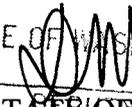


- FILED  
COURT OF APPEALS  
DIVISION II

08 MAY 22 PM 12:22

STATE OF WASHINGTON NO. 36379-8-II  
BY 

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

CLINTON THORNTON,

Appellant.

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2008 MAY 20 PM 4:24

---

---

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

The Honorable Theodore F. Spearman, Judge

---

---

REPLY BRIEF OF APPELLANT

---

---

JORDAN B. McCABE  
CHRISTOPHER H. GIBSON  
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

**TABLE OF CONTENTS**

	Page
A. ARGUMENTS IN REPLY .....	1
1. THE TRIAL COURT ERRED IN EXCLUDING THORNTON'S 'OTHER SUSPECT' EVIDENCE.....	1
(a) The Evidence Is Relevant. ....	1
(b) Only the Jury Evaluates the Weight of the Evidence. ....	2
2. THE COURT ERRED IN EXCLUDING EVIDENCE OF THORNTON'S DRUG-FREE REPUTATION.....	4
3. THE VERDICT WAS TAINTED BY AN IMPERMISSIBLE COMMENT ON GUILT.....	6
(a) The Error Was Manifest and Constitutional. ....	7
(b) The State Cannot Show the Error Was Harmless.....	9
4. THORNTON WAS DENIED A PUBLIC TRIAL.....	10
5. THORNTON WAS DENIED AN UNBIASED JURY. ....	11
B. CONCLUSION .....	14

## TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
 <u>City of Kennewick v. Day</u> , 142 Wn.2d 1, 11 P.3d 304 (2000).....	4
 <u>In re Personal Restraint of Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2005).....	10
 <u>Seattle v. Heatley</u> , 70 Wn. App. 573, 854 P.2d 658 (1993).....	8
 <u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988).....	12
 <u>State v. Bone-Club</u> , 128 Wn.2d 254, 906 P.2d 325 (1995).....	10, 11
 <u>State v. Brightman</u> , 155 Wn.2d 506, 122 P.3d 150 (2005).....	11
 <u>State v. Clark</u> , 78 Wn. App. 471, 898 P.2d 854 (1995).....	4
 <u>State v. Condon</u> , 72 Wn. App. 638, 865 P.2d 521 (1993).....	1
 <u>State v. Crane</u> , 116 Wn.2d 315, 804 P.2d 10 (1991).....	12, 13
 <u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001).....	9
 <u>State v. Fernandez-Medina</u> , 141 Wn.2d 448, 6 P.3d 1150 (2000).....	2, 3

**TABLE OF AUTHORITIES** (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Ginn,</u> 128 Wn. App. 872, 117 P.3d 1155 (2005).....	5
<u>State v. Gregory,</u> 158 Wn.2d 759, 147 P.3d 1201 (2006).....	5, 11
<u>State v. Guloy,</u> 104 Wn.2d 412, 705 P.2d 1182 (1985).....	9
<u>State v. Kirkman,</u> 159 Wn.2d 918, 155 P.3d 125 (2007).....	7
<u>State v. Maupin,</u> 128 Wn.2d 918, 913 P.2d 808 (1996).....	1
<u>State v. Norlin,</u> 134 Wn.2d 570, 951 P.2d 1131 (1998).....	1
<u>State v. Rehak,</u> 67 Wn. App. 157, 834 P.2d 651 (1992).....	4
<u>State v. Russell,</u> 125 Wn.2d 24, 882 P.2d 747 (1994).....	12
<u>State v. Saunders,</u> 132 Wn. App. 592, 132 P.3d 743 (2006).....	9

FEDERAL CASES

<u>Delaware v. Van Arsdall,</u> 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986).....	9
---	---

**TABLE OF AUTHORITIES** (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS</u>	
ER 401 .....	4
ER 402 .....	1
ER 403 .....	5
ER 405 .....	4, 6
ER 704 .....	7
U.S. Const. amend. VI .....	10
Wash. Const. art. I, § 22 .....	10

A. ARGUMENTS IN REPLY

1. THE TRIAL COURT ERRED IN EXCLUDING THORNTON'S 'OTHER SUSPECT' EVIDENCE.

Thornton was convicted of possessing methamphetamine found in the rear passenger seat of Joseph Dill's car. The State claims Thornton failed to establish the relevance of evidence that Dill was stopped again a couple of weeks later with methamphetamine in his pocket and drug paraphernalia hidden in the same rear seat. Brief of Respondent (BOR) at 10. The State dismisses this as not "real evidence," and asserts the evidence is no more than "probatively neutral." BOR at 11. The State is wrong.

