SUPREME COURT NO. 96289-8

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

ROBERT L. VANDERVORT,

Defendant.

AMENDED PETITION FOR REVIEW

Court of Appeals No. 50116-1-II
Appeal from the Superior Court of Mason County,
Cause No. 16-1-00351-6
The Honorable Daniel L. Goodell

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I. Identity of Petitioner

Petitioner Robert Vandervort asks this Court to accept review of the Court of Appeals decision terminating review designated in Part II.

II. Court of Appeals Decision

Vandervort seeks review of the Opinion filed by Division II of the Court of Appeals on July 31, 2018. A copy is attached as Appendix A.

III. Issues Presented for Review

1. Is there sufficient evidence to support convictions for unlawful possession of a controlled substance where there was methamphetamine and heroin residue stuck to the inside of a scale, when the scale was closed in and defendant's pocket?

2. Can a reasonable jury fail to find unwitting possession when there is a small amount of residue inside a closed scale, and no other evidence of drugs, paraphernalia, or drug use found, and where the defendant testifies that he got the scale out of a car and did not open it?

3. Should there be a presumption that miniscule amounts of a controlled substance, such as reside, are unwittingly possessed?

4. Is it flagrant and ill-intentioned misconduct to misstate the law on unwitting possession, by arguing that a person who knowingly possesses a scale and knows what methamphetamine is from prior use, cannot unwittingly possess residue inside a closed scale?

5. Is it flagrant and ill-intentioned misconduct to argue that in order to acquit the defendant in an unwitting possession case, where the defendant testified that he did not know there were drugs inside a scale, and the officers testimony did not directly contradict the defendant's testimony

regarding knowledge, that the jury must find the defendant more credible than the officers?

6. Is it ineffective for counsel to fail to object to improper closing arguments that misstate unwitting possession and incorrectly argue that the jury must find the defendant more credible than the officers to acquit?

7. Is it ineffective for counsel to fail to investigate, interview witnesses, and anticipate hearsay objections?

IV. Statement of the Case

On September 18, 2017, Vandervort filed a brief alleging that the trial court had erred in regards to the above-indicated issues. Below are the facts in an abbreviated form pertaining solely to the issues upon which he seeks review. For a more comprehensive review, the opening appellate brief sets out facts and law relevant to this petition and is hereby incorporated herein by reference.

1. Facts.

Mason County police, acting on information from Olympia Police Department, responded to a residence to investigate of two men using counterfeit money to purchase items at yard sales. RP2 233-34. At the time, Vandervort was standing outside; he ran into the house when police arrived. RP2 233-35. Vandervort testified that he went in the house because he had a Department of Corrections (DOC) warrant and didn't want to be arrested. RP2 367. The police located Vandervort inside the

house and arrested him. RP2 238.

After Vandervort was arrested, he was searched. RP2 239. Police found a digital scale in Vandervort's pocket. RP2 239. The officer opened the lid that covered the scale and then saw a small amount of a white crystal substance. RP2 239, 241, 255. At the time, the officer did not notice brown substances or anything that resembled heroin. RP2 254.

The crime lab technician testified that there was a small amount of residue smeared on the scale; she estimated it was less than one tenth of a gram. RP2 310. There was not enough residue to remove it from the scale and weigh it. RP2 310. The residue was tested and it contained heroin and methamphetamine. RP2 305.

The officer testified that it is common to find drugs and drug paraphernalia associated with scales. RP2 264. However, police did not locate any drugs, paraphernalia, or other illegal items in the house or on Vandervort. RP2 264, 326, 339.

Vandervort testified that he got a call from a friend's son, saying that his mom had been arrested, so he went to pick up her car. RP2 362-63. When he picked up the car, there was stuff everywhere, the keys were under the seat, and there was a scale inside, which he put in his pocket. RP2 363. He never opened the scale or looked inside. RP2 366. No one ever saw Vandervort open the lid to the scale. RP2 255.

Vandervort was previously convicted possession of methamphetamine in 2005 and 2012. RP2 371-72. He testified that he used methamphetamine in the past, but never heroin, and that he had not used since 2013. RP2 370-71. He testified that drugs are normally kept in a bag, not a scale, and he had no reason to suspect there may be drugs on the scale. RP2 369-70.

2. Closing Arguments.

The State argued that the possession was not unwitting because Vandervort knew he had a scale and he knew what methamphetamine was, misstating the law on unwitting possession. RP2 404.

The State also argued that the jury could only find Vandervort not guilty if they found "Mr. Vandervort's testimony more credible than that of the officers." RP2 404-05.

V. Argument Why Review Should Be Accepted

It is submitted that the issues raised by this petition should be addressed by this Court because the decision of the Court of Appeals is in conflict with Supreme Court and Court of Appeals decisions, and raises significant questions under the Constitution of the State of Washington and the Constitution of the United States, as well as issues of public interest, as set forth in RAP 13.4(b)(1), (2), (3) and (4).

1. There Was Insufficient Evidence to Convict Vandervort of Possession of a Controlled Substance When the Evidence Showed That Vandervort Knowingly Possessed a Scale, But Not That He Knew That Inside the Scale There Was a Small Amount of Residue That Included Methamphetamine and Heroin.

Vandervort argued that there was insufficient evidence to convict him of possession of a controlled substance because no rational jury could have found that that he failed to prove unwitting possession by a preponderance of the evidence. The Court of Appeals deferred to the jury's findings and found that there was sufficient evidence because Vandervort ran from the police, the scale was in his pocket, the scale contained drugs, and Vandervort was familiar with scales and drugs from his prior drug use, despite the fact that Vandervort testified that he ran because he had a warrant, and he did in fact have a warrant for his arrest, the scale was closed, there was a small amount of residue inside the scale, there was no evidence that Vandervort opened the scale, and he testified that he did not open the scale or know there were drugs inside. This court should grant review because the Court of Appeals ruling raises significant constitutional issues and issues of public policy, including whether a person should be able to be convicted of possession of a controlled substance when there is only drug residue, that may not have been visible, and a reasonable person would not have known that they were in possession of a controlled substance.

