

NO. 35270-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ADA CELIA MOORE

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY [Signature] DEPUTY

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

The Honorable Sally F. Olsen, Judge

BRIEF OF APPELLANT

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PM 1-16-07

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A. ASSIGNMENTS OF ERROR

Issues Presented on Appeal

1. The prosecutor's statements in closing argument constituted prejudicial misconduct.
2. Appellant was denied her right to a fair trial by the prosecutor's comments in closing argument.
3. Appellant was denied her right to a fair trial where the court did not provide a required unanimity instruction.
4. Appellant was denied due process where the charging document did not contain any facts in support of the elements of the crime charged.

Assignments of Error

1. Did the prosecutor's statements in closing argument constitute prejudicial misconduct?
2. Was Appellant denied her right to a fair trial by the prosecutor's comments in closing argument?
3. Was Appellant denied her right to a fair trial where the court did not provide a required unanimity instruction?
4. Was Appellant denied due process where the charging document did not contain any facts in support of the elements of the crime

charged?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Ms. Ada Moore was charged with one count of possession of a controlled substance, to-wit: Methamphetamine, in violation of RCW 69.50.4013 and RCW 69.50.206(d)(2). CP 1. The charging document read as follows:

On or about May 10, 2006, in the County of Kitsap, State of Washington, the above named Defendant did possess a controlled substance, to-wit: Methamphetamine...

CP 1. Ms. Moore was convicted by a jury as charged, the Honorable Sally Olsen presiding. CP 21-22. She was sentenced within the standard range. CP 24. This timely appeal follows. CP 34.

a. Jury Instruction Issue.

The Court provided a general verdict form to the jury without requiring unanimity. RP 57. **After** the jury returned a verdict of guilty, the Court instructed the jury in the form of a special verdict as follows:

**THIS SPECIAL VERDICT IS TO BE ANSWERED  
ONLY IF THE JURY FINDS THE DEFENDANT  
GUILTY OF POSSESSION OF A CONTROLLED  
SUBSTANCE AS CHARGED IN COUNT ONE.**

We, the jury return a special verdict by answering as follows-

1. Did the defendant possess State's exhibit 1?

- Yes
- No
- No Unanimous Agreement

We, the jury return a special verdict by answering as follows-

2. Did the defendant possess State's exhibit 2?

- Yes
- No
- No Unanimous Agreement

We, the jury return a special verdict by answering as follows-

3. Did the defendant possess State's exhibit 3?

- Yes
- No
- No Unanimous Agreement

Supp CP Special Verdict August 15, 2006). On the special verdict form the jury checked "no unanimous verdict for question "1, "Yes" for question "2" and "No unanimous verdict" for question 3. The jury was not instructed that the finding of guilt as to each exhibit must be unanimous in finding possession beyond a reasonable doubt.

b. Prosecutorial Misconduct

During closing argument the prosecutor made the following statements:

MR. CURE: Thank you, Your Honor. Ladies and gentlemen, I would like to make an observation. We have

been here the last day and a half. You have been listening to the attorneys and listening to the testimony. It might be natural for you, as jurors, to think that there is some real issue as to the defendant's guilt. Well, there is no issue as to the defendant's guilt. The defendant's guilt could not be any clearer. When you are caught with meth in your house, when you are caught with meth in your pants, and when you are caught with meth in your underwear, you are guilty of the crime of possession of a controlled substance. It's the end of the ball game. The score is over. Now, the defense has raised several points in their argument. There is a drug dog that apparently -- we don't know anything about the training of the dog. There is videotape. Officer Valley wasn't there. I am really harping on points, and I would suggest to you that they're red hearings and that the idea is to get you to void looking at the big picture in this case, trying to get you to stare at a couple of trees and miss the forest. It's the oldest trick in the book.

RP 51-52.

Defense objected as follows: "MS. MUTH: I'm going to object to that. I think that is improper argument.". The Court allowed the argument ruling" It's argument. I will allow it.". RP 52.