(a) The Evidence Is Relevant.

Under ER 402, all relevant evidence is admissible unless it is barred by constitution, statute, the Rules of Evidence, or another court rule. State v. Norlin, 134 Wn.2d 570, 576, 951 P.2d 1131 (1998). Evidence connecting another person with the crime charged is both relevant and admissible if it establishes a train of facts or circumstances clearly pointing to someone other than the defendant as the guilty party. State v. Maupin, 128 Wn.2d 918, 928, 913 P.2d 808 (1996). It is sufficient that the evidence creates a nexus between another suspect and the crime. State v. Condon, 72 Wn. App. 638, 647, 865 P.2d 521 (1993).

The evidence at issue here tends to prove the methamphetamine belonged to Dill, not Thornton. Only two circumstantial facts supported Thornton's conviction for possessing methamphetamine found in Dill's car: (1) Thornton happened to be seated in the location where the methamphetamine was found; and (2) the jury heard no evidence suggesting the methamphetamine belonged to anyone else. Dill testified he did not use methamphetamine and said he knew nothing about any drugs hidden in his car. RP 53.

Dill's claim of complete innocence makes it highly relevant that he was arrested for methamphetamine possession soon after Thornton's arrest and that the methamphetamine was found both in Dill's pocket and that there was drug paraphernalia hidden in the same rear seat. RP 23. This evidence cast doubt on the inference that because Thornton was sitting where the drugs were found they must have been his. That Dill was found with drugs hidden in the same place shortly after Thornton's arrest provides a basis to conclude Dill was the true owner of the drugs used to charge Thornton with methamphetamine possession.

(b) Only the Jury Evaluates the Weight of the Evidence.

The finder of fact is the "sole and exclusive judge of the evidence". State v. Fernandez-Medina, 141 Wn.2d 448, 460, 6 P.3d 1150 (2000). As

such, only the jury can decide what weight to give evidence and determine the credibility of witnesses. Id.

The State defends exclusion of the evidence of Dill's subsequent drug arrest noting the judge's 'finding' that during Dill's arrest the drugs were found merely "under" the rear seat, not inside" it as during Thornton's arrest. BOR at 12. The court made no such finding. It merely reserved its ruling pending determination of whether the hiding place was inside or under the seat. RP 28.

Moreover, Officer Deatherage testified she knew the rear seat cushion lifts up in the type of car Dill drove, and she would routinely lift it up to look underneath. RP 26. Therefore, the jury could have found that the hiding place in both instances was fairly described as either "under" or "inside" the seat. The jury could also have found that two separate hiding places in the rear seat were nevertheless close enough to suggest a habitual practice by Dill of concealing contraband in the rear passenger seat. These were fact questions to be decided by the jury after hearing all the evidence – not by the judge. Fernandez-Medina, 141 Wn.2d at 460. Thus, the State's claim that evidence of Dill's arrest was "probatively neutral" is wrong. BOR at 11.

This Court should uphold Thornton's right to have a jury decide what weight to give evidence of Dill's arrest for methamphetamine,

particularly in light of Dill's claims of innocence at trial. It was reversible error to keep the facts of Dill's subsequent drug possession from the jury.

2. THE COURT ERRED IN EXCLUDING EVIDENCE OF THORNTON'S DRUG-FREE REPUTATION.

The trial court rejected proposed character evidence from Thornton's mother that he had a reputation for not using drugs. The State concedes the trial court misread controlling authority holding that character evidence is relevant in a prosecution for simple possession and is admissible as a matter of law to prove the affirmative defense of unwitting possession. BOR at 13-14, citing City of Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). The State nevertheless asks this Court to uphold the exclusion of this evidence on the alternative grounds that the proposed witness's credentials do not satisfy the requirements of ER 405. BOR at 14. The Court should not sustain the erroneous ruling.