"The standard for determining whether a conviction rests on insufficient evidence is 'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (internal citations omitted). "The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged." *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); U.S. CONST. amend. XIV.

However, a defendant is not guilty of possession of a controlled substance if he establishes by a preponderance of the evidence that he "did not know the substance was in his possession or did not know the nature of the substance." *State v. Staley*, 123 Wash. 2d 794, 799, 872 P.2d 502, 505 (1994); CP 45. When challenging sufficiency of the evidence based on an affirmative defense, such as unwitting possession, the standard is "whether, considering the evidence in the light most favorable to the [state], a rational trier of fact could have found that the accused failed to prove the defense by a preponderance of the evidence." *City of Spokane v. Beck*, 130 Wash. App. 481, 486, 123 P.3d 854, 857 (2005) (reversing DUI conviction because no rational trier of fact could have found that

defendant failed to prove safely off the roadway affirmative defense by a preponderance of the evidence), citing *State v. Lively*, 130 Wash.2d 1, 17, 921 P.2d 1035 (1996). Therefore, there is insufficient evidence to convict Vandervort if no rational trier of fact could have found that he failed to prove unwitting possession by a preponderance of the evidence.

In Washington, there is no minimum quantity of a controlled substance required for a conviction and there is no knowledge element for possession of a controlled substance. However, knowledge is relevant to the defense of unwitting possession.

Other states consider the quantity of a controlled substance present in determining a defendant's knowledge that they are in possession of a controlled substance. *See People v. Theel*, 180 Colo. 348, 350, 505 P.2d 964, 965–66 (1973) (marijuana conviction reversed where defendant possessed trace amounts of marijuana in his pocket because insufficient to prove that he knowingly possessed marijuana); *State v. Dempsey*, 22 Ohio St. 2d 219, 222, 259 N.E.2d 745, 748 (1970) (no knowledge presumed where cocaine found in lint in pocket); *People v. Leal*, 64 Cal. 2d 504, 511, 413 P.2d 665, 670 (1966) (knowledge of possession unlikely where heroin residue found on spoon).

In this case, there was residue that contained methamphetamine and heroin on the scale in Vandervort's pocket. The substance was visible

only if the scale cover was removed. It was estimated that there was one tenth of a gram on the scale, but the amount was too small to weigh. In order to test the substance, it was scraped off of the scale. There was testimony that the officer originally only observed what he believed to be methamphetamine on the scale; he did not observe or suspect heroin at the time. And, while there was evidence that Vandervort had previously used methamphetamine, there was no evidence he had ever used heroin.

This court should accept review because the question of whether there is sufficient evidence to convict someone of possession of a controlled substance, when there is residue that contains methamphetamine and heroin, inside a closed scale, when there is no other paraphernalia or evidence of drug use, and when there is no evidence that the defendant opened the scale, or knew there were drugs on the scale, raises significant constitutional issues.

In addition, this Court should consider adopting a rule that small amounts of a controlled substance, like residue, are presumptively possessed unwittingly. Such a rule would serve public policy and protect the constitutional rights of persons accused of possessing small amounts of a controlled substance. Other states take into consideration the amount of the controlled substance in determining knowledge. Similarly, Washington should adopt a rule that miniscule amounts of a controlled

substance, such as a residue, are presumptively possessed unwittingly.

2. Prosecutorial Misconduct.

This Court should accept review because the Court of Appeals decision is contrary to case law and prosecutorial misconduct raises significant constitutional and public policy issues. In this case, there was only a small amount of residue inside a scale. Vandervort argued unwitting possession at trial and testified that he got the scale from a friend's car, did not open it, and did not know there were drugs in the scale. The State misstated the law on unwitting possession, conflating knowingly possessing the scale and knowingly possessing the drugs, and argued that the in order to acquit Vandervort, the jury must find Vandervort more credible than the officers.

a. *Standard of Review.*

A claim of prosecutorial misconduct can be raised and considered for the first time on appeal if the prosecutor's actions "were 'so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct.'" *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (internal citations omitted). An argument is flagrant and ill-intentioned when those same arguments have been held improper in a published opinion. *State v. Johnson*, 158 Wash. App. 677, 685, 243 P.3d 936, 940 (2010).

"Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial." *In re Glasmann*, 175 Wash. 2d 696, 703-04, 286 P.3d 673, 677 (2012); *State v. Davenport,* 100 Wash.2d 757, 762, 675 P.2d 1213 (1984); *see also* WASH. CONST. art I, § 21, U.S. CONST. amend. VI, XIV. A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the conduct was improper and that it prejudiced his defense. *State v. Harvey*, 34 Wn. App. 737, 740, 664 P.2d 1281 (1983), *review denied,* 100 Wn.2d 1008 (1983). A defendant's constitutional right to a fair trial is violated when there is a substantial likelihood that improper comments affected the jury's verdict. *State v. Jungers*, 125 Wn. App. 895, 106 P.3d 827 (2005).

b. *The State Misstated the Law Regarding Unwitting Possession by Conflating Knowingly Possessing the Scale and Knowingly Possessing Drugs Inside the Scale.*

A defendant is denied a fair trial when the prosecutor mischaracterizes the law and there is a substantial likelihood that the misstatement affected the jury verdict. *State v. Gotcher*, 52 Wash. App. 350, 355, 759 P.2d 1216 (1988). A prosecutor's misstatement of the law is a serious irregularity having the grave potential to mislead the jury. *Davenport*, 100 Wash.2d at 764. Misstating the law, especially regarding a key issue in the case, is likely to affect the verdict. *See State v. Allen*,

182 Wash. 2d 364, 375, 341 P.3d 268, 273 (2015) (reversed when State misstated accomplice liability in closing).

As stated above, unwitting possession is an affirmative defense to possession of a controlled substance. Vandervort is not guilty of possession of a controlled substance if he establishes by a preponderance of the evidence that he "did not know the substance was in his possession or did not know the nature of the substance." *Staley*, 123 Wash. 2d 794, 799; CP 45.

