SUPREME COURT NO.
98507-3
COA NO. 52855-0-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

NICHOLAS ROSELLO,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

Cowlitz County Cause No. 18-1-00499-1

The Honorable Stephen M. Warning, Judge

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner Nicholas Rosello, the appellant below, asks the Court to review the decision of Division II of the Court of Appeals referred to in Section II below.

II. COURT OF APPEALS DECISION

Nicholas Rosello seeks review of the Court of Appeals unpublished opinion entered on April 7, 2020. A copy of the opinion is attached.

III. ISSUES PRESENTED FOR REVIEW

> **ISSUE 1:** A criminal defense attorney provides ineffective assistance of counsel by waiving objection to or eliciting evidence that is inadmissible and harms his/her client's defense. Did Mr. Rosello's attorney provide ineffective assistance by eliciting and opening the door to admission of claims by absent, unnamed witnesses that his client had delivered drugs in the past when those allegations would not have been admissible but for counsel's errors?
>
> **ISSUE 2:** A prosecutor commits misconduct by encouraging the jury to convict based on "facts" that have not been admitted into evidence. Did the prosecutor at Mr. Rosello's trial commit misconduct by telling the jury that the police had found more than $500 in cash in Mr. Rosello's wallet -- and explicitly encouraging the jury to infer that the cash was the result of a drug sale -- when there was no evidence to that effect admitted at trial?

IV. STATEMENT OF THE CASE

Nicholas Rosello was in his home with his roommate and at least three other people when the police entered to execute a search warrant. RP 48, 120. Several of the visitors were in Mr. Rosello's bedroom when the police came into the house. RP 60.

The police found small amounts of methamphetamine in various locations, all in plain view, in the room where the group had been hanging out. RP 49-50. The officers also found several pipes and a digital scale. RP 87. The police did not find any weapons, drug ledgers (which the officers referred to as "pay-and-owe sheets"), or a safe in which Mr. Rosello stored drugs or cash. RP 53-55.

The officers found Mr. Rosello's wallet in his room, which contained his driver's license and some cash. RP 87. But none of the witnesses testified to how much cash there was. *See* RP *generally*. The officers took a close-up photo of the inside of Mr. Rosello's wallet. Ex. 6; RP 87-88. But the photo shows only one bill, the denomination of which is not clear. *See* Ex. 6.

The state charged Mr. Rosello with possession of methamphetamine with intent to deliver. CP 1-2.

The primary issue at trial was whether Mr. Rosello had had intent to deliver the drugs found by the police. *See* RP *generally*.

The drugs that the officers sent to the crime lab weighed 7.6 grams total. RP 140. The detectives testified that seven grams was the minimum that they would consider as evidence that someone "starting to dabble in selling." RP 44.[1]

The lead detective on the case said that a methamphetamine user in the area would generally buy only 0.2 grams of drugs at a time, which would be enough for a single use. RP 43. he explained that most addicts could not afford to buy more than that at one time and that they had to scrap metal or steal care stereos to keep their habits going. RP 58.

Even so, the detective admitted that an addict with a source of income would get a better deal and also put him/herself in less risk of danger by buying a larger amount to use over time. RP 58-59.

The lead detective testified that the warrant for the search of Mr. Rosello's home was based on a tip from a confidential informant. RP 46. That informant was never named or called to testify at trial. *See* RP *generally*. Accordingly, the prosecutor was unable to elicit any specifics of what the confidential informant had told the police. *See* RP *generally*.

[1] The prosecutor argued in closing that the weight of the drugs in the room would likely have added up to seven grams or more if the jury included the residue found on the pipes, etc. *See* RP 162. But none of that residue was sent to the crime lab so none of it was confirmed to be methamphetamine. *See* RP 140.

But Mr. Rosello's defense attorney overcame that problem in the state's case on the prosecutor's behalf. *See* RP 52. Defense counsel elicited the confidential informant's statements to the police by having the following exchange during cross-examination of the lead detective:

> DEFENSE ATTORNEY: And were you going in with the belief that Mr. Rosello was selling drugs or just possessing and using them?
>
> DETECTIVE SANDERS. Selling. The informant had mentioned that they observed a drug sale inside the house.
> RP 52.

