NO. 46137-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DARYL CLAY REID,

Appellant.

RESPONDENT'S BRIEF

RYAN JURVAKAINEN
Prosecuting Attorney
AILA R. WALLACE/WSBA 46898
Deputy Prosecuting Attorney
Representing Respondent

HALL OF JUSTICE
312 SW FIRST
KELSO, WA 98626
(360) 577-3080

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

A. REPLY TO ASSIGNMENTS OF ERROR

1. The trial court did not abuse its discretion in admitting trial Exhibit One, as the State established a sufficient chain of custody to identify the evidence.

2. The trial court properly entered a guilty verdict.

3. The defendant's trial counsel was not ineffective, as his actions were legitimate trial strategy.

4. The prosecutor's argument was proper, as it was an accurate statement of the law on which the jury was instructed.

B. STATEMENT OF THE CASE

Daryl Reid, the defendant, was booked into the Cowlitz County Jail on November 5, 2013. RP 30. He was housed in cell F10 with Jeremiah Landis, who had been in custody since October 6, 2013. RP 30. The defendant took the bottom bunk, and Mr. Landis had made his bed on the floor, which is typical for the jail, as people do not like to get up on the top bunk. RP 33.

At booking, each inmate is given a bin, or Tupperware container, that contains two blankets, two sheets, and a towel. RP 33, 38. The bins are packed by worker inmates. RP 39. An inmate can use the bin to keep

his property, such as court paperwork or commissary. RP 38–39. In Officer Joel Treichel's experience as a corrections officer, individuals keep their property in their own bins; inmates typically do not keep their property in other people's bin. RP 48.

Four days after the defendant was booked into jail, on Saturday, November 9, 2013, the jail conducted a "linen and green exchange." RP 32. A linen and green exchange is when jail staff changes out the inmate's clothes, towels, and sheets. RP 26. Jail cells are also searched for contraband during the exchange. RP 28.

As part of the linen and green exchange that took place on November 9, 2013, Officer Treichel went into the defendant's cell. RP 33. There was a property bucket near the door and a property bucket near or almost underneath the bottom bunk, where the defendant's head would be. RP 33, 44. Officer Treichel did not know which bucket belong to which inmate until he began the search and found papers with the defendant's name on them in the bucket near the bottom bunk. RP 34. Once he picked up those papers, Officer Treichel found a small baggie that looked like what he thought drugs would look like. RP 34. Officer Treichel described that baggie as being approximately two inches square. RP 47. He transferred possession of the baggie to Deputy Derek Baker, the sheriff's deputy that arrived to investigate. RP 35.

Deputy Baker testified at trial that he spoke to Officer Treichel, and the booking officer handed him the drugs that were found at the jail. RP 53–54. He described the baggie as a small Ziploc baggie with a crystalline substance inside, that was wrapped with electrical tape. RP 54. Deputy Baker transferred the baggie back to the Sheriff's Office and submitted it into evidence to be sent to the Washington State Patrol Crime Lab for analysis. RP 54. Washington State Patrol Forensic scientist John Dunn tested Exhibit 1 and determined it contained methamphetamine. RP 58, 66. Deputy Baker testified at trial that Exhibit One was the baggie he submitted into evidence. RP 57. The baggie was admitted at trial as Exhibit One. RP 63–64.

At trial, defense counsel requested the jury be instructed on the affirmative defense of unwitting possession. RP 84.

The defendant was found guilty of possession of methamphetamine. CP 3, 4. He was sentenced to 12 months plus 1 day standard range sentence, plus the 12 month county jail enhancement. CP 11; RP 130.

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EXHIBIT ONE, AS THE CHAIN OF CUSTODY WAS SUFFICIENTLY ESTABLISHED.

