

NO. 35386-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

CHEKEYMA NICHELL CUBEAN,

Appellant.

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STATE OF WASHINGTON
BY [Signature] REIDY

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

The Honorable Brian Tollefson, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Ms. Cuban's motion to suppress physical evidence.

2. The trial court erred in entering conclusions of law 9, 10, 11 and 12 in its written Findings of Fact and Conclusions of Law Regarding 3.6 Hearing. CP 48-52 (attached).

3. The trial court erred in denying Ms. Cuban's motion to dismiss the charges of possession of a controlled substance with intent to deliver at the close of the state's case.

4. There was insufficient evidence at trial to sustain Ms. Cuban's convictions for possession of a controlled substance with intent to deliver.

5. The trial court erred in failing to give instructions sufficient to allow Ms. Cuban to argue her theory of the case.

6. The trial court erred in failing to give an instruction which cautioned the jury that it could not find that Ms. Cuban intended to deliver a controlled substance based only on an officer's opinion that the amount of drugs was for more than personal use.

7. The prosecutor's misconduct in misstating the burden of proof in closing argument denied Ms. Cuban a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying Ms. Cuban's motion to suppress evidence where the police searched her before placing her under arrest and without reasonable suspicion that she was armed or presently dangerous, and would not have arrested her if they had not discovered a drug pipe during their illegal search?

2. Where there was no substantial evidence corroborating Ms. Cuban's mere possession of controlled substances--no packaging, scales, pager, crib notes, weapon, extraordinary and unexplained amount of cash--was there insufficient evidence of intent to deliver?

3. Did the trial court err in refusing to instruct the jury that it could not find intent to deliver based solely on the opinion testimony of a police officer that the amount of drugs was for more than personal use and that it must find substantial corroborating evidence in order to infer intent to deliver from the fact of possession, where such an

instruction was a correct statement of the law and was necessary to allow Ms. Cubean to argue her theory of the case and to prevent the jury from convicting solely on the testimony of the officer?

4. Did the prosecutor's misconduct in arguing to the jury that Ms. Cubean had to prove that she possessed the controlled substances only for personal use and that it had to decide whether she was more credible than the police officer deny Ms. Cubean a fair trial?

C. STATEMENT OF THE CASE

1. Procedural facts

The Pierce County Prosecutor's Office charged Chekeyma Cubean, by amended information, with two counts of possession of a controlled substance with intent to deliver and one count of unlawful use of drug paraphernalia. CP 43-45. The information charged Ms. Cubean with possessing the controlled substances within 1,000 feet of a school bus zone. CP 43-45.

A jury convicted Ms. Cubean as charged after a trial before the Honorable Brian Tollefson. RP 4, 118, 120. On October 2, 2006, Judge Tollefson imposed 144-month concurrent sentences on the felony

convictions. CP 169-173. Ms. Cubean subsequently filed a timely notice of appeal. CP 137-150.

2. CrR 3.6 motion

Prior to trial, Judge Lisa Worswick heard Ms. Cubean's motion to suppress physical evidence pursuant to CrR 3.6

The state's witness at the hearing on the motion was Tacoma Police Officer Gregory Hopkins. CP 125. Officer Hopkins testified that he and his partner were sitting in an unmarked car near the corner of 13th Street and Fawcett in Tacoma, Washington at 12:40 p.m. on January 2, 2006. CP 126. Hopkins and his partner were watching a group of people in front of a vacant building. RP 126. Hopkins saw a car pull up to a stop light and watched a person from the group, whom he recognized as Dorothy Hurd, leave the group and go to the car and lean in the window while the car sat through several cycles of the traffic light. CP 127. Ms. Cubean was in the area on the sidewalk while this took place. CP 127. Hopkins recognized Ms. Hurd and Ms. Cubean from prior contacts with them. CP 126-127.

Hopkins and his partner followed the car to get the license number, but returned to see the group huddled in a doorway of the abandoned building. CP 127. Hopkins jumped the curb in his car near the group. CP 127. As he approached, he saw a small bag containing what he believed to be crack cocaine fall to the ground between Ms. Hurd and Ms. Cuban; the other four members of the group scattered as Hopkins and his partner detained the two women. CP 127-128.

