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DIVISION II

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STATE OF WASHINGTON
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REPLY

No. 35895-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Richard Hurn,

Appellant.

Jefferson County Superior Court

Cause No. 06-1-00179-1

The Honorable Judge Craddock Verser

Appellant's Reply Brief

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ARGUMENT

I. THE WASHINGTON SUPREME COURT HAS DISAPPROVED THE TRIAL COURT’S INSTRUCTION ON REASONABLE DOUBT.

The Supreme Court recently disapproved the instruction on reasonable doubt used by the trial judge in this case. *State v. Bennett*, 131 Wn. App. 319, 126 P.3d 836 (2007). However, the Court found the instruction constitutional (although confusing). There is apparently no remedy for the misuse of this instruction. *Bennett, supra*.

II. PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

A. The prosecutor elicited inadmissible and prejudicial evidence.

When police officers contacted Mr. Hurn, they were not aware that his gun was loaded. RP 95, 120. The fact that he was armed with a loaded gun was not relevant to any issue at trial, and the trial court should have granted Mr. Hurn’s motion *in limine* for exclusion of the gun, and the prosecutor should not have elicited the wholly irrelevant fact that the gun was loaded. Respondent suggests (without citation to the record or to any authority) that the gun “explained some of the arresting officer’s actions,” and that “[t]he gun being loaded or not is not prejudicial since the gun itself was not prejudicial.” Brief of Respondent, p. 8.

Neither the gun nor the fact that it was loaded was relevant under ER 401. Mr. Hurn was charged with Possession of a Controlled Substance and with Refusal to Give Information or Cooperate with a Police Officer. CP 1-13. Neither the gun nor the fact that it was loaded had “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.

Furthermore, both the gun and the fact that it was loaded were prejudicial. The prosecutor used the gun (and the fact that it was loaded) to suggest that Mr. Hurn was a bad and dangerous person. RP 94-95; RP 265, 268, 271. Such propensity evidence violates ER 401, ER 403 and ER 404(b).

The same is true for Mr. Hurn’s prior driving convictions: none were relevant to any fact of consequence, and they were inadmissible under ER 401, 403, and 404(b). Respondent argues that Mr. Hurn opened the door, and quotes a lengthy (and largely irrelevant) passage from the transcript in support of this claim. Brief of Respondent, pp. 9-10. According to Respondent, this testimony “was clearly testimony about his own past good behavior,” and “created a clear impression on the jury that Mr. Hurn had had only one previous ‘random’ encounter with the police, thus claiming a law abiding past and opening him up to questioning on

prior convictions.” Respondent does not cite any authority for its claim that Mr. Hurn’s statements “clearly” implied good behavior or a law-abiding past.

Where no authority is cited, this court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001). In fact, Mr. Hurn’s testimony did not imply that he’d lead an exemplary life. First, his comment that “the only law I broke was I wasn’t supposed to be driving,” when taken in context, referred to the reason for the traffic stop; he did not claim an unblemished past. RP 204-206. His statement “I’ve been here before” implied that he’d had previous encounters with police, and was followed up with the clarification “That’s my last problem I’ve got to take care of...” RP 204-206. Rather than establishing good character, Mr. Hurn’s testimony suggested that he’d been in trouble before. It did not open the door to specific inquiry into the nature of that trouble, and the prosecutor should not have questioned him about his prior convictions.

In addition, the prosecutor should not have asked Mr. Hurn about “other reasons why [he] might be worried about the officers being behind [his car].” RP 232. This open-ended question was designed to elicit inadmissible testimony, including Mr. Hurn’s outstanding misdemeanor warrants. Rather than being a “moot and irrelevant” argument as

Respondent suggests, the misconduct brought additional prejudicial material in front of the jury and violated Mr. Hurn's right to a fair trial. *State v. Boehning*, 127 Wn. App. 511, 111 P. 3d 899 (2005).

B. The prosecutor improperly expressed personal opinions during closing.

The prosecutor should not have used the personal pronoun "I" during closing arguments, and this error was not corrected by substituting the phrase "the state." *See* Respondent's Brief, p. 13.¹ The state, an incorporeal entity, does not have beliefs and cannot find anything "repugnant." RP 268, 270-271, 280. Any beliefs or opinions attributed to "the state" are prejudicial, either because they imply that the government as a whole has an opinion, or because they convey the personal opinion of the prosecuting attorney. Regardless of the interpretation placed on this language, the prosecutor committed misconduct requiring reversal.

Boehning, supra.

C. Mr. Hurn was denied the effective assistance of counsel.

Mr. Hurn rests on the arguments made in the opening brief.

¹ Respondent's argument relies on a manipulation of punctuation in the transcript, inserting a period and capitalizing the 't' in the word 'the.' Brief of Respondent, p. 13.

CONCLUSION

For the foregoing reasons, Mr. Hurn's convictions on Count I and Count III must be reversed and the case remanded for a new trial.

Respectfully submitted on September 19, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Richard Hurn
General Delivery
Joyce, WA 98343

and to:

Jefferson County Prosecuting Attorney
P.O. Box 1220
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on September 19, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 18, 2007.


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