

NO. 43333-8-II

COURT OF APPEALS, DIVISION II

---

STATE OF WASHINGTON,

Respondent,

vs.

DAVID D. FLYNN,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Chris Wickham, Judge  
Cause No. 11-1-01608-4

---

BRIEF OF APPELLANT

---

THOMAS E. DOYLE, WSBA NO. 10634  
Attorney for Appellant

P.O. Box 510  
Hansville, WA 98340  
(360) 638-2106

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENT OF ERROR .....	1
B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR .....	1
C. STATEMENT OF THE CASE .....	1
D. ARGUMENT .....	10
THE PROSECUTOR ENGAGED IN PREJUDICIAL MISCONDUCT BY MINIMIZING THE STATE’S BURDEN OF PROOF .....	10
E. CONCLUSION .....	15

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>State of Washington</u>	
<u>In re Glassman</u> , ___ Wn.2d ___, 286 P.3d 673 (2012).....	15
<u>State v. Anderson</u> , 153 Wn. App. 417, 220 P.3d 1273 (2009), <u>review denied</u> , 170 Wn.2d 10902 (2010) .....	13
<u>State v. Belgarde</u> , 110 Wn.2d 504, 755 P.2d 174 (1988) .....	11
<u>State v. Bennett</u> , 161 Wn.2d 303, 165 P.3d 1241 (2007) .....	14
<u>State v. Boehning</u> , 127 Wn. App. 511, 111 P.3d 899 (2005) .....	10
<u>State v. Bennett</u> , ___ P.3d ___, 2012, WL 1605735 (2012).....	22
<u>State v. Davenport</u> , 100 Wn.2d 757, 675 P.2d 1213 (1984).....	11, 14
<u>State v. Fisher</u> , 165 Wn.2d 727, 202 P.3d 937 (2009).....	15
<u>State v. Gregory</u> , 158 Wn.2d 759, 147 P.3d 1201 (2006).....	15
<u>State v. Hoffman</u> , 116 Wn.2d 51, 804 P.2d 577 (1991) .....	10, 11
<u>State v. Huson</u> , 73 Wn.2d 660, 440 P.2d 192 (1968) .....	10
<u>State v. Johnson</u> , 158 Wn. App. 677, 243 P.3d 936, <u>review denied</u> , 171 Wn.2d 1013 (2011) .....	13, 14
<u>State v. Perez-Mejia</u> , 134 Wn. App. 907, 143 P.3d 838 (2006) .....	15
<u>State v. Reed</u> , 102 Wn.2d 140, 684 P.2d 699 (1984).....	10
<u>State v. Rivers</u> , 96 Wn. App. 672, 981 P.2d 16 (1999).....	11
<u>State v. Stenson</u> , 132 Wn.2d 668, 940 P.2d 1239 (1997) .....	12
<u>State v. Ziegler</u> , 114 Wn.2d 533, 789 P.2d 79 (1990) .....	11

Federal Cases

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694  
(1966) ..... 7

Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78  
(1982)..... 11

Statutes

RCW 69.50.401 ..... 1

A. ASSIGNMENT OF ERROR

The trial court erred in allowing prosecutorial misconduct during closing argument to deprive Flynn of his constitutional due process right to a fair trial.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether Flynn was denied his constitutional due process right to a fair trial where the prosecutor engaged in prejudicial misconduct by minimizing the State's burden of proof?

C. STATEMENT OF THE CASE

01. Procedural Facts

David D. Flynn (Flynn) was charged by first amended information filed in Thurston County Superior Court on January 6, 2012, with possession of methamphetamine with intent to deliver, contrary to RCW 69.50.401. [CP 46].

The court denied Flynn's pretrial motion to suppress evidence under CrR 3.5 and entered the following findings of fact and conclusions of law:

I. FINDINGS OF FACT

The following facts, evidence in support of which was presented at the hearing, were undisputed:

Undisputed Findings:

1.1 On October 13, 2011, Deputy Nastansky of

the Thurston County Sheriff's Office arrested the defendant for Driving While License Suspended in the Third Degree, handcuffed him, and placed him in the rear of a patrol vehicle;

- 1.2 Deputy Nastansky advised the defendant of his Miranda rights.
- 1.3 The defendant indicated that he understood those rights and that he was willing to speak with Deputy Nastansky.
- 1.4 Deputy Nastansky and Deputy Elkins interrogated the defendant.
- 1.5 The defendant made incriminating statements to Deputy Nastansky and to Deputy Elkins:

There are no disputed facts.

