NO. 47528-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

LEO FANNON,

Appellant.

RESPONDENT'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

I. ISSUES

1. Did the State commit misconduct when it referred to the jacket as belonging to the Appellant?

2. Did the Appellant receive ineffective assistance of counsel?

II. SHORT ANSWERS

1. No, the State did not commit misconduct.

2. No, the Appellant did not receive ineffective assistance of counsel.

III. FACTS

On November 12, 2014, detectives with the Longview Police Department Street Crimes Unit executed a search warrant at 2121 Sycamore St, Longview, WA. RP at 122. The detectives were looking for controlled substances and Leo Fannon, the Appellant. RP at 122-23. As the detectives entered and secured the house, they came into contact with the Appellant as he was exiting one of the bedrooms. RP at 127-28. Sergeant Ray Hartley searched the room the Appellant had exited and observed a bag of methamphetamine, a bag of heroin, and drug paraphernalia. RP at 128-134. Sgt. Hartley also located a leather jacket in the same room. RP at 133. The jacket contained a large bag of methamphetamine, digital scales with

residue, and a bag that held numerous controlled substances pills. RP at 132-43.

The Appellant, who had been detained while search warrant was being executed, was searched. The Appellant's wallet was located and found to contain $2615 in U.S. currency. RP at 145; 2RP at 235. Detective Seth Libbey informed the Appellant of his constitutional warnings, who agreed to waive them and answer questions. RP at 233. The Appellant admitted the bedroom he was seen exiting was his room. RP at 234. The Appellant admitted that the controlled substances and drug paraphernalia found in his room belonged to him. RP at 234. The Appellant claimed that the money found in his wallet were the proceeds of automobile sales. RP at 234. Det. Libbey asked the Appellant for further details about his automobile sales – what cars did he sell, who did he sell the cars to, and whether he had any documentation to support these claims. RP at 236. The Appellant was unable to provide any of this information to Det. Libbey. RP at 236.

The State charged the Appellant with possession of methamphetamine with intent to deliver within 1000 feet of a school zone, possession of heroin, possession of methadone, possession of oxycodone, and possession of clonazepam. CP 5-7, 33-35. At trial, Sgt. Hartley testified that he was part of the team that executed the search warrant and

that he located the controlled substances that lead to the charges. RP 120-159. Sgt. Hartley also testified that the jacket that he had located in the Appellant's bedroom on November 12, 2014 was the same jacket that the Appellant had worn to court. RP at 144. He specifically pointed out the jacket that was on the Appellant's chair was the same jacket that contained the controlled substances and paraphernalia on November 12, 2014. RP at 144.

Det. Libbey testified about his role in the execution of the search warrant. RP at 221-58. Det. Libbey testified that he contacted the Appellant, spoke to him about the room, the controlled substances, and the money that was located. RP at 233-37. The Appellant admitted the room was his, the controlled substances were his, and the money came from the proceeds of car sales.

The Appellant testified on his own behalf. RP at 308-36. The Appellant disputed the State's facts, testifying that he did not reside at 2121 Sycamore St., the jacket found by Sgt. Hartley did not belong to him, the controlled substances found in the room did not belong to him, and the money in his wallet were the proceeds of car sales. RP at 308-12, 317-20, 333.

The jury returned with a verdict of guilty on each count alleged against the Appellant. RP 396-97; CP 66-72. The jury also found the

Appellant committed Count I while within 1000 feet of a school zone. RP at 397-98; CP 67. The court sentenced the Appellant to a standard range sentence. CP 74-86. The Appellant filed this timely notice of appeal. CP 88-101.

IV. ARGUMENTS

A. THE STATE DID NOT COMMIT MISCONDUCT WHEN IT REFERRED TO THE JACKET AS BELONGING TO THE APPELLANT.

All of the Appellant's claims of prosecutor misconduct are waived because he did not object at trial. "A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)). All of the Appellant's claims of prosecutor misconduct share a similar trait—in no instance did the Appellant object. Further, in none of these instances was evidence elicited or argument made by the prosecutor improper. For these reasons, his claims of prosecutor misconduct were waived.

With all claims of misconduct, "the defendant bears the burden of establishing that the conduct complained of was both improper and

prejudicial." *Id.* at 718 (citing *State v. Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Luvene,* 127 Wn.2d 690, 701, 903 P.2d 960 (1995)). The court reviews the effect of allegedly improper comments not in isolation, but in the context of the total argument and the issues in the case. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Even if it is shown that the conduct was improper "prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict." *Stenson*, 125 Wn.2d at 718-19.

