

NO. 34749-1-II

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

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STATE OF WASHINGTON,  
Respondent,  
v.  
JESSICA COLPITT,  
Appellant.

FILED  
COURT OF APPEALS  
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THURSTON  
COUNTY

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
CAUSE NO. 03-1-01571-1

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HONORABLE CHRIS WICKHAM, Judge

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RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether the trial court properly precluded the defendant from presenting a common law medical necessity defense at trial.

2. Whether the prosecutor committed misconduct in challenging the credibility of the defendant's assertion that the marijuana seized in this case was for her personal, medical use.

3. Whether the prosecutor committed misconduct by commenting on the defendant's failure to call certain witnesses to testify.

4. Whether the prosecutor's reference in closing argument to protecting the community constituted misconduct.

B. STATEMENT OF THE CASE

On March 18, 2003, Thurston County Detectives Rudloff and Duprey went to the residence of defendant Jessica Colpitt to investigate a tip concerning unlawful drug activity at that location. They arrived at the residence at about 3 that afternoon and contacted Colpitt, who was at home with her four-year-old daughter. The defendant consented to a search of her residence. Trial RP 60-61.

The officers located a briefcase on the floor of the living room. Inside the briefcase were

five sandwich-style baggies containing marijuana. Each baggie contained between 2 and 3 grams of marijuana, for a total of 12.1 grams. Trial RP 62, 108-109. The briefcase also contained an electronic gram scale, a pill bottle containing a small additional amount of marijuana, \$165 in currency, and some papers listing names and monetary figures. Trial RP 62-63.

The defendant and her daughter had previously been diagnosed as being HIV positive. Trial RP 170. The defendant described her medical condition to the officers to explain her possession of marijuana. Trial RP 182-183. One of the detectives asked whether she had a note from her doctor with regard to her use of marijuana for medical purposes. She responded in the negative, admitting that her doctor had refused to write a note for her in regard to such use of marijuana. Trial RP 189.

Detective Rudloff inquired whether the defendant had ever given any of the marijuana to her daughter. Initially, the defendant denied

doing so. However, she then admitted that she had done this months earlier, and thereafter admitted that she had actually done this just a few days earlier. Trial RP 212-213, 239-242.

On August 18, 2003, an Information was filed in Thurston County Superior Court charging the defendant with one count of unlawful delivery of marijuana to a child and one count of unlawful possession of marijuana with the intent to deliver. CP 3. At the time of the jury trial in this case, which began on April 19, 2006, the charges had been reduced to one count of unlawful possession of marijuana with the intent to deliver, and an allegation had been added that the offense had occurred within a thousand feet of a school bus route stop. Trial RP 50-51.

At the trial, the defendant testified that she had knowingly possessed marijuana at her residence and used it for medical purposes. She claimed that she had divided the marijuana into the five baggies for the purpose of separating out each daily dose. Trial RP 175-178.

The defendant was convicted of the lesser included offense of unlawful possession of marijuana less than 40 grams, a misdemeanor. On April 21, 2006, she was sentenced to 90 days in jail. CP 106-107.

#### C. ARGUMENT

1. Pursuant to *State v. Butler*, the trial court properly precluded the defendant from presenting a common law medical necessity defense at the trial of this cause.

At the beginning of the trial in this case, the court ruled that the defendant could not present at trial a common law defense of medical necessity, but rather could only present a medical necessity defense if she met the requirements for doing so set out in Chapter 69.51A RCW. In making this ruling, the court relied upon *State v. Butler*, 126 Wn. App. 741, 109 P.3d 493 (2005). Trial RP 9-10, 28-29. The court further found that the defense offer of proof did not satisfy the requirements for presenting a defense of medical necessity as a primary caregiver pursuant to RCW 69.51A.040. Trial RP 38-39.

On appeal, this defendant contends that the

holding of the Court of Appeals, Division Two, in State v. Butler, supra, was wrongly decided. She asks that it be overruled. In response, the State notes that the defendant relies upon Chapter 69.51A RCW to claim that a medical necessity defense now exists within this state regarding the possession of marijuana, and yet ignores the dictates of that very statutory scheme regarding such a defense in claiming that a defendant can, as a result of the passage of Chapter 69.51A RCW, present at trial a common law defense of medical necessity for marijuana possession. Such a contradictory argument does not support overruling this court's decision in State v. Butler.