Based on the foregoing findings of fact, the Court makes the following:

## II. CONCLUSIONS OF LAW

- 3.1 The Court has jurisdiction over the defendant and the subject matter of this action;
- 3.2 The defendant was in custody;
- 3.3 The defendant knowingly, intelligently and voluntarily waived his Miranda rights;
- 3.4 The defendant's statements were voluntarily made;

Based on the foregoing findings of fact and conclusion of law, the Court makes the following:

## III. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

- 4.1 The defendant's statements to Deputy Nastansky and Deputy Elkins are admissible (in the State's case in chief, and may also be admitted for impeachment purposes, should such evidence become relevant during the trial.

[CP 41-42].

The court also denied Flynn's pretrial motion to suppress evidence under CrR 3.6 and entered the following findings of fact and conclusions of law:

#### I. FINDINGS OF FACT

- 1.1 On October 13, 2011, Deputy Nastansky of the Thurston County Sheriff's Office was patrolling the southern area of Thurston County, along with Deputy Ben Elkins, who was "field training" Deputy Nastansky;
- 1.2 As a patrol deputy, Deputy Nastansky's duties include responding to calls, performing follow-up investigation, and enforcing traffic laws. As part of her routine, she checks vehicle license plate numbers to determine if a vehicle is stolen, if it is properly licensed, and if the registered owner is validly licensed to drive;
- 1.3 Deputy Nastansky observed an oncoming vehicle, and attempted to read the front license plate, but was unable to, so she turned her vehicle around to attempt to catch up to the vehicle to read the license plate number;
- 1.4 After turning around to catch up to the

vehicle, Deputy Nastansky observed the vehicle accelerate, then turn into a private driveway. The vehicle's turn signal was not activated 100 feet prior to making the turn, and only blinked twice before turning;

- 1.5 Deputy Nastansky activated her emergency lights prior to the driver exiting the vehicle;
- 1.6 The driver exited the vehicle, and approached the private residence on foot;
- 1.7 Deputy Elkins verbally directed the driver—later identified as the defendant, David Doyle Flynn—back to the vehicle;
- 1.8 Deputy Elkins asked the defendant what he was doing, and why he was at the residence;
- 1.9 Deputy Nastansky requested the defendant's driver's license, registration, and proof of insurance;
- 1.10 The defendant told Deputy Nastansky that his license was suspended;
- 1.11 After confirming that his license was suspended, and that he had warrants for his arrest, Deputy Nastansky arrested the defendant;
- 1.12 Deputy Nastansky searched the defendant's person incident to arrest, finding a plastic bag which contained numerous smaller (approximately 1" x 1") smaller baggies and another bag which contained methamphetamine;
- 1.13 The defendant's vehicle was searched incident to his arrest;
- 1.14 Neither Deputy Nastansky or Deputy Elkins was familiar with the defendant, or had any reason to suspect that he was engaged in criminal activity

other than the traffic violation for failing to signal 100 feet prior to turning.

Based on the foregoing findings of fact, the Court makes the following:

### III. CONCLUSIONS OF LAW

- 2.1 The Court has jurisdiction over the defendant and the subject matter of this action;
- 2.2 Deputy Nastansky had reasonable suspicion to stop the defendant for violating RCW 46.61.305;
- 2.3 The defendant was required to stop, to identify himself and give his current address, pursuant to RCW 46.61.021;
- 2.4 Based on information that the defendant's license was suspended, Deputy Nastansky had probable cause to arrest the defendant for Driving While License Suspended in the Third Degree;
- 2.5 The defendant's arrest for Driving While License Suspended in the Third Degree was valid;
- 2.6 The deputies' search of the defendant's person was a valid search incident to arrest;
- 2.7 The deputies search of the defendant's vehicle was not a valid search incident to arrest;
- 2.8 Deputy Nastansky's traffic stop of the defendant was not a pretext stop.

