SUPREME COURT NO. 102279-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

JOSEPH CASANO,
Petitioner.

ON DISCRETIONARY REVIEW
FROM THE COURT OF APPEALS, DIVISION TWO

Court of Appeals No. 57055-6-II
Thurston County No. 20-1-01338-34

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, JOSEPH CASANO, by and through his attorney, CATHERINE E. GLINSKI, requests the relief designated in part B.

B. COURT OF APPEALS DECISION

Casano seeks review of the July 18, 2023, unpublished decision of Division Two of the Court of Appeals affirming his convictions.

C. ISSUES PRESENTED FOR REVIEW

Where defense counsel failed to object to or seek curative instructions for the prosecutor's incorrect and misleading statements of law in rebuttal argument, did appellant receive ineffective assistance of counsel?

D. STATEMENT OF THE CASE

Petitioner Joseph Casano was charged with possession of methamphetamine with intent to deliver and third degree assault. CP 1; RCW 69.50.401(1) and (2)(b); RCW 9A.36.031(1)(a). At trial, William McGinnis, Casano's community corrections

officer, testified that on July 3, 2019, he and corrections specialist John Tulloch were looking for Casano to execute an arrest warrant. RP 58, 66, 135. When they spotted Casano walking down the street, McGinnis got out of the vehicle and yelled at Casano to stop. RP 61, 139.

Casano turned and ran, and McGinnis followed, continuing to shout orders for Casano to stop. RP 62. Casano ran down some stairs, turning to face McGinnis when he got to a landing, and Casano screamed at McGinnis as McGinnis ordered Casano to get to the ground. RP 62-63. As Tulloch caught up with McGinnis, Casano threw a walking stick he had been carrying. RP 63, 140.

McGinnis testified that he was within 10 feet of Casano, and the stick came fairly close to his head. RP 63. He was not hit by the stick because he ducked out of the way. RP 63, 109. On cross-examination, McGinnis admitted that he did not write in his report that Casano threw the stick at his head or that he had to move to avoid being hit. RP 113. Tulloch testified that he saw

Casano throw the stick at McGinnis. RP 140. Like McGinnis, he did not write in his report that McGinnis had to jump out of the way to avoid being hit by the stick. RP 185.

McGinnis also testified that he noticed a fixed blade knife attached to Casano's belt. RP 63. He was concerned about the knife and told Casano to keep his hands up. When Casano eventually started to lower his hands, McGinnis used his taser on Casano, hitting him in the chest. RP 64. Tulloch did not recall Casano doing anything with his hands after he threw the stick, but he saw McGinnis use his taser on Casano. RP 141.

Tulloch handcuffed Casano, took him back upstairs, and had him sit on the curb while he recovered from being tased. RP 68. He searched Casano incident to arrest and found some money on his person. RP 143. Tulloch then searched Casano's backpack. RP 144. Inside were some small baggies and a larger sandwich bag containing methamphetamine, a small amount of marijuana, and Casano's identification card. RP 148. These items

were photographed, inventoried and taken into evidence. RP 160, 174.

McGinnis, who was present when Tulloch searched the backpack, testified that a there was also a scale in the backpack. RP 70. There was no photo of a scale, however, and no such item was inventoried. RP 92, 174. Defense counsel established through cross-examination that McGinnis did not write in his report that a scale was found in Casano's backpack. RP 114. Tulloch testified that he did not find a scale when he searched Casano and the backpack. RP 176. He confirmed that there was no scale listed in his case report or inventory, and if he had found a scale he would have documented it. RP 174-75.

Following the search, Tulloch told Casano he had found the methamphetamine and asked him how much there was. Casano said there was half an ounce and the bags were 20, 40, and 80. Tulloch testified that when he asked Casano what that meant, Casano said that was what he sold the bags for and that he was a horrible drug dealer. RP 148. On cross-examination,

Tulloch admitted that he did not use quotation marks in his report to indicate that he was including a direct quote from Casano, but he was pretty sure that's what Casano said. RP 191.

