

79564-9

No. 24123-8-III

IN THE
COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

VIRGIL R. MONTGOMERY,
Appellant.

APPELLANT'S REPLY BRIEF

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ARGUMENT

Point I: The Evidence of Mr. Montgomery's Intent to Manufacture Methamphetamine was Insufficient to Convict as a Matter of Law

The evidence at trial was insufficient as a matter of law to prove Mr. Montgomery intended to manufacture methamphetamine. See Appellant's Brief (App. Br.) at 23-29. The State has cited no case where similar circumstances – the lawful purchase of lawful items that incidentally have unlawful uses – have justified a finding of the intent to manufacture methamphetamine. See *Brief of Respondent* (State's Br.). Instead, the State points out that the purchases were suspicious and would have justified an investigative stop. State's Br. at 7. Mr. Montgomery does not dispute this assertion. Merely suspicious behavior, however, cannot support a criminal conviction.

Mr. Montgomery purchased three boxes of cold medicine, acetone, hydrogen peroxide and matches. His shopping companion, shopping independently, purchased four boxes of cold medicine, matches and denatured alcohol. These purchases, taken together, may raise suspicions. However, these purchases cannot support a conclusion beyond a reasonable doubt that Mr. Montgomery intended to manufacture methamphetamine. Further, no additional evidence supports such a conclusion in this case.

No additional evidence revealed an illicit intent. That Mr. Montgomery and his companion made separate purchases should not even be grounds for suspicion. It is not uncommon for individuals to enter a store together and shop separately. See RP at 36; *State v. Carlson*, 130 Wn. App. 589, 595, 123 P.3d 891 (2005) (noting that fact that individuals entered store together and made separate purchases of legitimate items that also had illicit uses not suspicious or even atypical):

In addition, there was no other evidence tending to show an illicit intent: No evidence that Mr. Montgomery possessed any portions of the equipment necessary to make meth; that he possessed or had access to the missing ingredients necessary in the manufacture of meth; or that he was known to sell, manufacture or even use methamphetamine. Indeed, there was no evidence of his involvement in illicit drugs at all. In light of this lack of evidence, the State argues that Mr. Montgomery's guilt is evidenced by the way he and his companion needlessly shopped in several stores: "There simply was no need to visit all of those stores . . . unless one was trying to hide what he or she was doing." State's Br. at 7.

The State's spin on the evidence is downright scary. See *State v. Schneider*, 32 Kan. App. 2d 258, 80 P.3d 1184 (2003) (suppressing evidence and

agreeing with trial court's conclusion that it was "scary" to find articulable suspicion over perfectly legal transaction involving individuals who had separated in store to make purchases of pseudoephedrine products), *cited in Carlson*, 130 Wn. App. at 594. Surely this type of shopping, where people spend part of the day going from store to store comparing prices and merchandise and just looking around, is as common as individuals splitting up inside a store to shop. Under the State's world view, to avoid not just mere suspicion, but a conviction for the intent to manufacture methamphetamine, only one-stop shopping is beyond reproach.

In short, while the evidence in this case may lead to suspicions regarding Mr. Montgomery's purchases, it in no way supports a finding of guilt beyond a reasonable doubt. This Court should not countenance a conviction based on mere suspicion coupled with the fear and outrage that surround the methamphetamine scourge. For these reason and the reasons set forth in Appellant's Brief, this Court should reverse Mr. Montgomery's conviction and dismiss the case.

Point II: The State's Witnesses' Opinions as to Mr. Montgomery's Intent Were Inadmissible

The trial court erred in permitted the State's witnesses to testify as to their opinions that Mr. Montgomery's intended to manufacture methamphetamine. Since the only disputed issue in the case was Mr. Montgomery's intent, this

testimony was the same as opining that Mr. Montgomery was guilty. See App.

Br. at 30-32.

The State relies on *Seattle v. Heatley*, 70 Wn. App. 573, 577-79, 854 P.2d 658 (1993) to argue that all opinion testimony concerning an ultimate issue of fact is permissible at trial, unless it goes to the credibility of a witness. State's Br. at 8-9. That case does not stand for this proposition. Indeed, if the issue were as simple as the State presents, courts would no longer wrestle with the question. Yet Washington law is replete with cases regarding impermissible opinion testimony. See, e.g., *State v. Read*, 147 Wn.2d 238, 244, 53 P.3d 26 (2002) (holding that when a self-defense claim was not properly before the court, opinion testimony regarding whether the defendant had reason to defend himself was not an impermissible opinion as to his guilt or innocence); *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (in rape case where the defense was consent, improper for witness to testify that accuser suffered from rape trauma syndrome); *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003) (where only mother and father-defendant could have assaulted child, improper for witnesses to testify that they did not believe mother was the perpetrator); *State v. Carlson*, 80 Wn. App. 116, 125-29, 906 P.2d 999 (1995) (witness opined that child had been sexually abused due to her behavior at interview).