The Court of Appeals held that the State's argument, "there are two ways that you get to an unwitting possession defense, and they're laid out. Didn't know that I had it, or didn't know what it was," was an accurate statement of the law. However, the Court of Appeals ignored the rest of the argument, and the context. The full argument was:

> [T]here are two ways that you get to an unwitting possession defense, and they're laid out. Didn't know that I had it, or didn't know what it was. Well, he knew that he had it. He indicated as much on the stand. And his prior criminal history possessing methamphetamine, that indicates that he knew what it was. And the heroin too in that particular case.

RP2 404. Vandervort testified that he knew he had a scale; he never testified that he knew he had drugs. He also testified that he had used methamphetamine in the past; there is no evidence that he used heroin. Given the testimony, the State's argument is telling the jury that

Vandervort cannot establish unwitting possession because 1) he knew he had a scale, and 2) he knows what methamphetamine is. However, the question for the jury was not whether or not Vandervort knew he had a scale, or if he knew what methamphetamine was, but whether or not he knew there was methamphetamine and heroin on the scale. The State's argument, taken in context, clearly misstates the law and would confuse a jury regarding the unwitting possession defense.

The Court of Appeals further stated that the State's argument was a reasonable inference from the evidence. However, the State was not arguing that you could infer Vandervort knowingly possessed drugs; the State's argument improperly stated the law did not allow an unwitting possession defense because Vandervort knew the scale was in his pocket. That argument was an improper statement of the law and extremely prejudicial.

The Court of Appeals also held that the error was waived because it was not objected to at trial, and the error could have been cured. Although this argument was not objected to at trial, this Court should grant review and consider it first time on appeal because the prosecutor's misstatement of the law was flagrant and ill-intentioned and likely affected the verdict. As stated above, the misstatement of the law is a serious irregularity. The key issue in this case was whether or not Vandervort

knew he was in possession of a controlled substance, where there were only trace amounts of drugs smeared on the scale, which was covered with a lid, and no other evidence that he knew he was in possession of a controlled substance. Unwitting possession is a complicated legal principal, and a curative instruction would not have been sufficient to unring the bell for the jury regarding knowledge of possession of the scale versus the drugs on the scale, once the State improperly stated the law. Given that unwitting possession was the entire defense in this case, the misstatement was extremely prejudicial and likely effected the verdict in this case.

c. *The State Improperly Argued That to Find Vandervort Not Guilty, They Were Required to Find Him More Credible Than the Officers.*

This Court should grant review because the State's improper argument, that the jury must find Vandervort more credible than the officers, to acquit him, raises significant constitutional issues and is contrary to case law.

Vandervort argued that the State improperly argued that the jury must find the officers more credible than Vandervort in order to find him not guilty:

> [E]ven though a statement wasn't taken of Mr. Vandervort in this case, that's no reason for you to find – to not find him guilty in this particular case because the evidence and

> the weight of it is so stacked against him, you would have to find Mr. Vandervort's testimony more credible than that of the officers. And you'd also have to ignore the admissions that Mr. Vandervort made on the stand."

RP 404-05. The Court of Appeals held that the argument was not improper because it focused on the credibility of the witnesses, and did not require the jury to find the officers lying to acquit. However, such argument is improper and a misstatement of the law, because the jury could find the officers more credible and still have reasonable doubt. In addition, this was not a case that hinged on the credibility of the officers versus Vandervort. It was undisputed that there was a small amount of residue on the scale, that the scale was closed, that the scale was in Vandervort's pocket, and there was no evidence Vandervort opened the scale. This Court should accept review because such an argument raises significant constitutional issues and is inconsistent with case law.

Our courts have "repeatedly held that it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State's witnesses are either lying or mistaken." *State v. Fleming*, 83 Wash. App. 209, 213, 921 P.2d 1076, 1078 (1996), citing *State v. Casteneda–Perez*, 61 Wash.App. 354, 362–63, 810 P.2d 74 ("it is misleading and unfair to make it appear that an acquittal requires the conclusion that the police officers are lying"), review denied, 118

Wash.2d 1007, 822 P.2d 287 (1991); *State v. Wright*, 76 Wash.App. 811, 826, 888 P.2d 1214, review denied 127 Wash.2d 1010, 902 P.2d 163 (1995); *State v. Barrow*, 60 Wash.App. 869, 874–75, 809 P.2d 209, review denied 118 Wash.2d 1007, 822 P.2d 288 (1991). Such arguments misstate the burden of proof and the role of the jury. *Id.* Instead, the jury is "required to acquit unless it had an abiding conviction in the truth of [the witness'] testimony." *Id.*

The argument in this case is similar. It is improper because a jury need not find Vandervort more credible than the officers in order to find reasonable doubt and acquit him. Also, the central issue in this case is whether or not Vandervort knew there were drugs on the scale. That evidence was not overwhelming and had nothing to do with the credibility of the officers. The jury could have believed everything the officers testified to, and still found that Vandervort did not know there was methamphetamine and heroin drug residue on the inside of the scale. The argument is improper, contrary to case law, and raises constitutional issues regarding reasonable doubt, due process, and the right to a fair trial.

The Court of Appeals also held that any error was waived because it was not objected to. In this case, the argument was not objected to. However, this court should accept review and consider it because the argument is flagrant and ill-intentioned as it is contrary to established law

and a misstatement of the law. The jury could have found the officers credible and found that Vandervort did not know there were drugs on the scale, and in that case, they would have been required to find Vandervort not guilty. A curative instruction may not have cured the error after the State improperly placed the idea of weighing the credibility of the officers versus Vandervort in the jurors' minds. Given that this entire case relied on an unwitting possession defense and the lack of evidence that Vandervort knew there was drug residue on the scale, this misstatement of the law likely affected the verdict.

