

No. 44763-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Laronzo Murphy,

Appellant.

Clark County Superior Court Cause No. 12-1-01393-4

The Honorable Judge Daniel Stahnke

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Skylar T. Brett
Attorneys for Appellant

BACKLUND & MISTRY

P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ARGUMENT

I. THE COURT VIOLATED MR. MURPHY’S RIGHT TO PRESENT A DEFENSE BY EXCLUDING ADMISSIBLE EVIDENCE AND REFUSING TO INSTRUCT THE JURY ON THE MEDICAL MARIJUANA DEFENSE.

A. The evidence Mr. Murphy offered regarding his medical marijuana defense was not hearsay because it was not offered for the truth of the matter asserted.

The trial court violated Mr. Murphy’s due process right to present a defense by excluding Durosimi’s testimony and doctor’s letter about her authorization to use medical marijuana. *State v. Lord*, 161 Wn.2d 276, 301, 165 P.3d 1251 (2007).

A “verbal act” is not hearsay because its significance lies in the fact that it was made, not in the truth of what is asserted. *State v. Rangel-Reyes*, 119 Wn. App. 494, 498, 81 P.3d 157 (2003). Durosimi’s testimony and the doctor’s letter established the fact of her diagnosis, and thus involved a “verbal act.” Still, the state argues that the evidence was properly excluded as hearsay. Brief of Respondent, pp, 8-9. Respondent claims that Mr. Murphy offered the evidence for the truth of the matter asserted: to demonstrate that Durosimi suffered from a debilitating medical condition. Brief of Respondent, p. 9. But Mr. Murphy was not required to show that Durosimi “suffered” from a debilitating medical

condition, only that she had been diagnosed with one by a physician.

RCW 69.51A.010(4).

Durosimi could have testified about her diagnosis without offering any statement for the truth of the matter asserted. In fact, Durosimi's testimony need not even have contained a statement at all. Mr. Murphy planned to ask her whether she had been diagnosed by a doctor: a yes-or-no question. RP 436.

The court also excluded a letter designating Mr. Murphy as Durosimi's medical marijuana provider. RP 231, 235. Even though the court excluded the letter in hearsay grounds, the state argues that it was excluded because it was not properly authenticated. Brief of Respondent, p. 8. But a document can be authenticated by "testimony of a witness with knowledge that a matter is what it is claimed to be." ER 901(b)(1). Durosimi had knowledge of the letter and could have properly authenticated it under the rules of evidence.

The court violated Mr. Murphy's right to due process by excluding admissible evidence necessary to establish his medical marijuana defense. *Lord*, 161 Wn.2d at 301.

B. Mr. Murphy made a *prima facie* showing that he was Durosimi's designated medical marijuana provider; whether he proved each element of the defense was a question for the jury.

In order to raise the medical marijuana defense, the accused must make a *prima facie* showing that his/her possession was lawful under the statute. *State v. Brown*, 166 Wn. App. 99, 104, 269 P.3d 359 (2012). The trial court may not weigh conflicting factual issues to deny the accused the opportunity to present the defense to the jury. *Id.* at 104-05.

Mr. Murphy presented *prima facie* evidence that he was Durosimi's designated medical marijuana provider. RP 70-72, 220-27, 278, 436-38. The court refused to instruct the jury on the medical marijuana defense, finding that Durosimi was not a "qualifying patient." RP 90, 224, 487, 513.

Respondent abandons this reasoning on appeal. Instead, Respondent argues that the court properly refused to instruct the jury on the defense because Mr. Murphy admitted to using some of Durosimi's marijuana. Brief of Respondent, pp. 10-11. But Durosimi testified that Mr. Murphy did not use the marijuana he grew for her medical use. RP 438. Additionally, Mr. Murphy did not admit to using marijuana that he had grown or obtained for Durosimi for medical purposes, which is the only use that would have precluded the defense. RP 461. The court erred by weighing the conflicting evidence. *Brown*, 166 Wn. App. at 104-05.

