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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 37501-0-II  
COURT OF APPEALS, DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL LANG,

Appellant,

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
The Honorable Christine A. Pomeroy, Judge  
Cause No. 07-1-01653-1

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking the case from the jury where Lang produced sufficient evidence showing that his possession of the methamphetamine was unwitting.
02. The trial court erred in allowing the prosecutor to present argument that Lang was guilty even if he forgot and didn't know that he possessed the substance.
03. The trial court erred in denying Lang's motion for a mistrial where the prosecutor had exhorted the jury to find Lang guilty as a safeguard against others who would avail themselves of the same defense of unwitting possession.
04. The trial court erred in failing to dismiss Lang's conviction where the cumulative effect of the claimed errors materially affected the outcome of the trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether Lang proved by a preponderance of the evidence that his possession of the methamphetamine was unwitting? [Assignment of Error No. 1].
02. Whether the prosecutor's improper argument to the jury that Lang was guilty even if he forgot and didn't know that he possessed the substance denied Lang his rights to a fair trial, affected the jury verdict and eliminated the possibility that even a precise objection or a carefully worded curative instruction would have obviated

the resultant prejudice?  
[Assignment of Error No. 2].

03. Whether the outcome of Lang's trial was affected by the trial court's denial of his motion for a mistrial after the prosecutor had exhorted the jury to find Lang guilty as a safeguard against others who would avail themselves of the same defense of unwitting possession?  
limine? [Assignment of Error No. 3].
04. Whether the cumulative effect of the claimed errors materially affected the outcome of the trial requiring reversal of Lang's conviction?  
[Assignment of Error No. 4].

C. STATEMENT OF THE CASE

01. Procedural Facts

Michael Lang (Lang) was charged by information filed in Thurston County Superior Court on September 14, 2007, with unlawful possession of methamphetamine, contrary to RCW 69.50.4013(1). [CP 3].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 6]. Trial to a jury commenced on March 19, 2008, the Honorable Christine A. Pomeroy presiding. Lang took neither exceptions nor objections to the jury instructions, and the jury returned a verdict of guilty as charged. [RP 03/19/08 69; CP 18].

Lang was sentenced within his standard sentence range and timely notice of this appeal followed. [CP 42-50].

02. Substantive Facts

On September 13, 2007, at 1:20 in the morning, Patrol Deputy Alan Clark stopped a vehicle driven by Lang and arrested him for driving while license suspended. [RP 03/19/08 12-15, 23]. A search of Lang incident to his arrest produced a black nylon case taken from the left leg pocket of his work coveralls that contained “a glass smoking device and two baggies(,)” [RP 03/19/08 16, 25]. According to Clark, Lang said “he forgot he had them in his pocket(,)” adding that the substance in the pipe and/or baggies would test positive for “(m)eth” and that he hadn’t used it for “(t)hree or four days.” [RP 03/19/08 17-18]. The residue in the smoking device subsequently tested positive for methamphetamine. [RP 03/19/08 34-35].

Lang testified to his following exchange with Clark:

Well, he was checking me out and he started patting me and he said what’s this, and I said well, I didn’t know that was there. The deputy officer was checking me down and he started patting me down, and he found a little black pouch in my side pocket, my work coveralls. He asked me what it was, I said I don’t know. And then he opened it up and said is this yours, and I says, no, and he asked me are these your coveralls, and I said, yes, these are my coveralls.

[RP 03/19/08 48-49].

Lang went on to say that he had used methamphetamine “maybe four or five days prior” and that he hadn’t worn his coveralls since. [RP 03/19/08 50]. He also said it was plausible that he had previously used the seized pipe before putting it away in his coveralls where it was discovered at the time of his arrest, but denied he had told Clark that it would test positive for methamphetamine, saying he had told him he didn’t know. [RP 03/19/08 52 56-57, 59]. If he had known the pipe was in his pocket, he would “have disposed of it.” [RP 03/19/08 52]. “I didn’t know I had the pipe.” [RP 03/19/08 53].

D. ARGUMENT

01. LANG’S CRIMINAL CONVICTION  
FOR POSSESSION OF METHAMPHETAMINE  
MUST BE REVERSED WHERE HE  
PROVED THAT HIS POSSESSION WAS  
UNWITTING.

Unwitting possession is an affirmative defense to the charge of possession of a controlled substance. State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 958 (1998). To establish the defense, a defendant must prove by a preponderance of the evidence that the possession of the unlawful substance is unwitting. State v. Wiley, 79 Wn. App. 852, 860, 604 P.2d 1304 (1979). “Preponderance of the evidence” means that unwitting possession must be more probably true than not true.

San Juan County v. Ayer, 24 Wn. App. 852, 860, 604 P.2d 1304 (1979).

There are two alternative ways of establishing the defense: (1) that the defendant did not know he or she was in possession of the controlled substance; or (2) that the defendant did not know the nature of the substance he or she possessed. City of Kennewick v. Day, 142 Wn.2d 1, 11, 11 P.3d 304 (2000).

Here, the trial court gave the following jury instruction regarding unwitting possession.