Based on the foregoing findings of fact and conclusions of law, the Court makes the following:

### III. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND  
DECREED that:

- 3.1 The evidence recovered from the defendant's person by Deputy Nastansky and Deputy Elkins is admissible in the State's case in chief.

[CP 43-45].

Trial to a jury commenced the following January 9<sup>th</sup>, the Honorable Chris Wickham presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 01/10/12 116]. Flynn was found guilty as charged and sentenced within his standard range. [CP 72, 79-88]. The court denied his motion to vacate judgment and timely notice of appeal was filed. [CP 255, 282-83].

02. Substantive Facts: CrR 3.5/3.6 Hearing

On October 13, 2011, at approximately 5:00 p.m., a vehicle driven by Flynn passed a patrol car going in the opposite direction occupied by Deputies Carrie Nastansky and Ben Elkins. [RP 12/19/11 10, 21]. Nastansky, who was unable to read Flynn's front license plate, did a U-turn and began to follow him. [RP 12/19/11 10, 23]. Flynn "quickly accelerated and turned into a driveway [RP 12/19/11 10](,)" where he exited his car and began walking toward the residence. [RP 12/19/11 12]. Simultaneously, Nastansky turned into the driveway and activated her patrol lights for a traffic infraction [RP 12/19/11 12, 26-27, 32, 53, 58-59]:

Flynn failure to signal 100 feet prior to turning into the driveway, as required by RCW 46.61.305. [RP 12/19/11 11-12, 40, 64, 114]. Elkins directed Flynn back to his vehicle where he was arrested for driving while license suspended. [RP 12/19/11 13-15, 28, 40-43, 90]. A person at the residence had no idea who Flynn was. [RP 12/19/11 20, 42].

Nastansky's search of Flynn incident to his arrest produced numerous baggies and what was verified to be methamphetamine. [RP 12/19/11 15-17, 45]. Consistent with his request that "the evidence recovered from (Flynn's) person should be admissible for all purposes at trial [CP 30](,)" the prosecutor asked Nastansky:

Q. Okay. And did you find anything else that was on his person that was pertinent to this investigation?

A. I don't believe so.

Q. Okay. Did he have scales on his person?

A. Not on his person.

[RP 12/19/11 17].

Following advisement and waiver of his Miranda<sup>1</sup> rights, Flynn said the methamphetamine was for his personal use and denied any type of distribution. [RP 12/19/11 18-19, 44, 48, 91-92].

---

<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Flynn remembered hitting his “blinker on the - - I hit my blinker. It blinked a couple of times, and then I started to slow down for the - - the driveway.” [RP 12/19/11 74]. “Just normal everyday driving.” [RP 12/19/11 85]. “I can’t say when I actually turned my signal on.” [RP 12/19/11 88]. He didn’t see any flashing lights “until (he) was already out of the vehicle and almost - - well, when I was at the fence railing just starting my conversation with the lady of the residence.” [RP 12/19/11 74]. “That’s when they hit their lights.” [RP 12/19/11 89]. He had stopped at the residence to inquire “if they were the folks that had anything such as tires for sale in their yard three to four days before that.” [RP 12/19/11 71]. A friend of Flynn’s had told him he had seen some tires for sale on “that stretch of road” during that period. [RP 12/19/11 79]. Before or after his arrest, neither deputy “never once mentioned anything about a blinker or anything like that.” [RP 12/19/11 77].

During cross examination, Flynn, who had nine prior convictions for driving without a license and two outstanding warrants for driving while license suspended, acknowledged he was aware that police read license plates and run the registered owner to see if they are suspended [RP 12/19/11 82], but pointed out he was “not the registered owner on that vehicle.” [RP 12/19/11 83].

//

03. Substantive Facts: Trial

The trial mirrored much of the testimony presented at the CrR 3.6 hearing, with a critical exception. Nastansky reiterated her testimony regarding the stop, arrest and search of Flynn, again saying the search produced numerous baggies, some with shards and some with residue, which subsequently tested positive for methamphetamine. [RP 01/09/12 32-36, 45, 65]. However, when asked if she found anything else, she abandoned her CrR 3.6 testimony, without objection:

Inside the same right front pocket here was a black digital scale, and on the scale, there was also some residue. I continued to search, and I found a - - he had a cargo pocket on his pants, and in that cargo pocket was a glass pipe which also contained some residue on it.

