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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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Nº. 36227-9-II

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

STATE OF WASHINGTON
Respondent,

v.

JAMES DEE NEWTON,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 06-1-01197-8
The Honorable M. Karlynn Haberly, Presiding Judge

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ER 6027

A. ASSIGNMENTS OF ERROR

1. Mr. Newton received ineffective assistance of counsel which deprived him of his right to a fair trial.
2. The prosecutor committed misconduct by making improper argument in closing arguments.
3. Cumulative error rendered Mr. Newton's trial fundamentally unfair.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Is it effective assistance of counsel for trial counsel to stipulate to the existence of a sentence enhancement where the State has presented insufficient evidence to prove the existence of the enhancement beyond a reasonable doubt? (Assignment of Error No. 1)
2. Does a prosecutor commit misconduct in closing argument by arguing that finding the defendant innocent would require the jurors to find that the police and confidential informant were lying? (Assignment of Error No. 2)
3. Did cumulative error render Mr. Newton's trial fundamentally unfair? (Assignments of Error Nos. 1 and 2)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On February 8, 2006, Detective Martin Garland of the Bremerton Police Department met with a police operative, Edwina Stokes, and set up a controlled buy of crack cocaine. CP 1-6, RP 42-43. Ms. Stokes called Detective Garland and said that a person she knew as "J" could sell her drugs. RP 42-43. Ms. Stokes met with "J" at a location in West

Bremerton and purchased \$100 worth of crack cocaine. CP 1-6.

Other detectives told Detective Garland that "J" was the street name of James Dee Newton. RP 53.

On February 14, 2006, Detective Garland showed Ms. Stokes a six person photo montage which included a picture of Mr. Newton. CP 1-6, RP 54. Ms. Stokes identified Mr. Newton as "J." CP 1-6, RP 54.

Detective Garland had Ms. Stokes set up a controlled buy of crack cocaine with Mr. Newton and Ms. Stokes purchased \$100 worth of crack cocaine. CP 1-6.

On February 24, 2006, Detective Garland had Ms. Stokes set up another controlled buy with Mr. Newton and Ms. Stokes purchased \$100 worth of crack cocaine. CP 1-6.

On March 24, 2006, Detective Garland had Ms. Stokes set up a fourth controlled buy with Mr. Newton. CP 1-6. Ms. Stokes again purchased \$100 of crack cocaine from Mr. Newton. CP 1-6.

On August 9, 2006, Mr. Newton was arrested and booked into the Kitsap County Jail for four counts of delivery of a controlled substance. CP 1-6.

On August 10, 2006, Mr. Newton was charged with two counts of delivery of a controlled substance based on the February 8 and February 14 controlled buys. CP 1-6.

On November 7, 2006, the charges against Mr. Newton were amended to four counts of delivery of a controlled substance, one for each controlled buy performed by Detective Garland and Ms. Stokes. CP 10-15. All counts were charged with a “free crime” aggravating factor. CP 10-15. Counts I, III, and IV, also were charged with having been committed within one thousand feet of a school bus stop or school grounds. CP 10-15.

Trial began on January 9, 2007. RP 36.

On January 11, the trial court granted the State’s oral motion to withdraw the special allegation of the school grounds enhancement in count III. RP 233-234.

On January 12, 2007, Mr. Newton stipulated that Count I had been carried out within 1,000 feet of a school bus stop and count IV had been carried out within 1,000 feet of school grounds. RP 252-253.

The jury found Mr. Newton guilty of all four counts and found that the school bus stop and school grounds aggravating factors applied. CP 139-141, RP 322-325.

At sentencing, the trial court did not find the “free crime” aggravating factor. CP 219-220. Mr. Newton received a standard range sentence of 90 months on all counts with a 24 month school zone aggravating factor on counts one and four. CP 206-217, RP 340-341.

Notice of appeal was timely filed on April 16, 2007. CP 218.

D. ARGUMENT

1. It was ineffective assistance of counsel for Mr. Newton's trial counsel to stipulate that count 4 had occurred within 1,000 feet of school grounds.

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

In order to show that he received ineffective assistance of counsel, an appellant must show (1) that trial counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2005).

There is a strong presumption that defense counsel's conduct is not deficient, however, there is a sufficient basis to rebut such a presumption

where there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, 153 Wn.2d at 130, 101 P.3d 80 (2005).

Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel. *State v. Ermert*, 94 Wn.2d 839, 851, 621 P.2d 121 (1980).