In State v. Diana, 24 Wn. App. 908, 604 P.2d 1312 (1979), Division Three of the Court of Appeals held that, based on common law, a defense of medical necessity could be presented with regard to a charge of possession of marijuana. The court stated that such a defense would exist in only very limited circumstances. The defendant would have the affirmative burden of proving by a

preponderance that: (1) the defendant believed that the use of marijuana was necessary to minimize the effects of the defendant's illness, and that the reasonableness of that belief was corroborated by medical testimony; (2) that the benefits derived by the defendant from the use of marijuana were greater than the harm sought to be prevented by the controlled substances law; and (3) that there was no lawful alternative that was as effective in minimizing the effects of the illness. Diana, 24 Wn. App. at 915-916. In State v. Cole, 74 Wn. App. 571, 578, 874 P.2d 878 (1994), Division Two of the Court of Appeals adopted the holding in Diana.

In 1997, the Washington Supreme Court decided the case of Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997), wherein Seeley challenged the constitutionality of legislation categorizing marijuana as a Schedule I controlled substance. A substance is placed in Schedule I if it: (1) has high potential for abuse; (2) has no currently accepted medical use in treatment in the United

States; and (3) lacks accepted safety for use in treatment under medical supervision. RCW 69.50.203(a).

In Seeley, the State Supreme Court noted that the Washington Constitution, Article XX, section 2, specifically grants the Legislature the authority to regulate the practice of medicine and the sale of drugs and medicine. Seeley, 132 Wn.2d at 789. The court further found that the designation of marijuana as a Schedule I controlled substance was rationally related to a legitimate state interest. Seeley, 132 Wn.2d at 813-814.

In State v. Williams, 93 Wn. App. 340, 968 P.2d 26 (1998), *review denied in* 138 Wn.2d 1002 (1999), Division Two of the Court of Appeals once again examined the medical necessity defense in the context of marijuana possession. The court noted that implicit in any application of the medical necessity defense in a marijuana case was that marijuana had currently accepted medical uses. However, the Washington Legislature had

constitutional authority to make that determination, and by including marijuana as a Schedule I drug, the Legislature had determined that marijuana had no accepted medical use. This decision of the Legislature had been upheld as constitutional by the Washington Supreme Court in Seeley, supra. Therefore, reasoned the appellate court in Williams, the defense of medical necessity was not available in a case of marijuana possession. Williams, 93 Wn. App. at 346-347.

In that same year, 1998, Initiative 692 was approved by voters. It was then codified as Chapter 69.51A RCW, the Medical Use of Marijuana Act. This law created an affirmative medical necessity defense for the medical use of marijuana provided a defendant was a qualifying patient or primary caregiver, as those terms were statutorily defined, possessed no more marijuana than was necessary for a patient's 60-day supply, and presented the valid documentation required by this law to any law enforcement officer requesting such information. RCW 69.51A.040.

In State v. Butler, 126 Wn. App. 741, 109 P.3d 493 (2005), Butler was charged, among other offenses, with one count of possessing less than 40 grams of marijuana. Butler lacked the necessary documentation showing him to be a qualifying patient under Chapter 69.51A RCW, and therefore lacked the ability to present a medical necessity defense pursuant to RCW 69.51A.040. The trial court refused to allow Butler to present a common law medical necessity defense to the State's charges. On appeal, he claimed this was error. Butler, 126 Wn. App. at 744-745.

Division Two of the Court of Appeals noted that in State v. Williams, supra, the court had found that there was no common law medical necessity defense in Washington with regard to the use of marijuana. The court then found that Initiative 692, the Medical Use of Marijuana Act, had filled this vacuum by creating a statutory medical necessity defense for possession of marijuana. This statutory defense was more restrictive than the common law defense of medical

necessity, and was held to have superseded that common law defense. Butler, 126 Wn. App. at 748-750.

On appeal in the present case, the defendant argues that Butler, supra, was wrongly decided, contending that the Medical Use of Marijuana Act did not supersede the common law medical necessity defense in Washington, but rather revived it. However, no provision of that Act is cited by the defendant for this assertion.

