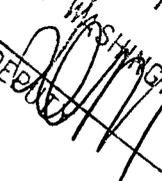


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COURT OF APPEALS  
DIVISION II  
2016 JAN 15 PM 12:00  
STATE OF WASHINGTON  
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NO. 46349-1-II

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

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STATE OF WASHINGTON,  
Respondent,

v.

ERIK K. BOSCOVICH,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE  
OF WASHINGTON FOR GRAYS HARBOR COUNTY

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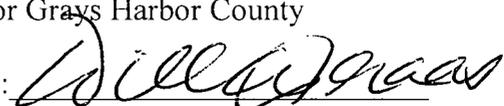
THE HONORABLE GORDON L. GODFREY, JUDGE

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BRIEF OF RESPONDENT

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**TABLE**

**Table of Contents**

STATEMENT OF THE CASE..... 1  
ARGUMENT ..... 1  
    1. The State did not commit prosecutorial misconduct in its closing  
    argument. .... 1  
    2. The methamphetamine was properly admitted. .... 7  
CONCLUSION..... 9

**TABLE OF AUTHORITIES**

**Cases**

*In Re Glasmann*, 175 Wn.2d 696, 698, 286 P.3d 673 (2012)..... 1  
*State v. Boehning*, 127 Wn.App. 511, 519, 111 P.3d 899 (2005)..... 1  
*State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)..... 5  
*State v. DeCuir*, 19 Wn.App. 130, 135, 574 P.2d 397 (1978) ..... 8  
*State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009)..... 5  
*State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985) ..... 9  
*State v. Keend*, 140 Wn.App. 858, 868, 166 P. 3d 1268 (2007)..... 10  
*State v. Larios-Lopez*, 156 Wn.App. 257, 233 P.3d 899 (2010)..... 6, 7  
*State v. Picard*, 90 Wn.App. 890, 897, 954 P.2d 336 (1998) ..... 7, 8  
*State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)..... 1  
*State v. Vassar*, 188 Wn.App. 251, 352 P.3d 856 (2015) ..... 3, 4

## STATEMENT OF THE CASE

The State of Washington moves this court for an order affirming the conviction of the appellant and dismissing this appeal.

## ARGUMENT

### **1. The State did not commit prosecutorial misconduct in its closing argument.**

To prevail on a claim of prosecutorial misconduct “a defendant is required to show that in the context of the record and all of the circumstances of the trial, the prosecutor’s conduct was both improper and prejudicial.” *In Re Glasmann*, 175 Wn.2d 696, 698, 286 P.3d 673 (2012). To show prejudice a defendant must show a substantial likelihood that the misconduct affected the jury’s verdict. *Id.* if a defendant does not object at trial to any of the alleged misconduct the complained of errors are waived unless the defendant establishes the misconduct is “so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994). Courts “review a prosecutor’s comments during closing argument in the context of the total argument, of the issues in the case, of the evidence addressed in the argument, and the jury instructions.” *State v. Boehning*, 127 Wn.App. 511, 519, 111 P.3d 899 (2005). Prosecutors are given “wide latitude in closing argument to

draw reasonable inferences from the evidence and to express such inferences to the jury.” Id.

Appellant objects to three statements made by the State during closing argument: (1) That Officer Saunders “can’t make this stuff up. If the officer was going to, he would do a better job than that” (RP 95) with regard to Saunders’ testimony as to what the appellant told him at the police station; (2) “You cannot have a reasonable doubt,” and; (3) The State’s statement that “I am sure the scales at the Washington State Patrol Crime Lab are a little higher tech than the ones at the Westport . . .” (RP 82). This statement was objected to on the basis of facts not in evidence and the objection was sustained by the court: “Stay within the evidence, counsel.” (RP 82). With the statement about Officer Saunders the State was not vouching for the witness but arguing credibility. Mr. Boscovich told Officer Saunders that the suspected methamphetamine “was crystal like substances that he was storing in the baggie in the his backpack and that if he could store them long enough they would grow and he could hold them up to the light and see pretty colors.” (RP 46). The essence of the State’s argument was that that statement was so fantastic that it is not something an officer would testify to unless it were true. Furthermore,

referring to instruction number 1 the State told the jury that “[y]ou are the sole judges of the credibility of each witness.” (RP 83).

