No. 44323-6-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

CHARLES LONGSHORE, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Amber Finlay

No. 12-1-00119-7

BRIEF OF RESPONDENT

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A. STATE'S RESTATEMENT OF LONGSHORE'S ASSIGNMENTS OF ERROR

1) Longshore avers that the trial court violated his due process right to the presumption of innocence by ordering that a security officer would be placed between him and he jury when he testified.

2) Longshore avers that his right to testify was violated because the trial court did not conduct a colloquy on the record with him to determine whether his waiver of the right to testify was a knowing, voluntary, and intelligent decision.

3) Longshore avers that his trial attorney violated his right to testify.

4) Longshore avers that his trial counsel was ineffective because the attorney rejected the court's offer of an unwitting possession instruction in relation to the charge of possession of a controlled substance.

B. STATE'S COUNTER-STATEMENTS OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Longshore avers factually that the court ordered a security measure in the courtroom without holding a hearing or making findings on the record to support the security measure, and he avers that the security measure ordered by the judge was to place a security officer between Longshore and the jury when, or if, Longshore testified. Longshore asserts that this action by the trial court violated his state and federal constitutional rights to testify in his own behalf. The State counters that the trial court did hold a hearing and did place its findings on the record, that the trial court ordered that the deputy bailiff would stand next to an exit door (behind Longshore) when Longshore testified (rather than between him and the jury), and that

because Longshore voluntarily waived the right to testify, the security measure was never implemented.

2. Longshore's attorney represented to the trial court that Longshore wished to testify but that in deference to the attorney's advice, Longshore was waiving the right to testify, and the attorney invited the trial court to engage in a colloquy directly with Longshore to determine whether his waiver was in fact knowing, voluntary and intelligent. Longshore avers that the trial court erred by declining to engage in this colloquy. The State counters that on the facts of this case it would have been error for the trial court to have engaged in such a colloquy directly with the defendant.

3. Longshore avers that he wanted to testify at trial but wanted to do so unencumbered by the trial court's security measure (of placing a bailiff by the exit door near the witness stand and jury). Longshore avers that his trial attorney violated his right to testify when the attorney told the court that based on counsel's advice Longshore was choosing not to testify (but did not mention any particular reason why he advised Longshore not to testify). The State avers that there is no citation to the record to show that the court's planned, added security measure deterred Longshore from testifying or to show that but for the security measure he would have testified; nor are there facts to support an argument that the added security measure was intrusive to the point that it interfered with Longshore's right to testify.

4. Longshore avers that his trial attorney was ineffective because the attorney rejected an unwitting possession instruction in regard to the charge of possession of a controlled substance. The State counters that rejection of an unwitting possession instruction was Longshore's right and that it was a legitimate trial strategy to decline the instruction because it would have imposed upon him a burden of proof that he would not bear in the absence of the instruction.

C. FACTS

In the days and months leading up to March 25, 2012, Charles Longshore had made many trips and visits to the Firwood Court complex in Shelton, Washington. RP 68-69, 87-88. He was seen there frequently in a goldish-beige Dodge Intrepid with tinted windows and a little sticker with feathers on it. RP 43-44, 68-69, 87-88. Because the residents and owner of the complex suspected criminal activity, Longshore was eventually trespassed from the premises. RP 65, 69, 85.

On March 25, 2012, Longshore returned to Firwood Court, driving the same goldish-beige Dodge Intrepid with the tinted windows and a little sticker with feathers on it. RP 42-44, 70-71, 80, 85, 89. Neighbors called 911. RP 40, 69. Justin Elston tried to box in Longshore's car so he could hold him until police arrived. RP 41, 48-49, 69. In response, Longshore began moving about like he had a gun or was reaching for a gun, and he threatened the neighbors that he would kill every one of them and would also kill their families. RP 41, 43, 46, 49-50, 70, 77, 86. At least a couple of the neighbors were afraid that Longshore would carry out the threats. RP 43, 46-47, 71, 88.

