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COURT OF APPEALS
DIVISION II

NO. 39418-9

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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY


DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

LEONARD JOHNSON, JR., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Lisa Worswick

No. 08-1-02125-6

BRIEF OF RESPONDENT

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

1. Has defendant failed to prove prosecutorial misconduct where he did not object to the prosecutor's closing argument below and has failed to show that the argument was misconduct at all, let alone so flagrant or ill-intentioned that any prejudice could not have been cured by an instruction from the court?
2. Has defendant failed to show that he received ineffective assistance of counsel where counsel performance was not deficient for failing to object to proper argument and defendant was not prejudiced?

B. STATEMENT OF THE CASE.

1. Procedure

On May 5, 2008, the State charged LEONARD JOHNSON, JR., hereinafter "defendant," with one count of unlawful possession of a controlled substance and one count of obstructing a law enforcement officer in Pierce County Superior Court Cause Number 08-1-02125-6. CP¹ 1-2. The parties held a CrR 3.6 hearing on December 16, 2008, for

¹ Citations to Clerk's Papers will be to "CP." All volumes of the verbatim report of proceedings for the trial are sequentially numbered; therefore the citations to the trial record will be to "RP." The verbatim report of proceedings for the CrR 3.6 hearing on December 16, 2008, was not included in the trial volumes; therefore citations to the hearing will be to "RP (3.6)" followed by the page number of the transcript.

defendant's motion to suppress evidence obtained as a result of defendant's arrest on the basis that the officer's stop was pretextual. *See* RP (3.6) 1-30. The court denied the motion, finding that the officer's stop was valid. CP 14-17; RP (3.6) 29-30.

Jury trial commenced on May 11, 2009, before the Honorable Lisa Worswick. RP 1. The jury found defendant guilty of unlawful possession of a controlled substance, but was unable to reach a verdict on the obstruction charge. CP 86, 87; RP 225-26. Prior to sentencing, the State moved to dismiss the obstruction charge. CP 116-117; RP 235. The State recommended that the court impose a sentence of three months, the middle of defendant's standard range. RP 235. Defendant requested a sentence of three days, which would have been fulfilled by credit for time he had already served. RP 236. The court imposed a high-end, standard range sentence of six months, but allowed a Breaking the Cycle drug treatment alternative to in-custody time. CP 118-130; RP 238.

Defendant filed this timely notice of appeal. CP 135.

2. Facts

On May 4, 2008, at approximately 9:45 p.m., Tacoma Police Officer Jeff Thiry was on routine patrol when he observed defendant riding a bicycle on the sidewalk. RP 26. Defendant was not wearing a helmet, which is an infraction. RP 26. Officer Thiry pulled his patrol car to the side of the road in front of defendant and opened his door in order to contact defendant. RP 26-27. Before Officer Thiry left his car, defendant

made eye contact with him and then quickly pedaled away. RP 27.

Officer Thiry activated his lights and siren, and pursued defendant. RP 27.

Defendant led Officer Thiry on a convoluted chase which involved two parking lots, three streets, and ultimately forced Officer Thiry to drive along a sidewalk in order to keep up with defendant. RP 28-29, 30, 32. Defendant eventually struck a parked car, fell off of his bike, and began to run. RP 29.

Officer Thiry continued to chase defendant on foot. RP 29. He chased defendant for approximately one quarter of a block before deploying his electronic patrol device (taser), striking defendant in the back. RP 29. Officer Thiry noted that the taser had little effect² on defendant, so he increased speed to tackle defendant. RP 29-30, 32. Back up officers arrived while Officer Thiry was on the ground, wrestling with defendant. RP 32, 35-36, 81, 95, 126. It took four officers and a second taser application to subdue defendant to the point where he could be handcuffed. RP 36, 59, 81-83, 95-96, 126-29.

Once defendant was arrested, Officer Keith O'Rourke advised defendant of his *Miranda*³ warnings and Officer Brian Kelley searched

² Officer Thiry and Officer O'Rourke believed the taser's effect was muted by defendant's thick layers of clothing. RP 29, 96. Officer Robert Hannity took the probes into evidence and noticed they were snagged in the outer layer of defendant's "puffy" jacket. RP 135.

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

him incident to the arrest. RP 37-38, 84, 96, 108. In the front pocket of defendant's sweatshirt, Officer Kelley discovered a plastic baggie containing white rocks, which field tested positive⁴ as crack cocaine. RP 38, 84, 108, 110.