Shortly thereafter, defense counsel asked the lead detective whether any of the visitors in Mr. Rosello's home at the time of the search told the police that he had sold them drugs. RP 64. The detective's response was that the visitors did not say that Mr. Rosello had sold them drugs "on that day." RP 64.

As a result, the prosecutor was able to elicit that those people had told the police that they knew Mr. Rosello to have sold drugs in the past. RP 65. The court overruled defense counsel's hearsay objection to that testimony. RP 65.

During closing argument, the prosecutor relied heavily upon the evidence that the confidential informant and the visitors in Mr. Rosello's home had all alleged that he had delivered drugs in the past. *See* CP 155-65, 175-77.

The prosecutor began his closing argument by telling the jury that:

> The search warrant was based on information from a confidential informant who had been inside the residence and had seen the defendant engage in a drug deal and sell drugs to another person.
> RP 155.

Later, the prosecutor specifically argued that the jury should rely on that evidence to infer that Mr. Rosello had intended to deliver the drugs found in his home:

> So we know that he has given drugs to people in the past. Other people in the residence that day said that he's given drugs to people in the past. We know the confidential informant actually saw the defendant engage in a drug deal…
> RP 161.

The prosecutor hammered that point again during his rebuttal argument. *See* RP 175.

The prosecutor also told the jury that the police had found more than $500 of cash in Mr. Rosello's wallet. RP 156. The prosecutor explicitly encouraged the jury to infer that Mr. Rosello only had that much cash because it was the proceeds from a drug sale. RP 160-61, 163.

The jury found Mr. Rosello guilty of possession with intent to deliver. CP 23.

Mr. Rosello timely appealed. CP 38. The Court of Appeals affirmed his conviction in an unpublished opinion. *See* Decision.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Supreme Court should accept review and hold that Mr. Rosello's defense attorney provided ineffective assistance of counsel by taking action leading to the admission of highly prejudicial, otherwise inadmissible evidence, which overcame a significant evidentiary shortcoming in the state's case.

The prosecution went into Mr. Rosello's trial with evidence of intent to deliver that was far from overwhelming. He possessed only slightly more drugs than what the detectives considered evidence that someone was "starting to dabble in selling." RP 44. The police did not find any weapons, safes, or "pay-and-owe sheets," all of which are things they consider evidence of drug dealing. RP 53-55.

The police investigation had revealed allegations by the confidential informant and by some of the visitors to Mr. Rosello's home that Mr. Rosello had sold drugs in the past. RP 52, 65. But the prosecutor would have been unable to elicit any of that evidence because it was inadmissible under the Confrontation Clause, ER 404(b), and the hearsay rules.

Accordingly, the state's evidence of intent to deliver was weak. The state even proposed a jury instruction on lesser-included offense of simple possession, apparently recognizing a significant likelihood that the jury would find that Mr. Rosello had possessed the drugs but that intent to deliver had not been proved beyond a reasonable doubt. *See* CP 60-61.

That was the case until *defense counsel* elicited the evidence that the jury would not otherwise had heard: that both the confidential informant and the visitors to Mr. Rosello's home told the police that he had sold or given away drugs in the past. RP 52, 64-65. Mr. Rosello's defense attorney provided ineffective assistance of counsel. *State v. Saunders*, 91 Wn. App. 575, 580, 958 P.2d 364 (1998).

The state and federal constitutions both protect the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV, Wash. Const. art. I, § 22; *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).

In order to demonstrate ineffective assistance of counsel, the accused must establish deficient performance and prejudice. *Id.* Performance is deficient if it falls below an objective standard of reasonableness. *Id.* The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that counsel's mistakes affected the outcome of the proceedings. *Id.*

Defense counsel provides ineffective assistance by waiving objection to inadmissible evidence that prejudices his/her client, absent a valid tactical reason. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1257 (2007), *aff'd*, 165 Wn.2d 474, 198 P.3d 1029 (2009). Of course,

counsel also provides ineffective assistance by eliciting such evidence him/herself. *See Saunders*, 91 Wn. App. at 580.

It is a primary tenet of cross-examination that an attorney should never ask an opposing witness question to which s/he does not already know the answer. *See* Thomas A. Mauet, *Trial Techniques* 256 (8th Ed. 2010). Under the most generous interpretation of the actions of Mr. Rosello's defense attorney, he committed ineffective assistance of counsel by violating this tenet and accidentally eliciting inadmissible evidence that was highly prejudicial to his client. Under a less generous interpretation, defense counsel sabotaged his client's defense by eliciting evidence that was extremely helpful to the prosecution, but which would have been inadmissible but for counsel's actions.

