favorable to Sundberg only if Wood testified that he committed the crime of unlawful possession of a controlled substance by possessing the methamphetamine and placing it in Sundberg's pocket. Thus, his testimony would have been necessarily self-incriminatory and privileged. *Blair,* 117 Wn.2d at 490–91; *State v. Dixon,* 150 Wn. App. 46, 55, 207 P.3d 459 (2009). Second, Sundberg had not unequivocally implied that Wood would have corroborated his testimony. *Contreras,* 57 Wn. App. [471] at 476 [788 P.2d 1114 (1990)]. Sundberg explicitly said it was impossible to know whether Wood was the source of the methamphetamine. For these reasons, the missing witness doctrine did not apply and the prosecutor was not entitled to invoke it.

State v. Sundberg, 45081-0-II at p. 7-8. But the State never argued that the missing witness doctrine applied, and accordingly, the State never asked for a missing witness instruction and never argued that Paul Wood's testimony would have been unfavorable to Sundberg. Instead, the State merely questioned whether Paul Wood existed and argued that Sundberg

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

had not met his burden of proof on the affirmative defense of unwitting possession. RP 194-96. The Court of Appeals reasoned that "Sundberg had not unequivocally implied that Wood would have corroborated his testimony" (*State v. Sundberg*, 45081-0-II at p. 7); but, with this being so, the State contends that Wood's testimony could have corroborated Sundberg's testimony even if Wood did not testify that it was he who put the methamphetamine into Sundberg's pocket. Wood could have corroborated Sundberg's theory of the case – that Sundberg did not have exclusive control of the pants during the time leading up to discovery of methamphetamine in the pocket – and Wood could have corroborated his own existence, even while denying that it was he who put drugs into Sundberg's pocket.

Still more, the prosecutor's argument in this case was in direct response to, and provoked by, defense counsel's arguments during closing. Sundberg's counsel argued in closing that:

> Through cross examination the State tried to suggest, or imply, that Cory actually wasn't pressure washing the roof, and he wasn't doing this work, there wasn't anybody named Paul Wood, and Wes Rider was — everything he said was lying just to cover up for his foster son of 34 years. Well okay, that's great. I suppose that's the State's job to do that. But is there any evidence to support any of that? There's not a shred, there's not a scrap.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

RP I at 189. Defense counsel argued to the jury that it was better to let ten guilty defendants go free rather than to convict one innocent person. *Id.* Expanding on this theme, defense counsel then argued:

> And that is why the State is required to bring forth sufficient evidence, in the first instance, to convince you beyond a reasonable doubt. In the second instance, to overcome the evidence that Cory has put on. And in regard to that, *the State didn't put on any evidence to overcome what Cory said, I mean none*. [Emphasis added].

RP 1 at 189-90. Defense counsel continued the argument, as follows:

> Now this kind of a case is very difficult to defend because of what I said. How do I prove that something did not happen? Well the answer first off is we don't have to prove anything other than he didn't know it was there, which I'd submit we have proved. But how do we go about proving that in a case like this? There aren't any witnesses. The only person that would know whether there is meth in the pocket is the person wearing the clothes that day. That would be Cory himself, unless there was some other evidence which we don't have in this case. We've got absolutely nothing one way or the other, other than Cory's word on that.

RP 1 at 190. Sundberg impugned the State's efforts to contend with his surprise, non-testifying witness and the defense of unwitting possession, stating that "it's really the only argument that the State has got here" and "[b]ut again, it's all the State's got."

Defense counsel summed up, as follows:

> So folks, with the evidence that we have here, Cory Sundberg is not guilty. We've done the best that we could do with the evidence that we have to work with. The evidence that we have is all the evidence that we have. There isn't any way to get any more. If we — there was any way, I'd have found a way to get it. But this is the evidence that it is. The State would have put on more evidence if it had more evidence. There simply isn't any more. So this is what you've got to work with.

RP 1 at 192.

The prosecutor's comments in response to the defense arguments only stated what was obviously apparent to the jury – that Paul Wood had not appeared and verified his own existence. "[E]ven if improper, a prosecutor's remarks that are in direct response to a defense argument are not grounds for reversal as long as the remarks do not 'go beyond what is necessary to respond to the defense and must not bring before the jury matters not in the record, or be so prejudicial that an instruction cannot cure them.'" *State v. Francisco,* 148 Wn. App. 168, 178–79, 199 P.3d 478 (2009) (quoting *State v. Dykstra,* 127 Wn. App. 1, 8, 110 P.3d 758 (2005)). Here, the prosecutor did not ask the jury to infer anything about what Paul Wood's testimony would have been, if he existed and had testified; instead, the prosecutor only questioned whether the jury should

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

be persuaded that Wood existed and whether Sundberg had satisfied his burden of proof as required by the affirmative defense of unwitting possession. RP 194-96.