Criminal defendants have a constitutional right to present all relevant, admissible evidence in their defense. State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992). "Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely." ER 401; State v. Clark, 78 Wn. App. 471, 477, 898 P.2d 854 (1995). All relevant evidence is admissible unless its probative value is outweighed by potential prejudice or it is likely to confuse the issues,

mislead the jury, cause undue delay, or is unnecessarily cumulative. ER 403.

The State first misrepresents the proposed defense evidence as showing that only Thornton's own mother thought he did not use drugs. BOR at 15. The State then easily disposes of this straw man with case law that a defendant's reputation within his own family is insufficient to establish a character trait because the family is not sufficiently neutral to constitute a relevant "community" for the purposes of this rule. BOR at 16, citing State v. Gregory, 158 Wn.2d 759, 805, 147 P.3d 1201 (2006).

But Thornton did not propose his family as the relevant community. Therefore, Gregory, in which the defense proposed the defendant's family as a "community" of only two people, is inapplicable. Gregory, 158 Wn.2d at 805. No case holds that a family member cannot testify from personal knowledge about the defendant's reputation in the larger community.

Moreover, this Court will affirm an erroneous ruling on other grounds only if supported by the record. State v. Ginn; 128 Wn. App. 872, 884, n.9, 117 P.3d 1155 (2005). The record here does not support affirming on alternative grounds.

Here, the trial court excluded evidence of Thornton's reputation in the community based solely on its erroneous conclusion that reputation

was relevant only where intent was an essential element of the crime. RP 253.<sup>1</sup> Therefore, the court did not inquire whether the proposed character witness met the foundational requirements of ER 405. Accordingly, the record is not sufficiently developed for this Court to uphold the erroneous ruling on that basis.

The probative value of this evidence was particularly high in light of the unfortunate remarks during jury selection that Thornton looked like an addict. RP 216. The potential for undue prejudice was negligible. It was error to exclude evidence of Thornton's reputation in the community as a person that does not use drugs.

3. THE VERDICT WAS TAINTED BY AN IMPERMISSIBLE COMMENT ON GUILT.

Officer Deatherage testified she conducted no more than a cursory investigation of the interior of Dill's car, in part because "the location where the narcotics were found, in my opinion, it was pretty obvious who owned them." RP 335. This was an impermissible comment on guilt that requires reversal.

The State contends that (a) the comment was not manifest constitutional error and (b) any error was harmless. BOR at 21. The State is wrong.

---

<sup>1</sup> The State concedes Kennewick's holding that character evidence is admissible to prove the defense of unwitting possession to the strict liability crime of possession. Kennewick, 192 Wn.2d at 10-11.

(a) The Error Was Manifest and Constitutional.

It is axiomatic that an opinion regarding a defendant's guilt violates the constitutional right to a jury trial, and that such testimony from a law enforcement officer is especially prejudicial because of the officer's special aura of reliability. State v. Kirkman, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007). In an attempt to circumvent this legal axiom, the State mischaracterizes Thornton's argument by claiming he is arguing that opinion evidence is always inadmissible. BOR at 18.

But Thornton does not contend it is always unconstitutional for any expert to express an opinion as to any question of ultimate fact. Such a claim would contravene ER 704 and Kirkman 159 Wn.2d at 929. Thornton does contend, however, that it was impermissible for Officer Deatherage to express her personal opinion that it was "pretty obvious" he was guilty.

In Kirkman, a physician gave expert testimony that an alleged child sexual abuse victim told her story with clarity, detail and consistency. The doctor also testified that his physical examination found nothing to contradict what the child said. Kirkman, 159 Wn.2d at 929. The Court concluded this did not constitute a comment on the relative credibility of defendant and victim and was not an indirect comment on the defendant's guilt. Id.

Here, by contrast, Deatherage was not an expert witness, she was talking about Thornton, the defendant, and her comment was a clear and direct expression of her opinion that Thornton was guilty. This violated the province of the jury and denied Thornton a fair trial.

Another case relied on by the State, Seattle v. Heatley, 70 Wn. App. 573, 576, 854 P.2d 658 (1993), is also distinguishable. In Heatley, a police officer testified the DUI defendant was obviously intoxicated. This testimony concerned an evidentiary fact and was based on the officer's direct observation. Heatley, 70 Wn. App. at 576. It is well-settled that lay witnesses such as police officers may comment on a defendant's degree of intoxication based on personal observation. Heatley, 70 Wn. App. at 580. To do so is not an opinion on guilt. Heatley, 70 Wn. App. at 579.