Clearly, the Act created a carefully defined statutory defense which is not the same as the common law defense. RCW 69.51A.040. The legislation could have adopted the common law medical necessity defense, as had been set out in prior case law, but did not do so. The Court of Appeals in Butler, supra, came to the only possible conclusion, which was that the Act had superseded the common law medical necessity defense in marijuana cases, replacing it with a more structured and defined affirmative defense. Therefore, the trial court in the present case did

not err in precluding the defendant from presenting a common law medical necessity defense at trial.

2. The prosecutor did not manipulate or misstate or falsify the evidence in challenging the credibility of the defendant's assertion that the marijuana seized in this case was for her personal, medical use.

The defendant testified that in 2000 she began using marijuana to alleviate some of the physical effects of her illness. Trial RP 176-177. She further stated that she was still using marijuana for this purpose as of March 2003, and that she was using 2.5 to 3 grams per day. Trial RP 178. According to the defendant, the five baggies of marijuana found by the police were her daily rations she intended to use for herself. Trial RP 178-180, 186-187.

On cross-examination, the prosecutor elicited the following responses from the defendant:

Q. Now, the detective asked you if you had a note from your doctor about your supposed medical marijuana, right?

A. Right.

Q. And you told him no?

A. Right.

Q. You told him that your doctor wouldn't write you a note for it?

A. Correct

Trial RP 189.

In closing argument, defense counsel stated that the defense agreed the defendant had been in possession of marijuana and asked that the jury find the defendant guilty of possession of marijuana "because that is what she did". Trial RP 271, 285. Defense counsel then argued that the evidence regarding the defendant's medical condition explained why the marijuana was for her personal use and not intended for delivery to anyone else. Trial RP 274.

In rebuttal argument, the prosecutor challenged the credibility of the defendant's testimony. The prosecutor referred to the issue of the defendant's intent as of March 2003 with regard to the marijuana seized, and her claim at trial that she had intended only to use the marijuana for her personal, medical condition. The prosecutor then questioned how credible it was

that the defendant would have chosen to use the marijuana for that purpose when her own doctor had refused to support such use.

If she is using it for medical purposes, and once again it is not a central issue, because it is not a defense, it just goes to this one little part, but if she is using it for medical purposes, why won't her doctor give her a note?

I mean do we go around deciding, hey, I think I'm in pain, I think I will use morphine, I will just get me some morphine, I talked to my doctor about it, he said I can't have it, or I don't have OxyContin or Oxycodone, but I will just get some off the street, I will buy some off the street and use it, because it is medically necessary in my opinion? That is not how it works, ladies and gentlemen.

Trial RP 297-298.

On appeal, the defendant contends that this argument by the prosecutor constituted misconduct.

When prosecutorial misconduct is claimed, the defense bears the burden of establishing the impropriety of the prosecutor's comments. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

The allegedly improper remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the

argument, and the instructions to the jury. Id.  
at 561.

The defendant contends that the prosecutor's argument misstated the evidence. Of course, it did not. The defendant had testified consistent with the prosecutor's reference to the evidence in his argument.

The defendant also claims that the prosecutor manipulated the evidence because he was aware that a physician named Carter was prepared to present evidence in support of a common law medical necessity defense for this defendant. However, that fact was irrelevant to the prosecutor's argument.

This Dr. Carter had examined the defendant and had reviewed her medical history about a week before the start of the trial of this cause in 2006. Trial RP 27. He never had contact with the defendant back in 2003. Trial RP 40. Nothing Carter said or did in 2006 would have influenced the defendant's intent back in 2003. The prosecutor's contention in argument was that a

patient would not likely choose to use marijuana for her medical condition if her doctor refused to support that choice, and therefore the defendant's claim regarding how she intended to use the marijuana was not credible. The prosecutor did not manipulate or falsify any evidence in making this argument.

In any event, there was no objection to this argument. In claiming prosecutorial misconduct, the defendant also has the burden to show that there was prejudicial effect. Brown, 132 Wn.2d at 561. To establish prejudice, the defendant must show that there is a substantial likelihood the misconduct affected the jury's verdict. Even when some prejudice can be shown, if there was no objection made at the time of the argument, the defendant must also show that the resulting prejudice was so enduring that it could not have been neutralized by a curative instruction to the jury. Id. at 561.

