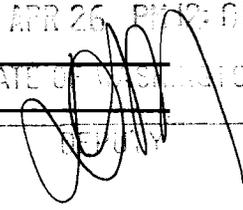


COURT OF APPEALS
DIVISION II

No. 40842-2

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STATE OF WASHINGTON
BY 

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

BRADLEY D. KENYON, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Theodore F. Spearman, Visiting Judge

No. 09-1-00398-0

BRIEF OF RESPONDENT

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A. RESPONDENT'S COUNTER-STATEMENT OF ISSUES
PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. When during closing argument Kenyon advanced an exculpatory theory that was premised upon the speculative existence of a witness who only Kenyon was in a position to identify, was it improper for the prosecutor to rebut Kenyon's comment to the jury by stating that Kenyon had not presented evidence to corroborate his speculative theory?
2. Was the evidence presented at trial sufficient to prove the location of the school bus stop so that it was clear beyond a reasonable doubt that Kenyon sold illegal drugs within 1,000 feet of a school bus stop?
3. When a measuring device was used to determine that the bus stop was 525 feet from Kenyon's illegal drug sale, but the accuracy of the measuring device was not established by additional evidence, was the evidence presented at trial sufficient to prove beyond a reasonable doubt that the bus stop was within 1,000 feet of Kenyon's illegal drug sale?
4. Did the court err by instructing the jury that it had to be in unanimous agreement as to the special verdict form?
5. Was Kenyon's attorney ineffective for failing to object to the foundation establishing the reliability of the measuring device and for failing to object to the special verdict instruction given to the jury in this case?
6. In a post-verdict motion for a new trial based upon alleged jury misconduct, Kenyon alleged there were pre-deliberation comments between jurors in regard to the poor appearance of spectators in the gallery who appeared to be supporters of the defendant. When Kenyon moved for a

new trial based upon these allegations, did the trial court abuse its discretion when it denied Kenyon a new trial

7. Is the evidence in this case sufficient to sustain Kenyon's conviction?

B. FACTS AND STATEMENT OF THE CASE

Police officers in Mason County, Washington, observed as a confidential informant bought methamphetamine from Bradley Kenyon on September 2, 2009. RP (Vol. I) 52, 72, (Vol. II) 109. Prior to the drug sale, police officers searched the confidential informant to verify that she had no drugs or money on her, then gave her marked money, and took her to Kenyon's neighborhood. RP (Vol. I) 86, 97, (Vol. II) 112, 113, 116, 122, 126.

The confidential informant phoned Kenyon and set up the drug deal. RP (Vol. II) 111-112. She then walked to Kenyon's trailer as officers watched from a distance. RP (Vol. I) 73, 77, (Vol. II) 116-118. She entered the trailer, then exited and walked back to where officers were waiting for her. RP (Vol. II) 117. She no longer had the marked money, but she now had methamphetamine that she purchased from Kenyon. RP (Vol. II) 124-125, 126, 191.

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The trailer from which Kenyon sold these drugs is located within 1,000 feet of a school bus stop. RP (Vol. II) 138-141. The distance from the school bus stop was measured by a police officer who used a rolling wheel measuring device. RP (Vol. II) 138-141. The officer testified at trial that he used the device to determine that the distance from the bus stop to Kenyon's trailer was 525 feet. RP (Vol. II) 138-141. However, there was no foundation provided to establish the reliability or accuracy of the measuring device. RP (Vol. II) 138-141.

During the trial one or possibly two jurors saw people in the gallery of the courtroom and, during a recess, made a comment to at least one other juror about their impression of these people in the gallery. RP (Vol. XVII) 275-298. It is apparent that the people in the gallery were supporters of Kenyon, and the juror described these supporters as resembling the "Manson family." RP (Vol. XVII) 275-298.

At the close of trial, the State offered a special verdict instruction on the school zone enhancement. RP (Vol. XIV) 181. The special verdict instruction required that the verdict be unanimous irrespective of whether it was answered yes or no. RP (Vol. XIV) 181. There was no objection located in the record in regard to this instruction.

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The jury returned a verdict of guilty to the offense of delivery of a controlled substance, and it answered the special verdict yes as to whether this drug sale had occurred within 1,000 feet of a school bus stop. RP (Vol. XIV) 223-224.