Either way, defense counsel's actions amount to ineffective assistance of counsel and requires reversal of Mr. Rosello's conviction. *Saunders*, 91 Wn. App. at 581.

1. The testimony elicited by Mr. Rosello's defense attorney was otherwise inadmissible under the Confrontation Clause.

But for defense counsel's unreasonable actions, the jury would never have heard that the confidential informant and guests in Mr. Rosello's home – who were absent at trial -- claimed to have seen him

deliver drugs in the past because that evidence was inadmissible under the Confrontation Clause.

An accused person has a constitutional right to confront her or his accuser. U.S. Const. Amends. VI, XIV; art. I, § 22. Accordingly, the state may not admit testimonial evidence from a witness who is not present at trial and is, therefore, not subject to cross-examination. *State v. Hudlow*, 182 Wn. App. 266, 282, 331 P.3d 90 (2014) (*citing Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006)).

Evidence is testimonial if its primary purpose "is to establish or prove past events potentially relevant to a later criminal prosecution." *Davis*, 547 U.S. at 82. Statements from a confidential informant to his/her police handlers are testimonial because:

> …a reasonable confidential informant would believe his or her statement would further police investigations toward future criminal prosecutions and specifically that such statements "would be available for use at a later trial.

Hudlow, 182 Wn. App. at 283 (*citing State v. Chambers*, 134 Wn. App. 853, 861, 142 P.2d 668 (2006)).

Statements made by other witnesses in response to police questioning are also testimonial (as long as they are not related to an ongoing emergency). *State v. Koslowski*, 166 Wn.2d 409, 418, 209 P.3d 479 (2009).

In Mr. Rosello's case, there was no ongoing emergency. The statements made to the police by the confidential informant and the guests at Mr. Rosello's home were all testimonial because they were all intended to "establish or prove past events potentially relevant to a later criminal prosecution." *Davis*, 547 U.S. at 82. Indeed, that is the exact purpose for which the prosecutor relied on the evidence in closing argument. *See* CP 155-65, 175-77.

If defense counsel had not elicited the evidence himself, the jury at Mr. Rosello's trial would never have heard that the confidential informant and guests in Mr. Rosello's home claimed to have seen him deliver drugs in the past because that evidence was inadmissible under the Confrontation Clause. *Id.*

2. The testimony elicited by Mr. Rosello's defense attorney was otherwise inadmissible under ER 404(b)

Second, the jury would not have heard the allegations regarding Mr. Rosello's prior deliveries if not for his attorney's errors because that evidence was inadmissible under ER 404(b).

Under ER 404(b), "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." ER 404(b). This rule must be read in conjunction

with ER 403. *State v. Gunderson*, 181 Wn.2d 916, 923, 337 P.3d 1090 (2014).

Before admitting evidence of prior bad acts by the accused, the court must (1) find by a preponderance of the evidence the misconduct actually occurred, (2) identify the purpose for which the evidence is offered, (3) determine the relevance of the evidence to prove an element of the crime, and (4) weigh the probative value against the prejudicial effect. *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2015).

A trial court must begin with the presumption that evidence of uncharged bad acts is inadmissible. *State v. McCreven*, 170 Wn. App. 444, 458, 284 P.3d 793 (2012) *review denied*, 176 Wn.2d 1015, 297 P.3d 708 (2013). The proponent of the evidence carries the burden of establishing that it is offered for a proper purpose. *Slocum*, 183 Wn. App. at 448. Doubtful cases are resolved in favor of exclusion. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002); *State v. Wilson*, 144 Wn. App. 166, 176-78, 181 P.3d 887 (2008).

The evidence that Mr. Rosello had allegedly delivered drugs in the past was inadmissible under ER 404(b) and ER 403 because its only possible relevance was that it led to an improper propensity inference: encouraging the jury to conclude that Mr. Rosello was more likely to have intended to deliver the methamphetamine because he had delivered drugs

in the past.[2] In fact, the prosecutor explicitly relied on the evidence to encourage the jury to make that inference during closing arguments at Mr. Rosello's trial. *See* CP 155-65, 175-77. Absent defense counsel's errors, the jury would never had learned of Mr. Rosello's alleged prior drug deliveries because the evidence was inadmissible under ER 404(b). *Slocum*, 183 Wn. App. at 48; *McCreven*, 170 Wn. App. at 458.