3. Mr. Vandervort Received Ineffective Assistance of Counsel.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that

there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

a. *Defense Counsel Failed to Object to the State's Improper Closing Arguments.*

As argued above, in closing argument, the State improperly misstated the law regarding unwitting possession and argued that in order to find Vandervort not guilty, the jury had to find Vandervort more credible than the officers. For the reasons stated above, each of these arguments was improper and an objection would have likely been successful. Because these arguments were improper and prejudicial, as argued above, there was no strategical reason for failing to object. And, for the reasons stated above, objections would likely have been successful. Counsel's failure to object denied Vandervort of effective assistance of counsel and likely affected the verdicts in this case.

For the same reasons argued above, this Court should grant review and consider ineffective assistance of counsel because the failure to object to the State's improper arguments raises significant constitutional issues regarding the right to counsel and a fair trial.

b. *Defense Counsel Failed to Properly Investigate and Present a Defense.*

Vandervort argued that he received ineffective assistance of counsel because his attorney failed to properly investigate his case and present a defense. The Court of Appeals held that the issues raised were outside the record and could not be considered on appeal. The Court of Appeals erred because the record contains information that supports Vandervort's argument that his attorney did not properly investigate his case.

Counsel's failure to call witnesses based on lack of investigation and preparation may constitute ineffective assistance of counsel.

> The decision whether to call a witness is generally presumed to be a matter of trial strategy or tactics. But this presumption may be overcome by showing that the witness was not presented because counsel failed to conduct appropriate investigations.

State v. Weber, 137 Wash. App. 852, 858, 155 P.3d 947, 950 (2007), citing *State v. Thomas*, 109 Wash.2d 222, 230, 743 P.2d 816 (1987). "The duty to provide effective assistance includes the duty to research relevant statutes." *State v. Estes*, 188 Wash. 2d 450, 460, 395 P.3d 1045, 1050 (2017); *In re Pers. Restraint of Yung-Cheng Tsai*, 183 Wash.2d 91, 102, 351 P.3d 138 (2015).

In this case, the defense was unwitting possession. It is clear from the record and comments of counsel that defense counsel's strategy was to show the jury that Vandervort's friend had been arrested the previous day on drug charges, police searched the car for contraband, Vandervort picked up the car, retrieved the scale, and because the police searched the car for drugs and paraphernalia, he had no reason to believe drugs were on the scale. RP 16-20, 106, 108-09. Defense counsel planned to call witnesses who were present during the arrest and search in Olympia, however, one was represented by counsel and Vandervort's attorney did not know that she was represented, had not spoken to her or her attorney prior to trial, and the witnesses did not appear for trial. RP 16-22, 35-36. During the first trial, defense counsel tried to elicit this information from Officer Anderson. RP 112-113. Counsel also tried to elicit this information from Vandervort, but most of it was excluded as hearsay. RP 124-27. At the second trial, defense counsel again, unsuccessfully, tried to introduce this evidence through the State's witnesses. RP2 267-278. He did not subpoena or call any of the officers from Olympia. RP2 274.

This record makes it clear that defense counsel did not interview at least one potential defense witness, did not know she was represented, and did not attempt to contact her attorney. More importantly, defense counsel incorrectly assumed counsel would be able to elicit the information about

the vehicle involved in the arrest in Olympia through the State's witnesses. Defense counsel either did not interview the officers, or did not do so thoroughly, because the officers who testified for the State had no knowledge of the arrest that occurred in Olympia. The lack of investigation and preparation constitutes ineffective assistance of counsel.

This Court should grant review because Vandervort was prejudiced by his counsel's failure to properly investigate, research, and prepare for trial. This was a case that involved unwitting possession, a trace amount of residue, no other evidence that he knew he was in possession of two controlled substances, and, therefore, evidence that the scale came from a vehicle that had been the subject of an arrest and search the day before, would have likely affected the verdict. This Court should accept review because the failure to investigate and prepare for trial raises significant constitutional issues.

VI. CONCLUSION

This court should accept review for the reasons indicated in Part V.

DATED this 31st day of August, 2018.

Respectfully submitted,

Jennifer Freeman, WSBA No. 35612
Attorney for Robert Vandervort

CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this petition for review were delivered electronically to the following:

Derek Byrne, Clerk, Division II, Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

Timothy Higgs (Opposing Counsel)
timh@co.mason.wa.us

The undersigned certifies that on this day correct copies of this petition for review were delivered by U.S. mail to the following:

Robert Vandervort
1425 Railroad AVE
Shelton, WA 98584

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

_____

Signed August 31st, 2018 at Tacoma, Washington.

APPENDIX

the vehicle involved in the arrest in Olympia through the State's witnesses. Defense counsel either did not interview the officers, or did not do so thoroughly, because the officers who testified for the State had no knowledge of the arrest that occurred in Olympia. The lack of investigation and preparation constitutes ineffective assistance of counsel.

This Court should grant review because Vandervort was prejudiced by his counsel's failure to properly investigate, research, and prepare for trial. This was a case that involved unwitting possession, a trace amount of residue, no other evidence that he knew he was in possession of two controlled substances, and, therefore, evidence that the scale came from a vehicle that had been the subject of an arrest and search the day before, would have likely affected the verdict. This Court should accept review because the failure to investigate and prepare for trial raises significant constitutional issues.

VI. CONCLUSION

This court should accept review for the reasons indicated in Part V.

DATED this 18th day of September, 2018.

