

NO. 43422-9

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JUAN GOMEZ VASQUEZ, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Ronald E. Culpepper

No. 11-1-03677-6

Response Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did defendant fail to demonstrate that his counsel's performance was deficient when defense counsel's decision not to make a motion to exclude or object can be characterized as a legitimate tactical decision?
2. Did defendant fail to show that the prosecutor's conduct was improper for introducing evidence of a gun found during the execution of a search warrant of defendant's home or for referencing the evidence at closing when the court had not excluded the evidence which was supported by the record and not argued for improper purposes?
3. Did defendant waive his right to self-representation when he failed to timely assert his request to proceed pro se?

B. STATEMENT OF THE CASE.

1. Procedure

On September 8, 2011, the State charged Juan Gomez Vasquez, defendant, with two counts of unlawful delivery of a controlled substance, one count of unlawful possession of a firearm in the second degree, two counts of possession of a legend drug, and one count of unlawful possession of a controlled substance. CP 1-3. Charges were amended to one count of unlawful delivery of a controlled substance. CP 31.

Pre-trial proceedings were held on March 6, 2012, before the Honorable Ronald Culpepper, and defendant's jury trial began the next day. RP 4, 172. Defendant was found guilty as charged on March 8, 2012. 3/8/12 RP 5. Throughout trial, defendant was represented by Jeffrey Kim. RP 173.

Sentencing was set over from April 27, 2012, to May 4, 2012, because counsel brought to the courts attention several motions defendant had filed pro se over the course of the proceedings. 4/27/12 RP 13. Included in these motions was one asking to go pro se. The court denied defendant's motion for a new trial and issued a non-ruling on the other motions, including the motion for self-representation, because he failed to bring the motions to the attention of the court. 5/4/12 RP 23-24. On May 4, 2012, the court sentenced defendant to 75 months in prison with credit for time served, 12 months of community custody, standard legal financial obligations, and denied DOSA. 5/4/12 RP 30-31.

Defendant timely filed a Notice of Appeal on May 14, 2012. CP 185.

2. Facts

Officer Buchanan of the Tacoma Police Department testified that after he received a tip from Kevin Gordon, a reliable confidential informant, that Mr. Gordon had purchased drugs from defendant, Officer Buchanan arranged a controlled purchase targeting defendant. RP 179, 181, 182.

On August 18, 2011, Officer Buchanan met with Mr. Gordon to conduct the controlled purchase. RP 179. Officer Buchanan and Mr. Gordon testified that after Mr. Gordon was searched, given \$300 in cash and a scale; Gordon then called defendant to arrange for a meeting to exchange the cash for drugs. RP 183-185, 231. Mr. Gordon testified that police officers dropped him off at the agreed upon location near 56th and Park, where he walked to and entered a van with defendant and the driver inside. RP 229-230. He testified after he gave defendant the money, defendant left on his bicycle to get the drugs from his supplier and returned to the van. RP 229-230. He also testified that because the scale given to him by the police officers was broken, defendant called and arranged to meet with someone who had a scale. RP 229. Although defendant and Mr. Gordon initially went to a Goodwill parking lot to meet with that person, they decided just to go to defendant's house to complete the exchange. RP 229-230.

During the controlled purchase, Officer Buchanan testified that he was conducting surveillance of the exchange from a few blocks away, and that he kept constant contact with Mr. Gordon through text messaging. RP 200-201. He also testified that after Mr. Gordon initially made contact with the van, he saw defendant ride away from the van on a bicycle. RP 200. Officer Buchanan testified that he received a text message from Mr. Gordon stating that he believed they were going to defendant's house. RP 204.

Mr. Gordon testified that at defendant's house, defendant bagged and weighed a quarter ounce of methamphetamines, gave the baggie to Mr. Gordon, and kept the rest. RP 230. He testified that one of defendant's friends then dropped him off at another location where he later met up with police officers who took the drugs and searched him again. RP 230-231.

Officer Buchanan testified that on September 7, 2011, a search warrant of defendant's house was executed. RP 191. He testified that police officers found marijuana and pills in a room that they suspected to be defendant's. RP 205, 208. He also testified that a handgun, ammunition, documents with defendant's name, and a scale were also found in the house. RP 205, 208. Officer Buchanan testified that defendant admitted to selling drugs after he was told that he was under arrest for distribution. RP 206.

