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JUL 20 2011
King County Prosecutor
Appellate Unit

NO. 66438-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

DERRICK THOMPSON,

Appellant.

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

The Honorable Jim Rogers, Judge

REPLY BRIEF OF APPELLANT

2011 JUL 20 PM 4:22
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

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A. ARGUMENT IN REPLY¹

THE COURT'S STATEMENT THAT THE EVIDENCE ESTABLISHED THOMPSON POSSESSED A MARKETABLE AMOUNT OF COCAINE WENT BEYOND MERELY RULING ON AN OBJECTION.

"A statement by the court constitutes a comment on the evidence if . . . the court's evaluation relative to the disputed issue is inferable from the statement." State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995). Such a comment is presumed prejudicial because it operates to deprive the defendant of a fair trial. Id., at 839. The State bears the burden to show no prejudice resulted. "[R]eversal is required even where the evidence is undisputed or overwhelming unless it is apparent the remark could not have influenced the jury." State v. Stephens, 7 Wn. App. 569, 573, 500 P.2d 1262 (1972), aff'd in part, rev'd in part, 83 Wn.2d 485, 519 P.2d 249 (1974); see also State v. Boss, 167 Wn.2d 710, 720-21, 223 P.3d 506 (2009) (judicial comment on the evidence presumed prejudicial, and burden on the State to show not prejudicial); State v. Becker, 132 Wn.2d 54, 65, 935 P.2d 1321 (1997) (whether the State produced sufficient evidence to convict is irrelevant); State v. Lampshire, 74 Wn.2d 888, 892,

¹ Thompson believes the opening brief adequately addresses the prosecutorial and ineffective assistance of counsel claims, and therefore provides this reply on with regard to the State's arguments in response to the improper judicial comment on the evidence claim.

447 P.2d 727 (1968) (instruction requiring jury to disregard comments of court and counsel incapable of curing prejudice).

The State claims the trial court here did not unconstitutionally comment on the evidence, reasoning the trial court may give its reasons for rulings admitting or excluding evidence. Brief of Respondent (BOR) at 2-8. The State relies on State v. Cerny, 78 Wn.2d 845, 855-56, 480 P.2d 199 (1971), vacated on other grounds, 408 U.S. 939 (1972), State v. Dykstra, 127 Wn. App. 1, 8, 110 P.3d 758, review denied, 156 Wn.2d 1004 (2006), and State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990).

In Dykstra, this Court held there was no unconstitutional comment when the trial court overruled a defense objection in closing argument by stating, "[t]his is rebuttal. You opened this door. I have to let her address it." 127 Wn. App. at 8-9. This Court held the prosecutor's rebuttal was a fair response to defense counsel's improper argument. Id.

In Cerny, the Court found no error when the trial judge conditionally overruled a defense objection by stating,

'The state will have to tie it up, of course, and the burden is on the state to tie this together.' Later, in response to appellant's further objections, the trial judge stated: 'I think the chain of evidence has been established.'

78 Wn.2d at 855.

In Swan, the appellants claimed the trial court impermissibly commented on the evidence by ruling the State's witness qualified as an expert. This Court held there was no violation of Article 4, § 16, because “[t]he court's ruling merely indicates that the threshold query provided in ER 702 was satisfied. The court offered no opinion as to the credibility, sufficiency, or weight of Dr. Jenny's testimony.” 114 Wn.2d at 657. The Supreme Court agreed, noting

A court must be allowed to rule as to the qualifications of expert witnesses and inform counsel of its decision. The trial court did just that in its ruling regarding Dr. Jenny and did not offer a personal opinion about the doctor's testimony. There was no comment on the evidence in accepting the doctor as an expert witness.

114 Wn.2d at 657-58.

None of these cases supports the State position here. Dykstra stands for the unremarkable proposition that a trial judge has discretion to allow the prosecutor, in rebuttal, to respond to an inappropriate defense closing argument. Cerny merely held a trial judge can admit evidence on the condition that a party later provides the foundation to support its relevance. See generally, ER 104(a), (b) (judge should rule on preliminary questions of conditional admissibility). And Swan, similar to Cerny, provides only that preliminary determinations about a witness's qualifications to testify do not constitute improper comments if they don't

comment on the veracity of the witness. See also, Boss, 167 Wn.2d at 720-21 (proper for the trial court make preliminary admissibility determination, but "it was for the jury to determine whether it believed the State's evidence and witnesses").

None of these cases held a trial court can rule on the admission of evidence by commenting on the credibility of testimony from State and defense witnesses. That is, and should be, the jury's sole province.

This case is more closely analogous to State v. Vaughn, 167 Wash. 420, 9 P.2d 355 (1932). In Vaughn, the trial prosecutor was called as a defense witness. When it came time for cross examination, there was discussion about whether the prosecutor had to ask himself a question before he could answer. The following exchanged occurred:

Mr. Foley [prosecutor]: I will ask myself a question on cross examination.

The Court: You needn't ask the question, Mr. Foley.

Mr. Mitchell [defense counsel]: Just wait a minute. Ask yourself the question first.

Mr. Foley: His Honor said I didn't need to.

Mr. Mitchell: Well, he has got to ask his question if he wants to answer it. I want to know what he is going to state.

The Court: It seems to be a senseless procedure, Mr. Mitchell, to ask yourself a question. *I dare say he wouldn't answer anything that he shouldn't.*

167 Wash., at 424 (emphasis in the original).

On appeal, the Court held the comment violated Article 4, § 16.

Even the most oblique judicial comment must be scrutinized carefully because of the impact it may have on the jury:

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

114 Wash. at 425.

Here, the jury could have inferred that the judge considered Officer Legaspi credible when he testified that street-level crack cocaine sales can often involve the sale of very small amounts, and that even 0.2 grams was a "marketable amount". 1RP 113. The trial court did not leave resolution of this factual issue to the jury, but instead informed the jury that the prosecution had "established" that fact through Officer Legaspi's testimony. 1RP 114. This was an improper judicial comment on the evidence that warrants reversal of Thompson's conviction.

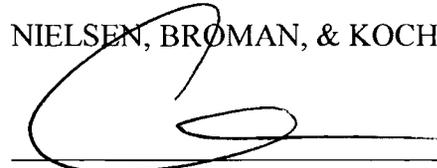
B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse Thompson's conviction.

DATED this 20~~th~~ day of July 2011.

Respectfully submitted,

NIELSEN, BROMAN, & KOCH

A handwritten signature in black ink, appearing to read 'C. Gibson', is written over a horizontal line.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 66438-7-1
)	
DERRICK THOMPSON,)	
)	
Appellant.)	

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 20TH DAY OF JULY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DERRICK THOMPSON
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SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JULY, 2011.

x. *Patrick Mayovsky*

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