## 2. SUBSTANTIVE FACTS

Ms. Moore was charged with one count of possession of methamphetamine. The state however presented three different potential possessions. The first presented involved officer Scott Eberhard's testimony that he contacted Ms. Moore at her home on May 5, 2006 where he found a scale and methamphetamine on a bookshelf in the trailer home in the first

room entered. RP 9-10. The methamphetamine was in a bowl on the scale and was introduced as Exhibit 3. RP 27.

Ms. Moore testified that she lived at the trailer home with her husband but that a person named Scott and another named Grady had used that room to help her husband fix some pipes in the trailer home. RP 31. Ms. Moore testified that the pipe and scale were not in the room before Scott and Grady entered it. RP 31-32.

The state also presented evidence that Ms. Moore had a small quantity of methamphetamine in the coin pocket to the borrowed jeans she was wearing. RP 33. Ms. Moore testified that the jeans were borrowed and that she was unaware of the methamphetamine in the coin pocket. RP 33. The methamphetamine in the coin pocket weighed less than  $\frac{1}{4}$  of a gram, 0.21 grams. RP 26. The third allegation of possession of methamphetamine possession involved officer Melanie Pate's testimony that during a strip search of Ms. Moore she saw a plastic baggie fall out of Ms. Moore's underwear. 19-20. When analyzed, the baggie contained .05 grams of methamphetamine. RP 27. Ms. Moore testified that the methamphetamine was on the floor of the jail cell and did not come from her person. RP 34.

C. ARGUMENT

1. PROSECUTORIAL MISCONDUCT  
DENIED MS. MOORE HER RIGHT TO A  
FAIR TRIAL.

Misconduct by a prosecutor may violate a defendant's right due process right to a fair trial. State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). A defendant's right o a fair trial is denied when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140. 145, 684 P.2d 699 (1984). The prosecutor has a duty to see that an accused receives a fair trial. In the interests of justice, a prosecutor must act impartially, seeking a verdict free of prejudice and based upon reason." State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994), citing State v. Charlton, 90 Wn.2d at 664-45.

a. Prosecutor's Expression of His  
Personal Opinion As to Guilt Denies  
the Defendant Her Right To Due  
Process.

It is misconduct for the prosecutor to express his personal opinion or draw legal conclusions as to guilt. State v. Reed, 102 Wn.2d at 145-46; State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993) (. Prosecutors are also prohibited from making prejudicial statements that are not supported by the

record or encouraging the jury to render a verdict based on facts not in evidence. State v. Dhaliwal, 150 Wn.2d 559, 577, 79 P.3d 432 (2003); State v. Stover, 67 Wn. App. 228, 230-31, 834 P.2d 671 (1992), review denied, 120 Wn2d 1025, 847 P.2d 480 (1993). The prosecutor as an officer of the court has a duty to see that the accused receives a fair trial. State v. Charlton, 90 Wn.2d at 664-45) (verdict reversed for misconduct where the prosecutor told the jury that the defendant invoked his marital privilege prohibiting his spouse from testifying).

The Washington State Rules of Professional Conduct 3.4(f) states unequivocally that an attorney shall not

Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of an accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

The prosecutor in the instant case disregarded both the Rules of Professional Conduct and well established case law prohibiting misconduct. He expressed his own personal opinions as to Ms. Moore's guilt during closing argument. First he told the jury that it was not "natural" to think that Ms. Moore might not be guilty because in his opinion "there is no issue as to the defendant's guilt. The defendant's guilt could not be more clear." RP 52.

The prosecutor then told the jury that the defense closing argument was intended to “trick” them, RP 52.

By stating his opinion as to Ms. Moore’s guilt and by telling the jury that the defense was a “trick” the prosecutor violated his duty to protect Ms. Moore’s right to a fair trial. He attempted to sway the jury into finding guilt through expressing his personal opinion as to guilt rather than based on the evidence presented. It was for the jury and not the prosecutor to decide whether the evidence was sufficient to establish guilt. Charlton, supra, Reed, supra; Stith, supra.