Respectfully submitted,

Jennifer Freeman, WSBA No. 35612
Attorney for Robert Vandervort

APPENDIX

Filed
Washington State
Court of Appeals
Division Two

July 31, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT VANDERVORT, Appellant.	No. 50116-3-II UNPUBLISHED OPINION

LEE, J. — Robert Vandervort appeals his convictions for two counts of unlawful possession of a controlled substance. Vandervort argues that (1) he proved unwitting possession by a preponderance of the evidence;[1] (2) the State committed prosecutorial misconduct by (a) misstating the law, (b) impugning defense counsel, and (c) improperly arguing that the jury had to find that its witnesses were lying to acquit; and (3) defense counsel provided ineffective assistance by (a) failing to object to the State's misconduct and (b) failing to properly investigate and present a defense. We hold that Vandervort's claims fail and affirm.

[1] In his assignment of error, Vandervort frames this issue as an "insufficient evidence" challenge, but he argues that "there is insufficient evidence to convict" him because "no rational finder of fact could find that [he] failed to prove unwitting possession by a preponderance of the evidence." Br. of Appellant at 8, 10.

FACTS

A. THE INCIDENT AND CHARGES

On July 30, 2016, the Olympia Police Department asked the Mason County Sheriff's Office to assist with an investigation into two men using counterfeit money at garage sales. The two men were linked to a vehicle registered at an address in Mason County.

When Deputy Anderson of the Mason County Sheriff's Office arrived at the vehicle's registered address, he saw Vandervort and another man outside. Deputy Anderson told Vandervort that he needed to speak with him, but Vandervort ran into the home. After additional officers arrived to assist, they learned that Vandervort had warrants for his arrest. The officers then spoke with the homeowner, who allowed them to enter and search the home. When the officers entered the home, they found Vandervort hiding under a bed and arrested him.

Deputy Anderson found an electronic scale in Vandervort's pants pocket in a search incident to arrest. Deputy Anderson opened the lid of the scale and observed a white crystal-like substance that he believed to be methamphetamine based on his training and experience. The substance was visible to the naked eye. Deputy Anderson field tested the substance, which tested positive for methamphetamine. He did not test the scale for heroin. Deputy Anderson then secured the scale into evidence and submitted it to the Washington State Patrol Crime Lab for testing.

The crime lab tested the residue on the scale and found that it contained methamphetamine and heroin. The State charged Vandervort by amended information with two counts of unlawful possession of a controlled substance, one count for methamphetamine and one count for heroin.

B. TRIAL[2]

At trial, Deputy Anderson testified to the events above. Deputy Anderson also testified that scales like the one found on Vandervort are found a lot and are associated with illegal substances. The crime lab forensic scientist testified that the substances found on the scale were methamphetamine and heroin.

Vandervort testified that on July 30, 2016, he went to pick up a friend's car because his friend was arrested and wanted him to pick it up. He said that when he got to the car, he saw the scale in the center console of the car and stuck it in his pocket. He did not open the scale or see what was inside. Vandervort also testified that he was familiar with drugs and that he had never seen drugs kept in a scale. But he also said that he knew that such scales were used to weigh drugs. If he had known that there were drugs on the scale, he would have gotten rid of it. Vandervort further testified that his drug of choice used to be methamphetamine, he had been previously convicted of possession of methamphetamine, he had been sober since 2013, and he had never used heroin.

C. JURY INSTRUCTIONS

The trial court instructed the jury that it had "to decide the facts in this case based upon the evidence presented to [it] during this trial," that they were "the sole judges of the credibility of each witness [and] . . . the value or weight to be given to the testimony of each witness," "that the lawyers' statements [were] not evidence," and that the jury had to "disregard any remark, statement, or argument that [was] not supported by the evidence or the law in [the court's]

[2] The first trial in this case resulted in a mistrial.

instructions." Clerk's Papers (CP) at 28-30. The trial court then instructed the jury that to convict Vandervort of possession of methamphetamine, the jury had to find each of the following elements proved beyond a reasonable doubt:

> (1) That on or about July 30, 2016, the defendant possessed a controlled substance Methamphetamine; and
>
> (2) That this act occurred in Mason County, State of Washington.

CP at 42. The trial court gave the jury a similar to-convict instruction for the heroin charge. The trial court also instructed the jury:

> A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.
>
> The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP at 45. The trial court further instructed the jury:

> A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.
>
> If a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact.

CP at 46.

D. CLOSING ARGUMENTS AND VERDICT

During closing arguments, the State argued:

> [T]he to convict instruction . . . On or about July 30, 2016, defendant possessed a controlled substance, methamphetamine, occurred in Mason County, State of

> Washington. I mention this instruction more so for what's not in it than what is in it. There's no mental state in this instruction. There's no mens rea, evil mind. . . . [T]his is a strict liability crime. And the State's proven Counts I and II beyond a reasonable doubt in this particular case because the scale was on his person, and it tested positive for the two substances, and occurred in Mason County, State of Washington on or about July 30, 2016. That proves all the elements of the crime.
>
> I know it seems counterintuitive. Well wait a second, if I didn't know that I had that, how can I be guilty of it? Well, that brings us to the unwitting possession defense. . . . And this is the part that is the except [sic] as authorized by law section. That's how this ties together. And there are two ways that you get to an unwitting possession defense, and they're laid out. Didn't know that I had it, or didn't know what it was. Well, he knew that he had it. He indicated as much on the stand. And his prior criminal history possessing methamphetamine, that indicates that he knew what it was. And the heroin too in that particular case.
>
> . . . .
>
> . . . [E]ven though a statement wasn't taken of Mr. Vandervort in this case, that's no reason for you to find—to not find him guilty in this particular case because the evidence and the weight of it is so stacked against him, you would have to find Mr. Vandervort's testimony more credible than that of the officers. And you'd also have to ignore the admissions that Mr. Vandervort made on the stand.

Verbatim Report of Proceeding (VRP) (Feb. 3, 2017) at 403-405.