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

[Court's Instruction 11a; CP 37].

The circumstances in this case establish proof by a preponderance of the evidence that Lang's possession of the methamphetamine was unwitting.

Lang readily admitted that it was plausible he had used methamphetamine in the pipe four or five days earlier and had left it in his

coveralls. This was clear, as was his assertion that he did not know the substance was in his possession at the time of his arrest. Clark, the only other witness to the events, corroborated this claim by relating that Lang had told him that he had did not remember putting the pipe in his pocket. Whether Lang further said that the residue in the pipe would test positive for methamphetamine, is of no consequence on the issue of his lack of knowledge of possession, as opposed to his lack of knowledge of the nature of the substance, for this is not how the issue is measured. Whether Lang consumed methamphetamine in the pipe four or five days earlier or possessed the pipe at the time of his arrest, has nothing to do with his uncontradicted claim that he “didn’t know (he) had the pipe.” [RP 03/19/08 53]. Lang carried his burden of persuasion, which was not rebutted, with the result that his possession was unwitting and thus his conviction must be reversed.

02. THE PROSECUTOR’S IMPROPER ARGUMENT TO THE JURY THAT LANG WAS GUILTY EVEN IF HE FORGOT AND DIDN’T KNOW THAT HE POSSESSED THE SUBSTANCE DENIED LANG HIS RIGHTS TO A FAIR TRIAL, AFFECTED THE JURY VERDICT AND ELIMINATED THE POSSIBILITY THAT EVEN A PRECISE OBJECTION OR A CAREFULLY WORDED CURATIVE INSTRUCTION WOULD HAVE OBTIATED THE RESULTANT PREJUDICE.

A criminal defendant’s right to a fair trial is denied

when the prosecutor makes improper comments and there is a substantial likelihood that the comments affected the jury's verdict. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Where there is no objection to the prosecutor's comment below, the right to assert prosecutorial misconduct on this basis is waived unless the remark was so flagrant and ill intentioned that a curative instruction could not have obviated the resultant prejudice. State v. Ziegler, 114 Wn.2d 533, 540, 789 P.2d 79 (1990). The defense bears the burden of establishing both the impropriety and the prejudicial effect. State v. Hoffman, 116 Wn.2d 51, 93,804 P.2d 577 (1991).

Over objection, the prosecutor neared the end her argument with this: "I'll make it simple. Unwitting substance possession is not forgetting you have drugs." [RP 03/19/08 91]. She added that "(i)t's not about people who forget about it. It doesn't apply in his case." [RP 03/19/08 91].

As previously noted, the jury was instructed that Lang was not guilty of the possession charge if "he did not know that the substance was in his possession(.)" [Emphasis added]. [Court's Instruction 11a; CP 37]. In addition, the jury was instructed that "(a) person knows or acts knowingly or with knowledge when he or she is aware of a fact,

circumstance or result which is described by law as being a crime(.)"

[Emphasis added]. [Court's Instruction 11; CP 36].

It is proper, of course, to draw appropriate inferences from the testimony presented at trial. It is not so good, however, to cross the line by incorrectly stating the law as set forth in the trial court's instructions, which happened in this case. State v. Estill, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972). Lang asserted that he did not know that that the pipe with the methamphetamine residue was in his coveralls. No evidence was presented to the contrary, including that of the arresting officer. The only response from the State was the prosecutor's aforementioned So What? claim quoted above, which both directed the jury and left it free to find Lang guilty even it found that he "did not know that the substance was in his possession."

Under both the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). A prosecutor commits misconduct when he misstates the jury's role or his own constitutionally mandated burden of proof. See State v. Miles, 139 Wn. App. 879, 890, 162 P.3d

1169 (2007); State v. Fleming, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Reversal is required here because the misconduct not only affected the jury verdict but also directly affected Lang's constitutional due process rights to have the prosecution shoulder the burden of proving its case against him beyond a reasonable doubt. See, e.g., State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). That standard requires the prosecution to shoulder the very heavy burden of showing the error harmless. Easter, 130 Wn.2d at 242. The prosecution can only meet that burden if it can convince this court that any reasonable jury would have reached the same result absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it "necessarily" leads to a finding of guilt. 104 Wn.2d at 425.

Moreover, should this court determine that Lang's objection lacked specificity, it is worth noting that for all of the reasons argued herein, the prosecutor's comments not only substantially affected the jury's verdict but also eliminated the possibility that even a precise objection or a carefully worded curative instruction would have cured the prejudicial effect of the prosecutor's argument.

The misconduct was of a very serious nature. Unwitting possession — not knowing the substance is in one's possession — is a defense to the charge for which Lang was convicted. The prosecutor's comments, as illustrated above, informed the jury that it could ignore this defense, thus relieving the State's of its burden to prove every element of the offense. An attorney has "no right to mislead the jury. This is especially true of a prosecutor, who is a quasi-judicial officer whose duty is to see that a defendant in a criminal prosecution is given a fair trial." [Emphasis in the original]. State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) (quoting State v. Reeder, 46 Wn.2d 888, 992, 285 P.2d 884 (1955)).