At trial, defense counsel's theory of defense was that Mr. Gordon lied about the entire drug exchange to receive a more lenient sentence for himself. Defense counsel presented his theory of defense by thoroughly cross-examining all of the State's witnesses. As such, defense counsel elicited the following testimony from Officer Buchanan:

- Q. People who use drugs are pretty good, as you've said at not telling the truth right?
- A. Yes.
- Q. They are usually pretty adept at hiding or concealing controlled substances that they have on

- them, right?
- A. They can be.
- Q. Some would even go as far as to put some things in their body cavity to avoid detection, right?
- A. That's a possibility.
- Q. And you didn't do a cavity search and he wasn't wearing a hat and you pretty much frisked him all over. You did a full pat-down; is that right?
- A. Yes.

RP 199-200.

Defense counsel also elicited testimony from Officer Buchanan to suggest that there was a lack of evidence of the drug exchange between Mr. Gordon and defendant. RP 207.

- Q. Specifically, did [defendant] admit to or did he tell you that he sold drugs on August 18th to Kevin Gordon?
- A. No.
- Q. No?
- A. No.
- Q. Did [defendant] say that, I've sold drugs on this date, that date, to this person and this person?
- A. No.
- Q. So you didn't find any pre-recorded buy money?
- A.. Correct.
- Q. You didn't find any drugs?
- A. No.

RP 207.

Defense counsel also brought forth evidence to support an argument that there was insufficient evidence to link defendant to the crime because he was not the sole occupant of the residence. RP 210.

- Q. Officer Buchanan, this residence that you searched, is it your understanding, how many people live there?
- A. I don't know. We only found three people inside the house.
- Q. Did you find -- you said you found a document with Mr. Gomez Vasquez's name on it?
- A. Yes.
- Q. Did you find any documents with other people's names on them?
- A. Yes.
- Q. So safe to say there was, at least, one other person living at the house?
- A. Yes.
- Q. So this wasn't exclusively Mr. Gomez Vasquez's residence?
- A. Correct.

RP 210.

In response, the State elicited testimony from Officer Buchanan that the evidence found at defendant's house was consistent with drug dealing. RP 208.

- Q. So your understanding is that on August 18th, 2011, Mr. Gordon left the 56th block of Portland Avenue to go to that home that we showed the picture of to do what?
- A. To weigh and cut up a bag to give to Mr. Gordon.
- Q. So Mr. Kim was asking you about some of the things you found in the house. Did you find a scale in the house?
- A. Yes.
- Q. Did you find a gun in the house?
- A. Yes.
- Q. Did you find bullets in the house?
- A. Yes.

- Q. You found pills in the house?
A. Yes, or the labels.

RP 208.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW HE RECIEVED CONSTITUTIONALLY INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL'S DECISION NOT TO BRING A MOTION TO EXCLUDE OR TO OBJECT CAN BE CHARACTERIZED AS A LEGITIMATE TACTICAL DECISION.

To establish a claim of ineffective assistance of counsel, defendant must show both that (1) counsel's performance was deficient, and (2) the performance prejudiced the defense. *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011); *see also Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *Grier*, 171 Wn.2d at 33. There is a strong presumption that counsel's performance was sufficient. *Id.*; *see also State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Moreover, the courts will not find deficient performance where counsel's conduct can be characterized as legitimate trial strategy. *Grier*, 171 Wn.2d at 33.

A defendant establishes prejudice by showing there is a reasonable probability that but for counsel's performance, the outcome of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Where a defendant challenges a

conviction, “the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.” *Strickland*, 466 U.S. at 695.

- a. Defendant fails to demonstrate that defense counsel was ineffective for failing to bring a motion in limine.

Defendant alleges that his counsel was ineffective for failing to bring a motion in limine to exclude evidence of the gun found during the execution of a search warrant of defendant’s home. Brief of Appellant at 11. Defendant’s claim fails because he fails to show that the motion would likely have been granted, and the decision not to seek a limiting order could be characterized as a legitimate tactical decision.

To prevail on a claim of ineffective assistance of counsel on the basis of failure to bring a motion to exclude, the defendant must establish that the motion likely would have been granted. *State v. McFarland*, 127 Wn.2d 322, 333-334, 899 P.2d 1251 (1995). That standard often cannot be met when the record lacks a factual basis for determining the merits of the claim. *Id.* at 337-338. The presumption in favor of effective representation can only be overcome by a showing of deficient representation based on the record established in the proceedings below. *Id.* at 336. There may be legitimate strategic or tactical reasons why an exclusion hearing is not sought at trial. *Id.*

Here, defendant fails to overcome the presumption of effective assistance of counsel. The record shows that defense counsel did not seek to exclude the evidence of the gun or any of the items found during the execution of the search warrant at defendant's house. Defendant fails to meet his burden of demonstrating that the motion would likely have been granted because he offers no support for why the evidence should have been excluded. Here, as in most ineffective assistance of counsel claims based on failure to bring a motion to exclude, the record is too undeveloped to support defendant's claim because there was no hearing to determine the admissibility of the evidence. As there is no indication of why the motion would likely have been granted, defendant fails to meet this burden.