Fearing for his life and for the lives of others, Elston moved his car and allowed Longshore to drive away. RP 43. Elston noted Longshore's license number. RP 44-46. Longshore drove away in the goldish-beige Dodge Intrepid with at least one female passenger. RP 42, 89.

Officer Patton of the Shelton Police Department was on patrol and received a dispatch about the Firwood Court incident. RP 128-29. Twelve minutes later, Patton received a call that a fellow officer had contacted or attempted to contact the Dodge Intrepid. RP 130. The Dodge Intrepid had the same license number as the one reported at Firwood Court. RP 131. Rather than stop for police, the Dodge ran, and police then took up a pursuit. RP 131.

Officer Patton listened to the radio traffic and tried to determine the path of the fleeing Dodge Intrepid. RP 131-32. He determined that the car may be heading for the intersection of Lake Boulevard and Wyoming, so he headed there, and when he arrived he put out spike strips and blocked other traffic from entering the intersection. RP 131-32. But one of the pursuing officers put out a miscommunication and mistakenly said that the Dodge was now traveling in the opposite direction; so, Patton put away his spike strips and was about leave when he then saw the

fleeing Dodge and pursuing marked police cars, with lights and sirens activated, speeding toward him. RP 132-33, 240.

The fleeing Dodge sped right past Patton, within feet, and went right through a stop sign without making any attempt to stop. RP 133. As the Dodge sped past, Patton saw the driver and recognized him to be Charles Longshore. RP 133-34. Patton then joined the pursuit and was the third in a line of three police cars that were pursing Longshore. RP 135-36.

During the pursuit, Deputy Clark of the Mason County Sheriff's Office was directly behind Longshore, and at one point Deputy Clark got a good look at Longshore's face when he saw it in Longshore's side, rearview mirror when Longshore had to slow to make a turn during the pursuit. RP 247, 249. Deputy Clark knew Longshore from prior contacts, and he was 100% sure that it was him. RP 250. As Longshore was driving during the pursuit, Deputy Clark saw him taking off a coat, or something, and suspected that Longshore might be reaching for or aiming a gun; so, Deputy Clark began to move back and forth in the roadway so as to avoid being too stationary of a target. RP 250.

During the pursuit, Officer Patton lost sight of Longshore and the Dodge for a time, and when he next saw him his observations were not as good as they were on the corner of Wyoming and Lake Boulevard, but Patton could see that the driver was now wearing some kind of dark hooded sweater or jacket. RP 137.

Officer Patton now became the lead police car in the pursuit. RP 139. The pursuit entered a residential neighborhood where children were present. RP 139. Because children and other residents were put in danger by the pursuit, Officer Patton slowed to 30 mph and turned off his lights and siren. RP 139. Longshore continued to speed away, as Patton watched the distance grow between them. RP 139.

Once out of the residential area, Patton resumed lights and siren and tried then to catch up to Longshore and the Dodge Intrepid. RP139. The chase had meandered over an area of at least ten miles and had put numerous innocent civilians and police officers in danger, as Longshore drove at speeds up to 110 mph and ran through traffic signals without stopping. RP 140-50, 219-23, 241-46.

Police soon caught up with the Dodge Intrepid, where it was found at the end of a rural road. RP 152, 247. Longshore and two females were

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found near the car, hiding behind a shed, and were taken into custody. RP 152, 247. Witnesses identified Longshore and the Dodge Intrepid as the same car that he was driving when he left Firwood Court. RP 44, 46, 68, 86, 125, 153.

A search of the Dodge revealed a methamphetamine pipe, with unburned methamphetamine in it, that was found in a black sock that was stuck between the driver's door and the driver's seat. RP 157, 159-60, 163, 262.

Based on these facts, the State charged Longshore with felony harassment (threats to kill), attempting to elude a pursuing police vehicle, and possession of a controlled substance (methamphetamine). After receiving the evidence cited above, the jury convicted Longshore on all counts.