3. Defense counsel had no valid tactical reason for eliciting the only evidence that his client had engaged in alleged drug deliveries in the past.

Defense counsel's theory at trial was that the state had not proved that Mr. Rosello intended to deliver the drugs found in his house, rather than to use them himself. *See* RP 166-74. Indeed, the attorney all but admitted during closing argument that his client had possessed the drugs in order to pursue this theory. RP 166-67.

In response, the prosecutor relied heavily on the strongest evidence before the jury that Mr. Rosello *had* intended to deliver the drugs: the allegations from multiple absent, unnamed witnesses that he had delivered drugs in the past. *See* CP 155-65, 175-77. If not for the actions of Mr. Rosello's defense attorney, however, that evidence would never have been available to the state. Defense counsel had no valid tactical reason for

[2] The evidence was also inadmissible because it was hearsay, offered for the truth of the matter asserted. ER 801, 802.

handing the prosecutor the evidence that he needed to most effectively rebut the theory of Mr. Rosello's defense.

It appears as though defense counsel's general goal during his cross-examination of the lead detective was to demonstrate that the police went into their search of Mr. Rosello's home with the assumption that he had been selling drugs, not just possessing them. *See* RP 52. But defense counsel could have elicited that evidence without asking about allegations that his client actually had sold drugs before. For example, counsel could have pointed the detective to the language of the search warrant (directing the police to search for evidence of drug dealing) or simply asked the detective about his frame of mind, to which he readily admitted. *See* RP 52.[3]

Furthermore, any tactical decision by defense counsel must be *reasonable* in order to constitute effective assistance. *See In re Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (*cting State v. McNeal*, 145 Wn.2d 352, 358, 37 P.3d 280 (2002)) (even deliberate tactical choices can constitute ineffective assistance of counsel if they fall outside the range of "competent assistance").

[3] Indeed, recognizing the prejudicial effect of the evidence of the alleged prior deliveries to his client, defense counsel objected when the state elicited that Mr. Rosello's guests claimed to have seen him deliver drugs in the past. RP 65. But that objection was overruled because, even though the evidence was technically inadmissible, defense counsel had opened the door to its admission during his own cross-examination. RP 65.

Mr. Rosello's attorney appears to have opened the door to the allegations by the visitors to his client's home on accident, as demonstrated by his attempt to keep that evidence out through an unsuccessful hearsay objection. RP 65.

Even if counsel possessed some strategic justification for eliciting the delivery allegation by the confidential informant, that justification was not reasonable. *Id.* As outlined above, counsel could have demonstrated that the detectives were predisposed to believe that Mr. Rosello had sold drugs through other means: by asking about the language on the warrant or about the detective's assumptions going into the search. There was no tactical advantage that could possibly have been gained by eliciting otherwise inadmissible evidence that defense counsel's client had allegedly sold drugs in the past. Mr. Rosello's attorney provided deficient performance by eliciting or opening the door to highly prejudicial, inadmissible evidence without a valid tactical justification for doing so. *Id.*; *Hendrickson*, 138 Wn. App. at 833.

4. Mr. Rosello was prejudiced by his attorney's deficient performance.

Absent the allegations (elicited by defense counsel) that Mr. Rosello had previously sold drugs, the evidence of his intent to deliver the drugs found in his home was far from overwhelming. The police search

did not uncover many of the things the detective expected to find in the house of a drug dealer, including weapons, "pay-and-owe sheets," or safes. RP 52-55.

Additionally, the total weight of the non-residue drugs that the police collected was only slightly more than what the detectives testified that they considered evidence that someone was "starting to dabble in selling." RP 44.[4]

But Mr. Rosello's attorney overcame that evidentiary shortcoming on the prosecutor's behalf by eliciting or opening the door to allegations that his own client had sold drugs in the past. Once defense counsel had done so, the prosecutor was able to rely heavily on that evidence in closing, explicitly encouraging the jury to infer that Mr. Rosello must have intended to deliver the drugs because he had done so in the past. *See* CP 155-65, 175-77.