If the defendant objects at trial, to prove prosecutorial misconduct, the defendant must first establish that the question posed by the prosecutor was improper. *Id.* at 722 (citing *State v. Brett,* 126 Wn.2d 136, 175, 892 P.2d 29 (1995)). However, when the defendant fails to object, a heightened standard of review applies: "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark 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). (citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991); *State v. York*, 50 Wn. App. 446, 458-59, 749 P.2d 683 (1987)). The wisdom underlying this rule is so that a party may not "remain silent at trial as to claimed errors and later, if the verdict is

adverse, urge trial objections for the first time in a motion for new trial or appeal." *State v. Bebb*, 44 Wn. App. 803, 806, 723 P.2d 512 (1986); *see also Jones v. Hogan*, 56 Wn.2d 23, 27, 351 P.2d 153 (1960) ("If misconduct occurs, the trial court must be promptly asked to correct it. Counsel may not remain silent, speculating upon a favorable verdict, and then, when it is adverse, use the claimed misconduct as a life preserver on a motion for new trial or on appeal.").

"Where improper argument is charged, the defense bears the burden of establishing the impropriety of the prosecuting attorney's comments as well as their prejudicial effect." *Russell*, 125 Wn.2d at 85 If a defendant—who did not object at trial—can establish that misconduct occurred, then he or she must also show that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *State v. Emery*, 174 Wn.2d 741, 760-61, 278 P.3d 653 (2012) (citation omitted); *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 704 (2012). Under this heightened standard, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) ("Reversal is not required if the error could have been obviated by a curative instruction

which the defense did not request."). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

Here, the Appellant's argument mischaracterizes the State's evidence in an attempt to persuade this court that the prosecution committed misconduct. The testimony that was presented by the State was more specific and detailed than the Appellant presented to this court in his brief. The Appellant focuses on one portion of the testimony and ignores subsequent testimony that defeats his argument.

During direct examination, the State asked Sgt. Hartley if he would recognize the jacket if he saw it again. Sgt. Hartley responded that he would and that it was sitting on the back of the Appellant's chair. 1RP at 144. In other words, Sgt. Hartley identified the jacket that the Appellant wore to his trial as being the same jacket that he located on November 12, 2014 when he contacted the Appellant.

Additionally, Det. Libbey testified that he spoke with the Appellant, and was told that the room the Appellant was seen exiting at the time the detectives entered the residence was his room. 2RP at 234. This is the same room that the jacket was found, the same jacket that the Appellant wore to

the trial. Det. Libbey then asked the Appellant about the controlled substance and drug paraphernalia that was located in the room that he had just acknowledged was his. The Appellant told Det. Libbey that the controlled substances and drug paraphernalia were his. 2RP at 234.

As state above, the State did not commit misconduct by referring to the jacket as belonging to the Appellant. The Appellant admitted to Det. Libbey that the room was his. The Appellant admitted to Det. Libbey that the controlled substance and paraphernalia in the room were his. The jacket was found in the Appellant's room. Sgt. Hartley specifically pointed out to the jury that the jacket the Appellant wore to trial was the same jacket he searched on November 12, 2014. Thus, the State properly argued the evidence presented to the jury.

B. THE APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987. 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). 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." *Id.* at 335.

Whether counsel is effective is determined by the following test: "[a]fter 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 (1978) (*citing State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, "[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby." *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.

1. The Appellant has not shown that his trial counsel's performance was deficient.

"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. App. 352, 362, 37 P.3d 280 (2002). Trial counsel has "wide latitude in making tactical decisions." *Sardinia*, 42 Wn. App. at 542. "Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel." *Id.* (citing *Strickland*, 446 U.S. 668, 104 S.Ct. at 2065). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). Of course, if trial counsel would not have succeeded in a course of action a defendant claims should have been taken at trial, it cannot form the basis of an ineffective assistance claim. *See State v. Nichols*, 161 Wn.2d 1, 14-15, 162 P.3d 1122 (2007).

Here, the Appellant has not provided any analysis to suggest that his trial counsel's failure to object was deficient. Instead, the Appellant attempts to shoehorn his prosecutorial misconduct argument by suggesting that the State attempted to elicit opinion evidence on the Appellant's credibility and commented on his right to remain silent. Again, as with the above argument, the Appellant is mischaracterizing the testimony and

assuming the State's intentions behind its line of questioning. Additionally, the Appellant fails to address how the Appellant's trial counsel's failure to object was not a tactical decision.

In regards to the "opinion testimony, the State questioned Det. Libbey about his interaction with the Appellant. The Appellant told Det. Libbey that the money found in his room and amongst his possessions were the proceeds from car sales. The State then questioned Det. Libbey about his interest in the money he had located. Det. Libbey explained how the money, the room, the items found in the room, the setup of the house, and the amount of people that were present in the house were consistent with drug trafficking. 2RP at 234-35. None of this is improper testimony.