After the trial, counsel for Kenyon learned from an alternate juror that one of the jurors had made a derogatory comment during the trial. Based upon this allegation, Kenyon moved for a new trial based upon jury misconduct. The trial judge investigated the matter and denied Kenyon's motion for a new trial. RP (Vol. XVII) 275-288.

This appeal followed.

C. ARGUMENT

1. When during closing argument Kenyon advanced an exculpatory theory that was premised upon the speculative existence of a witness who only Kenyon was in a position to identify, was it improper for the prosecutor to rebut Kenyon's comment to the jury by stating that Kenyon had not presented evidence to corroborate his speculative theory?

When prosecutorial misconduct is alleged, the defendant has the burden of proving that misconduct occurred and that the conduct was

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prejudicial. *State v. Finch*, 137 Wn.2d 792, 839, 975 P.2d 967 (1999).

The trial court's ruling regarding prosecutorial misconduct is reviewed for an abuse of discretion, and a new trial is not required unless it is substantially likely that the prosecutor's conduct affected the verdict. *Id.*

Where a defendant advances an exculpatory theory and there is a witness available who could have corroborated the theory, but the witness was not called by the defendant, then the State may comment during closing about the defendant's failure to corroborate the exculpatory theory. *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209 (1991).

On review, the prosecutor's comments during closing argument are considered in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *State v. Boehning*, 127 Wn. App. 511, 111 P.3d 899 (2005).

In the instant case, the trial judge properly instructed the jury in regard to the burdens of proof. RP (Vol. XIV) 176-181. On this point, the trial judge specifically instructed the jury as follows:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable

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doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.

RP (Vol. XIV) 178-179.

During closing arguments, Kenyon's attorney made the following comment to the jury: "See, I haven't said this out loud yet. But there could have been somebody else in that trailer. That's a reasonable doubt. That's a reason to doubt, and that's the end of this case." RP (Vol. XIV) 207.

In response to Kenyon's argument, the prosecutor reminded the jury that the prosecution has the burden of proof, and asked a rhetorical question: "But you have to ask yourself if someone argues to you about what if there's somebody else in the trailer, wouldn't you want to hear from that person?" RP (Vol. XIV) 216. Kenyon interrupted this comment by the prosecutor three times with objections, but each time the court overruled the objection. RP (Vol. XIV) 216.

Because the jury was properly instructed in this case, because the prosecutor correctly stated that the prosecution has the burden of proof, and because the prosecutor's comment was in response to Kenyon's uncorroborated exculpatory theory, no error occurred. *State v. Gregory*, 158 Wn.2d 759, 861, 147 P.3d 1201 (2006). The prosecutor's comments

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were proper because the burden of proof was not shifted, and the prosecutor's comments were in direct response to Kenyon's own comments. *State v. Hartzell*, 156 Wn. App. 918, 941-943, 237 P.3d 928 (2010). "The mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense." *State v. Jackson*, 150 Wn. App. 877, 885-886, 209 P.3d 553 (2009). "Further, a prosecutor may comment on the absence of certain evidence if persons other than the defendant could have testified regarding that evidence." *Id* at 887, citing *State v. Ashby*, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969).

"When a defendant advances a theory exculpating him, the theory is not immunized from attack. On the contrary, the evidence supporting a defendant's theory of the case is subject to the same searching examination as the State's evidence." *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). Thus, it is not correct to assert that it is always an impermissible shifting of the burden of proof where a prosecutor comments on a defendant's failure to produce witnesses. *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991).

Additionally, on the facts of the instant case, because during closing argument Kenyon asserted that the State had not proved that no one other than Kenyon was in Kenyon's trailer when officers observed a confidential informant buying drugs at Kenyon's trailer, and because Kenyon further asserted that this constituted reasonable doubt, Kenyon thereby invited a comment from the prosecutor in regard to the missing witness who on these facts could be known only by Kenyon. The prosecutor's comment was fleetingly short and was in direct response to Kenyon's comment. If someone other than Kenyon was in Kenyon's trailer when the confidential informant bought drugs there, then Kenyon was in a better position than anyone to know who the missing witness was, if he or she existed, and if this witness's testimony was exculpatory, then Kenyon had no explanation for not calling this witness at trial.