There is a reasonable probability that defense counsel's deficient performance affected the outcome of Mr. Rosello's trial. *Jones*, 183 Wn.2d at 339. Mr. Rosello was prejudiced by his attorney's ineffective assistance. *Id.* Mr. Rosello's conviction must be reversed because he was

[4] The prosecution appears to have recognized this potential deficiency in the state's case, going so far as to propose a jury instruction on the lesser-included offense of simple possession in case the jury did not believe that intent to deliver had been proved. *See* CP 60-61.

deprived of his constitutional right to the effective assistance of counsel. *Id.*

This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

A. The Supreme Court should accept review and hold that the prosecutor committed misconduct at Mr. Rosello's trial by "testifying" during closing argument to "facts" that had not been admitted into evidence.

The police officers testified that they found Mr. Rosello's wallet, with contained his driver's license and some cash, in his bedroom. RP 87. But no witness ever testified to the amount of cash in the wallet. *See* RP *generally*. The state offered a close-up photo of the wallet into evidence. Ex. 6. But the photo only shows one bill, the denomination of which is not clear. Ex. 6.

Even so, the prosecutor told the jury during closing argument that the police had found more than $500 of cash in Mr. Rosello's wallet. RP 156. Then the prosecutor went into detail about how Mr. Rosello's failure to provide the police with an explanation for that large amount of cash meant that the jury should infer that her had received it by selling drugs. RP 160-61, 163. The prosecutor committed reversible misconduct by "testifying" during closing to "facts" that had not been admitted into

evidence. *See State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008) (Jones II).

Prosecutorial misconduct can deprive the accused of a fair trial. *In re Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012); U.S. Const. Amends. VI, XIV, art. I, § 22. To determine whether a prosecutor's misconduct warrants reversal, the court looks at its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). A prosecutor's improper statements prejudice the accused if they create a substantial likelihood that the verdict was affected. *Glasmann*, 175 Wn.2d at 704. The inquiry must look to the misconduct and its impact, not the evidence that was properly admitted. *Id.* at 711.

Even absent objection, reversal is required when misconduct is "so flagrant and ill-intentioned that an instruction would not have cured the prejudice." *Glasmann*, 175 Wn.2d at 704.

A prosecutor commits misconduct by arguing "facts" to the jury that have not been admitted into evidence. *Jones* II, 144 Wn. App. at 293 (*citing State v. Weber*, 159 Wn.2d 252, 276, 149 P.3d 646 (2006)).

In this case, the prosecutor committed misconduct by telling the jury that the police had found more than $500 of cash in Mr. Rosello's wallet when there was no evidence to that effect. *Jones* II, 144 Wn. App. at 293. The prosecutor's argument was improper. *Id.*

There is a substantial likelihood that the prosecutor's improper argument affected the outcome of Mr. Rosello's trial. *Glasmann,* 175 Wn.2d at 704. As outlined above, the evidence that Mr. Rosello intended to deliver drugs was slim. Rather than relying only on the properly-admitted evidence, however, the prosecutor "testified" that Mr. Rosello had more than $500 in cash at the time of the warrant search. RP 156. The prosecutor went further by explicitly encouraging the jury to infer that Mr. Rosello only had such a large amount of cash because he had been selling drugs. RP 160-61, 163.

Furthermore, because of the "fact-finding facilities presumably available to the [prosecutor's] office," the jury likely believed that the prosecutor was correct in his claim that Mr. Rosello had possessed more than $500 in cash, even though there was no evidence of that amount admitted at trial. *Glasmann,* 175 Wn.2d at 706. Mr. Rosello was prejudiced by the prosecutor's misconduct. *Id.*[5]

[5] In the alternative, reversal is required under the doctrine of cumulative error. An appellate court may reverse a conviction when "the combined effect of errors during trial effectively denied the defendant [his/]her right to a fair trial even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010); U.S. Const. Amends. VI, XIV. In Mr. Rosello's case, the cumulative effect of defense counsel's ineffective assistance and the prosecutor's misconduct strongly encouraged the jury to find guilt based on evidence that either was not admitted at trial or never should have been admitted (absent defense counsel's errors). The cumulative effect of these errors is sufficient to undermine confidence in the outcome of Mr. Rosello's trial. Mr. Rosello was deprived of his right to a fair trial. The doctrine of cumulative error requires reversal of his conviction. *Id.*

Misconduct is flagrant and ill-intentioned when it violates professional standards and case law that were available to the prosecutor at the time of the improper statement. *Glasmann*, 175 Wn.2d at 707. Here, the prosecutor had access to longstanding case law prohibiting the introduction of "facts" outside the evidence into closing argument. *See e.g. Jones* II, 144 Wn. App. at 293. The prosecutor's improper argument requires reversal of Mr. Rosello's conviction even absent an objection below. *Glasmann*, 175 Wn.2d at 707.

