

NO. 35539-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

RICHELLE FAULKNER,

Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY [Signature]

ORIGINAL

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 98-1-01385-9

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED June 6, 2007, Port Orchard, WA [Signature]
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left. [Signature]

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Faulkner has met her burden of showing that her counsel was deficient for failing to object to the mention of the marijuana found with the methamphetamine she was charged with possessing, and or that she was prejudiced by counsel's failure to object?

2. Whether the trial court properly refused to give Faulkner's requested instruction on "passing control" where it was factually unsupported in that, at best, the evidence showed she handled the drugs in an effort to dispose of them or hide them from the police and where the proposed instruction misstated the law by suggesting that momentary handling could per se constitute passing control?

3. Whether there is invited error regarding the instructional issue?

4. Whether Faulkner has established cumulative error warranting reversal?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Richelle Faulkner was charged by information filed in Kitsap County Superior Court on October 29, 1998, with possession of methamphetamine. Supp. CP. In December of that year she absconded. Supp. CP. Faulkner was

arrested on the warrant on May 10, 2006. Supp. CP.

After trial held October 31 through November 1, 2006, the jury found Faulkner guilty as charged. CP 81.

B. FACTS

Washington State Patrol Officer Jimmie Foster made a traffic stop of Appellant Faulkner.¹ 1RP 37. Foster subsequently arrested Faulkner on an outstanding warrant. 1RP 37. Foster also determined that there was also a protection order under which Faulkner was the protected party. 1RP 37. The respondent was Faulkner's passenger, Mike Laumen, who Foster arrested him for violation of the protection order. 1RP 37-38. Both were placed in the back of his patrol car. Laumen was handcuffed behind his back. 1RP 38. Faulkner was handcuffed in front, because handcuffing her behind her back was uncomfortable due to her size. 1RP 38.

As he was pulling into the jail, Foster heard a loud thump in the back seat and saw Faulkner leaning forward. 1RP 39. Concluding that the noise was from the rear seat coming off its bracket, he searched the rear seat after the prisoners were removed. 1RP 39. He found two bags under the left side of the seat near the seatbelt bracket. 1RP 39. The baggies were toward the

¹ Although Faulkner married subsequent to being charged and expressed a preference for being addressed by her married name, Laumen, RP 4-5, the State will refer to her as Faulkner, both because that is how many of the witnesses identified her, and to avoid confusion with her husband Mike Laumen, who was involved in the circumstances of the offense.

part of the car furthest from Laumen. 1RP 66. One of the small bags contained what appeared to be methamphetamine and the other what appeared to be marijuana. 1RP 40.

Foster had searched the area before putting them in the car. 1RP 40. It was on the side that Faulkner had been on. 1RP 40. Faulkner nevertheless initially denied any knowledge of either item. 1RP 40. She subsequently admitted that they were hers alone, 1RP 40, 42, and stated that she had hidden them in her shoe. 1RP 41. Faulkner specifically told him that the baggies contained methamphetamine and marijuana. 1RP 42. Field-testing later confirmed this. 1RP 42. Lab testing further confirmed that the crystalline substance was methamphetamine. 2RP 96.

Due to the tight space in the rear of the vehicle it would have been very difficult for Faulkner and Laumen to have had contact without Foster having heard them banging into the divider. 1RP 43. They both remained upright up until they got to the jail, when Foster heard the thump of the seat. 1RP 44.

Faulkner testified at trial. She acknowledged that she had a forgery conviction. 2RP 115. She also conceded that she knew traveling with Laumen and failing to appear in court were violations of court orders. 2RP 122. After she was arraigned on the current charges she disappeared for eight

years. 2RP 121. She married Laumen while she was at large with a bench warrant out for her arrest. 2RP 121.

She explained her possession of the methamphetamine by stating she was concerned, based on her experience when she had when she had previously been arrested, that they would be searched. 2RP 108. She asserted that that after some argument on the subject, she acceded to Laumen's wishes and took the drugs out of Laumen's shoe during the ride to the jail. 2RP 108. She stuffed it down where the police found it. 2RP 109.

She admitted that she had told Foster that the drugs were hers alone, and that she had them in her shoe. 2RP 110, 119-20. She asserted, however that she had had possession of it for less than five seconds. 2RP 112.