Det. Libbey then went on to explain that, in regards to money located during the execution of a search warrant, he has previously been provided with alternative explanations. 2RP at 236. Det. Libbey then testified that he asked the Appellant numerous follow-up questions about the source of the money – "what cars, who did you sell them to, do you have any documentation?" 2RP at 236. The State then asked Det. Libbey why he was asking these questions. Det. Libbey then testified that "Because, -- well, I didn't believe him. The way he said it to me and the evidence, I –I initially didn't feel that that matched up to what I saw." 2RP at 236. This is the quote that the Appellant hinges his argument on.

The State, in no way, intended to elicit testimony from Det. Libbey about the Appellant's credibility. When referring to the record as a whole, rather than one quote, it is clear that the State was intending on having Det. Libbey explain why he asked follow-up questions as to the Appellant claim that he received the money from car sales. The State did not know Det. Libbey was going to make any statement about what he believed or did not believe. Det. Libbey had just explained how, in his experience, the situation he was observing was consistent with drug trafficking. The Appellant offered up an alternative explanation and Det. Libbey attempted to explore that.

Additionally, it should be noted that the questionable testimony was about the money that was located. It was not in reference to the drugs that were found, nor any drug dealing activities. Det. Libbey's statement indicated that he did not believe that Appellant sold cars. The statement did not render an opinion as to guilt, nor did it make the jury question the Appellant's credibility.

In regards to the testimony that elicited evidence on the Appellant's right to remain silent, the Appellant, again, mischaracterizes the record. "The right to remain silent, or the privilege against self-incrimination, is based upon Amendment V of the United State Constitution which provides in pertinent part that '[n]o person…shall be compelled in any criminal case

to be a witness against himself..." *State v. Sweet*, 138 Wn.2d 466, 480, 980 P.2d 1223 (1999). Prior to any custodial interrogation, a suspect must be informed of his *Miranda*[1] warnings. *State v. Piatnitsky*, 180 Wn.2d 407, 412, 325 P.3d 167 (2014). "It is well established that *Miranda* rights must be invoked unambiguously." *Id.* at 413 (citing *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008)).

The Appellant points to the same interaction with Det. Libbey. As explained by Det. Libbey, the Appellant was questioned further about his claims that the money located amongst his property was the proceeds from car sales. Det. Libbey testified that he asked the Appellant for specific information about these car sales – "what cars, who did you sell them to, do you have any documentation." 2RP at 236. Det. Libbey then testified that the Appellant could not answer these questions: "he was unable to provide me anything, any –anything factual of who he sold it to." 2RP at 236. This is not a comment on a person's right to remain silent. This is testimony that the Appellant was unable to provide information upon request.

The Appellant was informed of his constitutional rights. He waived those rights and agreed to speak to Det. Libbey. Upon being questioned, he made statements. Upon further questioning, he was unable to provide

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

further information to support his statements. He did not invoke his rights to remain silent. He did not refuse to answer questions. He did not ignore the questions. The testimony that was presented to the jury only shows that after he agreed to answer questions, he could not answer the questions.

Appellant's trial counsel failure to object during this testimony can be considered tactical. Det. Libbey was providing much of the context of what the Appellant's own testimony would later address. Much of the Appellant's claims at trial were that everyone had it wrong, that no one would listen to him, and that these assumptions about his presence in the house and his source of income were misconstrued. Det. Libbey incidentally provided the Appellant with the context of those positions. Thus, it would be logical to not object when it gives the jury two opportunities to hear the Appellant's defense.

2. The Appellant has not shown that he suffered prejudice.

"Prejudice is established if the defendant shows that there is a reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different." *Nichols*, 161 Wn.2d at 8 (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). As with the prosecutorial misconduct argument, the Appellant has not established that he was prejudiced and that the outcome of the trial would

have been different had his trial counsel objected. The Appellant admitted the room was his. The Appellant admitted the controlled substances and paraphernalia was his. The Appellant attempted to explain where the money came from, but was ultimately unable to do so. The Appellant wore the same jacket found by Sgt. Hartley to his trial. The outcome of the trial would not have changed had his trial counsel objected to any of the Appellant's alleged errors. Furthermore, because none of these alleged errors is prosecutorial misconduct, it was not ineffective to fail to object.

V. CONCLUSION

The State did not commit misconduct. The Appellant did not receive ineffective assistance of counsel. As such, the Appellant's convictions should be affirmed.

Respectfully submitted this 14th day of December, 2015.

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CERTIFICATE OF SERVICE

Hannah Bennett-Swanson, certifies that opposing counsel was served electronically via the Division II portal:

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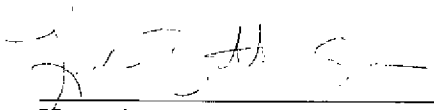
I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 11 day of December, 2015.



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