

NO. 38191-5-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent

v.

EDWARD J. ALLEN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE BARBARA JOHNSON
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-00763-4

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the statement of facts as set forth by the defendant. Where additional information is needed, it will be supplemented in the argument section of the brief.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The two assignments of error raised by the defendant in this case are a claim that the prosecutor had violated a motion in limine thus robbing the defendant of a right to a fair trial and trial counsel's failure to object to the prosecution's misconduct, which deprived the defendant of his right to effective counsel.

The State submits that there has been no violation of the motion in limine by the prosecution and thus no ineffective assistance of counsel claim because there has been no flagrant misconduct on the part of the prosecution.

By Amended Information the defendant was charged with Possession of Controlled Substance – Cocaine. (CP 3). The defense in this matter was unwitting possession. The trial court instructed the jury on the concepts of unwitting possession along with the elements of the crime of possession of the controlled substance. (CP 4).

The defendant had been arrested for trespass and during a pat down in the jail, cocaine was found on his person. His claim was that the cocaine did not belong to him and the jacket it was found in, although his, had been used recently by someone else.

Prior to the commencement of the trial, the State dismissed a criminal trespass charge. Because that charge had been dismissed, the defense moved to prevent anything coming out about the arrest of the defendant. (RP 102). The State responded to that indicating that it may become relevant and probative to explain why it is that he was arrested and taken to jail where the drug was found. (RP 103). The court indicated that she and counsel had discussed this in chambers and made the following observation:

THE COURT: I think I had suggested in chambers that there could be something of the nature of there had been an incident at the location where he's arrested that led to his arrest, and just something rather neutral of that. And then, if necessary, to get into some other part of what happened, I'd need to know more specifically what it is that --

(RP 103, L.21- 104, L.2)

After further discussion with the parties, the court felt that there had been no showing as to relevance at that point but that that may change depending on whether or not the defendant testified and what he said. (RP

105). The prosecution asked for further clarity of the court's ruling and the court responded as follows:

THE COURT: Well, I haven't heard any showing so far that any of that would be relevant to the charge here which resulted from the search of the Defendant. So, at this point I'll exclude it. If it somehow comes up in the course of Defendant's testimony –

MR. PETERSON (Deputy Prosecutor): Okay.

THE COURT: -- it may become relevant at that point, but I haven't heard anything at this point that it seems to relate to the remaining charge of Possession of Cocaine.

All right. Are we ready for the jury for opening statement?

MR. DUNKERLY (Defense Attorney): Your Honor, give me a second here, please. Yes, I think we're ready, Your Honor.

THE COURT: All right. Let's bring in the jury.

MR. PETERSON: Your Honor, I have one more question. What is Officer O'Meara specifically allowed to say about why the arrest occurred?

THE COURT: I think we were just going to say that an incident at whatever location it was led to the arrest of the Defendant. Any objection to –

MR. PETERSON: Can we –

THE COURT: -- that?

MR. PETERSON: -- mention that it's a criminal trespass or not?

MR. DUNKERLY: No.

MR. PETERSON: Just incident?

THE COURT: I don't think that it's really necessary to go into it –

MR. PETERSON: Okay.

THE COURT: -- since the charge has been dismissed. And that may cause to (inaudible) under uncharged or 404(b) type of evidence at that point.

MR. PETERSON: Okay.

MR. DUNKERLY: Thank you, Your Honor.

(RP 105, L.1 – 106, L.10)

As indicated in this long quote, the court did mention that the prosecution could refer to it as an incident that lead to the arrest of the defendant. This could further be fleshed out and clarified when the defendant testified, if he testified, and the nature of his defense.

When the defendant testified in his own behalf, he acknowledged that there was an incident when he got arrested and specifically, whether or not he was wearing a jacket that belonged to him. (RP 143-144). He told the jury that the jacket was his but he didn't have it for a couple of months because he lent to a friend named Tony. He further indicated that he got the jacket back and had been wearing it that evening and that he was unaware that there was a pipe in the pocket of the jacket. He testified that the pipe did not belong to him. He thought it belonged to Tony but he

again reiterated that he didn't know he had the pipe in his pocket. (RP 144-145).

The prosecution during cross-examination then was asking him specifically why he was going to the store and he was describing that he was going to the store for Mother's Day to get something to complete the cooking. (RP 146-147). The prosecution questioned him in some detail about lending his clothing to other people. (RP 149-151). And he remembers this coat in particular as being with Tony from January through to sometime in April. (RP 152, L.12-15).

The prosecution then returned to the question off why he had gone to the ARCO station and he indicated that he had gone there to "get a couple of things of gas and I was gonna get some milk, and like I said, the night before I was cooking, I was sautéing her some dinner for the next day was Mother's Day and I went up there to go get some milk and get a couple gallons of gas, 'cause I was gonna make them breakfast that morning." (RP 153, L.23 – 154, L.4). He indicated that there at the ARCO station he wasn't there to get any alcohol and that he wasn't doing anything provocative like panhandling. He was just there to pick up some milk. (RP 155).