[RP 01/09/12 36-37]. Elkins also testified that the scale was found in Flynn's pocket. [RP 01/09/12 80]. The residue on the scale tested positive for methamphetamine. [RP 01/09/12 65]. Flynn told Elkins the methamphetamine was for his personal use. [RP 01/09/12 82].

During cross-examination, Nastansky admitted she had previously testified (at the CrR 3.6 hearing) that no scales were found on Flynn's person, but that (u)pon reviewing my report, again, they were on his person." [RP 01/09/12 48]. She referred to her previous sworn testimony as "an incorrect statement." [RP 01/09/12 49]. Similarly, during his cross-examination, Elkins admitted he had not mentioned anything about a

scale found on Flynn when he previously testified (at the CrR 3.6 hearing), even though he had specifically been asked and discussed the evidence he observed recovered from Flynn. [RP 01/09/12 86-87, 99-100].

D. ARGUMENT

THE PROSECUTOR ENGAGED IN  
PREJUDICIAL MISCONDUCT BY  
MINIMIZING THE STATE'S BURDEN  
OF PROOF.

The law in Washington is clear, prosecutors are held to the highest professional standards, for he or she is a quasi-judicial officer who has a duty to ensure defendants receive a fair trial. See State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). Violation of this duty can constitute reversible error. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005).

A criminal defendant's right to a fair trial is denied where there is an unsuccessful objection to the prosecutor's improper comments and there is a substantial likelihood the comments affected the jury's verdict. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). 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). Where a defendant fails to object to improper comments at trial, or fails to request a curative instruction, or to move for a mistrial, reversal is not always

required unless the prosecutorial misconduct 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 State’s burden to prove harmless error is heavier the more egregious the conduct is.” State v. Rivers, 96 Wn. App. 672, 676, 981 P.2d 16 (1999).

A prosecutor’s obligation is to see that a defendant receives a fair trial and, in the interest of justice, must act impartially, seeking a verdict free of prejudice and based on reason. State v. Belgarde, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). The hallmark of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury and thus deny the defendant a fair trial guaranteed by the due process clause? Smith v. Phillips, 455 U.S. 209, 210, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982). In this context, the definitive inquiry is not whether the error was harmless or not harmless but rather did the irregularity violate the defendant’s due process rights to a fair trial. State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984).

Although a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury, State v. Hoffman, 116 Wn.2d at 94-95, it is misconduct of the most flagrant degree to minimize the burden of proof

and thereby encourage the jury to convict based on something short of proof beyond a reasonable doubt, which occurred in this case. State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997); State v. Davenport, 100 Wn.2d at 763.

During rebuttal argument, in addressing the reasonable doubt instruction [Court's Instruction 3; CP 56], the prosecutor argued to the jury:

... It does talk about abiding belief in the truth of the charge. And that's tough language. That's abiding belief. What's an abiding belief? I sometimes hear from a jury, well, we think you did it - - this is after an acquittal. We think he did it; we just don't think there is enough proof beyond a reasonable doubt. I submit to you, if you think he did it, that's an abiding belief in the truth of the charge.

[RP 01/10/12 152] 10/04/11 1016]. When defense counsel immediately objected—"This misstates the jury instruction. It also misstates the law in the state of Washington"—the court responded:

I guess what I heard is (the prosecutor) reading from the instruction on reasonable doubt, and I would ask the jury to look at that instruction when you attempt to understand the burden of proof in this case.

[RP 01/10/12 152]. The prosecutor then repeated his argument:

... You've heard all of the evidence, and after hearing all of the evidence, if it's your belief that he did this, you've got an abiding belief in the truth of the charge, the charge being possession with intent to deliver.

[RP 01/10/12 153].

It was clearly misconduct for the prosecutor to argue to the jury that even if it thought there is not “enough proof beyond a reasonable doubt,” if it thought the defendant did the crime, it therefore had an abiding belief in the truth of the charge and thus could return a verdict of guilty. This minimized the State’s burden of proof to a level of “if you think the defendant did it,” which was further exacerbated by the court’s somewhat cavalier response that implies that what the prosecutor argued is what the jury instruction says or means.