During rebuttal arguments, the State argued:

> Really the entire defense in this particular case, and getting up and admitting to something else, it's really kind of a distraction technique. It's somewhat reminiscent of sitting around the dinner table, your kids and dad comes in and says, Michael, I see that you got an F in algebra. Well that may be true, dad, but Mark is smoking pot. It doesn't mean that Michael didn't get an F in algebra. It's just admitting to something else as a distraction and confusion technique. Especially when there's no other charge. There's nothing dealing with stolen property. That's just really foundation as to how they came into contact with Mr. Vandervort.

VRP (Feb. 3, 2017) at 417-18. Vandervort did not object to the State's closing and rebuttal arguments.

The jury convicted Vandervort as charged. Vandervort appeals.

ANALYSIS

A. UNWITTING POSSESSION AFFIRMATIVE DEFENSE

Vandervort argues that "there is insufficient evidence to convict" him because "no rational finder of fact could find that [he] failed to prove unwitting possession by a preponderance of the evidence." Br. of Appellant at 8, 10. We disagree.

Under RCW 69.50.4013(1), "It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter." Methamphetamine and heroin are controlled substances. RCW 69.50.101(f), .204(b)(11), .206(d)(2).

Unlawful possession of a controlled substance does not require proof of knowledge. *State v. Higgs*, 177 Wn. App. 414, 437, 311 P.3d 1266 (2013), *review denied*, 179 Wn.2d 1024 (2014). Rather, the State must only prove beyond a reasonable doubt that Vandervort possessed the controlled substance. *State v. Hathaway*, 161 Wn. App. 634, 645, 251 P.3d 253, *review denied*, 172 Wn.2d 1021 (2011). However, Washington recognizes unwitting possession as an affirmative defense to the charge of unlawful possession of a controlled substance. *Higgs*, 177 Wn. App. at 437. To prove unwitting possession, the defendant must show by a preponderance of the evidence that he did not know that the substance was in his possession or did not know the nature of the substance. *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005), *review denied*, 157 Wn.2d 1009 (2006). The existence of the defense is a question for the trier of fact. *State v. Knapp,* 54 Wn. App. 314, 322, 773 P.2d 134, *review denied*, 113 Wn.2d 1022 (1989).

We defer to the trier of fact on factual determinations. *Olinger*, 130 Wn. App. at 26. We also defer to the trier of fact on issues such as conflicting testimony, witness credibility, and persuasiveness of the evidence. *Higgs*, 177 Wn. App. at 436. The trier of fact is in the best position to evaluate conflicting evidence, witness credibility, and the weight of the evidence. *Olinger*, 130 Wn. App. at 26. We do not reweigh the evidence and substitute our judgment for that of the trier of fact. *State v. McCreven*, 170 Wn. App. 444, 477, 284 P.3d 793 (2012), *review denied*, 176 Wn.2d 1015 (2013).

Here, the jury rejected Vandervort's unwitting possession defense and found him guilty of unlawful possession of methamphetamine and heroin. To prove unwitting possession, Vandervort had to show by a preponderance of the evidence that he did not know that the substances were in his possession or did not know the nature of the substances. *Olinger*, 130 Wn. App. at 26. But the existence of the defense is a question for the trier of fact and the jury here found that Vandervort failed to prove the defense. *Knapp,* 54 Wn. App. at 322. We do not reweigh the evidence or substitute our judgment for the jury. *McCreven*, 170 Wn. App. at 477.

Vandervort argues that no rational trier of fact could find that he failed to prove unwitting possession by a preponderance of the evidence. However, the evidence showed that when Deputy Anderson told Vandervort that he needed to speak with him, Vandervort ran into the home and hid under a bed; Deputy Anderson found a scale in Anderson's pocket during a search incident to arrest; the substance on the scale was methamphetamine and heroin; Vandervort was familiar with drugs as evidenced by his prior use of methamphetamine; and Vandervort knew such scales were used to weigh drugs. Although Vandervort testified that he got the scale from a friend's car, he did not open the scale or see what was inside, and he would have gotten rid of it had he known

there were drugs on it, the jury apparently found Vandervort's testimony not credible. And we defer to the trier of fact on issues of witness credibility and persuasiveness of evidence. *Higgs*, 177 Wn. App. at 436. Thus, we hold that Vandervort's claim that he proved unwitting possession by a preponderance of the evidence fails.

B. PROSECUTORIAL MISCONDUCT

Vandervort argues that the State committed prosecutorial misconduct by (1) misstating the law, (2) impugning defense counsel, and (3) making an improper argument about having to find the witnesses were lying. We disagree.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that the prosecutor's conduct was improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 756, 278 P.3d 653 (2012). We first determine whether the prosecutor's conduct was improper. *Id.* at 759. Any allegedly improper statements are reviewed in the context of the entire case, the entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Thorgerson*, 172 Wn.2d 438, 443, 258 P.3d 43 (2011); *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). In the context of closing arguments, a prosecutor has wide latitude to make arguments to the jury and may draw reasonable inferences from the evidence. *State v. Magers*, 164 Wn.2d 174, 192, 189 P.3d 126 (2008). If the prosecutor's conduct was improper, the question turns to whether the misconduct resulted in prejudice. *Emery*, 174 Wn.2d at 760. Prejudice is established by showing a substantial likelihood that such misconduct affected the verdict. *Id.*

Where a defendant does not object at trial, he is deemed to have waived any error unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured any resulting prejudice. *Id.* at 760-61. Under this heightened standard, the defendant must

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.' " *Id.* at 761 (quoting *Thorgerson*, 172 Wn.2d at 455). In making that determination, we "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. In determining prejudice, we look at the comments "in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury." *State v. Warren*, 165 Wn.2d 17, 28, 195 P.3d 940 (2008), *cert. denied*, 556 U.S. 1192 (2009). The jury is presumed to follow the trial court's instructions. *State v. Anderson*, 153 Wn. App. 417, 428, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

1. Misstating the Law

Vandervort argues that the State committed prosecutorial misconduct by misstating the law when it argued about what the unwitting possession defense required and that Vandervort knew he had the drugs. We disagree.