Hopkins testified that as he started a pat search of Ms. Cuban, he could see some money wadded in her pocket. CP 128. He then conducted a pat search for weapons. CP 128. According to Hopkins, when asked if she had anything on her, Ms. Cuban said she had a crack pipe. CP 128. Hopkins removed the pipe, placed Ms. Cuban in handcuffs and arrested her for possession of drug paraphernalia. CP 128, 130. As she was being booked into jail, Ms. Cuban appeared to adjust her bra and two baggies fell to the ground, one containing 14 rocks of cocaine and the other containing 8 acetaminophen pills. CP 128-129.

In its oral ruling, the court found that the officers did not have probable cause to arrest Ms. Cuban for possession of drug paraphernalia, but did have probable cause to arrest her for drug loitering. CP 134-135.

In the court's Findings of Fact and Conclusions of Law Regarding 3.6 Hearing, the court concluded that Officer Hopkins had probable cause to arrest Ms. Cuban for "Loitering for the Purposes of Drug Activity," that the initial detention was valid, the pat-down search was valid, the arrest was valid and that the evidence located while the defendant was being booked at jail was admissible. CP 48-52.

3. Trial evidence

a. The state's case

Officer Hopkins testified at trial consistently with his pretrial testimony. RP 18-84. Additionally, Officer Hopkins testified that in his experience, 14 rocks of cocaine were not for personal use. RP 48. On cross-examination, however, Hopkins had to agree that he did not see any drug transaction involving Ms. Hurd or anyone else, and that he did not find any scales, bindles or baggies in searching Ms. Cuban. RP 55-57, 60,

74. What he did find was Ms. Cuban's personal drug pipe and \$90. RP 58.

Franklin Boshears, a forensic scientist for the Washington State Patrol Crime Lab, testified that 14 rocks contained cocaine and weighed 1.5 grams. RP 85-90, 96. The tablets contained codeine. RP 93.

The parties stipulated that 13th and Fawcett was within 1,000 feet of a school bus stop. RP 100-102.

b. The half-time motion to dismiss

After the state rested, the defense moved to dismiss the charges of possession with intent to deliver on the grounds that Officer Hopkins's testimony was not sufficient to prove intent to deliver rather than simple possession and that there was no packaging or other evidence from which intent to deliver could be inferred. RP 103-113. Counsel argued that the fact that Ms. Cuban was in an area of high narcotics activity together with 14 rocks did not justify a finding of intent to deliver. RP 112. The court denied the motion based on Officer Hopkins' opinion that possession of two drugs made it likely that they were possessed with intent to deliver. RP 115.

c. The defense case

Defense investigator Jerry Crow measured the distance between Officer Hopkins and the group he was watching; Hopkins was about the distance of a football field. RP 128. Mr. Crow could not "make out anybody that might have been standing there." RP 128.

Ms. Cuban testified in her own behalf. She told the jury that she had purchased and smoked crack cocaine on January 2, 2006, but denied that she intended to deliver cocaine. RP 143-144. She explained that she suffered from bipolar disorder and received her monthly GAU award for her disability at midnight on January 1, 2006. RP 139. This had allowed her to withdraw money from her account through a cash machine. RP 140. Ms. Cuban had \$150 on January 2, 2006, some of which she obtained from pawning a ring for \$70 on December 31, 2005. RP 145. She separated out \$90 to use to reclaim the ring she had pawned two days earlier. RP 144. She spent \$50 on crack and \$5 on the pills which she used to ease the pain from a ganglion cyst in her wrist. RP 145. She purchased the drugs from

someone who was present at 13th and Fawcett. RP 154.

Wesley Clark, a hearing coordinator for DSHS, testified that DSHS records showing deductions for two cash transactions for \$40 and \$50 plus transaction fees on January 2, 2006. RP 207, 212-213.

d. Jury instructions

The defense objected to the court's failure to give its proposed instruction:

Washington case law forbids the inference of an intent to deliver a controlled substance based upon the bare allegation of that controlled substance, absent other facts and circumstances, such as weapons, a substantial sum of money, scales, or other drug paraphernalia indicative of sales or delivery. To convict the defendant on possession with intent to deliver, you must find that there is substantial corroborating evidence in addition to the mere fact of possession. Further, the police officer's opinion as to what a person would carry for normal use is insufficient to justify a finding beyond a reasonable doubt that the defendant possessed a controlled substance with intent to deliver.

CP 75-76.

