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NO. 67525-7-I

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

REC'D  
MAR 09 2012  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ALVIN R. BURNS,

Appellant.

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

The Honorable Monica J. Benton, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by granting the State's motion in limine to exclude testimony of a proposed defense witness based on a finding the testimony would not be relevant.

2. The judgment and sentence must be remanded for correction because of a miscalculated offender score.

Issues Pertaining to Assignments of Error

1. The state charged Alvin R. Burns with possession of cocaine with intent to deliver after an officer found a baggie containing individually packaged rocks of suspected cocaine in Burns' jacket pocket. One of Burns' defense theories was that he did not know the baggie was in his pocket. In support of his defense, Burns sought to call a witness who would testify she saw another man borrow Burns' jacket the night before the incident and use it for several hours before returning it. The trial court excluded the evidence, finding that because the proposed witness could not say what was in the jacket pockets before the man borrowed the jacket or after he returned it, the proposed testimony was not relevant. Was the court's ruling reversible error?

2. Although Burns had seven prior convictions, each of which counted as one point, the trial court imposed sentence using an offender

score of 8. Although the standard range remains the same using the correct score of 7, must this Court remand for correction of the judgment and sentence?

B. STATEMENT OF THE CASE

1. Trial and sentencing

Alvin R. Burns was a student at Green River Community College (GRCC). 3RP 62-63.<sup>1</sup> One day as he drove to school, Burns experienced severe pain and spasms. 3RP 67-68. He made it to school, but the lower back pain became so severe he could not stand up. 3RP 13-15, 68. Seeing Burns' condition, his instructor called 911. 3RP 68-69.

By the time medics arrived, Burns was literally screaming in pain. 3RP 70. A GRCC security officer responded to Burns' location. One of the primary roles of the security officer was to secure a student's property so it did not get lost during any transport from the school to hospital. 3RP 14-15.

Because it was winter, Burns was wearing a heavy jacket with a large pocket. 2RP 28; 3RP 65-67. Medics informed Burns they had to remove the jacket to examine him. 2RP 15; 3RP 70. According to the

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<sup>1</sup> Burns cited to the verbatim report of proceedings as follows: 1RP – 6/9/2011; 2RP – 6/13/2011; 3RP – 6/14/2011; 4RP – 6/15/2011; 5RP – 7/8/2011.

security officer, Burns objected to having his jacket removed, but relented and allowed medics to take it off. 2RP 15-16, 25-26. As the security officer received the jacket from a medic, he looked down and saw a package containing a large quantity of a suspected controlled substance in an open pocket. 2RP 16-18, 26, 28. The security officer pulled the package out of the pocket, informed the medics of what he had found, and returned the package to the pocket. 2RP 17-18, 21, 26.

At that point, Burns stood up and removed the medical equipment that had been attached to him. He saw the package and asked the officer, "[W]hat's that?" 2RP 18, 26. Burns then began walking toward a parking lot, still in severe pain. The security officer followed Burns and notified the police of his discovery. 2RP 19-20. Burns asked the security officer not to call the police and declared the officer was ruining his life. 2RP 20. Burns got closer to his car, but sat on the sidewalk in pain and called someone on his cell phone. 2RP 20-21, 27.

An Auburn police officer, Michael Burris, arrived at about this time. 3RP 5-6. Both Burris and the security officer heard Burns tell the person on the phone they found his "work" in his jacket and he was going to jail. 2RP 23; 3RP 6-7. Burris observed a package of suspected

controlled substances in Burns' jacket pocket. 3RP 7-8. He seized the package when Burns was transported to the hospital. 3RP 8.

The package contained 48 smaller packages. 3RP 38. With packaging, the evidence weighed 15.7 grams. 3RP 14. In Burriss' opinion, the cocaine was packaged for sale and was not for personal use. 3RP 14-15, 18-20, 27.