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). But a prosecutor's statements must be considered in context. *State v. Swanson*, 181 Wn. App. 953, 964, 327 P.3d 67 (holding that a prosecutor's conduct is reviewed in the full context, considering the issues, arguments, evidence, and instructions presented and given to the jury), *review denied*, 181 Wn.2d 1024 (2014). A prosecutor may not refer to evidence not presented at trial; but, in the context of closing arguments,

a prosecutor has wide latitude to make arguments to the jury and may draw reasonable inferences from the evidence. *Magers*, 164 Wn.2d at 192.

Here, to prove unwitting possession, Vandervort had to show by a preponderance of the evidence that he did not know that the substances were in his possession or did not know the nature of the substances. *Olinger*, 130 Wn. App. at 26. In closing arguments, the State said that "there are two ways that you get to an unwitting possession defense, and they're laid out. Didn't know that I had it, or didn't know what it was." VRP (Feb. 3, 2017) at 404. This statement mirrors the law regarding unwitting possession and was a proper statement of the law.

Vandervort argues that the State misstated the law by arguing Vandervort knew he had the drugs. However, the State's argument that Vandervort knew he had the drugs was a statement of fact, not law, and it was a reasonable inference from the evidence. At trial, evidence was presented that the scale was found on Vandervort and that such scales are associated with illegal substances. Evidence was also presented that the substance on the scale was visible to the naked eye, Vandervort knew such scales were used to weigh drugs, and Vandervort was familiar with drugs. From such evidence, the State could and did make a reasonable inference, and argued that Vandervort knew that the scale had methamphetamine and heroin on it. *Magers*, 164 Wn.2d at 192. The State's argument was not improper.

Furthermore, Vandervort did not object to the State's argument and, thus, has waived this claim because a jury instruction could have cured any prejudice. *Emery*, 174 Wn.2d at 760-61. Also, the trial court instructed the jury on unwitting possession; that the jury had to decide the case on the evidence presented at trial; that the lawyers' remarks were not evidence; and that the jury must disregard any remark, statement, or argument that was not supported by the evidence or the

law as set forth in the court's instructions. The jury is presumed to follow the court's instructions. *Anderson*, 153 Wn. App. at 428. Therefore, this claim fails.

2. Impugning Defense Counsel

Vandervort argues that the State committed prosecutorial misconduct by impugning defense counsel with its argument that the entire defense was a distraction technique. We disagree.

It is improper for a prosecutor to disparagingly comment on defense counsel's role or impugn defense counsel's integrity. *Thorgerson*, 172 Wn.2d at 451. A prosecutor's statement that maligns defense counsel can severely damage a defendant's opportunity to present his case and is, therefore, impermissible. *State v. Lindsay*, 180 Wn.2d 423, 432, 326 P.3d 125 (2014). A prosecutor improperly impugns defense counsel's integrity when he states that defense counsel is using deception or dishonesty. *See id.* at 433 (holding that it was improper for the prosecutor to say that defense counsel's argument was a "crock" because it implied the use of deception and dishonesty); *Thorgerson*, 172 Wn.2d at 452 (holding that it was improper for the prosecutor to refer to the defense's case as "sleight of hand" because the phrase implied the use of "wrongful deception or even dishonesty"); *Warren*, 165 Wn.2d at 29 (holding that it was improper for the prosecutor to state that "there were a 'number of mischaracterizations' in defense counsel's argument as 'an example of what people go through in a criminal justice system when they deal with defense attorneys' "); *State v. Negrete*, 72 Wn. App. 62, 66-67, 863 P.2d 137 (1993) (holding that it was improper for the prosecutor to argue that defense counsel was "*being paid to twist the words of the witnesses by [the defendant]*"), *review denied*, 123 Wn.2d 1030 (1994).

Here, the State did not impugn defense counsel by arguing that the defense was deceptive or dishonest. *See Lindsay*, 180 Wn.2d at 433. In rebuttal argument, the State argued, "Really the

entire defense in this particular case, and getting up and admitting to something else, it's really kind of a distraction technique. . . . It's just admitting to something else as a distraction and confusion technique. Especially when there's no other charge. There's nothing dealing with stolen property." VRP (Feb 3, 2017) at 417-18. In making this argument, the State did not argue that defense counsel was deceiving the jury or being dishonest to the jury. Rather, the State argued that defense counsel was trying to draw the jury's attention to a different uncharged crime, which did not mean that Vandervort did not commit the crime actually charged. The State's argument focused on the evidence that was presented and told the jury to focus on the evidence that supported the charges. This was not improper.

Furthermore, even if the State's argument constituted misconduct, Vandervort did not object to the State's argument and has waived this claim because an instruction could have cured any prejudice. *Emery*, 174 Wn.2d at 760-61. Therefore, we hold that this claim fails.

3. Witnesses Lying

Vandervort argues that the State committed prosecutorial misconduct by arguing that the jury had to find that the State's witnesses were lying in order to acquit Vandervort. We disagree.

A prosecutor may not argue that the jury must find that the State's witnesses are either lying or mistaken in order to acquit a defendant. *State v. Rafay*, 168 Wn. App. 734, 836, 285 P.3d 83 (2012), *review denied*, 176 Wn.2d 1023 (2013). "Such arguments may undermine the presumption of innocence, shift the burden of proof, and mislead the jury." *Id.*

Here, the State did not argue that the jury had to find that its witnesses were lying in order to acquit Vandervort. In closing arguments, the State argued:

> [E]ven though a statement wasn't taken of Mr. Vandervort in this case, that's no reason for you to find—to not find him guilty in this particular case because the evidence and the weight of it is so stacked against him, you would have to find Mr. Vandervort's testimony more credible than that of the officers. And you'd also have to ignore the admissions that Mr. Vandervort made on the stand.