The prosecutor committed misconduct at Mr. Rosello's trial by "testifying" to "facts" that had not been admitted into evidence but which went to the very heart of the issue for the jury in the case: whether Mr. Rosello had intended to deliver the drugs found in his bedroom. *Id.*; *Jones* II, 144 Wn. App. at 293. Mr. Rosello's conviction must be reversed. *Id.*

This significant question of constitutional law is of substantial public interest and should be determined by the Supreme Court. This Court should grant review pursuant to RAP 13.4(b)(3) and (4).

VI. CONCLUSION

The issues here are significant under the State and Federal Constitutions. Because they could impact a large number of criminal cases, they are also of substantial public interest. The Supreme Court should accept review pursuant to RAP 13.4(b)(3) and (4).

Respectfully submitted May 6, 2020.

Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

CERTIFICATE OF SERVICE

I certify that I mailed a copy of the Petition for Review, postage pre-paid, to:

Nicholas Rosello/DOC#346957
Longview Work Release
1821 1st Ave.
Longview, WA 98632

and I sent an electronic copy to

Cowlitz County Prosecuting Attorney
appeals@co.cowlitz.wa.us

through the Court's online filing system, with the permission of the recipient(s).

In addition, I electronically filed the original with the Court of Appeals.

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

Signed at Seattle, Washington on May 6, 2020.

_____
Skylar T. Brett, WSBA No. 45475
Attorney for Appellant/Petitioner

APPENDIX:

Filed
Washington State
Court of Appeals
Division Two

April 7, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. NICHOLAS PETER ROSELLO, Appellant	No. 52855-0-II UNPUBLISHED OPINION

MELNICK, J. — A jury convicted Nicholas Rosello of one count of possession of methamphetamine with intent to deliver. Rosello argues that he received ineffective assistance of counsel and that the prosecutor committed misconduct. He also argues that the combined effect of errors at trial violated his right to a fair trial. We affirm.

FACTS

The police executed a search warrant at Rosello's home. Rosello and at least four other people were present. The police seized approximately 7.6 grams of methamphetamine from Rosello's bedroom, as well as pipes, a digital scale, and plastic packaging items. The police also found and photographed Rosello's wallet, which contained an unspecified amount of cash and his driver's license.

At trial, Detective Jordan Sanders testified that, at the scene of the warrant execution, Rosello said he did not sell drugs, but "he had given methamphetamine to people on occasion." Report of Proceedings (RP) at 51. After being asked if the cash in his wallet came from selling drugs, Rosello paused, looked at the ground, and then denied selling drugs.

Sanders testified as an expert witness and told the jury that generally, 7 grams of methamphetamine was a quantity the police would "probably" see if someone was "starting to dabble in selling." RP at 44. In addition, he would expect to see money, digital scales, packaging material, and pay-and-owe sheets at a dealer's home. Police found a scale and some "plastic packaging items" in Rosello's bedroom but no pay-and-owe sheets. RP at 87. Sanders testified that a typical user of methamphetamine would buy around 0.2 grams for a single use at a time because most addicts could not afford to buy more than that at one time. However, it "would be fair" to say that a user with more money could get a better "deal" by buying in a larger amount for personal use. RP at 58.

On cross-examination, the following exchange occurred.

> [Defense Attorney]. . . . So you had a confidential informant that you believed based on your conversations with him that there would be drugs at Mr. Rosello's residence?
> [Sanders]. Correct.
> [Defense Attorney]. And were you going in with the belief that Mr. Rosello was selling drugs or just possessing and using them?
> [Sanders]. Selling. The informant had mentioned that they observed a drug sale inside the house.