In State v. Reed, 102 Wn.2d at 143, the prosecutor told the jury in closing that the defense attorney could not be trusted because he was from the City and that the witnesses were also not to be trusted because the prosecutor “had all of the goods” and the defendant was guilty.

It's quite an experience to try a case with a gentleman like Mr. Taylor, specially [\*\*\*6] somebody as eloquent as he is. If I irritated him, it is probably because I had all the goods. It must be very difficult to represent somebody like Gordon Reed when you don't have anything. . . . Let me do that again. Logic. You have A, and you take A and B and you get to C, a conclusion. The doctors have all their experience, their background. That's B. They asked Mr. Reed about the incident itself, and he tells him something. So you've got A, you've got B and you have got C, a conclusion. But since A is a liar, this guy couldn't tell the truth under torture. He has no idea what it is. . . . In all their experience, they're gentlemen. They really are. Dr. Kaufman, I can't imagine spending a

more pleasant afternoon with somebody. He looked very bad at the end of cross examination. I think a lot of his -- his education and stuff -- we've got education down here in the woods. I've got that many years of education and 3 more.

....

Are you going to let a bunch of city lawyers come down here and make your decision? A bunch of city doctors who drive down here in their Mercedes Benz?

Id. The Supreme Court in Reed, supra reversed Mr. Reed's conviction finding that the prosecutor's comments regarding his opinion as to the defendant's guilt and his comments on the witnesses created a substantial likelihood that the comments affected the jury. Reed, 102 Wn.2d at 145, 147.

In the instant case, as in Reed, the prosecutor told the jury that the defense attorney was not to be trusted and that the defendant was, in his opinion, guilty. RP 51-52. These comments are of the same caliber as those in Reed and for the same reasons created a substantial likelihood that the comments affected the jury. As in Reed, reversal and remand for a new trial is the appropriate remedy.

b. Ms. Moore Was Prejudiced By the Prosecutor's Misconduct.

The repeated acts of misconduct by the prosecutor make it substantially likely that the verdict was affected by the misconduct. State v.

Dhaliwal, 150 Wn.2d at 578. Prejudice is established where “there is a substantial likelihood the instances of misconduct affected the jury’s verdict. Id. The Court considers the following factors in evaluating prejudice from a trial irregularity such as prosecutorial misconduct:

(1) the seriousness of the irregularity; (2) whether the statement at issue was cumulative evidence; (3) whether jurors were properly instructed to disregard the remarks of counsel not supported by the evidence; and (4) whether the prejudice was so grievous that nothing short of a new trial could remedy the error.

State v. Mak, 105 Wn.2d 692, 701, 728 P.2d 407 (1986), overruled on other grounds, State v. Hill, 123 Wn.2d 641, 870 P.2d 313 (1994).

A prosecutors comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Dhaliwal at 150 Wn.2d at 578, citing, State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). To determine whether misconduct warrants reversal, the court considers its cumulative effect on the jury. State v. Suarez-Bravo, 72 Wn. App. at 367

Reviewing the closing argument in its entirety, it was prejudicial. The prosecutor did not dissect the evidence but rather told the jury that Ms. Moore was guilty.

When you are caught with meth in your house, when you are caught with meth in your pants, and when you are caught with

meth in your underwear, you are guilty of the crime of possession of a controlled substance. It's the end of the ball game. The score is over

RP 52. The actual factual evidence presented during trial was weak and the jury was only able to agree on one of three potential possessions. The improper argument informing the jury that Ms. Moore was guilty rather than instructing them to examine the evidence against the law denied Ms. Moore her right to a fair trial because it invited the jury to find guilt based on “irrelevant and inflammatory matter”....”which has the tendency to prejudice the jury against the accused,....”. State v. Miles, 73 Wn.2d 67, 70, 436 P.2d 198 (1969).