Before an object can be properly admitted into evidence, "it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed." *State v. Campbell*, 103 Wn. 2d 1, 21, 691 P.2d 929 (1984). In determining whether an object is admissible, courts look to the nature of the item, the circumstances surrounding the item's preservation and custody, and the likelihood of it being tampered with. *Id.* The proponent of the evidence does not need to identify it with absolute certainty, or eliminate every possibility of alteration or substitution. *Id.* "Minor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility." *Id.* The standard of review of a trial court's decision to admit evidence is abuse of discretion. *Id.*

Evidence that is readily identifiable can be identified by a witness who can state that the evidence is what it purports to be. *State v. Roche*, 114 Wn. App. 424, 437, 59 P.3d 682 (2002). When evidence is not readily identifiable, it is normally identified by the testimony of each custodian in

the chain of custody from the time the evidence was acquired. *Id.* The chain of custody must be established with sufficient completeness to make it improbable that the original item was exchanged with another, contaminated, or tampered with. *Id.* The State established a sufficient chain of custody here.

a. The State established a sufficient chain of custody.

First, Officer Treichel testified that he found a baggie of drugs in cell F10, that he held on to it for a while, and that he eventually transferred possession of that baggie to the sheriff's deputy that arrived, Deputy Baker. RP 34–35. When asked what size the baggie was, he described it as approximately two inches square. RP 47. Officer Treichel was not asked to further describe the baggie's appearance. Then, Deputy Baker testified that he responded to the jail on a report that drugs had been found, that he spoke to Officer Treichel, and that the booking officer handed him the drugs that were found. RP 53. He described the baggie as a small Ziploc that was wrapped with electrical tape. RP 54. Even assuming the baggie of drugs is not readily identifiable, this testimony establishes a sufficient chain of custody.

It is improbable that the evidence would have been exchanged with another, tampered with, or contaminated, given the realities of the jail. First, the descriptions of the baggie given by Officer Treichel and Deputy Baker

are not necessarily different. Officer Treichel described the item's size, while Deputy Baker described its appearance. Both men were describing the same item – the drugs found in cell F10. Any uncertainty goes to the weight of the evidence, not its admissibility. Second, the appellant argues that the booking officer could have searched an incoming inmate, found drugs on that person, and switched those drugs with the drugs found in cell F10. This assumption has no basis in the record, and arguing it does not make it probable. Here, Officer Treichel found the baggie, which was eventually transferred to Deputy Baker, who identified it as the baggie that he received at the jail.

Finally, a trial court has "a wide latitude of discretion in determining admissibility, which will not be disturbed absent clear abuse." *Campbell*, 103 Wn. 2d at 22. Abuse of discretion is present when a trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds. *State v. Powell*, 126 Wash.2d 244, 258, 893 P.2d 615 (1995). A discretionary decision is based on untenable grounds if it rests on facts that are not supported by the record, or was reached by applying the wrong legal standard. *State v. Rafay*, 167 Wash.2d 644, 655, 222 P.3d 86 (2009). There was no abuse of discretion here. The trial court appropriately found that any uncertainty or discrepancies in the chain of custody go to the weight of

the evidence, not its admissibility. Therefore, Exhibit 1 was properly admitted.

b. Even assuming Exhibit One was improperly admitted, there is sufficient evidence to convict the defendant of possession of methamphetamine.

The standard of review for a claim of insufficient evidence is, after viewing the evidence in the light most favorable to the prosecution, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Zamora*, 63 Wn. App. 220, 223, 817 P.2d 880, 882 (1991). A reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See State v. Price*, 127 Wn. App. 193, 202, 110 P.3d 1171, 1175 (Div. II 2005), *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d. 533, review denied, 119 Wn.2d 1011 (1992), *State v. Camarilla*, 115 Wash.2d 60, 71, 794 P.2d850 (1990) (appellate court will not review credibility determinations). In order for the jury to have reached a verdict of guilty in the case at hand, they had to find that the State proved that the defendant possessed a controlled substance. Court's Instructions to the Jury, Instruction 9; RCW 69.50.4013.

The testimony from the State's witnesses showed that the defendant possessed a controlled substance. Officer Treichel found a baggie in cell F10 that looked to him like drugs, and gave that baggie to Deputy Baker.