Deatherage, by contrast, testified based solely on her personal opinion that the drugs must be Thornton's. This was not based on any direct observation by Deatherage, but rather required an inference on her part that because Thornton was sitting in the back seat, the drugs must be his. Although this may have been an allowable inference for the jury, it was not one Deatherage could properly make for the jury. This is precisely the sort of testimony Heatley held was improper. Heatley, 70 Wn. App. at 579.

The State notes that Deatherage cited additional reasons why she did not fingerprint the crime scene. BOR at 20. This is irrelevant. The existence of additional reasons for not doing so does not mitigate the prejudice resulting from Deatherage's expressed opinion that Thornton was obviously guilty.

(b) The State Cannot Show the Error Was Harmless.

In assessing the damage of constitutional errors involving inadmissible testimony, the Court first assumes the damaging potential of the testimony was fully realized. State v. Saunders, 132 Wn. App. 592, 604, 132 P.3d 743 (2006), citing Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The error is harmless only if the untainted evidence is so overwhelming that it leads inevitably to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). When an evidentiary error of constitutional magnitude is not harmless, the remedy is to reverse. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001).

Here, the untainted evidence was far from overwhelming. Thornton was convicted entirely on circumstantial evidence that could just as easily have supported an acquittal. Therefore, Deatherage's impermissible opinion of guilt requires reversal.

4. THORNTON WAS DENIED A PUBLIC TRIAL.

The State claims the trial court did not violate the public trial doctrine when it conducted a private juror voir dire without balancing the need for privacy versus the right of the people and the accused to have all voir dire conducted in public. The State is wrong.

A person accused of crime has a constitutional right to a public trial. U.S. Const. amend. VI; Wash. Const. art. I, § 22; State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 325 (1995). This includes the right to have all jury voir dire conducted in public. In re Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2005); Bone-Club, 128 Wn.2d at 259. Without a valid waiver, the court must consider the following criteria before closing any part of any juror voir dire: (a) whether there is a compelling interest in privacy; (b) the opportunity for objections; (c) the weight of the alleged privacy interest versus public trial interests; and (d) whether closing the proceedings is the least restrictive means available. Orange, 152 Wn.2d at 801-02, 804-07; Bone-Club, 128 Wn.2d at 256-59.

The court must address these factors on the record before conducting juror voir dire in private. Bone-Club, 128 Wn.2d at 260-61; Orange, 152 Wn.2d at 811-12. Failure to do so is an error of constitutional magnitude that can be raised for the first time on appeal. Bone-Club, 128 Wn.2d at 257; State v. Brightman, 155 Wn.2d 506, 517,

122 P.3d 150 (2005). The error is not subject to harmless error analysis; prejudice is presumed. Bone-Club, 128 Wn.2d at 261-62; Orange, 152 Wn.2d at 812. The sole remedy is to reverse the conviction. Brightman, 155 Wn.2d at 518; State v. Gregory, 158 Wn.2d 759, 816, 147 P.3d 1201 (2006).

Here, the trial court conducted a private voir dire for Juror No. 36 without making a record of the Bone-Club factors. RP 105-06, 112. The State disputes that the record supports this contention. BOR at 22. This is wrong. The court reporter affirmatively noted that only the judge and counsel were present at the private voir dire. RP 105. By contrast, when two other jurors were eliminated, the record shows this happened outside presence of the other jury panel members but does not say attendance was limited to the court and counsel. RP 153. The logical conclusion is that the public was excluded from the former proceedings but not the latter.

It was particularly important here that the public witness all parts of the voir dire, because of the potential for manifest juror misconduct as discussed below. Reversal is required. Brightman, 155 Wn.2d at 518.

5. THORNTON WAS DENIED AN UNBIASED JURY.

Thornton's jury selection was irretrievably contaminated by the misconduct of two potential jurors who announced that they knew what methamphetamine addicts looked like and that Thornton most definitely

was one. RP 215, 216. Thornton assigned error to the court's denial of defense counsel's repeated requests to declare a mistrial and start over with an untainted panel. Brief of Appellant at 1 (assignment of error 4 and issues pertaining to assignments of error 5). The State claims the court solved the problem with a curative instruction to disregard the impermissible comments. BOR at 24-25. The State is wrong given the circumstances here.