[i]f prosecutors are permitted to convict guilty defendants by improper, unfair means, then we are but a moment away from the time when prosecutors will convict innocent defendants by unfair means.

Charlton, 90 Wn.2d at 665, citing, State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976).

The prosecutor clothed in an aura of special reliability as an officer of the court used tactics during closing argument included an argument for guilt based on the prosecutor's opinion as to guilt and not based on facts in evidence. State v. Demery, 144 Wn.2d 753, 763, 30 P.3d 1278 (2001). The

prosecutor also told the jury that the defense theory of the case was a trick. Together these statements encouraged the jury to find guilt on improper basis, rather than on facts supporting a conclusion of guilt beyond a reasonable doubt as to the elements of the crime charged. There is a substantial likelihood that the prosecutor's misconduct tainted the verdict: the remedy is reversal and remand for a new trial.

2. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO PROVIDE A UNANIMITY INSTRUCTION.

- a. The Jury Was n Not Required to Be Unanimous As to the Several Distinct Acts Presented in Support of the Single Crime Charged.

Jury unanimity is required when the states charges a single crime that may have been committed by several distinct acts. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Hanson, 59 Wn. App. 651, 656, 800 P.2d 1124 (1990 ). Jury unanimity is assured when the trial court instructs that the “jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt”. State v. Petrich, 101 Wn.2d at 572.

The Supreme Court explained:

When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected. We therefore adhere to the [*State v.*] *Workman*

*[66 Wash. 292, 119 P. 751 (1911)]* rule, with the following modification. The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, if the jury is [\*656] instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement.

In Hanson, the Court reversed the conviction for failing to provide a unanimity instruction where the evidence suggested a “multitude of events sufficient to support conviction”. State v. Hanson, 59 Wn. App. at 658. The error was not harmless because the Court ruled that the jury could have had reasonable doubt as to some of the events presented. State v. Hanson, 59 Wn. App. at 659-60.

In the instant case, Ms. Moore was charged with one count of possession of methamphetamine by several distinct acts. As such she was entitled to a unanimity instruction under State v. Petrich, supra that expressly informed the jury that “all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt.” State v. Petrich, 101 Wn.2d at 572. The to-convict instruction merely required the jurors to find that “on or about May 10, 2006, the defendant possessed a controlled substance, to-wit: Methamphetamine” Supp CP (Jury Instruction #9 August

15, 2006). This instruction did not direct that the jury must unanimously agree on one of the three acts of possession alleged during trial.

After the jury returned a verdict of guilty, the judge provided the jury with a special verdict form that asked if the jury was unanimous as to each exhibit presented to the jury. RP 63. The special verdict form did not provide any instruction regarding the requirement that the jury find possession beyond a reasonable doubt and did not reference the jury instructions. It simply instructed the jury to answer the special verdict form is the jury “finds the defendant guilty of possession”. The jury indicated unanimity only as to the state’s Exhibit 2. Supp CP (Jury Instruction #9 August 15, 2006); Supp CP (Jury Instruction #9 August 15, 2006); RP 63-64.

The special verdict form did not protect Ms. Moore’s right to unanimity because it did not require the jury to find that the state proved its case beyond a reasonable doubt as to each of its three exhibits. Moreover, the to-convict instruction did not reference the state’s exhibits and did not require the jury to unanimously find that the state proved possession of methamphetamine beyond a reasonable doubt as to each exhibit. There was no express connection between the jury instructions and the special verdict form. In the instant case, the purpose of the Petrich instruction was to

guarantee that the jury unanimously find guilt beyond a reasonable doubt based on the same evidence. The special verdict form did not accomplish this required goal.

b. Lack of Unanimity Instruction Not Harmless Error.

Failure to provide a Petrich instruction “affects the defendant's constitutional right to jury trial, State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988), and thus may be raised for the first time on appeal.” State v. Hanson, 59 Wn. App at 659. “Constitutional error requires reversal unless it is harmless beyond a reasonable doubt”. *Id.* Error can only be deemed harmless if no rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Id.* In the instant case as in Hanson, the jury had reasonable doubt as to at least two of the events presented. The error was not harmless.