Brett Curtright, another corrections specialist, testified that he looked at the items found in Casano's backpack and then interviewed Casano. RP 207-08. He testified that Casano would not say who he got the drugs from, but when asked if he was selling drugs, Casano said "I gotta do what I gotta do to eat." RP 209. He also testified that he did not see a scale among the evidence seized from Casano, and if there had been one it would be noteworthy. RP 229.

Casano testified that he was using methamphetamine at the time of his arrest. He used as much as he could, as many times a day as possible. RP 269. He had withdrawn $300 from the bank that day and bought some food and cigarettes and $80 worth of methamphetamine, which he intended to use. RP 277, 286. Casano testified he was not intending to give or sell the methamphetamine to anyone. He was going to use it. RP 289.

Casano admitted running when he saw McGinnis, and when McGinnis caught up to him on the stairs, he threw his walking stick to the ground. RP 279, 282-83. He did not recall McGinnis having to jump out of the way to avoid being hit by the stick. RP 284. The next thing he remembered was being tased. RP 284-85. He spoke to Tulloch, but he did not say he was a horrible drug dealer. He said he "would be" a horrible drug dealer, meaning that he intended to use the drugs himself. RP 291-92.

During closing argument, defense counsel said he wanted to talk about the evidence the jury needed to examine when "trying to decide if the State can convince you beyond all reasonable doubt that this gentleman intended to deliver those drugs on that day." RP 397. He argued that the cash, the baggies containing less than a third of an ounce of methamphetamine, and the claim that Casano made statements about selling was the only evidence that even raised a suspicion. RP 398-99. Counsel then continued, "The court's instructed you that a reasonable

doubt is one for which a reason exists, right? So if you have one reason to doubt a charge, you have an obligation to find this gentleman not guilty." RP 399. He went on to argue that the evidence left plenty of doubt that Casano intended to deliver the methamphetamine. RP 399-403.

When discussing the assault charge, defense counsel reminded the jury that although McGinnis testified Casano threw the stick at his head, that testimony was not consistent with his report. RP 407. He argued that if a law enforcement officer had a stick thrown at his head, that detail would be included in the report, not missed and left to faulty memory. RP 407-08. Counsel noted that Tulloch's report said nothing about this either, and both officers documented the events at the time they occurred. RP 408.

Similarly, counsel urged the jury to question McGinnis's testimony that there was a scale, and that Casano reached for his knife, because those details were not observed by Tulloch and not documented in the report. RP 408-09.

Counsel urged the jury to look carefully at the evidence and conclude there was not proof beyond a reasonable doubt of what Casano intended to do with the drugs. And he asked the jury to find there are real reasons to doubt that Casano threw the stick at McGinnis. RP 418-19.

In rebuttal, the State addressed defense counsel's argument regarding reasonable doubt:

> [Defense counsel] told you that the State has to prove its case beyond all reasonable doubt. The State has to prove its case beyond a reasonable doubt. Not all. A reasonable doubt. And … you are satisfied beyond a reasonable doubt if you have an abiding belief in the truth of the charge.
>
> [Defense counsel] said if you have one doubt, you have to find the defendant not guilty. That is not the standard as it is contained in the instructions that you have. Beyond a reasonable doubt is an abiding belief in the truth of the charge.

RP 420. Defense counsel did not object to this argument or ask for a curative instruction.

The State also addressed the defense argument regarding the credibility of the State's witnesses, noting that defense counsel talked at length about what was included in the officers'

reports. The prosecutor argued that police reports are written so that the officers can remember details that happened some time ago, but that defense counsel was arguing that if a detail was not in the report, then testimony about that detail is not credible. RP 422-23. The State argued that that is not the correct standard of credibility. RP 423.

> The standard for assessing credibility, again, is outlined in Instruction 1. … The opportunity for people to observe and know the things they testified about, the ability to observe accurately, the quality of the witness's memory while testifying, the manner of the witness while testifying, any personal interest that might exist, any bias or prejudice, and the reasonableness of the witness's statements in the context of all the other evidence and then any other factor you find helpful. That is the basis for which you are to determine the credibility, not whether or not things are written in a police report, which, again, are written so that they – to help law enforcement recall what happened.

RP 423-34. Defense counsel did not object to this argument or request a curative instruction.