Further, defense counsel's decision not to bring a motion to exclude can be characterized as a legitimate tactical decision because it was not inconsistent with his theory of defense. Defense counsel's theory of defense rested on the argument that the evidence found belonged to other residents of the home. RP 210. In support of this theory, defense counsel elicited testimony from Officer Buchanan to suggest that defendant was not the sole occupant of the home. RP 210.

Q. Officer Buchanan, this residence that you searched, is it your understanding, how many people live there?

A. I don't know. We only found three people inside the

- house.
- Q. Did you find -- you said you found a document with Mr. Gomez Vasquez's name on it?
- A. Yes.
- Q. Did you find any documents with other people's names on them?
- A. Yes.
- Q. So safe to say there was, at least, one other person living at the house?
- A. Yes.
- Q. So this wasn't exclusively Mr. Gomez Vasquez's residence?
- A. Correct.

RP 210.

As the courts will not find deficient performance where counsel's conduct can be characterized as legitimate trial strategy, defendant's claim fails when counsel's decision not to bring a motion to exclude is consistent with his theory of defense.

- b. Defendant fails to demonstrate that defense counsel was ineffective for failing to object.

Defendant alleges that his counsel was ineffective for failing to object to evidence of a gun found during a search of defendant's home when it was adduced at trial. Brief of Appellant at 11. Defendant's claim fails as counsel's decision not to object to the evidence can be characterized as a tactical decision and defendant fails to demonstrate any prejudice.

“The decision of when or whether to object is a classic example of trial tactics.” *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). Specifically, where a defendant challenges defense counsel’s failure to object during closing argument, the courts have recognized that “[l]awyers do not commonly object during closing argument ‘absent egregious misstatements.’ A decision not to object during summation is within the wide range of permissible professional legal conduct.” *In re Davis*, 152 Wn.2d 647, 717, 101 P.3d 1 (2004). To establish ineffective assistance of counsel based on counsel's failure to object to testimony, the defendant must show (1) the absence of a legitimate strategic or tactical reason for not objecting; (2) that the trial court would have sustained the objection if made, and (3) the result of the trial would have differed if the evidence has not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

The record shows that defense counsel made no objection when the evidence was adducted at trial. RP 208. Defendant's claim fails because defense counsel’s decision not to object can be characterized as a legitimate tactical decision in two ways. First, defense counsel’s decision not to object to the evidence was likely a tactical decision because it was consistent with the theory of defense that the evidence belonged to other residents of the house. RP 208. Second, defense counsel likely made the

decision not to object as a tactical decision because doing otherwise would have only brought attention to the evidence. Moreover, defense counsel was an effective advocate for his client. He successfully brought pre-trial motions, made opening and closing statements, and objected at trial when proper. 3/6/12 RP 8-9; RP 173, 191, 307. As such, defendant fails to demonstrate that counsel's performance was deficient.

Defendant also fails to meet his burden of proving that the outcome of the trial would have been different had defense counsel objected to the evidence. The jury heard not only Mr. Gordon's testimony of his first-hand drug exchange with defendant, but also Officer Buchanan's testimony to corroborate Mr. Gordon's testimony. The jury was also presented with the evidence of defendant's statement to the police admitting that he sold drugs.

As defense counsel's decision not object to the evidence of the gun can be characterized as a legitimate tactical decision, defendant's claim fails and this Court should dismiss his claim and affirm his conviction.

2. DEFENDANT FAILS TO SHOW THAT THE PROSECUTOR IMPROPERLY ADDUCED EVIDENCE OF A GUN THAT WAS FOUND IN THE SEARCH OF DEFENDANT'S HOUSE WHEN THE COURT HAD NOT EXCLUDED THE EVIDENCE.

Defendant claims that the State committed prosecutorial misconduct by eliciting evidence of a gun found during the execution of a

search warrant of defendant's house. Brief of Appellant at 16. Defendant's claim fails as the court made no ruling to exclude the evidence from trial.