On cross-examination she admitted that she did try to hide the drugs in the patrol vehicle. 2RP 115, 119. She also conceded that she knew the methamphetamine was "crank," an illegal substance. 2RP 117.

III. ARGUMENT

A. FAULKNER FAILS TO MEET HER BURDEN OF SHOWING THAT HER COUNSEL WAS DEFICIENT FOR FAILING TO OBJECT TO THE MENTION OF THE MARIJUANA FOUND WITH THE METHAMPHETAMINE SHE WAS CHARGED WITH POSSESSING, AND FAILS TO SHOW SHE WAS PREJUDICED BY COUNSEL'S FAILURE TO OBJECT.

Faulkner argues that her counsel was ineffective for not objecting to evidence that she secreted a small bag of marijuana along with the small bag of methamphetamine that formed the basis of the charge against her. This claim is without merit because Faulkner fails to show counsel did not have a tactical reason for not objecting, she fails to show that such an objection should have been sustained, and she fails to show prejudice.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the

reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

To prove that failure to object rendered counsel's performance, a defendant must show that not objecting fell below prevailing professional norms, *State v. Townsend*, 142 Wn.2d 838, 847, 15 P.3d 145 (2001), and that the proposed objection would likely have been sustained, *McFarland*, 127 Wn.2d at 337 n.4. To prevail on this issue, the defendant must rebut the presumption that counsel's failure to object "can be characterized as legitimate trial strategy or tactics." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (emphasis added). Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, "exceptional deference must be given

when evaluating counsel's strategic decisions." *McNeal*, 145 Wn.2d at 362.

"The decision of when or whether to object is a classic example of trial tactics. 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. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). Faulkner cannot show that counsel's failure to object was not tactical. The defense theory was that the methamphetamine was not Faulkner's and that she had hidden it away only due to pressure from Laumen. Since the methamphetamine was found at the same time and place as the methamphetamine, it was of no moment to the defense theory that marijuana as well as methamphetamine was found.²

Moreover, even if counsel had objected, Faulkner fails to show that the evidence would not have been properly admissible. Evidence is admissible under ER 404(b) if it is part of the *res gestae* of the offense charged. *Res gestae* or "same transaction" evidence "complete[s] the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Tharp*, 27 Wn. App. 198, 204, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981); *State v. Lane*, 125 Wn.2d 825,

² Although Faulkner volunteered on cross-examination that unlike the methamphetamine, the marijuana was hers, there is no evidence in the record that counsel knew she would make this admission. 2RP 116.

831, 889 P.2d 929 (1995). Res gestae evidence is admissible in Washington if it is so connected in time, place, circumstances, or means employed that proof of such other misconduct is necessary for a complete description of the crime charged, or constitutes proof of the history of the crime charged. *State v. Schaffer*, 63 Wn. App. 761, 769, 822 P.2d 292 (1997), *aff'd*, 120 Wn.2d 616, 845 P.2d 281 (1993). “Where another offense constitutes a ‘link in the chain’ of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible ‘in order that a complete picture be depicted for the jury.’” *State v. Hughes*, 118 Wn. App. 713, 725, 77 P.3d 681 (2003) (*quoting State v. Brown*, 132 Wn.2d 529, 571-72, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998)). “There is no additional requirement ... that res gestae evidence be relevant for *an additional purpose*, such as plan, motive, or identity.” *Lane*, 125 Wn.2d at 838 (emphasis the Court’s).

Since the marijuana and the methamphetamine were found at the same time and place, Faulkner’s possession of them were clearly part of the same transaction. Faulkner fails to show the objection would have been sustained had it been raised.

Finally, Faulkner fails to demonstrate prejudice. In view of all the evidence, it is highly unlikely that exclusion of the marijuana evidence would have affected the outcome of the trial.

The evidence was mentioned only very briefly in closing. 2RP 142, 146, 151. It's mention was only in the context of where the methamphetamine and marijuana were found. At no point did the State ever suggest that because Faulkner had marijuana she must have had the methamphetamine.