Once he had made a *prima facie* showing, the issue of whether Mr. Murphy was able to prove each element of the medical marijuana defense was an issue for the jury, not for the court. *Brown*, 166 Wn. App. at 104-05.

Once the accused has presented some evidence that s/he is entitled to raise the medical marijuana defense, whether each element has been proven by a preponderance of the evidence becomes a jury question. *Brown*, 166 Wn. App. at 105. Nevertheless, the state argues that Mr. Murphy was required to establish each element of the statutory defense in order to qualify for a jury instruction. Brief of Respondent at pp. 13-14 (*citing State v. Shepherd*, 110 Wn. App. 544, 431 P.3d 1235 (2002)). But *Shepherd* did not address the standard for instructing a jury on the medical marijuana defense. *Id.* Rather, it dealt with a claim that the court had erred by finding insufficient evidence for the defense in a stipulated facts bench trial. *Id.* at 548. Respondent's reliance on *Shepherd* is misplaced.

The court violated Mr. Murphy's constitutional right to present a defense by weighing conflicting evidence in refusing to instruct the jury on the medical marijuana defense. *Brown*, 166 Wn. App. at 104-05. Mr. Murphy's marijuana conviction must be reversed. *Id.*

II. THE SEARCH WARRANT WAS UNCONSTITUTIONALLY OVERBROAD.

A. Mr. Murphy may challenge the search for the first time on appeal.

An unconstitutional search can constitute manifest error affecting a constitutional right, raised for the first time on review. RAP 2.5(a)(3); *State v. Swetz*, 160 Wn. App. 122, 128, 247 P.3d 802 (2011) *review denied*, 174 Wn.2d 1009, 281 P.3d 686 (2012). Still, the state argues that Mr. Murphy may not challenge the warrant search for the first time on appeal. Brief of Respondent, pp. 14-15 (*citing State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995)). *McFarland* addressed a claim that defense counsel had provided ineffective assistance by failing to challenge a warrantless arrest pretrial. *Id.* The court declined to review the issue because the necessary facts were not in the record. *Id.* Here, however, all of the necessary facts -- the warrant and the affidavit -- are in the record. As discussed in Mr. Murphy's Opening Brief and below, the prejudice is apparent as well. The state's reliance on *McFarland* is misplaced.

B. The search warrant was overbroad with regard to authorization to search for and seize items protected by the First Amendment.

A warrant authorizing seizure of materials protected by the First Amendment must be written with "the most scrupulous exactitude." *Zurcher v. Stanford Daily*, 436 U.S. 547, 564, 98 S.Ct. 1970, 56 L.Ed.2d

525 (1978); *Stanford v. Texas*, 379 U.S. 476, 485, 85 S.Ct. 506, 13 L.Ed.2d 431 (1965); *State v. Perrone*, 119 Wn.2d 538, 547, 834 P.2d 611 (1992). In this case, the warrant authorized police to search for and seize broad categories of items protected by the first amendment, for which there was no probable cause. CP 37.

Respondent does not contest the overbreadth of that portion of the warrant relating to First Amendment materials. Brief of Respondent, pp. 14-22. Instead, the state claims that the warrant is severable, and that Mr. Murphy cannot show prejudice because the police did not seize any photographs or videos. Brief of Respondent, p. 21. But the police did seize a notebook, which was admitted against Mr. Murphy at trial. Ex. 70. The notebook was protected by the First Amendment and the information written inside was relevant to all three charges. The state's argument fails.

The Fourth Amendment was adopted, in part, to prevent general searches. *Perrone*, 119 Wn.2d at 557. Here, the warrant authorized a "general search of materials protected by the First Amendment," allowing the executing officers to "rummage through virtually all of defendant's" photos and digital media, despite the lack of any basis in the affidavit. *Id.* at 559. The severability doctrine does not apply to general warrants; in such cases, "the invalidity due to unlimited language of the warrant taints

all items seized without regard to whether they were specifically named in the warrant.” *Id.*, at 557.