The officers called for emergency medical technicians (EMT) to check defendant, which is standard operating procedure when the officers deploy their tasers on a subject. RP 85, 97, 135. Defendant was initially cooperative with the EMTs, but he stopped cooperating at the end of their assessment. RP 86. When the EMTs cleared defendant for release to the officers, defendant refused to walk and the officers had to carry him to the patrol car. RP 86, 98, 113. Once they were at the car, defendant straightened his legs and hindered the officers' efforts to place him in the back of the patrol car. RP 86, 113. Once defendant was in the car, the officers turned their attention to dispersing the crowd of approximately 15 hostile on-lookers. RP 87-88, 97-98, 136.

Defendant testified in his own defense. RP 146. Defendant testified that on May 4, 2008, he was at his sister's house attending a barbeque held as a memorial for his nephew. RP 147. After the barbeque, defendant rode his sister's bike around the block, in order to settle his stomach. RP 148-49. Defendant claimed he had gotten cold at the

⁴ The substance was also tested in the Washington State Patrol Crime Laboratory and tested positive as cocaine. *See* RP 145. Defendant stipulated to the accuracy of the results. CP 40-41; RP 145.

barbeque and had put on a sweatshirt that “was pretty much laying around.” RP 149.

According to defendant, while he was riding he heard an engine revving and turned immediately to go back to his sister’s house. RP 150. He noticed a police car nearby, and had to swerve to avoid a collision. RP 150. The swerve caused him to lose control of his bicycle and stumble off. RP 151. As he was catching his balance, he noticed a red, laser light and felt his legs lock up. RP 151. Later he realized he was being tased. RP 151. Defendant claimed that when Officer Thiry approached him, he put up his hands and said, “I surrender,” repeatedly, but Officer Thiry “instantly” tased him again. RP 153.

Defendant also testified that did not have any drugs on him that day and was unaware of anything that was in the pocket of the sweatshirt. RP 163.

C. ARGUMENT.

1. DEFENDANT WAS NOT DENIED THE RIGHT TO A FAIR TRIAL AS THE STATEMENTS MADE BY THE PROSECUTOR DID NOT CONSTITUTE PROSECUTORIAL MISCONDUCT.

To prove that a prosecutor’s actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor’s actions were improper. *State v. Manthie*, 39 Wn. App. 815,

820, 696 P.2d 33 (1985) (citing *State v. Weekly*, 41 Wn.2d 727, 252 P.2d 246 (1952)). The defendant has the burden of establishing that the alleged misconduct is both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Even if the defendant proves that the conduct of the prosecutor was improper, the misconduct does not constitute prejudice unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Id.* at 718-19.

When reviewing an argument that has been challenged as improper, the court should review the context of the whole argument, the issues in the case, the evidence addressed in the argument and the instructions given to the jury. *State v. Russell*, 125 Wn.2d 24, 85-6, 882 P.2d 747 (1994), citing *State v. Graham*, 59 Wn. App. 418, 428, 798 P.2d 314 (1990), *State v. Green*, 46 Wn. App. 92, 96, 730 P.2d 1350 (1986).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Gentry*, 125 Wn.2d 570, 640, 888 P.2d 570 (1995), citing *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), *overruled on other grounds by State v. Kilgore*, 147 Wn.2d 288, 53 P.3d 974 (2002). Failure by the defendant to object to an improper remark constitutes a waiver of that

error unless the remark is deemed 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, citing *Gentry*, 125 Wn.2d at 593-594.

“A ‘reasonable doubt’, at a minimum, is one based upon ‘reason.’” “A fanciful doubt is not a reasonable doubt.” *Victor v. Nebraska*, 511 U.S. 1, 17, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) (citing *Jackson v. Virginia*, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

Here, defendant asserts that the prosecutor committed misconduct where she allegedly (a) misstated the State’s burden of proof beyond a reasonable doubt, and (b) shifted the burden to defendant. When read in the context of the entire argument, the State’s arguments were proper arguments based on the court’s instructions and the evidence adduced at trial.

Prior to closing arguments, the court instructed the jury on the law including the reasonable doubt standard and the presumption of innocence:

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 68-85 (Jury Instruction 3) (emphasis added); *see also* Washington Pattern Jury Instructions Criminal, WPIC 4.01. Further, the court instructed the jury:

The lawyer's remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions

CP 68-85, (Jury Instruction 1); *see also* Washington Pattern Jury Instructions Criminal, WPIC 1.02.