Contrary to the State's position, the rule remains that opinion testimony directly commenting on guilt is inadmissible: "Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant 'because it 'invad[es] the exclusive province of the [jury].'" *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (holding officers' statements during pretrial interview not testimony subject to prohibition of opinion testimony), *quoting Heatley*, 70 Wn. App. at 577. The following factors are considered in determining whether statements are impermissible opinion testimony: "(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact." *Demery*, 144 Wn.2d at 759 (internal quotes omitted), *quoting Heatley*, 70 Wn. App. at 579. Considering these factors in this case compels the conclusion that the opinion testimony was wrongly admitted.

Here, the witnesses were two police officers and a forensic chemist, all people jurors would expect to have better knowledge of the issue at hand than the average juror. The charge was that Mr. Montgomery possessed pseudoephedrine with intent to manufacture methamphetamine. CP at 1. In his defense, Mr. Montgomery admitted the possession but argued that he did not intend to

manufacture methamphetamine. In counterpoint, at least one officer and the forensic chemist stated outright that they believed Mr. Montgomery did intend to manufacture meth. App. Br. at 30-32.

Aside from the opinion testimony, the other evidence against Mr. Montgomery was slight and perfectly consistent with actual innocence. Indeed, the entire case was based on inferences of illicit intent from utterly legal conduct. See Point I, above, and App. Br. at 23-29. Under these circumstances, where the opinion testimony was the only concrete evidence of guilt, the opinions were a direct comment on Mr. Montgomery's guilt and should not have been admitted. See *State v. Kirkman*, 126 Wn. App. 97, 107 P.3d 133 (2005) (holding opinions as to credibility of witness inadmissible when witness's statement was only evidence of guilt).

Moreover, under these circumstances, the opinion testimony was unfairly prejudicial in violation of ER 403. First, the fact that one of two of the witnesses were police officers is particularly significant: "Testimony from a law enforcement officer may be especially prejudicial because the officer's testimony often carries a special aura of reliability." *Demery*, 144 Wn.2d at 765. Next, in this case, the testimony led the jurors to set aside their normal expectations. The ordinary person – or juror – must not infrequently buy or observe other people

buying pseudoephedrine without even considering an illegal intent. Thus, when the jurors in this case were told – by people “in the know” – that Mr. Montgomery’s otherwise innocent-seeming actions necessarily showed his illegal intent, the jurors, in effect, were told to substitute the witnesses’ judgment for their own. Accordingly, the opinion testimony was unfairly prejudicial and should not have been admitted.

In this argument, Mr. Montgomery raises an issue of constitutional magnitude that can be raised for the first time on appeal: “Admitting impermissible opinion testimony regarding the defendant’s guilt may be reversible error because admitting such evidence violates [the defendant’s] constitutional right to a jury trial, including the independent determination of the facts by the jury.” *Demery*, 144 Wn.2d at 759 (internal quotes omitted) (quotation omitted); see App. Br. at 32 & 32 n.5; *State v. Mercer-Drummer*, 128 Wn. App. 625, 116 P.3d 454 (2005) (reviewing admissibility of unobjected-to opinion testimony as it raised constitutional claim). As the State points out, however, the Supreme Court has accepted review of two cases where the court of appeals ruled that opinion testimony as to the credibility of witnesses was inadmissible, even though the claims were not raised at trial.

For these reasons and the reasons set forth in Appellant’s Brief, the

opinion testimony was unlawfully admitted and this Court should reverse Mr. Montgomery's conviction.

Point III: The State Violated Mr. Montgomery's Due Process Rights When it Elicited Testimony Regarding His Post-Miranda Silence, Requiring Reversal

Mr. Montgomery rests on Appellant's Brief for his argument on this point, but addresses a point of law in the State's brief. The State averred that a comment on the right to remain silent cannot occur unless "the prosecutor manifestly intended the remarks to be a comment on that right." State's Br. at 10, quoting *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10 (1991). While this quote is accurate, it is of questionable authority here.