Instead the court gave instruction No. 8, "You may not infer an intent to deliver a controlled substance based upon the bare possession of that controlled substance, absent other facts and

circumstances." CP 94. Counsel did not object to removing the first part of the instruction counsel proposed, but objected to the failure to instruct that substantial corroboration is required and that a police officer's opinion as to what a person would carry for normal use is insufficient to justify a finding of intent to deliver beyond a reasonable doubt. RP 185-188, 192, 215.

e. Closing argument

In closing, the prosecutor argued that "so really for her to be guilty of unlawful possession you have to determine that the drugs were for personal use, that she got them so she could use them, not so she could sell them." RP 224. The prosecutor continued that "we know" that the drugs were not for personal use because Ms. Cuban's "story just doesn't add up." RP 224.

The prosecutor argued, "Whose story in this case is credible?" RP 224. The prosecutor compared Ms. Cuban's testimony to Officer Hopkins': "Or ask yourself if Officer Hopkins' testimony is credible. A 27-year veteran in the Tacoma Police Department. No motivation to tell you anything otherwise." RP 224.

The prosecutor listed the evidence of intent to deliver as (1) 13th and Fawcett is a "Stay Out of Drug Area," (2) that Ms. Cubean had two different types of drugs, (3) that she had "large quantities" of each, (4) that it was a holiday, (5) that a companion leaned into a car; and (6) that Ms. Cubean had \$90 in her pocket. RP 225-226. The prosecutor also cited Officer Hopkins as the source of the proof of intent: Officer Hopkins testified that the rocks were "in a size that could be sold" and he testified that \$90 in Ms. Cubean's pocket was evidence of drug dealing. RP 225-227.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MS. CUBEAN'S MOTION TO SUPPRESS THE PHYSICAL EVIDENCE SEIZED BY THE POLICE.

The trial court erred in denying Ms. Cubean's CrR 3.6 motion. Even if the police had probable cause to arrest Ms. Cubean for drug loitering, as the trial court found, they did not arrest her for any crime prior to searching her; and, therefore, the initial search could not be justified as a search incident to arrest. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2001).

Even if the police had reasonable suspicion to detain Ms. Cuban for drug loitering, given that they had no reason to believe she was either armed or dangerous, their patdown search for weapons was beyond the scope of that detention.¹ State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993).

Because the police arrested Ms. Cuban for possession of drug paraphernalia and not for drug loitering, had they not found the drug pipe during their unlawful search of her, they would not have arrested Ms. Cuban and would not have found the drugs she later dropped while being booked. Possession of drug paraphernalia does not provide probable cause for an arrest. State v. McKenna, 91 Wn. App. 554, 557, 958 P.2d 1017 (1998).

In State v. O'Neill, 148 Wn.2d at 571, the Washington Supreme Court held that under article 1, § 7 probable cause for a custodial arrest is not enough to justify a search incident to arrest, there must be an actual arrest to provide "authority of law" to justify a warrantless search incident to arrest. Therefore, the initial search of Ms. Cuban

¹ If the police had probable cause, they had reasonable suspicion.

cannot be justified by a finding that the police had probable cause to arrest her at the time. There was no actual arrest, the condition precedent to a search incident to arrest. See also, State v. Radka, 120 Wn. App. 43, 83 P.3d 1038 (2004).

Further, although the police had a sufficient basis to conduct an investigatory stop of Ms. Cuban based on reasonable suspicion that she was engaged in drug loitering, this reasonable suspicion did not justify a pat search for weapons. A "reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to 'specific and articulable facts' which create and objectively reasonable belief that a suspect is 'armed and presently dangerous.'" State v. Collins, 121 Wn.2d at 173 (quoting Terry v. Ohio, 392 U.S. 1, 21-24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). These "specific and articulable facts" were missing here.

A police officer may not intentionally expose items that he knows are not weapons. State v. Fowler, 76 Wn. App. 168, 883 P.2d 338 (1994) (a protective frisk must be limited to its purpose). The purpose of the frisk is not to discover

evidence, but to allow the officer to pursue his investigation without fear. Adams v. Williams, 407 U.S. 143, 145-146, 92 S. Ct. 1921, 32 L. Ed. 2d 612 (1972). "To approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons' searches as a pretext for unwarranted searches," State v. Hobart, 94 Wn.2d 437, 447, 617 P.2d 429 (1972).