2) Whether Division Two of the Court of Appeals' unpublished decision in the instant case is in conflict with the published decision of *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991) in Division One of the Court of Appeals.

An extensive search of Washington and foreign cases has so far not revealed any case where either the missing witness doctrine or a mere reference to a missing witness (an *incomplete* missing witness argument) is analyzed as applied to the affirmative defense of unwitting possession. The State contends that the missing witness doctrine originated and evolved long before the advent of strict liability offenses and the affirmative defense of unwitting possession. Therefore, there are cases that apply the missing witness doctrine to other affirmative defenses, such as alibi, but it is axiomatic that the alibi defense negates an element of the State's case in chief, which the State must then disprove beyond a reasonable doubt. In contrast, however, the affirmative defense of unwitting possession provides an exception to strict criminal liability, and

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

the defendant bears the burden of proving this affirmative defense by a preponderance of evidence.

It appears that the only Washington case that concerns the application of the missing witness rule to the affirmative defense of unwitting possession is *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991). *Barrow* is strikingly similar to the instant case in that the defendant in *Barrow* was charged with possession of a controlled substance, and as a defense to the charge, the defendant in *Barrow* alleged unwitting possession, asserting that it was his brother, and not Barrow himself, who was responsible for the contraband. *Id.* During trial, the prosecutor commented on Barrow's failure to call his brother as a witness to corroborate the unwitting possession defense. *Id.* The jury convicted, and on review Barrow asserted error based on the prosecutor's comments about Barrow's failure to call his brother as a witness. *Id.* The Court of Appeals rejected Barrow's assertions of error, finding instead, as follows:

> Here, Barrow personally testified about an exculpatory theory that could have been corroborated by his brother. Nothing in the record indicates that his brother could not be produced to testify. Accordingly, pursuant to *Contreras,* we reject this assignment of error.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Id. at 873 (citing *State v. Contreras,* 57 Wn. App 471, 788 P.2d 1114 (1990)).

Barrow would appear to be in contradiction to the oft-cited rule that no negative inference may be drawn from the failure to present a witness whose testimony would be self-incriminating. *See, e.g., State v. Blair*, 117 Wn.2d 479, 489-90, 816 P.2d 718 (1991). But *Barrow* held only that there was "[n]othing in the record" to show that the brother could not testify. *Barrow* at 873.

The same is true in the instant case, where there is nothing in the record to show that Paul Wood could not have testified. As argued previously, Sundberg subtly implied as much but did not bluntly say that Wood put methamphetamine in his coveralls; instead, Sundberg's apparent theory was that he did not maintain exclusive control over the coveralls. Sundberg made no effort to produce Wood, who could have testified as to whether he in fact existed, whether he knew Sundberg or had ever worked for him, and whether Sundberg had loaned him his coveralls and that Sundberg did not have exclusive control of them.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

The State contends that *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991), is strikingly similar to the instant case and that the prosecutor was justified in relying on it in the instant case.

3) Whether this Court should declare a rule that would require pretrial disclosure of witnesses and evidence to support an affirmative defense for which the defendant bears the burden of proof and a rule that, whenever a defendant asserts the existence of a witness who could corroborate an affirmative defense for which the defendant bears the burden of proof, would require the defendant to make some good faith attempt to present the witness to the court and allow or require the witness to assert the 5th Amendment outside the presence of the jury rather than to assume in all cases that all witnesses whose testimony may be self-incriminating will always assert the 5th Amendment.

Both the Sixth Amendment to the United States Constitution and the Washington Constitution protect a defendant's right to compel the testimony of witnesses. *State v. Maupin,* 128 Wn.2d 918, 924, 913 P.2d 808 (1996). However, this right must be balanced against a witness's Fifth Amendment right against self-incrimination in any proceeding. *State v. Lougin,* 50 Wn. App. 376, 381, 749 P.2d 173 (1988); *State v. Fish,* 99 Wn. App. 86, 93, 992 P.2d 505 (1999).