Here, the defendant claims on appeal that there is a substantial likelihood the prosecutor's

argument influenced the outcome of the trial. However, no explanation is provided as to how that could be true. The prosecutor's argument was intended to convince the jury that the defendant possessed the marijuana with the intent to deliver, rather than for her own use. Yet, the jury found the defendant guilty only of simple possession of the marijuana. As noted above, during closing argument defense counsel twice asked the jury to find his client guilty of possession of marijuana, arguing that was the crime she committed. Trial RP 271, 285. The jury decided the case in the manner defense counsel requested. Thus, there is no showing of prejudice.

3. The prosecutor's comments concerning the defense failure to call certain witnesses to testify did not constitute misconduct, but rather was a proper application of the missing witness doctrine.

At trial in the present case, the defendant testified concerning the notebook, containing partial names and monetary amounts, which was found in the briefcase along with the marijuana.

One of the entries read "Ray \$45". The defendant testified that the entry referred to the amount remaining on a loan she had made to Ray Ramos. Trial RP 185. The defense called Ramos as a witness. Ramos corroborated that the defendant had loaned him money and he was paying her back, although he had difficulty remembering whether the loan had occurred before or after March 2003. Trial RP 160-162.

Another entry read "Leonard paid a hundred dollars, \$50 left". The defendant claimed that this was in reference to Leonard Hayley's payment on a loan she had made to him. Trial RP 185. Hayley was the father of the defendant's daughter. Trial RP 185. While Leonard was available to testify for the defense, the defense chose not to have him do so. Trial RP 215.

A third entry read "Amy, \$31 pipe balance". The defendant testified that she had purchased a glass pipe for her friend Amy but had asked Amy to pay her back. Trial RP 185-186. However, no last name was given for Amy, and she did not testify at

the trial.

On cross-examination, the prosecutor asked the defendant whether either Amy or Leonard Hayley was going to testify. Defense counsel objected, but the court overruled the objection. Trial RP 214-215. During closing argument, the prosecutor referred to the defense failure to have either Leonard Hayley or Amy testify to corroborate the claim that the entries relating to them had nothing to do with the sale of marijuana, suggesting that this failure cast doubt on the credibility of the defendant's claim. Trial RP 269, 292-293.

On appeal, the defendant contends that the prosecutor's references to the defense failure to have these witnesses testify was misconduct. However, pursuant to State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991), the prosecutor's questions and comments in the present case were a proper application of the missing witness doctrine.

In Blair, the defendant was convicted for

unlawful delivery of a controlled substance. Police had searched his residence pursuant to a warrant and had found cocaine and sheets of paper with handwritten notations. At the trial, Blair testified that most of the names and numbers on the sheets of paper referred to personal loans and amounts owed to him from card games. The defense had one of the persons listed on the slips of paper provide corroborating testimony at the trial. However, none of the other people listed on the slips of paper testified. In closing argument, the prosecutor argued that the failure of the defense to have these other persons come in and testify cast doubt on the credibility of Blair's claim. Blair, 117 Wn.2d at 482-484.

On appeal, Blair argued that the prosecutor's argument constituted misconduct. However, the Washington Supreme Court found that the prosecutor's comments constituted a valid application of the missing witness doctrine and did not constitute error. Blair, 117 Wn.2d at 488.

Under the missing witness doctrine, when evidence that would properly be part of the case is within the control of the party whose interest it would naturally be to produce it, and she fails to do so, the jury may draw an inference that the evidence would be unfavorable to her. Blair, 117 Wn.2d at 485-486. Pursuant to this doctrine, a prosecutor may comment on a defendant's failure to call particular witnesses if: the defendant's testimony implies that the absent witness could corroborate the defense theory of the case, the witness is peculiarly available to the defendant, the testimony concerns a matter of importance and is not merely cumulative, the witness's absence has not been otherwise explained, the witness is not incompetent nor subject to a testimonial privilege, the witness's testimony would not be self-incriminatory if favorable to the defendant, and the prosecutor's comments do not infringe on a defendant's constitutional rights. Blair, 117 Wn.2d at 487-492; State v. Cheatam, 150 Wn.2d 626, 652-653, 81 P.3d 830 (2003).