The jury returned guilty verdicts on both counts. CP 134-35. Casano appealed, arguing that trial counsel's failure to object to the prosecutor's improper argument denied him effective

assistance of counsel and that the court improperly imposed community custody supervision fees in the judgment and sentence. The Court of Appeals affirmed Casano's convictions but remanded for the trial court to strike the supervision fees.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

WHETHER TRIAL COUNSEL'S FAILURE TO OBJECT TO IMPROPER CLOSING ARGUMENT CONSTITUTES INEFFECTIVE ASSISTANCE OF COUNSEL IS SIGNIFICANT CONSTITUTIONAL ISSUE THIS COURT SHOULD ADDRESS.

The Sixth Amendment to the United States Constitution guarantees "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const. amend. VI. The Washington State Constitution similarly provides "[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...." Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to

meaningful representation. *See Evitts v. Lucey*, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) ("Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits."); *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled.") (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)).

A defendant is denied his right to effective representation when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845

P.2d 289 (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 510 U.S. 944 (1993). Only legitimate trial strategy or tactics constitute reasonable performance. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

In this case, counsel was deficient in failing to object to and seek curative instructions for the prosecutor's misstatement of the law in closing argument. This deficient representation prejudiced the defense and denied Casano effective assistance of counsel.

A prosecutor commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Such misstatements have "grave potential to mislead the jury." *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984). In rebuttal closing argument, the prosecutor misstated the law when attacking the defense arguments that there was reasonable doubt as to the charges and that the State's witnesses lacked credibility.

As to reasonable doubt, defense counsel had pointed the jury to the instruction defining reasonable doubt as a doubt for

which a reason exists. CP 118[1]. He argued that if the jury had a reason to doubt the charge, they had the obligation to find Casano not guilty. RP 399. Counsel then went on to discuss all the reasons to doubt the charges based on the evidence or lack of evidence at trial. This was appropriate argument consistent with the court's instruction. CP 118.

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[1] Instruction No. 4 provides:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists as to these elements.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 118.

The prosecutor argued in rebuttal, however, that the jury could still convict Casano if it had a reasonable doubt, because the State did not have to prove the charges beyond all reasonable doubt. The State focused on the "abiding belief in the truth" language of the reasonable doubt instruction, arguing that such a belief in the truth was sufficient to convict even in the face of a reasonable doubt. RP 420 ("[Defense counsel] said if you have one doubt, you have to find the defendant not guilty. That is not the standard as it is contained in the instructions that you have. Beyond a reasonable doubt is an abiding belief in the truth of the charge."). This argument misstates the State's burden of proof. A jury's job is not to search for the truth. Rather, the jury's job is to determine whether the State has proved the charges beyond a reasonable doubt. *See State v. Lindsay*, 180 Wn.2d 423, 437, 326 P.3d 125 (2014) ("Telling the jury that its job is to "speak the truth," or some variation thereof, misstates the burden of proof and is improper.").

The prosecutor similarly misled the jury when arguing that the officer's reports could not be used to attack their credibility. Defense counsel had pointed out that the officers testified to details as to both charges, but those details were not contained within the reports, written contemporaneously with the events. He argued that these details were important enough that they would have been included in the reports if true and that the discrepancy called the credibility of the trial testimony into question. RP 407-09. This was a valid method of impeaching the witnesses' credibility. *See State v. Garland*, 169 Wn. App. 869, 885, 282 P.3d 1137 (2012) (A witness may be impeached as to their credibility by a prior inconsistent statement.); *State v. Spencer*, 111 Wn. App. 401, 408-09, 45 P.3d 209 (2002) (defendant has constitutional right to impeach witnesses' credibility, including by comparing trial testimony to prior inconsistent statements), *review denied*, 148 Wn.2d 1009 (2003).

Rather than responding with reasons that the trial testimony was nonetheless credible, the prosecutor took it on

herself to instruct the jury that it could not determine credibility based on "whether or not things are written in a police report, which, again, are written so that they – to help law enforcement recall what happened." RP 424. This argument was misleading and improper.

Trial counsel failed to object to or seek curative instructions for either of these improper arguments. This failure constitutes deficient performance. The improper arguments misinformed and misled the jury as to the State's burden of proof and permissible evaluation of witness credibility. There is no legitimate strategic or tactical reason for not objecting to improper comments which so undermined the defense.