The Court generally presumes a trial court's curative instruction to disregard inflammatory comments was effective. State v. Russell, 125 Wn.2d 24, 84, 882 P.2d 747 (1994). But a remark may be so improper that no instruction can cure it, in which case the mandatory remedy is to declare a mistrial or remand for a new trial. State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174, 176 (1988).

Improper comments resulting in mistrial usually are made by prosecutors, not by potential jurors. But the same reasoning applies. Some comments simply cannot be cured by admonishing the jury to disregard them. Belgarde, 110 Wn.2d at 508.

State v. Crane, 116 Wn.2d 315, 332, 804 P.2d 10 (1991), is instructive. There, the defendant was charged with beating to death a three-year-old, and the evidence of his guilt was overwhelming. Crane, 116 Wn.2d at 315, 322-23. During the testimony, the prosecutor

inadvertently mentioned Crane's participation in a methadone program. Crane, 116 Wn.2d at 333. The Court set forth three factors to be considered in determining whether a mistrial should have been granted: (a) the seriousness of the irregularity; (b) whether the comment was cumulative to properly admitted evidence; and (c) whether any prejudice could be avoided by a curative instruction to disregard the remark. Crane, 116 Wn.2d at 332. A new trial is required if there is a substantial likelihood a prejudicial remark affected the verdict. Id. The Court concluded that the methadone remark did not require a mistrial because it was peripheral to the issue of guilt, of which the untainted evidence was overwhelming. Crane, 116 Wn.2d at 333.

Applying the Crane factors here demonstrates the need for a new trial: (a) the jurors' offending comments were most serious because they asserted the defendant's own face bore witness against him and they directly related to the charged offense of methamphetamine possession; (b) the comments were not merely cumulative; and (c) their prejudicial effect could not be dissipated – the bell could not be unrung – by instructing the other jurors to take no notice, because Thornton's appearance was present throughout the trial. It was, therefore, reversible error to deny a mistrial.

B. CONCLUSION

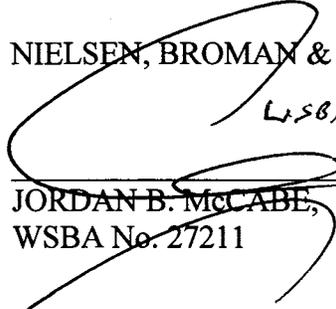
For the reasons set forth here and in the Brief of Appellant, this Court should reverse Thornton's conviction.

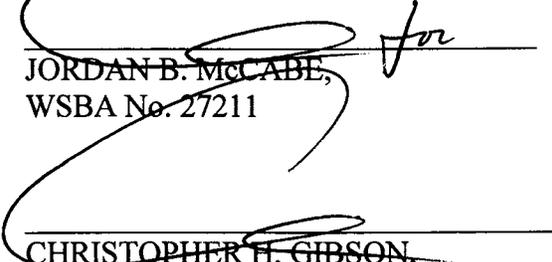
DATED this 20th day of May, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

WSBA 25097

  
\_\_\_\_\_  
JORDAN B. McCABE,  
WSBA No. 27211

  
\_\_\_\_\_  
CHRISTOPHER H. GIBSON,  
WSBA No. 25097  
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON )

Respondent, )

vs. )

CLINTON THORNTON, )

Appellant. )

COA NO. 36379-8-II

FILED  
COURT OF APPEALS  
DIVISION II  
08 MAY 22 PM 12:22  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 20<sup>TH</sup> DAY OF MAY 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] RUSSELL HAUGE  
KITSAP COUNTY PROSECUTOR'S OFFICE  
MSC 35  
614 DIVISION STREET  
PORT ORCHARD, WA 98366-4681
  
- [X] CLINTON THORNTON  
9505 HEARTWOOD LANE  
PORT ORCHARD, WA 98366

**SIGNED** IN SEATTLE WASHINGTON, THIS 20<sup>TH</sup> DAY OF MAY 2008.

x Patrick Mayovsky

FILED  
COURT OF APPEALS DIVISION II  
STATE OF WASHINGTON  
2008 MAY 20 PM 4:24