As to the comment about the crime lab scales, once again that statement was objected to and the objection was sustained. The State told the jury that the only evidence they were to consider during their deliberations “consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.” (RP 76-77). Again in rebuttal the State told the jury “once again, the instruction that – number one, that cautions you only to consider evidence that has been before you.” (RP 93).

*State v. Vassar*, 188 Wn.App. 251, 352 P.3d 856 (2015) involved a prosecution for motor vehicle theft. Charlene Hammons, the victim, worked part-time repossessing vehicles. She bought a truck from Ms. Vassar but never received the title. Hammons then resold the truck to another individual conditioned on her obtaining the title from Vassar. A few days later, Vassar saw the truck on a Centralia street and used the key she had retained to take the truck to a friend’s place. She continually refused to return the truck and was charged with and convicted of motor

vehicle theft. In closing the State argued that the victim “works part time repossessing vehicles. She has to be bonded if you are going to be a repo person. Is she going to risk her bond on this old truck? There is no proof that she forged this bill of sale.” *Vassar* at 259. Vassar contended that the State argued prejudicial facts not in evidence when telling the jury that the victim was bonded and that as a result the prosecutor impermissibly used the prestige of his office to show the victim was the more credible witness. *Vassar* at 258-259. The court responded to this argument as follows:

While no party elicited the information about her being bonded, Ms. Hammons testified on both direct and cross examination about her repossession business. Repossession businesses are usually bonded and insured. We conclude the bonding argument does not rise to the level of “flagrant and ill-intentioned” misconduct and is not prejudicial like the error in *Rinkes*. The jury had the opportunity to observe the witnesses regarding credibility. A stray comment about Ms. Hammons being “bonded” is unlikely to have affected the jury’s credibility determinations. Again a timely objection and instruction would have cured any error.

*Vassar* at 259.

Here, the comment about the scales at the crime lab was much like the “bonded” comment in *Vassar*. In this case a timely objection was

made and sustained. The comment about the scales likely did not affect the jury's credibility determinations. "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Appellant claims that the State's comment "you cannot have a reasonable doubt" (RP 84) unconstitutionally relieved the State of its burden of proof and misstated the law prejudicing the appellant. But courts do not take allegedly improper comments out of context; rather, they are viewed in the context of the entire argument. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Here is what the State told the jury about reasonable doubt:

The State has the burden of proving each element of the crime beyond a reasonable doubt. A reasonable doubt is one for which a reason exists and may rise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If from such consideration you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

I would submit to you, ladies and gentlemen, that you cannot have a reasonable doubt that Mr. Boscovich, given all of the evidence, given the testimony, given the bias and interest of the parties

involved, you cannot have a reasonable doubt that Mr. Boscovich is guilty of possession of methamphetamine and I would ask you to find him so.

RP 83-84.

And again, in rebuttal, the State told the jury that it had “proven its case beyond a reasonable doubt and I would ask you to find him guilty.” (RP 95). While perhaps and inartfully stated, the comment “you cannot have a reasonable doubt” was another way of telling the jury that the State had proved its case beyond a reasonable doubt, which is certainly permissible.

In *State v. Larios-Lopez*, 156 Wn.App. 257, 233 P.3d 899 (2010) the prosecutor, in closing argument, told the jury that “[w]hether you vote guilty or not guilty, you have to know that you did the right thing. That is an abiding belief.” *Larios-Lopez* at 261. The appellant argued that this argument by the prosecutor constituted misconduct by shifting the burden of proof and violating his right to a fair trial. *Larios-Lopez* at 260. The court noted that when taken out of context the statement appeared to tell the jury that it needed to have an abiding belief in either a vote of guilty or not guilty which would be a misstatement of the law as the jury did not need an abiding belief in Larios-Lopez’s innocence to acquit. It only needed an abiding belief in his guilt to convict:

But we do not take allegedly improper comments out of context; rather, we review them in the context of the entire argument. Here, the challenged statement occurred after the prosecutor reminded the jury that it needed “an abiding belief of the charge”; this accurate statement of the law emphasized the State’s burden of proof. Thus, viewed as a whole, the State’s argument was not improper. Furthermore, also unlike Fleming, the State’s argument here did not constitute a flagrant and ill-intentioned violation of the rules governing a prosecutor’s conduct at trial. We hold, therefore, that in failing to object, Larios-Lopez failed to preserve his challenge to the State’s closing argument for appeal.