VRP (Feb. 3, 2017) at 404-405. The State's argument focused on the credibility of the witnesses. The State did not say that the jury had to make a choice between acquitting Vandervort and determining that the officers were lying. Thus, we hold that the State did not commit misconduct with its argument.

Furthermore, even if the State's argument constituted misconduct, Vandervort did not object to the State's argument and has waived this claim. *Emery*, 174 Wn.2d at 760-61. The trial court instructed the jury that it had to decide the case on the evidence presented at trial; that the lawyers' remarks were not evidence; that it must disregard any remark, statement, or argument that was not supported by the evidence or the law as set forth in the court's instructions; and that it was the sole judge of credibility. Although Vandervort argues that the State's argument was prejudicial because it asked the jury to weigh the credibility of the officer's versus the credibility of Vandervort, that is the role of the jury—to determine issues of conflicting testimony, credibility, and weight of evidence. *Higgs*, 177 Wn. App. at 437. Therefore, this claim fails.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Vandervort argues that defense counsel provided ineffective assistance by failing to (1) object to the State (a) misstating the law, (b) impugning defense counsel, and (c) arguing that the jury had to find that its witnesses were lying to acquit him; and (2) investigate the case and present a defense. We disagree.

1. Legal Principles

To establish ineffective assistance of counsel, a defendant must show both deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Failure to establish either prong of the test ends our inquiry. *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). There is a strong presumption of effective assistance, and the defendant bears the burden of rebutting that presumption by showing the lack of a legitimate strategic or tactical reason for the challenged conduct. *McFarland*, 127 Wn.2d at 336-37. This court views the decisions of whether to object as "classic example[s] of trial tactics." *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). When a defendant bases his ineffective assistance of counsel claim on trial counsel's failure to object, the defendant must show that the objection would likely have succeeded. *State v. Gerdts*, 136 Wn. App. 720, 727, 150 P.3d 627 (2007). "The absence of an objection by defense counsel 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. Edvalds*, 157 Wn. App. 517, 525-26, 237 P.3d 368 (2010), *review denied*, 171 Wn.2d 1021 (2011). " 'Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal.' " *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127 (2007) (quoting *Madison*, 53 Wn. App. at 763).

Resulting prejudice must also be shown. *McFarland*, 127 Wn.2d at 335. The defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.*

2. Failure to Object

Vandervort argues that defense counsel provided ineffective assistance by failing to object to the State (a) misstating the law, (b) impugning defense counsel, and (c) arguing that the jury had to find that its witnesses were lying to acquit. We disagree.

a. Misstating the law

The State did not misstate the law with its argument about what the unwitting possession defense required. *See supra* Section B.1. Therefore, defense counsel did not provide ineffective assistance by failing to object to the State's argument on unwitting possession.

b. Impugning defense counsel

The State did not impugn defense counsel with its argument about Vandervort's defense being a distraction technique. *See supra* Section B.2. As a result, defense counsel did not provide ineffective assistance by failing to object to the State's argument.

c. Witnesses lying

The State did not argue that the jury had to find that its witnesses were lying in order to acquit Vandervort, as mentioned above. *See supra* Section B.3. Thus, defense counsel did not provide ineffective assistance by failing to object to the State's argument on finding Vandervort more credible than the officers.

3. Failure to Investigate and Present a Defense

Vandervort argues that defense counsel at trial provided ineffective assistance by failing to investigate and present a defense. Specifically, Vandervort argues that defense counsel failed to "call any of the officers from Olympia who were involved in the arrest or search of the vehicle in Olympia as witnesses," to "interview at least one potential defense witness," and to "adequately review the hearsay rules and incorrectly assumed counsel would be able to elicit the information about the vehicle involved in the arrest in Olympia through the State's witnesses." Br. of Appellant at 18-19.

To provide effective assistance, defense counsel must investigate the case, which includes investigation of witnesses. *State v. Visitacion*, 55 Wn. App. 166, 173–74, 776 P.2d 986 (1989). "Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest." *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991)

Here, the record does not contain any information about any officers from Olympia, what information they may have had with regard to arrests made in an unrelated incident, and the subsequent search of a vehicle in Olympia. The record also does not contain any information about the witness Vandervort claims was present during the arrest and search in the unrelated incident in Olympia. Nor does Vandervort identify the alleged witness. Thus, Vandervort relies on matters outside of the record to support his ineffective assistance of counsel claim. Matters that are outside of the record cannot be considered on direct appeal. *State v. Kinzle*, 181 Wn. App. 774, 786, 326 P.3d 870, *review denied*, 181 Wn.2d 1019 (2014). For us to consider matters outside of the record,

the defendant must file a personal restraint petition under RAP 16.3. *McFarland*, 127 Wn.2d at 335. Therefore, we do not address this claim.

We affirm.

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.

Lee, J.

We concur:

Worswick, J.

Maxa, C.J.

CERTIFICATE OF SERVICE

The undersigned certifies that on this day correct copies of this petition for review were delivered electronically to the following:

Derek Byrne, Clerk, Division II, Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

Timothy Higgs (Opposing Counsel)
timh@co.mason.wa.us

The undersigned certifies that on this day correct copies of this petition for review were delivered by U.S. mail to the following:

Robert Vandervort
1425 Railroad AVE
Shelton, WA 98584

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.

Mary E. Benton

Signed September 18th, 2018 at Tacoma, Washington.

PIERCE COUNTY ASSIGNED COUNSEL

September 18, 2018 - 10:29 AM

Transmittal Information

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Appellate Court Case Title:	State of Washington v. Robert Leslie Vandervort
Superior Court Case Number:	16-1-00351-6

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