

FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

NO. 36994-0-II  
Lewis County No. 06-1-00690-3

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**LARRY D. HOUSE**

**Appellant.**

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENT OF ERROR**

**I. MR. HOUSE WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR COMMITTED MISCONDUCT BY COMMENTING ON HIS RIGHT TO REMAIN SILENT.**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

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**C. STATEMENT OF THE CASE**

**1. PROCEDURAL HISTORY**

The Lewis County Prosecuting Attorney charged Appellant Larry

D. House by Information with Count I: Possession of a Controlled Substance (Methamphetamine) and Count III: Driving While License Suspended or Revoked in the Third Degree.<sup>1</sup> CP 1-2. Mr. House was tried before a jury and was convicted of Counts I and III. RP (10-30-07), CP 19-20. Mr. House was given a standard range sentence. CP 26. This timely appeal followed. CP 30.

**2. FACTUAL HISTORY**

On October 13<sup>th</sup>, 2006 Officer Schlecht of the Winlock Police Department stopped a car being driven by Larry House because it had a burned out headlight and expired tabs. RP (10-30-07), p. 13. During the

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<sup>1</sup> Count II was dismissed during trial.

course of the stop Officer Schlecht discovered that Mr. House had been operating the car with a suspended license. RP (10-30-07), p. 14. Officer Schlecht placed Mr. House under arrest for driving while license suspended in the third degree and conducted a search incident to arrest of Mr. House and the car. RP (10-30-07), p. 15. Mr. House was wearing a Carhartt jacket. RP (10-30-07), p. 15. In the right front breast pocket of the jacket Officer Schlecht found a small straw with an infinitesimal amount of methamphetamine inside it. RP (10-30-07), p. 16, 32. Mr. House denied knowing the straw was in his coat and denied that the straw was his, and, according to Schlecht, said that he had loaned his coat to a friend and had just gotten it back. RP (10-30-07), p. 20. Mr. House made no attempt to discard the straw nor did he make any furtive movements after Officer Schlecht activated his emergency lights. RP (10-30-07), p. 24.

Mr. House testified on his own behalf at his trial. He testified that on the evening in question, he took his daughter to a friend's house and dropped her off. RP (10-30-07), p. 37. After that he ran out of gas and put his coat on, which was in his truck, to go get gas. RP (10-30-07), p. 37. Mr. House testified he had never seen the straw before Officer Schlecht pulled it out of his jacket. RP (10-30-07), p. 37-38. Mr. House testified he had last worn the jacket a couple of weeks before the traffic

stop. RP (10-30-07), p. 38. Mr. House testified he had loaned his truck out to a friend by the name of Ky Williams a couple of weeks before, and the coat was in the truck at that time. RP (10-30-07), p. 38. Mr. House did not notice anything in his pocket when he put his coat on prior to the traffic stop. RP (10-30-07), p. 39. Mr. House maintained that he told Officer Schlecht that he had loaned out his truck with the jacket inside it. RP (10-30-07), p. 40.

During cross examination, the following exchange occurred between the deputy prosecutor and Mr. House:

**Prosecutor:** You told the officer you loaned your coat, isn't that correct?

**Mr. House:** I told him I hadn't been driving, I just got my truck back and my coat.

**Prosecutor:** And it wasn't until today that we finally hear you didn't loan your coat, you loaned the truck and your coat was in the truck?

RP (10-30-07), p. 41.

Defense Counsel immediately objected to this question and moved for a mistrial. RP (10-30-07), p. 41-42. Defense Counsel argued that the prosecutor's question constituted an improper comment on Mr. House's right to remain silent and that the violation could not be cured by a curative instruction. RP (10-30-07) p. 42-45. The trial court agreed that the question was an improper comment on Mr. House's right to remain

silent but denied the motion, deciding to give a curative instruction. RP (10-30-07), p. 46. The court instructed the jury as follows:

Ladies and gentlemen, the jury is instructed to disregard entirely the last question by the deputy prosecuting attorney and disregard any suggestion that the defendant had a responsibility to correct or explain his answer to the officer's question at any time since his arrest.

RP (10-30-07), p. 48. Although Defense Counsel agreed to the wording of the curative instruction, he maintained his position that a mistrial was the proper remedy. RP 48.

Mr. House raised the defense of unwitting possession, and the court instructed the jury based on his proposed instruction. CP 13.