Here, there was no basis for the officers to have concluded that Ms. Cuban was "armed and presently dangerous," and no pat search for weapons was justified.

Thus, the money and the drug pipe which were recovered from Ms. Cuban initially were wrongfully obtained and should have been suppressed. Since the police arrested Ms. Cuban for possession of the drug pipe, the drugs found at booking must also be suppressed. Although the prosecutor argued successfully at the suppression hearing that the officers had probable cause to arrest for drug loitering, there was absolutely no evidence presented at the CrR 3.6 hearing establishing that the officers would have arrested Ms. Cuban for drug

loitering or that they would have arrested her absent their finding the drug pipe.

The trial court therefore erred in finding that the search of Ms. Cubean was lawful, that her arrest was lawful or that the evidence was not subject to suppression. Ms. Cubean's convictions should be reversed and the case remanded to the trial court with instructions to suppress the evidence.

2. THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN MS. CUBEAN'S CONVICTIONS FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER.

Ms. Cubean's defense at trial was that she possessed the drugs she had for personal use and did not intend to deliver them. Because there was insufficient evidence of intent to deliver, the trial court erred in denying her half-time motion to dismiss. Because there was insufficient evidence of intent to deliver, this Court should reverse her convictions for possession with intent to deliver and remand for either a new trial or entry of convictions for possession of a controlled substance.

In closing, the prosecutor listed the evidence of intent to deliver as (1) 13th and Fawcett is a "Stay Out of Drug Area," (2) that Ms. Cubean had two

different types of drugs, (3) that she had "large quantities" of each, (4) that it was a holiday, (5) that a companion leaned into a car; and (6) that Ms. Cuban had \$90 in her pocket. RP 225-226.

Clearly these factors are insufficient to establish an intent to deliver or differentiate an intent to possess from an intent to deliver. Ms. Cuban's presence in an area of drug activity or the fact that it was a holiday could be explained equally by her desire to obtain drugs as to sell them. The fact that Ms. Hurd leaned into a car-- absent some involvement by Ms. Cuban--could not be evidence of Ms. Cuban's intent. There was no evidence that drug users possess or use only one type of drug, and the quantity of drugs alone and a sum of less than \$100 cannot establish intent to deliver.

Due process, under the state and federal constitutions, requires that the state prove beyond a reasonable doubt every fact necessary to establish the essential elements of the crime charged. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Therefore, as a matter of state and federal constitutional law, a conviction cannot

be affirmed unless "a rational trier of fact taking the evidence in the light most favorable to the State could find, beyond a reasonable doubt, the facts needed to support the conviction." Jackson v. Virginia, 443 U.S. 307, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

As held in State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993), the case provided to the trial court by defense counsel, to establish possession with intent to deliver, the state must provide "substantial corroborating evidence"; conviction cannot be based solely on an "officer's opinion as to what a person would carry for normal use." In Brown, the defendant was in a high crime area and had 20 rocks of cocaine, weighing 5.1 grams at the time of his arrest. Brown at 482. The Brown court cited a number of cases holding that there was insufficient evidence of intent to deliver, involving amounts greater than the 1.4 grams Ms. Cuban had. Brown, at 483, State v. Cobelli, 56 Wn. App. 921, 788 P.2d 1081 (1989) (several baggies of marijuana weighing a total of 1.4 grams); State v. Kovac, 50 Wn. App. 117, 747 P.2d 484 (1987) (seven

baggies of marijuana weighing 8 grams); State v. Johnson, 61 Wn. App. 539, 811 P.2d 687 (1991) (seven bindles of cocaine insufficient).

Here, as in Brown, there was "no weapon, no substantial sum of money, no scales or other drug paraphernalia indicative of sales or delivery, the rocks of cocaine were not separately packaged nor were separate packages in his possession." Brown, 68 Wn. App. at 484.

The facts in this case were not comparable to cases such as State v. Goodman, 150 Wn.2d 777, 83 P.3d 410 (2004) (six baggies weighing 2.8 grams, scales, additional baggies, and a controlled buy sufficient to establish intent to deliver), State v. Llamas-Villa, 67 Wn. App. 448, 836 P.2d 239 (1992) (where the defendant possessed cocaine, heroin and \$3,200, combined with the officer's observations of drug deals); State v. Mejia, 111 Wn.2d 892, 766 P.2d 454 (1989) (one and a-half pounds of cocaine and a controlled buy); State v. Simpson, 22 Wn. App. 572, 590 P.2d 1276 (1979) (cocaine, uncut heroin, lactose for cutting, balloons for packaging).