Accordingly, it was proper for the prosecutor to directly comment on Kenyon's comment in closing argument. *State v. Blair*, 117 Wn.2d 479, 484-493, 816 P.2d 718, 721 - 725 (1991).

Finally, on the facts of this case, irrespective of whether the prosecutor's rebuttal of Kenyon's comment was proper, Kenyon suffered no prejudice from the prosecutor's conduct. The evidence presented in

this case was that a confidential informant went to Kenyon's trailer and bought drugs from Kenyon while officers observed from a distance. Although there is no evidence to suggest that anyone other than Kenyon was in Kenyon's trailer when the State's witness bought drugs from Kenyon, even if someone else was in the trailer, and even if there would have been corroborating evidence of this point, the fact still remains that Kenyon sold drugs to the confidential informant who testified at trial.

To prevail on appeal, Kenyon must show both prosecutorial misconduct and that the prosecutor's conduct was prejudicial. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Kenyon can show neither prosecutorial misconduct nor prejudice. Kenyon bears the burden of establishing the prejudicial effect of the prosecutor's comment. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). On the facts of the instant case, Kenyon cannot make this showing.

2. Was the evidence presented at trial sufficient to prove the location of the school bus stop so that it was clear beyond a reasonable doubt that Kenyon sold illegal drugs within 1,000 feet of a school bus stop?

Testimony at trial showed that Kenyon sold methamphetamine to a

confidential informant from his trailer in Olympia, Washington. RP (Vol. II) 138. Further testimony showed that there was a school bus stop at Olympic Highway North and C Street. RP (Vol. II) 139. The distance from the school bus stop to Kenyon's trailer was measured to be 525 feet. RP (Vol. II) 139-140.

The police officer who testified in regard to the location of the school bus stop explained that he got information from the school district to verify the location of the school bus stop and that he knew from his personal experience where the bus stop was located. RP (Vol. II) 139-143.

On cross examination, the officer was asked questions that led to the possibility of a second bus stop. RP (Vol. II) 178-179.

Despite confusion created by the defense line of questioning, however, there was sufficient evidence from which the jury could find, and did find, that there is a bus stop at C Street and Olympic Highway North and that this bus stop is within less than 1,000 feet from Kenyon's trailer where he sold drugs to a confidential informant. RP (Vol. II) 138-140.

3. When a measuring device was used to determine that the bus stop was 525 feet from Kenyon's illegal drug sale, but the accuracy of the measuring device was not established by additional evidence, was the evidence presented at trial sufficient to prove beyond a reasonable doubt that the bus stop was within 1,000 feet of Kenyon's illegal drug sale?

The State agrees that there was insufficient evidence presented at trial with which to make a prima facie showing of the accuracy of the measuring device used to measure the distance from the school bus stop to Kenyon's trailer. *State v. Bashaw*, 169 Wn.2d 133, 142-143, 234 P.3d 195 (2010).

The State also asserts, however, that the error in this case was harmless. *Id.* at 143-144. The officer measured a distance of 525 feet, which was only slightly more than half the distance of 1,000 feet. Accordingly, there is no reasonable probability that the jury would have reached a different result had the accuracy of the measuring device been firmly established. Had counsel for Kenyon properly objected to the lack of foundation, the foundation could have been addressed by the prosecution, and the likely result would have been a bolstering of the

weight of this evidence. Thus, the State asserts that it was not error for Kenyon's counsel to fail to object prior to admission of the measurement.

4. Did the court err by instructing the jury that it had to be in unanimous agreement as to the special verdict form?

The special jury instruction at issue in this case is substantively identical to, though not verbatim with, the one at issue in *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010). CP 170. In *Bashaw*, the Washington Supreme Court reversed a sentencing enhancement under facts very similar to the instant case. *Id.* Thus, had Kenyon's counsel objected to the special verdict instruction that given to the jury in this case, it is clear that error would have occurred.