RP 34–35. Deputy Baker testified that he received that baggie and it looked to him like drugs. RP 54. John Dunn then testified that he tested the baggie found in cell F10 and it contained methamphetamine. RP 66. This evidence, taken in the light most favorable to the State, is sufficient to prove that the defendant possessed methamphetamine.

2. TRIAL COUNSEL WAS NOT INEFFECTIVE.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. To prove that counsel was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*; *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

The Washington Court of Appeals has devised the following test to determine whether counsel was ineffective: "After considering the entire

record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Like the *Strickland* test, this test requires the defendant to prove that he was denied effective representation, given the entire record, and that he suffered prejudice as a result. *Id.* at 263. The first prong of this two-part test requires the defendant to show that his lawyer "failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show "there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *Id.* at 173. Therefore, even if a defendant can show that counsel was deficient, he or she also must show that the deficiency caused prejudice.

a. Defendant cannot show that his counsel's conduct was not legitimate trial strategy.

"If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel." *State v. McNeal*, 145 Wn.2d

352, 362, 37 P.3d 280 (2002). Trial counsel has "wide latitude in making tactical decisions." *State v. Sardinia*, 42 Wn.App. 533, 542, 713 P.2d 122 (1986). "Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel." *Id.* (citing *Strickland v. Washington*, 446 U.S. 668 (1984)).

Looking at the entire record in this case, trial counsel gave effective representation, and his actions were legitimate trial strategy. The evidence presented in this case was defendant was housed with one other person in jail cell F10. RP 30. Four days after he was booked, a baggie of methamphetamine was found inside the bin nearest the defendant. That bin also included papers with the defendants name on them. RP 33–34. There is no indication in the record that the defendant did not have his own bin. In fact, there are multiple points in the record where the defendant was asked about and referred to *his* bucket. The defendant testified that he had never seen the methamphetamine that was found in *his* bin. RP 76. He was asked, "Did you ever see Mr. Landis accessing your bucket?", and he responded that he had not. RP 81. He was also asked, "Is it your position that Mr. Landis is the one who put the meth in your bucket?", to which he responded that he could not say. RP 81. The defendant did not say anything to refute that he had his own bucket. Given that, plus the testimony from Officer Treichel regarding jail protocol and inmate's bins (RP 38, 48), a

reasonable jury could find that the defendant did have dominion and control over one bin but the possession of the methamphetamine was unwitting. However, a reasonable jury could also find that the defendant did not possess the bin or the methamphetamine, as trial counsel argued. Therefore, it is sound trial strategy to give the jury an alternate reason to find the defendant not guilty. Either the jury could find that the defendant possessed neither the bin nor the methamphetamine or, if they found that he possessed the bin, the possession of the meth inside the bin was unwitting.

Furthermore, defense counsel did give some context for the unwitting possession instruction in his closing argument. He argued, "He had no control over what was in that bin...you know, exclusive control, I should say, over what's in the bin." RP 112. This is functionally an argument that, if the jury wants to find that the bin was in fact the defendant's, he did not have knowledge of what was in it. The defense attorney was giving the jury two alternate theories under which they could find the defendant not guilty. For these reasons, trial counsel's decision to request an unwitting possession instruction was a legitimate trial tactic. His performance was not deficient.

b. Defendant cannot show that the proposed jury instruction prejudiced him.

In addition to overcoming the strong presumption of effective assistance, the defendant must also show that he was prejudiced. Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *McFarland*, 127 Wn.2d at 335. A reasonable probability is one that is "sufficient to undermine confidence in the outcome of the trial." *Strickland*, 466 U.S. at 694.

Here, the defendant has not made such a showing. As discussed above, trial counsel's argument gave the jury an alternate theory under which it could find the defendant not guilty. The unwitting possession instruction therefore can only be construed as helpful to the defendant. This is especially so because trial counsel argued in closing that the defendant did not have exclusive control over the bin. Therefore, even if the jury chose to find that the defendant possessed the bin, they had the option to find that the methamphetamine possession was unwitting. Given the entire record, which included testimony by the jail officer that found the methamphetamine, as well as testimony by the defendant himself, there was

simply not a reasonable probability that the outcome of the trial would have been different if the unwitting possession instruction were not given.