In this case, the directive to search for photographs and electronic media—for which there was no basis in the affidavit—was itself equivalent to a general warrant. The offending language directed the executing officers to seize any “photo, negatives, digital images, video tapes, slides, film, undeveloped film, and the contents therein,” all of which might contain images, recordings, or texts protected by the First Amendment. CP 37

Because the “photographs” clause was broad enough to allow such a general rummaging through all of Mr. Murphy’s photographs and electronic media, it was itself a general warrant of the type forbidden by the Fourth Amendment. *Perrone*, 119 Wn.2d at 538. Accordingly, the clause cannot be severed from the remainder of the warrant.¹

Because the warrant was overbroad, the evidence must be suppressed, Mr. Murphy’s convictions reversed, and the case dismissed with prejudice. *Perrone*, 119 Wn.2d at 547.

¹ Furthermore, the remainder of the warrant is overbroad, and is also invalid due to a lack of nexus between the area to be searched and the evidence to be seized.

- C. The search warrant affidavit's boilerplate language did not provide probable cause and did not establish a nexus between the things to be seized and Durosimi's home.

Generalizations and boilerplate regarding the activities of drug dealers are insufficient to establish probable cause. *State v. Thein*, 138 Wn.2d 133, 147-48, 977 P.2d 582 (1999). The warrant for the search of Durosimi's home authorized an exploratory search for any firearms, ammunition, holsters, manuals, etc. even though there was only probable cause for the handgun allegedly used in the robbery. CP 36, 38-44.

A search warrant may include a generic list of items sought only if the officers' discretion is limited by tying the list to the crime under investigation: "A search warrant that fails to specify the crime under investigation without otherwise limiting the items that may be seized violates the particularity requirement of the Fourth Amendment." *State v. Riley*, 121 Wn.2d 22, 27, 846 P.2d 1365 (1993). Respondent argues that a less descriptive itemization was permitted in Mr. Murphy's case because the warrant listed the crimes under investigation. Brief of Respondent, p. 19-21. But the warrant only listed robbery and unlawful possession of a firearm. CP 36. It did not list possession with intent to deliver, for which Mr. Murphy was also under investigation. CP 36. The state's contention is inaccurate.

“Blanket inferences” cannot supply the specific underlying circumstances necessary to provide probable cause in support of a search warrant. *Thein*, 138 Wn.2d at 147. The state argues, however, that *Thein* prohibits generalizations only as they relate to the place to be searched. Brief of Respondent, pp. 19-20.

Respondent construes *Thein* too narrowly. The proscription in *Thein* was not limited in this manner. But even under the state’s constricted interpretation, *Thein* supports suppression in this case because the affidavit did not establish a nexus between any illegally-possessioned guns and Durosimi’s apartment. Without citation to authority, the state argues that the allegation that Mr. Murphy used a gun in a robbery provided probable cause to search his girlfriend’s home for any and all guns. Brief of Respondent, p. 22. But alleged use of a gun at McKeen’s home does not provide the necessary nexus to believe that the gun could be found at Durosimi’s home. *Id.* Respondent also notes that Durosimi told police that she had shot guns with Mr. Murphy’s friends a week previously. Brief of Respondent, p. 21. Again, that fact does not provide any nexus between any guns and Durosimi’s home. Even under Respondent’s narrow interpretation of *Thein*, the state’s argument fails.

The warrant was also overbroad because it permitted seizure of wide-ranging categories of items that were not, themselves, contraband.

CP 36-37. Respondent points out that court will generally uphold a warrant authorizing police to search for evidence of dominion and control where a list of items follows. Brief of Respondent, p. 20. But the warrant in Mr. Murphy's case did not limit itself to evidence of dominion and control. CP 36-37. Instead it permitted police to search for and seize firearm holsters, cleaning kits, instruction manuals, and boxes, as well as photographs of the home, negatives, digital images, video, slides, films, and undeveloped film. CP 36-37. The warrant authorized seizure of much more than items establishing dominion and control.