In State v. Campos, 100 Wn. App. 218, 998 P.2d 893 (2002), the court affirmed a conviction for

possession with intent to deliver based on possession of 2.5 grams of cocaine; \$1,750 in small bills, which was separate from the \$162 in the defendant's wallet; and a pager and charger for the pager.

Here the amount of drugs was less than in most of the cited cases, and there was no "substantial corroborating evidence." The \$90 Ms. Cubean had was not a large amount of money. Most importantly, she established at trial that she had pawned a ring for \$70 two days earlier and had withdrawn a total of \$90 on two separate occasions on the day of her arrest. RP 144-145, 212-213.

There was insufficient evidence to establish that Ms. Cubean possessed with intent to deliver and her convictions for two counts of possession of a controlled substance with intent to deliver should be reversed; and, if the evidence is not suppressed, her case remanded for imposition of sentences for simple possession of a controlled substance.

3. THE TRIAL COURT ERRED IN REFUSING TO GIVE AN INSTRUCTION WHICH CORRECTLY STATED THE LAW AND WHICH ALLOWED THE DEFENSE TO ARGUE ITS THEORY OF THE CASE TO THE JURY.

The defense requested an instruction, based on State v. Brown, supra, which informed the jury of

three things: (1) that intent to deliver cannot be found based on mere possession; (2) that there must be *substantial* corroborating evidence in addition to possession of a controlled substance in order to establish an intent to deliver; and (3) that a police officer's opinion that the amount of drugs shows an intent to deliver is insufficient to prove intent to deliver beyond a reasonable doubt. CP 75-76; RP 185-188, 192, 215. Defense counsel agreed that portions of the instruction he proposed could be stricken, but argued that the three components of the instruction were essential. RP 185-188, 192, 215.

The court's instruction No. 8 informed the jurors only that "bare possession of that controlled substance, absent other facts and circumstances" was insufficient to establish intent to deliver. CP 94. The court's instruction was insufficient to allow Ms. Cuban to argue her theory of the case-- that substantial corroboration beyond an officer's opinion testimony is needed to prove intent to deliver beyond a reasonable doubt.

Absent an instruction containing the correct statement of the law requested by defense counsel,

it is likely the jury convicted based on Officer Hopkins' opinion. In closing argument, the prosecutor relied on Hopkins' opinion to argue that the rocks were of a size that would be sold and that \$90 was evidence of drug dealing. RP 225-227. Officer Hopkins, of course, also testified that in his opinion the 14 rocks of cocaine were not possessed for personal use. RP 48. The jury had no way of knowing that Officer Hopkins' opinions, unless substantially corroborated by other evidence, were insufficient to establish Ms. Cuban's intent to deliver. Brown, 68 Wn. App. at 485.

Jury instructions are sufficient only if (1) they are not misleading, (2) they permit the parties to argue their cases, and (3) when read as a whole, they properly inform the jury of the applicable law. State v. Pesta, 87 Wn. App. 515, 524, 942 P.2d 1013 (1997), review denied, 135 Wn.2d 1002 (1998). A court must instruct on a party's theory of the case if evidence supports it. State v. Theroff, 95 Wn.2d 385, 389, 622 P.2d 1240 (1980). In determining whether a party has been given instructions sufficient to support his theory of the case, the instructions should be read and considered as a

whole. State v. Lane, 4 Wn. App. 745, 748, 484 P.2d 432, review denied, 79 Wn.2d 1007 (1971).

Here, nothing in the instructions read and considered as a whole instructed the jurors that substantial corroboration was required to find intent to deliver or that an officer's uncorroborated opinion that the amount of drugs established an intent to deliver was insufficient to establish proof beyond a reasonable doubt. Additional instruction was necessary. The trial court declined to give the additional instruction believing that it would be a comment on the evidence. RP 192. It is well-established, however, that it is proper to give cautionary instructions. For example, jurors routinely are instructed that they should be cautious about convicting solely on uncorroborated testimony of an accomplice. State v. Pearson, 37 Wash. 405, 79 P. 985 (1905).