During the trial, Officer Newell of the Mason County Jail voiced a security concern that would arise in the event that Longshore decided to testify. RP 324. The jury box is located very near the witness box in the Mason County courtroom, and directly behind the witness box, there is an exit door. RP 324, 327, 330 (see also, Longshore's "Appendix A," attached to his opening brief). Officer Newell was concerned because in

addition to the trial charges, Longshore was also being held for two counts of aggravated murder in the first degree in a separate case. RP 326.

The trial court heard from Officer Newell and then heard the arguments of Longshore's counsel. RP 324-326. The court then made the following findings:

> The issue before the court is what type of restraints – security should be on a defendant in a jury trial. This is a case that is an eluding, a harassment and a possession of a controlled substance. However Mr. Longshore is also held on another set of charges, which are aggravated murder.
>
> Currently in this trial Mr. Longshore has been unrestrained at the table, but there has been the presence of three officers from the jail....
>
> There has been a request made that if Mr. Longshore testifies that the officer then be placed behind him when Mr. Longshore is in the... [witness box]. When he's in the witness box, to put an officer behind him that is between him and the jury box....

RP 326-37 (excerpted from several pages of findings). Additionally, the trial court reasoned that the charge of eluding "does mean a flight risk, because that's essentially what eluding is; you're eluding a police officer." RP 328. The court concluded that it "does not find that it is too prejudicial to have an officer in the well behind the court bench and behind the witness box." RP 328. The officer was to stand about six feet behind the witness box, next to the door which is located behind and between the

witness box and the jury box (thus, the officer would have been visible to the jury, but would not have been in the line of sight of jurors looking at the witness box or the witness). RP 324-331 (see also, Longshore's "Appendix A," attached to his opening brief).

However, the issue of where to place an officer was made moot by Longshore's decision not to testify. RP 378-79. Defense counsel informed the court that: "Mr. Longshore and I have discussed his right to testify. He indicates that he… would prefer to testify, but that on my advice will not testify." RP 378. Counsel then invited the court to engage in a colloquy with Mr. Longshore on the record, but the court declined. RP 378. So, counsel declared: "I have made it clear to him that it is his right, and nobody – the Court, myself – nobody can take away that right. But on my advice, he will choose not to testify." RP 379.

Defense counsel gave no indication whatsoever about the reason why he advised Longshore not to testify or the reason why Longshore was choosing not to testify. RP 378-79.

D. ARGUMENT

1. Longshore avers factually that the court ordered a security measure in the courtroom without holding a hearing or making findings on the record to support the security measure, and he avers that the security measure ordered by the judge was to place a security officer between Longshore and the jury when, or if, Longshore testified. Longshore asserts that this action by the trial court violated his state and federal constitutional rights to testify in his own behalf. The State counters that the trial court did hold a hearing and did place its findings on the record, that the trial court ordered that the deputy bailiff would stand next to an exit door (behind Longshore) when Longshore testified (rather than between him and the jury), and that because Longshore voluntarily waived the right to testify, the security measure was never implemented.

Trial management decisions, including the implementation of courtroom or trial security, are reviewed for an abuse of discretion. *State v. Jaime*, 168 Wn.2d 857, 865, 233 P.3d 554 (2010), citing *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981).

In the instant case, the only security measure that was under consideration by the trial court was to move one of three bailiffs who were present in the courtroom during the trial to a position that was next to an exit door, which is about six feet behind the witness box. RP 324-25. The witness box is about four or five feet from the jury box (RP 324), and the door is basically six feet from the jury box (RP 330, 331), between the

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jury box and witness box, so that the jury box, witness box, and door might be described as relating to each other as do the three points of a triangle. RP 324-31 (see also, Longshore's "Appendix A," attached to his opening brief). The officer was to be placed there only during Longshore's testimony, and if the officer's presence at the door would be conspicuous, it would only be so because no officer had been placed there during any other time during the course of the trial. RP 326-28.