RP at 51-52.[1]

Sanders testified that multiple people had been in the room with the drugs prior to the execution of the warrant. Rosello's attorney also asked Sanders if he had checked for fingerprints on any of the items found in Rosello's bedroom. Sanders said he had not because the police typically only tested for fingerprints in a case where no suspect existed. Rosello's attorney later

[1] The only other trial testimony about the confidential informant occurred when the detective stated on direct examination that "it was my confidential informant that got us the information to serve this warrant." RP at 46.

asked Sanders if "any of those people that [he] interviewed [said] that [Rosello] sold them drugs." RP at 64. Sanders responded, "Not that day." RP at 64.

On redirect examination, the following exchange occurred:

> [Prosecuting Attorney]. You just stated that none of the other folks at the residence had told you that the defendant sold them drugs that day?
> [Sanders]. Correct.
> [Prosecuting Attorney]. Did they say that he sold them drugs on any other day?
> [Defense]: Objection; hearsay.
> THE COURT: Overruled.
> [Prosecuting Attorney]. You may answer.
> [Sanders]. Some of the folks that said that they knew him to give away drugs or sell drugs in the past.
> [Prosecuting Attorney]. Were other folks that were in the house that day arrested?
> [Sanders]. Yes.
> [Prosecuting Attorney]. For drugs?
> [Sanders]. Correct.

RP at 64-65.

The court instructed the jury that delivery means "transfer of a controlled substance from one person to another." RP at 149; Clerk's Papers at 17 (Instr. 11).

Rosello argued in closing that the prosecutor would have charged him with intent to deliver regardless of the evidence because the police went into the search assuming he was a drug dealer. He argued that officers ignored evidence that the drugs might not all belong to him because they did not send the drug packaging in for DNA or fingerprint analysis.

The State argued that the evidence indicated an intent to distribute. It referenced the large quantity of methamphetamine, the multiple baggies of methamphetamine, smoking devices, scales, and "defendant's wallet [with] his identification, and over $500 in cash." RP at 156. Rosello did not object even though no evidence supported the statement about the amount of cash.

The jury found Rosello guilty of one count of possession of methamphetamine with intent to deliver. Rosello appeals.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Rosello argues that he received ineffective assistance of counsel because his attorney elicited testimony that he had sold or given away drugs in the past, which allowed the prosecutor to use that information and rely on it during closing argument. Rosello contends that the information would have been otherwise inadmissible under ER 404(b) and the confrontation clause. Rosello further argues that his counsel had no valid tactical reason to elicit that evidence, and he was prejudiced because overwhelming evidence did not exist to prove his intent to deliver.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to effective assistance of counsel. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). We review ineffective assistance of counsel claims de novo. *Estes*, 188 Wn.2d at 457.

To prevail on a claim of ineffective assistance of counsel, the defendant must show both (1) that defense counsel's representation was deficient and (2) that the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

Representation is deficient if, after considering all the circumstances, "it falls 'below an objective standard of reasonableness.'" *Estes*, 188 Wn.2d at 458 (quoting *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Generally, a court will not find ineffective assistance of counsel if "the actions of counsel complained of go to the theory of the case or to trial tactics." *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Therefore, "[w]hen counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." *State v.*

Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009). However, not all strategies or tactics are immune from attack, because "'[t]he relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'" *Grier*, 171 Wn.2d at 34 (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)).

Prejudice exists if there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Estes*, 188 Wn.2d at 458. It is not enough that ineffective assistance conceivably impacted the case's outcome; the defendant must affirmatively show prejudice. *Estes*, 188 Wn.2d at 458.

"'[T]he introduction of inadmissible evidence is often said to "open the door" both to cross-examination that would normally be improper and to the introduction of normally inadmissible evidence to explain or contradict the initial evidence.'" *State v. Avendano-Lopez*, 79 Wn. App. 706, 714, 904 P.2d 324 (1995) (quoting 5 KARL B. TEGLAND, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE, at 41 (3rd ed. 1989)).

Rosello's theory of the case, as put forth in closing argument, was that the police had decided prior to executing the warrant, that Rosello sold or possessed drugs with an intent to deliver. He argued that the police had already made up their minds about his guilt, and therefore did not investigate whether the other people present could have owned the drugs. As a result, the police did not fingerprint the bags containing methamphetamine or any of the paraphernalia found in the bedroom.