Under RCW 69.50.435(1)(c) and RCW 9.94A.533, where an individual is found to have sold drugs within 1,000 feet of a school zone, 24 months is added to the individual's sentence.

Here, with no explanation present in the record, counsel for Mr. Newton stipulated that the alleged crime charged in count four had occurred within 1,000 feet of a school zone.

a. The State failed to introduce sufficient evidence to establish beyond a reasonable doubt that the crime charged in Count 4 had been committed within 1,000 feet of a school zone.

“Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation which triggers the enhanced penalty.” *State v. Hennessey*, 80 Wash.App. 190, 194, 907 P.2d 331 (1995).

In order to establish that the crime charged in count 4 was committed within 1,000 feet of a school zone, the State relied on the testimony of Detective Martin Garland. RP 36-112. At trial, the State

introduced Exhibit 2, an aerial photograph of the location where one of the alleged controlled buys took place and the surrounding area. RP 61. Det. Garland testified that the photograph comported with his knowledge of the area. RP 61. The State then used an enlargement of Exhibit 2 to assist Det. Garland describe where event in this case took place. RP 61-66.

Det. Garland identified an area on the enlargement as West Hills Elementary School and testified that the school property encompassed the “entire city block.” RP 65. Det. Garland then testified that the controlled buy which took place on March 24, 2006, and which was the basis of count 4, took place 356 feet from the West Hills Elementary School. RP 66-68.

Under RCW 69.50.435(5),

a map produced or reproduced by any municipality, school district, county, transit authority engineer, or public housing authority for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for a school...or a true copy of such a map, shall under proper authentication, be admissible and shall constitute prima facie evidence of the location and boundaries of [the school] if the governing body of the municipality, school district, county, or transit authority has adopted a resolution or ordinance approving the map as the official location and record of the location and boundaries of the area on or within one thousand feet of the school... Any map approved under this section or a true copy of the map shall be filed with the clerk of the municipality or county, and shall be maintained as an official record of the municipality or county.

Here, the State laid no foundation as to the origin of Exhibit 2

beyond Det. Garland's statement that it was an aerial photo of the area where the controlled buys took place. RP 61. The State introduced no evidence that either Exhibit 2 or the enlargement of Exhibit 2 was produced by any of the authorities listed in RCW 69.50.435(5) or that any of the authorities listed in RCW 69.50.435(5) had adopted Exhibit 2 or the enlargement as the official record and location of the boundaries of the school zone. Thus, under RCW 69.50.435(5), Exhibit 2 is not prima facie evidence of the location or boundaries of West Hills Elementary School.

Under ER 602, "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." At no time did the State lay a foundation as to the basis of Det. Garland's personal knowledge of the area depicted in Exhibit 2, the location of the school on the enlargement, the boundaries of the school property, or the accuracy of Det. Garland's measurement technique or equipment. The State failed to meet its burden under ER 602 of establishing that Det. Garland had sufficient personal knowledge of the location and boundaries of the school as well as the accuracy of his measurement to testify regarding those issues.

The State failed to present a map which was prima facie evidence under RCW 69.50.435(5) of the location of the school or the school boundaries and failed to lay a sufficient foundation as to Det. Garland's

personal knowledge regarding the same. Therefore, the State failed to present sufficient facts to establish beyond a reasonable doubt that the controlled buy which occurred on March 24, 2006, took place within 1,000 feet of a school zone.

b. Given that the State failed to introduce sufficient evidence to establish that count 4 occurred within 1,000 feet of a school zone, it was ineffective assistance of counsel for Mr. Newton's trial counsel to stipulate that it had.

As discussed above, without any indication in the record as to why it was done, counsel for Mr. Newton stipulated that the location where count 4 occurred was within 1,000 feet of a school zone, effectively stipulating that the school zone enhancement applied to count 4. RP 252-253.

Given that the State had failed to lay a proper foundation for Exhibit 2 and Det. Garland's testimony to be sufficient evidence to establish beyond a reasonable doubt that the controlled buy took place within 1,000 feet of a school zone, and given that there was no apparent benefit to Mr. Newton in entering the stipulation, it cannot be said that it was objectively reasonable or that it was a legitimate strategic tactic for Mr. Newton's trial counsel to agree to the stipulation. Mr. Newton was prejudiced by this stipulation in that the stipulation was effectively equivalent to counsel for Mr. Newton stipulating to increase Mr. Newton's

sentence by two years should he be convicted. Had counsel for Mr. Newton not agreed to the stipulation, the jury would not have had sufficient evidence to find that the school zone enhancement applied to count 4.