The prosecutor's misstatement of the law to the jury is a serious irregularity having more than grave potential to mislead the jury, with the result that this court should reverse.

03. THE TRIAL COURT ERRED IN DENYING LANG'S MOTION FOR A MISTRIAL WHERE THE PROSECUTOR HAD EXHORTED THE JURY TO FIND LANG GUILTY AS A SAFEGUARD AGAINST OTHERS WHO WOULD AVAIL THEMSELVES OF THE SAME DEFENSE OF UNWITTING POSSESSION.

During closing, the State argued:

Forgetting and not knowing are two completely different things, and I ask you to apply your common sense and your life experience to that. You know that. Not knowing and forgetting are two different things. What would happen if everybody that possessed drugs just said, Oh, I forgot I had it. I forgot about it. That's ridiculous.

[RP 03/19/08 82].

Lang objected, moved for a mistrial at sidebar [RP 03/19/08 82-83]

and subsequently made the following record:

(M)y objection on (the prosecutor's) closing dealt with the statement she made with respect to what posing the question to the jury, something along the lines of what would happen if we did this, if every single person who was stopped with drugs said I forgot. And I understand the Court ruled against my objection, but I just want to reiterate on the record that I felt it was asking the jury to make a decision on society in general, and it was inappropriate for the closing arguments. I moved for a mistrial, and the Court - -

....

Denied it.

[RP 03/19/08 92-93].

In denying the motion for mistrial, the court put the following on the record:

I heard your argument at sidebar. I heard counsel, and I will say I don't think she's asking them to make a comment on society or anything. I did not feel that it went to the point of a mistrial. She went on. I told you then and I will tell you now on the record. I don't think it rises to the level of mistrial. Her comments are for the record for the court of

appeals. I simply think it did not rise to that level.  
Thank you.

[RP 03/19/08 93].

A trial court's decision whether or not to grant a mistrial is reviewed for an abuse of discretion. State v. Post, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). In making this determination, this court applies a three-step test to determine if the trial irregularity may have influenced the jury: "(1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction." State v. Escalona, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing State v. Weber, 99 Wn.2d 158, 165-66, 659 P.2d 1102 (1983)).

It was improper for the prosecutor to exhort the jury to find Lang guilty as a safeguard against others who would avail themselves of the same defense of unwitting possession, which is nothing short of a disguised plea to protect the community from "everybody that possessed drugs" from claiming innocence because the "person did not know that the substance was in his possession." See State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1011 (1990). The obvious import of the prosecutor's argument was to tell the jury that they should convict based upon their obligation to the

community. Such arguments are improper because they invite the jury to decide the case based upon emotion and sending a message to society, rather than the evidence at trial against the particular defendant. See State v. Coleman, 74 Wn. App. 835, 838, 876 P.2d 458 (1994), review denied, 125 Wn.2d 1017 (1995) (telling the jurors they would have to violate their oath as jurors by ignoring the evidence if they did not find the defendant guilty as charged).

The prejudice here is self-evident and precluded the jury from making a fair determination of Lang's guilt or innocence, with the result that he was denied his right to a fair and impartial jury trial. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) and State v. Oughton, 26 Wn. App. 74, 612 P.2d 812 (1980). The seriousness of this improper argument cannot be denied, and did not lend itself to instructional cure and was certainly exacerbated, where, as here, the defendant objected and the court overruled the objection, which effectively gave the court's imprimatur to the misconduct. See State v. Davenport, 100 Wn.2d at 764; Mahorney v. Wallman, 917 F.2d 469, 473 (10<sup>th</sup> Cir. 1990).

In denying the motion for mistrial, the trial court abused its discretion in ignoring the obvious and inescapable prejudice inherent in the prosecutor's argument, which materially affected the outcome of the trial that singularly centered on Lang's claim or unwitting possession.

There is more than a substantial probability that the prosecutor's improper argument affected the verdict. It was of major significance and not harmless. This Court should reverse.

04. THE CUMULATIVE EFFECT OF THE ERRORS CLAIMED HEREIN MATERIALLY AFFECTED THE OUTCOME OF LANG'S TRIAL AND REQUIRES REVERSAL OF HIS CONVICTION.

An accumulation of non-reversible errors may deny a defendant a fair trial. State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

Here, as previously argued, the prosecutor exhorted the jury to convict Lang after incorrectly stating the law as set forth in the trial court's instructions and by also inviting the jury to decide the case on concerns other than the evidence elicited at trial. In light of this and further consideration of the evidence adduced demonstrating that Lang's possession was unwitting, even if any one of the issues presented standing alone does not warrant reversal of Lang's conviction, the cumulative effect of these errors materially affected the outcome of his trial and his conviction should be reversed, even if each error examined on its own

would otherwise be considered harmless. State v. Coe, 101 Wn.2d at 789;  
State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963).

E. CONCLUSION

Based on the above, Lang respectfully requests this court to reverse and dismiss his conviction for possession of methamphetamine consistent with the arguments presented herein.

DATED this 21<sup>st</sup> day of October 2008.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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