In State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 10902 (2010), even though the jury, as here, was correctly instructed on the State’s burden of proof and that lawyers’ statements are not evidence, this court, while affirming since the misconduct was not sufficiently prejudicial, held that the State committed misconduct by comparing its beyond a reasonable doubt burden of proof to everyday common decisions in which one might choose to act or refrain from acting, reasoning this was improper because it minimized the importance of the reasonable doubt standard and the jury’s role in determining whether the State had met its burden. Anderson, 153 Wn. App. at 431. Similarly, in State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011), where the prosecutor trivialized the State’s burden of proof by arguing that an

abiding belief was like knowing what a scene depicted in a puzzle looked like prior to putting in the last pieces, this court reversed, reasoning in part that the State had impermissibly quantified the level of certainty required to satisfy its burden of proof. Johnson, 158 Wn. App. at 685-86.

Given that the presumption of innocence is the bedrock upon which the criminal justice stands, and because this presumption is defined by the reasonable doubt instruction, “it can be diluted and even washed away if reasonable doubt is defined so as to be illusive or too difficult to achieve(,)” State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007), which is what happened in this case. Contrary to the prosecutor’s argument, wherein he quantified the level of certainty to “if you think he did it,” the jury was within its right to conclude that although it may have thought Flynn “did it,” it was also not satisfied beyond a reasonable doubt that he was guilty of the charged offense.

The State’s evidence of Flynn’s “intent to deliver,” in contrast to his mere possession, was neither clear-cut nor overwhelming, and the effect of the trial court’s response to defense counsel’s objection to the improper argument, provided an emphatic aura of legitimacy to the impermissible comments. See State v. Davenport, 100 Wn.2d at 764. Because the State’s case against Flynn “was controverted, the prejudicial

impact of the misconduct is magnified.” State v. Perez-Mejia, 134 Wn. App. 907, 919, 143 P.3d 838 (2006).

Based on this record, reversal is required, for there is a substantial likelihood that the prosecutor’s comments affected the jury’s verdict. Moreover, the comments were nothing short of a flagrant attempt to encourage the jury to decide the case on improper grounds, for they were “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice’ incurable by a jury instruction.” See State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009) (quoting State v. Gregory, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)). The prosecutor’s misconduct minimized the State’s burden of proof and in the process ensured that Flynn did not receive a fair trial.

Thus, deciding whether reversal is required is not a matter of whether there is sufficient evidence to justify upholding the verdicts. Rather, the question is whether there is a substantial likelihood that the instances of misconduct affected the jury’s verdict. Dhaliwal, 150 Wn.2d at 578. We do not decide whether reversal is required by deciding whether, in our view, the evidence is sufficient....

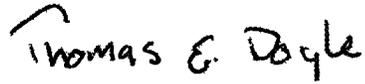
In re Glassman, \_\_\_ Wn.2d \_\_\_, 286 P.3d 673, 681 (2012).

E. CONCLUSION

Based on the above, Flynn respectfully requests this court to reverse and remand.

//

DATED this 30<sup>th</sup> day of November 2012.



THOMAS E. DOYLE  
WSBA NO. 10634

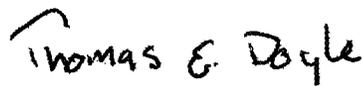
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Carol La Verne  
paoappeals@co.thurston.wa.us

David D. Flynn #773244  
A.H.C.C.  
P.O. Box 2049  
Airway Heights, WA 99001

DATED this 30<sup>th</sup> day of November 2012.



THOMAS E. DOYLE  
Attorney for Appellant  
WSBA NO. 10634

# DOYLE LAW OFFICE

**November 30, 2012 - 1:02 PM**

## Transmittal Letter

Document Uploaded: 433338-Appellant's Brief.pdf

Case Name: State v. Flynn

Court of Appeals Case Number: 43333-8

**Is this a Personal Restraint Petition?**  Yes  No

### The document being Filed is:

- Designation of Clerk's Papers  Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: \_\_\_\_\_
- Answer/Reply to Motion: \_\_\_\_\_
- Brief: Appellant's
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_  
Hearing Date(s): \_\_\_\_\_
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: ted9@me.com

A copy of this document has been emailed to the following addresses:  
paoappeals@co.thurston.wa.usa