A defendant alleging prosecutorial misconduct carries the burden of proving that the prosecutor's conduct was improper. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). Once defendant has established that the conduct was improper, defendant must also show that the conduct prejudiced his right to a fair trial. *Emery*, 174 Wn.2d at 760; *Carver*, 122 Wn. App. at 306 ("Prejudice is established only where 'there is a substantial likelihood the instances of misconduct affected the jury's verdict.'" (internal citations omitted)). The court reviews the prosecutor's conduct in "the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instruction given." *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Where a defendant fails to object to the alleged misconduct at trial, then the defendant must also show that the conduct was so flagrant, ill-intentioned, and prejudicial that any resulting prejudice could not have been neutralized by a curative instruction. *Emery*, 174 Wn.2d at 760–61. Under this heightened standard, defendant must show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Id.* at 761; *see also Warren*, 165 Wn.2d at 26–28 (finding that the

defendant's right to a fair trial was not prejudiced even though the prosecutor had repeatedly shifted the burden of proof to the defense in spite of a court's orders to the contrary).

- a. Defendant fails in his burden to show that the prosecutor's conduct in adducing the evidence was improper, much less that it was so flagrant, ill-intentioned, and prejudicial such that any prejudice could have been remedied with a curative instruction.

The record shows that defendant did not object when the State adduced the evidence of the gun at trial. RP 208. Accordingly, defendant bears not only the burden of demonstrating that the conduct was improper, but also the higher burden of showing that the conduct had a *substantial likelihood* of affecting the jury's verdict. Defendant fails this burden. The alleged misconduct was not so prejudicial that it could not have readily been remedied by a curative instruction to the jury to disregard if only defendant had objected and requested it.

The record shows that the prosecutor adduced evidence that, during the execution of the search warrant, a gun and ammunition was found in the residence. RP 208. No motions were brought to exclude the evidence found within the residence during the execution of the search warrant. Defendant fails to identify any pre-trial motion that he raised to exclude introduction of such evidence. The State can find no indication of such a motion being brought nor can defendant identify any point where the court

ruled that the evidence was inadmissible.¹ As the court made no ruling to exclude the evidence, the State did not act improperly by adducing the evidence found during the execution of the warrant. As such, this Court should dismiss defendant's claim and affirm his conviction.

- b. Defendant fails his burden to show that the prosecutor's reference to the gun in closing was improper, much less that it was so flagrant, ill-intentioned, and prejudicial such that any prejudice could have been remedied with a curative instruction.

Defendant claims that the State committed prosecutorial misconduct by referring to evidence of a gun found during the execution of the search warrant of defendant's home at closing. Brief of Appellant at 16. Defendant's claim fails as the evidence was supported by the record and not adduced for improper purposes. RP 208.

A defendant alleging prosecutorial misconduct carries the burden of proving that the prosecutor's conduct was improper. *Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012); *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). Once defendant has established that the conduct was improper, defendant must also show that the conduct prejudiced his right to a fair trial. *Emery*, 174 Wn.2d at 760; *Carver*, 122 Wn. App. at 306

¹ Any weakness in the record as to the admissibility of the evidence must be held against the defendant as the record would have been developed.

“Prejudice is established only where ‘there is a substantial likelihood the instances of misconduct affected the jury’s verdict.’ (internal citations omitted)). The court reviews the prosecutor’s conduct in “the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instruction given.” *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008).

Where a defendant fails to object to the alleged misconduct at trial, then the defendant must also show that the conduct was so flagrant, ill-intentioned, and prejudicial that any resulting prejudice could not have been neutralized by a curative instruction. *Emery*, 174 Wn.2d at 760–61. Under this heightened standard, defendant must show that the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Id.* at 761; *see also Warren*, 165 Wn.2d at 26–28 (finding that the defendant’s right to a fair trial was not prejudiced even though the prosecutor had repeatedly shifted the burden of proof to the defense in spite of a court’s orders to the contrary).

Contrary to defendant's claim that the prosecutor's conduct was improper for referencing the evidence, his claim fails not only because the evidence was supported by the record, but also because the State only used it to show that the items seized during the warrant were consistent with drug dealing activities as a means of corroborating the testimony of the state's key witness.

[Mr. Gordon] told you what he did find at the house. What was the reason? Ask yourselves, think about this, why did Mr. Gordon tell you that they went to his house? What did they need? You remember. He said, a scale, right? What did Officer Buchanan tell you that he found in that house? A scale. I'm going to hang up another little peg for Mr. Gordon, right. **Everything keeps supporting what he told you. You didn't find any methamphetamine, no, but I found some other drugs. You didn't find any methamphetamine, but I found a loaded handgun.**

RP 304.

Officer Buchanan's testimony of the evidence found during the search was consistent with evidence typically found at drug deals and tended to corroborate Mr. Gordon's testimony that a drug transaction occurred there. The argument was not made to suggest that defendant was dangerous or a criminal, only that Mr. Gordon should be believed.