Burriss went to the hospital to visit Burns. Burns was still in obvious pain and lying on a bed. 3RP 8-9. Burriss read Burns his rights. He asked Burns to identify the substance found in his jacket pocket and also whether he had consumed any of the suspected drug. Burns responded the substance was crack cocaine and he had not used any of the drug. 3RP 10.<sup>2</sup>

Burriss then began to leave, but Burns asked him to stay. Just a moment later, Burns received pain medication, which appeared to relieve a great deal of pain. 3RP 10-11. According to Burriss, Burns nevertheless remained coherent and articulate. 3RP 11, 23-25, 28-29.

Burriss again began to leave, but Burns said he wanted to tell him some things. Burns then said he was a felon, sold drugs, and was not

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<sup>2</sup> The results of lab analysis confirmed Burns' statement. 3RP 40-41.

proud of that fact. 3RP 11-12. Burns said the cocaine found in his jacket was worth \$800 to \$900. 3RP 12.

The State charged Burns with possession of cocaine with intent to deliver. CP 1-3. Burns presented defenses of unwitting possession and general denial. 3RP 97-98.

Vernice McAllister testified she and Burns lived together during the time of the GRCC incident. 3RP 47-50. McAllister typically did the couple's laundry and specifically recalled the type of jacket Burns' wore during the time. 3RP 51, 54. Because she suspected Burns was cheating on her, McAllister routinely checked his jacket pockets, other clothes, and backpack. 3RP 51-52. On the night before the incident, McAllister checked the jacket pockets and found nothing incriminating. 3RP 52, 55-56.

Both McAllister and Burns recalled that later that night, Burns' friend Michael Clark, who was staying with them, borrowed the jacket. 3RP 50, 53-54, 56-57, 64-66. Burns was asleep before Clark returned, but the jacket was there when he left for school the next morning. 3RP 79.

As for the campus incident, Burns said he did not resist when the medics asked for his jacket. Instead, he asked them to help him take it off because he was in severe pain. 3RP 69-71. All of a sudden, he heard

someone say he found something in the jacket pocket and was calling the police. 3RP 71, 80. Shocked, Burns then saw someone slide something back into the pocket. He stood up and asked, "What the hell is going on here?" 3RP 71, 80-81.

While still in great pain, Burns walked toward the parking lot. 3RP 81. He acknowledged calling someone on his cell phone, but denied saying anything about the authorities finding his "work" or going to jail. 3RP 81-82.

Eventually he was taken to the hospital and given strong pain medicine. 3RP 72-75, 82. Burris came to meet him there, but did not read him his rights. 3RP 75, 82. He did not tell Burris he was selling drugs. Nor did he know the value of the cocaine found in his jacket. 3RP 75. The crack was not his and he did not know to whom it belonged. 3RP 72.

After hearing the above, a King County jury found Burns guilty. CP 51. The trial court imposed a 60-month standard range sentence and 12 months community custody. CP 54-63.

2. Pretrial ruling

The prosecutor moved in limine to exclude Amber Clifton's testimony on Burns' behalf. Supp. CP \_\_\_ (sub. no. 46, State's Trial Memorandum, filed 6/9/2011) at 6-7; 1RP 3-4. Defense counsel explained

Clifton would testify that she and Michael Clark stayed the night before the incident with Burns and McAllister, that Clark borrowed Burns' jacket and left the apartment for awhile, and that when she and Clark arose the next morning Burns had already left for school. 1RP 3.

The prosecutor contended the evidence was not relevant because Clifton did not check the jacket pockets and therefore did not know what was in the pockets before Clark left or after he returned. 1RP 3-4. The trial court agreed, stating because Clifton could not say what was in the pockets, allowing her to testify would "distract" the jury and cause it to "look[] down the road at something that is purely speculative." 1RP 4.

Defense counsel countered the State and court were defining "relevance" too narrowly, and the fact someone other than Burns had the jacket the night before the incident was relevant in and of itself. 1RP 5. Counsel called the evidence "a small piece of the puzzle, but it's an important piece for the defense . . . ." 1RP 5. The trial court did not change its ruling. Clifton therefore did not testify. 1RP 5.