Finally, the prosecutor's argument regarding unwitting possession was not improper. The argument was an accurate statement of the law, as enumerated in the court's instructions to the jury. Jury instruction number ten stated in part that "possession of a controlled is unwitting if a person did not know that the substance was in his possession." RP 95. This instruction concedes that the methamphetamine was in the defendant's possession, but he did not know it was. That is the substance of the prosecutor's argument. RP 114–15. Therefore, the argument was not improper.

3. THE DEFENDANT'S STATEMENT OF ADDITIONAL GROUNDS DOES NOT STATE A VALID CLAIM FOR RELIEF.

A defendant may submit a pro se statement of additional grounds for review by the Court of Appeals. RAP 10.10. However, the purpose of a statement of additional grounds is to identify and discuss errors that the defendant believes have not been adequately addressed by the brief filed by defendant's attorney. RAP 10.10(a); *State v. Thompson*, 169 Wn. App. 436, 493, 290 P.3d 996 (2012). Furthermore, the statement of additional grounds must inform the court of the nature and occurrence of alleged errors with enough specificity that the court can address them. The defendant's statement of additional grounds is repetitive of the brief filed by his attorney

in parts, raises issues outside the record in parts, and does not state a valid claim for relief from the judgment.

a. The prosecutor did not commit misconduct in the trial.

It is axiomatic that the State must disclose evidence favorable to an accused when it is material to guilt or to punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). Suppression of such evidence by the State violates due process, irrespective of the good or bad faith of the prosecution. *Id.* However, *Brady* does not require the State to call certain witnesses at trial. The State did not commit misconduct by not calling the defendant's cellmate as a witness.

Second, "issues that involve facts or evidence no in the record are properly raised through a personal restraint petition." *State v. Calvin*, 316 P.3d 496 (2013). There is no indication in the record regarding jury selection or the occupations of those chosen to sit on the jury. Therefore, the defendant's claims that jury selection constituted prosecutorial misconduct are not proper here.

The third issue the defendant raises in the section on prosecutorial misconduct concerns the argument regarding unwitting possession. This is repetitive of the brief by defendant's counsel and has been previously addressed.

b. The defendant received effective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). There is a strong presumption of effectiveness that a defendant must overcome. *Strickland*, 466 U.S. at 689. To prove that counsel was deficient, "the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.*; *State v. Barragan*, 102 Wn.App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Deficient performance "is not shown by matters that go to trial strategy or tactics." *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Trial counsel's decision to not bring the defendant's cellmate to testify was a legitimate tactical decision. There are any number of reasons why a defense attorney would not want to call someone as a witness,

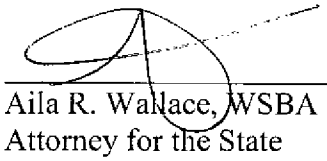
including prior crimes of dishonesty, other means of impeachment, or simply because the witness will not help the case. The defendant cannot show that not calling this witness was deficient performance, nor can he show that the outcome of the trial would have been different if the witness had testified.

The same is true of trial counsel's failure to object at points that the defendant thought warranted objection. The defendant cannot show that those failures to object constitutes deficient performance or would have affected the outcome of the trial. Therefore, the defendant received effective assistance of counsel.

D. CONCLUSION

The defendant's conviction for possession of methamphetamine in a county jail should be affirmed, as the State established a proper chain of custody and trial counsel was not ineffective.

Respectfully submitted this 5th day of January, 2015.



Aila R. Wallace, WSBA #46898
Attorney for the State

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Lisa E. Tabbut
Attorney at Law
P.O. Box 1396
Longview, WA 98632
Lisa.tabbut@comcast.net

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

Signed at Kelso, Washington on January 2nd, 2015.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

January 02, 2015 - 12:57 PM

Transmittal Letter

Document Uploaded: 6-461374-Respondent's Brief.pdf

Case Name: State of Washington v. Daryl Reid

Court of Appeals Case Number: 46137-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:

Lisa.tabbut@comcast.net