"In general, a claim of privilege may be raised only against specific questions, and not as a blanket foreclosure of testimony." *State v.*

Lougin, 50 Wn. App. 376, 381, 749 P.2d 173 (1988); *United States v. Moore,* 682 F.2d 853, 856 (9th Cir.1982). The trial court must inquire into the legitimacy and scope of the assertion and may allow the witness to refuse to answer all questions only if the judge has "specialized knowledge" of the likely testimony and can determine whether a blanket assertion is proper. *State v. Levy*, 156 Wn.2d 709, 732, 132 P.3d 1076 (2006); *Moore,* 682 F.2d at 856.

There is no constitutional restriction on any person's right to give a voluntary confession. *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694 (1966). Nevertheless, many courts hold that a party may not call a witness to the stand if the proponent of the witness knows that the witness will assert the 5th Amendment. *See, e.g., Bowles v. United States*, 439 F.2d 536, 541-42 (D.C. Cir. 1970). Other courts, however, reason that the decision whether to allow a witness to take the stand to assert the 5th Amendment rests with the discretion of the trial court. *See, e.g., People v. Thomas*, 51 N.Y.2d 466, 472, 415 N.E.2d 931, 434 N.Y.S.2d 941 (1980) (citing *United States v Licavoli*, 604 F2d 613, 624 (9th Cir. 1979); *United States v Espinoza*, 578 F2d 224, 228 (9th Cir. 1978); *United States v Reese*, 561 F2d 894, 899 (D.C. Cir. 1977); *United*

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

States v Martin, 526 F2d 485, 487 (10th Cir. 1975); *United States v La Couture*, 495 F2d 1237 (5th Cir. 1974), cert. den. 419 US 1053; *Bowles v United States*, 439 F2d 536 (D.C. Cir. 1970), cert. den. 401 US 995).

As recently as 2014, the West Virginia Supreme Court held that "in a criminal trial, when a non-party witness intends to invoke the constitutional privilege against self-incrimination, the trial court shall require the witness to invoke the privilege in the presence of the jury." *State v. Herbert*, 234 W. Va. 576, 584, 767 S.E.2d 471, 479 (2014). In contrast, however, the Supreme Court of California has reasoned instead that "[a]llowing a witness to be put on the stand to have the witness exercise the privilege before the jury would only invite the jury to make an improper inference[,]" and that, "[t]herefore, 'it is the better practice for the court to require the exercise of the privilege out of the presence of the jury.'" *People v. Richardson*, 43 Cal. 4th 959, 1011, 183 P.3d 1146, 1180, 77 Cal. Rptr. 3d 163, 204 (2008), *as modified* (July 16, 2008). The State contends that the California approach is the better rule because if a witness is compelled to invoke the 5th Amendment in the presence of the jury when called to testify regarding a defendant's assertion of the affirmative

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

defense of unwitting possession, this would lead to an inference of culpability without subjecting the witness to cross-examination.

The State contends that on the facts of the instant case, if the State is prohibited from mere comment on Paul Wood's absence from the trial, then, without this Court's rule requiring him to do so, Sundberg would have no incentive to disclose Wood prior to the swearing of the jury. In other words, the only tactically beneficial reason to submit Wood pretrial is if he would, in fact, support Sundberg's theory of the defense. If Wood would deny Sundberg's theory of the defense, or if Wood did not exist, then it would be tactically wise for a defendant in such circumstances to withhold any disclosure of the witness. By withholding disclosure of the witness, the defendant could then rely on the fact that the trial court would assume that the witness would invoke the 5th Amendment if compelled to testify, and that, therefore, by operation of the missing witness rule the prosecutor would be prohibited from mentioning the witness's absence, thus insulating the defendant's claim from impeachment, rebuttal, or argument.

Still more, it is not impossible that the witness would support the affirmative defense, in which case the prosecutor would have the option of

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

dismissing the prosecution. In general, the 5th Amendment right to remain silent is personal and may be waived, *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694 (1966), and in some cases a person may choose to exercise his or her constitutional right to speak. Or, perhaps in other cases the prosecution would chose to offer immunity to the witness so as to obtain the witness's testimony.

For all these reasons, therefore, the State urges this Court to declare a rule that requires a defendant asserting an affirmative defense for which he or she bears the burden of proof, such as the defense of unwitting possession, to make a good faith attempt to compel the witness to appear before the trial court and personally choose whether to assert the 5th Amendment.

4) Whether this Court should declare a rule that distinguishes the term of art "prosecutorial misconduct" from mere prosecutorial error. Or, in the alternative, to hold that the prosecutor did not commit misconduct in the instant case.