Longshore cites *State v. Jaime*, 168 Wn.2d 857, 233 P.3d 554 (2010), and *State v. Hartzog*, 96 Wn.2d 383, 635 P.2d 694 (1981), to support his contention that the trial court erred in this case by not holding a formal hearing prior to deciding upon courtroom security. But at issue in *Hartzog* was a standing security order that required all trial defendants who were inmates at a penitentiary to undergo: "rectal probe searches prior to entry into the courtroom; physical restraints during trial; and limitations on consultation during trial between defendants and counsel." *Hartzog* at 386. And at issue in *Jaime* was whether it was appropriate for the trial court to have ordered that trial occur in a jail courtroom rather than the standard courtroom in the courthouse. *Jaime* at 860.

But unlike *Hartzog* and *Jaime*, the defendant in the instant case was not subjected to such extreme restraints. "It is well settled that a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances." *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999). In the instant case, however, there were no bonds or shackles; the only courtroom security measure at issue is that the trial court intended to have a guard on an exit door, which was near both the jury box and the witness box, when Longshore testified. RP 324-31.

Ordinarily, when an extreme measure such as shackles or the movement of trial to an unusual location such as the jail are considered, then the trial court is required to first hold a hearing and to make findings in regard to eleven criteria, which include the following:

1) seriousness of the present charge against the defendant;
2) defendant's temperament and character;
3) defendant's age and physical attributes;
4) defendant's past record;
5) past escapes or attempted escapes, and evidence of a present plan to escape;

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6) threats to harm others or cause a disturbance;

7) self-destructive tendencies;

8) risk of mob violence or of attempted revenge by others;

9) possibility of rescue by other offenders still at large;

10) size and mood of the audience;

11) nature and physical security of the courtroom; and adequacy and availability of alternative remedies.

Hartzog, 96 Wn.2d at 400. Where courtroom security measures are imposed, the "[t]he judge's decision must take into account 'specific facts relating to the individual' and be 'founded upon a factual basis *set forth in the record'*." *Jaime*, 168 Wash. 2d at 866, quoting *Hartzog,* 96 Wn.2d at 399–400, 635 P.2d 694 (emphasis added by *Jamie* court).

In the instant case, the trial court held a hearing, but it did not hold a detailed or otherwise complicated hearing, and it did not individually consider each of the eleven factors cited above. However, the court did hold a hearing, at which it considered the concerns voiced by officer Newell and considered the arguments of the parties, and the court considered some of the criteria described above, namely the fact that Longshore was being held on two counts of aggravated murder in the first

degree, that he had tried to escape in the past (which resulted in the current charge of eluding and had placed many people in serious danger during the elude attempt), and that the peculiar nature of the courtroom required special considerations, which was obvious and apparent to the judge without the benefit of anyone's opinion or suggestion. RP 324-31.

Longshore argues that the proposed placement of an officer by an exit door was "dramatic and noticeable" and that such action would "prejudice him as dangerous and violent." Appellant's Opening Brief at 10. While the action might have been noticeable, since it would have represented a new or different place for an officer to be posted or positioned as compared to anywhere else officers might have been located from time to time throughout the trial (RP 324-331), there was nothing so "dramatic" about the mere fact that an officer would sit or stand by the door. And there was nothing in particular about this that would have caused Longshore to be viewed as "dangerous and violent." It was just a guard sitting or standing by the door. It might have been noticed by the jury, but there is nothing to indicate that it would have been particularly shocking.

Longshore characterizes the officer's proposed location as being "between the defendant and the jury box." Appellant's Opening Brief at 11. While this might be technically correct, it is more correct to also understand that the proposed position was also six feet behind the jury box and six feet behind the witness box, so that it was not literally between the jury box and the witness box. RP 324-331; Appellant's Appendix A.