As alluded to above, that she had the marijuana was utterly consistent with the defense that the methamphetamine was Laumen's. Moreover, the jury had substantial basis for simply finding Faulkner not credible. She was a convicted forger. She admitted to lying to the police. She admitted to violating the protection order. She admitted to absconding on the present charges for eight years. She admitted to taking the drugs and hiding them to allegedly protect her boyfriend. There simply is no likelihood that had counsel objected, and had the objection been sustained, that the jury would have found Faulkner not guilty. This claim should be rejected.

B. THE TRIAL COURT PROPERLY REFUSED TO GIVE FAULKNER'S REQUESTED INSTRUCTION ON "PASSING CONTROL" WHERE IT WAS FACTUALLY UNSUPPORTED IN THAT AT BEST THE EVIDENCE SHOWED SHE HANDLED THE DRUGS IN AN EFFORT TO DISPOSE OF THEM OR HIDE THEM FROM THE POLICE AND WHERE THE PROPOSED INSTRUCTION MISSTATED THE LAW BY SUGGESTING THAT MOMENTARY HANDLING COULD PER SE CONSTITUTE PASSING CONTROL.

Faulkner next claims that the trial court erred in giving her instruction, CP 56, on "passing control." This claim is without merit because Faulkner's requested instruction was factually unsupported where at best the evidence showed she handled the drugs in an effort to dispose of them or hide them from the police. Moreover, the proposed instruction misstated the law by suggesting that momentary handling could per se constitute passing control.

A trial court is not required to give a defense instruction that is erroneous in any respect. *State v. Hoffman*, 116 Wn.2d 51, 111, 804 P.2d 577 (1991). Likewise, it is error to give an instruction that is not supported by the evidence. *Id.*

Faulkner relies on *State v. Werry*, 6 Wn. App. 540, 494 P.2d 1002 (1972), for the proposition that "mere passing control" does not establish constructive possession. Her reliance is misplaced. This Court did indeed acknowledge in *Werry* that the language proposed by Faulkner "is a correct

statement of the law and in an appropriate case the theory of passing control should be submitted to the jury.” *Werry*, 6 Wn. App. at 547.³ What Faulkner ignores, however, is that in *Werry*, this Court went on to hold that there was no error in refusing the instruction under the facts of the case, where the defendant was attempting to dispose of or hide the drugs from the police:

As to defendant Cline, the evidence was undisputed that when he seized the bag of drugs he intended to get rid of it, or secrete it from the police.

Werry, 6 Wn. App. at 548.

The instant case is indistinguishable from *Werry*. Taking the evidence in the light most favorable to Faulkner, the best that can be said is that she took the drugs, which she knew were illegal drugs, 2RP 117, from Laumen in an attempt to hide them from the police. She specifically conceded this point in her testimony. 2RP 115, 119. Because this does not constitute “passing control” as a matter of law, the trial court properly denied the instruction.

Moreover, even if this were not the case, Faulkner’s inclusion of the term “momentary” in her proposed instruction renders it an inaccurate statement of the law. *State v. Summers*, 107 Wn. App. 373, 387, 28 P.3d 780 (2001). The trial court does not err in refusing to give an instruction that misstates the law. *Id.* Faulkner’s contention that the trial court had a duty to

³ *But see State v. Summers*, 107 Wn. App. 373, 387, 28 P.3d 780 (2001) (narrowing *Werry*’s dicta, as discussed *infra*).

modify the proposed instruction to make it a correct statement of the law unsupported by any citation to authority and unsupported by any authority known to the state.

C. THERE IS NO INVITED ERROR.

Contrary to Faulkner's predictions, the State will not claim invited error with regard to the "passing control" instruction, because that doctrine applies where the trial court *gives* an erroneous instruction that the defendant proposes and then later attacks as erroneous on appeal. *See State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). Here, the trial court properly *refused* an instruction that both misstated the law, and was not supported by the evidence.

D. THERE IS NO CUMULATIVE ERROR.

Faulkner next claims that cumulative error mandates reversal. This claim is without merit because, as discussed, there is no error at all.

IV. CONCLUSION

For the foregoing reasons, Faulkner's conviction and sentence should be affirmed.

DATED June 6, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RAS', with a long horizontal stroke extending to the right.

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