C. ARGUMENT

1. THE TRIAL COURT ERRED BY EXCLUDING A PROPOSED DEFENSE WITNESS.

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the federal constitution guarantee a criminal defendant the

right to present a defense through live testimony. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). The right extends only to evidence that is at least minimally relevant. State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). The threshold to admit relevant evidence is "very low." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Evidence tending to establish the defendant's theory of the case is generally relevant and admissible. State v. Sheets, 128 Wn. App. 149, 156, 115 P.3d 1004 (2005), review denied, 156 Wn.2d 1014 (2006). Decisions regarding relevancy are reviewed under an abuse of discretion standard. State v. Suarez-Bravo, 72 Wn. App. 359, 364, 864 P.2d 426 (1994). A trial court abuses its discretion when it erroneously rules on a motion in limine. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

One of the defense theories in Burns' case is that he did not know there was cocaine in his jacket pocket. 3RP 97. This is a valid legal defense. See State v. Sanders, 66 Wn. App. 380, 390, 832 P.2d 1326 (1992) (guilty knowledge of the nature or presence of the controlled

substance is subsumed under the statutory requirement that the defendant intended to deliver a controlled substance). It was also a factually viable defense. The security officer acknowledged Burns' asked, "[W]hat's that?" when the contents of the jacket pocket were revealed. 2RP 18-19, 26-27. Burns testified he was so shocked at the revelation that he asked, "What the hell's going on here?" 3RP 71.

Burns did not dispute the jacket he was wearing at GRCC the day of the incident was his. He based his defense on the fact his friend Clark borrowed the jacket the night before and did not return it until after Burns had fallen asleep. The desired inference flowing from this evidence was that Clark was responsible for the cocaine found in the jacket. According to defense counsel's offer of proof, Clifton would have testified she saw Clark take the jacket out of the apartment and not return for several hours. 1RP 4.

Contrary to the trial court's ruling, Clifton's testimony was relevant; it not only strengthened the desired inference, but it also corroborated the testimony of McAllister and Burns that Clark took the jacket. This latter feature was particularly helpful. Because Burns was the accused, his testimony about Clark's use of the jacket was inherently suspect. Similarly, Burns and McAllister dated for more than a year and lived

together in McAllister's apartment. 3RP 48-49, 52-53. McAllister's relationship with Burns thus rendered her testimony suspect as well. See Huffington v. Nuth, 140 F.3d 572, 581-82 (4th Cir. 1998) (courts evaluate testimony of defendant's family members in light of potential bias inherent in such testimony), cert. denied, 525 U.S. 981 (1998).

The trial court's ruling that Clifton's proposed testimony would be irrelevant because she did not look into the jacket pocket erroneously confuses the weight of the evidence with its admissibility. Defense counsel explained Clifton would not be called to say Clark put the cocaine in the jacket pocket, but instead only that Clark used the jacket outside McAllister's apartment for a few hours. 1RP 2-3. In and of itself, evidence that someone other than Burns controlled the coat had a tendency to make Burns' claim of unwitting possession, i.e. lack of intent to deliver, "more probable . . . than it would be without the evidence." ER 402. The evidence was therefore relevant and the trial court erred.

Although relevant, Clifton's proposed testimony could have nevertheless been excluded "if its probative value [was] substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403. In weighing the

probative value of evidence against the specified dangers, "the general rule requires the balance be struck in favor of admissibility." State v. Young, 48 Wn. App. 406, 413, 739 P.2d 1170 (1987) (citing United States v. Dennis, 625 F.2d 782 (8th Cir.1980)). This is especially true when the evidence goes to a central issue in the case. See Carson v. Fine, 123 Wn.2d 206, 224, 867 P.2d 610 (1994) ("The ability of the danger of unfair prejudice to substantially outweigh the probative force of evidence is 'quite slim' where the evidence is undeniably probative of a central issue in the case.").

Burns' intent was the central issue in his trial. The trial court nevertheless reasoned Clifton's testimony would cause the jury to be "distracted and looking down the road at something that is purely speculative." IRP 4. This is error; Clifton would merely testify she saw Clark take the jacket out of the apartment and return with it several hours later. That is relevant evidence. Whether it sufficiently connected Clark with the cocaine was for the jury to determine. By preventing such a determination, and granting the state's motion in limine, the trial court abused its discretion and violated Burns' constitutional right to present a meaningful defense.