Longshore argues that he was not disruptive in court and that he had not displayed any dangerous behaviors. Appellant's Opening Brief at 12. While it is correct that there were no identified incidents of concern in the courtroom, demonstrated precursors of future violence is not the trial judge's only concern or consideration. *Hartzog*, 96 Wn.2d at 400. Longshore had exhibited callous, irrational, dangerous behavior when he endangered many innocent bystanders as he attempted to elude police in the instant case, and he was also being held in another case for two counts of aggravated first degree murder. RP 140-50, 219-23, 241-46, 326, 328.

Longshore argues that it was error for the trial court to base its ruling solely on the concern of security personnel. Appellant's Opening Brief at 19. However, in addition to the concerns of security personnel, the trial court judge was aware that Longshore had endangered many

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people when he attempted to elude officers and that he was being held on charges of aggravated first degree murder. RP 140-50, 219-23, 241-46, 326, 328. Longshore, thus, had exhibited indifference for human life and had a reason to be desperate. *Id.* While Longshore may have so far exhibited himself in a restrained manner while under scrutiny in the courtroom, he had not yet been put in a position to be a mere few feet from an exit and to be a mere few feet from jurors, while at the same time being put at a greater distance from security personnel than what had so far occurred, and there was no guarantee that he would not be desperate enough to try to flee through the exit door, and if the exit door were locked or blocked, there was no guarantee that he would not attempt to take a hostage, such as a juror. While such concerns might be remote or otherwise sensational (particularly to those who cannot foresee such risks or who weigh such risks lightly), there was no way of eliminating such concerns entirely, and the act of putting a single officer near a door was not so exceptional as to create any particular prejudice to Longshore.

Longshore argues that the trial court should have considered lesser restraints, "such as hidden restraints or electrical belt devices, or locking the special exit door near the witness stand." Appellant's Opening Brief at

19-20. But the record does not suggest that any such alternative devices or other alternatives were available to the court. And it is not clear that such restraints would be less, rather than more, intrusive. In *Hartzog*, the Court considered physical restraints to be highly intrusive, but the Court reasoned that providing for the security of the courtroom was within the inherent power of the trial court judge and that the "the reasonable use of additional security personnel" was an appropriate precaution. *State v. Hartzog*, 96 Wn.2d 383, 401, 635 P.2d 694 (1981), quoting *State v. Hartzog*, 26 Wn.App. 576, 589, 615 P.2d 480 (1980).

2. Longshore's attorney represented to the trial court that Longshore wished to testify but that in deference to the attorney's advice, Longshore was waiving the right to testify, and the attorney invited the trial court to engage in a colloquy directly with Longshore to determine whether his waiver was in fact knowing, voluntary and intelligent. Longshore avers that the trial court erred by declining to engage in this colloquy. The State counters that on the facts of this case it would have been error for the trial court to have engaged in such a colloquy directly with the defendant.

At page 12 of Appellant's Opening Brief, Longshore states that "[c]ounsel stated that Mr. Longshore would prefer to testify but that he now would not do so in these circumstances, on counsel's advice." To

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support this contention, Longshore cites RP 378-79. But scrutiny of these pages of the verbatim report do not support Longshore's contention that counsel said Longshore "would not do so in these circumstances." Nor does the record support Longshore's other contentions -- that the court's ruling regarding the placement of an officer near the door was the reason for counsel's advice, or that the court's decision was the reason for Longshore's decision to follow his counsel's advice. RP 378-79.

Longshore cites *State v. Thomas*, 128 Wn.2d 553, 910 P.2d 475 (1996), to support his contentions that the trial court should have informed him of his right testify and should have conducted a colloquy with him to determine the nature of his decision not to testify. Appellant's Opening Brief at 25-26. But *Thomas* stands for the opposite of Longshore's contention.