However, in the instant case, Kenyon has not pointed to any portion in the record where he objected to the instruction that was given to the jury. Whether Kenyon may raise this issue for the first time on appeal is not clearly settled. There is precedent supporting a finding that the court should not consider this error for the first time on appeal because Kenyon has not preserved the issue for appeal. *State v. Nunez*, 160 Wn. App. 150, 248 P.3d 103 (2011). However, more on point to the instant

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case (because the reviewing court was specifically considering *Bashaw*), is stronger precedent establishing that the erroneous instruction in Kenyon's case is manifest constitutional error that can be raised for the first time on appeal. *State v. Ryan*, 2011 WL 1233976 (No. 64726-1-I, April 4, 2011).

Because the instruction required that the jury unanimously agree that the special verdict form should be answered "yes," the State asserts that the court should find that Kenyon has not preserved this issue for appeal.

5. Was Kenyon's attorney ineffective for failing to object to the foundation establishing the reliability of the measuring device and for failing to object to the special verdict instruction given to the jury in this case?

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011).

Kenyon's counsel was not ineffective for failing to object to the foundation for the reliability of the measuring device because an objection

would have served no purpose other than to prompt the State to put on additional evidence that would have had the effect of bolstering the reliability of the device and increased the weight given to it by the jury. The distance from the school bus stop to Kenyon's trailer where he sold drugs, 525 feet, was so obviously within 1,000 feet that an objection to the lack of foundation for the measuring device would have served no tactical benefit but would have prejudiced Kenyon by causing the State to enhance the weight of its evidence.

Legitimate trial tactics are not deficient performance. *Grier*, 171 Wn.2d at 33.

In regard to counsel's failure to object to the special jury verdict instruction given to jury in this case, counsel was not ineffective because the trial of this matter occurred in February of 2010, and *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195, was not decided until July 1, 2010. When this trial occurred in February of 2010, *State v. Bashaw*, 144 Wn. App. 196, 182 P.3d 451 (2008), was still controlling because it had not yet been overturned. Thus, counsel cannot be ineffective for following the controlling precedent.

6. In a post-verdict motion for a new trial based upon alleged jury misconduct, Kenyon alleged there were pre-deliberation comments between jurors in regard to the poor appearance of spectators in the gallery who appeared to be supporters of the defendant. When Kenyon moved for a new trial based upon these allegations, did the trial court abuse its discretion when it denied Kenyon a new trial?

Kenyon alleges juror misconduct requiring a new trial because, during a recess that occurred prior to deliberations, one or two of the jurors made a comment to each other or to other jurors about the appearance of Kenyon or his supporters who were in the courtroom. Kenyon characterizes this comment as “extrinsic evidence” and asserts that its consideration by the jury during deliberations requires a new trial. Br. of Appellant 22-25.

The State asserts in response that the jurors’ passive, reactive, or casual comments to each other, if any, about things plainly observable in the courtroom do not constitute evidence in the case, that there is no showing of any prejudice to Kenyon by what the jurors may have observed, and that there is no indication that the jury objectively or subjectively considered these comments or what they observed when rendering its verdict.

After the issue of a jury comment was brought to the trial court's attention, the trial court made the following observations for the record:

I only see from the declarations... one juror saying anything, more likely than not one time, on one occasion. And only one juror thought he had heard it – or she had heard it two times. But then again, only one juror saying anything that second time, one phrase. And it was never followed-up on at any time during the rest of the trial, or in deliberations.... Juror 4 said it had nothing to do with the defendant. Juror number 7 said it had to do with the people sitting in the gallery and how they were dressed and behaving. The second juror who said there might have been a second time has indicated that one of them had a phone that went off and thought I may have been mad or something, and had to do with the phone.

RP (Vol. XVII) 276. Then, while ruling on the issue of a new trial, the trial court judge summarized the facts, as follows:

It's clear that all of the jurors who participated in the deliberations agreed with juror number 4. That she made a comment referring to the women in the gallery as the Manson family because of the way they dressed. It happened once in the jury room during a recess while they were at the jury table. They – trying to be humorous, juror number 4 indicated she made the remarks as an attempt at being cute. She was not thinking about the defendant, she claims.

RP (Vol. XVII) 297.

Prior to deliberations, the court instructed the jury, beginning with the following instruction:

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial... The evidence that you are to consider during your deliberations consists of the

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testimony that you have heard from witnesses, stipulations, and the Exhibits that I have admitted during the trial.

RP (Vol. XIV) 176; CP 156. The reviewing court should assume that the jury followed its instructions from the trial court. *State v. Bourgeois*, 133 Wn.2d 389, 409, 945 P.2d 1120 (1997).