Those conditions are met in the present case. The defendant's testimony indicated that these witnesses could corroborate that the entries had nothing to do with the sale of marijuana. Since the entries only referred to first names, the witnesses were peculiarly available to the defendant. Since the entries were alleged by the prosecution to be evidence of the defendant's drug-dealing, the testimony of these witnesses would have concerned a matter of importance. The testimony would not have been cumulative here any more than it was in Blair, supra. No explanation was provided for the absence of these witnesses other than the defense choice not to call them. Had the witnesses testified consistent with the claims of the defendant, that testimony would not have incriminated the witnesses in the commission of a crime.

The defendant contends on appeal that such comments by the prosecutor did infringe on the defendant's constitutional right to remain silent. However, this contention was rejected by the

Washington Supreme Court in Blair, 117 Wn.2d at 491-492 and also in State v. Russell, 125 Wn.2d 24, 90-92, 882 P.2d 747 (1994). It was also rejected by Division One of the Court of Appeals in State v. Contreras, 57 Wn. App. 471, 473-475, 788 P.2d 1114 (1990).

Thus, the prosecutor's comments regarding the defense failure to call Leonard Hayley and Amy to testify was not misconduct. Even if it had been, there could be no showing of prejudice. The comments were made to support the prosecution's contention that the defendant had committed unlawful possession of a controlled substance with intent to deliver. Instead, the jury found the defendant guilty of possession of marijuana as the defense requested.

4. The prosecutor's reference in closing argument to protecting the community was in regard to the jury's responsibility to follow the law, and so did not constitute misconduct.

The defendant contends that the prosecutor committed misconduct by arguing to the jury that the defendant should be convicted to protect the community. However, this claim mischaracterizes

the prosecutor's argument. The prosecutor properly called upon the jury to decide the case by applying the law to the facts and to not be swayed by either sympathy or prejudice. It was in this context that the prosecutor made his reference to protecting both the community, and also protecting the innocent. This was not an exhortation to convict the defendant.

Ladies and gentlemen, once again, I want to ask you to do the only thing that anyone has a right to do in this courtroom, follow that law that you hold in your hands in every sense now. Uphold your oath and apply that law to the facts of this case. Divorce sympathy and prejudice from your consideration, because there are two sides to your job here, ladies and gentlemen. You are here to protect the innocent, and you are also here to protect the innocent, the people in our community, including the kids. Thank you for your attention.

Trial RP 303.

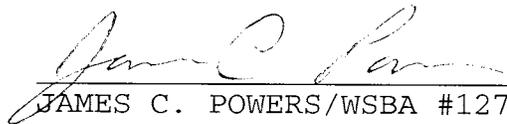
There was no misconduct here. Even if there had been, there was no objection. As has been discussed previously in this Brief, there has been no showing of prejudice, much less prejudice so enduring that it could not have been neutralized by a curative instruction to the jury.

D. CONCLUSION

For the reasons discussed above, the State asks that the defendant's conviction for the unlawful possession of marijuana, and the resulting Judgment and Sentence, be affirmed.

DATED this 8th day of January, 2007.

Respectfully submitted,



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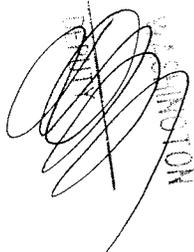
JAMES C. POWERS/WSBA #12791  
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Respondent	)	DECLARATION OF
	)	MAILING
v.	)	
	)	
MARK T. MURRAY,	)	
Appellant	)	

STATE OF WASHINGTON	)	
	)	ss.
COUNTY OF THURSTON	)	

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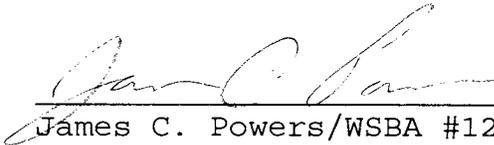
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 8th day of January, 2007, I caused to be mailed to appellant's attorney, SUZANNE LEE ELLIOTT, a copy of the Respondent's Brief, addressing said envelope as follows:

Suzanne Lee Elliott,  
Attorney at Law  
705 Second Avenue  
Suite 1300 Hoge Building  
Seattle, WA 98104

I certify (or declare) under penalty of perjury  
under the laws of the State of Washington that  
the foregoing is true and correct to the best of  
my knowledge.

DATED this 8<sup>th</sup> day of January, 2007 at Olympia,  
WA.

  
\_\_\_\_\_  
James C. Powers/WSBA #12791  
Senior Deputy Prosecuting Attorney