After the jury in *Thomas* convicted the defendant of possession of stolen property, he filed a declaration with the trial court stating that he was denied the ability to testify, and he asked for a new trial. *Thomas*, 128 Wn.2d at 555. After the trial court denied his motion for a new trial, the defendant appealed to the Court of Appeals, where he averred that the trial court erred by not advising him of his right to testify. *Id.* at 555-56. On

review of the Court of Appeals decision affirming the conviction, the Supreme Court held "that a trial judge is not required to advise a defendant of the right to testify in order for a waiver of the right to be valid." *Id.* at 557. Likewise, "there [also] is no requirement of a colloquy on the record to protect the state constitutional right to testify in one's behalf." *State v. Russ*, 93 Wn. App. 241, 243, 969 P.2d 106 (1998).

The Court in *Thomas* confirmed that "[t]he defendant, not trial counsel, has the authority to decide whether or not to testify." *Id.* at 558. In the instant case, this bedrock principle and rule of law was clearly expressed by Longshore's trial counsel, who informed not only the trial court, but also Longshore and the record, that he had "made it clear to [Longshore] that it is his right, and nobody – the Court, myself – nobody can take away that right. But on my advice, he will choose not to testify." RP 379.

In *Thomas*, when rejecting the defendant's assertions that the trial court was required to inform him of his right to testify and that the court was required to conduct a colloquy with him in order to determine whether his waiver of the right was voluntary, knowing and intelligent, the Court explained that "[t]he conduct of not taking the stand may be interpreted as

a valid waiver of the right to testify." *Thomas* at 559. Rejecting the contention that the trial court should engage in a colloquy with the defendant, the Court reasoned that doing so would risk interfering with the defendant's right not to testify, that it might also interfere with and intrude upon attorney-client relations, and that it might prejudicially disrupt defense counsel's trial strategy. *Id.* at 560. "As a result, courts rely upon defense counsel to inform the defendant of his constitutional right to testify." *Id.* at 560. And that is exactly what happened in the instant case. RP 379.

3. Longshore avers that he wanted to testify at trial but wanted to do so unencumbered by the trial court's security measure (of placing a bailiff by the exit door near the witness stand and jury). Longshore avers that his trial attorney violated his right to testify when the attorney told the court that based on counsel's advice Longshore was choosing not to testify (but did not mention any particular reason why he advised Longshore not to testify). The State avers that there is no citation to the record to show that the court's planned, added security measure deterred Longshore from testifying or to show that, but for the security measure, he would have testified; nor are there facts to support an argument that the added security measure was intrusive to the point that it interfered with Longshore's right to testify.

Longshore cites *State v. Hill*, 83 Wn.2d 558, 520 P.2d 618 (1974), for the proposition that the trial court's ruling in the instant case (that it

intended to post an officer at the exit door that is located to the rear of the courtroom behind the witness box and the jury box) prevented him from testifying. The facts of *Hill*, however, are distinguished from the facts of the instant case, because in *Hill* the record clearly indicated that the defendant initially chose to testify but then changed his mind about testifying, and that the reason the defendant was changing his mind and choosing not to testify was because the court had ruled that if he testified the court would allow impeachment by two prior convictions that had been reversed on appeal. *Id.* at 561-66.

In the instant case, however, there is no statement in the record *of the trial* to indicate Longshore's reason for waiving the right to testify or to show that Longshore would have testified but for the trial court's decision to post an officer by the exit. Still more, despite Longshore's assertions to the contrary, the record does not support Longshore's argument that the mere posting of an officer by the door would lead to the jury concluding that "the allegations were correct and that the defendant was both dangerous and violent, and certainly to run out the door into the hallway as only a guilty person would do." Appellant's Opening Brief at 22.

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The State counters that merely having an officer posted by a door is not shocking or prejudicial. It is reasonable to consider that jurors expect courthouse security, so that jurors are not shocked or overly impressed by the presence of security. More likely, the absence of security should be expected to cause more shock than the presence of security. Jurors should expect that the courthouse would always be protected and that they, too, would always be protected and that as a routine, standard procedure this protection would be offered not just when some danger was foreseeable, but at all times, because the worst harm can occur when it is unforeseen and unexpected. The jurors would have no basis to suspect that the arrangements in the instant case were any different than the arrangements of any other case or that this defendant was regarded as any different than any other defendant. Merely having one single officer sit six feet behind the jury and witness box, as far *behind* those places as possible given the design of the room, should not lead to any particular impression in the minds of the jury.