*Larios-Lopez* at 261.

Here, as in *Larios-Lopez*, the State made a correct statement of the law regarding reasonable doubt and the burden of proof not once, but twice. There was no error.

**2. The methamphetamine was properly admitted.**

“A sufficient foundation for the admission of evidence may be established even without proof of an unbroken chain of custody.” *State v. Picard*, 90 Wn.App. 890, 897, 954 P.2d 336 (1998). “ ‘A failure to present evidence of an unbroken chain of custody does not render an exhibit inadmissible if it is properly identified as being the same object and in the same condition as it was when it was initially acquired by the

party.”” *Picard* at 897 citing *State v. DeCuir*, 19 Wn.App. 130, 135, 574 P.2d 397 (1978). Ms. Wilson recognized exhibit 2, methamphetamine, because the “evidence bag has some blue evidence tape on it, which is the tape that has my initials, date, case number, and item number for this item that I received and analyzed.” (RP 20). Furthermore, Officer Saunders identified exhibit 2 as the methamphetamine that he found in appellant’s backpack and other than the repackaging inside and the crime lab tape on the larger bag, Saunders testified that it was in the same or similar condition as when he seized it. (RP 45-46). There was no evidence of tampering. Ms. Wilson didn’t find the difference in weight surprising especially if Saunders had weighed the methamphetamine in the packaging, which he had. (RP 32, 47).

In *Picard, supra*, an arson prosecution, the defendant argued that a portable heater was improperly admitted because the storage facility where it was held was accessible to many people and an unbroken chain of custody had not been established. The court rejected that argument noting that the lead investigator identified the heater at trial and testified that it was substantially in the same condition as it was when he picked it up at the scene of the fire. *Picard* at 897-898.

## CONCLUSION

Not only was there no cumulative error in this case, there was no error at all. In the context of the total argument, the issues in the case, the evidence addressed in argument, and the jury instructions, appellant has failed to show that the State's comments were both improper and prejudicial and that they were so flagrant and ill-intentioned that they caused an enduring and resulting prejudice that could not have been neutralized by the admonition to the jury. If the comments were error, they were harmless, given all of the other evidence in the case.

Under the "overwhelming untainted evidence" tests, the appellate court looks only at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt . . . the "overwhelming untainted evidence" tests allows the appellate court to avoid reversal on merely technical or academic grounds while ensuring that a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.

*State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Here, the defendant was found with a meth pipe on his person (RP 42) and methamphetamine in his backpack (RP 45) which he asked the

officer to throw away. (RP 47, 70). The State would argue that the guilty verdict was inevitable.

Also, as the court is to consider, among other things, the instructions to the jury when evaluating the prosecutor's comments, in this case the jury was provided with a set of instructions that correctly stated the law, including reasonable doubt, evaluation of credibility, and the evidence to be considered. CP 30-37. Jurors are presumed to follow the court's instructions. *State v. Keend*, 140 Wn.App. 858, 868, 166 P. 3d 1268 (2007).

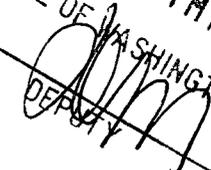
For all the foregoing reasons, appellant's conviction should be affirmed and this appeal dismissed.

DATED this 14 day of January, 2016.

Respectfully Submitted,

By:   
WILLIAM A. LERAAS  
Deputy Prosecuting Attorney  
WSBA #15489

WAL/lh

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**DECLARATION OF MAILING**

ERIC K. BOSCOVICH.

Appellant.

**DECLARATION**

I, Laura A. Harwick, hereby declare as follows:

On the 14th day of January, 2016, I mailed a copy of the Brief of Respondent to Lise Ellner, Law Offices of Lise Ellner, P. O. Box 2711, Vashon, WA 98070 by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 14th day of January, 2016, in Montesano, Washington.