What remains is whether the trial court's ruling prejudiced Burns. An evidentiary error is not harmless if it is reasonably probable the jury's verdict would have been materially affected had the error not occurred. State v. Bashaw, 169 Wn.2d 133, 143, 234 P.3d 195 (2010). For reasons already stated, Clifton's testimony was crucial in assessing Burns' intent to deliver. And while it is true Burns made incriminating statements on the GRCC campus and at the hospital, he was indisputably in extreme pain until he received very strong pain medications that rendered him unable to recall his conversation with Officer Burris. 3RP 74. Under the circumstances, a reasonable juror probably gave little weight to the statements.

Furthermore, there was no other physical evidence indicating an intent to deliver, such as a large amount of cash, packaging materials, or scales. Cf. State v. Goodman, 150 Wn.2d 774, 783, 83 P.3d 410 (2004) (evidence sufficient to sustain guilty finding where, aside from baggies of methamphetamine, police found a scale, additional baggies, and an accessory kit in a safe located in Goodman's bedroom, as well as three vials and another small baggie containing methamphetamine, and established a link between things seized from Goodman's room and earlier controlled buy).

Finally, although Burris testified the amount of cocaine found in the jacket was more than what would be for personal use, he also acknowledged he had "minimal" experience investigating drug cases. 3RP 16. When pressed on whether it was possible for someone to use two grams of cocaine per day, Burris admitted he did not know. 3RP 19. A juror could reasonably question Burris' conclusions regarding intent to deliver.

For these reasons, the trial court's erroneous preclusion of Clifton's testimony was not harmless. Burns' fundamental right to present a defense was violated. This Court should reverse the conviction and remand for a new trial.

2. THE TRIAL COURT IMPOSED BURNS' SENTENCE  
BASED ON A MISCALCULATED OFFENDER SCORE.

Burns presented to the sentencing court with seven countable prior convictions, six for violations of the Controlled Substances Act and one for first degree theft. CP 60. Each conviction counts as one point. RCW 9.94A.525(13). Burns was not on community custody when he committed the current crime. Nor was Burns sentenced for another offense at the same time as the current one.

Burns' offender score should have been 7, not 8. This is error. Despite the failure to timely object, Burns may raise the issue for the first

time on appeal because a sentencing court acts without statutory authority when it imposes a sentence based on a erroneous offender score. State v. Winston, 135 Wn. App. 400, 411, 144 P.3d 363 (2006). See State v. Knippling, 141 Wn. App. 50, 56, 168 P.3d 426 (2007) ("[A] defendant is free to challenge an erroneous sentence based on a miscalculated offender score at any time."), affd., 166 Wn.2d 93 (2009).

Despite the error, Burns' standard range remains 60 months to 120 months. RCW 9.94A.517. The error in the judgment and sentence is effectively a scrivener's error. The proper remedy for a scrivener's error is to remand to the trial court to correct it. See In re Personal Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005) (citing CrR 7.8(a), which provides that "clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time").

This Court should therefore remand the judgment and sentence for correction of the offender score from 8 to 7.

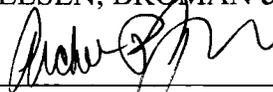
D. CONCLUSION

For the aforesaid reasons, this Court should reverse Burns' conviction and remand for a new trial or, alternatively, to remand for correction of the offender score in the judgment and sentence.

DATED this 9 day of March, 2012.

Respectfully submitted,

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DIVISION ONE

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 67525-7-1
	)	
ALVIN BURNS,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9<sup>TH</sup> DAY OF MARCH, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALVIN BURNS  
DOC NO. 980694  
MONRE CORRECTIONS CENTER  
P.O. BOX 777  
MONROE, WA 98272

**SIGNED** IN SEATTLE WASHINGTON, THIS 9<sup>TH</sup> DAY OF MARCH, 2012.

x Patrick Mayovsky

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