The State contends that on the facts of this case, where the State did not argue an inference of adverse testimony from Sundberg's failure to present Paul Wood as a witness, and where Sundberg bore the burden of proof on an affirmative defense, the prosecutor did not commit

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

prosecutorial misconduct or error. The prosecutor's comments in this case fit within the facts and holdings of *State v. Barrow*, 60 Wn. App. 869, 809 P.2d 209 (1991), and *State v. Berube*, 171 Wn. App. 103, 286 P.3d 402 (2012). *Barrow* appears to be the only Washington case, and perhaps the only case in any jurisdiction, that closely matches the facts and issues of the instant case. The prosecutor should be allowed to rely on these cases without risking that in hindsight he will be found to have committed "prosecutorial misconduct" or error.

Sundberg objected to the prosecutor's comments regarding Paul Wood, but the trial court overruled the objection, thus indicating the court's approval. RP 195-96. Again, the State urges that the prosecutor here should be permitted to rely on the good judgment of the trial court. Rather than frame the argument here as one of "prosecutorial misconduct," the argument should be framed as one of trial error. *See, e.g., State v. Montgomery*, 163 Wn.2d 577, 597, 183 P.3d 267 (2008); *State v. Blair*, 117 Wn.2d 479, 488, 816 P.2d 718 (1991); *State v. Gant*, 6 Wn. App. 263, 792 P.2d 571 (1971) (finding "judicial error" where trial court refused to grant new trial based on prosecutor's "misconduct" during closing argument).

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Generally, to prevail on a prosecutorial misconduct claim, a defendant must show that in the context of the record *and all the trial circumstances*, the prosecutor's conduct was improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Here, Sundberg did not raise the affirmative defense of unwitting possession, or the existence of Paul Wood, until after the jury was sworn and the trial was underway. RP 60, 72, 79, 84, 96, 121, 122. Then, in closing argument, Sundberg shifted to the State the burden of disproving his defense of unwitting possession. RP 184-92. The prosecutor acted during the stress of trial to the provocations and arguments of Sundberg's trial counsel and made what appeared to be a valid argument since he was relying on *Barrow* and was not seeking the powerful advantage of the missing witness doctrine, which would have led to a judicial instruction to the jury that it may infer that Paul Wood's testimony would have been contrary to Sundberg's theory of the case. Under these circumstances, the prosecutor's reaction and arguments were not sinister or evil, as the term "misconduct" implies; instead, if error occurred, it was just that, error, and not evidence of misconduct.

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

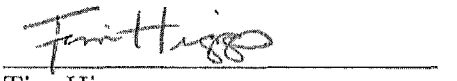
In *Montgomery*, this Court ruled that it "review[s] a trial court's rulings on improper prosecutorial argument for abuse of discretion." *Montgomery*, 163 Wn.2d at 597 (citing *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). The State asks this Court to return to the reasoning of *Mongtomery* and *Cheatam* and hold that on the facts of the instant case, where the prosecutor relied on a good faith consideration of published case law, that even if this Court finds error, the mistake was in fact error, and not "misconduct."

V. CONCLUSION

For the reasons argued above, the State asks that this Court reverse the Court of Appeals decision in this case and reinstate Sundberg's jury trial conviction.

DATED: November 5, 2015.

MICHAEL DORCY
Mason County Prosecuting Attorney



Tim Higgs
Deputy Prosecuting Attorney
WSBA #25919

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

OFFICE RECEPTIONIST, CLERK

To: Timothy Higgs; ptiller@tillerlaw.com
Subject: RE: 91660-8 --- State v. Sundberg --- Amended Supp. Brief / and Motion to Amend Brief

Received on 11-05-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Timothy Higgs [mailto:TimH@co.mason.wa.us]
Sent: Thursday, November 05, 2015 2:26 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>; ptiller@tillerlaw.com
Subject: 91660-8 --- State v. Sundberg --- Amended Supp. Brief / and Motion to Amend Brief

Greetings,

Attached, please find two documents for filing with the Court: 1) Motion to Amend Supplemental Brief of Petitioner; and 2) Supplemental Brief of Petitioner (Amended).

I have contacted the office of Mr. Tiller (the attorney for Mr. Sundberg), and they agree to accept service by email. Therefore, because I am sending this transmittal contemporaneously to the Court and to Mr. Tiller, I have not included a certificate of service.

Sincerely,
Tim Higgs

Tim Higgs (#25919)
Deputy Prosecutor
Mason County, Washington
360-427-9670 ext. 417