Unwitting possession was the only defense presented at trial. Report of Proceedings.

#### **D. ARGUMENT**

##### **I. MR. HOUSE WAS DENIED A FAIR TRIAL WHEN THE PROSECUTOR DREW THE JURY'S ATTENTION TO HIS EXERCISE OF HIS RIGHT TO REMAIN SILENT, AND THE TRIAL COURT ERRED IN DENYING HIS MOTION FOR A MISTRIAL.**

A criminal defendant has a constitutional privilege against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Washington State Constitution. *State v. Easter*, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996).

A defendant's post-arrest silence cannot be used as evidence of guilt:

“[T]he State may not elicit comments from witnesses...relating to a defendant’s silence to infer guilt from such silence...” *Easter* at 236. Further, a prosecutor’s comments on the right to remain silent by pointing out a defendant’s failure to deny facts relevant to the crime. *State v. Holmes*, 122 Wn.App. 438, 445, 93 P.3d 212 (2004); *State v. MacDonald*, 122 Wn.App. 804, 812, 95 P.3d 1248 (2004). “It is fundamentally unfair, and a violation of due process, to allow an arrested person’s silence to be used to impeach an exculpatory explanation offered by that person at trial.” *Holmes* at 444, citing *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S.Ct. 2240 (1976); *State v. Romero*, 113 Wn.App. 779, 786-87, 54 P.3d 1255 (2002).

Error of this type is prejudicial and requires reversal unless the State establishes beyond a reasonable doubt that the error is harmless. *Easter* at 42. To meet this standard, the State must show beyond a reasonable doubt that “any reasonable jury would reach the same result absent the error, [and] the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” *Easter* at 42.

In this case, the State cannot demonstrate that the error is harmless beyond a reasonable doubt. Mr. House did not deny that Officer Schlecht removed the straw from the jacket he was wearing, nor did he refute the opinion of the State’s expert that there was methamphetamine residue in

the straw. Mr. House's defense was not predicated upon the jury disbelieving the testimony of either of the State's witnesses. This case boiled down to whether the jury believed Mr. House when he denied knowing that the straw was in his jacket pocket because it had been placed there by someone else during the time the jacket and vehicle were not in his possession. This case was not complicated; it rested solely on Mr. House's credibility with the jury. The prosecutor's flagrantly improper and ill-intentioned question destroyed that credibility because it suggested to the jury that any discrepancy between what actually happened and what the Officer Schlecht believed happened was correctable by Mr. House.

Further, the trial court erred by failing to grant a mistrial and electing to give a curative instruction because this error simply could not be cured in front of this jury. As the *Holmes* Court noted, "the bell is hard to unring. The defense is in a difficult position. 'Counsel must gamble on whether to object and ask for a curative instruction—a course of action which frequently does more harm than good—or to leave the comment alone.'" *Holmes* at 446, citing *State v. Curtis*, 110 Wn.App. 6, 15, 37 P.3d 1274 (2002).

Here, the curative instruction could not have removed that which the prosecutor had placed into the minds of the jurors: That Officer Schlecht had gotten a major detail of Mr. House's story wrong, that Mr.

House knew it, that Mr. House was in a position to correct Officer Schlecht prior to trial but failed to do so, and that an innocent person in that situation would have tried to clear up the matter with Officer Schlecht.

Because the jury's determination of Mr. House's guilt rested *entirely* on his credibility, the State cannot establish that the result of this case would have been the same absent this flagrant misconduct by the prosecutor. Further, the curative instruction could not unring this bell. Members of the jury are human and cannot be expected to un-remember what they heard. The evidence in this case, insofar as the only issue in this case was whether the possession was unwitting, was not overwhelming. Mr. House should be granted new trial.

**E. CONCLUSION**

Mr. House was denied a fair trial under both the United States Constitution and the Washington State Constitution, his conviction should be reversed, and he should be granted a new trial.

RESPECTFULLY SUBMITTED this 26<sup>th</sup> day of July, 2008.

  
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ANNE M. CRUSER, WSBA#27944  
Attorney for Mr. House

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) AFFIDAVIT OF MAILING  
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ANNE M. CRUSER, being sworn on oath, states that on the 26<sup>th</sup> day of July 2008,  
affiant placed a properly stamped envelope in the mails of the United States addressed to:

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AND

Mr. Larry House  
1666 SR 505