It was ineffective assistance of counsel for Mr. Newton's trial counsel to stipulate that count 4 occurred within 1,000 feet of a school zone where the State had failed to introduce sufficient evidence to establish this fact beyond a reasonable doubt.

2. The prosecutor committed misconduct in closing argument by arguing that to find Mr. Newton innocent the jury would have to believe that the police witnesses and the confidential informant were lying.

Prosecutorial misconduct may violate a defendant's due process right to a fair trial. *State v. Charlton*, 90 Wn.2d 657, 664, 585 P.2d 142 (1978). In order for a defendant to obtain reversal of his conviction on the basis of prosecutorial misconduct, he must show the prosecutor's conduct was improper and the conduct had a prejudicial effect. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996).

"A defendant has no duty to present evidence; the State bears the entire burden of proving each element of its case beyond a reasonable doubt." *State v. Fleming*, 83 Wash.App. 209, 215, 921 P.2d 1076 (1996),

review denied, 131 Wash.2d 1018, 936 P.2d 417 (1997).

“Although prosecutors have ‘wide latitude’ to make inferences about witness credibility, it is flagrant misconduct to shift the burden of proof to the defendant.” *State v. Miles*, ___ Wn.App. ___, 162 P.3d 1169, 1174 (2007). *See also, Fleming*, 83 Wash.App. at 213, 921 P.2d 1076 (“This court has repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.”)

Here, in closing argument the prosecutor argued that the jury could believe the testimony of Ms. Stokes because

the detectives of the Bremerton Police Department have faith in Nina Stokes. They trust her. And in fact, the defense brought that out in their cross examination of Detective Garland, that Detective Garland has faith in her. And for that reason, you can have faith in her. And for that reason, you can have faith in her, and you can have faith that on February 8th, February 14th, February 24th, and March 24th, she bought drugs from James Newton under the supervision of the Bremerton Police Department.

RP 278.

The prosecutor referred to the detective’s faith in Ms. Stokes a second time:

Why else should you believe and have faith in Nina? Probably the most critical is, the officers have faith in Nina. You will recall that in the defense’s opening statement they brought out that fact. Detective Garland had faith in Nina. You will recall that the opening statement, Ms. Atwood

also said that we're going to talk about the drug world, we're going to talk about the drug community, and this is a community steeped in dishonesty. We have detectives that have been narcotics investigators for years. If you talk about their collective experience, we are talking years of experience. We are taking investigators who probably don't believe most of the people that they deal with. They probably don't have faith in a lot of people they deal with. For them to say that they have faith in Nina is huge.

You heard Detective Garland say that there have been times when he's had a CI that he suspects of using drugs or committing crimes, and he has followed up with that, but he never felt like he needed to do that with Nina. And you heard Detective Endicott say that yeah, he has faith, he had never any reason to believe [sic] that she was telling them any lies or that she was using drugs or bringing drugs to the area. You can believe Nina because the officers believe Nina.

RP 286-287.

The prosecutor's arguments that the jury should believe Ms. Stokes because the police detective believed Ms. Stokes are equivalent to arguments that in order to find Mr. Newton innocent the jury would have to find that the State's witnesses were lying. Such argument was improper and deprived Mr. Newton of his right to a fair trial.

3. Cumulative error deprived Mr. Newton of a his right to a fair trial.

Where multiple errors occurred at the trial level, a defendant may be entitled to a new trial if cumulative errors resulted in a trial that was fundamentally unfair. Courts apply the cumulative error doctrine when several errors occurred at the trial court level, but none alone warrants

reversal. Rather, the combined errors effectively denied the defendant a fair trial.

State v. Rooth, 129 Wn.App. 761, ¶ 75, 121 P.3d 755 (2005).

As stated above, Mr. Newton received ineffective assistance of counsel and his right to a fair trial was violated by the prosecutor's improper burden-shifting closing argument. Should this court find that neither of these errors alone warrants a new trial, this court should find that the errors combined rendered Mr. Newton's trial fundamentally unfair. This court should vacate Mr. Newton's convictions and remand for a new trial.

E. CONCLUSION

For the reasons state above, this court should vacate Mr. Newton's conviction and remand the case for a new trial.

DATED this 24 day of September, 2007.

Respectfully submitted,



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