Moreover, counsel's deficient performance prejudiced the defense. The prosecutor's remarks encouraged the jury to believe that it could convict even if they had a reasonable doubt as to the charges and that it could not consider evidence that crucial details were not included in the witnesses' reports when evaluating their testimony as to those details. Had counsel objected, the court

could have issued curative instructions and stopped the improper arguments. Instead, counsel's failure to object communicated that the prosecutor was accurately describing the law as to reasonable doubt and witness credibility. And, as the last thing the jury heard before beginning deliberations, it is reasonably likely these unchallenged comments impacted the decision-making.

These issues were central to the defense and not insignificant in light of the evidence. The jury could easily have had a reasonable doubt as to whether Casano threw the stick at McGinnis or merely threw it to the ground. The evidence established that McGinnis's testimony that he had to move to avoid being struck was not corroborated by his report or Tulloch's, which called into question McGinnis's credibility as well as supported a reasonable doubt as to the assault charge. Similarly, McGinnis's testimony that there was a scale in Casano's backpack was contradicted by reports failing to mention a scale. That fact, along with the question as to whether

Casano actually said he was a horrible drug dealer or he would be a horrible drug dealer, support a reasonable doubt as to whether he intended to deliver the drugs as charged or merely possessed them for personal use. Given the misleading nature of the prosecutor's comments, there is a reasonable probability the jury would have returned a different verdict if counsel had sought correction of the misstatements of law. Counsel's error denied Casano effective representation, and the Court of Appeals' decision to the contrary raises a significant constitutional question this Court should address. RAP 13.4(b)(3).

F. CONCLUSION

For the reasons discussed above, this Court should grant review and reverse Casano's convictions.

I certify that this document contains 3,177 words as calculated by Microsoft Word.

DATED this 17th day of August, 2023.

Respectfully submitted,

GLINSKI LAW FIRM PLLC

_____

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APPENDIX

Filed
Washington State
Court of Appeals
Division Two

July 18, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSEPH WILLIAM CASANO, Appellant.	No. 57055-6-II UNPUBLISHED OPINION

GLASGOW, C.J.—Joseph Casano threw a walking stick at William McGinnis, a community corrections officer. After arresting Casano, McGinnis found methamphetamine in Casano's backpack. The State charged Casano with possession of a controlled substance with intent to deliver and third degree assault.

At trial, defense counsel highlighted differences between the testimony of the State's witnesses and their police reports. Defense counsel argued in closing that "one reason to doubt" equated to reasonable doubt. 1 Verbatim Rep. of Proc. (VRP) at 399. In response, the prosecutor told jurors that having one doubt would not obligate them to acquit Casano, because beyond a reasonable doubt meant an abiding belief in the truth of the charge. The prosecutor also told jurors that whether or not things are written in a police report is not a basis for determining credibility. Defense counsel did not object to these statements.

The jury found Casano guilty of both charges. The judgment and sentence contained a boilerplate provision ordering Casano to pay community custody supervision fees.

Casano appeals. He argues that defense counsel rendered ineffective assistance by failing to object to the prosecutor's statements at closing about the burden of proof and about assessing witness credibility. Casano also argues that the trial court must strike the community custody supervision fees. We remand for the trial court to strike the supervision fees and otherwise affirm Casano's convictions and sentence.

FACTS

I. ARREST

McGinnis, a community corrections officer, and John Tulloch, a corrections specialist, were looking to serve an arrest warrant on Casano when they saw him in a business park. McGinnis yelled Casano's name and Casano ran away. When McGinnis and Tulloch caught up with Casano, Casano threw the walking stick he was holding at McGinnis. In response, McGinnis tased Casano. Casano fell and Tulloch handcuffed him. A search of Casano's backpack revealed multiple small baggies of methamphetamine, one larger baggie also containing methamphetamine, and cash. The State charged Casano with possession of a controlled substance with intent to deliver and third degree assault.