During closing, the prosecutor reiterated the State's burden of proof beyond a reasonable doubt for both charges. First, she listed a number of actions which could support a finding of obstruction, and informed the jury that:

The defendant can be found guilty of obstruction if you believe beyond a reasonable doubt he committed any one of those acts. Any one of those acts caused other officers to have to delay.

RP 197. Then the prosecutor discussed the possession charge:

You have two instructions in your packets that start with the words “to convict.” The to-convict instruction regarding the cocaine is instruction number 7. I have a duty to prove this case to you beyond a reasonable doubt, to prove that the defendant is guilty of unlawful possession of a controlled substance. I have to prove those two elements and those two only beyond a reasonable doubt.

RP 198.

Once the prosecutor discussed the difference between circumstantial evidence and direct evidence, she turned to the definition of reasonable doubt. RP 200-02. She directed the jury to the proper instruction and read, verbatim, the section involving reasonable doubt. RP 201-02; CP 68-85 (Jury Instruction 3). She then went on to explain:

What that says is “a doubt for which a reason exists.” In order to find the defendant not guilty, you have to say, “I doubt the defendant is guilty and my reason is I believed his testimony that he just borrowed that sweater, sweatshirt, jacket, one item, two items, he wasn’t sure what he was wearing and he didn’t know that the cocaine was in there, and he didn’t know what cocaine was.” And then you have to also believe that either he really didn’t hear the lights and sirens or that Officer Thiry really forgot to turn them on and that a lot of those events didn’t really happen or more events that didn’t.

To be able to find reason to doubt, you have to fill in the blank, that’s your job. What is reasonable doubt? That instruction, what it doesn’t say is “beyond any doubt.” Are there other ways physically that the cocaine could have gotten into the sweatshirt? I don’t know. We could probably think about it, they’re rolling around on the ground. Maybe somebody threw the bag down, even though it was worth a lot of money, in the struggle maybe

somehow it worked it's [sic] way in. Maybe, but is that a reasonable explanation for what happened? You don't have to close every other possibility. It's not beyond a shadow of a doubt or beyond all doubt. It's beyond a reasonable doubt.

And you don't have to be 100 percent. You just have to have a belief beyond a reasonable doubt. The key word is reasonable. And it's only a reasonable doubt as to the elements of the crime, not a reasonable doubt as to all of the surrounding circumstances, which there are quite a few in this case, but a reasonable doubt about whether or not he possessed the cocaine and whether it occurred on May 4th and it occurred in Washington.

You don't have to resolve every doubt to every minor detail or everything that happened in the case. You don't have to answer every conceivable remaining question. You have to only answer those questions that are asked of you on the two instructions.

There is still doubt in almost every case because we weren't there. We weren't there from start to finish. The doubt that you have must be supported by a reason after hearing all of the evidence, and if you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

RP 202-04. The prosecutor concluded her argument with the use of a puzzle to explain when a person has an abiding belief in some fact. RP 204. In the puzzle, she filled in small sections of the Tacoma city skyline to show that a person could have an abiding belief that the puzzle was a picture of Tacoma, even without all the pieces filled in. RP 204.

Defendant did not object to any of the above statements that are discussed as error. As such, defendant must show that the arguments constitute misconduct and that the prosecutor's actions were "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.”

The prosecutor’s argument does not constitute misconduct. It is a reasonable argument based on the law as given to the jury in the court’s instructions. The prosecutor was clear in his argument that the burden of proof in a criminal case is on the State and that burden is proof beyond a reasonable doubt. RP 197, 198. The prosecutor quoted the law directly from the jury instructions, which makes it difficult to see how she could be acting in bad faith or trying to mislead the jurors, especially when she reiterated her burden twice during closing. *See* RP 197, 198, 201-02.

Further, the prosecutor’s statements merely expound on the concept of reasonable doubt. The language “a reasonable doubt is one for which a reason exists” is taken directly out of the instruction. CP 68-85 (Jury Instruction 3). The prosecutor’s argument is telling the jurors that they do not need to be satisfied beyond all doubt, but that if they have a doubt it must be reasonable. The prosecutor informed the jury that a juror who has a reasonable doubt should be able to articulate a reason for that doubt. To make her point more clearly, she noted that it was possible, but not likely or reasonable, that baggie of cocaine, which happened to be lying on the ground, could have worked its way into defendant’s sweatshirt while he was struggling with the officers. RP 203.