Longshore avers that there was no constitutionally valid waiver of his right to testify. Appellant's Opening Brief at 24. Longshore supports this assertion with his argument that "the unsupported courtroom security

order issued by the Court was the reason Mr. Longshore did not end up on the witness stand...." *Id.* at 24-25. But the trial record does not support Longshore's argument. Longshore never stated for the record that, but for the trial court's ruling, he would testify. Still more, the factual context and substance of the court's security measure does not support Longshore's argument that he would have been prejudiced and was therefore prevented from testifying because of the ruling.

Longshore asserts that his trial attorney prevented him from testifying. Appellant's Opening Brief at 27-28. But, *State v. Thomas*, 128 Wn.2d 553, 910 P.2d 475 (1996), stands for the legal principle that when making this claim "[t]he defendant must... produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action." *Thomas* at 561. Similar to the facts of *Thomas*, in the instant case Longshore was present when his trial attorney told the court that Longshore would follow his advice and that Longshore had chosen not to testify. RP 378-79; *Thomas* at 561. As in *Thomas*, Longshore's trial counsel discussed the choice with him and informed him that it was his exclusive decision whether to testify. RP 378-79; *Thomas* at 561. As

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in *Thomas*, there is no indication from the record that Longshore disagreed with his attorney or that he attempted to assert his right to testify. *Id.* Instead, the record of the instant case shows that Longshore chose to defer to his attorney's advice and that he voluntarily, intelligently and knowingly waived the right to testify. RP 378-79. Thus, as in *Thomas*, no evidentiary hearing is required in response to Longshore's claim. *Thomas* at 561.

4. Longshore avers that his trial attorney was ineffective because the attorney rejected an unwitting possession instruction in regard to the charge of possession of a controlled substance. The State counters that rejection of an unwitting possession instruction was Longshore's right and that it was a legitimate trial strategy to decline the instruction because it would have imposed upon him a burden of proof that he would not bear in the absence of the instruction.

Longshore voluntarily, knowingly and intelligently chose not to testify in the instant case. RP 378-79. The record does not show Longshore's reason for making this decision, other that that he was deferring to the advice of his attorney. RP 378-79. Although a defendant's silence is never a reason to infer guilt, in regard to the charge

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of possession of a controlled substance, one of the potential reasons that a defendant may choose not to testify is that the defendant in fact knowingly possessed a controlled substance, as charged, so that in such circumstances the defendant might be better advised to rely upon putting the State to it's burden of proof rather than to testify. In such cases where the true facts establish the elements of the crime beyond a reasonable doubt, the assertion of the defense of unwitting possession would not be available.

To prove the crime of possession of a controlled substance in the instant case, the State was required to prove that on the date alleged Longshore unlawfully possessed a controlled substance. RCW 69.50.4013(1). Possession may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). But mere proximity is insufficient to establish possession. *Id.* To have possession, the person must exercise dominion and control over the substance or the premises where the substance is found. *Id.* Such premises may include a vehicle. *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). "In Washington, it is well settled that the defendant bears the burden of proving unknowing possession, as opposed to the State bearing the burden of proving knowing possession." *State v. Huff*, 64 Wn. App. 641, 654,

826 P.2d 698 (1992); *see also*, *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

In the instant case, to prove the charge of eluding, the State offered testimony that Longshore was the driver of the Dodge Intrepid as it fled from police. RP 133-34, 247, 249. The State provided testimony that methamphetamine was found between the driver's seat and the driver's door. RP 157, 159-60, 163, 262. To assert the defense of unwitting possession, Longshore would have been required to prove by a preponderance of the evidence that his possession of the methamphetamine was unwitting. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004); *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.2d 931 (1998).