II. TRIAL

A. Testimony about the Incident

At trial, McGinnis, Tulloch, and Casano all testified about the walking stick. McGinnis testified that Casano threw the walking stick at him and that the stick came so close to his head that he "had to dodge out of its way." 1 VRP at 109. On cross-examination, McGinnis acknowledged that while he wrote in his police report that Casano threw the stick at him, the report contained no details about the stick being thrown at his head or about having to avoid being hit by

it. Tulloch testified similarly. He said Casano threw the stick at McGinnis, but he acknowledged that while his police report contained that detail, it did not state that Casano threw the stick toward McGinnis's head or that McGinnis had to jump out of the way. And Casano testified that he threw the walking stick to the ground rather than at McGinnis.

McGinnis also testified about the search of Casano's backpack. He said the search revealed a scale. But McGinnis confirmed on cross-examination that his report did not mention finding a scale. Additionally, Tulloch and Brett Curtright, a different community corrections specialist who assisted with Casano's arrest, testified that they did not remember finding a scale.

Later, Tulloch testified about a postarrest conversation with Casano. Tulloch said that when he spoke with Casano about the contents of his backpack, Casano "told [him] he was a horrible drug dealer." 1 VRP at 148. On cross-examination, Tulloch said he did not use quotation marks when he wrote about Casano's statement, although he was "[p]retty sure that's what [Casano] said." 1 VRP at 190-91. Casano testified that he told Tulloch that he *would be* a horrible drug dealer, not that he *was* a horrible drug dealer.

Curtright testified that he also spoke with Casano after his arrest. He said he asked Casano whether he was selling narcotics, and Casano replied, "'I gotta do what I gotta do to eat.'" 1 VRP at 209.

B. Jury Instructions and Closing Arguments

The jury instructions explained reasonable doubt as doubt "for which a reason exists and may arise from the evidence or lack of evidence." Clerk's Papers (CP) at 118. The instructions also stated, "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." *Id.*

The jury also received instructions on assessing witness credibility:

> In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and *any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony*.

CP at 114 (emphasis added).

During closing argument, the prosecutor told jurors, "I'm going to highlight some [jury] instructions for you. Rely on what is contained in the instructions. If one of us misspeaks, the instructions that you are given is what controls." 1 VRP at 371.

Defense counsel also referenced the jury instructions. He told jurors, "The court's instructed you that a reasonable doubt is one for which a reason exists, right? So[,] if you have one reason to doubt a charge, you have an obligation to find [Casano] not guilty." 1 VRP at 399. Defense counsel pointed out that the State's witnesses testified inconsistently about whether Casano had a scale and highlighted differences between their testimony and their police reports.

In rebuttal, the prosecutor argued that defense counsel had misrepresented the State's burden of proof: "[Defense counsel] said if you have one doubt, you have to find the defendant not guilty. That is not the standard as it is contained in the instructions that you have. Beyond a reasonable doubt is an abiding belief in the truth of the charge." 1 VRP at 420.

The prosecutor also argued about the weight jurors should assign to discrepancies between the State witnesses' testimony and their police reports. The prosecutor recited the jury instruction for assessing credibility, listing the considerations, including "all the other evidence and then any other factor that you find helpful." 1 VRP at 424. But the prosecutor then said, "That is the basis

for which you are to determine the credibility, not whether or not things are written in a police report, which, again, are written so that they -- to help law enforcement recall what happened." *Id.* Defense counsel did not object to the prosecutor's statements about the burden of proof or the standard for assessing credibility.

C. Verdict and Sentence

The jury found Casano guilty of possession of a controlled substance with intent to deliver and third degree assault. The trial court sentenced Casano to 20 months and 1 day for the possession with intent to deliver conviction and 17 months for the assault conviction, to be served concurrently. The judgment and sentence contained a boilerplate provision ordering Casano to "pay supervision fees as determined by" the Department of Corrections. CP at 170.

Casano appeals his convictions and sentence.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Casano argues that defense counsel's failure to object and request curative instructions during the State's closing argument denied him effective assistance of counsel. We disagree.