3. THE STATE FAILED TO COMPLY WITH CrR 2.1 WHICH REQUIRES THE INDICTMENT OR INFORMATION CONTAIN THE ESSENTIAL FACTS CONSTITUTING THE CRIME CHARGED.

CrR 2.1(a)(1) provides in relevant part that “[t]he indictment or the information shall be a plain, concise and definite written statement of the

essential facts constituting the offense charged.” State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989). This has been referred to as the “essential elements” rule. State v. Leach 113 Wn.2d at 689. The "essential elements" rule requires that the charging document allege specific facts in support of each element of the crime charged in addition to specifically identifying the crime charged. State v. Leach 113 Wn.2d at 688-689. This means that the charging document must describe the acts that constitute the crime charged in addition to identifying the crime.

The essential elements rule is not a novel concept. The Supreme Court in State v. Royse, 66 Wn.2d 552, 557, 403 P.2d 838 (1965), citing with approval to Seattle v. Proctor, 183 Wash. 299, 48 P.2d 241 (1935) held that”

the information must state the acts constituting the offense in ordinary and concise language, not the name of the offense, but the statement of the acts constituting the offense is just as important and essential as the other requirements of the information, such as the title of the action and the names of the parties

State v. Royse, 66 Wn.2d at 557. In Royse, the Supreme Court held that the information was deficient where it did not specify the underlying felony the defendant intended to commit. The information read in relevant part as follows:

did then and there willfully, unlawfully and feloniously assault Mona Painter with the intent to commit a felony, by then and there grasping, seizing, holding and struggling with the said Mona Painter for the purpose of violently forcing the said Mona Painter into an automobile against her will and without her consent; . .

Royse, 66 Wn.2d at 553. This deficient information is far more detailed than the one in the instant case which merely charged that Ms. Moore “possessed” methamphetamine. CP 1.

In Leach, the Supreme Court also found the charging document defective for several reasons. First, it merely referenced the statute, “‘*RCW 9A.88.010*/PUBLIC INDECENCY’ and incorporated an attached police report describing the general facts of the July 8, 1986, offense.” Leach, 113 Wn.2d at 690. Second, the complaint did not specify the severity of the offense. Finally the information omitted an essential elemental fact that an alleged victim was under the age of 14.

In the instant case, as in Royse, supra and Leach, supra, the information simply did not contain facts in support of the elements of the crime charged. Ms. Moore was simply charged with possession of methamphetamine. CP 1. While this identified the crime charged, the information was defective because it did not identify the facts in support of the possession. Ms. Moore was left to guess as the acts which the state

intended to rely on to prove its case. As such she was not afforded her constitutionally guaranteed right to be apprised of the nature of the crime and the and facts in support of the crime. Const. art. 1, § 22 provides: “[i]n criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him, . . .”Id.

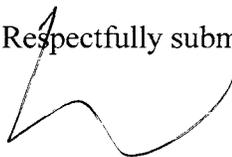
The purpose of the constitutional guarantee and of the essential elements rule is to provide the accused with notice of the crime charged and the acts constituting the crime so that the accused can prepare a defense and to prevent double jeopardy. Royse, 66 Wn.2d at 557. In Leach, supra and Royse, supra, the Supreme Court reversed the convictions for defective charging documents. Similarly, Ms. Moore’s rights were violated by the defective charging document and this Court should reverse her conviction.

D. CONCLUSION

For the reasons stated herein, Ms. Moore respectfully requests this Court reverse her conviction.

DATED this 12 day of January 2007.

Respectfully submitted,



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LISE ELLNER  
WSBA No. 20955  
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Ada Moore 4202 Country Lane Rd. #55 Bremerton, WA 98311 a true copy of the document to which this certificate is affixed, on January 12, 2007. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

\_\_\_\_\_  
Signature

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