As the evidence was supported by the record and not referenced for improper purposes, this Court should dismiss defendant's claim and affirm his conviction.

3. AS DEFENDANT FAILED TO TIMELY ASSERT HIS REQUEST TO PROCEED PRO SE, HE WAIVED HIS RIGHT TO SELF-REPRESENTATION.

Defendant claims that his constitutional right to self-representation was violated because the court did not acknowledge his pro se motion for self-representation. Brief of Appellant at 24. Defendant's claim fails as he did not timely assert his request to proceed pro se, thus waiving his right to self-representation.

The right to self-representation necessarily involves the waiver of the right to counsel, and can only be invoked by waiving counsel expressly, knowingly, and intelligently. *Faretta v. California*, 422 U.S. 806, 819, 95 S. Ct. 2525, 2533, 45 L.Ed.2d 562 (1975); *U.S. v. Chatman*, 584 F.2d 1358 (4th Cir. 1978). In the absence of a clear and knowing election, a court should not quickly infer that a defendant unskilled in the law has waived counsel and has opted to conduct his own defense. *Brewer v. Williams*, 430 U.S. 387, 404, 97 S. Ct. 1232, 1242, 51 L.Ed.2d 424 (1976). The court must indulge every reasonable presumption against waiver of counsel. *Id.*

The right to proceed without fully independent counsel must be affirmatively requested and is more easily waived than right to independent counsel. *U.S. v. Mahar*, 550 F.2d 1005, 1009 (5th Cir. 1977). The right to self-representation is waived if not timely asserted or by subsequent conduct giving the appearance of uncertainty. *U.S. vs. Dunlap*, 577 F.2d 867 (4th Cir.); *Brown v. Wainwright*, 665 F.2d 607 (5th Cir. 1982).

If the right is not asserted before trial, it becomes discretionary with the trial court whether to allow the defendant to proceed pro se. *U.S. v. Weisz*, 718 F.2d 413 (D.C. Cir.); *U.S. vs. Dunlap*, 577 F.2d 867 (4th

Cir.). A waiver may be found if it reasonably appears to the court that defendant has abandoned his initial request to represent himself. *Brown v. Wainwright*, 665 F.2d at 611 (5th Cir. 1982).

Here, defendant's right to self-representation was not violated because he waived his right to self-representation by failing to assert that right in a timely manner. The record shows that the first time that defendant notified the court of his desire to represent himself was after the trial had been completed. 4/27/12 RP 7. Defendant, who was represented by counsel, filed numerous pleadings during the course of the proceedings. CP 14-16, 150-154, 160-166, 284-269. Among a litany of motions defendant filed pro se was a handwritten Motion and Demand for Self-Representation. CP 14-16. Despite filing these numerous motions, defendant failed to properly bring any of them to the attention of the court in a timely manner. As a defendant has no right to hybrid representation, the court was under no obligation to consider such motions. *State v. DeWeese*, 117 Wn.2d 369, 379, 816 P.2d 1 (1991). It was not until after the jury had convicted defendant that his counsel asked the court to address the pro se motions. 4/27/12 RP 5-6. There is nothing in the record to show that defendant asserted his right to self-representation prior to or during trial or that the court was aware that one of the motions filed pertained to self-representation. Instead, the record shows that defendant

allowed defense counsel to advocate for him throughout trial, and that only after he was found guilty was the court asked to rule on a request to proceed pro se. 4/27/12 RP 7. The court recognized this stating, "You weren't pro se on that case; you were represented by Mr. Kim. The case is over." 4/27/12 RP 9. By failing to bring to the attention of the court his motion to proceed pro se and allowing defense counsel to represent him throughout trial, defendant clearly waived his right to self-representation.

As it is well established that failure to timely assert the right to self-representation is a waiver of that right, defendant waived his right to self-representation by failing to timely notify the court of his request.


D. CONCLUSION.

Defendant received effective assistance of counsel where defense counsel's decision not to bring a motion to exclude evidence of a gun or object when it was adduced at trial can be characterized as a legitimate tactical decision. Further, defendant fails in his burden to show that the State committed prosecutorial misconduct when he made no objection to the evidence, the evidence was supported by the record, and not argued for improper purposes. Finally, defendant waived his right to self-

representation by failing to properly notify the court of his request. As such, this Court should dismiss defendant's claims and affirm his conviction.

DATED: April 9, 2013.

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KATHLEEN PROCTOR
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WSB # 14811

Robin Sand
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the ~~appellant~~ and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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