The trial court judge is, “[a]s a neutral, trained person observing both the verbal and nonverbal features of the trial,” the person who is best suited to determine whether any alleged juror misconduct has prejudiced the trial; therefore, whether to grant a mistrial is within the sound discretion of the trial court judge. *State v. Tigano*, 63 Wn. App. 336, 342, 818 P.2d 1369 (1991).

In the instant case, the trial court judge carefully investigated Kenyon’s allegations of jury misconduct but did not find any prejudice to Kenyon. “A personal remark, even a derogatory one, between jurors during a deliberation break, is not juror misconduct if it does not involve the substance of the jury's deliberations [footnote omitted].” *State v. Earl*, 142 Wn. App. 768, 775-776, 177 P.3d 132 (2008).

The issue that Kenyon raises suggests a question of “spectator misconduct.” *State v. Bourgeois*, 133 Wn.2d 389, 407-411, 945 P.2d 1120 (1997). In *Bourgeois*, some members of the jury saw spectators in

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the gallery “staring or glaring” and “hand-gesturing in the nature of pointing a gun at [a] witness.” *Id.* at 408. One of the jurors who saw the gestures told another juror what he had seen. On review of the trial court’s denial of a new trial on these facts, the Washington Supreme Court said that “the communication between jurors, even if it occurred, does not warrant a new trial.” *Id.* at 410.

In the instant case, the juror misconduct alleged by Kenyon was “not sufficiently prejudicial to warrant a new trial.” *Id.* at 411. Thus, the trial court did not abuse its discretion, and the trial court’s ruling denying Kenyon a new trial should be sustained on appeal. *Id.*

7. Is the evidence in this case sufficient to sustain Kenyon’s conviction?

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980). The appellate court is required to view the evidence in the light most favorable to the State and to grant deference to the trial

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court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992).

As discussed in detail in other sections of this brief, and as revealed by consideration of the complete record on review, there is sufficient evidence from which the jury could find, and did find, that on or about September 2, 2009, in Mason County, Washington, Kenyon knowingly sold methamphetamine to another person. RP (Vol. I) 52, 72, 73, 77, 86, (Vol. II) 109, 124, 125, 191. Additionally, there is sufficient proof from which the jury could, and did, find that the sale occurred within 1,000 feet of a school bus stop. RP (Vol. II) 109, 138, 139-140.

D. CONCLUSION

The prosecutor in this case did not commit misconduct in closing argument because the prosecutor's comment was in direct response to Kenyon's argument, and because the prosecutor did not shift the burden of proof by responding to Kenyon's argument.

The evidence was sufficient to show that Kenyon's drug sale occurred within 1,000 feet of a school bust stop.

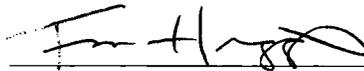
However, under authority of the Washington Supreme Court established after Kenyon's trial, the special verdict instruction given in this case was error. Recent authority of the court of appeal holds that this issue can be raised for the first time on appeal even though it was not preserved by an object at the trial. It is not clear that this court will rule the same as other courts; so, the State respectfully requests that this court rule that Kenyon's appeal was not preserved in this case.

Kenyon's attorney was not ineffective, and the evidence in this case was sufficient for the jury to find Kenyon guilty beyond a reasonable doubt.

The State respectfully requests that the court deny Kenyon's appeal and sustain his conviction and sentence in the trial court.

DATED: April 25, 2011.

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

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
BRADLEY D. KENYON,)
)
 Appellant,)
_____)

No. 40842-2-II

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BY _____
STATE OF WASHINGTON

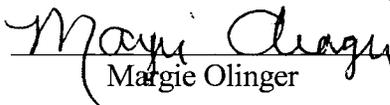
I, MARGIE OLINGER, declare and state as follows:

On April 25, 2011, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Patricia Pethick
P.O. Box 7269
Tacoma, WA 98417

I, Margie Olinger, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 25th day of April, 2011, at Shelton, Washington.



Margie Olinger

Mason County Prosecutor's Office
521 N. Fourth Street, P.O. Box 639
Shelton, WA 98584
(360) 427-9670 ext. 417
(360) 427-7754 FAX