The bulk of jurisprudence on the topic relies on the effect of the prosecutorial comment, not the intent of the prosecutor. See, e.g., *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996) (in discussing effect of testimony commenting on defendant's right to silence, Court makes no mention of requirement that State "manifestly intended" to comment on right, affirms that "The right against self-incrimination is liberally construed"); *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978) ("The test employed to determine if defendant's Fifth Amendment rights have been violated is whether prosecutor's statement was of such character that the jury would naturally and necessarily

accept it as a comment on the defendant's failure to testify.”), *cited in Crane*, 116 Wn.2d at 331. While impeachment is generally, by its nature, intentional, counsel has found no other published cases holding that the manifest intent to comment on the right to silence is required before an error may be found. Indeed, counsel could find no published opinions (and only one unpublished opinion) citing *Crane* for this proposition.

Further, in *Crane*, the Court did not suggest that it was creating a new rule. Instead, in making the quoted statement, it relied on *State v. Scott*, 93 Wn.2d 7, 13, 604 P.2d 943 (1980). In that case, the Court explained the analysis of potential comment on the right to silence. It established no threshold test for finding error, but rather suggest a totality of the circumstances approach:

This claimed error must be viewed in light of the surrounding circumstances. The subject which the deputy prosecuting attorney was discussing in his argument was the credibility of a state's witness, Ms. Cserepes. He was alluding to the argument of Mr. Baker in which Baker had questioned the credibility of Ms. Cserepes, and had relied on the testimony of his own client, Benson. *In that context the words used were not intended as a comment on the failure of Scott and Sample to testify, and could not reasonably be so understood by the jury.* An examination of the record shows adequate reason to mention both Mr. Baker and his client, Benson, and to question the latter's credibility. The statement was not of such character that the jury would naturally and necessarily accept it as a comment on defendant's failure to testify.

Scott, 93 Wn.2d at 13 (emphasis added, internal quotes omitted). Thus, while

Scott did address the prosecutor's intention, it does not support the *Crane* court's statement. Further, as the right to remain silent is a federal, as well as a state, constitutional right, our Supreme Court cannot change the standard for finding a violation of federal due process rights.

Accordingly, Mr. Montgomery submits that the prosecutor's manifest intent to comment on his silence is not required before error may be found. Even if this Court finds that such a threshold test is required, by offering a rebuttal case expressly for the purpose of showing no one provided an innocent explanation for the purchases, the prosecutor plainly intended to comment on Mr. Montgomery's right to silence in this case. See App. Br. at 35-36.

For these reasons and the reasons set forth in Appellant's Brief, Mr. Montgomery's right to remain silent was violated at trial and this Court should reverse Mr. Montgomery's conviction.

Point IV: The Missing Witness Instruction and the State's Closing Argument in this Regard Were Inappropriate and Prejudicial

As argued in Mr. Montgomery's Brief, when neither Mr. Montgomery's grandson nor his landlord could properly be considered a missing witness, the trial court erred in giving a missing witness instruction. For the same reasons, the prosecutor's closing argument as to these matters was erroneous and prejudicial. See App. Br. 37-42.

As an initial matter, the State errs when it states that the grandson was a “natural witness” because it was his dog that was injured and required the hydrogen peroxide. State’s Br. at 13. Maggie was Mr. Montgomery’s dog; she did not belong to the grandson. RP at 187-88.

In addition, the State errs in suggesting that *State v. Cozza*, 19 Wn. App. 623, 576 P.2d 1336 (1978), has any bearing on the instant case. State’s Br. at 14. First, that case was decided well before the current jurisprudence on the topic was developed. *See, e.g., State v. Blair*, 117 Wn.2d 479, 487-89, 816 P.2d 718 (1991). Next, unlike the situation here, the defendant in that case “repeatedly attempted to place responsibility for the charged incident on” the missing witness and the witness was peculiarly within the control of the defendant. *Cozza*, 19 Wn. App. at 627-28.

In the instant case, of course, far from repeatedly discussing a missing witness, Mr. Montgomery did not even mention the landlord at trial. See App. Br. at 38. Thus, unlike in *Cozza*, there was no foundation for the landlord being “missing.” Nor did Mr. Montgomery, unlike the defendant in *Cozza*, suggest that the landlord had any knowledge of the situation. App. Br. at 40. Further, again unlike in *Cozza*, there was no evidence that Mr. Montgomery would have been able to produce the landlord. App. Br. at 39-40. Similarly, and as discussed more

fully in Mr. Montgomery's brief, the grandson's testimony could have had nowhere near the importance of the missing witness in *Cozza*. App. Br. at 37-38.