Thus, the defense of unwitting possession would have been inconsistent with Longshore's other defense that he was not the driver of the Dodge Intrepid. The State bore the burden of proving possession beyond a reasonable doubt. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). Therefore, it was reasonable trial strategy for Longshore's counsel to avoid assuming the burden of proving by a preponderance of the evidence that Longshore's possession was unwitting.

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State v. Coristine, 177 Wn.2d 370, 378-79, 300 P.3d 400 (2013); *State v. Lynch*, 87882-0, 2013 WL 5310164 (Wash. Sept. 19, 2013).

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

It was a legitimate trial strategy for Longshore's trial counsel to forego the affirmative defense of unwitting possession. The defense would have imposed upon Longshore a burden of proof that he had no apparent ability to satisfy. The State bore the burden of proving beyond a reasonable doubt that Longshore possessed the methamphetamine at issue in this case. Because it was a legitimate trial strategy for trial counsel to focus the jury's attention upon the State's burden rather than to distract from that burden by creating a burden for Longshore, trial counsel was not ineffective. *Id.*

E. CONCLUSION

The trial court judge was aware that while Longshore was on trial for the charges in the instant case, he was also being held in jail for charges of aggravated first degree murder in another case. The trial court was also aware that Longshore had heedlessly endangered many innocent people when he fled from police in the instant case.

Thus, when the courtroom security personnel expressed concerns about the layout of the courtroom and about how to handle courtroom security if Longshore were to enter the witness box, the court held a brief hearing in the courtroom and heard from Longshore's attorney. The trial court made findings regarding Longshore, the courtroom, and the security measures that would be taken. The judge decided that if Longshore testified, an officer would sit or stand by a door that is located about six feet behind, and somewhat between, the jury box and the witness box.

The facts of this case do not support a finding that the court's proposed precaution was so dramatic as to prejudice Longshore. The mere presence of an officer in the courtroom near an exit door does not remove the presumption of innocence from a defendant. And in any event,

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Longshore did not testify in this case, and the officer apparently never took a position near the door as proposed by the trial court judge.

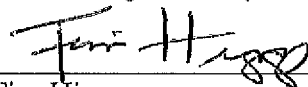
Still, Longshore claims on appeal that he would have testified if not for the judge's order that the officer take a position by the door if Longshore testified. The facts, however, do not support Longshore's contention that the officer's presence by the door would have been sufficient cause to prevent his testimony. Instead, it is probable that Longshore had other legitimate reasons not to testify. Longshore asserts that the trial court should have engaged him in a colloquy to determine the basis for his decision not to testify, but to have done so would have risked creating reversible error because to engage a defendant in a colloquy in this manner would have invaded the attorney-client relationship, would have risked persuading Longshore to testify in disregard for his right not to testify, and would have risked disrupting defense strategy regarding the conduct of the defense.

Finally, Longshore's trial attorney was not ineffective by declining an unwitting possession instruction on the charge of possession of a controlled substance. Particularly where the theme of the defense case was that Longshore was not the driver of the fleeing car where

methamphetamine was found, and where there was no evidence to support a finding that Longshore was unwittingly in possession of the drugs, declining an unwitting possession instruction was a valid defense strategy. An unwitting possession instruction would have imposed on Longshore a burden of proving by a preponderance of the evidence that he unwittingly possessed methamphetamine, but the theme of his defense was that he was not in possession because he was not the driver of the car where the drugs were found between the driver's door and the driver's seat. Thus, the State bore the burden of proving beyond a reasonable doubt that Longshore possessed the drugs; therefore, his trial counsel was not ineffective for declining to confuse or distract the jury from the State's burden by accepting his own burden to prove unwitting possession by a preponderance.

DATED: September 24, 2013.

MICHAEL DORCY
Mason County
Prosecuting Attorney



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