The State submits that there is nothing inappropriate with that type of cross-examination especially when the defense is unwitting possession

and that the jury knows that at the ARCO station there was some type of “incident” which lead to him being arrested. This is inline with what the court indicated was appropriate under the motion in limine and, the State further submits, that during closing argument the prosecution did nothing more then point back to this line of questioning based on the type of defense that was being raised.

Thus, the comment during closing argument by the State as follows:

Officer O’Meara, remember, responded to an incident. Now you haven’t heard a description of this incident. Okay. But the only thing I wanted to point out is that the Defendant states that he only went to ARCO to buy milk for Mother’s Day. That’s the only reason why he showed up. Okay. But Officer O’Meara responded to an incident that was occurring at the ARCO station, and his arrest of the Defendant – the reason why to took him to jail – was based upon that incident. Okay. It wasn’t simply a buying of – buying of milk for Mother’s Day.

(RP 171, L.14-24)

Later, in the rebuttal argument, the prosecution goes back to this same incident:

Basically, what you have here, what it all boils down to it, you have a situation where the Defendant is involved in an incident, an incident that justifies an officer arresting him. This is not going to the store to buy milk. Okay. He’s arrested for an incident, and he’s searched at a jail, and he’s found with a cocaine pipe in his pocket. He gives a story with almost no detail about some other guy and some other place, that somehow this pipe got into his pocket. Okay.

Again, it's up to you to determine whether you believe that story or not. Okay.

(RP 189, L.6-16)

As the State Supreme Court has commented in State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999):

Trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard. Stenson, 132 Wn.2d at 718; Brett, 126 Wn.2d at 174; Lord, 117 Wn.2d at 887. In making such a challenge the defendant bears the burden of establishing that the prosecutor's conduct was both improper and prejudicial. Stenson, 132 Wn.2d at 718; Gentry, 125 Wn.2d at 640. If the prosecutor's conduct is improper it does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. Stenson, 132 Wn.2d at 719; Brett, 129 Wn.2d at 175.

If the defendant fails to object to an improper remark it is considered waived unless the remark is "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Stenson, 132 Wn.2d at 719; Gentry, 125 Wn.2d at 596. In this case, since the Defendant did not object to any of the Prosecutor's statements this latter standard will apply.¹

The Appellate Court reviews a prosecutor's comments in the context of the total closing argument, the issues in the case, the evidence addressed in the argument and the jury instructions. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). A prosecutor has wide latitude

¹ State v. Stenson, 132 Wn.2d 668, 94 P.2d 1239 (1997); State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995); State v. Lord, 117 Wn.2d 829, 822 P.2d 177 (1991); State v. Gentry, 125 Wn.2d 507, 888 P.2d 1105 (1995).

in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). A prosecutor is allowed in argument to properly draw inferences from the evidence as to why the jury would want to believe one witness over another. State v. Brett, 126 Wn.2d at 175; State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996).

If defense counsel fails to object to the prosecutor's statements, then reversal is required only if the misconduct was so flagrant and ill-intentioned that no instruction could have cured the resulting prejudice. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). The defendant bears the burden of establishing both the impropriety and the prejudicial effect of the prosecutor's comments. State v. Perkins, 97 Wn. App. 453, 457, 983 P.2d 1177 (1999).

The State submits that, if this was an error, it is harmless in that the evidence against this defendant was overwhelming and the alleged prejudice from the prosecutor's remarks could not have affected the verdict. State v. Guloy, 104 Wn.2d 412, 425-426, 705 P.2d 1182 (1985). The defendant would have been arrested under any circumstances and the cocaine was found in his pocket when he was being booked into the jail.

The State further submits, though, that there is nothing improper about any of the comments made by the prosecutor either during

questioning of the defendant or in closing argument. As the defense is quick to point out in its appellate brief, this is a question of unwitting possession which places squarely before the jury the question of credibility of the witness. (Appellate Brief Page 10).

As part of the issues on appeal is the claim of ineffective assistance of counsel because he did not object to the comments in closing argument by the prosecutor. As previously set forth, the comments by the State did not violate the motion in limine and thus there would be no reason for the defense to object in the first place.

A criminal defendant has the right to effective assistance of trial counsel under the Sixth Amendment of the United States Constitution and article 1, section 22 of the Washington State Constitution. See, e.g., In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). To establish that the right to effective assistance of counsel has been violated, the defendant must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. *Id.* (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *Id.* Trial strategy and tactics cannot form the basis of a

finding of deficient performance. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Prejudice can be shown only if there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. Davis, 152 Wn.2d at 672-73.

The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

The State submits that there has been no showing of ineffective assistance of counsel. Further, even if the claim is that the representation is deficient, there is no showing that it prejudiced the defendant's ability to receive a fair trial.

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III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 13 day of March, 2009.

Respectfully submitted:

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