For all these reasons, *Cozza* is inapposite. Instead, this Court should apply the analyses set forth in *Blair* and *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990). Under the law of those cases, the trial court erred in giving the missing witness instruction as to both the grandson and the landlord, the instruction prejudiced Mr. Montgomery by shifting the burden of proof, and his conviction should be reversed. See App. Br. at 37-42.

In addition, as argued in Mr. Montgomery's brief, because the missing witness instruction was not warranted, the prosecutor's comments during closing argument regarding "missing" witnesses and Mr. Montgomery's failure to corroborate his testimony were both inappropriate and prejudicial and also require reversal. See App. Br. at 41-42.

Point V: The Trial Court Erred in Failing to Consider the First-time Offender Waiver Sentencing Option of RCW 9.94A.650

Mr. Montgomery, with no prior felonies on his record, was eligible for the First-time Offender Waiver of RCW 9.94A.650 and the trial court erred in not considering it. The State does not dispute Mr. Montgomery's eligibility under this statute. See State's Br. at 14-16. Instead, it argues that the trial court did not err in failing to consider the statute because the parties did not bring it to the court's

attention. The mandatory nature of RCW 9.94A.650 belies this argument. A court must consider the provision whether the parties raise it or not. Failure to consider the provision in an applicable case is reversible error.

RCW 9.94A.650 is not a “sentencing alternative.” See State’s Br. at 14. While the trial court is not required to impose a sentence under this provision, by the terms of the statute, it is required to *consider* the provision: “*This section applies to offenders who have never been previously convicted of a felony in this state, federal court, or another state, and who have never participated in a program of deferred prosecution for a felony, and who are convicted of a felony that is not: [list of enumerated crimes].*” RCW 9.94A.650 (emphasis added). Written in mandatory terms, the provision unequivocally applies to those being sentenced for certain first felonies. Accordingly, its application to Mr. Montgomery is required even though his attorney did not point it out to the court.

That a sentence made pursuant to RCW 9.94A.650 is considered a standard range, unappealable sentence, is additional evidence that a court must consider the provision when it is applicable. RCW 9.94A.585(1). Although potentially significantly lower than the typical standard range sentence, a sentence under this provision is explicitly not an exceptional sentence. RCW 9.94A.585(1). The Legislature’s singular treatment of the lower sentences

obtained through this statute evidences its intent that application of the provision is a built-in, required part of sentencing a first time offender. In sum, RCW 9.94A.650 should have been considered in this case.

The trial court manifestly did not consider RCW 9.94A.650. It made no reference to the provision at sentencing. RP at 270-92. The provision was not mentioned in any of the papers filed with the court. See CP. Thus, the sentencing procedure was deficient and the deficient procedure is appealable.

Contrary to the State's argument, failure to consider this provision is an appealable issue. A deficient sentencing procedure is appealable when "the sentencing court had a duty to follow some specific procedure required by the SRA, and . . . the court failed to do so." *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). The mandatory nature of RCW 9.94A.650 imposed a duty on the sentencing court to consider the provision for a first-time offender. When the court failed to consider the provision, it omitted a specific duty and committed reversible error.

For these reasons and the reasons set forth in Mr. Montgomery's brief, this Court should remand Mr. Montgomery's sentence for resentencing.

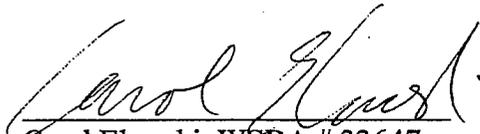
Mr. Montgomery relies upon his original brief for the remainder of his arguments.

CONCLUSION

For all of these reasons, Virgil R. Montgomery respectfully requests this Court to reverse his conviction and order his case dismissed or, in the alternative, to remand his sentence for resentencing in accordance with RCW 9.94A.650.

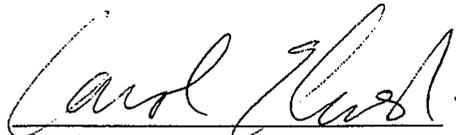
Dated this 10th day of February, 2006.

Respectfully submitted,


Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 10th day of February, 2006, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, Kevin Michael Korsmo, Deputy Prosecuting Attorney, 1100 W. Mallon, Spokane, Washington, 99201, and one copy of the brief, postage prepaid, to Mr. Virgil R. Montgomery, DOC No. 882674, C4, E-4-2, Airway Heights Correction Center, P.O. Box 2079, Airway Heights, WA, 99001-2079.


Carol Elewski