The court denied Mr. Murphy his state and federal constitutional rights by admitting evidence that had been seized pursuant to an overbroad search warrant. *Thein*, 138 Wn.2d at 147-48. Mr. Murphy's convictions must be reversed. *Id.*

III. THE COURT DENIED MR. MURPHY'S STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT AND CREATED THE RISK THAT THE JURY WOULD IMPROPERLY AGGREGATE THE EVIDENCE AGAINST HIM.

When the state relies on evidence of multiple acts of similar misconduct to prove a single charge, the court must provide a unanimity instruction. Wash. Const. art. I, §§ 21, 22; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005); *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007). The state relied on evidence of two distinct acts in

arguing Mr. Murphy's guilt for possession with intent to deliver. RP 195, 351, 575. But the court failed to instruct the jury that they had to agree unanimously regarding which act had been proven beyond a reasonable doubt. RP 195, 351, 575.

Failure to provide a unanimity instruction requires reversal when the state relies on multiple acts of possession to prove a single charge and a rational juror could have a reasonable doubt as to either incident. *State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994). Even so, Respondent argues that Mr. Murphy was not entitled to a unanimity instruction because the evidence demonstrated a continuous course of conduct. Brief of Respondent, p. 25 (*citing State v. Love*, 80 Wn. App. 357, 908 P.2d 395 (1996)). This is incorrect

Love does not control here. In *Love*, the accused claimed that the police had planted five crack rocks on his person and an additional forty at his home. *Id.* Thus, the jury would have had to either believe all or none of the evidence against him. *Id.* In *King*, on the other hand, the accused claimed that the drugs found in his car belonged to someone else and that the police had planted the drugs found on his person. *Id.* The jury would have had to make a separate determination of guilt for each incident. *Id.*

Mr. Murphy's case is more analogous to *King*. The police found only a small quantity of marijuana on Mr. Murphy's person. RP 351. The

jury could have reasonably doubted that he intended to deliver that amount of drugs.

The court's failure to provide a unanimity instruction created the risk that the jurors improperly aggregated evidence of multiple acts, reaching a non-unanimous verdict for a single count. *Coleman*, 159 Wn.2d at 512. The court denied Mr. Murphy his right to a unanimous verdict. *Id.* Mr. Murphy's marijuana conviction must be reversed. *Id.*

IV. MR. MURPHY'S ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Defense counsel provided ineffective assistance by failing to raise the only available defense to Mr. Murphy's school bus route stop aggravating factor.

The accused is denied a fair trial when defense counsel fails to identify and raise the sole defense available to defeat a charge. *State v. Powell*, 150 Wn. App. 139, 156, 206 P.3d 703 (2009). the evidence demonstrated only that Mr. Murphy gave marijuana to Durosimi for free (for her medical use) or bartered it with other family members. RP 438, 446-48; RCW 69.50.435(4). But Mr. Murphy's attorney failed to request an instruction on the affirmative defense that he did not make a profit from selling drugs within a school zone. RCW 69.50.435(4).

"Profit" means "the excess of returns over expenditure in a transaction or serious of transactions; especially: the excess of the selling

price of goods over their cost.” *Merriam-Webster.com* (accessed 4/1/14).

Nonetheless, the state argues that Mr. Murphy made a profit when he asked his family members to “give [him] what [the marijuana] was worth.” Brief of Respondent, p. 30. The bartering system Mr. Murphy had with members of his family was not evidence that he made profit. The state did not offer any additional evidence that Mr. Murphy ever made profit from selling marijuana.

Mr. Murphy’s attorney provided ineffective assistance of counsel by failing to raise the affirmative defense that he did not gain profit from distributing drugs within a school zone. *Powell*, 150 Wn. App. at 156.

Mr. Murphy’s convictions must be reversed. *Id.*

B. Defense counsel provided ineffective assistance by failing seek suppression of evidence seized pursuant to an unconstitutionally overbroad search warrant.