The federal and state constitutions guarantee the right to effective assistance of counsel. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017); U.S. CONST. amend. VI; CONST. art. I, § 22. To establish ineffective assistance of counsel, a defendant must show "'that counsel's performance was deficient' and that 'the deficient performance prejudiced the defense.'" *State v. Carson*, 184 Wn.2d 207, 216, 357 P.3d 1064 (2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To prevail, the defendant must meet both the deficiency requirement and the prejudice requirement. *Estes*, 188 Wn.2d at 457-58.

Counsel's performance was deficient if it fell "'below an objective standard of reasonableness based on consideration of all the circumstances.'" *Id.* at 458 (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). To establish that counsel performed deficiently, the defendant must show that there were no "'legitimate strategic or tactical reasons supporting the challenged conduct.'" *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012) (quoting *McFarland*, 127 Wn.2d at 336). We strongly presume that counsel's representation was reasonable. *Estes*, 188 Wn.2d at 458.

Counsel's deficient performance prejudices the defense "if there is a reasonable probability that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.'" *Id.* (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Id.*

A. Failure to Object

First, Casano contends that defense counsel should have objected because the State inaccurately described the burden of proof and because the State told the jurors that they should not evaluate the State witnesses' credibility based on discrepancies between their testimony and their police reports. We disagree.

To establish ineffective assistance of counsel based on counsel's failure to object, the defendant "must rebut the presumption that counsel's failure to object 'can be characterized as *legitimate* trial strategy or tactics.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (quoting *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002)). Refraining from objecting even where the prosecutor's argument was improper in order to avoid emphasizing unhelpful testimony or argument is a legitimate trial tactic. *See id.* And a decision not to object

during closing argument is generally "within the wide range of permissible professional legal conduct," especially because lawyers "do not commonly object during closing argument 'absent egregious misstatements.'" *Id.* at 717 (quoting *United States v. Necoechea*, 986 F.2d 1273, 1281 (9th Cir. 1993)).

1. Prosecutor's statements on the State's burden of proof

We give prosecutors significant latitude in closing argument, particularly when responding to defense counsel's arguments. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011); *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994). A prosecutor does not make egregious misstatements by paraphrasing jury instructions. *State v. Anderson*, 153 Wn. App. 417, 430, 220 P.3d 1273 (2009). For example, in *Anderson*, we held that a prosecutor's statement was proper where he said "that a 'reasonable doubt' is one for which a reason exists" and the jury instructions "reiterated this concept: 'A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.'" *Id.*

Here, defense counsel did not perform deficiently by refraining from objecting during closing argument when the prosecutor spoke about the burden of proof. The prosecutor was responding to arguments defense counsel made in their closing arguments. Far from making egregious misstatements, the prosecutor paraphrased the jury instructions—much like the prosecutor in *Anderson*. In rebuttal, the prosecutor stated, "[Defense counsel] said if you have one doubt, you have to find the defendant not guilty. That is not the standard as it is contained in the instructions that you have. Beyond a reasonable doubt is an abiding belief in the truth of the charge." 1 VRP at 420. These statements accurately reiterated the jury instructions on the State's burden of proof. The jury instructions provided that the State had "the burden of proving each

element . . . beyond a *reasonable* doubt" and that a "*reasonable* doubt is one for which a reason exists." CP at 118 (emphasis added). The prosecutor was thus correct that having "one doubt" was not a sufficient basis for returning a verdict of not guilty. 1 VRP at 420. The instructions further provided that if, "after fully, fairly, and carefully considering all of the evidence or lack of evidence," the jurors had "an abiding belief in the truth of the charge," they would be "satisfied beyond a reasonable doubt." CP at 118. The prosecutor's statement was nearly identical. Defense counsel's decision to refrain from objecting was thus well within the range of permissible professional conduct.

Even if defense counsel had performed deficiently, there would have been no prejudice. We presume that jurors follow the trial court's instructions, *Emery*, 174 Wn.2d at 766, and Casano provides no argument rebutting that presumption. Moreover, at the beginning of closing argument, the prosecutor said, "If one of us misspeaks, the [jury] instructions that you are given is what controls." 1 VRP at 371. Any difference between the prosecutor's statement and the jury instructions was so insignificant that this precautionary comment would have prevented any prejudice by redirecting the jury to the language of the instructions. Because there is no reasonable probability that but for counsel's alleged deficient performance, the outcome of the proceedings would have been different, Casano's challenge fails.