Finally, the prosecutor's use of the puzzle was not an attempt to minimize the State's burden of proof. Rather, the puzzle emphasized that the burden of proof is not beyond any doubt. It showed the jurors that an abiding belief is not an objective standard, but a subjective belief based on the evidence presented combined with their own experiences and knowledge.

Moreover, defendant cannot show that he was prejudiced by the argument. The jury was unable to reach a verdict regarding the obstruction charge. CP 86, 87, 116-117; RP 225-26. Clearly at least one of the jurors did not have an abiding belief in the truth of the charge and found that the State had not met its burden of proof beyond a reasonable doubt.

When reviewed in the context of her argument as a whole, the prosecutor's statements did not minimize the State's burden of proving defendant's guilt beyond a reasonable doubt. Her argument was not misconduct, nor was the argument so flagrant or ill-intentioned that an instruction could not have cured any prejudice.

2. DEFENDANT RECEIVED CONSTITUTIONALLY EFFECTIVE ASSISTANCE OF COUNSEL AS DEFENDANT CANNOT SHOW DEFICIENT PERFORMANCE OR PREJUDICE.

The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of

the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant’s conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as “counsel” guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also **State v. McFarland**, 127 Wn.2d 322, 899 P.2d 1251 (1995); **State v. Foster**, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996); **State v. Walton**, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); **State v. Denison**, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995).

Under the prejudice aspect, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” **Strickland**, 466 U.S. at 694. Because the defendant must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel’s performance was deficient. **Strickland**, 466 U.S. at 697; **State v. Lord**, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992).

Competency of counsel is determined based upon the entire record below. **McFarland**, 127 Wn.2d, at 335 (*citing State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” **Strickland**, 466 U.S., at 690;

State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S., at 689.

Defendant alleges that his counsel was ineffective for failing to object to the State’s closing argument. As addressed above, the State’s comments did not misstate or minimize the burden of proof, so there is no reason to assume that the court would have sustained an objection. Counsel’s performance did not fall below an objective standard of reasonableness for failing to object to proper argument.

Moreover, defendant cannot show prejudice, i.e. that the outcome would have been different but for counsel’s deficient performance. When defendant was arrested, the officers found crack cocaine in his sweatshirt pocket. RP 108, 110. Defendant stipulated that the substance was, in fact, cocaine. CP 40-41. The jury clearly found defendant’s testimony that he was unaware of the drugs inside the sweatshirt not credible. *See* RP 149, 163. The court instructed the jury as to the definition of a reasonable doubt and the prosecutor read this instruction to the jury, verbatim. CP 68-85 (Jury Instruction 3); RP 201-02. Even without an objection by counsel, the jury was unable to reach a verdict on the obstruction charge.

If counsel had objected to the prosecutor's argument, the court would have reminded the jury to refer to the jury instructions for the appropriate law. As the jury is presumed to have followed the court's instruction, there is no reason to believe they did not follow the instruction in this case. Where defendant was found with drugs on his person and would have had to have believed his unwitting possession defense in order to find him not guilty, it is unlikely in the extreme that defense counsel's failure to object to proper argument affected the outcome of the trial.

In addition, defendant's sole challenge to counsel's effectiveness was her failure to make a single objection. A review of the entire record shows that defense counsel subjected the State's case to meaningful, adversarial testing. She challenged the validity of defendant's arrest and argued for suppression of all evidence resulting from the arrest. *See* RP (3.6) 26-28. Counsel cross-examined witnesses and made a closing argument. She objected at appropriate times throughout the trial. Further, counsel explained the purpose and effect of the drug-test stipulation and defendant was satisfied with her explanation. RP 62-63, 89. Counsel's performance convinced at least one juror that defendant was not guilty of obstructing a police officer, where the bulk of the evidence presented at trial related solely to that charge. *See* RP 225-26. Defendant received constitutionally effective assistance of counsel.

Counsel's performance did not fall below an objective standard of reasonableness when she failed to object to proper argument and defendant was not prejudiced.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this court to affirm defendant's conviction for unlawful possession of a controlled substance.

DATED: March 24, 2010.

MARK LINDQUIST
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Prosecuting Attorney

Pharos C. Roberts (17442 bar)
Kimberley DeMarco
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WSB # 39218

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

3-24-10 Therese Kar
Date Signature

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