Mr. Murphy relies on the argument above and in his Opening Brief.

C. Defense counsel provided ineffective assistance by failing to request a unanimity instruction relating to the possession with intent charge.

Mr. Murphy relies on the argument above and in his Opening Brief.

V. THE STATE CONCEDES THAT THE COURT VIOLATED MR. MURPHY'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY.

Respondent concedes that the court violated the protection against double jeopardy by entering convictions for both assault and robbery. Brief of Respondent, pp. 32-34. The court should accept the state's concession and vacate Mr. Murphy's assault conviction. . U.S. Const. Amends. V, XIV; Wash. Const. art. I, § 9; *State v. Chesnokov*, 175 Wn. App. 345, 348, 305 P.3d 1103 (2013).

VI. THE SENTENCING COURT FAILED TO PROPERLY CALCULATE MR. MURPHY'S OFFENDER SCORE AND SENTENCE.

A. The prosecution failed to prove that Mr. Murphy's Oregon convictions were comparable to a Washington felony.

Where the state alleges that an out-of-state conviction adds a point to an offender score, the prosecution bears the burden of proving comparability. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Here, the state failed to prove that Mr. Murphy's Oregon convictions for delivery of an imitation controlled substance were comparable to the analogous Washington statute. CP 18.

Washington law defines delivery of an imitation controlled substance more narrowly. The Washington statute requires proof that a reasonable person would believe the material to be a controlled substance. RCW 69.52.020(3). That element is not present in the Oregon statute.

ORS 475.912(1). Even so, the state argues that the convictions are comparable because the charging document alleges that Mr. Murphy “made an express or implied representation that the substance was a controlled substance.” Brief of Respondent, pp. 36-37. But any representation Mr. Murphy allegedly made has no bearing on whether a reasonable person would have believed the material to be a controlled substance. The state cannot prove that Mr. Murphy’s Oregon convictions fell within the more narrow Washington definition.

The Oregon statute defines the offense more broadly than Washington law and is not legally comparable to the Washington statute. *State v. Thieffault*, 160 Wn.2d 409, 416, 158 P.3d 580 (2007). Mr. Murphy’s case must be remanded for resentencing. *Id.*

B. The court erred by adding 24 months to Mr. Murphy’s robbery and assault sentences based on the school bus stop enhancement, which only applies to drug convictions.

Respondent concedes that it was a mistake to add 24 months to Mr. Murphy’s robbery and assault sentences, but prefers to refer to the mishap as a scrivener’s error. Brief of Respondent, pp. 37-39. Either way, the court should remand Mr. Murphy’s case for correction of the judgment and sentence.

CONCLUSION

The court violated Mr. Murphy's constitutional right to present a defense by prohibiting him from showing that he was Durosimi's designated medical marijuana provider. The court violated Mr. Murphy's constitutional rights by admitting evidence seized pursuant to an overbroad warrant. The court erred by failing to instruct the jury that they must be unanimous regarding which alleged act of possession had occurred. Mr. Murphy's defense attorney provided ineffective assistance of counsel. The state concedes that the court violated the protection against double jeopardy by entering convictions for both robbery and assault.

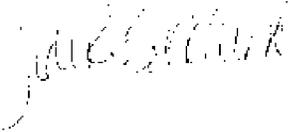
In the alternative, the state failed to prove that Mr. Murphy's Oregon convictions were comparable to a Washington felony. Respondent concedes that the court erred by adding a 24 month enhancement to his robbery and assault sentences. Mr. Murphy's sentence must be vacated and the case remanded for resentencing.

Respectfully submitted on April 3, 2014,

BACKLUND AND MISTRY



Skylar T. Brett, WSBA No. 45475
Attorney for Appellant



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Laronzo Murphy, DOC #365669
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

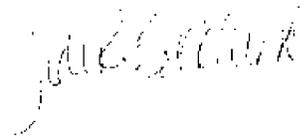
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 3, 2014.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

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