The need for further instruction was compelling and goes to the heart of the right to a jury trial. Every case that gets charged and goes to trial does so because the police believe the person charged is guilty of the crime. If it is enough to have the officers testify as to their opinion and why, then

there is very little to the presumption of innocence. The accused will be in the position of disproving the officer's opinion at trial.

The trial court erred in refusing to give an instruction which allowed the defense to argue its theory of the case and which prevented the jury from convicting based solely on the opinion of Officer Hopkins. Ms. Cubean's convictions should be reversed for this reason.

4. THE PROSECUTOR'S ARGUMENT IN CLOSING THAT MISSTATED THE BURDEN OF PROOF AND TOLD THE JURY THAT ITS JOB WAS TO DECIDE WHETHER MS. CUBEAN WAS MORE CREDIBLE THAT THE OFFICER DENIED MS. CUBEAN A FAIR TRIAL.

In closing argument, the prosecutor implied that the jury's job was to choose whether they found the state's witnesses more credible than the defense witnesses and misstated the burden of proof. The prosecutor argued that "so really for her to be guilty of unlawful possession you have to determine that the drugs were for personal use, that she got them so she could use them, not so she could sell them." RP 224. The prosecutor continued that "we know" that the drugs were not for personal use because Ms. Cubean's "story just doesn't add up." RP 224. The prosecutor argued, "Whose story in this

case is credible?" RP 224. The prosecutor then compared Ms. Cuban's credibility with Officer Hopkins' credibility. RP 224.

Clearly, the state had to prove that Ms. Cuban intended to sell the drugs and she did not carry the burden of proving that they were possessed for her personal use. Ms. Cuban had no duty to present any evidence and the state bore the burden of proving the intent element beyond a reasonable doubt. State v. Traweek, 43 Wn. App. 99, 107, 715 P.2d 1148, review denied, 106 Wn.2d 1007 (1986); Winship, supra. Just as clearly, the juror's determination was not simply choosing between the state's evidence at the defense testimony.

As the court held in State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997), a jury is "required to acquit unless it had an abiding conviction in the truth of" the state's evidence. As the court further held, it is well-established misconduct for the prosecutor to argue to the jurors that to acquit, they had to find that the state's witnesses were not credible. Fleming, at 213 (citing State v. Casteneda-Perez, 61 Wn. App. 354, 362-363, 810 P.2d 74, review denied,

118 Wn.2d 1007 (1991), State v. Wright, 76 Wn. App. 811, 826, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995), State v. Barrow, 60 Wn. App. 869, 874-875, 809 P.2d 209, review denied, 118 Wn.2d 1007 (1991)).

The Fleming court held that arguments which misstate the burden of proof violate such well-established principles that they can be raised for the first time on appeal: "Misstating the bases upon which a jury can acquit may insidiously lead, as it did here, to burden-shifting . . ." Fleming, at 214. As the court noted, "trained and experienced prosecutors presumably do not risk appellate reversal of hard-fought conviction by engaging in improper tactics unless the prosecutor feels that those tactics are necessary to sway the jury in a close case." Fleming, at 215 (citing the brief of Appellant Lee).

Here, there was insufficient corroborating evidence of intent to deliver. It is very likely that the prosecutor's argument shifting the burden of proof to Ms. Cuban to prove that she did not intend to deliver and the prosecutor's implication that the jurors had to determine which story was

more credible swayed the jury to convict. The misconduct denied Ms. Cubean a fair trial.

The prosecutor committed misconduct in closing argument; and, because it should be deemed flagrant and ill-intentioned and created unfair prejudice, Ms. Cubean's convictions should be reversed.

E. CONCLUSION

Ms. Cubean respectfully submits that her convictions should be reversed and her case remanded for retrial with instructions to suppress the physical evidence. Ms. Cubean's convictions for possession of a controlled substance with intent to deliver should be reversed and vacated for insufficiency of the evidence. If the denial of suppression is upheld, Ms. Cubean should be sentenced for simple possession of a controlled substance.

DATED this 9th day of January, 2007.

Respectfully submitted,


Rita J. Griffith
WSBA #14360

Certification of Service

I, Rita Griffith, attorney for Chekeyma Cubean, certify that on January ~~7~~ ⁹, 2007, I mailed to each of the following persons a copy of the document on which this certification appears:

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