2. Prosecutor's statements on witness credibility

As stated above, refraining from objecting to an objectionable statement to avoid emphasizing the other party's argument is a legitimate trial tactic, and lawyers "do not commonly object during closing argument 'absent egregious misstatements.'" *Davis*, 152 Wn.2d at 717 (quoting *Necoechea*, 986 F.2d at 1281).

Here, to the extent that the prosecutor misstated the standard for evaluating witness credibility, that misstatement was not so egregious that defense counsel performed deficiently by failing to object. The prosecutor first listed the factors the jury instructions directed jurors to consider when assessing witness credibility, including "any other factor that [they found] helpful." 1 VRP at 424. This statement accurately relayed the instructions. *See* CP at 114. The prosecutor then said, "That is the basis for which you are to determine the credibility, not whether or not things are written in a police report, which, again, are written . . . to help law enforcement recall what happened." 1 VRP at 424.

Casano argues that, in making this statement, the prosecutor told the jurors that they could not use the police reports to asses witness credibility. But the prosecutor had just told jurors that they could consider any factor they found helpful, so it was reasonable to interpret this statement as an argument against assessing the officers' credibility *solely* based on the consistency of their testimony with their reports. Moreover, even if the jury had not interpreted the statement in this way, the prosecutor's reiteration that the jury could consider any factor helpful to determining credibility reduced the likelihood that the jury would have ignored the police reports entirely. It was reasonable to refrain from objecting under these circumstances, and even if this decision had constituted deficient performance, the difference between the prosecutor's statements and the jury instructions was insignificant, so the prosecutor's earlier emphasis on the fact that the written jury instructions control would have prevented any prejudice. *See* 1 VRP at 371. Because there is no reasonable probability that but for counsel's alleged deficient performance, the outcome of the proceedings would have been different, Casano's challenge fails.

B. Failure to Request Curative Instructions

Casano further contends that defense counsel should have sought curative instructions to remedy the prosecutor's improper statements. We disagree.

To establish ineffective assistance of counsel based on "counsel's failure to request a particular jury instruction, the defendant must show [they were] entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." *State v. Thompson*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012).

Here, Casano has not established that defense counsel gave ineffective assistance by refraining from requesting curative instructions. The prosecutor's statements about the burden of proof were proper, so Casano was not entitled to a curative instruction and defense counsel did not perform deficiently by failing to request it. And while the prosecutor's statement about using police reports to assess witness credibility was more problematic, defense counsel did not perform deficiently by declining to object and failing to request a curative instruction. We strongly presume that counsel's representation was reasonable, *Estes*, 188 Wn.2d at 458, and as stated above, Casano fails to rebut the presumption that counsel reasonably decided not to object in these circumstances where the instructions and the prosecutor's prior statement made it clear that the jury could consider anything that was helpful to them when assessing credibility.

There is no basis for us to find that defense counsel gave Casano ineffective assistance. We affirm Casano's convictions.

II. SUPERVISION FEES

Casano argues, and the State concedes, that the trial court must strike the provision in the judgment and sentence imposing community custody supervision fees because RCW 9.94A.703 does not authorize that provision. We agree.

While Casano's case was pending on appeal, the legislature removed the authorization for trial courts to impose community custody supervision fees. *See* LAWS OF 2022, ch. 29 § 8. The statutory amendment eliminating community custody supervision fees took effect on July 1, 2022. The statutory amendment applies here because Casano's case was still pending on review when the amendment became effective. *State v. Ellis*, No. 56984-1-II, slip op. at 13 (Wash. Ct. App. June 13, 2023).[1] We accept the State's concession and remand for the trial court to strike the provision imposing community custody supervision fees.

CONCLUSION

We remand for the trial court to strike the provision imposing community custody supervision fees from the judgment and sentence. We otherwise affirm Casano's convictions and sentence.

[1] https://www.courts.wa.gov/opinions/pdf/D2%2056984-1-II%20Published%20Opinion.pdf.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, CJ

Glasgow, C.J.

We concur:

Lee, J.

Che, J.

GLINSKI LAW FIRM PLLC

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