In support of this defense theory, Rosello's attorney elicited testimony from Sanders that the confidential informant "mentioned that they observed a drug sale inside the house." RP at 52. The testimony did not specify who had made the drug sale.

Rosello's attorney also asked Sanders a question that opened the door for the State to elicit testimony that, "[s]ome of the folks . . . said that they knew [Rosello] to give away drugs or sell drugs in the past." RP at 65. The questions by Rosello's attorney went to the defense theory that other people in the apartment could have owned some or all of the drugs found in the bedroom. However, counsel should reasonably have expected the questions would open the door to inadmissible testimony. Therefore, while the questions went to the defense theory of the case, the attorney's actions fell below an objective standard of reasonableness. We conclude that Rosello's counsel acted deficiently.

However, Rosello cannot show that absent his attorney's deficient performance, the result of the proceeding would have been different. On the day of the search warrant execution, Rosello admitted to the police that "he had given methamphetamine to people on occasion." RP at 51. Other independent evidence supported the verdict. The police found a large quantity of methamphetamine, consistent with someone selling it. They found a scale, a quantity of cash, and some packaging material.

Based on the evidence presented, there is not a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. Because Rosello has not demonstrated prejudice, his ineffective assistance of counsel claim fails.

II. PROSECUTORIAL MISCONDUCT

Rosello argues prosecutorial misconduct occurred because the prosecutor testified that Rosello had $500 cash in his wallet. He contends that because no evidence supported this statement, a substantial likelihood existed that the misconduct affected the outcome of the trial. We disagree.

Prosecutorial misconduct may deprive a defendant of his constitutional right to a fair trial. *In re Pers. Restraint of Glasmann*, 175 Wn.2d 696, 703-04, 286 P.3d 673 (2012). An appellant claiming prosecutorial misconduct must demonstrate that the prosecutor's conduct was both improper and prejudicial. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

When the defendant fails to object to the improper statement at trial, the appellant must show that the comments were "so flagrant and ill intentioned that an instruction could not have cured the resulting prejudice." *Emery*, 174 Wn.2d at 760-61. The appellant must show that (1) no curative instruction would have eliminated the prejudicial effect, and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the verdict. *Emery*, 174 Wn.2d at 761. The focus of this inquiry is more on whether the resulting prejudice could have been cured, rather than the flagrant or illintentioned nature of the remarks. *Emery*, 174 Wn.2d at 762.

"Although prosecuting attorneys have some latitude to argue facts and inferences from the evidence, they are not permitted to make prejudicial statements unsupported by the record." *State v. Jones*, 144 Wn. App. 284, 293, 183 P.3d 307 (2008).

In the present case, the prosecutor argued that the evidence supported a finding that Rosello had intent to distribute. In outlining the evidence, he stated that police found over $500 cash in Rosello's wallet. However, the no evidence supported the actual amount of cash in the wallet. The jury could not determine the amount of cash because the photograph showed that the wallet contained a single bill of unknown denomination. The statement was prejudicial because the large value of cash could lead the jury to infer that the money was from drug sales. The prosecutor made a statement that was unsupported by the record; therefore, it was improper.

However, Rosello did not object to the statement at trial. He has failed to show that the comment was flagrant or ill intentioned, as opposed to being a misstatement or an inadvertent statement. In addition, a curative instruction striking the statement would likely have cured any potential prejudice. Therefore, Rosello's argument on prosecutorial misconduct fails.

III. CUMULATIVE ERROR

Rosello argues that the combined effect of errors at trial violated his right to a fair trial because the jury was encouraged to convict him on evidence that was not admitted or should not have been admitted. We disagree

The cumulative error doctrine applies when a trial is affected by several errors that "standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). To determine whether cumulative error requires reversal of a defendant's conviction, we must consider whether the totality of circumstances substantially prejudiced the defendant. *In re Pers. Restraint of Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014), *abrogated on other grounds by State v. Gregory*, 192 Wn.2d 1, 427 P.3d 621 (2018).

Because Rosello has failed to establish that he received ineffective assistance of counsel, and prosecutorial misconduct, we reject Rosello's cumulative error argument.

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.

Melnick, J.

We concur:

Worswick, J.

Lee, C.J.

LAW OFFICE OF SKYLAR BRETT

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